SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

SEPTEMBER 30, 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

857

TP 11-00553

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

IN THE MATTER OF KEVIN EVANS, PETITIONER,

V ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (EDWARD L. CHASSIN OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered March 11, 2011) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

858

TP 11-00670

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

IN THE MATTER OF BERNARD PITTS, PETITIONER,

V ORDER

MALCOLM R. CULLY, SUPERINTENDENT, LIVINGSTON CORRECTIONAL FACILITY, RESPONDENT.

BERNARD PITTS, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Livingston County [Robert B. Wiggins, A.J.], entered December 10, 2010) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

859

KA 08-00219

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

QUINTRELL JOE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered August 31, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

860

KA 08-01361

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JERMAINE JENNINGS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered March 31, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

861

KA 10-00213

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY R. DOMBROWSKI, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Erie County Court (Michael F. Pietruszka, J.), entered December 3, 2009. The order denied the CPL article 440 motion of defendant.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Erie County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order summarily denying his motion pursuant to CPL 440.10 and 440.20 seeking to vacate the judgment convicting him upon a nonjury verdict of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]) and to set aside the sentence. This Court previously affirmed the judgment of conviction (*People v Dombrowski*, 55 AD3d 1358, *lv denied* 11 NY3d 924). We note at the outset that defendant does not raise any contention concerning the denial of that part of his motion seeking to set aside the sentence, and we thus deem any issues with respect thereto abandoned (*see generally People v Bradley*, 83 AD3d 1444, 1445).

Defendant contends that he was denied effective assistance of counsel based on the failure of his trial counsel to call various witnesses who allegedly would have testified that they observed defendant leaving and entering the apartment in question on a regular basis. According to defendant, they also would have testified that they observed him accessing the apartment with keys and bringing groceries into the apartment. The complainant, who was the mother of defendant's child, testified that, at the time of the alleged burglary, her romantic relationship with defendant had ended. She admitted, however, that she had taken two vacations with defendant within the month preceding the alleged burglary and that defendant had occasionally spent the night at the apartment since the romantic relationship ended.

In order for a factfinder to convict a defendant of burglary in the second degree, the People are required to establish that the defendant knowingly entered or remained unlawfully in a dwelling with the intent to commit a crime therein (Penal Law § 140.25 [2]). "A person 'enters or remains unlawfully' in or upon premises when he [or she] is not licensed or privileged to do so" (§ 140.00 [5]). "In general, a person is 'licensed or privileged' to enter private premises when he [or she] has obtained the consent of the owner or another whose relationship to the premises gives him [or her] authority to issue such consent" (*People v Graves*, 76 NY2d 16, 20*; see People v Dale*, 224 AD2d 917). Here, the testimony of the witnesses in question would have supported the defense theory that defendant did not enter the apartment unlawfully. Contrary to the contention of the People, defendant was not required to establish that he actually resided at the apartment. "[T]he intruder must be aware of the fact that he [or she] has no license or privilege to enter the premises . . . Thus, a person who mistakenly believed that he [or she] was licensed or privileged to enter a building[] would not be guilty of burglary, even though he [or she] entered with intent to commit a crime therein" (*People v Uloth*, 201 AD2d 926, 926 [internal quotation marks omitted]; *see People v Isogna*, 86 AD2d 979; *cf. People v Bull*, 136 AD2d 929, *lv denied* 71 NY2d 966).

It is well established that "the failure to investigate or call exculpatory witnesses may amount to ineffective assistance of counsel" (*People v Nau*, 21 AD3d 568, 569; *see People v Mosley*, 56 AD3d 1140; *People v Bussey*, 6 AD3d 621, 623, *lv denied* 4 NY3d 828), but it is also well established that "[t]rial tactics [that] terminate unsuccessfully do not automatically indicate ineffectiveness" (*People v Baldi*, 54 NY2d 137, 146). Here, defendant submitted the affidavits of the witnesses in question setting forth the substance of their proposed testimony, as well as their willingness to testify (*cf. People v Ozuna*, 7 NY3d 913, 915). Two of those witnesses were actually present in the courthouse during defendant's trial. From this record, we can discern no tactical reason for trial counsel's failure to call those witnesses to testify (*see People v Castricone*, 224 AD2d 1019; *see also Bussey*, 6 AD3d at 623; *cf. People v Brooks*, 283 AD2d 367, *lv denied* 96 NY2d 916). Thus, a hearing is required to afford defendant's trial counsel an opportunity to explain the reason that he chose not to call those witnesses " 'or to provide a tactical explanation for the omission' " (*Mosley*, 56 AD3d at 1141; *see e.g. Nau*, 21 AD3d at 569; *People v Coleman*, 10 AD3d 487). We therefore hold the case, reserve decision and remit the matter to County Court for a hearing on that issue.

Entered: September 30, 2011 Patricia L. Morgan
Clerk of the Court

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

862

KA 07-01622

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMERUS GILMER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered May 11, 2007. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of robbery in the first degree (Penal Law § 160.15 [4]). We agree with defendant that Supreme Court erred in summarily denying his request for a *Wade* hearing with respect to a witness's identification of defendant. Defendant submitted an "Affirmation in support of [*Wade*] Hearing" in which he sought to suppress the identification in question on the ground that the photo array identification procedure was unduly suggestive. The court concluded that defendant failed to comply with CPL 710.60 (1), pursuant to which a motion to suppress must include sworn allegations of fact supporting the grounds of the motion. Such sworn allegations of fact, however, are not required when the motion seeks to suppress an identification of the defendant on the ground of an improper pretrial identification procedure (*see* CPL 710.20 [6]; 710.60 [3] [b]; *People v Mendoza*, 82 NY2d 415, 429; *People v Rodriguez*, 79 NY2d 445, 453). Here, "defendant simply does not know the facts surrounding [the photo array] pretrial identification procedure[]," and thus he is unable to make sworn allegations of fact to support the motion (*Mendoza*, 82 NY2d at 429).

We agree with the People, however, that the error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 237). Although the witness at issue testified at trial, she did not identify defendant as the perpetrator of the robbery, nor did she testify regarding any

police-arranged identification procedure (*see Matter of William J.*, 203 AD2d 144; *see also People v Livingston*, 186 AD2d 1076, *lv denied* 81 NY2d 791; *People v Epps*, 155 AD2d 933, *lv denied* 75 NY2d 868).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The testimony of the only eyewitness who identified defendant in court as the perpetrator was corroborated by the testimony of the other eyewitnesses, who provided almost identical descriptions of the perpetrator and the events surrounding the robbery. Although a different result would not have been unreasonable, we accord deference to the credibility determinations of the jury, which had the opportunity to hear the witnesses and assess their credibility, and it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally id.*; *People v Baker*, 30 AD3d 1102, *lv denied* 7 NY3d 846).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

863

KA 10-01129

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS BRYANT, DEFENDANT-APPELLANT.

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

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (MARSHALL A. KELLY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered April 9, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted promoting prison contraband in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [2]). Contrary to defendant's contention, he knowingly, intelligently and voluntarily waived his right to appeal as a condition of the plea bargain (*see generally People v Lopez*, 6 NY3d 248, 256). "County Court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v James*, 71 AD3d 1465, 1465 [internal quotation marks omitted]), and the record establishes that defendant " 'understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Dunham*, 83 AD3d 1423, 1424, quoting *Lopez*, 6 NY3d at 256).

Defendant further contends that the court abused its discretion in denying his motion to withdraw his *Alford* plea. Although that contention " 'survives his waiver of the right to appeal to the extent that [it] implicates the voluntariness of the plea' " (*People v Dash*, 74 AD3d 1859, 1860, *lv denied* 15 NY3d 892; *see People v Toliver*, 82 AD3d 1581), we conclude that it is without merit. "The contention of defendant that his plea was involuntary because he was coerced by [correctional facility personnel] is belied by his responses to the court's questions during the plea colloquy, indicating that he was pleading guilty voluntarily and that no threats or promises had induced the plea" (*Toliver*, 82 AD3d at 1582). Defendant's challenge

to the factual sufficiency of the plea allocution is encompassed by the valid waiver of the right to appeal and is unpreserved for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v McCarthy*, 83 AD3d 1533, 1534). In any event, defendant's challenge lacks merit inasmuch as there is no requirement that an *Alford* plea contain a recitation of " 'every essential element' " of the crime (*People v Hill*, 16 NY3d 811, 814).

The further contention of defendant that the court erred in failing sua sponte to conduct a competency hearing pursuant to CPL 730.30 (2) is not encompassed by his valid waiver of the right to appeal to the extent that it implicates the voluntariness of the plea (*see People v Stoddard*, 67 AD3d 1055, *lv denied* 14 NY3d 806). That contention, however, is unpreserved for our review inasmuch as defendant failed to move to withdraw the plea or to vacate the judgment of conviction on that ground (*see id.*). In any event, defendant's contention lacks merit. The court issued an order of examination pursuant to CPL 730.30 (1), and both psychiatric examiners who evaluated defendant concluded that he was competent to proceed. It "is well settled that a defendant is not entitled, as a matter of right, to have the question of his capacity to stand trial passed upon . . . if the court is satisfied from the available information that there is no proper basis for questioning the defendant's sanity" (*People v Mills*, 28 AD3d 1156, 1156-1157, *lv denied* 7 NY3d 903 [internal quotation marks omitted]; *see* CPL 730.30 [2]; *People v Morgan*, 87 NY2d 878, 880). " 'Moreover, it is noted that defense counsel . . . was in the best position to assess defendant's capacity and request an examination pursuant to CPL 730.30 (2)' " (*People v Jermain*, 56 AD3d 1165, 1165, *lv denied* 11 NY3d 926). Here, defense counsel did not request a competency hearing but, rather, he informed the court that defendant had received medication, understood the proceedings and was able to participate in his own defense (*see id.*; *People v Loria*, 12 AD3d 1125, *lv denied* 4 NY3d 746, 749). Defendant further contends that he was denied effective assistance of counsel based on the failure of defense counsel to request a competency hearing. To the extent that defendant's contention survives the plea and waiver of the right to appeal (*see People v Gimenez*, 59 AD3d 1088, *lv denied* 12 NY3d 816; *cf. People v Burke*, 256 AD2d 1244, *lv denied* 93 NY2d 851), we conclude that it is lacking in merit (*see generally People v Ford*, 86 NY2d 397, 404). "[T]here is no indication in the record that defendant was unable to understand the proceedings or that he was mentally incompetent at the time he entered his [*Alford*] plea . . ., and [t]here can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to make a motion or argument that has little or no chance of success" (*People v Jorge N.T.*, 70 AD3d 1456, 1457, *lv denied* 14 NY3d 889).

Finally, defendant's challenge to the severity of the sentence is encompassed by the valid waiver of the right to appeal (*see Lopez*, 6

NY3d at 255-256; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

864

CAF 10-01831

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

IN THE MATTER OF DENISE M. CANFIELD,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER V. CANFIELD, RESPONDENT-RESPONDENT.

JOSEPH S. DRESSNER, ATTORNEY FOR THE CHILD
NATHANIEL C., APPELLANT;

LESLIE A. ROFF, ATTORNEY FOR THE CHILD
JENNIFER C., RESPONDENT.

JOSEPH S. DRESSNER, ATTORNEY FOR THE CHILD, CANANDAIGUA, APPELLANT PRO SE.

KATHLEEN P. REARDON, ROCHESTER, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Yates County (W. Patrick Falvey, J.), entered April 30, 2010 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole custody of the parties' children.

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

Memorandum: The Attorney for the Child representing the parties' son appeals from an order that, inter alia, granted the petition of the mother seeking sole custody of the parties' children and denied the cross petition of the father seeking sole custody of only the parties' son. Contrary to the contention of the Attorney for the Child, Family Court properly awarded sole custody of the parties' son to the mother. The court's determination, based upon its assessment of the character and credibility of the witnesses, is entitled to great weight (*see Matter of Green v Bontzolakes*, 83 AD3d 1401, *lv denied* 17 NY3d 703; *Matter of Chappell v Dibble*, 82 AD3d 1669). "We will not disturb that determination inasmuch as the record establishes that it is the product of 'careful weighing of [the] appropriate factors' . . ., and it has a sound and substantial basis in the record" (*Matter of McLeod v McLeod*, 59 AD3d 1011, 1011; *see Chappell*, 82 AD3d 1669).

Entered: September 30, 2011 Patricia L. Morgan
Clerk of the Court

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

865

CAF 10-01066

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

IN THE MATTER OF DEREK R. BROWNLEE, ESQ., ATTORNEY FOR THE CHILD, ON BEHALF OF CAILYN G., PETITIONER-RESPONDENT,

V ORDER

CARL A. GUTZMER, RESPONDENT-APPELLANT.

CHARLES J. GREENBERG, BUFFALO, FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered October 21, 2009 in a proceeding pursuant to Family Court Act article 8. The order, among other things, adjudged that respondent committed acts constituting the family offense of harassment in the second degree and placed respondent under probation supervision for a period of 12 months.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

866

CAF 10-01016

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

IN THE MATTER OF TONYA HELLES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

LUKE HELLES, SR., RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, LIVINGSTON COUNTY CONFLICT DEFENDER, WARSAW (EDWARD L. CHASSIN OF COUNSEL), FOR PETITIONER-APPELLANT.

KATHLEEN P. REARDON, ROCHESTER, FOR RESPONDENT-RESPONDENT.

WENDY S. SISSON, ATTORNEY FOR THE CHILDREN, GENESEO, FOR ABIGAIL H., JASMINE H., ISAAC H., LUKE H., JR. AND DYLAN H.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered April 8, 2010 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, continued the prior visitation schedule.

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

Memorandum: In appeal No. 1, petitioner mother appeals from an order that, inter alia, continued the prior visitation schedule with respect to the parties' children. In appeal No. 2, the mother appeals from an order that, inter alia, dismissed her family offense petition. In appeal No. 3, the mother appeals from an order dismissing two petitions in which she alleged that the father had violated the temporary order of protection. We affirm the order in each appeal. Addressing first the order in appeal No. 3, we conclude that the mother has failed to brief any issues regarding that order, and we therefore deem those issues abandoned (*see Matter of Jezekiah R.-A.*, 78 AD3d 1550, 1551; *Ciesinski v Town of Aurora*, 202 AD2d 984).

Contrary to the mother's contention with respect to the order in appeal No. 1, " '[v]isitation decisions are generally left to Family Court's sound discretion, requiring reversal only where the decision lacks a sound and substantial basis in the record' " (*Matter of Nicole J.R. v Jason M.R.*, 81 AD3d 1450, 1451, *lv denied* 17 NY3d 701; *see Matter of Vieira v Huff*, 83 AD3d 1520, 1521; *Matter of Vasquez v Barfield*, 81 AD3d 1398). Here, there was a sound and substantial

basis in the record for the court's determination to continue the prior visitation schedule inasmuch as it was based on a credibility assessment, and we generally defer to "the court's firsthand assessment of the character and credibility of the parties" (*Matter of Thayer v Thayer*, 67 AD3d 1358, 1359; *see Nicole J.R.*, 81 AD3d at 1451; *Matter of Hill v Rogers*, 213 AD2d 1079).

We reject the mother's contention with respect to the order in appeal No. 2 that the court erred in taking sworn testimony from her before issuing a temporary order of protection (*see generally* Family Ct Act § 828; *Matter of Ardis S. v Sanford S.*, 88 Misc 2d 724, 725-726; Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 828, at 286). Finally, we conclude with respect to the order in appeal No. 2 that the court properly dismissed the family offense petition inasmuch as the mother failed to meet her burden of establishing by a fair preponderance of the evidence that the father committed the family offense of harassment in the second degree (*see* Family Ct Act § 812 [1]; § 832; *Matter of Woodruff v Rogers*, 50 AD3d 1571, *lv denied* 10 NY3d 717; *Matter of Deborah D. v Kathy D.*, 26 AD3d 759). "Contrary to the further contention of the mother, the court's assessment of the credibility of the witnesses is entitled to great weight, and the court was entitled to credit the testimony of the father over that of the mother" (*Matter of Kobel v Holiday*, 78 AD3d 1660; *see Matter of Danielle S. v Larry R.S.*, 41 AD3d 1188).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

867

CAF 10-01018

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

IN THE MATTER OF TONYA HELLES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

LUKE HELLES, SR., RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, LIVINGSTON COUNTY CONFLICT DEFENDER, WARSAW (EDWARD L. CHASSIN OF COUNSEL), FOR PETITIONER-APPELLANT.

KATHLEEN P. REARDON, ROCHESTER, FOR RESPONDENT-RESPONDENT.

WENDY S. SISSON, ATTORNEY FOR THE CHILDREN, GENESEO, FOR ABIGAIL H., JASMINE H., ISAAC H., LUKE H., JR. AND DYLAN H.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered April 8, 2010 in a proceeding pursuant to Family Court Act article 8. The order, inter alia, dismissed the petition.

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

Same Memorandum as in *Matter of Helles v Helles* ([appeal No. 1] ___ AD3d ___ [Sept. 30, 2011]).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

868

CAF 10-01019

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

IN THE MATTER OF TONYA HELLES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

LUKE HELLES, SR., RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, LIVINGSTON COUNTY CONFLICT DEFENDER, WARSAW (EDWARD L. CHASSIN OF COUNSEL), FOR PETITIONER-APPELLANT.

KATHLEEN P. REARDON, ROCHESTER, FOR RESPONDENT-RESPONDENT.

WENDY S. SISSON, ATTORNEY FOR THE CHILDREN, GENESEO, FOR ABIGAIL H., JASMINE H., ISAAC H., LUKE H., JR. AND DYLAN H.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered April 8, 2010 in a proceeding pursuant to Family Court Act article 8. The order dismissed the petitions.

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

Same Memorandum as in *Matter of Helles v Helles* ([appeal No. 1] ___ AD3d ___ [Sept. 30, 2011]).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

869

CAF 11-00805

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

IN THE MATTER OF KRISTIN T. WRIGHT,
PETITIONER-RESPONDENT,

V ORDER

JEFFREY J. PATAKY, RESPONDENT-APPELLANT.

JOHN P. PIERI, BUFFALO, FOR RESPONDENT-APPELLANT.

WILLIAM R. HITES, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered September 1, 2010 in a proceeding pursuant to Family Court Act article 4. The order denied the objection of respondent to the order of the Support Magistrate.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

870

CAF 10-02365

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

IN THE MATTER OF COMMISSIONER OF GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF NAKEETA GIBSON, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JERRELL J.T. JONES, RESPONDENT-APPELLANT.

CHARLES J. GREENBERG, BUFFALO, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered November 9, 2010 in a proceeding pursuant to Family Court Act article 4. The order committed respondent to the Genesee County Jail for a period of six months.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Genesee County, for a new hearing.

Memorandum: Respondent father appeals from an order confirming the Support Magistrate's determination that he willfully failed to obey an order of Family Court and sentencing him to six months in jail. We agree with the father that the court erred in allowing him to proceed pro se at the confirmation hearing.

"A person who faces the possibility of imprisonment stemming from the willful violation of a previous order of the court has the right to the assistance of counsel" (*Matter of Scott v Scott*, 62 AD3d 714, 715; *see* Family Ct Act § 262 [a] [vi]; *Matter of Tanya T. McD. v Timothy E.D.*, 63 AD3d 423; *Matter of Keenan v Keenan*, 51 AD3d 1075, 1077). "The deprivation of a party's fundamental right to counsel is a denial of due process and requires reversal, without regard to the merits of the unrepresented party's position . . . Although a party may proceed pro se, [a] court's decision to permit a party who is entitled to counsel to proceed pro se must be supported by a showing on the record of a knowing, voluntary and intelligent waiver of [the right to counsel] . . . In order for the court to ensure that the waiver of the right to counsel is valid, the court must conduct a searching inquiry of [the] party . . .[, and] there must be a showing that the party was aware of the dangers and disadvantages of proceeding without counsel" (*Matter of Deon M.*, 68 AD3d 1740, 1741-1742 [internal quotation marks omitted]; *see Matter of Kathleen K.*, 17 NY3d 380; *Matter of Casey N.*, 59 AD3d 625, 627-628, *lv denied* 12 NY3d 710, 710). "Where, as here, the court fails to conduct a searching

inquiry, reversal is required" (*Deon M.*, 68 AD3d at 1742). We therefore reverse the order and remit the matter to Family Court for a new hearing.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

871

CA 10-02433

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

LORI MARCERA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL S. MARCERA, DEFENDANT-RESPONDENT.

WILLKIE FARR & GALLAGHER LLP, NEW YORK CITY (TIMOTHY J. MCGINN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from a judgment of the Supreme Court, Monroe County (Elma A. Bellini, J.), entered March 3, 2010 in a divorce action. The judgment, inter alia, granted plaintiff a divorce.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the 5th, 6th and 15th decretal paragraphs and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: Plaintiff appeals from a judgment of divorce that, inter alia, directed defendant to pay to plaintiff $25 per month in child support, awarded her no maintenance and distributed the parties' personal property. Defendant lost his employment approximately four months prior to the commencement of the divorce action and was subsequently incarcerated during the pendency thereof. We agree with plaintiff that Supreme Court erred in directing defendant to pay the minimum amount of child support (*see* Domestic Relations Law § 240 [1-b] [g]), as well as in awarding plaintiff no maintenance, based solely on defendant's unemployment. To the extent that defendant's financial hardship is the result of his own wrongful conduct, he is not entitled to a reduction in his obligation to pay child support (*see Matter of Grettler v Grettler*, 12 AD3d 602; *Matter of Winn v Baker*, 2 AD3d 1169; *see generally Matter of Knights v Knights*, 71 NY2d 865, 866-867), nor is he entitled to evade his obligation to pay maintenance (*see Frasca v Frasca*, 213 AD2d 589; *Romanous v Romanous*, 181 AD2d 872). We therefore modify the judgment by vacating the amount awarded to plaintiff for child support and the award of no maintenance to plaintiff, and we remit the matter to Supreme Court for further consideration of those issues, following a hearing if necessary.

We reject plaintiff's further contention that the court erred in distributing the parties' personal property. The court "has great flexibility in fashioning an equitable distribution of marital assets" (*Torgersen v Torgersen*, 188 AD2d 1023, 1023, *lv denied* 81 NY2d 709), and we perceive no error in the procedure utilized by the court to

distribute the disputed items of personal property (*see Gelb v Brown*, 163 AD2d 189, 193).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

872

CA 11-00776

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

O'BRIEN & GERE LIMITED AND O'BRIEN & GERE ENGINEERS, INC.,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

NEXTGEN CHEMICAL PROCESSES, INC., NEXTGEN FUEL, INC., GOLDEN TECHNOLOGY MANAGEMENT, LLC, JOHN GAUS, JEFF DEWEESE AND PHILIP D. LEVESON,
DEFENDANTS-RESPONDENTS-APPELLANTS.

FRANK A. BERSANI, JR., SYRACUSE, FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

FRENCH-ALCOTT, PLLC, SYRACUSE (LEE ALCOTT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered October 26, 2010. The order granted in part the motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of defendants' motion for summary judgment dismissing the fifth cause of action against defendants Golden Technology Management, LLC, John Gaus, Jeff DeWeese and Philip D. Leveson and by reinstating that cause of action against those defendants, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking, inter alia, damages resulting from defendants' alleged breach of a Services Agreement, pursuant to which plaintiffs were to install process equipment skids fabricated by a third-party supplier as part of a project to produce biodiesel fuel. Under the terms of that agreement, defendant NextGen Fuel, Inc. (NextGen Fuel) was to deposit plaintiffs' entire payment into an escrow account from which plaintiffs were to receive an installment "within three days of the closing and funding of a financing agreement between NextGen [Fuel] and [its] investor." Plaintiffs appeal from an order granting those parts of defendants' motion for summary judgment dismissing the 1st through 4th and 6th through 10th causes of action, as well as the 5th cause of action against defendant Golden Technology Management, LLC (Golden Technology) and the individual defendants. Defendants cross-appeal

from the order only insofar as it denied that part of their motion with respect to the fifth cause of action against NextGen Fuel and its parent company, defendant NextGen Chemical Processes, Inc. (collectively, NextGen defendants). We note that although only the court's decision, but not the order on appeal, expressly grants that part of defendants' motion with respect to the fifth cause of action against Golden Technology and the individual defendants, "it is well established that where there is a discrepancy between the order and the decision, the decision controls" (*Utica Mut. Ins. Co. v McAteer & FitzGerald, Inc.*, 78 AD3d 1612, 1612-1613; *see Matter of Edward V.*, 204 AD2d 1060, 1061).

Addressing first the cross appeal, we reject defendants' contention that Supreme Court erred in denying those parts of their motion for summary judgment dismissing the fifth cause of action against the NextGen defendants, alleging a breach of the Services Agreement. The NextGen defendants established their entitlement to judgment as a matter of law with respect to that cause of action by submitting evidence that no financing agreement between NextGen Fuel and its investor was ever closed and funded (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In opposition to the motion, however, plaintiffs submitted evidence raising a triable issue of fact whether a $200,000 down payment for a biodiesel processing system made by a potential investor in the project to a third party supplier constituted a "financing agreement" within the meaning of the Services Agreement (*see generally id.*). Further, we agree with the court that, in the absence of an express provision in the Services Agreement concerning the time of performance for the escrow deposit, the timing of the escrow deposit need only be reasonable, and that issue cannot be determined as a matter of law on this record (*see Lake Steel Erection v Egan*, 61 AD2d 1125, 1126, *lv dismissed* 44 NY2d 646, 848; *see generally Spagna v Licht*, 87 AD2d 626).

We agree with plaintiffs on appeal that the court erred in granting those parts of the motion for summary judgment dismissing the fifth cause of action against Golden Technology and the individual defendants. We therefore modify the order accordingly. To establish their entitlement to judgment as a matter of law, those defendants were required to submit evidence "demonstrat[ing] that they were acting only as officers and stockholders in performing [the] corporate business" of the NextGen defendants (*Lawlor v Hoffman*, 59 AD3d 499, 500). Golden Technology and the individual defendants failed to do so, and they may not meet their summary judgment burden by pointing to gaps in plaintiffs' proof (*see generally Higgins v Pope*, 37 AD3d 1086). We have reviewed plaintiffs' remaining contentions on appeal and conclude that they are without merit.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

873

CA 11-00424

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

ANNA STRANZ, PLAINTIFF,

V MEMORANDUM AND ORDER

NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY (NYSERDA), BURNS INTERNATIONAL SECURITY SERVICES CORPORATION AND SECURITAS SECURITY SERVICES USA, INC., DEFENDANTS.

NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY (NYSERDA), THIRD-PARTY PLAINTIFF, BURNS INTERNATIONAL SECURITY SERVICES CORPORATION AND SECURITAS SECURITY SERVICES USA, INC., THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

WEST VALLEY NUCLEAR SERVICES COMPANY, LLC, THIRD-PARTY DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (WILLIAM D. CHRIST OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

EDWARD C. COSGROVE, BUFFALO (J. MICHAEL LENNON OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 26, 2010 in a personal injury action. The order, insofar as appealed from, denied that part of third-party defendant's motion seeking summary judgment against defendant-third-party plaintiffs Burns International Security Services Corporation and Securitas Security Services USA, Inc.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion of third-party defendant West Valley Nuclear Services Company, LLC for summary judgment dismissing the second third-party complaint of third-party plaintiffs Burns International Security Services Corporation and Securitas Security Services USA, Inc. and for summary judgment on its counterclaim against those third-party plaintiffs for up to the sum of $250,000 in costs incurred in defending itself in the third-party action with respect to third-party plaintiff New York State Energy Research and Development Authority (NYSERDA) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell on an icy staircase at the Western New York Nuclear Service Center (hereafter, Site). Although the Site was owned by New York State, defendant-third-party plaintiff New York State Energy Research and Development Authority (NYSERDA) assumed jurisdiction over it. Pursuant to a "cooperative agreement" between NYSERDA and the United States Department of Energy (DOE), the DOE operated a high level radioactive waste management project at the Site. The record establishes that the DOE contracted with third-party defendant West Valley Nuclear Services Company, LLC (West Valley) to manage and operate the Site, and that West Valley in turn contracted with defendant-third-party plaintiff Burns International Security Services Corporation and its successor in interest, defendant-third-party plaintiff Securitas Security Services USA, Inc. (collectively, Burns), for Burns to provide security services on the Site. Incorporated into the two purchase order contracts between West Valley and Burns for the provision of the security services were West Valley's General Provisions for Commercial Items (General Provisions).

Two provisions in the General Provisions are relevant to this appeal taken by West Valley. Section 13A required Burns to indemnify and hold harmless West Valley from and against, inter alia, any and all claims, actions, causes of action, expenses and liabilities resulting from any injury to any person alleged to have occurred as a result of or in connection with the performance of Burns's contractual duties, except for any injuries that resulted "directly from the sole negligence" of West Valley. Section 13B required Burns to "procure . . . and . . . maintain . . ., while any work or Services are being performed, and for such periods thereafter as may be 'necessary under the circumstances' . . . insurance sufficient to protect . . . [West Valley] . . . against any and all liability, or alleged liability, with respect to bodily injury . . . arising pursuant to [the purchase orders]." Also pursuant to the General Provisions, the insurance policy was to contain a provision stating that the insurer agreed to waive " 'any rights of subrogation against [West Valley] . . . which might arise by reason of any payment under this policy.' " West Valley was to be named as an additional insured in the insurance policy.

The insurance policy obtained by Burns contained the requisite waiver of subrogation clause, named West Valley as an additional insured and provided single incident coverage of $1 million. That coverage, however, was in excess of a self-insured retention (SIR) of $250,000.

After plaintiff commenced her action against NYSERDA and Burns, they commenced separate third-party actions against West Valley. In its third-party answer in the NYSERDA third-party action, West Valley asserted a cross claim against Burns for common-law indemnification. In its amended third-party answer in the Burns third-party action, West Valley asserted two counterclaims, the first seeking contractual indemnification from Burns and the second seeking a defense from Burns or its insurer in the NYSERDA third-party action. West Valley

thereafter moved for, inter alia, summary judgment dismissing the Burns "second third-party complaint" and for summary judgment on its two counterclaims. We conclude that Supreme Court erred in denying West Valley's motion with respect to Burns in its entirety. Rather, we conclude that the court should have granted those parts of the motion for summary judgment dismissing Burns's second third-party complaint and for summary judgment on the counterclaim seeking defense costs in the NYSERDA third-party action, but only up to the sum of $250,000. We therefore modify the order accordingly.

With respect to that part of its motion for summary judgment dismissing Burns's second third-party complaint, West Valley contends that the second third-party complaint is barred by both the contractual waiver of subrogation provision and the antisubrogation rule. Contrary to the contention of Burns, West Valley's assertion with respect to the contractual waiver of subrogation is preserved for our review. Furthermore, although Burns is correct that the assertion with respect to the antisubrogation rule is not preserved for our review, West Valley may raise that assertion for the first time on appeal because it involves " '[a] question of law appearing on the face of the record . . . [that] could not have been avoided by [Burns] if brought to [its] attention in a timely manner' " (*Art Capital Partners, LP v Tyco Acquisition Corp. XVIII*, 71 AD3d 1404, 1405, quoting *Oram v Capone*, 206 AD2d 839, 840).

Nevertheless, although both assertions are properly before us, we conclude that the contractual waiver of subrogation provision does not constitute a basis for granting that part of the motion for summary judgment dismissing Burns's second third-party complaint. Here, the contract stated only that the insurance policy must contain a waiver of subrogation clause that would bar the insurer providing the insurance policy from seeking subrogation against West Valley. That contractual provision does not preclude Burns from seeking subrogation against West Valley.

We further conclude, however, that West Valley's assertion with respect to the antisubrogation rule does constitute a basis for granting that part of the motion for summary judgment dismissing Burns's second third-party complaint. It is well established that "an insurance carrier has no right of subrogation against its own insured to recover for a claim the insurer has paid that arose out of 'the very risk for which the insured was covered' " (*Fitch v Turner Constr. Co.*, 241 AD2d 166, 170; *see North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294-295; *McMann v A.R. Mack Constr. Co., Inc.*, 8 AD3d 1083, 1084). Because Burns procured an insurance policy that has an SIR, Burns has become an insurer (*see New York State Thruway Auth. v KTA-Tator Eng'g Servs., P.C.*, 78 AD3d 1566, 1567-1568), and therefore is not entitled to seek payment from its insured, West Valley.

With respect to the counterclaim seeking to require Burns or its insurer to provide West Valley with a defense in the NYSERDA third-party action, we conclude that West Valley is entitled to recover from Burns defense costs up to the sum of $250,000, the amount of the SIR.

Pursuant to section 13B of the General Provisions of the two purchase order contracts in question, Burns was to procure and maintain insurance that would insure West Valley, as an additional insured, against "any and all liability" that arose pursuant to the contracts. The phrase "[a]ny and all liability" includes the cost of a defense. "[I]t is well settled that an insurer's duty to defend [its insured] is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage . . . The duty to defend [an] insured[] . . . is derived from the allegations of the complaint and terms of the policy. If [a] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [internal quotation marks omitted]; *see Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137; *Henderson v New York Cent. Mut. Fire Ins. Co.*, 56 AD3d 1141, 1142). Because the allegations of the complaint in the main action potentially bring the claims within the protection of the insurance coverage purchased, the *insurer* would be required to provide West Valley with a defense (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v City of Oswego*, 295 AD2d 905, 905-906; *see also Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175). In the motion underlying the appeal, however, West Valley is seeking to require Burns, rather than the insurer from whom Burns purchased the insurance, to provide West Valley with a defense. Although West Valley bases its contention on the argument that Burns breached the contracts by obtaining an insurance policy that had a SIR of $250,000, our conclusion is the same regardless of the argument that Burns breached the contract. In the event that Burns in fact breached the contracts, then it is responsible for any damages that would have been avoided had the correct insurance policy been obtained (*see Kinney v G. W. Lisk Co.*, 76 NY2d 215, 219; *Lima v NAB Constr. Corp.*, 59 AD3d 395, 397; *Moll v Wegmans Food Mkts.*, 300 AD2d 1041, 1042; *Nrecaj v Fisher Liberty Co.*, 282 AD2d 213, 214). If, on the other hand, Burns did not breach the contracts because the SIR may be deemed to constitute insurance covering West Valley for any and all liability, then Burns has become an insurer for any liability up to the sum of $250,000. As an insurer, Burns therefore must provide up to the sum of $250,000 in defense costs to West Valley in the NYSERDA action.

We note that, to the extent that West Valley contends for the first time on appeal that it is entitled to a defense in the Burns third-party action as well, that contention is not properly before us (*see generally Hyde v North Collins Cent. School Dist.*, 83 AD3d 1557, 1558; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Finally, we conclude that the court properly denied that part of West Valley's motion for summary judgment on its counterclaim for contractual indemnification. There is an issue of fact whether Burns and/or West Valley were negligent, and thus any determination whether Burns must provide contractual indemnification to West Valley would be premature (*see Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808-809; *Niagara Frontier Transp. Auth. v City of Buffalo Sewer Auth.*, 1 AD3d 893, 895).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

877

CA 11-00558

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

DAVID LEAVINES, PLAINTIFF-RESPONDENT,

V ORDER

HUEBER-BREUER CONSTRUCTION CO., INC. AND
ELMCREST CHILDREN'S CENTER, INC.,
DEFENDANTS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KEVIN E. HULSLANDER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

STANLEY LAW OFFICES, LLP, SYRACUSE (JOSEPH P. STANLEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered November 18, 2010 in a personal injury action. The order, insofar as appealed from, granted the motion of plaintiff for partial summary judgment pursuant to Labor Law § 240 (1) and denied in part the cross motion of defendants for summary judgment.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on May 18, 2011,

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

878

TP 11-00462

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

IN THE MATTER OF JERMAINE BAKER, PETITIONER,

V MEMORANDUM AND ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (EDWARD L. CHASSIN OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered March 2, 2011) to review a determination of respondent. The determination denied the application of petitioner for temporary release.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination denying his application for temporary release to a substance abuse treatment program. We note at the outset that the proceeding was improperly transferred to this Court pursuant to CPLR 7804 (g) because no substantial evidence question is raised herein (*see generally* CPLR 7803 [4]; Correction Law § 855 [9]; *Matter of Tatta v Dennison*, 26 AD3d 663, *lv denied* 6 NY3d 714; *Matter of Gonzalez v Wilson*, 106 AD2d 386). Nevertheless, we consider the merits of the petition in the interest of judicial economy (*see generally Matter of La Rocco v Goord*, 19 AD3d 1073). Here, petitioner's escalating criminal history, especially the circumstances of his instant offense, raised rational concerns regarding whether petitioner was sufficiently trustworthy to participate in a temporary release program and whether his release would pose a threat to community safety (*see Matter of Wallman v Joy*, 304 AD2d 996; *Matter of Romer v Goord*, 242 AD2d 574, *lv denied* 91 NY2d 811). Thus, the determination denying petitioner's application for temporary release was not "affected by irrationality bordering on impropriety," nor did respondent violate any statutory requirement or

deny a constitutional right of petitioner (*Gonzalez*, 106 AD2d at 386-387).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

879

KAH 10-00962

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
CHRIS APPLEWHITE, PETITIONER-APPELLANT,

V ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

KATHLEEN WALSH INFANTI, WEEDSPORT, FOR PETITIONER-APPELLANT.

CHRIS APPLEWHITE, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated decision and order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered March 4, 2010 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

880

KA 07-02181

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH R. SPENCER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THEODORE W. STENUF, MINOA, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered April 16, 2007. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the fifth degree (§§ 110.00, 220.06 [2]) and criminally possessing a hypodermic instrument (§ 220.45). With respect to appeal No. 1, "[t]he challenge by defendant to the amount of restitution is not foreclosed by his waiver of the right to appeal because the amount of restitution was not included in the terms of the plea agreement" (*People v Sweeney*, 4 AD3d 769, 770, *lv denied* 2 NY3d 807; *cf. People v Gilmore*, 12 AD3d 1155, 1156). Defendant waived that challenge, however, because he failed to object to the amount of restitution at sentencing (*see Sweeney*, 4 AD3d at 770). He also "failed to preserve that challenge for our review, . . . by failing to request a hearing or to object to the amount of restitution" (*People v Lovett*, 8 AD3d 1007, 1008, *lv denied* 3 NY3d 673, 677; *see People v Horne*, 97 NY2d 404, 414 n 3). Furthermore, there is no support in the record for defendant's contention that he was deprived of the benefit of his plea bargain, i.e., that he did not receive the benefit that he was promised in exchange for pleading guilty (*cf. People v Pichardo*, 1 NY3d 126). With respect to defendant's further contention in appeal No. 1, that County Court erred in refusing to suppress his statements to the police, that contention is encompassed by defendant's valid waiver of the right to appeal, and we therefore do not address it (*see People v Kemp*, 94 NY2d 831, 833).

With respect to appeal No. 2, defendant contends that his waiver

of indictment was invalid inasmuch as there is no evidence in the record before us that a local criminal court held him over for the action of a grand jury on the charges in the superior court information (SCI). Defendant is correct that his contention "is a jurisdictional one which survives his appeal waiver and guilty plea" (*People v Dennis*, 66 AD3d 1058, 1058; *see People v Boston*, 75 NY2d 585, 589 n), and we agree with defendant that his contention has merit. As the record establishes, at the time defendant waived indictment and consented to be prosecuted by an SCI, he had already been indicted on the burglary charges, which arose from the same incident. Consequently, we agree with defendant that, "[g]iven the objective and the plain language of CPL 195.10 (2) (b), the conclusion is inescapable that waiver cannot be accomplished after indictment, as was the case here, even where it is the defendant who orchestrates the scenario" (*Boston*, 75 NY2d at 589). We therefore reverse the judgment in appeal No. 2, vacate the sentence imposed, and dismiss the SCI.

Entered: September 30, 2011 Patricia L. Morgan
Clerk of the Court

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

881

KA 10-00802

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHARLES N. JONES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered December 15, 2008. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree (two counts).

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

882

KA 10-01759

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL W. MYERS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Niagara County Court (Sara S. Sperrazza, J.), dated June 30, 2010. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We reject defendant's contention that County Court erred in assessing 10 points under risk factor 13 on the risk assessment instrument based on his unsatisfactory conduct while confined. Points are properly assessed under that risk factor against "an offender . . . who receives dispositions for behavior such as attempting to contact the victim" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 16 [2006]). Here, defendant admitted at the SORA hearing that he sent two letters from prison to the police officer who arrested him, threatening to kill the officer and his family. In addition, the case summary, which was admitted in evidence at the SORA hearing, stated that defendant had "39 Tier II infractions and 10 serious Tier III infractions" while incarcerated. We thus conclude that the court properly assessed the 10 points in question.

Defendant further contends that he was denied a meaningful opportunity to present mitigating evidence at the SORA hearing concerning risk factor 13. Although the People did not provide timely notice of their intent to seek an assessment of points under that risk factor (*see* Correction Law § 168-n [3]), the court granted defense counsel a brief adjournment to review the "documentary evidence" sought to be admitted by the People with respect to risk factor 13

(*see People v Inghilleri*, 21 AD3d 404, 405). Defense counsel availed himself of the adjournment and proceeded with the hearing without requesting a further adjournment or any other corrective action (*see People v Jordan*, 31 AD3d 1196, *lv denied* 7 NY3d 714), and thus defendant is deemed to have waived his present contention concerning risk factor 13 (*see generally People v Forshey*, 298 AD2d 962, 963, *lv denied* 99 NY2d 558, 100 NY2d 561). We note in any event that there was no prejudice to defendant inasmuch as he was aware prior to the SORA hearing of the nature of the evidence sought to be admitted by the People with respect to that risk factor. Thus, under the circumstances, defendant was not deprived of a meaningful opportunity to present mitigating evidence (*see generally People v Wheeler*, 59 AD3d 1007, *lv denied* 12 NY3d 711; *People v Warren*, 42 AD3d 593, 593-594, *lv denied* 9 NY3d 810).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

883

KAH 11-00261

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JAMES LYNCH, PETITIONER-APPELLANT,

V ORDER

MICHAEL P. CORCORAN, SUPERINTENDENT, CAYUGA
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

JAMES LYNCH, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated decision and order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered July 8, 2009 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

884

KA 09-02050

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY SCHROO, DEFENDANT-APPELLANT.

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

JASON L. COOK, DISTRICT ATTORNEY, PENN YAN (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered October 6, 2009. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (two counts), course of sexual conduct against a child in the first degree and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, two counts of sexual abuse in the first degree (Penal Law § 130.65 [3]) in connection with two victims, one of whom is his daughter, and one count of course of sexual conduct against a child in the first degree (§ 130.75 [1] [a]) with respect to his daughter. Defendant contends that County Court erred in refusing to suppress statements that he made to the police because the police officer had not told him he was free to leave before he made incriminating statements. We reject defendant's contention that he was in custody when he made the statements. Indeed, the court's determination that defendant was not in custody when he made the statements will not be disturbed unless it is " 'clearly erroneous,' " and that is not the case here (*People v Jones*, 9 AD3d 837, 839, *lv denied* 3 NY3d 708, 4 NY3d 745). The evidence presented at the suppression hearing established that defendant initially was interviewed for 25 minutes at the public safety building. He drove himself there and was not restrained, and the questions were investigative rather than accusatory. Thus, the court properly determined that defendant was not in custody when he made certain of the self-incriminating remarks sought to be suppressed (*see People v Lunderman*, 19 AD3d 1067, 1068-1069, *lv denied* 5 NY3d 830). With respect to the remainder of the remarks sought to be suppressed, we note that the second interview during which defendant

made those remarks occurred in his home, where he also was not in custody (*see People v Paulman*, 11 AD3d 878, *affd* 5 NY3d 122).

Defendant further contends that the evidence with respect to the younger of the two victims, who is not his daughter, is legally insufficient to support the conviction of one of the two counts of sexual abuse in the first degree because that child was not competent to testify under oath and because the People failed to prove the element that defendant's conduct was for the purpose of gratifying his sexual desire. Defendant failed to preserve those contentions for our review (*see People v Gray*, 86 NY2d 10, 19) and, in any event, they are without merit. The presumption pursuant to CPL 60.20 (2) that a child under the age of nine is not competent to give sworn testimony in a criminal proceeding may be overcome "if, upon examination, the court is satisfied that the witness understands the nature of an oath" (*People v Hetrick*, 80 NY2d 344, 349) and, contrary to defendant's contention, the court properly determined in this case that the presumption of incompetency was overcome (*see generally People v Heck*, 229 AD2d 931, 932). Also contrary to defendant's contention, the element of sexual gratification may be inferred from the sexual nature of defendant's actions (*see People v Willis*, 79 AD3d 1739, 1740, *lv denied* 16 NY3d 864).

With respect to the crimes related to his daughter, upon viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), a rational trier of fact could have found the essential elements of those crimes beyond a reasonable doubt and thus the evidence is legally sufficient to support the conviction (*see People v Calabria*, 3 NY3d 80, 81-82). Defendant's 10-year-old daughter testified that she usually slept with her father when she visited him, that the abuse occurred every time she slept with him, and that the abuse began when she was in the first grade. The daughter's mother testified that, from the time the daughter was in kindergarten she stayed at defendant's residence almost every weekend and for extended periods during the summer, including the period alleged in the indictment, i.e., the 2006-2007 school year, when the daughter was in the second grade, through August 31, 2008. We thus conclude that, contrary to defendant's contention, the evidence established that the abuse occurred over a period in excess of three months (*see* Penal Law § 130.75 [1] [a]). In addition, the jury was entitled to credit the testimony of the People's witnesses, and we therefore further conclude that the verdict is not against the weight of the evidence with respect to both victims (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's contention that he was denied his constitutional right to a fair trial based on prosecutorial misconduct and the cumulative effect of the various alleged errors raised on appeal. We also reject defendant's contention that his sentence is unduly harsh and severe. Although the court recognized that defendant was offered lenient sentences in two separate plea offers prior to trial, the court nevertheless determined that the sentences ultimately imposed were warranted after it heard the testimony presented at trial

and reviewed the presentence report. We decline defendant's request that we exercise our power to modify the sentences as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]). We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

885

KA 07-02180

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH R. SPENCER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THEODORE W. STENUF, MINOA, FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered April 16, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the fifth degree and criminally possessing a hypodermic instrument.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and the superior court information is dismissed.

Same Memorandum as in *People v Spencer* ([appeal No. 1] ___ AD3d ___ [Sept. 30, 2011]).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

886

KA 09-02627

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY ZUKE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered June 16, 2009. The judgment convicted defendant, upon his plea of guilty, of manslaughter 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 manslaughter in the second degree (Penal Law § 125.15 [1]), defendant contends that County Court erred in refusing to suppress his second statement to the police, which was given eight months after defendant had given a written statement to the police following an initial interview by them. That contention, however, is not properly before us. "[A]lthough the court issued a bench decision with respect to [those parts of defendant's omnibus motion seeking to suppress his statements to the police,] the exception set forth in CPL 710.70 (2) allowing appellate review with respect to orders that finally den[y] a motion to suppress evidence is not applicable because defendant pleaded guilty before the court issued such an order" (*People v Ellis*, 73 AD3d 1433, 1433-1434, *lv denied* 15 NY3d 851 [internal quotation marks omitted]; *see People v McGinnis*, 83 AD3d 1594). In addition, defendant's contention that the court should have suppressed the statement on the ground that the People presented insufficient evidence at the suppression hearing is raised for the first time on appeal and is therefore unpreserved for our review (*see People v Poole*, 55 AD3d 1354, 1355, *lv denied* 11 NY3d 929; *People v Brooks*, 26 AD3d 739, 740, *lv denied* 6 NY3d 846, 7 NY3d 810). In any event, we conclude that suppression was not warranted on the ground raised by defendant before the suppression court inasmuch as the record establishes that defendant was not in custody when he gave his second statement to the police and thus *Miranda* warnings were not required at that time (*see People v Stokes*, 212 AD2d 986, *lv denied* 86 NY2d 741; *People v Schultz*, 176 AD2d 1239, *lv denied* 79 NY2d 832; *see*

generally People v Paulman, 5 NY3d 122, 129; *People v Yukl*, 25 NY2d 585, 588-589, *cert denied* 400 US 851).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

887

CA 11-00172

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

MARK V. SABIA, AS ADMINISTRATOR OF THE ESTATE OF MARIO V. SABIA, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NIAGARA MOHAWK POWER CORPORATION, DOING BUSINESS AS NATIONAL GRID, DEFENDANT, AND NORTHERN ERIE SNO-SEEKERS, INC., DEFENDANT-APPELLANT.

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

LAW OFFICES OF EUGENE C. TENNEY, BUFFALO (EDWARD J. SCHWENDLER, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered December 8, 2010. The order, inter alia, denied the motion of defendant Northern Erie Sno-Seekers, Inc. for summary judgment dismissing the complaint and granted the cross motion of plaintiff to dismiss the General Obligations Law § 9-103 affirmative defense of Northern Erie Sno-Seekers, Inc.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the cross motion for summary judgment dismissing the affirmative defense of defendant Northern Erie Sno-Seekers, Inc. pursuant to General Obligations Law § 9-103 and granting the motion of defendant Northern Erie Sno-Seekers, Inc. for summary judgment dismissing the complaint against it and as modified the order is affirmed without costs.

Memorandum: Plaintiff's decedent was killed while operating a snowmobile on a trail maintained by defendant Northern Erie Sno-Seekers, Inc. (Sno-Seekers) on property owned by defendant Niagara Mohawk Power Corporation, doing business as National Grid (NiMo). After leaving a restaurant where he had consumed several alcoholic beverages, decedent, followed by a friend on another snowmobile, drove directly into a metal gate near a portion of the trail he had passed earlier that evening. By his friend's estimate, decedent was traveling at a speed of approximately 45 miles per hour when he hit the gate. Decedent was rendered unconscious immediately and died within one hour after the accident. Plaintiff commenced this action seeking to recover damages for decedent's wrongful death and conscious

pain and suffering, contending that the "accident was caused by the willful or malicious failure to guard or to warn against a dangerous condition, use, structure or activity of the [d]efendants." Following discovery, both defendants moved for summary judgment dismissing the complaint against them, respectively, based upon General Obligations Law § 9-103, which they each asserted as an affirmative defense. That statute provides in relevant part that "an owner, lessee or occupant of premises . . . owes no duty to keep the premises safe for entry or use by others for . . . motorized vehicle operation for recreational purposes[][or] snowmobile operation . . . or to give warning of any hazardous condition or use of or structure or activity on such premises to persons entering for such purposes" (§ 9-103 [1] [a]), unless the owner, lessee or occupant of the premises is guilty of a "willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity" (§ 9-103 [2] [a]), or receives consideration for the use of the premises to pursue, inter alia, the above enumerated activities (§ 9-103 [2] [b]). Plaintiff, in turn, cross-moved to strike defendants' affirmative defenses under section 9-103.

Supreme Court granted NiMo's motion, denied Sno-Seekers' motion, and granted that part of plaintiff's cross motion with respect to Sno-Seekers. The court reasoned that Sno-Seekers' affirmative action in directing riders in the direction of the metal gate without adequate warnings rendered General Obligations Law § 9-103 inapplicable. The court further determined that Sno-Seekers had failed to establish that the $25 membership dues charged to members, including decedent, did not constitute "consideration" for the use of the trail within the meaning of section 9-103 (2) (b). We conclude that the court erred in denying Sno-Seekers' motion and in granting that part of plaintiff's cross motion with respect to Sno-Sneekers. We therefore modify the order accordingly, thus dismissing the complaint in its entirety.

General Obligations Law § 9-103 "grants a special immunity to owners, lessees or occupants from the usual duty to keep places safe" when those using the property are engaged in specified recreational activities (*Farnham v Kittinger*, 83 NY2d 520, 525). Here, it is undisputed that decedent was engaged in a covered activity, i.e., snowmobiling, and that the property had been used extensively for snowmobiling for years and was suitable for that purpose. The court erred in determining that the statute was inapplicable because Sno-Seekers was guilty of "affirmative" acts of negligence, thereby rendering the statute inapplicable pursuant to section 9-103 (2) (a). Indeed, we held in *Sauberan v Ohl* (239 AD2d 891) that General Obligations Law § 9-103 does not immunize a landowner or occupant from liability for affirmative acts of negligence unrelated to the condition of the land itself. Thus, in *Sauberan*, we held that the statute did not shield the landowner/occupant from liability from a hunting accident that occurred on his property, where liability was not predicated upon his "status as owner or occupant of the land" but, instead, was predicated "upon his allegedly improper conduct in telling [the] defendant [in question] . . . to shoot at a target that [the owner/occupant] could not see" (*id.*). Similarly, in *Del Costello v Delaware & Hudson Ry. Co.* (274 AD2d 19, 21), the Third Department

held the statute was inapplicable in a case where the injured plaintiff was struck by a train while operating a snowmobile on property owned by the defendant. The *Del Costello* Court reasoned that "the statute does not immunize [the defendant] landowner [or one of its employees] from its separate and distinct duty to operate a vehicle on its recreational property with reasonable care" (*id*. at 23; *see Lee v Long Is. R.R.*, 204 AD2d 280, 282). Here, the negligence alleged by plaintiff is related solely to the condition of the property itself, not to any independent duty separate and distinct therefrom, and thus the affirmative negligence doctrine is inapplicable.

We reject plaintiff's contention that Sno-Seekers was guilty of willful or malicious conduct so as to trigger the statutory exception under General Obligations Law § 9-103 (2) (a). That exception " 'must be strictly construed in order that the major policy underlying the legislation itself is not defeated,' with all doubts resolved in favor of the general provision rather than the exception" (*Farnham*, 83 NY2d at 529). For a party successfully to invoke the exception, there must be "a high-threshold demonstration . . . to show willful intent by the alleged wrongdoer" (*id.*), a showing that plaintiff has failed to make in this case.

Finally, the fact that Sno-Seekers, a not-for-profit group, charged a nominal membership fee of $25 per year does not trigger the "consideration" exception to the statute (General Obligations Law § 9-103 [2] [b]). It is undisputed that the membership fee was not charged as a prerequisite to use of the trails, which were open to the public at large. Indeed, the friend of decedent who was riding with him that night was not a dues-paying member of Sno-Seekers at the time. Under the circumstances, we conclude that there was an insufficient nexus between the nominal membership dues and the maintenance of the trail to trigger the statutory exception (*see Heminway v State Univ. of N.Y.*, 244 AD2d 979, *lv denied* 91 NY2d 809; *see also Martins v Syracuse Univ.*, 214 AD2d 967).

Entered: September 30, 2011 Patricia L. Morgan
Clerk of the Court

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

888

CA 10-02515

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

IN THE MATTER OF CHARLES DEMCHIK,
CLAIMANT-APPELLANT,

V ORDER

COUNTY OF NIAGARA, NIAGARA COUNTY SHERIFF'S
OFFICE, AND JAMES R. CONTOUR, IN HIS OFFICIAL
CAPACITY AS NIAGARA COUNTY SHERIFF,
RESPONDENTS-RESPONDENTS.

DEMARIE & SCHOENBORN, P.C., BUFFALO (JOSEPH DEMARIE OF COUNSEL), FOR CLAIMANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (AMANDA C. SCHIEBER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered March 10, 2010. The order denied the application of claimant for leave to serve a late notice of claim.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

889

CA 10-01697

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

IN THE MATTER OF THE ESTATE OF MURIEL H. ALBRIGHT, DECEASED.

MICHAEL ALBRIGHT, AS EXECUTOR OF THE ESTATE OF MURIEL H. ALBRIGHT, DECEASED, PETITIONER-APPELLANT,

ERVINA MALIN AND TAYLOR D. MALIN, RESPONDENTS-RESPONDENTS.

(APPEAL NO. 1.)

MEMORANDUM AND ORDER

PANZARELLA & COIA, P.C., ROCHESTER (CHAD M. HUMMEL OF COUNSEL), FOR PETITIONER-APPELLANT.

MELVIN BRESSLER, ROCHESTER, FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Surrogate's Court, Monroe County (Edmund A. Calvaruso, S.), entered October 6, 2009. The order directed Michael Albright, as executor of the estate of Muriel H. Albright, deceased, to deliver title and possession of a certain motor vehicle to Taylor D. Malin.

It is hereby ORDERED that said appeal is unanimously dismissed with costs.

Same Memorandum as in *Matter of Albright* ([appeal No. 2] ___ AD3d ___ [Sept. 30, 2011]).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

890

CA 11-00183

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

IN THE MATTER OF THE ESTATE OF MURIEL H. ALBRIGHT, DECEASED.

MICHAEL ALBRIGHT, AS EXECUTOR OF THE ESTATE OF MURIEL H. ALBRIGHT, DECEASED, PETITIONER-APPELLANT,

ERVINA MALIN AND TAYLOR D. MALIN, RESPONDENTS-RESPONDENTS.

(APPEAL NO. 2.)

MEMORANDUM AND ORDER

PANZARELLA & COIA, P.C., ROCHESTER (CHAD M. HUMMEL OF COUNSEL), FOR PETITIONER-APPELLANT.

MELVIN BRESSLER, ROCHESTER, FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Surrogate's Court, Monroe County (Edmund A. Calvaruso, S.), entered November 30, 2010. The order settled the record for an appeal from an order entered October 6, 2009 and awarded attorney's fees and expenses to Ervina Malin and Taylor D. Malin.

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

Memorandum: Petitioner, as executor of the estate of his mother (decedent), appeals from two orders of Surrogate's Court entered in connection with an objection proceeding brought by decedent's daughter, who subsequently executed a stipulation of discontinuance with respect to the proceeding. Petitioner is the sole beneficiary of decedent's estate and, in appeal No. 1, he appeals from an order directing him to transfer a vehicle to decedent's grandson, the respondent herein, who was not a party to the objection proceeding. In appeal No. 2, petitioner appeals from an order settling the record on appeal.

Addressing first the order in appeal No. 2, we reject petitioner's contention that the Surrogate erred in determining that correspondence between petitioner's attorney and his sister's attorney that set forth the terms of the agreement to settle the objection proceeding was properly included in the record on appeal. According to the Surrogate's decision, the Surrogate relied upon, inter alia, the correspondence between those attorneys to direct the transfer of a vehicle to decedent's grandson as part of the settlement of the objection proceeding. Thus, the Surrogate properly determined that

meaningful review of the order in appeal No. 1 would not be possible were that correspondence not included in the record on appeal. "The trial court is the 'final arbiter of the record' and its settlement of the record should not be disturbed absent an abuse of discretion" (*Antokol & Coffin v Myers*, 86 AD3d 876, 878), and we perceive no abuse of discretion here. Furthermore, petitioner is not aggrieved with respect to the order in appeal No. 1 inasmuch as it is based upon the settlement agreement as set forth by his own attorney in the correspondence. We therefore dismiss his appeal from the order in appeal No. 1 (*see Matter of Sterling v Dyal*, 52 AD3d 894; *Matter of Cherilynn P.*, 192 AD2d 1084, *lv denied* 82 NY2d 652; *see generally* CPLR 5511).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

891

CA 10-02518

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

STEVEN M. GARBER & ASSOCIATES, A PROFESSIONAL CORPORATION, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KIM JOHN ZUBER, DEFENDANT-APPELLANT, ET AL., DEFENDANT.

HARTER SECREST & EMERY LLP, ROCHESTER (THOMAS G. SMITH OF COUNSEL), FOR DEFENDANT-APPELLANT.

PETER M. AGULNICK, P.C., GREAT NECK (PETER M. AGULNICK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered October 21, 2010. The order granted the motion of plaintiff for summary judgment in lieu of complaint.

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

Memorandum: By motion for summary judgment in lieu of complaint pursuant to CPLR 3213, plaintiff commenced this action to enforce a judgment entered in California upon the default of Kim John Zuber (defendant). Contrary to defendant's contention, Supreme Court properly granted the motion. "Absent a jurisdictional challenge, a final judgment entered upon the defendant's default in appearing in an action is . . . entitled to be given full faith and credit in the courts of this State" (*GNOC Corp. v Cappelletti*, 208 AD2d 498; *see Fiore v Oakwood Plaza Shopping Ctr.*, 78 NY2d 572, 577, *rearg denied* 79 NY2d 916, *cert denied* 506 US 823). Here, the record establishes that the California court had jurisdiction over defendant and that defendant admits that process was properly served upon him in New York (*cf. Vertex Std. USA, Inc. v Reichert*, 16 AD3d 1163). We agree with the court that plaintiff established that defendant had "certain minimum contacts with [California] so that the maintenance of the suit [there] would not offend traditional notions of fair play and substantial justice . . . and [that defendant] has purposefully [availed himself] of the privilege of conducting activities within the forum State, [i.e., California,] thus invoking the benefits and protections of its laws" (*Money-Line, Inc. v Cunningham*, 80 AD2d 60, 62; *see Hanson v Denckla*, 357 US 235, 253, *reh denied* 358 US 858;

International Shoe Co. v Washington, 326 US 310, 316).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

893

CA 11-00714

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

COLLEEN MASTROCOVO, FORMERLY KNOWN AS COLLEEN CAPIZZI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOEL CAPIZZI, DEFENDANT-APPELLANT.

CLAIR A. MONTROY, III, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

Appeal from a judgment and order (one paper) of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered June 21, 2010 in a postjudgment divorce action. The judgment and order denied the application of defendant to be relieved of his maintenance obligation and awarded plaintiff a money judgment for maintenance arrears.

It is hereby ORDERED that the judgment and order so appealed from is unanimously modified on the law by granting the relief sought in the order to show cause with respect to maintenance and judgment is entered in favor of plaintiff for maintenance arrears in the amount of $1,413.38, and as modified the judgment and order is affirmed without costs.

Memorandum: By order to show cause, defendant sought, inter alia, to modify a judgment of divorce by terminating his maintenance obligation based on plaintiff's cohabitation with another man. Supreme Court denied the relief sought in the order to show cause with respect to maintenance and awarded judgment to plaintiff for maintenance arrears in the amount of $9,015.38. It appears from the record that the order to show cause sought other relief as well. As per the CPLR 5531 statement, however, only the issue of maintenance is before us on this appeal. The parties' property settlement agreement (agreement), which was incorporated but not merged into the judgment of divorce, required defendant to pay maintenance of $1,000 per month for 4½ years or until "the death of either party, remarriage of the wife or the *continued cohabitation* of the wife as defined in Domestic Relations Law § 248" (emphasis added). There is no dispute that plaintiff lived with her boyfriend in a rental home since August 2008, approximately one year before defendant filed the order to show cause. Plaintiff otherwise had no separate residence from that of her boyfriend, and they shared a bedroom.

Following an evidentiary hearing, the court denied defendant's order to show cause with respect to maintenance. The court determined that defendant, to establish grounds for termination of maintenance,

was required under the agreement to prove that plaintiff cohabitated with another man *and* held herself out as the other man's wife. We conclude that the court erred in denying the order to show cause with respect to maintenance because defendant was required to prove only that plaintiff cohabitated with another man.

"It is well settled that the parties to a matrimonial agreement may condition a husband's obligation to support his wife solely on her refraining from living with another man without the necessity of the husband also proving that she habitually holds herself out as the other man's wife as Domestic Relations Law § 248 requires" (*Pesa v Pesa*, 230 AD2d 837). Here, as noted, the parties' agreement provides for termination of maintenance upon plaintiff's "continued cohabitation" with another man, and there is no requirement therein that plaintiff hold herself out as the other man's wife. Although plaintiff is correct that the agreement refers to Domestic Relations Law § 248, which in turn refers to "proof that the wife is habitually living with another man and holding herself out as his wife, although not married to such man," we conclude that the reference in the agreement to section 248 is solely for the purpose of defining *cohabitation*. Indeed, it is clear that there are two prongs under the statute, and that habitually living with another man is a prong that is separate and distinct from the second prong of holding oneself out as the other man's wife (*see Matter of Bliss v Bliss*, 66 NY2d 382, 387; *Northrup v Northrup*, 43 NY2d 566, 570-571; *Armas v Armas*, 172 AD2d 1084). "The absence of proof in a particular case does not justify an inference that cohabitation alone manifests a holding out" (*Northrup*, 43 NY2d at 571).

"Under the standard canon of contract construction expressio unius est exclusio alterius, that is, that the expression of one thing implies the exclusion of the other" (*Matter of New York City Asbestos Litig.*, 41 AD3d 299, 302), the fact that the agreement refers only to the cohabitation prong of section 248 compels us to conclude that the parties did not intend to include the second prong of plaintiff holding herself out as another man's wife. The evidence at the hearing established that plaintiff was in fact cohabiting with another man. Indeed, plaintiff does not dispute that fact. It follows that defendant was entitled to termination of his maintenance obligation, and that the termination is effective as of the date of filing of his order to show cause, i.e., August 28, 2009 (*see generally Matter of Dox v Tynon*, 90 NY2d 166, 173; Domestic Relations Law § 236 [B] [9] [b]). As of that date, defendant owed $1,413.38 in maintenance from July 15, 2009, when the marital residence was sold and the maintenance obligation was triggered under the agreement. We therefore modify the judgment and order by granting the relief sought in defendant's order to show cause with respect to maintenance and reducing the amount awarded to plaintiff to $1,413.38.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

897

TP 11-00294

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

IN THE MATTER OF CRAIG J. EMMERLING, PETITIONER,

V MEMORANDUM AND ORDER

TOWN OF RICHMOND, RESPONDENT.

CHRISTINA A. AGOLA, PLLC, ROCHESTER (CHRISTINA A. AGOLA OF COUNSEL), FOR PETITIONER.

KENYON & KENYON LAW FIRM, CANANDAIGUA (EDWARD C. KENYON OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Ontario County [William F. Kocher, A.J.], dated August 10, 2010) to review a determination of respondent. The determination, among other things, terminated petitioner's employment with respondent.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, made after a hearing pursuant to Civil Service Law § 75, to terminate his employment as a Recreational Specialist for respondent. According to petitioner, the determination is not supported by substantial evidence (*see* CPLR 7803 [4]), and he further contends that the penalty of termination constitutes an abuse of discretion (*see* CPLR 7803 [3]). Upon our review of the record, we conclude that substantial evidence supports the determination that petitioner, whose duties involved extensive contact with children and who had been notified that he was required to act as a role model for them, committed misconduct within the meaning of Civil Service Law § 75 by selling an alcoholic beverage to a minor in violation of Penal Law § 260.20 (2) (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181). Furthermore, the penalty of termination is not so disproportionate to the offense, in light of all of the circumstances, as to shock one's sense of fairness (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 234-235; *see also Matter of Scahill v Greece Cent. School Dist.*, 2 NY3d 754).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

898

CA 10-02480

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

PATRICIA IKEDA, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

DANIELLE M. TEDESCO AND JAMES R. TEDESCO,
DEFENDANTS-RESPONDENTS-APPELLANTS.

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

GOLDBERG SEGALLA LLP, SYRACUSE (LISA M. ROBINSON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered March 9, 2010 in a personal injury action. The order granted in part the motion of defendants for summary judgment.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

900

CA 10-02148

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

JOSEPH MORAN AND ROSE MARIE MORAN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JOSEPH L. MUSCARELLA, JR., D.O., BUFFALO ENT
SPECIALISTS, LLP, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (GREGORY T. MILLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GELBER & O'CONNELL, LLC, AMHERST (HERSCHEL GELBER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered May 19, 2010 in a medical malpractice action. The order denied the motion of defendants Joseph L. Muscarella, Jr., D.O. and Buffalo ENT Specialists, LLP for summary judgment dismissing the complaint.

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

Memorandum: In this medical malpractice action, defendants-appellants (hereafter, defendants), the sole remaining defendants, appeal from an order denying their motion for summary judgment dismissing the complaint against them. The underlying facts are set forth in *Moran v Muscarella* (85 AD3d 1579), and we shall not repeat them here. We conclude that Supreme Court erred in denying defendants' motion inasmuch as they met their initial burden 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). The opinions of plaintiffs' experts were based on speculation or unsupported by competent evidence and thus were insufficient to raise a triable issue of fact (*see Caulkins v Vicinanzo*, 71 AD3d 1224, 1226).

Here, defendants established as a matter of law that the care provided to Joseph Moran (plaintiff) by defendant Joseph L. Muscarella, Jr., D.O. was within the standards of acceptable medical care and in any event was not a proximate cause of plaintiff's injuries (*see generally Humphrey v Gardner*, 81 AD3d 1257). With

respect to the absence of proximate cause, we note that defendants submitted evidence establishing that, before the surgery in question, plaintiff suffered from carpal tunnel syndrome, multi-level disc degeneration and herniation with foraminal stenosis, and plaintiffs' experts did not address those preexisting conditions. We do not address plaintiffs' theory of liability that the length of plaintiff's surgery was excessive inasmuch as it was raised for the first time in opposition to defendants' motion, i.e., based on the statement of one of plaintiffs' experts in an affirmation that the injury to plaintiff's spine was "more likely than not a result of the . . . length of time he remained in [the] position" in which he was placed during the surgery (*see Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1770, *affd* 16 NY3d 729).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

901

TP 11-00551

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

IN THE MATTER OF FREDERICK MONROE, PETITIONER,

V MEMORANDUM AND ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered March 11, 2011) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling those parts of the determination finding that petitioner violated inmate rules 101.22 (7 NYCRR 270.2 [B] [2] [v]) and 107.10 (7 NYCRR 270.2 [B] [8] [i]) and vacating the recommended loss of good time and as modified the determination is confirmed without costs, respondent is directed to expunge from petitioner's institutional record all references to the violation of those rules, and the matter is remitted to respondent for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a Tier III hearing, that he violated inmate rules 101.22 (7 NYCRR 270.2 [B] [2] [v] [stalking]), 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference with an employee]), and 107.11 (7 NYCRR 270.2 [B] [8] [ii] [harassment]). As respondent correctly concedes, the determination with respect to inmate rules 101.22 and 107.10 is not supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139). We conclude, however, that there is substantial evidence to support the determination with respect to inmate rule 107.11. The misbehavior report, together with the hearing testimony of a nurse, constituted substantial evidence that petitioner violated that inmate rule by "communicating messages of a personal nature to an employee" (7 NYCRR 270.2 [B] [8] [ii]; *see Matter of Foster v Coughlin*, 76 NY2d 964, 966; *Vega*, 66 NY2d at 139). We therefore modify the

determination and grant the petition in part by annulling those parts of the determination finding that petitioner violated inmate rules 101.22 and 107.10, and we direct respondent to expunge from petitioner's institutional record all references to the violation of those rules. Although there is no need to remit the matter to respondent for reconsideration of those parts of the penalty already served by petitioner, we note that there was also a recommended loss of good time, and the record does not reflect the relationship between the violations and that recommendation. We therefore further modify the determination by vacating the recommended loss of good time, and we remit the matter to respondent for reconsideration of that recommendation (*see Matter of Cross v Goord*, 2 AD3d 1425).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

902

KA 10-00804

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LAWRENCE BELL, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered February 11, 2010. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

904

KA 10-01523

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HAROLD K. WOODRICH, DEFENDANT-APPELLANT.

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

HAROLD K. WOODRICH, DEFENDANT-APPELLANT PRO SE.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (DAVID E. GANN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Genesee County Court (Eric R. Adams, A.J.), entered May 20, 2009. The order denied the motion of defendant for additional DNA testing of certain evidence.

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

Memorandum: Defendant appeals from an order denying his postjudgment motion pursuant to CPL 440.30 (1-a) for additional DNA testing of certain items of evidence secured in connection with his conviction of, inter alia, rape in the first degree (Penal Law § 130.35 [1]). This Court previously affirmed the judgment convicting defendant of those crimes (*People v Woodrich*, 212 AD2d 998, *lv denied* 85 NY2d 945). County Court properly denied the motion "because defendant failed to establish that there was a reasonable probability that, had those items been tested [further] and had the results been admitted at trial, the verdict would have been more favorable to defendant" (*People v Sterling*, 37 AD3d 1158).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

905

KA 10-02041

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY HOUGHTALING, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MULDOON & GETZ, ROCHESTER (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

THOMAS E. MORAN, DISTRICT ATTORNEY, GENESEO (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Gerard J. Alonzo, Jr., J.), rendered January 27, 2005. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, as a felony, aggravated unlicensed operation of a motor vehicle in the first degree, driving while ability impaired by drugs, as a felony, and criminal possession of a controlled substance in the seventh degree.

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

Memorandum: Defendant appeals from two judgments convicting him upon a jury verdict of, inter alia, felony driving while intoxicated (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (ii)]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3]). We agree with defendant that County Court erred in conducting the trial in his absence. Even assuming, arguendo, that the court advised defendant of the scheduled trial date and warned him that the trial would proceed in his absence if he failed to appear (*see generally People v Parker*, 57 NY2d 136, 141), we conclude that the court failed to inquire into defendant's absence and to recite "on the record the facts and reasons it relied upon in determining that defendant's absence was deliberate" (*People v Brooks*, 75 NY2d 898, 899, *mot to amend remittitur granted* 76 NY2d 746; *see People v Dugan*, 210 AD2d 971, 972, *lv denied* 85 NY2d 972). In light of our conclusion that the court's error requires reversal (*see Dugan*, 210 AD2d 971), we need not address defendant's remaining contentions.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

906

KA 10-02157

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY HOUGHTALING, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MULDOON & GETZ, ROCHESTER (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

THOMAS E. MORAN, DISTRICT ATTORNEY, GENESEO (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Gerard J. Alonzo, Jr., J.), rendered January 27, 2005. The judgment convicted defendant, upon a jury verdict, of aggravated unlicensed operation of a motor vehicle in the first degree and driving while ability impaired.

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

Same Memorandum as in *People v Houghtaling* ([appeal No. 1] ___ AD3d ___ [Sept. 30, 2011]).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

907

KA 10-00467

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA L. MILLER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered November 23, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]), defendant contends that County Court made an insufficient inquiry regarding his waiver of the right to appeal and thus that the waiver is invalid. We reject defendant's contention. The court need not engage in any particular litany regarding a waiver of the right to appeal, so long as the court "make[s] certain that a defendant's understanding of the terms and conditions of a plea agreement is evident on the face of the record" (*People v Lopez*, 6 NY3d 248, 256). Here, the record establishes that defendant's waiver of the right to appeal was made knowingly, intelligently, and voluntarily (*see id.*; *People v Schenk*, 77 AD3d 1417, *lv denied* 15 NY3d 924, 16 NY3d 836). Although the valid waiver of the right to appeal does not encompass defendant's further contention that the *Alford* plea was not knowingly, intelligently or voluntarily entered, defendant failed to preserve that contention for our review by failing to move to withdraw his plea or to vacate the judgment of conviction (*see People v McKeon*, 78 AD3d 1617, 1618, *lv denied* 16 NY3d 799). In any event, that contention is without merit. Despite his denials of guilt, defendant stated clearly on the record that he wanted to enter a guilty plea to avoid the possibility of a more severe sentence in the event that the case proceeded to trial. Defendant's statements demonstrate that his decision to enter a guilty plea despite his purported innocence was "the product of a voluntary and rational

choice," and thus the *Alford* plea was proper (*Matter of Silmon v Travis*, 95 NY2d 470, 475; *see People v Hinkle*, 56 AD3d 1210).

Defendant contends that the People breached the plea agreement by making a sentencing recommendation. Although defendant's valid waiver of the right to appeal does not encompass that contention (*see People v Vancise*, 302 AD2d 864), defendant failed to preserve it for our review by failing to object to the People's recommendation during sentencing (*see People v Stripling*, 136 AD2d 772, 773). In any event, defendant's contention is without merit. The prosecutor stated during the plea colloquy that there was no sentencing promise, but the prosecutor never agreed to refrain from making a sentencing recommendation (*cf. People v Tindle*, 61 NY2d 752, 753-754; *People v Hoeltzel*, 290 AD2d 587, 587-588). The valid waiver of the right to appeal also does not encompass defendant's further contention that the court erred in determining the amount of restitution. Defendant, however, waived his right to a hearing on restitution and thus failed to preserve that contention for our review (*see People v Jorge N.T.*, 70 AD3d 1456, 1457, *lv denied* 14 NY3d 889), 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]).

Finally, the valid waiver of the right to appeal does not encompass defendant's challenge to the severity of the sentence because he waived his right to appeal before being advised of the maximum possible sentence (*see People v Martinez*, 55 AD3d 1334, *lv denied* 11 NY3d 927). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: September 30, 2011 Patricia L. Morgan
Clerk of the Court

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

908

KA 11-00115

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN BENTON, DEFENDANT-APPELLANT.

DANIEL P. GRASSO, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered January 7, 2011. The judgment convicted defendant, upon a nonjury verdict, of robbery in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [a]). On a prior appeal, we reversed the order that, inter alia, granted defendant's motion to set aside the verdict pursuant to CPL 330.30 (1), and we reinstated the verdict (*People v Benton*, 78 AD3d 1545, *lv denied* 16 NY3d 828). Defendant failed to preserve for our review his contention that the People committed a *Brady* violation by failing to disclose a report (hereafter, DNA report) containing the results of DNA analysis of a broken beer bottle allegedly used in the robbery (*see People v Caswell*, 56 AD3d 1300, 1303, *lv denied* 11 NY3d 923, 12 NY3d 781, *cert denied* ___ US ___, 129 S Ct 2775; *People v Thomas*, 8 AD3d 303, *lv denied* 3 NY3d 671, 682). In any event, that contention is without merit because the DNA report was not exculpatory in nature (*see People v Wright*, 43 AD3d 1359, 1360, *lv denied* 9 NY3d 1011; *People v Scott*, 32 AD3d 1178, 1179, *lv denied* 8 NY3d 884; *see also People v Forbes*, 190 AD2d 1005, *lv denied* 81 NY2d 970). Defendant also failed to preserve for our review his contention that the prosecutor violated his right to discovery pursuant to CPL 240.20 inasmuch as he did not object to the prosecutor's failure to disclose the DNA report when defendant was made aware of its existence during the trial (*see People v Delatorres*, 34 AD3d 1343, 1344, *lv denied* 8 NY3d 921). In any event, reversal based on that violation would not be required inasmuch as "defendant failed to establish that he was 'substantially

prejudice[d]' " by the belated disclosure of the DNA report (*id.*; *see generally People v Davis*, 52 AD3d 1205, 1206-1207).

Finally, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

909

KAH 10-01915

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
KALVIN HARMON, PETITIONER-APPELLANT,

V ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated decision and order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered May 17, 2010 in a habeas corpus proceeding. The judgment denied and dismissed the petition.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

910

CA 11-00004

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

IN THE MATTER OF VICTORIA G. GARTH AND LEONID G. GARTH, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

ASSESSORS OF TOWN OF PERINTON, TOWN OF PERINTON BOARD OF ASSESSMENT REVIEW AND TOWN OF PERINTON, RESPONDENTS-RESPONDENTS.

DIBBLE & MILLER, P.C., ROCHESTER (G. MICHAEL MILLER OF COUNSEL), FOR PETITIONERS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (JAMES S. GROSSMAN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated decision and order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered March 9, 2010 in a proceeding pursuant to CPLR article 78 and RPTL article 7. The judgment dismissed the petition.

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

Memorandum: Petitioners commenced this proceeding pursuant to CPLR article 78 and title 1 of RPTL article 7 seeking, inter alia, to annul the determination of the Hearing Officer in the small claims assessment review (SCAR) proceeding denying their petition seeking to reduce their real property assessment. Supreme Court concluded that, by electing to file a SCAR petition, petitioners waived their right to commence a tax review proceeding pursuant to title 1 of RPTL article 7 (*see* RPTL 736 [1]; *Matter of Yee v Town of Orangetown*, 76 AD3d 104, 109). Petitioners have not raised any challenge in their brief with respect to that part of the judgment dismissing the petition with respect to the RPTL article 7 title 1 proceeding, and thus they have abandoned any such challenge (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

We agree with petitioners that the court erred in granting that part of respondents' motion to dismiss the remainder of the petition on the ground that the proceeding pursuant to CPLR article 78 was not timely commenced within four months of the date of filing of the final assessment roll (*see* CPLR 217 [1]; *see generally Matter of Brimberg v Commissioner of Fin. of City of N.Y.*, 45 AD3d 506, 507). The four-month statute of limitations did not begin to run until the

"determination [to be reviewed became] 'final and binding upon the petitioner[s],' " i.e., when they received notice of the Hearing Officer's adverse determination (*Katz v Assessor of Vil. of Southampton*, 131 Misc 2d 552, 554). This proceeding was timely commenced within that period.

The court, however, properly granted that part of respondents' motion to dismiss the petition insofar as it sought to annul the Hearing Officer's determination in the SCAR proceeding on the merits. "When such a determination is contested, the court's role is limited to ascertaining whether there was a rational basis for that determination" (*Matter of Greenfield v Town of Babylon Dept. of Assessment*, 76 AD3d 1071, 1074). The evidence presented at the hearing, including evidence of comparable sales, provided a rational basis for the determination of the Hearing Officer that petitioners failed to meet their burden of demonstrating that respondents' assessment of their property was excessive (*see id.*; *Matter of Montgomery v Board of Assessment Review of Town of Union*, 30 AD3d 747, 748-749). Petitioners' contentions with respect to the failure of respondents to file a transcript of the SCAR hearing are raised for the first time on appeal and thus are not properly before us (*see Ciesinski*, 202 AD2d at 985). In any event, those contentions are without merit inasmuch as RPTL 735 provides that "[n]o transcript of testimony shall be made of a [SCAR] hearing." We have considered petitioners' remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: September 30, 2011 Patricia L. Morgan
Clerk of the Court

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

911

CA 11-00508

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

JOHN VISCOSI AND GEORGINA VISCOSI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

PREFERRED MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered September 2, 2010. The order, insofar as appealed from, denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for an alleged breach of an insurance policy issued by defendant. We note at the outset that, although defendant purports to appeal from "each and every part" of the order, it is not aggrieved by that part of the order denying plaintiffs' cross motion for summary judgment on the complaint and thus may not appeal therefrom (*see* CPLR 5511). We agree with defendant that Supreme Court erred in denying its motion for summary judgment dismissing the complaint (*see generally Government Empls. Ins. Co. v Kligler*, 42 NY2d 863, 864), and we therefore reverse the order insofar as appealed from.

The policy excluded coverage for loss "to the inside of a building or the property contained in a building caused by rain, snow, [or] sleet . . . unless the direct force of wind or hail damages the building causing an opening in a roof or wall and the rain, snow, [or] sleet . . . enters through [that] opening . . . ." In support of its motion, defendant submitted the deposition testimony of plaintiff John Viscosi in which he testified that the damage at issue was caused by water "that had seeped" into the ceiling of several rooms in the covered premises, and he specifically denied that either wind or hail created an opening in the building. We also agree with defendant that the ceiling did not collapse within the meaning of the policy, which

specifically states that "any part of a building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion." Here, the record establishes that the ceiling did not "abrubt[ly] fall[] down or cav[e] in" but, rather, the ceiling was noticeably bowed for several months before plaintiffs had it demolished. In light of our determination, defendant's remaining contentions are academic.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

915

CA 10-02477

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

WILLIAM DAVID YOUNG, WILLIAM KRAMER, AND LISA PECORARO, INDIVIDUALLY AND ON THE BEHALF OF ALL PROPERTY OWNERS SIMILARLY SITUATED, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MICHAEL R. CROSBY, DEFENDANT-APPELLANT.

FELT EVANS, LLP, CLINTON (ANTHONY G. HALLAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID V. DELUCA, ROCHESTER, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered March 5, 2010. The order, inter alia, denied defendant's cross motion for summary judgment and granted plaintiffs a preliminary injunction.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the cross motion seeking summary judgment dismissing the first and third causes of action and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking, inter alia, a determination that they have an easement by express or implied grant or by prescription over a parcel of property owned by defendant. We note at the outset that plaintiffs' cross appeal has been deemed abandoned and dismissed by their failure to perfect it in a timely fashion (*see* 22 NYCRR 1000.12 [b]; *Bucklaew v Walters*, 75 AD3d 1140, 1141). We therefore do not address the cross appeal.

We agree with defendant that Supreme Court erred in denying that part of his cross motion seeking summary judgment dismissing the first cause of action, alleging that plaintiffs have an easement by express or implied grant over defendant's parcel. Defendant established as a matter of law that the dominant and servient parcels did not have a common grantor (*see Dichter v Devers*, 68 AD3d 805, 806-807), and plaintiffs failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We also agree with defendant that the court erred in denying that part of his cross motion seeking summary judgment dismissing the third cause of action, alleging that plaintiffs are entitled to an award of sanctions pursuant to 22 NYCRR 130-1.1. " 'New York does not recognize a

separate cause of action to impose sanctions' pursuant to 22 NYCRR 130 - 1.1 (c)" and, in any event, defendant's conduct in defending the action is not frivolous within the meaning of that rule (*Schwartz v Sayah*, 72 AD3d 790, 792). We therefore modify the order accordingly.

The court, however, properly denied that part of the cross motion seeking summary judgment dismissing the second cause of action, alleging that plaintiffs have a prescriptive easement over defendant's parcel. Defendant's own submissions raise triable issues of fact with respect to that cause of action (*see Barra v Norfolk S. Ry. Co.*, 75 AD3d 821, 823-824; *cf. King's Ct. Rest., Inc. v Hurondel I, Inc.*, ___ AD3d ___ [Sept. 30, 2011]). Finally, we conclude that the court did not abuse its discretion in granting plaintiffs' motion insofar as it sought a preliminary injunction, thereby preserving the status quo pending a determination on the merits (*see S.P.Q.R. Co., Inc. v United Rockland Stairs, Inc.*, 57 AD3d 642; *Moody v Filipowski*, 146 AD2d 675, 678).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

916

CA 11-00578

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

LEONARD WHITE, PLAINTIFF,
AND PAULA WHITE, PLAINTIFF-RESPONDENT,

V ORDER

DENNIS FARRELL AND NANCY FARRELL,
DEFENDANTS-APPELLANTS.

MILFORD, LYNCH & SHANNON, ESQS., SKANEATELES, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE MATHEWS LAW FIRM, SYRACUSE (DANIEL F. MATHEWS, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered June 22, 2010. The order, insofar as appealed from, determined that defendants sustained no actual damages.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

918

CA 11-00774

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

IN THE MATTER OF MARK H. DEWINE,
PETITIONER-RESPONDENT,

V OPINION AND ORDER

STATE OF NEW YORK BOARD OF EXAMINERS OF
SEX OFFENDERS, RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR RESPONDENT-APPELLANT.

WEISBERG, ZUKHER & VANSTRY, PLLC, SYRACUSE (DAVID E. ZUKHER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), entered August 12, 2010 in a proceeding pursuant to CPLR article 78. The judgment granted the petition and vacated and annulled the determination of respondent that petitioner is a sex offender subject to registration pursuant to the Sex Offender Registration Act.

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

Opinion by PERADOTTO, J.: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination that he is a sex offender subject to registration pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Supreme Court granted the petition and annulled the determination, concluding that petitioner was not subject to SORA's registration requirements. We agree with respondent that petitioner, who was on probation in Wyoming for " '[s]ex offense[s]' " within the meaning of Correction Law § 168-a (2) (d) (i) on the effective date of SORA, is required to register as a sex offender in New York. We therefore conclude that the judgment should be reversed and the petition dismissed.

I

SORA, which went into effect on January 21, 1996 (*see* L 1995, ch 192, § 3), imposes registration requirements on " '[s]ex offender[s],' " i.e., "any person who is convicted of" certain sex offenses enumerated in the statute (Correction Law § 168-a [1]). SORA "applies to sex offenders incarcerated or on parole or probation on its effective

date, as well as to those sentenced thereafter, thereby imposing its obligations on many persons whose crimes were committed prior to the effective date" (*Doe v Pataki*, 120 F3d 1263, 1266, *cert denied* 522 US 1122; *see* § 168-g; *People v Carey*, 47 AD3d 1079, 1080, *lv dismissed* 10 NY3d 893). "Pursuant to Correction Law § 168-a (2) (d), certain defendants convicted of sex offenses in other jurisdictions must register as sex offenders in New York" (*People v Kennedy*, 7 NY3d 87, 89). As relevant here, "a person convicted of a felony in another jurisdiction . . . has been subject to registration in New York if the foreign offense 'includes all of the essential elements' of one of the New York offenses listed in SORA" (*Matter of North v Board of Examiners of Sex Offenders of State of N.Y.*, 8 NY3d 745, 748-749, quoting L 1995, ch 192, § 2). In 1999, the Legislature added another basis for registration arising from a foreign conviction, i.e., that an offender must register in New York if he or she was convicted of a felony "for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred" (L 1999, ch 453, § 1; *see North*, 8 NY3d at 749). Where a sex offender is convicted in another jurisdiction and then relocates to New York, Correction Law § 168-k (1) provides that he or she "shall notify the division [of criminal justice services] of the new address no later than [10] calendar days after such sex offender establishes residence in [New York]."

II

We agree with the court and petitioner that the 1999 amendments to Correction Law § 168-a do not apply to petitioner. Those amendments are retroactive only with respect to "persons convicted of an offense committed prior to [January 1, 2000] who, on such date, have not completed service of the sentence imposed thereon" (L 1999, ch 453, § 29). Here, petitioner was discharged from probation in Wyoming and thus completed service of his sentence in June 1996. As the court properly concluded and petitioner correctly concedes, however, the crimes of which petitioner was convicted in Wyoming qualify as sex offenses in New York under the "essential elements" provision of Correction Law § 168-a (2) (d) (i). "[T]he 'essential elements' provision in SORA requires registration whenever an individual is convicted of criminal conduct in a foreign jurisdiction that, if committed in New York, would have amounted to a registrable New York offense" (*North*, 8 NY3d at 753). Here, the conduct underlying petitioner's Wyoming conviction constitutes, inter alia, sexual abuse in the second degree (Penal Law § 130.60 [2] [sexual contact with a child less than 14]) and sexual abuse in the first degree (§ 130.65 [3] [sexual contact with a child less than 11]), both of which constitute registrable offenses (*see* Correction Law § 168-a [2] [a] [i]; [3] [a] [i]).

It is undisputed that petitioner was "on parole or probation" when SORA went into effect (Correction Law § 168-g [2]). Petitioner contends, however, that the retroactivity provisions contained in Correction Law § 168-g are limited to individuals who were on probation or parole in New York when SORA went into effect and,

inasmuch as he was on probation in Wyoming on that date and his probation term expired before he moved to New York, he is not subject to the statute's requirements. We reject that contention.

Pursuant to Correction Law § 168-g (1),

> "[t]he division of parole or department of probation and correctional alternatives in accordance with risk factors pursuant to section [168-*l*] . . . shall determine the duration of registration and notification for every sex offender who on the effective date of [SORA] is then on parole or probation for an offense provided for in [section 168-a (2) or (3)]."

Section 168-g (2) further provides that

> "[e]very sex offender who on the effective date of [SORA] is then on parole or probation for an offense provided for in [section 168-a (2) or (3)] . . . shall within [10] calendar days of such determination register with his [or her] parole or probation officer. On each anniversary of the sex offender's initial registration date thereafter, the provisions of section [168-f] . . . shall apply. Any sex offender who fails or refuses to so comply shall be subject to the same penalties as otherwise provided for in [SORA that] would be imposed upon a sex offender who fails or refuses to so comply with the provisions of [SORA] on or after such effective date."

There is no question that the provisions in Correction Law § 168-g mandating registration for New York probationers on SORA's effective date did not apply to petitioner, who was still on probation in Wyoming at that time. We nevertheless reject petitioner's contention that the retroactivity provisions set forth in that section are limited to those sex offenders who were on parole or probation in New York at the time of SORA's implementation. Indeed, neither the language of the statute nor the legislative history supports petitioner's restrictive interpretation. The language of the statute does not differentiate between in-state and out-of-state probationers, and we discern no such intent in the legislative history. Rather, SORA's legislative history evinces an intent to include all individuals then on parole or probation within its ambit. For example, a July 11, 1995 letter from SORA's Senate Sponsor to the Governor states that the proposed statute "applies to those offenders adjudicated on or after the effective date, *and to <u>all persons</u> still serving a sentence of incarceration, probation or parole as of the date of enactment*" (Letter from Senate Sponsor, Bill Jacket, L 1995, ch 192, at 9 [emphasis added]). The Assembly Sponsor likewise stated in a letter to the Governor that the proposed statute applied to "those offenders under supervision or in prison" (Letter from Assembly Sponsor, Bill Jacket, L 1995, ch 192, at 15). That Assembly Sponsor

explained that the rationale for applying SORA retroactively was that "sweeping so narrowly as to only reach offenders from enactment forward leaves the majority of sexual offenders cloaked in anonymity" (*id.*), and he noted the low rehabilitation and high recidivism rates for sex offenders (*see id.* at 13-15). In addition, the budget report with respect to SORA explains that it "creates a registry requirement *for convicted sex offenders presently on probation or parole* and for those sex offenders who will be released from correctional facilities in the future" (Budget Rep on Bills, Bill Jacket, L 1995, ch 192, at 17 [emphasis added]).

"SORA is a remedial statute" (*North*, 8 NY3d at 752), and it therefore must be liberally construed "to effect or carry out the reforms intended and to promote justice" (McKinney's Cons Laws of NY, Book 1, Statutes § 321). "A liberal construction . . . is one [that] is in the interest of those whose rights are to be protected, and if a case is within the beneficial intention of a remedial act it is deemed within the statute, though actually it is not within the letter of the law" (*id.*). SORA's "aim is to 'protect[ ] communities by notifying them of the presence of individuals who may present a danger and enhancing law enforcement authorities' ability to fight sex crimes' " (*North*, 8 NY3d at 752, quoting *Doe*, 120 F3d at 1276; *see also* Senate Introducer Mem in Support, Bill Jacket, L 1995, ch 192, at 6). Individuals such as petitioner who were serving a sentence or on parole or probation in another state at the time of SORA's implementation are clearly no less dangerous than similarly situated individuals in New York.

III

We further note that the statutory construction urged by petitioner and adopted by the court would lead to objectionable and unreasonable consequences (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 141; *Matter of Smith v Devane*, 73 AD3d 179, 183-184, *lv denied* 15 NY3d 708). Pursuant to petitioner's restrictive interpretation of SORA, an out-of-state sex offender on probation at the time of the statute's implementation who later moves to New York would be excluded from the notification and registration requirements thereof, while a sex offender on probation in New York at the same time would be subject to such requirements. Such an interpretation could have the unintended and undesirable effect of encouraging sex offenders convicted in other states to evade the registration requirements of those states by relocating to New York. Indeed, as one trial court aptly noted,

> "[s]tates have a legitimate interest in requiring offenders who commit [registrable] offenses in other jurisdictions to register in their new state of residence. [Otherwise], an offender could avoid sex offender registration requirements simply by moving his [or her] state of residence, thereby frustrating the purpose behind sex offender registration laws" (*People v McGarghan*, 18 Misc 3d 811, 814, *affd* 83 AD3d 422).

IV

Finally, contrary to petitioner's contention, requiring him to register as a sex offender pursuant to Correction Law § 168-k would not result in disparate treatment on the basis of residency. Rather, such an interpretation would subject petitioner to the same registration and notification requirements applicable to a similarly situated individual who was on probation in New York at the time of SORA's implementation.

V

Accordingly, we conclude that the judgment should be reversed and the petition dismissed.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

921

CA 11-00361

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

CASTLETON DEVELOPMENT, LLC, KURT SILVESTRO AND MICHAEL PALOMBO, PLAINTIFFS-RESPONDENTS,

V ORDER

GREENMAN-PEDERSEN, INC., DEFENDANT-APPELLANT.

HOWARD R. BIRNBACH, GREAT NECK, FOR DEFENDANT-APPELLANT.

GRECO TRAPP, PLLC, BUFFALO (DUANE D. SCHOONMAKER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered November 5, 2010. The order denied the motion of defendant to dismiss the complaint.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

922.1

TP 11-00164

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

IN THE MATTER OF VICKI PERCIVAL, PETITIONER,

V ORDER

JEANNE SAMPLE, DIRECTOR, NEW YORK STATE CENTRAL REGISTER, NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, RESPONDENT.

JAMES S. HINMAN, P.C., ROCHESTER (JAMES S. HINMAN OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wayne County [John B. Nesbitt, A.J.], entered January 25, 2011) to review a determination of respondent. The determination denied petitioner's request that a report maintained in the New York State Central Register of Child Abuse and Maltreatment, indicating petitioner for maltreatment be amended to unfounded and sealed.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

923

KA 08-02581

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DARNELL NORTON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered May 6, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

924.1

KA 11-00902

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REGINALD TAYLOR, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS 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 (Russell P. Buscaglia, A.J.), rendered February 19, 2010. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Same Memorandum as in *People v Taylor* ([appeal No. 1] ___ AD3d ___ [Sept. 30, 2011]).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

924

KA 10-00461

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REGINALD TAYLOR, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS 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 (Russell P. Buscaglia, A.J.), rendered February 19, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). In appeal No. 2, defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of criminal possession of a weapon in the third degree (§ 265.02 [former (4)]) and imposing a sentence of imprisonment based on his admission that he violated the terms and conditions of his probation.

In appeal No. 1, defendant contends that he did not knowingly, intelligently and voluntarily waive his right to appeal because he did not understand that his waiver of the right to appeal encompassed Supreme Court's suppression ruling. Although defendant initially sought to reserve his right to appeal with respect to the court's suppression ruling during the plea colloquy, it is apparent from the record that defendant abandoned that request. Rather, the record establishes that defendant agreed to waive his right to appeal without any reservations and stated on the record that he did so "knowingly, intelligently and voluntarily" after speaking with defense counsel (*People v Lopez*, 6 NY3d 248, 256; *see People v Dunham*, 83 AD3d 1423). Further, the court specifically addressed the fact that the waiver of the right to appeal is "separate and distinct from those rights

automatically forfeited upon a plea of guilty" and cautioned defendant concerning the effect of a waiver of the right to appeal (*Lopez*, 6 NY3d at 256; *cf. People v Adger*, 83 AD3d 1590). Contrary to defendant's contention, his " 'waiver [of the right to appeal] is not invalid on the ground that the court did not specifically inform [him] that his general waiver of the right to appeal encompassed the court's suppression ruling[]' " (*People v Graham*, 77 AD3d 1439, 1439, *lv denied* 15 NY3d 920; *see People v Kemp*, 94 NY2d 831, 833; *Dunham*, 83 AD3d at 1424). "Defendant's challenge [in appeal No. 1] to the court's suppression ruling is encompassed by his valid waiver of the right to appeal" (*People v Reinhardt*, 82 AD3d 1592, 1593; *see Kemp*, 94 NY2d at 833) and, in any event, we conclude that his challenges in appeal Nos. 1 and 2 to the court's suppression ruling are without merit (*see generally People v Prochilo*, 47 NY2d 759, 761; *People v Coleman*, 306 AD2d 941, *lv denied* 1 NY3d 596). Finally, we reject defendant's contention in appeal No. 2 that the sentence of imprisonment imposed is unduly harsh and severe.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

925

KA 08-01253

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RABAH E. MORAN, ALSO KNOWN AS TERRY MCKEE,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered January 14, 2008. The judgment convicted defendant, upon a nonjury verdict, of rape in the first degree and false personation.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of, inter alia, rape in the first degree (Penal Law § 130.35 [1]). Defendant failed to preserve for our review his contentions that his purported waiver of the right to a jury trial is invalid because the record does not establish that he signed the written waiver in open court, as required by CPL 320.10 and article I, § 2 of the New York Constitution (*see People v Magnano*, 158 AD2d 979, *affd* 77 NY2d 941, *cert denied* 502 US 864; *People v Brown*, 81 AD3d 499), and that he did not voluntarily waive his right to a jury trial (*see People v Dixon*, 50 AD3d 1519, *lv denied* 10 NY3d 958; *People v White*, 43 AD3d 1407, *lv denied* 9 NY3d 1010; *People v Jackson*, 26 AD3d 781, 781-782, *lv denied* 6 NY3d 849). In any event, those contentions are without merit. Defendant repeatedly waived his right to a jury trial in open court and executed a written waiver of that right prior to the commencement of trial, and the record establishes that defendant's waiver was knowing, voluntary and intelligent (*see People v O'Diah*, 68 AD3d 787, 787-788, *lv denied* 14 NY3d 803, 15 NY3d 776; *People v LaConte*, 45 AD3d 699, *lv denied* 10 NY3d 767; *People v Jackson*, 26 AD3d 781, 781-782, *lv denied* 6 NY3d 849). Although the transcript of the waiver proceedings does not conclusively establish that defendant signed the written waiver in open court, we note that the waiver form, which was signed by defendant, defense counsel, and the trial judge, expressly states that the waiver was made in open

court (*see Brown*, 81 AD3d at 500; *see also Magnano*,158 AD2d 979). Further, the record contains an extensive colloquy concerning defendant's waiver of his right to a jury trial (*see Brown*, 81 AD3d at 500; *People v Badden*, 13 AD3d 463, *lv denied* 4 NY3d 796; *People v Perez*, 213 AD2d 351, *lv denied* 85 NY2d 978).

Finally, we reject defendant's contention that he was denied effective assistance of counsel by the cumulative effect of alleged errors at trial. 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 People v Baldi*, 54 NY2d 137, 147).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

926

KA 10-01973

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MARK A. ROBERTS, DEFENDANT-APPELLANT.

AMY L. HALLENBECK, FULTON, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered August 9, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the third degree.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

927

KA 10-02197

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JACOB E. LAMBERTSON, ALSO KNOWN AS JACOB E. LAMPERTSON, ALSO KNOWN AS JACOB LAMBERTSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered November 1, 2010. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree (two counts).

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

928

KA 10-01916

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICKY BAKER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ROBERT TUCKER, PALMYRA, FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (MELVIN BRESSLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered April 1, 2010. The judgment convicted defendant, upon his plea of guilty, of misdemeanor driving while intoxicated.

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 driving while intoxicated (Vehicle and Traffic Law § 1192 [2]) and, in appeal No. 2, he appeals from a judgment convicting him of arson in the second degree (Penal Law § 150.15) following a jury trial before the same County Court Judge who accepted the guilty plea in appeal No. 1. Contrary to defendant's contention in appeal No. 1, the court properly determined that the police officer had the requisite reasonable suspicion to believe that he had committed a traffic infraction or criminal offense and thus properly stopped defendant's vehicle. The evidence presented at the suppression hearing established that a "radio computer check revealed that the license plates on the [vehicle that] the police observed the defendant operating were in fact issued for [and reported stolen from another vehicle, and thus] there was ample justification for the stop of" defendant's vehicle (*People v Lassiter*, 161 AD2d 605, 605-606; *see generally People v Singleton*, 41 NY2d 402, 404). Despite defendant's further contention to the contrary, the record establishes that the officer correctly entered the license plate number when performing a record check on the license plate. In any event, even if the officer had accidentally entered an incorrect license plate number, "[a] mistake of fact . . . may be used to justify a [stop]" (*People v Smith*, 1 AD3d 965, 965; *see People v Jean-Pierre*, 47 AD3d 445, *lv denied* 10 NY3d 865).

We reject defendant's contention in appeal No. 2 that the evidence is legally insufficient to support the conviction of arson (*see generally People v Bleakley*, 69 NY2d 490, 495). The People presented evidence establishing that defendant set an apartment building in his neighborhood on fire at approximately 3:30 A.M., that at least one other person who was not a participant in the crime was present in the building, and that "the circumstances [were] such as to render the presence of such a person therein a reasonable possibility" (Penal Law § 150.15). Defendant's contention that there was no direct evidence establishing such circumstances is without merit. Here, "[e]vidence . . . that 'circumstances [were] such as to render the presence of [another person who was not a participant in the crime inside the building] a reasonable possibility' may be inferred from both direct and circumstantial evidence" (*People v Regan*, 21 AD3d 1357, 1358, quoting § 150.15; *see generally People v Ozarowski*, 38 NY2d 481, 489-491). The evidence, including the testimony of the individuals in the building at the time of the fire and the photographs of the building taken immediately after the fire, is legally sufficient to establish the existence of such circumstances (*see People v Lingle*, 34 AD3d 287, 288, *mod on other grounds* 10 NY3d 457; *People v Grassi*, 92 NY2d 695, 698, *rearg denied* 94 NY2d 900). Furthermore, viewing the evidence in light of the elements of the crime of arson as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that the court erred in considering certain information in determining the sentence to be imposed for the arson conviction. At the time of sentencing, the prosecutor contended that defendant was also responsible for setting another fire in defendant's neighborhood, which resulted in a fatality, and the prosecutor asked the court to consider that information in determining the sentence to be imposed for the arson conviction. In denying defendant's objection to the reference by the prosecutor to the other fire, the court indicated that it would draw "proper" inferences from the information, and the court ultimately imposed the maximum sentence permissible for the arson conviction.

Although we do not address the length of the term of incarceration that was imposed, we nevertheless agree with defendant that the court erred in considering the other alleged fire, i.e., an uncharged crime, in determining the sentence for the arson conviction. It is well settled that, "[a]lthough a court may consider uncharged crimes in sentencing a defendant, it 'must assure itself that the information upon which it bases the sentence is reliable and accurate' " (*People v Bratcher*, 291 AD2d 878, 879, *lv denied* 98 NY2d 673, quoting *People v Outley*, 80 NY2d 702, 712; *see People v Hansen*, 99 NY2d 339, 345; *People v Naranjo*, 89 NY2d 1047, 1049). There is no indication in the record that the court ascertained the reliability of the information provided by the prosecutor, which was disputed by defendant and was not included in the presentence report or otherwise referenced in the record before us. In addition, based on the record before us, we conclude that the sentence is illegal insofar as the period of postrelease supervision exceeds five years. "Although

[that] issue was not raised before the [sentencing] court . . ., we cannot allow an [illegal] sentence to stand" (*People v Moore* [appeal No. 1], 78 AD3d 1658 [internal quotation marks omitted]; *see People v Gibson*, 52 AD3d 1227, 1227-1228). The maximum period of postrelease supervision that may be imposed upon a conviction of arson in the second degree is five years, absent any indication that the arson was sexually motivated (*see* Penal Law § 70.45 [2-a] [f]; § 70.80 [1] [a]; § 130.91 [1], [2]). Inasmuch as there is nothing in the record establishing such a motivation, we vacate the period of postrelease supervision as well. Unless the People establish that the arson was sexually motivated, the maximum period of postrelease supervision shall be five years. We therefore modify the judgment in appeal No. 2 by vacating the sentence imposed, and we remit the matter to County Court for resentencing.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

929

KA 10-01917

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICKY BAKER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ROBERT TUCKER, PALMYRA, FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (MELVIN BRESSLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered April 1, 2010. The judgment convicted defendant, upon a jury verdict, of arson in the second degree.

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

Same Memorandum as in *People v Baker* ([appeal No. 1] ___ AD3d ___ [Sept. 30, 2011]).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

930

KA 09-02649

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN W. STUBINGER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered November 10, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree (15 counts).

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of 15 counts of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), defendant contends that the conviction is not supported by legally sufficient evidence. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). Moreover, viewing the evidence in light of the elements of the counts as charged to the jury (*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).

We also conclude that there is no merit to defendant's contention that County Court erred in admitting evidence of an uncharged crime, i.e., defendant's alleged threat to cut the body of his girlfriend. Such evidence was probative with respect to the issue whether defendant brandished the knives described in the indictment with the intent to use them unlawfully against another individual (Penal Law § 265.01 [2]; *see* § 265.02 [1]), and the court properly concluded that the probative value of that evidence outweighed its potential for prejudice (*see People v Freece*, 46 AD3d 1428, *lv denied* 10 NY3d 811; *see generally People v Alvino*, 71 NY2d 233, 241-242; *People v Ventimiglia*, 52 NY2d 350, 359-360). In any event, " 'the court provided the jury with appropriate limiting instructions immediately after the challenged testimony was elicited,' thus minimizing any

potential prejudice to defendant" (*People v Bassett*, 55 AD3d 1434, 1436, *lv denied* 11 NY3d 922).

Defendant failed to preserve for our review his further contention that, in determining the sentence to be imposed, the court penalized him for exercising his right to a jury trial, inasmuch as defendant failed to raise that contention at sentencing (*see People v Brink*, 78 AD3d 1483, 1485, *lv denied* 16 NY3d 742, *rearg denied* 16 NY3d 828; *People v Dorn*, 71 AD3d 1523, 1523-1524). In any event, that contention lacks merit. "[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial . . ., and there is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to a trial" (*Brink*, 78 AD3d at 1485 [internal quotation marks omitted]).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

933

CAF 10-00915

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

IN THE MATTER OF JACOB E.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

VALERIE E., RESPONDENT-APPELLANT.

ROSEMARIE RICHARDS, SOUTH NEW BERLIN, FOR RESPONDENT-APPELLANT.

JAMES B. DOYLE, III, BATH, FOR PETITIONER-RESPONDENT.

DEETZA G. BENNO, ATTORNEY FOR THE CHILD, BATH, FOR JACOB E.

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered March 23, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to her son who is the subject of this proceeding on the ground of permanent neglect and transferring guardianship and custody to petitioner. We conclude that Family Court properly granted petitioner's motion pursuant to Family Court Act § 1039-b seeking to be relieved of the requirement that it make reasonable efforts to reunite the child with the mother. Petitioner established by the requisite clear and convincing evidence that the parental rights of the mother with respect to the son's half sibling had been involuntarily terminated (*see* § 1039-b [b] [6]; *Matter of Sasha M.*, 43 AD3d 1401, 1402, *lv denied* 10 NY3d 702), and that the mother had repeatedly failed to cooperate with programs intended to address her alcohol, substance abuse and mental health issues. In response, the mother failed to establish that requiring petitioner to make reasonable efforts to reunite her with her son "would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of [the mother] and the child in the foreseeable future" (§ 1039-b [b]; *see also Sasha M.*, 43 AD3d at 1402). We have reviewed the mother's remaining contentions and conclude that they are without merit.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

934

CAF 10-01548

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

IN THE MATTER OF ALICIA DILLARD,
PETITIONER-RESPONDENT,

V ORDER

DERRICK HILL, RESPONDENT-APPELLANT.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
RESPONDENT-RESPONDENT.

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR DERRICKA W.H.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered April 6, 2010 in a proceeding pursuant to Family Court Act article 6. The order granted petitioner custody of the subject child.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

935

CAF 10-01355

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

IN THE MATTER OF SEAN W.

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

BRITTANY W., RESPONDENT-APPELLANT,
AND CHRISTOPHER R., RESPONDENT.

VINCENT M. AND MICHELLE M.,
INTERVENORS-RESPONDENTS.

LINDA M. CAMPBELL, SYRACUSE (SHIRLEY GORMAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

PAUL L. CHAPMAN, ATTORNEY FOR THE CHILD, SYRACUSE, FOR SEAN W.

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

Appeal from an order of the Family Court, Onondaga County (Bryan R. Hedges, J.), entered May 25, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondent Brittany W.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to her son based on a finding of permanent neglect and freeing her son for adoption. The mother failed to preserve for our review her contention that Family Court should have entered a suspended judgment (*see Matter of Andrea E.*, 72 AD3d 1617, 1617-1618, *lv denied* 15 NY3d 703; *Matter of Charles B.*, 46 AD3d 1430, 1431, *lv denied* 10 NY3d 705). In any event, that contention lacks merit because " 'there was no evidence that [the mother] had a realistic, feasible plan to care for the child[ ]' " (*Matter of Nicolas B.*, 83 AD3d 1596, 1598, *lv denied* 17 NY3d 705), and the record establishes that the mother was not likely to change her behavior (*see Matter of Kyle S.*, 11 AD3d 935, 936). Any " 'progress made by the [mother] in the [weeks] preceding the dispositional determination was not sufficient to warrant any further prolongation of the child['s]

unsettled familial status' " (*Matter of Kyle K.*, 72 AD3d 1592, 1593-1594, *lv denied* 15 NY3d 705). In addition, the mother failed to preserve for our review her contention that the court should have provided for post-termination contact with the child, and we conclude in any event that she failed to establish that "such contact would be in the best interests of the child[ ]" (*Andrea E.*, 72 AD3d at 1618 [internal quotation marks omitted]).

We reject the mother's further contention that she was denied effective assistance of counsel. "There was no showing of ineffectiveness here, nor may ineffectiveness be inferred merely because the attorney counseled [the parent] to admit [to] the allegations in the petition" (*Matter of Nasir H.*, 251 AD2d 1010, 1010, *lv denied* 92 NY2d 809; *see Matter of Yusef P.*, 298 AD2d 968, 969; *Matter of Michael W.*, 266 AD2d 884, 884-885). Further, a parent alleging ineffective assistance of counsel in a Family Court case "has the burden of demonstrating . . . that the deficient representation resulted in actual prejudice" (*Matter of Michael C.*, 82 AD3d 1651, 1651, *lv denied* 17 NY3d 704; *see Matter of Amanda T.*, 4 AD3d 846, 847), and the mother failed to meet that burden here with respect to her attorney's alleged failure to request a suspended judgment or post-termination contact. Indeed, the evidence at the dispositional hearing established that neither a suspended judgment nor post-termination contact was in the child's best interests.

The mother further contends that the court lacked jurisdiction over the instant termination proceeding because there was no compliance with Social Services Law § 384-b (3) (c-1), which applies where one Family Court Judge presided over a prior permanency hearing and a termination of parental rights petition involving the same child is assigned to a different Family Court Judge. We reject that contention. Social Services Law § 384-b (3) (d) and (4) (d) specifically grant Family Court jurisdiction over proceedings to terminate parental rights based upon permanent neglect and, contrary to the mother's contention, Social Services Law § 384-b (3) (c-1) does not concern subject matter jurisdiction (*see* Carrieri, Practice Commentaries, McKinney's Cons Laws of NY, Book 52A, Social Services Law § 384-b at 225). Rather, that statute concerns venue, which may be waived if not raised, as was the case here (*see generally Matter of Brayanna G.*, 66 AD3d 1375, 1376, *lv denied* 13 NY3d 714). Moreover, the provision in Social Services Law § 384-b (3) (c-1) that "[t]he petition [to terminate parental rights] shall be assigned, wherever practicable, to the judge who heard the most recent proceeding" expresses no more than a preference in the assignment of judges and does not constitute a mandate (*see generally Matter of Michael M.*, 162 Misc 2d 676, 677-678). Such preference in the assignment of judges "[i]n no way . . . circumscribes the power of [Family C]ourt in the sense of competence to adjudicate causes [of action for termination of parental rights]," and therefore cannot be said to implicate the court's subject matter jurisdiction (*Lacks v Lacks*, 41 NY2d 71, 75-76, *rearg denied* 41 NY2d 862, 901; *see Brayanna G.*, 66 AD3d at 1376).

Finally, the mother failed to preserve for our review her

contention that the court erred in permitting the foster parents to participate in the dispositional hearing pursuant to Social Services Law § 383 (3) in the absence of a written motion to intervene (*see* CPLR 1012 [a] [1]; 1014). "An issue may not be raised for the first time on appeal . . . where it 'could have been obviated or cured by factual showings or legal countersteps' in the trial court" (*Oram v Capone*, 206 AD2d 839, 840, quoting *Telaro v Telaro*, 25 NY2d 433, 439, *rearg denied* 26 NY2d 751). Here, the alleged deficiency could have been cured upon the mother's objection by the filing of a written motion to intervene because the foster parents were entitled to intervene as a matter of right, having continuously cared for the child for more than 12 months (*see* Social Services Law § 383 [3]; CPLR 1012 [a] [1]).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

938

CA 11-00054

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

RONALD A. MALACHOWSKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARTIN J. DALY, DEFENDANT-RESPONDENT.

RHOADES, CUNNINGHAM & MCFADDEN, LLC, LATHAM (JOHN R. MCFADDEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS & PANELS, SYRACUSE (MICHAEL W. HARRIS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered March 5, 2010 in a legal malpractice action. The order granted in part the motion of defendant for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiff commenced this legal malpractice action alleging, inter alia, that defendant, the attorney who represented him in divorce proceedings, negligently failed to discover various assets of his ex-wife. Supreme Court granted defendant's motion for summary judgment dismissing the amended complaint except insofar as it alleged that defendant was negligent in failing to pay interest to plaintiff on a distributive award held in escrow by defendant for approximately nine months. Plaintiff contends that the court erred in granting defendant's motion with respect to three of his malpractice claims, those alleging that defendant was negligent in failing to ascertain prior to settlement of the underlying divorce action the exact amount of a credit card debt in his ex-wife's name, in failing to move to vacate the stipulation entered in the underlying matrimonial action, and in failing to discover the full extent of his ex-wife's retirement benefits. We affirm.

"To obtain summary judgment dismissing a complaint in an action to recover damages for legal malpractice, a defendant must demonstrate that the plaintiff is unable to prove at least one of the essential elements of [his or her] legal malpractice cause of action" (*Boglia v Greenberg*, 63 AD3d 973, 974; *see Pignataro v Welsh*, 38 AD3d 1320). Here, we conclude that the court properly granted that part of defendant's motion with respect to the claim that he was negligent in failing to ascertain prior to settlement of the underlying divorce

action the exact amount of a Providian credit card debt in the ex-wife's name. The ex-wife had disclosed that there was a specified debt on that credit card in her statement of net worth, but she did not identify the precise balance due as of the date of settlement. We note that the balance due on the date of settlement was only $74.11 more than the amount listed by the ex-wife in her net worth statement. In any event, defendant met his initial burden on that part of the motion by establishing that plaintiff was not damaged by defendant's failure to determine the exact amount due (*see Boglia*, 63 AD3d at 974). There is a presumption that all property acquired during a marriage constitutes marital property, "even if it is titled only in the name of one spouse" (*Parkinson v Parkinson*, 295 AD2d 909, 909), and it is similarly " 'well settled that expenses incurred prior to the commencement of a divorce action constitute marital debt and should be equally shared by the parties' " (*Rodriguez v Rodriguez*, 70 AD3d 799, 802; *see Levine v Levine*, 24 AD3d 625, 625-626). Thus, to defeat that part of the motion, it was incumbent upon plaintiff to demonstrate that the credit card debt constituted the wife's separate property, and he failed to do so. In the absence of evidence that the debt was not a joint marital obligation, plaintiff would have been obligated to pay one half of the amount due even if defendant had informed him of that exact amount prior to settlement.

We further conclude that the court properly granted that part of the motion seeking dismissal of the amended complaint insofar as it alleges that defendant failed to move to vacate the stipulation entered in the underlying divorce action, inasmuch as plaintiff did not retain defendant for that purpose (*see DiGiacomo v Levine*, 76 AD3d 946, 949-950). We note that plaintiff contends for the first time on appeal that defendant promised to move for vacatur. Because plaintiff did not set forth that contention in the amended complaint or in the bill of particulars, or otherwise raise the issue in Supreme Court, that contention is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Plaintiff's remaining contention is that the court erred in granting that part of defendant's motion with respect to his claim that defendant was negligent in failing to discover prior to settlement of the underlying divorce action that plaintiff's ex-wife, upon retirement, would receive payments of $500 per month from her then employer, over and above her anticipated pension benefits. We reject that contention. As the court noted in its decision, and as plaintiff concedes on appeal, the exact nature of the payments to plaintiff's ex-wife is unclear from the record. It cannot be determined whether the payments constitute marital property, as plaintiff suggests, or whether, as defendant posits, they constitute social security bridge payments, which do not constitute a form of deferred compensation and thus are not marital property (*see Olivo v Olivo*, 82 NY2d 202, 208). Plaintiff's claim regarding the payments in question was not set forth in the amended complaint, nor was it referenced in the bill of particulars. Instead, it was raised for the first time by plaintiff in opposition to defendant's motion. In any event, defendant, in moving for summary judgment, met his initial burden of establishing as a matter of law that plaintiff sustained no

damages as a result of defendant's negligence, thus shifting the burden to plaintiff to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We conclude that, because plaintiff failed to offer any evidence to support his claim that the $500 monthly payments received by his ex-wife from her former employer constitute marital property, he failed to raise an issue of fact whether he sustained any damages as a result of defendant's alleged failure to discover them prior to settlement.

Finally, we note that plaintiff has abandoned all other claims of malpractice alleged in the amended complaint and bill of particulars (*see Ciesinski*, 202 AD2d at 984), leaving for trial only the claim that defendant was negligent in failing to pay interest on the distributive award.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

939

CA 11-00653

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

JOHN DEFORGE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LYNDI KARWOSKI, DEFENDANT-RESPONDENT.

ADORANTE, TURNER & ASSOC., CAMILLUS (ANTHONY P. ADORANTE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAWRENCE BROWN, BRIDGEPORT, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered January 26, 2011. The order denied the motion of plaintiff for summary judgment and granted the cross 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, defendant's cross motion is denied, the complaint is reinstated and plaintiff's motion is granted.

Memorandum: In this action commenced by plaintiff to recover damages arising from money that he paid in his capacity as a cosigner in satisfaction of the student loan taken out by defendant, his daughter, plaintiff contends that Supreme Court erred in granting defendant's cross motion for summary judgment dismissing the complaint and instead should have granted his motion for summary judgment on the complaint, awarding him damages in the sum of $4,132.08 plus interest from the date on which he paid the loan along with the costs and disbursements incurred in bringing this action. We agree. In cosigning the loan agreement, plaintiff acted as a surety and thus, in accordance with the general rule, is equitably entitled to full indemnity against the consequences of the default of defendant, the principal obligor (*see Lori-Kay Golf, Inc. v Lassner*, 61 NY2d 722, 723; *Leghorn v Ross*, 53 AD2d 560, *affd* 42 NY2d 1043, *rearg denied* 43 NY2d 835). Contrary to the court's determination, a separate written contract between the parties to this action was not required to enable plaintiff to recover from defendant. Plaintiff surety's right to indemnification from his daughter, the principal herein, exists independently of any right of the creditor that issued the student loan pursuant to its written agreement with defendant, i.e., the principal under the agreement (*see Blanchard v Blanchard*, 201 NY 134, 138).

We further agree with plaintiff that he did not waive his right to seek indemnification from defendant pursuant to the terms of the loan agreement (*see generally Morlee Sales Corp. v Manufacturers Trust Co.*, 9 NY2d 16, 19; *Guasteferro v Family Health Network of Cent. N.Y.*, 203 AD2d 905). Finally, we reject defendant's contention that this action is barred by the doctrine of laches (*see generally Marcus v Village of Mamaroneck*, 283 NY 325, 332; *Matter of Kuhn v Town of Johnstown*, 248 AD2d 828, 830; *Cohen v Krantz*, 227 AD2d 581, 582).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

940

CA 11-00537

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

AMY G. GIACOMETTI, PLAINTIFF-RESPONDENT,

V ORDER

SHANNON M. DOYLE, DEFENDANT-APPELLANT.
(ACTION NO. 1.)

SHANNON M. DOYLE, PLAINTIFF,

V

AMY G. GIACOMETTI, DEFENDANT.
(ACTION NO. 2.)

MARLE M. FIOCCO, PLAINTIFF-RESPONDENT,

V

SHANNON M. DOYLE, DEFENDANT-APPELLANT,
AMY G. GIACOMETTI, DEFENDANT-RESPONDENT,
VEHICLE ASSET UNIVERSAL LEASING TRUST, ET AL.,
DEFENDANTS.
(ACTION NO. 3.)

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

BOUVIER PARTNERSHIP, LLP, BUFFALO (JOHN D. DEPAOLO OF COUNSEL), FOR DEFENDANT-RESPONDENT AMY G. GIACOMETTI.

LAW OFFICE OF JOHN J. DELMONTE, NIAGARA FALLS (JOHN J. DELMONTE OF COUNSEL), FOR PLAINTIFF-RESPONDENT AMY G. GIACOMETTI.

LAW OFFICE OF JOHN J. FROMEN, ESQ., BUFFALO (JOHN J. FROMEN OF COUNSEL), MAGAVERN MAGAVERN GRIMM LLP, FOR PLAINTIFF-RESPONDENT MARLE M. FIOCCO.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered November 18, 2010 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant Shannon M. Doyle for bifurcation.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on July 29, August 1, 2 and 4,

2011,

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

941

CA 10-02440

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

FARM FAMILY CASUALTY INSURANCE COMPANY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BRADY FARMS, INC., DEFENDANT-RESPONDENT.

HURWITZ & FINE, P.C., BUFFALO (DAN D. KOHANE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD LLP, ROCHESTER (HENRY R. IPPOLITO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered March 31, 2010 in a declaratory judgment action. The judgment declared that plaintiff is obligated to indemnify defendant for certain payments.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied and judgment is granted in favor of plaintiff as follows:

> It is ADJUDGED and DECLARED that plaintiff has no duty to defend or indemnify defendant with respect to any financial liabilities incurred in connection with the death of John T. Nichols under the Special Farm Package "10" policy.

Memorandum: Plaintiff commenced this action seeking a declaration that it has no duty to defend or indemnify defendant, the owner and operator of a farm, in connection with fatal injuries sustained by defendant's employee (hereafter, decedent) while working at the farm. At the time of the accident, defendant was insured under a primary policy issued by plaintiff, entitled the Special Farm Package "10" policy (hereafter, Package policy), as well as an umbrella policy also issued by plaintiff. Defendant did not have workers' compensation insurance at that time. Supreme Court thereafter granted defendant's motion for summary judgment seeking a declaration that, inter alia, plaintiff is obligated to defend and indemnify defendant under the Package policy "for all losses arising out of the death of" decedent. In granting the motion, the court agreed with defendant that the Package policy exclusions on which plaintiff relied do not operate to defeat coverage for defendant. According to defendant's attorney, however, the court indicated that

it would not rule on the issue whether the workers' compensation award issued against defendant in connection with decedent's death falls within the coverage of the Package policy because there was no such motion before it seeking that relief.

After multiple chambers conferences, defendant made a second motion for summary judgment seeking a declaration that, inter alia, the workers' compensation award was covered by the Package policy. The court granted the motion, declaring that plaintiff is obligated under the Package policy to indemnify defendant, inter alia, for payments required to be made to decedent's widow in accordance with the workers' compensation award, as well as for funeral expenses expended by the widow and for reasonable fees and expenses paid by defendant to its attorneys in connection with both the workers' compensation proceedings and this action. We reverse.

We note at the outset that we reject plaintiff's contention that the court erred in entertaining defendant's second motion for summary judgment. Although it is well settled that "successive motions for summary judgment are generally disfavored" (*Rupert v Gates & Adams, P.C.*, 83 AD3d 1393, 1395), such motions for summary judgment are permitted where there is "newly discovered evidence or other sufficient cause" (*Giardina v Lippes*, 77 AD3d 1290, 1291, *lv denied* 16 NY3d 702). Here, the court did not rule on the issue whether the subject workers' compensation award is within the coverage of the Package policy because there was no motion then before it seeking that relief, and the record establishes that the second motion was, if not encouraged, certainly not discouraged by the court. We thus conclude that " 'there was sufficient cause for defendant['s] [second] motion' " (*Tallie v Rochester Gas & Elec. Corp.*, 68 AD3d 1808, 1810).

We further conclude, however, that the court erred in granting defendant's second motion. "In determining a dispute over insurance coverage, we first look to the language of the policy . . . We construe the policy in a way that 'affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect' " (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221-222; *see Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162, *rearg denied* 5 NY3d 825). "As with the construction of contracts generally, 'unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court' " (*Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177).

Here, the Package policy sets forth in relevant part that plaintiff "provide[s] coverage . . . if a claim is made or a suit is brought against an INSURED for damages because of BODILY INJURY or PROPERTY DAMAGE caused by an OCCURRENCE to which [the] coverage [in the policy] applies." The workers' compensation claim made on decedent's behalf establishes that his estate elected to forego the recovery of damages through a civil action and instead sought to pursue what was essentially a claim for the workers' compensation insurance benefits defendant should have secured for him. Pursuant to

Workers' Compensation Law § 26-a (1) (a), an employer that failed to secure workers' compensation benefits for an injured worker is liable for the payment of benefits awarded to the injured worker. Thus, in effect, defendant employer is substituted for the insurer it failed to hire as the party responsible for payment of the workers' compensation benefits awarded to decedent. Consequently, the liability of defendant to decedent arises from defendant's failure to meet its statutory insurance procurement obligation rather than from the bodily injury sustained by decedent, and we conclude that there is no coverage for such liability under the Package policy (*cf. Charles F. Evans Co. v Zurich Ins. Co.*, 95 NY2d 779).

Finally, in view of the uncontroverted proof in the record that the workers' compensation award issued against defendant in connection with decedent's death is outside the scope of coverage for defendant under the Package policy, we exercise our power to search the record and grant summary judgment to plaintiff (*see* CPLR 3212 [b]; *Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 111).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

942

CA 10-01692

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

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

V MEMORANDUM AND ORDER

JOEY BLAIR, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (KEVIN S. DOYLE OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PATRICK J. WALSH OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (Timothy J. Walker, A.J.), entered June 28, 2010 in a proceeding pursuant to Mental Hygiene Law article 10. The order committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order determining that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10 and committing him to a secure treatment facility. Contrary to respondent's contention, we conclude that petitioner established by clear and convincing evidence at the dispositional hearing that he is a dangerous sex offender requiring confinement (*see* § 10.03 [e]; § 10.07 [f]). Supreme Court, as the trier of fact, was "in the best position to evaluate the weight and credibility of the conflicting psychiatric testimony presented" (*Matter of State of New York v Timothy JJ.*, 70 AD3d 1138, 1144; *see Matter of State of New York v Richard VV.*, 74 AD3d 1402, 1404), and we discern no basis to disturb the court's decision to credit the testimony of petitioner's expert over that of respondent's expert (*see Matter of State of New York v Boutelle*, 85 AD3d 1607). We reject the further contention of respondent that the court erred in permitting petitioner's expert to testify concerning his treatment progress at Central New York Psychiatric Center (CNYPC). Petitioner's expert reviewed the CNYPC treatment records of respondent and thus was competent to testify with respect to conclusions that he drew therefrom (*see generally Matter of State of New York v Fox*, 79 AD3d 1782, 1783-1784). The admittedly limited familiarity of the expert with CNYPC's treatment program goes " 'to [the] weight of his . . . opinion as evidence, not its admissibility' " (*Kabalan v Hoghooghi*, 77

AD3d 1350, 1351; *see Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 143) and, in any event, the expert testified that respondent's progress or lack thereof at CNYPC did not significantly factor into his opinion.

Finally, respondent's constitutional and statutory challenges to the CNYPC treatment program are not properly before us inasmuch as they are unpreserved for our review (*see generally Matter of Giovanni K.*, 68 AD3d 1766, 1767, *lv denied* 14 NY3d 707; *Matter of Wood v Goord*, 265 AD2d 854). In addition, we note that many of those contentions involve matters outside the record on appeal, and we are therefore unable to review them (*see generally Matter of State of New York v Pierce*, 79 AD3d 1779, 1781, *lv denied* 16 NY3d 712; *Matter of State of New York v Campany*, 77 AD3d 92, 99-100, *lv denied* 15 NY3d 713). In any event, on the record before us, there is no evidence that petitioner or CNYPC failed to fulfill its treatment responsibilities or violated respondent's due process rights.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

943

CA 11-00749

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

WENDY WILLIAMS, PLAINTIFF-RESPONDENT,

V ORDER

DELTA SONIC CAR WASH SYSTEMS, INC., DELTA SONIC SALES & SERVICES, INC., R B-3 ASSOCIATES, INC., RANDALL BENDERSON 1993-1 TRUST, BEN-MIL ASSOCIATES, INC., BENDERSON DEVELOPMENT COMPANY, INC., AND BENDERSON PROPERTY DEVELOPMENT, INC., DEFENDANTS-APPELLANTS.

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

THE LAW OFFICE OF MARK D. GROSSMAN, NIAGARA FALLS (MARK D. GROSSMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered August 10, 2010 in a personal injury action. The order denied the motion of defendants for summary judgment dismissing the complaint.

Now, upon the stipulations of discontinuance signed by the attorneys for the parties on July 7, 2011, and filed in the Niagara County Clerk’s Office on September 14, 2011,

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

945

TP 11-00552

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

IN THE MATTER OF WILLIAM EDWARDS, PETITIONER,

V MEMORANDUM AND ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (EDWARD L. CHASSIN OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered March 11, 2011) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 113.25 (7 NYCRR 270.2 [B] [14] [xv]) and vacating the penalty and as modified the determination is confirmed without costs, respondent is directed to expunge from petitioner's institutional record all references to the violation of that inmate rule and the matter is remitted to respondent for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a Tier III hearing, that he violated inmate rules 113.25 (7 NYCRR 270.2 [B] [14] [xv] [drug possession]) and 114.10 (7 NYCRR 270.2 [B] [15] [i] [smuggling]). Although petitioner contends that the determination finding that he violated inmate rule 113.25 is not supported by substantial evidence, his plea of guilty to that violation precludes our review of that contention (*see Matter of Cross v Goord*, 2 AD3d 1425).

Petitioner further contends that the Hearing Officer failed to complete the Tier III hearing in a timely manner. Although the hearing was completed more than 14 days after "the writing of the misbehavior report" (7 NYCRR 251-5.1 [b]), we nevertheless reject petitioner's contention inasmuch as the Hearing Officer obtained valid extensions and the hearing was completed within the extended time

period. "In any event, the time requirement set forth in 7 NYCRR 251-5.1 (b) is merely directory, . . . not mandatory, and there has been no showing by petitioner that he suffered any prejudice as a result of the delay" (*Matter of Crosby v Selsky*, 26 AD3d 571, 572). There is no support in the record for the contention of petitioner that the Hearing Officer's determination was influenced by any alleged bias against petitioner (*see Matter of Rodriguez v Herbert*, 270 AD2d 889, 890). " 'The mere fact that the Hearing Officer ruled against the petitioner is insufficient to establish bias' " (*Matter of Wade v Coombe*, 241 AD2d 977).

We agree with petitioner, however, that he was denied his right to call a material witness at the hearing. An "inmate may call witnesses on his [or her] behalf provided their testimony is material, is not redundant, and doing so does not jeopardize institutional safety or correctional goals" (7 NYCRR 253.5 [a]; *see Matter of Miller v Goord*, 2 AD3d 928, 929-930). Here, the Hearing Officer denied petitioner's request to call an employee of the Department of Corrections, and petitioner subsequently entered his plea of guilty to the alleged violations. Because the Hearing Officer failed to state a good faith basis for the denial of that request, such denial constitutes a constitutional violation, and the proper remedy is expungement (*see Matter of Caldwell v Goord*, 34 AD3d 1173, 1174-1175; *Matter of Alvarez v Goord*, 30 AD3d 118, 119-120; *Matter of Reyes v Goord*, 20 AD3d 830). Contrary to respondent's contention, the testimony of the witness in question would not have been redundant, nor would it have been irrelevant or immaterial to the issue whether the substance found in petitioner's cell constituted a controlled substance (*cf. Matter of Bunting v Fischer*, 85 AD3d 1473; *Matter of Thorpe v Fischer*, 67 AD3d 1101). We therefore modify the determination and grant the petition in part by annulling that part of the determination finding that petitioner violated inmate rule 113.25, and we direct respondent to expunge from petitioner's institutional record all references to the violation of that inmate rule. The testimony at issue, however, would have been irrelevant to the issue whether petitioner smuggled the substance into his cell. Thus, that part of the determination finding that petitioner violated inmate rule 114.10 is confirmed (*see Matter of Sanchez v Irvin*, 186 AD2d 996, *lv denied* 81 NY2d 702). By failing to raise the issue at the hearing, petitioner waived his right to challenge the Hearing Officer's failure to file a written notice of the reason the witness was not allowed to testify (*see Matter of Robinson v Herbert*, 269 AD2d 807).

"Because a single penalty was imposed and the record fails to specify any relation between the violations and that penalty," we further modify the determination by vacating the penalty, and we remit the matter to respondent for imposition of an appropriate penalty on the remaining violation (*Matter of Pena v Goord*, 6 AD3d 1106, 1106).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

946

KA 10-01599

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LAVON DEAN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered June 25, 2010. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

948

KA 10-00678

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW W. TAYLOR, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered March 10, 2010. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree and criminal mischief in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of burglary in the second degree (Penal Law § 140.25 [2]) and criminal mischief in the fourth degree (§ 145.00 [1]). Contrary to defendant's contention, the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). The testimony of his accomplices was sufficiently corroborated by, inter alia, defendant's admissions to another individual who was not involved in the crimes (*see People v Cole*, 68 AD3d 1763, *lv denied* 14 NY3d 839; *see generally* CPL 60.22 [1]; *People v Reome*, 15 NY3d 188, 191-192). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), and giving the appropriate deference to the jury's credibility determinations (*see People v Hill*, 74 AD3d 1782, *lv denied* 15 NY3d 805), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Finally, the sentence is not unduly harsh or severe.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

949

KA 08-01925

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LASHONDA BENTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered April 15, 2008. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the fourth degree (two counts).

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

950

KA 10-00557

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TRAVIS W. BILLUPS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered December 10, 2009. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree and unauthorized use of a vehicle in the third degree.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

951

KA 07-02656

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT DAVIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 21, 2007. The judgment convicted defendant, upon a jury verdict, of rape in the first degree (two counts), kidnapping in the second degree, criminal sexual act in the first degree, sexual abuse in the first degree and robbery in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of rape in the first degree (Penal Law § 130.35 [1]). The indictment charged defendant with crimes arising from an incident in August 2005 involving one victim and a second incident in April 2006 involving a different victim. At defendant's request, Supreme Court severed the counts relating to the August 2005 incident from those relating to the April 2006 incident and granted separate trials. Defendant contends that dismissal of the indictment, rather than severance, was the appropriate remedy for the "misjoinder" of the unrelated charges relating to each incident. We reject that contention. We conclude that this case does not involve "misjoinder," i.e., the improper joinder of unrelated charges in a single indictment (*see generally People v Craig*, 192 AD2d 323, *lv denied* 81 NY2d 1011, 1012; *People v Gadsden*, 139 AD2d 925, 925-926). Pursuant to CPL 200.20 (1), "[a]n indictment must charge at least one crime and may, in addition, charge in separate counts one or more other offenses . . . provided that all such offenses are joinable pursuant to [CPL 200.20 (2)]." Here, charges pertaining to the August 2005 incident were properly joined with those pertaining to the April 2006 incident because the "offenses are defined by the same or similar statutory provisions and consequently are the same or similar in law" (CPL 200.20 [2] [c]),

despite the fact that they involve different victims (*see People v Clark*, 24 AD3d 1225, *lv denied* 6 NY3d 832; *People v Nickel*, 14 AD3d 869, 870, *lv denied* 4 NY3d 834; *see also People v Burton*, 83 AD3d 1562).

Although defendant contends that dismissal of the indictment is warranted because he was potentially prejudiced by the submission to the grand jury of charges concerning two unrelated incidents, we note that such potential for prejudice is always present when charges are joined pursuant to CPL 200.20 (2) (c) (*see* Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, Penal Law § 200.20). Thus, CPL 200.20 (3) vests the court with the authority to order a severance based on potential prejudice, i.e., where "there is a substantial likelihood that the jury would be unable to consider separately the proof as it relates to each offense" (CPL 200.20 [3] [a]; *see People v Pierce*, 14 NY3d 564, 573). Here, the court granted severance pursuant to CPL 200.20 (3) (a), and we conclude that the circumstances of this case do not warrant the " 'exceptional remedy of dismissal' " of the indictment (*People v Workman*, 277 AD2d 1029, 1031, *lv denied* 96 NY2d 764, quoting *People v Huston*, 88 NY2d 400, 409; *see also People v Ramirez*, 298 AD2d 413, *lv denied* 99 NY2d 563).

Alternatively, defendant contends that the indictment should be dismissed because the prosecutor failed to instruct the grand jury to consider the August 2005 and April 2006 incidents separately. Defendant failed to preserve that contention for our review inasmuch as he failed to set forth that specific ground in that part of his omnibus motion seeking to dismiss the indictment (*see generally People v Becoats*, 71 AD3d 1578, 1579, *lv denied* 15 NY3d 849; *People v Gross*, 71 AD3d 1526, 1527, *lv denied* 15 NY3d 774; *People v Beyor*, 272 AD2d 929, *lv denied* 95 NY2d 832). Further, after the court inspected the grand jury minutes and advised defendant that the prosecutor failed to give a limiting instruction with respect to the two incidents, defendant did not thereafter challenge the prosecutor's instructions (*see People v Brown*, 81 NY2d 798). In any event, any deficiency in the grand jury instructions did not impair the integrity of the grand jury proceeding so as to require dismissal of the indictment (*see generally People v Walton*, 70 AD3d 871, 874-875, *lv denied* 14 NY3d 894; *People v Woodring*, 48 AD3d 1273, 1275-1276, *lv denied* 10 NY3d 846).

Contrary to the further contention of defendant, we conclude that the court properly quashed his subpoena duces tecum seeking DNA evidence pertaining to a suspect who had been excluded by the police. The subpoena in question ordered the State Division of Criminal Justice Services to produce "a certified copy of the DNA Databank submission form [and] DNA analysis" concerning that suspect. Inasmuch as defendant sought "DNA records contained in the state DNA identification index," the release of those records is governed by Executive Law § 995-c (6). Section 995-c (6) (b) permits the release of DNA records "for criminal defense purposes, to a defendant or his or her representative, who shall also have access to samples and analyses performed *in connection with the case in which such defendant is charged*" (emphasis added). The DNA records sought by defendant do

not qualify for release pursuant to that statute because the suspect's samples were not obtained nor were any analyses thereon performed "in connection with the case in which . . . defendant is charged" (§ 995-c [6] [b]; *see People v Days*, 31 Misc 3d 586, 589-590). The DNA records concerning the suspect predated the investigation and prosecution of the crimes at issue. Indeed, when the police ran the DNA obtained from the instant crimes through the state DNA databank, there was no indication that the suspect was a match.

Even assuming, arguendo, that disclosure of those DNA records was permissible pursuant to Executive Law § 995-c, we conclude that defendant failed to set forth a sufficient factual predicate to support the subpoena (*see generally People v Reddick*, 43 AD3d 1334, 1335, *lv denied* 10 NY3d 815). The individual in question was initially identified as a suspect because his neighbor informed the police that he matched the physical description provided by the victim. Thereafter, the investigation focused on defendant, who admitted to the police that he was at the bar where the victim had been working on the night of the April 2006 incident and that he engaged in consensual sex with the victim. The victim identified the bar patron as her assailant. The police subsequently determined that the DNA profile of defendant matched DNA found on the victim's mouth and vaginal area, as well as DNA taken from a glass found at the bar. In support of the subpoena, defendant relied on the fact that DNA from an unknown male was found on the straw inside that glass. Evidence establishing that such DNA belonged to the suspect would not tend to exculpate defendant, in light of his admissions and evidence concerning his own DNA. Thus, defendant's subpoena request amounted to nothing more than a "fishing expedition" (*People v Kozlowski*, 11 NY3d 223, 242, *rearg denied* 11 NY3d 904, 905, *cert denied* ___ US ___, 129 S Ct 2775).

We reject the contention of defendant that the court erred in allowing police witnesses to testify that he changed his statement concerning the incident after being confronted with information allegedly provided by his wife. To the extent that defendant contends that such testimony deprived him of his right of confrontation, that contention is unpreserved for our review inasmuch as he did not object to the testimony on that ground (*see People v McMillon*, 77 AD3d 1375, *lv denied* 16 NY3d 897; *People v Johnson*, 40 AD3d 1011, *lv denied* 9 NY3d 923; *People v Perez*, 9 AD3d 376, *lv denied* 3 NY3d 710). In any event, " '[t]he [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted' " (*People v Reynoso*, 2 NY3d 820, 821, quoting *Crawford v Washington*, 541 US 36, 59 n 9). Here, the testimony was properly admitted in evidence to explain why defendant made certain admissions to the police after first professing his ignorance of the incident and then denying his presence at the crime scene (*see People v Lewis*, 11 AD3d 954, 955, *lv denied* 3 NY3d 758; *Perez*, 9 AD3d 376; *People v Glover*, 195 AD2d 999, *lv denied* 82 NY2d 849). "Moreover, the court gave appropriate limiting instructions to the jury each . . . time[such testimony was given], and it is presumed that the jury followed those instructions" (*Lewis*, 11 AD3d at 955-956; *see People v McNeil*, 63 AD3d 551, 552, *lv denied* 13 NY3d 861; *Johnson*, 40 AD3d

1011).

Contrary to the further contention of defendant, the court did not abuse its discretion in admitting in evidence a recording of the 911 call made by the victim. The court concluded that the 911 call was admissible as an excited utterance because it was made while the victim remained "under the influence of an exciting event," and there is no basis in the record to disturb that determination (*see People v Jefferson*, 26 AD3d 798, 799, *lv denied* 6 NY3d 895; *People v Strong*, 17 AD3d 1121, *lv denied* 5 NY3d 795).

Finally, in light of the heinous nature of the crimes at issue and defendant's lengthy criminal history, we conclude that the sentence, which we note is reduced by operation of law (*see* Penal Law § 70.30 [1] [e] [vi]), is not unduly harsh or severe.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

952

CAF 11-00371

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

IN THE MATTER OF JOSE T.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

CHARLES D. HALVORSEN, ATTORNEY FOR THE CHILD, APPELLANT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), APPELLANT PRO SE.

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

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered January 6, 2011 in a proceeding pursuant to Family Court Act article 10-A. The order, among other things, ordered that the permanency goal for the subject child is placement for adoption.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part approving the permanency goal of placement for adoption and modifying the permanency goal to placement in an alternative planned permanent living arrangement with the child's foster parents, and as modified the order is affirmed without costs.

Memorandum: On appeal from an order in this proceeding pursuant to Family Court Act article 10-A, the Attorney for the Child contends that Family Court erred in determining that continuing the permanency goal of placement for adoption for the child is in his best interests. We agree with the Attorney for the Child that the court's determination lacks a sound and substantial basis in the record (*see Matter of Sean S.*, 85 AD3d 1575; *see generally Matter of Telsa Z.*, 74 AD3d 1434; *Matter of Jennifer R.*, 29 AD3d 1003, 1004-1005). We therefore modify the order by vacating that part approving the permanency goal of placement for adoption and modifying the permanency goal to placement in an alternative planned permanent living arrangement (APPLA) with the child's foster parents.

Petitioner met its burden of establishing by a preponderance of the evidence that its recommendation to modify the permanency goal from placement for adoption to APPLA was in the child's best interests (*see generally Sean S.*, 85 AD3d at 1576; *Matter of Michael D.*, 71 AD3d

1017; *Matter of Cristella B.*, 65 AD3d 1037, 1039). At the time of the permanency hearing, the child was 14 years old. Petitioner submitted uncontroverted evidence that, despite its diligent efforts to counsel the child regarding adoption and to find local adoptive resources for him, the child refused to consent to adoption and wished to remain in his foster placement (*see generally* Domestic Relations Law § 111 [1] [a]). In addition, petitioner submitted evidence indicating that the child's placement with his foster parents allowed the child to have continued contact with his older brother, with whom he is very close, and to reside in a home in which he was safe and happy. Also, the child would have access to family and friends who lived in the same area as his foster parents. Petitioner established that continuing the permanency goal of placement for adoption may result in removing the child from the positive environment of his foster placement and significantly diminishing his contact with family and friends, in contradiction of the child's express wishes. Thus, petitioner established the requisite "compelling reason for determining that it would not be in the best interests of the child to . . . be . . . placed for adoption" (Family Ct Act § 1089 [d] [2] [i] [E]).

Further, the record establishes that the child has a "significant connection to an adult willing to be a permanency resource for [him]," which is required for an APPLA placement (*id.*). Although the child's foster parents have not yet signed a permanency pact, they have unequivocally stated their willingness to serve as an ongoing resource for the child. The child's foster parents consider him part of their family, and petitioner's caseworker characterized the relationship between the child and his foster parents as "a significant connection." Thus, the record establishes that the child has strong ties to adults who have agreed " 'to be a permanent resource for [him] for as long as [he] need[s them]' " (*Sean S.*, 85 AD3d at 1576).

Entered: September 30, 2011 Patricia L. Morgan
Clerk of the Court

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

953

CAF 10-01629, CAF 10-01681

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

IN THE MATTER OF KRISTIAN J.P. AND
DOROTHY E.P., PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

JEANNETTE I.C. AND JASON M.C.,
RESPONDENTS-RESPONDENTS.

EMILY A. VELLA, SPRINGVILLE, FOR PETITIONER-APPELLANT KRISTIAN J.P.

SCHAVON R. MORGAN, MACHIAS, FOR PETITIONER-APPELLANT DOROTHY E.P.

DICERBO & PALUMBO, OLEAN (DANIEL R. PALUMBO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

CAROLYN KELLOGG JONAS, ATTORNEY FOR THE CHILDREN, WELLSVILLE, FOR ANTHONY R.C. AND ALEXIS J.C.

Appeals from an order of the Family Court, Cattaraugus County (Larry M. Himelein, J.), entered July 12, 2010 in a proceeding pursuant to Domestic Relations Law § 112-b. The order, inter alia, denied the petitions to enforce a post-adoption contact agreement.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by directing that the stay away provision is in effect until the 18th birthday of the youngest subject child, and as modified the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Domestic Relations Law § 112-b, petitioners appeal from an order denying their petitions to enforce a visitation provision in the post-adoption contact agreement with respect to two of their biological children who had been adopted by respondents (*see generally* Social Services Law § 383-c [2] [b]). Contrary to petitioners' contention, Family Court applied the appropriate standard when making its determination on the petitions. Pursuant to Domestic Relations Law § 112-b (4), "[t]he court shall not enforce an order [incorporating a post-adoption contact agreement] unless it finds that the enforcement is in the child[ren's] best interests." Here, petitioners were afforded a full and fair evidentiary hearing, and the court's determination that continued visitation was not in the children's best interests has a sound and substantial basis in the record (*see generally Matter of Heidi E.*, 68 AD3d 1174). Moreover, petitioners were each expressly warned prior to signing the judicial surrenders with respect to those

children that any post-adoption contact agreement was subject to modification based upon the best interests of the children.

We reject the further contention of petitioner Kristian J.P. (hereafter, biological father) that the court erred in granting respondents' cross petition seeking an order requiring the biological father to stay away from and refrain from any contact with respondents and the subject children. Although the petitions were filed pursuant to Domestic Relations Law § 112-b, the nature of the instant proceeding is the determination of visitation rights. We therefore conclude that the court has the authority to issue an order of protection "set[ting] forth reasonable conditions of behavior to be observed for a specific time by any petitioner" pursuant to Family Court Act § 656. Inasmuch as the court's order did not "plainly state the date that [the stay away provision] expires" (Family Ct Act § 154-c [1]), we modify the order by directing that the stay away provision is in effect until the 18th birthday of the youngest subject child (*see generally Matter of Thomas v Osborne*, 51 AD3d 1064, 1068-1069; *Matter of Morse v Brown*, 298 AD2d 656, 657). Finally, we reject the biological father's contention that he was denied effective assistance of counsel, inasmuch as he failed to demonstrate that he was "deprived of meaningful representation and that counsel's deficiencies caused [him] to suffer actual prejudice" (*Matter of Nicholas GG.*, 285 AD2d 678, 679).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

954

CAF 10-01672

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

IN THE MATTER OF DAVID J. CICCOTTI,
PETITIONER-APPELLANT,

V ORDER

STEPHANIE A. THOMPSON, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

BOSMAN LAW FIRM, LLC, ROME (A.J. BOSMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

SCOTT GODKIN, UTICA, FOR RESPONDENT-RESPONDENT.

GREGORY J. AMOROSO, ATTORNEY FOR THE CHILD, UTICA, FOR ANTHONY C.

Appeal from an order of the Family Court, Oneida County (Brian M. Miga, J.H.O.), entered July 2, 2010 in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition for an order of protection.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 27 and May 7, 2011 and by the Attorney for the Child on May 9, 2011,

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

955

CAF 10-01944

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

IN THE MATTER OF DAVID J. CICCOTTI,
PETITIONER-APPELLANT,

V ORDER

STEPHANIE A. THOMPSON, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

BOSMAN LAW FIRM, LLC, ROME (A.J. BOSMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

SCOTT GODKIN, UTICA, FOR RESPONDENT-RESPONDENT.

GREGORY J. AMOROSO, ATTORNEY FOR THE CHILD, UTICA, FOR ANTHONY C.

Appeal from an order of the Family Court, Oneida County (Brian M. Miga, J.H.O.), entered August 26, 2010 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for custody.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 27 and May 7, 2011 and by the Attorney for the Child on May 9, 2011,

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

956

CAF 10-01384

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

IN THE MATTER OF ADAM G., CHLOE G. AND MIEYA G.

---------- ORDER

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

ROBERT G., III, RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARK D. FUNK OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

ARLENE BRADSHAW, ATTORNEY FOR THE CHILDREN, SYRACUSE, FOR ADAM G., CHLOE G. AND MIEYA G.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered May 25, 2010 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected and abused the subject children.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

957

CAF 09-01654

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

IN THE MATTER OF STANLEY S. GRYBOSKY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DAWN M. RIORDAN, RESPONDENT-APPELLANT.

ELIZABETH CIAMBRONE, BUFFALO, FOR RESPONDENT-APPELLANT.

MARY G. CARNEY, BUFFALO, FOR PETITIONER-RESPONDENT.

JEFFREY C. MANNILLO, ATTORNEY FOR THE CHILD, BUFFALO, FOR ABIGAIL G.

Appeal from an order of the Family Court, Erie County (E. Jeannette Ogden, A.J.), entered July 28, 2009 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the parties' child to petitioner.

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

Memorandum: Petitioner father commenced this proceeding seeking, inter alia, to modify the prior consent order awarding sole custody to respondent mother by awarding him sole custody of the parties' child, with visitation with the mother. Family Court granted the petition, and we affirm. Contrary to the mother's contention, we conclude that the father met his burden of establishing a change in circumstances sufficient to warrant an inquiry into whether custody should be modified (*see Matter of Maher v Maher*, 1 AD3d 987, 988). A single incident of misconduct or neglect, if sufficiently serious, may establish a change in circumstances warranting a review of an existing custody arrangement (*see e.g. Matter of Bell v Raymond*, 67 AD3d 1410; *Matter of Samuel v Samuel*, 64 AD3d 920, 921). Here, the father's modification petition was prompted by an incident in which the mother left their child, who was then six years old, alone in a casino hotel room for nearly three hours while the mother gambled in the casino. A hotel patron found the child crying in the hallway and alerted casino security, which then called the police. As a result of the incident, the child missed her first day of first grade, the mother was arrested for endangering the welfare of a child, and Child Protective Services (CPS) issued an indicated report for inadequate guardianship and lack of supervision. In addition, evidence was presented that, after the casino incident, the mother and the child stayed over at the home of a man not known by the child. The mother and the man went out for

drinks, leaving the child in the care of the man's daughters. In addition, the father, the stepmother, and a social worker testified that the child exhibited poor hygiene when in the care of her mother, including wearing unclean clothes and exuding an unpleasant odor. In addition, during the time in which the mother had sole custody of the child, the child's teeth decayed to the point that she required 11 extractions and the placement of stainless steel crowns. We thus conclude that the casino incident, coupled with the other instances of inappropriate and neglectful behavior on the part of the mother, established the requisite change in circumstances (*see Maher*, 1 AD3d at 988).

We further conclude that, contrary to the contention of the mother, there is a sound and substantial basis in the record for the court's determination that an award of sole custody to the father is in the best interests of the child (*see Matter of Deborah E.C. v Shawn K.*, 63 AD3d 1724, 1725, *lv denied* 13 NY3d 710; *Matter of Jeremy J.A. v Carley A.*, 48 AD3d 1035). Here, there is ample support in the record for the court's conclusion that, as between the two parents, the father is better able to provide for the child's financial, educational and emotional needs. The record reflects that the mother has five children, including the subject child. The mother testified that she is unemployed and that her only income comes from Supplemental Security Income benefits, child support from the father and an ex-husband, and food stamps. Nonetheless, the mother acknowledged that she frequents a casino "about once a month," and she testified that she accumulated sufficient "slot dollars" to earn a free hotel room approximately eight times in the last five years. Although the mother sporadically attends Gamblers Anonymous, she did not seek individual counseling to address her admitted gambling addiction. The record further reflects that the mother failed to attend conferences at the child's school or a co-parenting class, as ordered by the court.

By contrast, the evidence presented at the hearing established that both the father and the stepmother are steadily employed, have no criminal record, are not the subjects of any CPS indicated reports, and completed a recommended co-parenting course. The social worker testified that, when the father and stepmother prepared the child for counseling sessions, she was appropriately dressed and groomed. Also according to the testimony of the social worker, the child is "[e]xtremely" close to the stepmother, and the stepmother testified that she attends parent-teacher conferences, lunches, and open houses at the child's school. We thus see no basis to disturb the determination of the court with respect to modification of the existing custody arrangement (*see generally Matter of Garland v Goodwin*, 13 AD3d 1059, 1059-1060).

Finally, the mother waived her contention that the court erred in failing to mention in its decision an alleged CPS indicated report concerning the father issued after the close of proof but prior to issuance of the court's decision. The record reflects that the court advised the mother that, if she wanted the CPS report included in the record and considered by the court, the mother had to obtain a

stipulation to that effect or, alternatively, seek court intervention before a specified date. There is no indication, however, that the mother prepared a written stipulation to include the CPS report in the record or that she requested a hearing on the ground that the father or the Attorney for the Child refused to so stipulate. The mother thus waived any contention that the CPS report should have been included in the record or considered by the court in rendering its custody determination (*see generally Matter of Iocovozzi v Herkimer County Bd. of Elections*, 76 AD3d 797, 798; *Reed v Fraser*, 52 AD3d 1323, 1324, *lv denied* 11 NY3d 714; *Matter of Dauria v Dauria*, 286 AD2d 879, 879-880).

In any event, there is no merit to the mother's contention. Initially, we note that it is unclear from the record whether such an indicated report exists, as the mother claims. Even assuming, arguendo, that there is such an indicated report, we further note that, although the report was not offered in evidence and no testimony was offered with respect to it inasmuch as it was allegedly issued after the close of proof, the mother did not seek to reopen the hearing to address the report. Thus, any such report was outside the record before the court, and the court properly declined to consider it in making its custody determination (*cf. Matter of Zwack v Kosier*, 61 AD3d 1020, 1022-1023, *lv denied* 13 NY3d 702; *Klembczyk v DiNardo*, 265 AD2d 934).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

958

CA 11-00781

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

IN THE MATTER OF ANTHONY SCRO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION OF JORDAN-ELBRIDGE
CENTRAL SCHOOL DISTRICT AND JOHN DOE,
TREASURER OR ACTING TREASURER,
JORDAN-ELBRIDGE CENTRAL SCHOOL
DISTRICT, RESPONDENTS-APPELLANTS.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (FRANK W. MILLER OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (DOMINIC S. D'IMPERIO OF COUNSEL), FOR PETITIONER-RESPONDENT.

TIMOTHY G. KREMER, EXECUTIVE DIRECTOR, LATHAM (JAY WORONA OF COUNSEL), FOR NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC., AMICUS CURIAE.

Appeal from a judgment (denominated decision and order) of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered January 20, 2011 in a proceeding pursuant to CPLR article 78. The judgment annulled the termination of petitioner's employment and ordered the reinstatement of petitioner.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding alleging that respondents terminated his employment as a school district treasurer in violation of his due process rights and Education Law § 306 (1) and seeking, inter alia, reinstatement to his position with back pay. We conclude that Supreme Court erred in granting the petition.

We agree with respondents and the contention of the New York State School Boards Association, Inc. in its amicus curiae brief that, under Education Law § 2130 (4), petitioner was an at-will employee who was not entitled to pre-termination due process. Education Law § 2130 (4) provides in relevant part that "[t]he board of education in every union free school district whose limits do not correspond with those of an incorporated village or city shall appoint a district treasurer,

and a collector who shall hold office during the pleasure of the board." Although that statute refers to union free school districts, it applies with equal force to central school districts (*see* Education Law § 1804 [1]; § 1805; *Appeal of DeMan*, 35 Ed Dept Rep 171, 173). Both treasurers and collectors "hold office during the pleasure of the board" (§ 2130 [4]), meaning that "a board of education has the right to discontinue the services of its treasurer at any time" (*Appeal of Myers*, 34 Ed Dept Rep 238, 239-240). Thus, contrary to petitioner's contention, Education Law § 306 (1) was not the only means by which respondents could terminate his employment (*see id.*). Petitioner was the equivalent of an at-will employee inasmuch as he served " 'at the pleasure of' " respondent Board of Education (*Matter of Cathy v Prober*, 195 AD2d 999, 1000, *lv denied* 82 NY2d 660; *see e.g. Moore v County of Rockland*, 192 AD2d 1021, 1022-1023), and he therefore was not entitled to pre-termination due process (*see Trakis v Manhattanville Coll.*, 51 AD3d 778, 780-781; *Natalizio v City of Middletown*, 301 AD2d 507, 507-508). For that reason, the court erred in granting the petition.

In any event, we agree with respondents that they had an alternative justification for their dismissal of petitioner, based on his failure to file his oath of office within 30 days of the commencement of the term of district treasurer, as required by Public Officers Law § 30 (1) (h). Where, as here, petitioner was present at the board meeting at which he was appointed and thus had actual notice of his appointment, written notice thereof was not required to commence the 30-day period (*see McDonough v Murphy*, 92 AD2d 1022, 1023-1024, *affd* 59 NY2d 941). Here, petitioner had notice of his appointment on July 7, 2010 but failed to file his oath of office until August 9, 2010, beyond the requisite 30-day period. Due to that failure, petitioner's office automatically became vacant (*see Lombino v Town Bd. of Town of Rye*, 206 AD2d 462, 463, *lv denied* 84 NY2d 807; *Staniszewski v Lackawanna Mun. Hous. Auth.*, 191 AD2d 1048, 1049; *Boisvert v County of Ontario*, 89 Misc 2d 183, 186, *affd* 57 AD2d 1051), and "no hearing on charges was required to dismiss him from office" (*Matter of Comins v County of Delaware*, 73 AD2d 698, 698; *Matter of Oakley v Longobardi*, 51 Misc 2d 427, 428).

Finally, petitioner's request for affirmative relief, i.e., an award of attorneys' fees, costs, and disbursements, is not properly before us inasmuch as he failed to take a cross appeal (*see e.g. City of Rye v Public Serv. Mut. Ins. Co.*, 34 NY2d 470, 474).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

959

CA 10-02444

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

KAUFMANN'S CAROUSEL, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CAROUSEL CENTER COMPANY LP AND CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY, DEFENDANTS-RESPONDENTS.
(ACTION NO. 1.)

LORD & TAYLOR CAROUSEL, INC., PLAINTIFF-APPELLANT,

V

CAROUSEL CENTER COMPANY LP AND CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY, DEFENDANTS-RESPONDENTS.
(ACTION NO. 2.)

LT PROPCO, LLC, PLAINTIFF-APPELLANT,

V

CAROUSEL CENTER COMPANY LP AND CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY, DEFENDANTS-RESPONDENTS.
(ACTION NO. 3.)

HARRIS BEACH PLLC, PITTSFORD (DOUGLAS A. FOSS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE (KEVIN G. ROE OF COUNSEL), FOR DEFENDANT-RESPONDENT CAROUSEL CENTER COMPANY LP.

HISCOCK & BARCLAY, LLP, BUFFALO (MARK R. MCNAMARA OF COUNSEL), FOR DEFENDANT-RESPONDENT CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY.

Appeals from an order and judgment (one paper) of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered March 9, 2010. The order and judgment, among other things, denied plaintiffs' motion to compel discovery and granted defendant Carousel Center Company LP's cross motion for partial summary judgment on its first counterclaim.

It is hereby ORDERED that said appeals by plaintiffs Lord & Taylor Carousel, Inc. and LT Propco, LLC are unanimously dismissed and the order and judgment is otherwise affirmed without costs.

Memorandum: The plaintiff in each action appeals from an order and judgment that denied plaintiffs' motion to compel discovery, granted the cross motion of Carousel Center Company LP, a defendant in each action (defendant), seeking partial summary judgment on its first counterclaim against Kaufmann's Carousel, Inc., the plaintiff in action No. 1 (plaintiff), and awarded defendant a judgment against plaintiff in the amount of $3,365,834.21, together with interest, costs and disbursements. We note at the outset that the appeals taken by the plaintiff in action No. 2, Lord & Taylor Carousel, Inc. (Lord & Taylor), and the plaintiff in action No. 3, LT Propco, LLC (LT Propco), must be dismissed. On a prior appeal that was before us while the motion and cross motion were pending (*LT Propco, LLC v Carousel Ctr. Co., L.P.* [appeal No. 2], 68 AD3d 1697, *lv dismissed in part and denied in part* 15 NY3d 743), we affirmed an order that, inter alia, dismissed Lord & Taylor's action inasmuch as its interest in the store located in the Carousel Center was sold to LT Propco, and Lord & Taylor thus lacked standing (*LT Propco, LLC* [appeal No. 3], 68 AD3d 1697). Further, defendant never asserted a counterclaim against LT Propco, and LT Propco conceded that its action therefore terminated in a judgment that we affirmed in a related prior appeal (*id.*). Thus, neither of those parties is aggrieved (*see generally Matter of Reynolds v Essex County*, 66 AD3d 1097).

We reject plaintiff's contention that Supreme Court erred in granting defendant's cross motion for partial summary judgment on its first counterclaim against plaintiff, for damages based on plaintiff's failure to make contributions to a payment in lieu of taxes (PILOT) agreement in breach of the Construction, Operation and Reciprocal Easement Agreement (REA). Defendant met its burden of establishing its entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiff contends that the court erred in failing to include the additional square footage of the expansion to Carousel Center in calculating plaintiff's PILOT contributions. We previously addressed that issue in the prior appeals from the order and judgment noted above. In those appeals, we concluded that the court properly determined that plaintiffs were not entitled to a declaration that they have no obligation to pay defendant amounts serving as contributions to the PILOT agreement (*LT Propco, LLC* [appeal No. 3], 68 AD3d at 1699-1700). We stated that "the court properly declared that plaintiff[] remained obligated to make contributions to PILOT payments in accordance with the REA, even if the amount of such contributions exceeds the amounts previously paid. Additionally, because the current PILOT agreement separates the existent Carousel Center from any expansion parcels, there was no need for the court to declare a new formula by which the parties should calculate plaintiff[']s] PILOT contributions" (*id.* at 1700). "Our determination is 'the law of the case and cannot be disturbed on this appeal' " (*Trisvan v County of Monroe*, 55 AD3d 1282, 1283, *lv denied* 11 NY3d 716).

We conclude that plaintiff failed to raise a triable issue of fact whether defendant incorrectly calculated the amount of plaintiff's PILOT contributions. Pursuant to the REA, plaintiff's contribution is to be determined by multiplying the total amount defendant is obligated to pay pursuant to a PILOT agreement with the City of Syracuse "by a fraction[,] the numerator of which shall be the number of square feet of [f]loor [a]rea of all building on [plaintiff's p]arcel and the denominator of which shall be the number of square feet of [f]loor [a]rea of all building in the Shopping Center." Defendant submitted evidence establishing that plaintiff and defendant have used 1,238,936 square feet as the denominator in that calculation for more than 12 years and that plaintiff has never objected to the use of that number (*see generally Goldman Copeland Assoc. v Goodstein Bros. & Co.*, 268 AD2d 370, *lv dismissed* 95 NY2d 825, 96 NY2d 796, *rearg denied* 96 NY2d 897). Although plaintiff submitted evidence in opposition to the cross motion establishing that other entities not involved in the present litigation have attributed a higher square footage to the Carousel Center, there is no indication that those other entities calculated the square footage in the manner required by the REA. Plaintiff's "mere hope or speculation" that further discovery will lead to evidence sufficient to defeat defendant's cross motion is insufficient to warrant denial thereof (*Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

961

CA 11-00036

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

KELVIN SEAWRIGHT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

OMAR M. CROOKS AND JOE A. RAMBO, JR.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

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

CELLINO & BARNES, P.C., ROCHESTER (RICHARD P. AMICO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered September 22, 2010 in a personal injury action. The judgment awarded plaintiff money damages upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, defendants' post-trial motion is granted, the verdict is set aside, and a new trial is granted on the issues of serious injury, proximate cause and damages.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained while a passenger in a vehicle that rear-ended another vehicle. The vehicle in which plaintiff was a passenger was operated by defendant Omar M. Crooks and owned by defendant Joe A. Rambo, Jr. Negligence was not at issue inasmuch as defendants stipulated that Crooks was solely responsible for the accident, and the matter proceeded to a jury trial on the issues of serious injury, proximate cause and damages. The jury found that plaintiff sustained a significant limitation of use of his cervical spine as a result of the accident and awarded him damages in the amount of $85,000 for past lost earnings; $750,000 for past pain and suffering; and $3,000,000 for future pain and suffering over 30.9 years. Defendants thereafter moved to set aside the verdict contending, inter alia, that the jury's verdict with respect to damages deviated materially from what would be reasonable compensation based on the evidence adduced at trial (*see* CPLR 5501 [c]). Supreme Court denied the post-trial motion.

Defendants contend on appeal, as they did in their post-trial motion, that the court erred in permitting plaintiff's treating

practitioners to testify concerning the findings of nontestifying medical professionals who conducted independent medical examinations and the contents of their reports. Plaintiff, in his brief, does not contend that the testimony was properly admitted but, rather, contends only that any error in the admission of the testimony is harmless. We agree with defendants that the testimony was improperly admitted (*see Matter of State of New York v Fox*, 79 AD3d 1782, 1783; *Elshaarawy v U-Haul Co. of Miss.*, 72 AD3d 878, 882; *Ewanciw v Atlas*, 65 AD3d 1077, 1078; *see generally Hinlicky v Dreyfuss*, 6 NY3d 636, 648) and, because we cannot conclude that the jury verdict would have been the same without the admission of the improper testimony, we cannot agree with plaintiff that the error is harmless (*see Wang v 161 Hudson, LLC*, 60 AD3d 668, 669; *cf. Ewanciw*, 65 AD3d at 1078-1079).

Based on our determination, we do not address defendants' remaining contentions.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

962

CA 11-00570

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

KELVIN SEAWRIGHT, PLAINTIFF-RESPONDENT,

V ORDER

OMAR M. CROOKS AND JOE A. RAMBO, JR.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

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

CELLINO & BARNES, P.C., ROCHESTER (RICHARD P. AMICO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered September 22, 2010 in a personal injury action. The order, insofar as appealed from, denied the motion of defendants to set aside the verdict and granted the motion of plaintiff for a structured judgment.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

966.1

CA 11-01089

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

INTERNATIONAL GROUP, INC. AND INTERNATIONAL GROUP, LLC, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V ORDER

UNITED STATES AVIATION UNDERWRITERS INCORPORATED, ACE AMERICAN INSURANCE COMPANY, GENERAL REINSURANCE CORPORATION, LIBERTY MUTUAL INSURANCE COMPANY AND NATIONAL LIABILITY & FIRE INSURANCE COMPANY, INDIVIDUALLY AND AS PARTICIPATING MEMBERS OF THE UNITED STATES AIRCRAFT INSURANCE GROUP, DEFENDANTS-RESPONDENTS-APPELLANTS.

HANDELMAN, WITKOWICZ & LEVITSKY, ROCHESTER (STEVEN M. WITKOWICZ OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

GOLDBERG SEGALLA LLP, BUFFALO (THOMAS F. SEGALLA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered April 19, 2011. The order, among other things, denied plaintiffs' motion for summary judgment and denied defendants' motion to dismiss plaintiffs' complaint.

Now, upon reading and filing the stipulation of withdrawal of appeal signed by the attorneys for the parties on August 4 and 5, 2011,

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

966

TP 11-00735

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

IN THE MATTER OF PATRICIA A. CUMMINGS,
PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,
RESPONDENT.

BURGIO, KITA & CURVIN, BUFFALO (HILARY C. BANKER OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Timothy J. Drury, J.], entered March 30, 2011) to review a determination of respondent. The determination, among other things, found that petitioner violated Vehicle and Traffic Law § 1146.

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

Memorandum: We conclude in this CPLR article 78 proceeding that, contrary to petitioner's contention, the determination to suspend her driver's license is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182; *Matter of Guarino v New York State Dept. of Motor Vehs.*, 80 AD3d 697). The evidence presented at the administrative hearing established that petitioner was making a left-hand turn in her vehicle at a T-intersection when she struck and killed a pedestrian. Petitioner contends that the evidence did not establish, however, that the pedestrian was in the crosswalk at the time of the accident and thus that her alleged violation of Vehicle and Traffic Law § 1146 is not supported by substantial evidence. The record belies that contention. According to both the accident report completed by a police officer and the testimony of the officer at the hearing, petitioner told the officer that she struck a pedestrian who was crossing the street "in [the] crosswalk from west to east." Petitioner's further contention that the Administrative Law Judge should have adduced additional evidence before rendering her decision is raised for the first time on appeal, and " '[t]he scope of [this] CPLR article 78 proceeding, following an administrative hearing, is

limited to review of the issues raised and addressed in that hearing' " (*Matter of Vicari v Wing*, 244 AD2d 974, 976).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

967

TP 11-00463

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

IN THE MATTER OF STEPHEN JONES, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered March 2, 2011) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

968

KA 10-02037

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RODNEY M. NEWMAN, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (MICHAEL S. DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered July 12, 2010. The judgment convicted defendant, upon a jury verdict, of promoting a sexual performance by a child, unlawful surveillance in the second degree (two counts), forcible touching and endangering the welfare of a child (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the definite sentence imposed on count four of the indictment shall run concurrently with the indeterminate sentences and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of promoting a sexual performance by a child (Penal Law § 263.15), forcible touching (§ 130.52), and two counts each of unlawful surveillance in the second degree (§ 250.45 [2]) and endangering the welfare of a child (§ 260.10 [1]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction because he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495).

With respect to the conviction of promoting a sexual performance by a child, the People established that defendant knew "the character and content" of the performance despite his absence during the recording of the sexual act (Penal Law § 263.15). With respect to the conviction of two counts of unlawful surveillance in the second degree, both applicable to the first victim, the People established that defendant made the recordings for his own "sexual arousal or sexual gratification" (§ 250.45 [2]). That element of the crime could

be inferred from defendant's conduct in placing surveillance cameras in the first victim's bathroom and bedroom (*see generally People v Willis*, 79 AD3d 1739, 1740, *lv denied* 16 NY3d 864). With respect to the conviction of forcible touching and the second count of endangering the welfare of a child, applicable to the second victim, we reject defendant's contention that the second victim's testimony was incredible as a matter of law. It cannot be said that his testimony was "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Harris*, 56 AD3d 1267, 1268, *lv denied* 11 NY3d 925; *see People v Moore* [appeal No. 2], 78 AD3d 1658, 1659-1660). With respect to the conviction of the first count of endangering the welfare of a child, applicable to the first victim, the People established that the recordings would be viewed by him. In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). The credibility of the witnesses was an issue for the jury to determine, and we perceive no basis for disturbing that determination (*see People v Massey*, 61 AD3d 1433, *lv denied* 13 NY3d 746).

Also contrary to defendant's contention, County Court did not err in admitting a videotape in evidence. There were "sufficient assurances of the identity and unchanged condition of the evidence . . ., and thus any alleged gaps in the chain of custody went to the weight of the evidence, not its admissibility" (*People v Kennedy*, 78 AD3d 1477, 1478, *lv denied* 16 NY3d 798; *see People v Hawkins*, 11 NY3d 484, 494). Defendant failed to preserve for our review his contention that the court erred in failing to conduct a *Ventimiglia* hearing to determine the admissibility of certain testimony concerning defendant's prior bad acts (*see People v Powell*, 303 AD2d 978, 979, *lv denied* 100 NY2d 565, 1 NY3d 541; *People v Trembling*, 298 AD2d 890, 891-892, *lv denied* 99 NY2d 540). Defendant also failed to preserve for our review his contention that the court's instructions to the jury were improper (*see People v Green*, 35 AD3d 1211, 1212, *lv denied* 8 NY3d 985). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We agree with defendant, however, that the court erred in directing that the definite sentence imposed on the misdemeanor count of forcible touching shall run consecutively to the indeterminate sentences imposed on the felony counts (*see* Penal Law § 70.35). "The offense underlying the definite sentence was committed prior to the date on which the [in]determinate sentence[s were] imposed, and thus the definite sentence must run concurrently" with those sentences (*People v Glinski* [appeal No. 2], 37 AD3d 1188, 1189; *see People v Leabo*, 84 NY2d 952, 953). We therefore modify the judgment accordingly. Finally, the sentence as modified is not unduly harsh or severe.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

970

KA 10-00535

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH FRAZIER, DEFENDANT-APPELLANT.

ARLOW M. LINTON, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), dated August 14, 2009. The order denied defendant's CPL 440.10 motion.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Supreme Court erred in denying without a hearing defendant's motion pursuant to CPL 440.10 (1) (h) to vacate the judgment convicting him of three counts of burglary in the first degree (Penal Law § 140.30 [2]-[4]) on the ground that he was denied his constitutional right to effective assistance of counsel. In support of the motion, defendant submitted his sworn statement asserting that trial counsel failed to inform him that a plea offer had been made and further asserting that he was prejudiced thereby because he would have accepted the offer. In addition, defendant submitted an affidavit from the prosecutor at his trial who recalled the specific terms of the plea offer, i.e., the reduced charge to which defendant was permitted to plead guilty and the trial court's sentencing commitment. We agree with defendant that his submissions "support[] his contention that he was denied effective assistance of counsel . . . and raise[] a factual issue that requires a hearing" (*People v Howard*, 12 AD3d 1127, 1128; *see People v Sherk*, 269 AD2d 755, *lv denied* 95 NY2d 804).

Contrary to the People's contention, the submissions of defendant in support of the motion were not "conclusively refuted by unquestionable documentary proof" (CPL 440.30 [4] [c]). The memorandum purportedly authored by the prosecutor at defendant's trial merely suggests that defendant was aware of a plea offer prior to trial but does not conclusively refute defendant's allegations to the contrary, nor is it sworn or even signed. Moreover, we do not agree

with the court that defendant's submissions in support of the motion consist of factual allegations "made solely by the defendant and . . . unsupported by other affidavit or evidence" (CPL 440.30 [4] [d]; *cf. People v Gunney*, 13 AD3d 980, 983, *lv denied* 5 NY3d 789; *People v Spencer*, 272 AD2d 682, 685-686, *lv denied* 95 NY2d 858). We therefore reverse the order and remit the matter to Supreme Court to conduct a hearing on defendant's motion.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

971

KA 11-00648

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARRETT WALKER, DEFENDANT-APPELLANT.

MILLER, WEINER & ASSOCIATES, P.C., KINGSTON (CAPPY WEINER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered August 5, 2010. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree and endangering the welfare of a child.

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

Memorandum: On appeal from a judgment convicting him, following a jury trial, of sexual abuse in the first degree (Penal Law § 130.65 [3]) and endangering the welfare of a child (§ 260.10 [1]), defendant contends that Supreme Court erred in refusing to suppress both initial oral statements and subsequent written statements that he made to the police. We reject that contention. With respect to the oral statements, we conclude that the court properly determined that defendant was not in custody at the time he made those statements (*see generally People v Morales*, 65 NY2d 997, 998). Indeed, the record of the suppression hearing establishes that a reasonable person, innocent of any crime, would not have believed that he or she was in custody during that time, given the circumstances of the initial interrogation (*see generally People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851; *People v Andrews*, 13 AD3d 1143, 1144).

Nor is there merit to defendant's contention that the *Miranda* warnings administered prior to his subsequent written statements were ineffective because his interrogation constituted a continuous chain of events. Given our agreement with the court that the initial oral statements to the police were not the subject of custodial interrogation, it cannot be said that the subsequent written statements were the result of a continuation of "custodial" interrogation.

We further conclude that the court did not err in refusing defendant's request to allow defendant to present the testimony of a false confessions expert. It is well established that the admissibility of expert testimony is addressed primarily to the sound discretion of the trial court (*see People v Cronin*, 60 NY2d 430, 433), and here we conclude that the court properly determined that the expert did not possess a professional or technical knowledge that was beyond the ken of the average juror (*see People v Hicks*, 2 NY3d 750). Finally, we conclude that the court properly denied defendant's motion for a subpoena duces tecum seeking the victim's counseling records. The reason proferred by defendant for the motion was speculative, and thus "the quest for [the file's] contents [was] merely a desperate grasping at a straw" (*People v Gissendanner*, 48 NY2d 543, 550).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

972

KA 08-02134

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER R. WEAKFALL, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered September 15, 2008. The judgment convicted defendant, upon a nonjury verdict, of burglary in the third degree, petit larceny and criminal mischief in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, after a nonjury trial, of burglary in the third degree (Penal Law § 140.20), petit larceny (§ 155.25), and criminal mischief in the fourth degree (§ 145.00 [1]). Even assuming, arguendo, that defendant's motion for a trial order of dismissal at the close of the People's proof was specifically directed at the alleged legal insufficiency of the evidence to support the conviction raised by defendant on appeal (*see People v Gray*, 86 NY2d 10, 19), we conclude that defendant failed to renew that motion after presenting evidence and therefore failed to preserve for our review his present contention that the conviction is not supported by legally sufficient evidence (*see People v Lane*, 7 NY3d 888, 889; *People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention is without merit. "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is 'whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*Hines*, 97 NY2d at 62; *see People v Daniels*, 75 AD3d 1169, *lv denied* 15 NY3d 892). Here, the circumstantial evidence, including the track of footprints in the fresh snow leading from the scene of the crime to the location where defendant was arrested and his exclusive possession of copper pipe taken in the course of the burglary, provides legally sufficient evidence to support the

conviction (*see People v Session*, 48 AD3d 1067, *lv denied* 10 NY3d 816; *see generally People v Baskerville*, 60 NY2d 374, 382). Furthermore, although a different result would not have been unreasonable (*see generally People v Bleakley*, 69 NY2d 490, 495), we conclude upon viewing the evidence in light of the elements of the crimes in this nonjury trial that it cannot be said that County Court failed to give the evidence the weight it should be accorded (*see generally People v Danielson*, 9 NY3d 342, 349; *Bleakley*, 69 NY2d at 495).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

973

KA 08-00431

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CANDY BUSKE, 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 January 4, 2008. The judgment convicted defendant, upon her plea of guilty, of attempted criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of attempted criminal possession of a weapon in the third degree (Penal Law §§ 110.00, 265.02 [1]). We reject defendant's contention that her waiver of the right to appeal was invalid. "County Court's plea colloquy, together with the written waiver of the right to appeal, adequately apprised defendant that 'the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Kulyeshie*, 71 AD3d 1478, 1478, *lv denied* 14 NY3d 889, quoting *People v Lopez*, 6 NY3d 248, 256). The further contention of defendant that her plea was not knowing, voluntary, or intelligent because she did not recite the underlying facts of the crime to which she pleaded guilty is actually a challenge to the factual sufficiency of the plea allocution and thus is encompassed by the valid waiver of the right to appeal (*see People v Simcoe*, 74 AD3d 1858, 1859, *lv denied* 15 NY3d 778; *People v Jamison*, 71 AD3d 1435, 1436, *lv denied* 14 NY3d 888). We further note that defendant failed to preserve her contention for our review because she did not move to vacate the judgment of conviction, nor did she raise that ground in her motion to withdraw the plea (*see Jamison*, 71 AD3d at 1436). In any event, defendant's contention is without merit. "[T]here is no requirement that defendant recite the underlying facts of the crime to which he [or she] is pleading guilty" (*People v Bailey*, 49 AD3d 1258, 1259, *lv denied* 10 NY3d 932; *see People v Williams*, 291 AD2d 891, 893, *lv denied* 98 NY2d 656).

Finally, defendant contends that the court failed to conduct a sufficient inquiry before denying her motion to withdraw her guilty plea and abused its discretion in denying her motion. We reject those contentions. First, "[t]he defendant should be afforded [a] reasonable opportunity to present his [or her] contentions [in support of the motion] and the court should be enabled to make an informed determination" based thereon (*People v Tinsley*, 35 NY2d 926, 927; *see People v Strasser*, 83 AD3d 1411; *People v Harris*, 63 AD3d 1653, *lv denied* 13 NY3d 744), and the record establishes that such was the case here. Second, with respect to the merits of the motion, defendant's claim of innocence in support thereof was belied by her statements during the plea colloquy (*see People v Gumpton*, 81 AD3d 1441, 1442; *People v Nichols*, 77 AD3d 1339, 1340, *lv denied* 15 NY3d 954). "The court was presented with a credibility determination when defendant moved to withdraw [her] plea and advanced [her] belated claim[] of innocence . . ., and it did not abuse its discretion in discrediting th[at] claim[]" (*People v Sparcino*, 78 AD3d 1508, 1509, *lv denied* 16 NY3d 746).

Entered: September 30, 2011 Patricia L. Morgan
Clerk of the Court

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

974

CAF 10-01317

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

IN THE MATTER OF CHASE J.E.

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

ANGELA A.K., RESPONDENT,
AND CHARLES E.E., III, RESPONDENT-APPELLANT.

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

ROBERT W. SCHNIZLER, ATTORNEY FOR THE CHILD, JAMESTOWN, FOR CHASE J.E.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered May 11, 2010 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents had neglected the subject child.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

975

CAF 10-00593

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

IN THE MATTER OF LASTANZEA L., IVANNA L., SAMYA L., DEAJAH L., AND SHAVIONTAE L.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

LAKESHA L., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

MEMORANDUM AND ORDER

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

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

JOHN G. KOSLOSKY, ATTORNEY FOR THE CHILDREN, UTICA, FOR LASTANZEA L., IVANNA L., SAMYA L., DEAJAH L., AND SHAVIONTAE L.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered February 13, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order revoked a suspended judgment and terminated the parental rights of respondent.

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

Same Memorandum as in *Matter of Lastanzea L.* ([appeal No. 2] ___ AD3d ___ [Sept. 30, 2011]).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

976

CAF 10-00594

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

IN THE MATTER OF LASTANZEA L., IVANNA L.,
SAMYA L., DEAJAH L., AND SHAVIONTAE L.
---------- MEMORANDUM AND ORDER
ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

LAKESHA L., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

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

JOHN G. KOSLOSKY, ATTORNEY FOR THE CHILDREN, UTICA, FOR LASTANZEA L., IVANNA L., SAMYA L., DEAJAH L., AND SHAVIONTAE L.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered February 9, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order denied the motion of respondent to vacate a prior order entered upon her default.

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

Memorandum: In appeal No. 1, respondent mother appeals from an order entered upon her default that, inter alia, revoked a suspended judgment and terminated her parental rights with respect to the five children who are the subjects of this proceeding. The mother failed to appear at the hearing on the petition seeking revocation of the suspended judgment and, although her attorney was present at the hearing, he did not participate therein. "[I]n light of her [attorney's] election to stand mute," the mother's unexplained failure to appear at the hearing constituted a default (*Matter of Miguel M.-R.B.*, 36 AD3d 613, 614, *lv dismissed* 8 NY3d 957). We therefore dismiss the appeal from the order in appeal No. 1 (*see Matter of Tiara B.* [appeal No. 2], 64 AD3d 1181, 1182).

In appeal No. 2, the mother appeals from an order denying her motion to vacate the order in appeal No. 1 entered upon her default. Family Court properly exercised its discretion in denying the motion. Contrary to the mother's contention, her incarceration at the time of the hearing does not constitute a reasonable excuse for her default because she failed to provide a credible explanation for her failure to advise her attorney, the court or petitioner of her unavailability

(*see Matter of Fa'Shon S.*, 40 AD3d 863; *Matter of Ashley Marie M.*, 287 AD2d 333). The mother also failed to demonstrate a meritorious defense or to explain her 11-month delay in seeking to vacate the order in appeal No. 1 (*see Matter of Tashona Sharmaine A.*, 24 AD3d 135, *lv denied* 6 NY3d 715; *Ashley Marie M.*, 287 AD2d at 334).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

977

CAF 10-02525

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

IN THE MATTER OF ANNA S., PETITIONER-RESPONDENT,

V ORDER

PEDRO R., RESPONDENT-APPELLANT.

ROSENTHAL, SIEGEL & MUENKEL, LLP, BUFFALO (BARBARA A. PIAZZA OF COUNSEL), FOR RESPONDENT-APPELLANT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR JULIEN S.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered July 7, 2010 in a proceeding pursuant to Family Court Act article 5. The order denied the motion of respondent to vacate a default order of filiation.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

978

CAF 10-01521

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

IN THE MATTER OF ANGEL L.H.

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

MELISSA H., RESPONDENT,
AND MATTHEW H., RESPONDENT-APPELLANT.

MICHAEL J. SULLIVAN, FREDONIA, FOR RESPONDENT-APPELLANT.

JANE E. LOVE, MAYVILLE, FOR PETITIONER-RESPONDENT.

NANCY A. DIETZEN, ATTORNEY FOR THE CHILD, FREDONIA, FOR ANGEL L.H.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered June 18, 2010 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Matthew H. had neglected his daughter.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Angel L.H.*, 85 AD3d 1637).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

981

CA 11-00425

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

STEPHANIE D'ANGELO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ANDREA S. LITTERER, DEFENDANT-APPELLANT.

HAGELIN KENT LLC, BUFFALO (VICTOR M. WRIGHT OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, LANCASTER (BRADLEY D. MARBLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered September 17, 2010 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle she was driving collided with a vehicle driven by defendant. Supreme Court erred in denying in part defendant's motion seeking summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Defendant met her initial burden by submitting medical records and the report of the physician who conducted a medical examination on defendant's behalf establishing that the injuries allegedly sustained by plaintiff in the accident were preexisting. "Because defendant submitted 'persuasive evidence that plaintiff's alleged pain and injuries were related to . . . preexisting condition[s], plaintiff had the burden to come forward with evidence addressing defendant's claimed lack of causation' " (*Clark v Perry*, 21 AD3d 1373, 1374, quoting *Pommells v Perez*, 4 NY3d 566, 580). Plaintiff, however, failed to meet that burden. Indeed, her "submissions in opposition to the motion did not 'adequately address how plaintiff's current medical problems, in light of [plaintiff's] past medical history, are causally related to the subject accident' " (*Anania v Verdgeline*, 45 AD3d 1473, 1474; *see Hartman-Jweid v Overbaugh*, 70 AD3d 1399, 1400).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

982

CA 11-00385

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

IN THE MATTER OF THOMAS C. ZEMBIEC,
PETITIONER-RESPONDENT,

V ORDER

COUNTY OF MONROE, MONROE COUNTY SHERIFF'S
DEPARTMENT, PATRICK O'FLYNN, SHERIFF,
MONROE COUNTY SHERIFF'S DEPARTMENT,
IN HIS OFFICIAL AND INDIVIDUAL CAPACITY,
AND UNDERSHERIFF GARY CAIOLA, IN HIS
OFFICIAL AND INDIVIDUAL CAPACITY,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

DAVID VAN VARICK, COUNTY ATTORNEY, ROCHESTER (JAMES L. GELORMINI OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

CHRISTINA A. AGOLA, PLLC, ROCHESTER (CHRISTINA A. AGOLA OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered January 15, 2010 in a proceeding pursuant to CPLR article 78. The judgment, among other things, adjudged that petitioner's application for a judgment to annul respondents' determination is held and remitted to the parties for additional information.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

983

CA 11-00330

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

IN THE MATTER OF THOMAS C. ZEMBIEC,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF MONROE, MONROE COUNTY SHERIFF'S
DEPARTMENT, PATRICK O'FLYNN, SHERIFF,
MONROE COUNTY SHERIFF'S DEPARTMENT,
IN HIS OFFICIAL AND INDIVIDUAL CAPACITY,
AND UNDERSHERIFF GARY CAIOLA, IN HIS
OFFICIAL AND INDIVIDUAL CAPACITY,
RESPONDENTS-APPELLANTS-RESPONDENTS.
(APPEAL NO. 2.)

DAVID VAN VARICK, COUNTY ATTORNEY, ROCHESTER (JAMES L. GELORMINI OF COUNSEL), FOR RESPONDENTS-APPELLANTS-RESPONDENTS.

CHRISTINA A. AGOLA, PLLC, ROCHESTER (CHRISTINA A. AGOLA OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

Appeal and cross appeal from an amended judgment of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered May 18, 2010 in a proceeding pursuant to CPLR article 78. The amended judgment, among other things, granted those parts of the petition seeking benefits pursuant to General Municipal Law § 207-c from August 12, 2008 through June 15, 2009 as well as petitioner's regular pay from June 15, 2009 through March 25, 2010.

It is hereby ORDERED that the amended judgment so appealed from is unanimously modified on the law by denying that part of the petition seeking an award of regular pay from June 15, 2009 through March 25, 2010 and vacating that award and as modified the amended judgment is affirmed without costs.

Memorandum: Petitioner, an employee of respondent Monroe County Sheriff's Department, commenced this proceeding seeking, inter alia, to annul the determination that he is not entitled to disability benefits. Respondents appeal and petitioner cross-appeals from an amended judgment granting those parts of the petition seeking benefits pursuant to General Municipal Law § 207-c from August 12, 2008 through June 15, 2009 as well as petitioner's regular pay from June 15, 2009 through March 25, 2010. Pursuant to General Municipal Law § 207-c, a sheriff, undersheriff, deputy sheriff or correction officer (hereafter, officer) who is injured in the performance of his or her

duties or who has become ill as a result of the performance of his duties so as to necessitate medical or other lawful remedial treatment is entitled to specified benefits. The statute does not require that a qualified employee demonstrate that his or her disability "is related in a substantial degree" to the employee's job duties (*Matter of White v County of Cortland*, 97 NY2d 336, 339). "Rather, consistent with a liberal reading of section 207-c, a qualified [employee] need only prove a direct causal relationship between job duties and the resulting illness or injury" (*id.* at 340). Here, Supreme Court properly concluded that the denial of benefits for the period from August 12, 2008 to June 15, 2009 was arbitrary and capricious, because petitioner established the requisite direct causal relationship between his job duties and his resulting illness (*see Matter of D'Accursio v Monroe County*, 74 AD3d 1908, 1908-1909, *lv denied* 15 NY3d 710). The court erred, however, in awarding petitioner his regular pay from June 15, 2009 through March 25, 2010, and we therefore modify the amended judgment accordingly. The record establishes that, as of June 15, 2009, petitioner was required to report for a modified duty assignment but did not do so. The statute provides for the termination of benefits upon an employee's refusal to return to work to perform a light duty assignment "consistent with his status as [an officer]" (§ 207-c [3]). Thus, petitioner did not have the right to an award of regular pay from June 15, 2009 through March 25, 2010 after he failed to report to work (*see Matter of Park v Kapica*, 8 NY3d 302). Although "a municipality is not permitted to *recoup* section 207-c payments where . . . the officer avails himself of due process protections by challenging the medical examiner's determination because such a challenge cannot be equated with a refusal to return to duty" (*id.* at 312), that was not the case here.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

984

CA 11-00455

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

IN THE MATTER OF STATEWAY PLAZA SHOPPING CENTER, BY: LONGLEY JONES MANAGEMENT CORP., AS MANAGING AGENT, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ASSESSOR OF CITY OF WATERTOWN AND CITY OF WATERTOWN, RESPONDENTS-APPELLANTS.

SLYE & BURROWS, WATERTOWN (JAMES A. BURROWS OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE (MARTIN A. LYNN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered November 23, 2010 in a proceeding pursuant to RPTL article 7. The order, insofar as appealed from, denied the motion of respondents for summary judgment.

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

Memorandum: Petitioner commenced this proceeding pursuant to RPTL article 7, challenging the tax assessment on the subject parcel for the 2009 tax year. Petitioner had challenged the assessments for the subject parcel for the 2006 and 2007 tax years, and those assessments were upheld by Supreme Court in judgments that are now final. Respondents moved for summary judgment dismissing the petition or, in the alternative, for an order vacating petitioner's note of issue pursuant to 22 NYCRR 202.21 (e) and 202.59, which contain prerequisites for filing a note of issue and certificate of readiness. Petitioner did not oppose the alternative request for relief, provided that it was permitted to re-file the note of issue within one year, and the court granted that alternative relief without prejudice to petitioner's right to re-file within one year of the date of the court's order. Respondents contend on appeal that the court was required to grant their motion insofar as they sought summary judgment dismissing the petition. We affirm inasmuch as, contrary to respondents' contention, RPTL 727 (3) does not bar this proceeding. We note at the outset that respondents are in fact aggrieved by the order, "despite the fact that the relief [they] requested in the alternative, to wit, [striking the note of issue], was granted . . . The [primary] relief [they] clearly sought was dismissal of the

[petition] . . ., and the denial of so much of [their] motion as was for dismissal involved a substantial right of" respondents (*Scharlack v Richmond Mem. Hosp.*, 127 AD2d 580, 581).

In pertinent part, RPTL 727 states that, "(1) Except as hereinafter provided, . . . where an assessment being reviewed pursuant to this article is found to be unlawful, unequal, excessive or misclassified by final court order or judgment, the assessed valuation so determined shall not be changed for such property for the next three succeeding assessment rolls . . . (3) No petition for review of the assessment on such property shall be filed while the provisions of subdivision one of this section are applicable to such property." It is well settled that, "as a general proposition, RPTL 727 precludes taxpayers from challenging an assessment for three years following a successful court challenge to that assessment" (*Matter of Curtis/Palmer Hydroelectric Co. v Town of Corinth*, 306 AD2d 794, 796; *see Matter of MRE Realty Corp. v Assessor of Town of Greenburgh*, 33 AD3d 802, 803-804). Here, it is undisputed that the prior challenges to the assessments for the 2006 and 2007 tax years were unsuccessful, and thus RPTL 727 does not preclude the instant challenge.

Contrary to respondents' further contention, the intent of the Legislature in enacting RPTL 727 does not require a different result. "As this is a question of statutory interpretation, we turn first to the plain language of the statute[] as the best evidence of legislative intent" (*Matter of Malta Town Ctr. I, Ltd. v Town of Malta Bd. of Assessment Review*, 3 NY3d 563, 568). Here, the Legislature provided therein that an assessment may not be reviewed for three years following a successful court challenge if the "assessment being reviewed pursuant to this article is found to be unlawful, unequal, excessive or misclassified by final court order or judgment" (RPTL 727 [1]). Respondents' proposed interpretation, i.e., that the Legislature intended the statute to apply whenever there was a prior court challenge notwithstanding the outcome of that challenge, would render that statutory language meaningless and would thereby violate the well-settled rule of statutory construction that "[a] construction rendering statutory language superfluous is to be avoided" (*Matter of Branford House v Michetti*, 81 NY2d 681, 688; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 231).

Entered: September 30, 2011 Patricia L. Morgan
Clerk of the Court

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

985

CA 11-00436

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

JOSEPH M. MASTERPOL, PLAINTIFF-RESPONDENT,

V ORDER

COUNTY OF ONONDAGA AND ONONDAGA COUNTY SHERIFF'S DEPARTMENT, DEFENDANTS-APPELLANTS.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (MARY J. FAHEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KUEHNER LAW FIRM, PLLC, SYRACUSE (KEVIN P. KUEHNER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered November 18, 2010. 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.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

986

CA 11-00391

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

KING'S COURT RESTAURANT, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HURONDEL I, INC., DEFENDANT-APPELLANT.

THE KNOER GROUP, PLLC, BUFFALO (ROBERT E. KNOER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRIAN J. RUFFINO, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered April 27, 2010 in a declaratory judgment action. The order denied the motion of defendant for summary judgment dismissing the complaint and for a declaratory judgment to quiet title.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, the complaint is dismissed and judgment is granted in favor of defendant as follows:

> It is ORDERED, ADJUDGED and DECREED that plaintiff has no title by adverse possession and/or easement by prescription over the adjacent portion of defendant's property in question.

Memorandum: Plaintiff commenced this action seeking a declaration that it has obtained title by adverse possession and/or easement by prescription over a portion of defendant's property that is adjacent to plaintiff's property. Supreme Court erred in denying defendant's motion for summary judgment dismissing the complaint and for a declaratory judgment on its counterclaim to quiet title. We therefore reverse.

In cases involving title by adverse possession and/or easement by prescription, an established record owner of the disputed property is "entitled to summary judgment unless the [opposing party] can demonstrate [its] rights by competent evidence or at least raise a factual issue regarding [its] claim to title through adverse possession or prescriptive easement" (*City of Tonawanda v Ellicott Cr. Homeowners Assn.*, 86 AD2d 118, 120, *appeal dismissed* 58 NY2d 824). " 'To acquire title to real property by adverse possession . . . the

possessor . . . [must] establish that the character of the possession is hostile and under a claim of right, actual, open and notorious, exclusive and continuous . . . for the statutory period of 10 years' " (*Dekdebrun v Kane*, 82 AD3d 1644, 1646). "The elements of an easement by prescription are similar although demonstration of exclusivity is not essential" (*Ellicott Cr. Homeowners Assn.*, 86 AD2d at 120; *see Di Leo v Pecksto Holding Corp.*, 304 NY 505, 511-512).

Here, defendant met its initial burden on its motion by submitting uncontroverted documentary evidence that it is the record owner of the property to which plaintiff claims to have obtained title by adverse possession and/or prescriptive easement. The burden thus shifted to plaintiff to "demonstrate [its] rights by competent evidence or at least raise a factual issue regarding [its] claim to title through adverse possession or prescriptive easement" (*Ellicott Cr. Homeowners Assn.*, 86 AD2d at 120), and plaintiff failed to meet that burden. Defendant established that neither plaintiff nor its predecessors in interest could have possessed or used the area in question in a continuous and uninterrupted manner and, with respect to adverse possession, in an exclusive manner, over the course of any 10-year period. Defendant is correct that there is no evidence that plaintiff's predecessors in interest used the alleged easement before plaintiff obtained the property in 1979. Defendant further established that part of a gas station covered a portion of the alleged easement until at least 1986 and that, from at least 1995 onward, vehicles with no affiliation to plaintiff have been parked on the alleged easement. Inasmuch as defendant's evidence illustrated the absence of both an uninterrupted 10-year period of possession or use for 10 years, exclusive or otherwise, defendant established its entitlement to a declaration in its favor on both the adverse possession and prescriptive easement claims as a matter of law.

We note that, in opposition to the motion, plaintiff submitted affidavits from two of its corporate officers and two neighboring business owners merely stating in a conclusory manner that plaintiff exercised uninterrupted, open, continuous, hostile, and adverse use and possession of the disputed area for over 10 years. Because those affidavits simply recited the legal elements of an easement but did not place them in the context of the facts of this case, they failed to raise any issues of fact for purposes of defeating defendant's motion (*see Villager Constr. v J. Kozel & Son*, 222 AD2d 1018; *Ellicott Cr. Homeowners Assn.*, 86 AD2d at 122-123). Additionally, the affidavit submitted by one of the neighboring business owners was insufficient to raise an issue of fact to defeat the motion because it was based upon information and belief rather than personal knowledge (*see Anderson v Livonia, Avon & Lakeville R.R. Corp.*, 300 AD2d 1134, 1135; *Wood v Nourse*, 124 AD2d 1020, 1021).

Because defendant established its entitlement to judgment as a matter of law on plaintiff's adverse possession and prescriptive

easement claims, defendant is entitled to a declaration in its favor.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

987

TP 11-00759

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

IN THE MATTER OF DANIEL A. LITTLE AND HELEN LITTLE, PETITIONERS,

V MEMORANDUM AND ORDER

TOWN OF FABIUS ZONING BOARD OF APPEALS, RESPONDENT.

CARDINALE & DELVECCHIO LAW FIRM, PLLC, CORTLAND (JOHN A. DELVECCHIO OF COUNSEL), FOR PETITIONERS.

DIRK J. OUDEMOOL, SYRACUSE, FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Anthony J. Paris, J.], entered April 1, 2011) to review a determination of respondent. The determination upheld the issuance of a certain certificate of compliance for mobile home occupancy.

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

Memorandum: Petitioners, the owners of real property in the Town of Fabius (Town), commenced this CPLR article 78 proceeding challenging the determination, issued following a public hearing, that upheld the Town Zoning Officer's 2010 issuance of a certificate of compliance for occupancy of a mobile home by tenants named in a lease agreement with the owners of neighboring property (owners). In 1993 respondent had issued a special permit to the owners for the placement of the mobile home on their property for the use of a full-time agricultural employee. As a preliminary matter, we agree with petitioners that this proceeding was improperly transferred to this Court inasmuch as petitioners do not challenge a determination made as a result of an evidentiary hearing directed by law (*see* CPLR 7803 [4]; 7804 [g]; *Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 770-771, *lv dismissed* 6 NY3d 890, *lv denied* 7 NY3d 708). Nevertheless, we review petitioners' contentions in the interest of judicial economy (*see Matter of W.K.J. Young Group v Zoning Bd. of Appeals of Vil. of Lancaster*, 16 AD3d 1021).

"A determination of a zoning board made after a public hearing should be sustained if it has a rational basis and is supported by evidence in the record" (*Matter of Haberman v Zoning Bd. of Appeals of*

Town of E. Hampton, 85 AD3d 1170, 1171). Pursuant to article VI, section 15 (C) (5) (a) of the Town's Zoning Law, the owners were permitted to maintain a mobile home on their property as long as it was "used as a dwelling by employees of an active farm operation." "Under a zoning ordinance which authorizes interpretation of its requirements by the board of appeals, specific application of a term of the ordinance to a particular property is . . . governed by the board's interpretation, unless unreasonable or irrational" (*Matter of Frishman v Schmidt*, 61 NY2d 823, 825). Here, respondent's determination that the property at issue was an "active farm operation" and that the tenants occupying the mobile home were "employees" of that operation is not unreasonable or irrational (*cf. Matter of Kinderhill Farm Breeding Assoc. v Walker*, 54 AD2d 811, *affd* 42 NY2d 919).

Contrary to petitioners' contentions, moreover, respondent adequately explained the rationale for its determination and afforded petitioners an opportunity to be heard at the September 2010 public hearing on their appeal challenging the Town Zoning Officer's issuance of the certificate of compliance for occupancy. Although the notice for respondent's subsequent hearing in December 2010 stated that members of the public would be permitted to be heard, that statement was made in error inasmuch as the record of the September hearing expressly provides that this matter was "concluded" at the September hearing. Thus, at the December hearing, "[a]ll that arguably remained was a vote on the matter and petitioners were not entitled to be heard further" (*Matter of Litz v Town Bd. of Guilderland*, 197 AD2d 825, 827). Finally, contrary to the contention of petitioners, respondent's answer was not deficient (*see* CPLR 7804 [d]).

Entered: September 30, 2011 Patricia L. Morgan
Clerk of the Court

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

988

TP 11-00646

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

IN THE MATTER OF NEW YORK STATE DIVISION OF HUMAN RIGHTS AND GENISE BENSON, PETITIONERS,

V MEMORANDUM AND ORDER

NANCY POTENZA DESIGN & BUILDING SERVICES, INC., ROCCO POTENZA, INDIVIDUALLY, HEALTHNOW NEW YORK, INC., DOING BUSINESS AS BLUECROSS BLUESHIELD OF WESTERN NEW YORK, POTENZA SERVICES INC., AS SUCCESSOR-IN-INTEREST, AND POTENZA SERVICE, INC., AS SUCCESSOR-IN-INTEREST, RESPONDENTS.

CAROLINE J. DOWNEY, BRONX (TONI ANN HOLLIFIELD OF COUNSEL), FOR PETITIONERS.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Joseph R. Glownia, J.], entered January 4, 2011) to enforce a determination of the New York State Division of Human Rights.

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

Memorandum: Petitioner New York State Division of Human Rights (SDHR) commenced this proceeding for judicial review and enforcement of an order pursuant to Executive Law § 298 finding that respondent Nancy Potenza Design & Building Services, Inc. was liable, as the complainant's employer, of aiding and abetting the sexual harassment of the complainant. The Administrative Law Judge (ALJ) awarded the complainant $10,000 in compensatory damages based on a hostile work environment claim and the Commissioner of SDHR (Commissioner) adopted the recommended order of the ALJ. We conclude that there is substantial evidence supporting the determination (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182).

The fact that the sexual harassment did not take place on the employer's premises does not relieve the employer of liability under the Human Rights Law (Executive Law art 15; *see Lockard v Pizza Hut*, 162 F3d 1062). Additionally, respondent Rocco Potenza, as the owner and president of the employer who condoned the sexual harassment, may be held individually liable for the discriminatory actions that damaged the complainant (*see Patrowich v Chemical Bank*, 63 NY2d 541,

542). Finally, we conclude that the amount of the award is reasonably related to the wrongdoing and is supported by the evidence before the Commissioner (*see Matter of New York State Dept. of Correctional Servs. v New York State Div. of Human Rights*, 265 AD2d 809).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

989

KA 10-00828

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL CAMERON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered November 25, 2009. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by providing that the order of protection shall expire on August 24, 2017 and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of rape in the third degree (Penal Law § 130.25 [3]). Defendant correctly contends that the waiver of the right to appeal does not encompass his contention that County Court erred in setting the expiration date of the order of protection from the date of sentencing rather than the date of conviction (*see People v Cambridge*, 55 AD3d 1381). Although defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]), we nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we modify the judgment by providing that the order of protection shall expire on August 24, 2017 (*see* CPL 530.13 [former (4) (i)]; *see generally Cambridge*, 55 AD3d 1381).

In appeal No. 2, defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Because the court made only general and conclusory findings of fact and conclusions of law, we are unable to conduct a meaningful review of the risk level assessment, particularly with respect to the court's assessment of 15 points for the failure of defendant to accept responsibility for his actions (*see People v Leopold*, 13 NY3d 923; *People v Smith*, 11 NY3d 797, 798;

People v Flax, 71 AD3d 1451). We therefore reverse the order and remit the matter to County Court for compliance with Correction Law § 168-n (3) (*see Flax*, 71 AD3d 1451).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

990

KA 11-00801

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL CAMERON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from an order of the Erie County Court (Michael F. Pietruszka, J.), entered December 1, 2009. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Erie County Court for further proceedings in accordance with the same Memorandum as in *People v Cameron* ([appeal No. 1] ___ AD3d ___ [Sept. 30, 2011]).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

991

KA 10-01110

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSEPH D. FAYETTE, DEFENDANT-APPELLANT.

BETZJITOMIR & BAXTER, LLP, BATH (TERRENCE BAXTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (KRISTYNA S. MILLS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered May 10, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Watts*, 78 AD3d 1593, *lv denied* 16 NY3d 838).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

992

KA 08-00436

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES R. STANFORD, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered September 26, 2007. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]). We reject defendant's contention that County Court erred in refusing to charge manslaughter in the second degree (§ 125.15 [1]) as an additional lesser included offense of murder in the second degree (§ 125.25 [1] [intentional murder]) as charged in the indictment. It is well settled that, "[t]o establish entitlement to a lesser included offense charge, the defendant must make two showings. First, it must be shown that . . . in all circumstances, not only in those presented in the particular case, it is impossible to commit the greater crime without concomitantly, by the same conduct, committing the lesser offense. That established, the defendant must then show that there is a reasonable view of the evidence in the particular case that would support a finding that he committed the lesser offense but not the greater" (*People v Glover*, 57 NY2d 61, 63). Although we agree with defendant that manslaughter in the second degree may be a lesser included offense of intentional murder (*see People v Brockett*, 74 AD3d 1218, 1219-1220; *People v Boyd*, 60 AD3d 779, 780, *lv denied* 12 NY3d 913; *see generally People v Sullivan*, 68 NY2d 495, 501), we conclude that there was no reasonable view of the evidence that would permit the jury to find that defendant committed manslaughter in the second degree but did not commit manslaughter in the first degree or intentional murder. The latter two crimes require evidence that defendant acted intentionally, whereas manslaughter in the second degree requires evidence that he acted recklessly. Defendant gave

several statements to the police in which he admitted that he stabbed the victim so that she would release her grip on him. The evidence also established that the victim was stabbed four times in the neck and that one of the wounds was several inches deep and had severed her major blood vessels. "Thus, by admitting intentional conduct, defendant negated any theory of recklessness . . . Furthermore, the number, depth, and placement of the victim's stab wounds were completely inconsistent with reckless rather than intentional conduct" (*People v Sussman*, 298 AD2d 205, 205, *lv denied* 99 NY2d 585; *cf. People v Castellano*, 41 AD3d 184, 185, *affd* 11 NY3d 850, *rearg denied* 12 NY3d 771).

The court also properly denied defendant's request for a jury charge on the justifiable use of deadly physical force to prevent or terminate a burglary (*see* Penal Law § 35.20 [3]). Viewing the evidence in the light most favorable to defendant (*see People v McManus*, 67 NY2d 541, 549; *People v Watts*, 57 NY2d 299, 301), we conclude that there was no reasonable view of the evidence that would permit a jury to conclude that defendant reasonably believed that deadly physical force was necessary to prevent or terminate a burglary (*see People v Petronio*, 34 AD3d 602, 603-604, *lv denied* 8 NY3d 948; *People v McDaniel*, 295 AD2d 371, *lv denied* 98 NY2d 770; *cf. People v Deis*, 97 NY2d 717, 719-720; *People v Fagan*, 24 AD3d 1185, 1186-1187).

In addition, the court properly denied defendant's request for a circumstantial evidence charge. It is well established that, where the charges against defendant are supported by both circumstantial and direct evidence, the court is not required to provide the circumstantial evidence charge (*see People v Daddona*, 81 NY2d 990, 992). Here, inasmuch as defendant's statements to the police "constituted direct evidence of several of the principal facts [at] issue" (*People v Campbell*, 69 AD3d 645, 646), the court properly denied his request for that charge (*see People v Alexander*, 153 AD2d 507, 509, *affd* 75 NY2d 979; *People v Buskey*, 13 AD3d 1058; *see generally People v Rumble*, 45 NY2d 879, 880-881).

Finally, the sentence is not unduly harsh or severe.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

993

KA 09-01469

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN P. LAVILLA, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (DAVID E. GANN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), entered June 16, 2009. The order directed defendant to pay restitution in the amount of $22,488.55.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reducing the amount of restitution ordered with respect to Erie Insurance Company of New York to $7,870.87 and reducing the collection surcharge to $1,037.26, thereby reducing the total amount of restitution ordered to $21,782.36, and as modified the order is affirmed.

Memorandum: Defendant appeals from an order of restitution arising from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). We note at the outset that, "[a]s a general rule, a defendant may not appeal as of right from a restitution order in a criminal case . . . Here, however, [County C]ourt bifurcated the sentencing proceeding by severing the issue of restitution for a separate hearing, and thus 'defendant may properly appeal as of right from both the judgment of conviction . . . and the sentence as amended . . ., directing payment of restitution . . ., [with] no need to seek leave to appeal from [the] order of restitution' " (*People v Brusie*, 70 AD3d 1395, 1396).

We reject defendant's contention that the People failed to establish the amount of restitution by a preponderance of the evidence (*see* CPL 400.30 [4]; *People v Tzitzikalakis*, 8 NY3d 217, 221-222). The People submitted the victim impact statement, which detailed the costs and damages resulting from defendant's actions, and that statement was supported by the victim's testimony at the restitution hearing (*see People v Howell*, 46 AD3d 1464, *lv denied* 10 NY3d 841; *People v Senecal*, 31 AD3d 980; *People v Periard*, 15 AD3d 693). In addition, the amount of restitution was supported by the business

records of the victim's insurance company, Erie Insurance Company of New York (Erie) (*see People v McLean*, 71 AD3d 1500, *lv denied* 14 NY3d 890; *People v Worthy*, 17 AD3d 1156, *lv denied* 5 NY3d 796; *see also People v Stevens*, 84 AD3d 1424, 1427; *see generally* CPLR 4518). We conclude, however, that the People correctly concede that some of the items for which restitution was requested in Erie's claim were improperly included. We therefore modify the order by reducing the amount of restitution ordered with respect to Erie to $7,870.87. Inasmuch as a 5% collection surcharge was also imposed, we further modify the order by reducing the collection surcharge to $1,037.26, thereby reducing the total amount of restitution ordered to $21,782.36.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

994

KA 08-01129

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRIS HANKS, DEFENDANT-APPELLANT.

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

TERRIS HANKS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered March 18, 2008. The judgment convicted defendant, upon his plea of guilty, of conspiracy in the second degree, criminal possession of a controlled substance in the first degree, criminal sale of a controlled substance in the second degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, conspiracy in the second degree (Penal Law § 105.15) and criminal possession of a controlled substance in the first degree (§ 220.21 [1]). Defendant contends in his main and pro se supplemental briefs that County Court erred in denying that part of his omnibus motion seeking to suppress evidence obtained through the execution of a series of eavesdropping warrants. Those warrants were issued during an investigation by the Attorney General's Statewide Organized Crime Task Force (Task Force) into a narcotics distribution network operating in and around the City of Syracuse. We note at the outset that defendant challenges only the first warrant and the fifth amended and extended warrant. We conclude that defendant does not have standing to challenge the first warrant inasmuch as it related solely to a coconspirator (*see People v Fonville*, 247 AD2d 115, 118 n).

Contrary to the contention of defendant in his main and pro se supplemental briefs, the record supports the court's finding that the application for the fifth amended and extended warrant established that "normal investigative procedures ha[d] been tried and ha[d] failed, or reasonably appear[ed] to be unlikely to succeed if tried,

or to be too dangerous to employ" (CPL 700.15 [4]; *see People v Rabb*, 16 NY3d 145, 152). In an affidavit supporting that warrant application, a detective detailed the traditional investigative techniques, including but not limited to physical surveillance of defendant and the use of confidential informants, that were utilized by Task Force members beginning four months prior to the issuance of the first warrant and continuing up to the date of the application for the fifth amended and extended warrant. The detective averred that, despite continued attempts, use of those traditional investigative techniques alone would not permit the Task Force to identify and successfully prosecute all suppliers of controlled substances, a stated goal of the investigation (*see People v Gray*, 57 AD3d 1473, 1474, *lv denied* 12 NY3d 854; *see generally Fonville*, 247 AD2d at 118-119). Further, because the detective provided details regarding the past and continued attempts to use traditional investigative techniques in connection with the investigation of defendant and his coconspirators, "it cannot be said that the [Task Force] relied solely on past investigations into [drug conspiracies] in general to support the[] assertion that normal investigative techniques would be generally unproductive in the [current] investigation" (*Rabb*, 16 NY3d at 154).

We reject the contention of defendant in his pro se supplemental brief that remedial action is required based on the failure of the court to "set forth on the record its findings of fact, its conclusions of law and the reasons for its determination" with respect to defendant's pro se memorandum of law concerning alleged material misrepresentations of fact in the supporting affidavits for the fifth amended and extended warrant application (CPL 710.60 [6]). The arguments contained in that memorandum of law are so plainly inadequate that the court was justified in summarily rejecting them (*see generally People v Jeffreys*, 284 AD2d 550, *lv denied* 99 NY2d 536). Indeed, defendant's pro se memorandum of law is unsworn and unsigned, and it therefore does not contain any "sworn allegations of fact" supporting his arguments therein (CPL 710.60 [1]). "Thus, defendant has failed to sustain his burden of proof that the search warrant affiant[s here] knowingly or recklessly submitted false information to the issuing [court] in order to obtain the [fifth amended and extended] search warrant" (*see People v Cohen*, 90 NY2d 632, 638). Defendant failed to preserve the remaining contentions in his main and pro se supplemental briefs for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: September 30, 2011 Patricia L. Morgan
Clerk of the Court

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

995

KA 09-01584

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

PEDRO J. COMACHO, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (KELLEY PROVO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered May 21, 2009. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

999

CA 11-00410

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

RALPH RINK, AS ADMINISTRATOR OF THE ESTATE
OF JOANNE RINK, DECEASED, AND RALPH RINK,
INDIVIDUALLY, CLAIMANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.

EXCELLUS HEALTH PLAN, INC.,
INTERVENOR-RESPONDENT.
(CLAIM NO. 114132.)

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

BOND, SCHOENECK & KING, PLLC, ROCHESTER (SCOTT M. PHILBIN OF COUNSEL), FOR INTERVENOR-RESPONDENT.

Appeal from an order of the Court of Claims (Diane L. Fitzpatrick, J.), entered April 20, 2010. The order granted the motion of Excellus Health Plan, Inc. for leave to intervene.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1000

CA 11-00429

PRESENT: SCUDDER, P.J., SMITH, SCONIERS, AND GORSKI, JJ.

PATRICK CROUGH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BJ'S WHOLESALE CLUB, INC.,
DEFENDANT-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (JONATHAN H. BARD OF COUNSEL), FOR DEFENDANT-APPELLANT.

FITZSIMMONS, NUNN, FITZSIMMONS & PLUKAS, LLP, ROCHESTER (JASON E. ABBOTT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered November 4, 2010 in a personal injury action. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for an injury he sustained to his nose while attempting to load a heavy box of merchandise into a pickup truck with the assistance of defendant's employee. Supreme Court denied defendant's motion seeking summary judgment dismissing the complaint. That was error.

It is axiomatic that "a duty of reasonable care owed by a[n alleged] tortfeasor to an injured party is elemental to any recovery in negligence" (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 584), and that "a duty may arise from negligent words or acts that induce reliance" (*Heard v City of New York*, 82 NY2d 66, 71, *rearg denied* 82 NY2d 889; *see Kievman v Philip*, 84 AD3d 1031, 1032). Here, however, defendant established in support of its motion that the voluntary action of its employee in agreeing to assist plaintiff did not create a duty to plaintiff. Although plaintiff relied upon the assistance of defendant's employee to load the box of merchandise, "the question is whether [the voluntary] conduct [of defendant's employee] placed plaintiff in a more vulnerable position than [he] would have been had defendant['s employee] done nothing" (*Heard*, 82 NY2d at 72). That is not the case here. It is undisputed that, although plaintiff was accompanied by his wife and adult daughter, he asked defendant's employee to help him load the box, and the employee agreed to do so. We therefore conclude that defendant established its

entitlement to judgment as a matter of law inasmuch as the actions of defendant's employee "neither enhanced the risk [plaintiff] faced [in loading the box], created a new risk nor induced [plaintiff] to forego some opportunity to avoid risk" (*id.* at 73; *see Malpeli v Yenna*, 81 AD3d 607, 608-609; *Van Hove v Baker Commodities*, 288 AD2d 927). We further conclude that plaintiff failed to raise a triable issue of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1001

CA 11-00743

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

CONNIE MOSS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SHIRLEY A. BATHURST, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (JEFFREY F. BAASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARK D. GROSSMAN, NIAGARA FALLS, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Paula L. Feroleto, J.), entered December 9, 2010 in a personal injury action. The order denied the motion of defendant Shirley A. Bathurst to dismiss the complaint and granted the cross motion of plaintiff for an extension of time to serve process on Shirley A. Bathurst.

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

Memorandum: In this action to recover damages for injuries she allegedly sustained in a motor vehicle accident, Shirley A. Bathurst (defendant) appeals from an order that denied her motion to dismiss the complaint against her and granted plaintiff's cross motion to extend the time in which to serve defendant. We affirm.

"If service is not made upon a defendant within the time provided in [CPLR 306-b], the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service" (CPLR 306-b). It is well settled that the determination to grant "[a]n extension of time for service is a matter within the court's discretion" (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101). We agree with defendant that plaintiff failed to establish good cause for an extension of time for service upon defendant. Nevertheless, that determination is not dispositive of the issue before us. "[A]lthough law office failure and the lack of reasonable diligence in effectuating service generally do not constitute good cause, the interest of justice standard of the statute [is] a separate, broader and more flexible provision [that may] encompass a mistake or oversight as long as there was no prejudice to the defendant" (*id.* at 102; *see Mead v Singleman*, 24 AD3d 1142, 1143-1144). After weighing the relevant factors, including the "expiration of the [s]tatute of [l]imitations, the meritorious nature

of the cause of action, the length of delay in service, the promptness of . . . plaintiff's request for the extension of time, and prejudice to defendant" (*Leader*, 97 NY2d at 105-106), and noting that no one factor is more important than the others, we reject defendant's contention that Supreme Court abused its discretion in denying her motion and granting plaintiff's cross motion.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1003

CA 10-02024

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

PATRICIA J. CURTO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARK DIEHL AND MELISSA SCHMIGEL,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

PATRICIA J. CURTO, PLAINTIFF-APPELLANT PRO SE.

HAGELIN KENT LLC, BUFFALO (VICTOR M. WRIGHT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), dated December 17, 2009. The order granted the motion of defendants to vacate a default judgment and ordered plaintiff to provide discovery.

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

Memorandum: We reject the contention of plaintiff that Supreme Court erred in granting that part of defendants' motion to vacate a default judgment. Inasmuch as defendants had previously appeared in this action, they were entitled to receive notice of plaintiff's motion for a default judgment (*see* CPLR 3215 [g] [1]; *Nowak v Oklahoma League for the Blind*, 289 AD2d 995). Plaintiff failed to provide defendants with such notice, and thus her motion for a default judgment was defective. We have reviewed plaintiff's remaining contentions and conclude that they are without merit.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1004

CA 10-02025

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

PATRICIA J. CURTO, PLAINTIFF-APPELLANT,

V ORDER

MARK DIEHL AND MELISSA SCHMIGEL,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

PATRICIA J. CURTO, PLAINTIFF-APPELLANT PRO SE.

HAGELIN KENT LLC, BUFFALO (VICTOR M. WRIGHT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), dated December 22, 2009. The order denied the motion of plaintiff seeking leave to reargue her opposition to defendants' motion to vacate a default judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1005

CA 10-02026

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

PATRICIA J. CURTO, PLAINTIFF-APPELLANT,

V ORDER

MARK DIEHL AND MELISSA SCHMIGEL,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 3.)

PATRICIA J. CURTO, PLAINTIFF-APPELLANT PRO SE.

HAGELIN KENT LLC, BUFFALO (VICTOR M. WRIGHT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), dated July 29, 2010. The order settled the record for appeals from orders entered December 17, 2009 and December 22, 2009.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1006

CA 11-00388

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

JOHN TENCZA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ST. ELIZABETH MEDICAL CENTER,
DEFENDANT-APPELLANT.

GALE & DANCKS, LLC, SYRACUSE (CATHERINE A. GALE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered July 6, 2010 in a medical malpractice action. The order, inter alia, directed defendant to pay plaintiff costs, disbursements and interest on a judgment.

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

Memorandum: Defendant appeals from an order in this medical malpractice action that, inter alia, denied its motion seeking to vacate a judgment entered in plaintiff's favor pursuant to CPLR 5003-a and ordered defendant to pay costs, disbursements and interest on that judgment. We affirm. Contrary to defendant's contention, plaintiff satisfied his obligation pursuant to CPLR 5003-a by tendering a general release and stipulation of discontinuance to defendant's attorney. The general release acknowledged the existence of a Medicare lien and provided "that a portion of the settlement will be paid to Medicare for [the] purpose[] of satisfying that lien." The parties thereafter agreed that defendant was permitted to withhold only $50,000 of the settlement to satisfy the Medicare lien. "Neither CPLR 5003-a, nor the parties' stipulation of settlement, imposed any additional requirement on the plaintiff or his attorney" (*Klee v Americas Best Bottling Co., Inc.*, 76 AD3d 544, 546).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1007

CA 11-00712

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

DARLENE TODD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PLSIII, LLC - WE CARE, LEON C. WASHINGTON,
DEFENDANTS-APPELLANTS,
AND OSCAR HASLEY, JR., DEFENDANT-RESPONDENT.
(ACTION NO. 1.)

OSCAR HASLEY, JR., PLAINTIFF-RESPONDENT,

V

PLSIII, LLC - WE CARE AND LEON C. WASHINGTON,
DEFENDANTS-APPELLANTS.
(ACTION NO. 2.)

CASCONE & KLUEPFEL, LLP, BUFFALO (MICHAEL T. REAGAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CANTOR, LUKASIK, DOLCE & PANEPINTO, BUFFALO (JAMES A. VERRICO OF COUNSEL), FOR PLAINTIFF-RESPONDENT DARLENE TODD.

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

HAGELIN KENT LLC, BUFFALO (VICTOR M. WRIGHT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered December 30, 2010 in a personal injury action. The order granted the motion of plaintiff Darlene Todd to set aside the jury verdict on the issue of liability with respect to defendants PLSIII, LLC - We Care and Leon C. Washington and granted a new trial on that issue.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the post-trial motion is denied and the verdict with respect to defendants PLSIII, LLC - We Care and Leon C. Washington is reinstated.

Memorandum: Darlene Todd, the plaintiff in action No. 1, was a passenger in a motor vehicle driven by Oscar Hasley, Jr., a defendant in action No. 1 and the plaintiff in action No. 2. The vehicle driven

by Hasley was involved in an accident with a vehicle owned by PLSIII, LLC - We Care (hereafter, PLSIII), a defendant in each action, and driven by another defendant in each action, Leon C. Washington. Todd, her daughter and Hasley testified at the trial on liability in both actions that, as Hasley's vehicle traveled on N. Humbolt Parkway in the City of Buffalo and approached the intersection with Main Street, the light was green. Washington testified that the light was red as he traveled on Main Street toward that intersection but that the light turned green before he reached the intersection. He therefore proceeded through the intersection, and his vehicle struck the driver's side of the vehicle driven by Hasley. The jury determined that, inter alia, Washington was negligent but that his negligence was not a proximate cause of the accident. Supreme Court granted Todd's post-trial motion seeking to set aside those parts of the verdict with respect to PLSIII and Washington (collectively, defendants) as inconsistent and against the weight of the evidence. Hasley joined in plaintiff's motion with respect to his action against defendants. Although the court's determination to set aside a verdict is " 'accorded great respect' " (*American Linen Supply Co. v M.W.S. Enters.*, 6 AD3d 1079, 1080, *lv dismissed* 3 NY3d 702), we nevertheless conclude that, here, " 'the verdict [with respect to defendants] is one that reasonable persons could have rendered after receiving conflicting evidence, [and thus] the court should not [have] substitute[d] its judgment for that of the jury' " (*Parr v Mongarella*, 77 AD3d 1429, 1430-1431).

"The well-established standard for determining . . . a motion [to set aside the verdict as against the weight of the evidence] is whether the evidence so preponderated in favor of the movant that the verdict could not have been reached on any fair interpretation of the evidence" (*Skowronski v Mordino*, 4 AD3d 782, 782-783; *see Grassi v Ulrich*, 87 NY2d 954, 956). Here, the court implicitly determined that the issues of negligence and proximate cause "are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" (*Skowronski*, 4 AD3d at 783 [internal quotation marks omitted]). That was error. In support of Todd's motion to set aside the verdict, Todd and Hasley relied primarily on stipulated evidence consisting of a chart depicting the sequence of the traffic signals at the two intersections through which Washington traveled before colliding with Hasley's vehicle. Todd and Hasley contended that, based on that evidence, the light at the intersection where the accident occurred would have been red when Washington approached it and thus that his negligence was a proximate cause of the accident. We conclude, however, that such evidence does not render the verdict "inconsistent or illogical" inasmuch as it is not conclusive with respect to whether the light was red or green when Washington entered the intersection in question (*id.* [internal quotation marks omitted]). Rather, the jury's determination that Washington was negligent but that his negligence was not a proximate cause of the accident "is one that could reasonably have been rendered upon the conflicting evidence presented by the parties at trial" (*Parr*, 77 AD3d at 1430; *see Skowronski*, 4 AD3d at 783). Indeed, Washington testified that he observed Hasley's vehicle traveling at a fast rate of speed toward the intersection of Main Street but that he

did not check to ensure that Hasley had stopped before Washington entered the intersection.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1008

CA 10-01139

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

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

V MEMORANDUM AND ORDER

KEITH REEVE, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (JANINE E. FRANK OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered January 22, 2010 in a proceeding pursuant to Mental Hygiene Law article 10. The order committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order determining that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10 and committing him to a secure treatment facility. Contrary to respondent's contention, we conclude that petitioner met its burden of establishing by clear and convincing evidence that respondent suffers from a mental abnormality (*see Matter of State of New York v Farnsworth*, 75 AD3d 14, 17, *appeal dismissed* 15 NY3d 848; *see generally* § 10.03 [i]). Petitioner also established by clear and convincing evidence that respondent has such an inability to control his behavior that he "is likely to be a danger to others and to commit sex offenses if not confined" (§ 10.07 [f]). Thus, Supreme Court's determination that respondent should be committed to a secure treatment facility is not against the weight of the evidence (*see generally id*.).

"Respondent's contention regarding the order issued following the probable cause hearing is not properly before us because no appeal lies from such an order" (*Matter of State of New York v Stein*, 85 AD3d 1646, 1648; *see* Mental Hygiene Law § 10.13 [b]). Respondent's further contention regarding the standard of proof is not preserved for our review inasmuch as he failed to raise it before the trial court (*see Matter of State of New York v Gierszewski*, 81 AD3d 1473, *lv denied* 17 NY3d 702; *Matter of State of New York v Chrisman*, 75 AD3d 1057; *cf.*

Matter of State of New York v Rashid, 16 NY3d 1, 13). In any event, respondent's contention is not properly before us because it is raised for the first time in his reply brief (*see Matter of State of New York v Zimmer* [appeal No. 4], 63 AD3d 1563; *see generally Turner v Canale*, 15 AD3d 960, *lv denied* 5 NY3d 702).

We have considered respondent's remaining contentions and conclude that they are without merit.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1010

TP 11-00600

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

IN THE MATTER OF TRACY E. SCOTT, PETITIONER,

V MEMORANDUM AND ORDER

BETH BERLIN, EXECUTIVE DEPUTY COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, AND LAURA CEROW, COMMISSIONER, JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

LEGAL AID SOCIETY OF MID-NEW YORK, INC., WATERTOWN (TERRENCE J. WHELAN OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT BETH BERLIN, EXECUTIVE DEPUTY COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE.

CARACCIOLI & NELSON, PLLC, WATERTOWN (KEVIN C. CARACCIOLI OF COUNSEL), FOR RESPONDENT LAURA CEROW, COMMISSIONER, JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Jefferson County [Hugh A. Gilbert, J.], entered March 11, 2011) to review a determination of respondents. The determination discontinued petitioner's Public Assistance and Food Stamps.

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

Memorandum: The determination sanctioning petitioner for failure to comply with the job search requirements of a work experience program without good cause is supported by substantial evidence (*see Matter of Gokey v Berlin*, 73 AD3d 1472; *Matter of LaSalle v Wing*, 256 AD2d 1243; *Matter of Bishop v New York State Dept. of Social Servs.*, 246 AD2d 391, *lv denied* 91 NY2d 813). Contrary to petitioner's contention, the sanctions imposed for her failure to comply with those requirements were proper (*see* Social Services Law § 131 [5]). We have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1011.1
TP 11-00163

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

IN THE MATTER OF PETRA WYDRA, PETITIONER,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, RESPONDENT.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (LAWRENCE J. ANDOLINA OF COUNSEL), FOR PETITIONER.

JEFFREY EICHNER, ACTING CORPORATION COUNSEL, ROCHESTER (IGOR SHUKOFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Thomas A. Stander, J.], entered January 24, 2011) to review a determination of respondent. The determination, among other things, terminated petitioner's employment as a police officer.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination to discontinue the payment of benefits to her under section 8A-6 of the Charter of respondent City of Rochester (City) and to terminate her employment as a police officer. We conclude that the petition should be granted. Section 8A-6 of the Charter provides in relevant part that the Chief of Police, on behalf of the City, shall compensate any member of the Police Department "who is injured in the performance of his or her duties or who is taken sick as a result of the performance of his or her duties . . . ." The parties agree that the section of the Charter in question is the local equivalent of General Municipal Law § 207-c. At the arbitration hearing, the City conceded that petitioner suffered from depression and anxiety, and that she was unable to work as a result of those conditions. Thus, the dispositive issue is whether there is a " 'direct causal relationship between [petitioner's] job duties and the resulting illness or injury' " (*Matter of D'Accursio v Monroe County*, 74 AD3d 1908, 1909, *lv denied* 15 NY3d 710). The statute, and thus the Charter section, do " 'not require that [employees] additionally demonstrate that their disability is related in a substantial degree to their job duties' " (*id.*; *see Matter of White v County of Cortland*, 97 NY2d 336, 339). Construed liberally, section 207-c merely requires "a qualified petitioner . . . [to] prove

a direct causal relationship between job duties and the resulting illness or injury . . . Preexisting non-work-related conditions do not bar recovery under section 207-c where [the] petitioner demonstrates that the job duties were a direct cause of the disability" (*White*, 97 NY2d at 340).

Here, petitioner's treating psychologist testified at the arbitration hearing that certain work-related incidents caused her to become severely depressed and anxious, which in turn rendered her unfit for duty. Indeed, even the City's expert witness, who evaluated petitioner several times and agreed that she suffered from depression and anxiety, testified that petitioner's condition "is certainly related to the job." The fact that the City's expert testified that petitioner had not suffered from posttraumatic stress disorder (PTSD) is of no moment, inasmuch as General Municipal Law § 207-c does not distinguish between categories of mental illness or disability. Because petitioner was disabled due to depression and anxiety that were caused, at least in part, by her professional duties, it is irrelevant whether she also suffered from PTSD. We thus conclude that the arbitrator's determination that petitioner's disability is unrelated to her job duties and that she therefore is not entitled to benefits under the City Charter's equivalent of section 207-c is not supported by substantial evidence in the record (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182).

We further conclude that the arbitrator's determination that the City lawfully terminated petitioner's employment must also be annulled. The sole basis for the termination, as stated in a letter to petitioner from the Chief of Police, was that she was "continuously absent for more than one (1) year due to a non-work related disability." Inasmuch as we have concluded above that petitioner is entitled to benefits under the Charter because her disability *is* work-related, it necessarily follows that the termination was improper (*see Matter of Ross v Town Bd. of Town of Ramapo*, 78 AD2d 656).

Entered: September 30, 2011 Patricia L. Morgan
Clerk of the Court

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

1011

TP 11-00777

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

IN THE MATTER OF MARK A. LICCIARDI, PETITIONER,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, RESPONDENT.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (LAWRENCE J. ANDOLINA OF COUNSEL), FOR PETITIONER.

JEFFREY EICHNER, ACTING CORPORATION COUNSEL, ROCHESTER (IGOR SHUKOFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Evelyn Frazee, J.], entered November 9, 2010) to review a determination of respondent. The determination terminated the employment of petitioner as a firefighter.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law by granting the petition in part and annulling those parts of the determination finding that petitioner is guilty of specification 2 of Charge 1, Charges 2 and 3, specification 1 of Charge 4 and Charge 7, and as modified the determination is confirmed without costs, and the matter is remitted to respondent for new findings with respect to Charge 7 and reconsideration of the penalty imposed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination terminating his employment as a firefighter for respondent. We agree with petitioner that several of the findings of misconduct rendered following a hearing are not supported by substantial evidence (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231). Four of the charges of misconduct involved petitioner's part-time outside employment while on sick leave from his employment as a firefighter. The record of the hearing, however, contains no "relevant proof as a reasonable mind may accept as adequate to support [the] conclusion" that working an additional part-time job while employed by respondent's Fire Department (Department) was not permitted or that the part-time job itself was improper or illegal (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180). Thus, the determination that petitioner's conduct violated the

Department's rule that members must at all times " 'conduct themselves to the credit of the Department,' " as alleged in specification 2 of Charge 1, and the rule that a firefighter shall " 'not conduct himself [or herself] in a manner unbecoming[] or prejudicial to the good reputation, the order, or discipline of the . . . Department,' " as alleged in specification 1 of Charge 4, are not supported by substantial evidence. We therefore modify the determination accordingly.

In Charge 2, respondent alleged that petitioner violated the Department's rule that a member shall not " 'knowingly[] or intentionally[] make[] or cause to be made a false report in connection with the . . . Department or other employees thereof' " by submitting a letter from his treating physician that stated without qualification that petitioner was unable to work during the time that he was out on sick leave. At the hearing, however, the physician testified that petitioner's disability was causally related to a work incident at the Department and that, although he was prevented from working as a firefighter, the part-time job outside of the Department was therapeutic. We thus conclude that the determination that petitioner knowingly and intentionally made a false report, as alleged in Charge 2, is not supported by substantial evidence, and we therefore further modify the determination accordingly.

Six of the charges of misconduct involved an incident in which petitioner allegedly made inappropriate comments about a Chief Officer of the Department. Charge 3 alleged that petitioner violated the Department's rule against " 'publically criticiz[ing] or ridicul[ing] the Department, its policies, or other employees . . . .' " We conclude that there is insufficient evidence from which to infer that the comments in question were made in the presence of the general public or otherwise publicly disseminated and thus that Charge 3 is not supported by substantial evidence. Charge 7 alleged that petitioner violated the Department's rule against the intentional making of a false report or statement concerning the Department or any of its members by making inappropriate, false and defamatory remarks about a Chief Officer. We agree with petitioner that respondent erred in finding him guilty of that charge based on conduct that was not alleged in the single specification supporting the charge (*see Matter of Brown v Saranac Lake Cent. School Dist.*, 273 AD2d 785, 785). Indeed, petitioner was found guilty of that charge based upon the finding that he had submitted false documentation regarding his sick leave, rather than upon any finding concerning the comments in question, and thus the finding of misconduct with respect to Charge 7 must be annulled as outside the scope of the charges (*see id.*). We therefore further modify the determination accordingly. Inasmuch as "the record contains evidence to support . . . [C]harge[7 as] actually made," we remit the matter to respondent for new findings on that charge and reconsideration of the penalty imposed with respect to all of the charges (*id.* at 786; *see Matter of Benson v Board of Educ. of Washingtonville Cent. School Dist.*, 183 AD2d 996, 997, *lv denied* 80

NY2d 756).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1015

KA 09-01941

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LON COLDIRON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered September 8, 2009. The judgment convicted defendant, upon a jury verdict, of arson in the third degree and attempted grand larceny in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of arson in the third degree (Penal Law § 150.10 [1]) and attempted grand larceny in the second degree (§§ 110.00, 155.40 [1]), defendant contends that County Court failed to comply with CPL 310.30 in responding to a jury note requesting a readback of certain testimony. The record establishes that the court gave defense counsel ample opportunity to provide input prior to the readback, and we thus conclude that defense counsel's "silence at a time when any error by the court could have been obviated by timely objection renders the [contention] unpreserved" for our review (*People v Starling*, 85 NY2d 509, 516; *see People v Smikle*, 82 AD3d 1697). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's further contention, the court properly allowed the People to present testimony concerning a prior uncharged arson. That testimony "was probative of defendant's motive and intent and provided background information explaining" defendant's conduct prior to the fire (*People v Collins*, 29 AD3d 434, 434). Nor did the court abuse its discretion in admitting the photograph of defendant's dog in evidence, inasmuch as the photograph was relevant to the prosecution's theory and thus was not admitted for the sole purpose of arousing the emotions of the jury (*see People v Hill*, 82 AD3d 1715, 1717). Finally, the sentence

is not unduly harsh or severe.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1016

KA 08-01205

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVIN J. GLOVER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered December 17, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, County Court properly refused to suppress both the handgun seized by the police from defendant's person and defendant's subsequent statements to the police. The record establishes that the officers were entitled to approach defendant to conduct a common-law inquiry because they had "a founded suspicion that criminal activity [was] afoot" (*People v De Bour*, 40 NY2d 210, 223). According to the testimony of two police officers at the suppression hearing, they were traveling in a marked police vehicle when they observed defendant turn and whistle toward a group of males standing in an area known for drug sales, at which time the group immediately dispersed from the area (*see generally People v Williams*, 39 AD3d 1269, 1270, *lv denied* 9 NY3d 871; *People v Rivera*, 175 AD2d 78, 79-80, *lv denied* 78 NY2d 1129). The officers also testified that, upon exiting their vehicle and approaching defendant, he "refus[ed] to remove his hand from his pocket despite the repeated demands of . . . the officers that he do so" (*People v Mack*, 49 AD3d 1291, 1292, *lv denied* 10 NY3d 866). Defendant's conduct, along with the fact that a shooting had recently occurred in the area of the encounter, "provided the officers with reasonable suspicion to believe that defendant posed a threat to their safety" (*id.*; *see People v Robinson*, 278 AD2d 808, *lv denied* 96 NY2d 787; *see generally People v Hensen*, 21 AD3d 172, 176, *lv denied* 5 NY3d

828). Thus, the frisk conducted by one of the officers at that time, as a result of which the officer discovered a loaded handgun in defendant's coat pocket, "was a 'constitutionally justified intrusion designed to protect the safety of the officers' . . ., and [we conclude] that the court properly refused to suppress the evidence seized as a result thereof, as well as defendant's ensuing statements" (*Mack*, 49 AD3d at 1292).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1017

KA 11-00105

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

DESHAUN FULMER, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Onondaga County Court (Joseph E. Fahey, J.), dated July 7, 2010. The order granted the motion of defendant to dismiss the first superceding indictment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion is denied, the first superseding indictment is reinstated and the matter is remitted to Onondaga County Court for further proceedings on that indictment.

Memorandum: The People appeal from an order granting defendant's motion to dismiss the first superseding indictment on statutory speedy trial grounds (*see* CPL 30.30 [1] [a]). We agree with the People that defendant's statutory speedy trial rights were not violated and thus that reversal is required. The People declared their readiness for trial within six months of the filing of the first accusatory instrument (*see* CPL 30.30 [1] [a]; *see generally People v Carter*, 91 NY2d 795, 798). County Court granted defendant's motion to dismiss the first superseding indictment on the ground that the People were charged with periods of postreadiness delay when they failed to act for a period of at least three weeks in obtaining a second saliva sample from defendant for DNA testing upon realizing that the first sample had been erroneously destroyed. "[P]ostreadiness delay may be charged to the People when the delay is attributable to their inaction and directly implicates their ability to proceed to trial" (*Carter*, 91 NY2d at 799). Here, the absence of the DNA sample did not implicate the People's ability to proceed to trial inasmuch as the People remained ready to proceed to trial even in the absence of the DNA test results (*see People v Wright*, 50 AD3d 429, 430, *lv denied* 10 NY3d 966; *People v Bargerstock*, 192 AD2d 1058, *lv denied* 82 NY2d 751).

Entered: September 30, 2011 Patricia L. Morgan
Clerk of the Court

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

1018

KA 10-00179

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LOGAN D. CRANE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered December 22, 2009. The judgment convicted defendant, upon a jury verdict, of falsifying business records in the first degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts of falsifying business records in the first degree (Penal Law § 175.10). 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 reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although a different result would not have been unreasonable in light of the conflicting testimony at trial (*see generally id.*), "it cannot be said that the jury failed to give the testimony and the conflicting inferences that may be drawn therefrom the weight they should be accorded" (*People v McLean*, 71 AD3d 1500, 1501, *lv denied* 14 NY3d 890).

Contrary to the further contention of defendant, the verdict finding him guilty of falsifying business records in the first degree is neither repugnant to nor inconsistent with the verdict finding him not guilty of grand larceny in the third degree (*see generally People v Trappier*, 87 NY2d 55, 58-59). "Read as a whole, it is clear that falsifying business records in the second degree is elevated to a first-degree offense on the basis of an enhanced intent requirement[,] . . . not any additional actus reus element" (*People v Taveras*, 12 NY3d 21, 27). Thus, "[t]he jury could . . . convict defendant of falsifying business records if the jury concluded that defendant had the intent to commit or conceal another crime, even if he was not convicted of the other crime" (*People v McCumiskey*, 12 AD3d 1145,

1146; *see People v Houghtaling*, 79 AD3d 1155, 1157-1158). In any event, grand larceny in the third degree has a monetary threshold (Penal Law § 155.35 [1]), which is an "essential element" that is not an element of falsifying business records in the first degree (*Trappier*, 87 NY2d at 58; *see generally People v Tucker*, 55 NY2d 1, 6-8, *rearg denied* 55 NY2d 1039).

Defendant further contends that County Court erred in refusing to suppress statements that he made to the police on the ground that he was in custody at the time and had not been administered *Miranda* warnings. We reject defendant's contention that he was in custody when he made the statements. As the court properly determined, " 'a reasonable person in defendant's position, innocent of any crime, would not have believed that he or she was in custody, and thus *Miranda* warnings were not required' " (*People v Daniels*, 75 AD3d 1169, 1169, *lv denied* 15 NY3d 892; *see generally People v Paulman*, 5 NY3d 122, 129; *People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851). Although the interview between defendant and the police may be characterized as accusatory in nature (*see People v Lunderman*, 19 AD3d 1067, 1068-1069, *lv denied* 5 NY3d 830; *People v Robbins*, 236 AD2d 823, 824-825, *lv denied* 90 NY2d 863), the record of the suppression hearing establishes that it was not in fact "conducted in a police-dominated atmosphere" (*Robbins*, 236 AD2d at 824). Indeed, the record establishes that defendant voluntarily agreed to meet with the police detective, who was not in uniform and was operating an unmarked police vehicle; the interview occurred in the parking lot of a store; defendant was not restrained in any manner during the interview; and the detective specifically informed defendant that he "wasn't there to arrest him" (*see People v Semrau*, 77 AD3d 1436, 1437, *lv denied* 16 NY3d 746; *People v Duda*, 45 AD3d 1464, 1466, *lv denied* 10 NY3d 764; *cf. Robbins*, 236 AD2d at 824-825). "It is well settled that, 'where there are conflicting inferences to be drawn from the proof, the choice of inferences is for the [suppression court. T]hat choice is to be honored unless unsupported, as a matter of law' " (*Semrau*, 77 AD3d at 1437), which cannot be said here.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1020

CA 11-00312

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

BEATRICE S. PHELPS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MELISSA A. RANGER, CHRISTOPHER M. DWYER,
JAMIE C. COGAN, STEPHANIE M. COGAN,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

MITCHELL GORIS & STOKES, LLC, CAZENOVIA (PATRICK J. O'SULLIVAN OF COUNSEL), FOR DEFENDANT-APPELLANT MELISSA A. RANGER.

MELVIN & MELVIN, PLLC, SYRACUSE (MICHAEL R. VACCARO OF COUNSEL), FOR DEFENDANT-APPELLANT CHRISTOPHER M. DWYER.

O'SHEA MCDONALD & STEVENS, LLP, ROME (TIMOTHY BRIAN O'SHEA OF COUNSEL), FOR DEFENDANTS-APPELLANTS JAMIE C. COGAN AND STEPHANIE M. COGAN.

ROBERT E. LAHM, PLLC, SYRACUSE (ROBERT E. LAHM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered May 26, 2010 in a personal injury action. The order denied the motion of defendants Jamie C. Cogan and Stephanie M. Cogan and cross motions of Melissa A. Ranger and Christopher M. Dwyer for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, damages for injuries she allegedly sustained when the vehicle in which she was a passenger, driven by defendant Melissa A. Ranger, collided head-on with a vehicle driven by defendant Christopher M. Dwyer. The vehicle driven by Dwyer was then struck by a vehicle driven by defendant Jamie C. Cogan and owned by defendant Stephanie M. Cogan. Supreme Court properly denied the motion of the Cogan defendants and the cross motions of Dwyer and Ranger seeking summary judgment dismissing the complaint and any cross claims against them on the ground that they were confronted with an emergency situation, i.e., blowing snow that produced white-out conditions. Even assuming, arguendo, that the defendant drivers were confronted with an emergency situation, we conclude that "there are issues of fact with respect to

the appropriateness of the conduct of the [defendant drivers] in light of all of the circumstances, including the severely inclement weather, and thus summary judgment is not appropriate" (*Sossin v Lewis*, 9 AD3d 849, 851, *amended on rearg on other grounds* 11 AD3d 1045). Contrary to the contention of Dwyer, we further conclude that there are issues of fact whether the vehicle driven by Ranger crossed into his lane and, if so, whether he acted reasonably under the circumstances (*see Rowen v Harris*, 45 AD3d 1420). Finally, there is a triable issue of fact whether there was only a single impact between the vehicle driven by Dwyer and that driven by Ranger, or whether there was a second impact to the vehicle driven by Ranger when the vehicle driven by Cogan struck Dwyer's vehicle and pushed it into the vehicle driven by Ranger (*see generally Bauman v Benlivi*, 291 AD2d 470).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1026.1

CA 11-00978

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

MICHAEL J. LOGRASSO AND PATRICIA A. LOGRASSO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF TONAWANDA, CITY OF TONAWANDA POLICE
DEPARTMENT AND MICHAEL E. ROGERS,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

WEBSTER SZANYI LLP, BUFFALO (RYAN G. SMITH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered March 16, 2011 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.

Same Memorandum as in *LoGrasso v City of Tonawanda* ([appeal No. 1] ___ AD3d ___ [Sept. 30, 2011]).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1026.2

OP 11-01202

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

IN THE MATTER OF H.H. WARNER, LLC, PETITIONER,

V MEMORANDUM AND ORDER

ROCHESTER GENESEE REGIONAL TRANSPORTATION AUTHORITY, RESPONDENT.

HISCOCK & BARCLAY, LLP, ROCHESTER (JAMES S. GROSSMAN OF COUNSEL), FOR PETITIONER.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (KATHLEEN M. BENNETT OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to EDPL 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul a determination of respondent to acquire certain real property by eminent domain.

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

Memorandum: Petitioner commenced this proceeding pursuant to EDPL 207 seeking to annul the determination to condemn three of its parcels in downtown Rochester, which are currently parking lots, for use as a regional and intercity bus transit center. Petitioner challenges only whether, pursuant to EDPL 207 (C) (3), respondent's determination and findings "were made in accordance with procedures set forth in" the State Environmental Quality Review Act ([SEQRA] ECL art 8). As a preliminary matter, we reject respondent's contention that the challenge to the SEQRA determination is untimely. Although the amended negative declaration was issued on June 8, 2010, respondent's determination to condemn the property was not made until May 5, 2011. A proceeding under EDPL 207 must be commenced within 30 days "after the condemnor's completion of its publication of its determination and findings pursuant to [EDPL 204]" (EDPL 207 [A]), and it is undisputed that petitioner commenced this EDPL proceeding in a timely manner. EDPL 207 (C) (3) was amended in 1991 explicitly to allow courts to review a SEQRA determination in the context of a proceeding to challenge a determination to condemn property. The statute does not require that a separate CPLR article 78 proceeding must have been commenced in order to challenge an earlier SEQRA determination; in fact, "[t]he 1991 amendment was intended to permit a reviewing court to pass on both the EDPL issues and the SEQRA issues in one proceeding[,] thereby facilitating prompt review and conserving

judicial resources" (*Matter of East Thirteenth St. Community Assn. v New York State Urban Dev. Corp.*, 84 NY2d 287, 297).

On the merits, we agree with respondent that it "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417; *see Matter of C/S 12th Ave. LLC v City of New York*, 32 AD3d 1, 7; *Matter of Gyrodyne Co. of Am., Inc. v State Univ. of N.Y. at Stony Brook*, 17 AD3d 675, 676, *lv denied* 5 NY3d 716). Respondent's determination was not affected by an error of law, nor was it arbitrary or capricious or an abuse of discretion (*see generally Matter of Town of Dryden v Tompkins County Bd. of Representatives*, 78 NY2d 331, 333). Contrary to petitioner's contention, respondent renewed and updated its SEQRA review once the scope of the project decreased, and it considered alternative locations for the project. In addition, while the decreased scope of the project would not provide the same economic revitalization to the downtown area in question as would have the initial proposed project, respondent appropriately considered that factor in its SEQRA review. In reviewing a SEQRA determination, the role of the courts is not to "weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively" (*Jackson*, 67 NY2d at 416), and we conclude that respondent satisfied the procedural and substantive requirements of SEQRA herein.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1026

CA 11-00423

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

MICHAEL J. LOGRASSO AND PATRICIA A. LOGRASSO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF TONAWANDA, CITY OF TONAWANDA POLICE
DEPARTMENT AND MICHAEL E. ROGERS,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

WEBSTER SZANYI LLP, BUFFALO (RYAN G. SMITH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered May 24, 2010 in a personal injury action. The order, insofar as appealed from, denied the motion of defendants for summary judgment and determined that the standard of ordinary negligence applies.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Michael J. LoGrasso (plaintiff) when the vehicle he was driving was struck by a police vehicle driven by defendant Michael E. Rogers, a detective in defendant City of Tonawanda Police Department. In appeal No. 1, defendants appeal from that part of an order denying their motion seeking summary judgment dismissing the complaint on the ground that the accident occurred when Rogers was engaged in an emergency operation while proceeding past a stop sign and as a matter of law did not drive with "reckless disregard for the safety of others" (Vehicle and Traffic Law § 1104 [e]). According to defendants, Supreme Court erred in determining that the standard of ordinary negligence applies in this case. In appeal No. 2, defendants appeal from an order denying their subsequent motion seeking summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as a result of the accident within the meaning of Insurance Law § 5102 (d).

With respect to the order in appeal No. 1, we conclude that the court properly denied defendants' motion. "[T]he reckless disregard

standard of care in Vehicle and Traffic Law § 1104 (e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b)" (*Kabir v County of Monroe*, 16 NY3d 217, 220). Here, Rogers did not in fact proceed past a stop sign, conduct that is exempted from the rules of the road under section 1104 (b), but rather he stopped and looked both ways before he proceeded into the intersection and struck plaintiff's vehicle. Thus, the court properly concluded that his "injury-causing conduct . . . is governed by the principles of ordinary negligence" (*Kabir*, 16 NY3d at 220), and there are triable issues of fact in the record before us with respect to his alleged negligence (*see Tatishev v City of New York*, 84 AD3d 656, 657).

With respect to the order in appeal No. 2, we conclude that the court properly denied defendants' motion seeking summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury in the accident. Defendants met their initial burden by submitting evidence that plaintiff's alleged disc injury was related to a preexisting condition (*see Carrasco v Mendez*, 4 NY3d 566, 579-580; *Clark v Perry*, 21 AD3d 1373, 1374). Plaintiffs, however, raised a triable issue of fact precluding summary judgment by submitting objective medical evidence that plaintiff's alleged C6-C7 herniated disc injury is distinguishable from his preexisting condition and is causally related to the accident (*see Schultz v Penske Truck Leasing Co., L.P.*, 59 AD3d 1119, 1120-1121).

Entered: September 30, 2011 Patricia L. Morgan
Clerk of the Court

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

1028

CA 11-00729

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

MERRILL LYNCH CREDIT CORPORATION, PLAINTIFF,

V MEMORANDUM AND ORDER

DOUGLAS P. SMITH, LISA A. SMITH, MARK CHAMBERLAIN, ALSO KNOWN AS MARK B. CHAMBERLAIN, ALEXANDRA M. CHAMBERLAIN, ET AL., DEFENDANTS.

MARK CHAMBERLAIN AND ALEXANDRA M. CHAMBERLAIN, THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

INDEPENDENT TITLE AGENCY, LLC, THIRD-PARTY DEFENDANT-RESPONDENT.

THE WOLFORD LAW FIRM LLP, ROCHESTER (VICTORIA SCHMIDT GLEASON OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (HEDWIG M. AULETTA OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered August 19, 2010. The order granted the motion of third-party defendant to dismiss the third-party complaint and denied the cross motion of third-party plaintiffs for partial summary judgment.

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

Memorandum: Defendants-third-party plaintiffs, Mark Chamberlain and Alexandra M. Chamberlain, purchased property from defendants Douglas P. Smith and Lisa A. Smith in September 1997. In conjunction therewith, third-party defendant performed a title search on the property and prepared a title abstract in July 1997, which was re-certified at the time of the closing in September. The title abstract, however, failed to list an outstanding mortgage in the amount of $50,000 to secure a loan given by plaintiff to the Smiths in July 1997. In December 2008, plaintiff commenced this mortgage foreclosure action after the Smiths failed to make payments on the loan, and the Chamberlains in turn commenced a third-party action asserting causes of action for fraud, negligent misrepresentation, and breach of contract.

Supreme Court properly granted third-party defendant's motion to dismiss the third-party complaint, on the grounds that the cause of action for fraud did not comply with CPLR 3016 (b) and the remaining two causes of action were time-barred. As a preliminary matter, we reject the Chamberlains' contention that the court committed procedural errors in considering the motion. The court did not convert third-party defendant's motion to dismiss to a motion for summary judgment (*see* CPLR 3211 [c]). Rather, as indicated in the court's August 2009 order and August 2010 decision and order, the court denied third-party defendant's first motion to dismiss without prejudice and with the proviso that it would "re-consider" that motion at the conclusion of discovery. Based on those circumstances, third-party defendant's renewal of its motion to dismiss did not violate the single motion rule set forth in CPLR 3211 (e). Contrary to the Chamberlains' further contention, nothing in CPLR 3211 (e) prohibits a party from moving to dismiss a cause of action based on the statute of limitations after raising that defense in an answer (*see generally Goldenberg v Westchester County Health Care Corp.*, 16 NY3d 323, 326).

With respect to the fraud cause of action, the Chamberlains were required to show " 'misrepresentation of a material fact, scienter, justifiable reliance, and injury' " (*Simmons v Washing Equip. Tech.*, 51 AD3d 1390, 1391). We agree with third-party defendant that the Chamberlains failed to plead the allegations of fraud with sufficient particularity as required by CPLR 3016 (b) (*see Greschler v Greschler*, 51 NY2d 368, 375; *Pope v Saget*, 29 AD3d 437, 441, *lv denied* 8 NY3d 803) and that, "when confronted with [third-party] defendant's motion to dismiss, [they] failed to come forth with any facts or circumstances constituting the claimed fraud as required by law" (*Greschler*, 51 NY2d at 375). Indeed, the Chamberlains' cause of action for fraud merely repeated the allegations for the negligent misrepresentation cause of action and added an allegation that third-party defendant had actual knowledge that its representation was false when made. "This single allegation of scienter, without additional detail concerning the facts constituting the alleged fraud, is insufficient under the special pleading standards required under CPLR 3016 (b)" (*Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 554, *mot to amend remittitur granted* 66 NY2d 812; *see Empire of Am., Fed. Sav. Bank v Arthur Andersen & Co.* [appeal No. 2], 129 AD2d 990, 991).

With respect to the negligent misrepresentation and breach of contract causes of action, the court properly dismissed them as untimely. Contrary to the Chamberlains' contention, the doctrine of equitable estoppel does not apply. The Chamberlains had to show that they were "induced by fraud, misrepresentations or deception to refrain from filing a timely action" (*Simcuski v Saeli*, 44 NY2d 442, 449), and that they reasonably relied on third-party defendant's alleged fraud, misrepresentations or deception (*see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552-553; *Zumpano v Quinn*, 6 NY3d 666, 674). Here, the Chamberlains have shown no "subsequent and specific actions by [third-party defendant that] somehow kept them from timely

bringing suit" (*Zumpano*, 6 NY3d at 674).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1029

CA 11-00003

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

JAMES R. MYERS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DIANE C. MYERS, DEFENDANT-RESPONDENT.

MERKEL AND MERKEL, ROCHESTER (DAVID A. MERKEL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL A. ROSENHOUSE, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered March 29, 2010 in a divorce action. The judgment, among other things, awarded defendant spousal maintenance in the amount of $1,000 per month for a period of seven years.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the ninth decretal paragraph and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Ontario County, for further proceedings in accordance with the following Memorandum: Plaintiff husband contends on appeal in this divorce action that Supreme Court erred in awarding maintenance to defendant wife. We note at the outset that the husband's notice of appeal recites that he is appealing from a portion of the decision of the Special Referee incorporated in a "Decree of Divorce." Although the husband instead should have taken his appeal from the judgment of divorce, in the exercise of our discretion we treat the notice of appeal as valid and deem the appeal as taken from the judgment (*see* CPLR 5520 [c]; *Francis v Francis*, 72 AD3d 1594, 1595).

We conclude that the court erred in awarding maintenance without setting forth all relevant factors enumerated in Domestic Relations Law § 236 (B) (6) (a) considered by the court in awarding such maintenance and the reasons for its decision (*see* § 236 [B] [6] [b]; *Hartog v Hartog*, 85 NY2d 36, 51-52; *Mayle v Mayle*, 299 AD2d 869). In particular, although the court granted the wife a substantial distributive award, we are unable to discern from the record whether the court considered that award in determining the amount and duration of maintenance (*see* § 236 [B] [6] [a] [1]; *Reed v Reed*, 55 AD3d 1249, 1251). Likewise, despite evidence that the wife had a degree in accounting, marketable skills and an extensive employment history, the court failed to set forth a determination whether the wife was or

could be self-supporting (*see* § 236 [B] [6] [a] [4]; *see generally Reed*, 55 AD3d at 1251; *Lo Maglio v Lo Maglio*, 273 AD2d 823, 824, *appeal dismissed* 95 NY2d 926). Although there was also conflicting evidence presented on the issue whether the wife contributed to the household as "a spouse, parent, wage earner and homemaker" (§ 236 [B] [6] [a] [8]), the court failed to make any factual or credibility determinations concerning that issue. Indeed, the court failed to provide any reason for the amount and duration of maintenance awarded, but merely set forth the ages, health and incomes of the parties (*see* § 236 [B] [6] [b]*; Hartog*, 85 NY2d at 51). Based on the foregoing, we are unable to determine whether the amount and duration of the maintenance awarded " 'reflects an appropriate balancing of [the wife's] needs and [the husband's] ability to pay' " (*Burns v Burns*, 70 AD3d 1501, 1503). We therefore modify the judgment by vacating the amount awarded for maintenance, and we remit the matter to Supreme Court to determine the amount and duration of maintenance, if any, after setting forth all relevant factors enumerated in Domestic Relations Law § 236 (B) (6) (a) that it considered and "the reasons for its decision" (§ 236 [B] [6] [b]).

We also agree with the husband that the court erred in awarding the wife retroactive maintenance without providing him with a credit for the carrying costs he paid on the marital home during the pendency of the action (*see Skladanek v Skladanek*, 60 AD3d 1035, 1037; *Southwick v Southwick*, 214 AD2d 987, 987-988; *Petrie v Petrie*, 124 AD2d 449, 451, *lv dismissed* 69 NY2d 1038), and we therefore further modify the judgment accordingly. Thus, upon remittal, the court must also determine the amount of those payments made during the pendency of the action and the amount of retroactive maintenance, if any, to be awarded to the wife (*see Petrie*, 124 AD2d at 451).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1030

CA 11-00662

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

ERICA L. NIEMANN AND DANIEL ELLIS, AS CO-ADMINISTRATORS OF THE ESTATE OF TIMOTHY W. NIEMANN, DECEASED, PLAINTIFFS-APPELLANTS,

V ORDER

ST. JOSEPH'S HOSPITAL HEALTH CENTER, RONALD CAPUTO, M.D., SJH CARDIOLOGY ASSOCIATES, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (DAVID H. ELIBOL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (MAUREEN E. MANEY OF COUNSEL), FOR DEFENDANT-RESPONDENT ST. JOSEPH'S HOSPITAL HEALTH CENTER.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (BRIAN M. GARGANO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS RONALD CAPUTO, M.D. AND SJH CARDIOLOGY ASSOCIATES.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered January 11, 2011 in a wrongful death action. The order denied the motion of plaintiffs to vacate a stipulation of discontinuance.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1031

CA 11-00644

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

JAMES M. STARR, JR., INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF STAR LYN STARR, AN INFANT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROGER H. HOLES, DEFENDANT-RESPONDENT, JOHN LIVELY AND WENDY LIVELY, DEFENDANTS.

HOGAN WILLIG, AMHERST (AMANDA L. LOWE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WAGNER & HART, LLP, OLEAN (JANINE C. FODOR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered June 10, 2010 in a personal injury action. The order granted the motion of defendant Roger H. Holes for summary judgment dismissing the complaint against him.

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 against defendant Roger H. Holes is reinstated.

Memorandum: Plaintiff commenced this action, individually and on behalf of his daughter, seeking damages for burn injuries sustained by his daughter when she fell into a basin of water. The basin had been placed on a grate covering a floor furnace in an apartment leased to defendants John and Wendy Lively by Roger H. Holes (defendant). Supreme Court erred in granting defendant's motion seeking summary judgment dismissing the complaint against him. "While an out-of-possession landlord generally will not be responsible for dangerous conditions existing on leased premises, it is settled that [a] landlord may be liable for failing to repair a dangerous condition, of which [he or she] has notice, on leased premises if the landlord assumes a duty to make repairs and reserves the right to enter in order to inspect or to make such repairs" (*Oates v Iacovelli*, 80 AD3d 1059, 1060 [internal quotation marks omitted]). Defendant failed to establish as a matter of law that he lacked control of the premises and thus that he could not be held liable in this case (*see Rose v Niagara Mohawk Power Corp.*, 298 AD2d 834), and his own submissions raise a triable issue of fact whether he had notice of the allegedly dangerous condition (*see Finch v Ryder Truck Rental, Inc.*, 68 AD3d 1754, 1754-1755). Defendant also failed to establish that section

RM1408 of the applicable Residential Code of New York State does not apply to the subject floor furnace (*see Brice v Vermeulen*, 74 AD3d 858), or that the alleged violation of that section was not a proximate cause of the injuries sustained by plaintiff's daughter (*see Sanchez v Irun*, 83 AD3d 611, 612).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1032.1

CA 11-00042

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

GARY W. GILPIN AND ANN C. GILPIN,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

OSWEGO BUILDERS, INC., HOWARD D. OLINSKY
AND OSLAW, INC.,
DEFENDANTS-APPELLANTS-RESPONDENTS.

HISCOCK & BARCLAY, LLP, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ANN M. ALEXANDER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered April 7, 2010. The order, among other things, denied in part the motion of defendants for partial summary judgment and denied the cross motion of plaintiffs for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of defendants' motion for partial summary judgment dismissing the breach of warranty claim with respect to mold, denying partial summary judgment to defendants dismissing the second cause of action, reinstating that claim with respect to mold as well as the second cause of action, and denying judgment to defendants on their counterclaim and as modified the order is affirmed without costs in accordance with the following Memorandum: Plaintiffs commenced this action alleging that they purchased a residence in a subdivision from defendant Oswego Builders, Inc. (Oswego Builders) and that, prior to the closing, defendants agreed to complete certain repairs, including addressing "basement moisture." On the day of the closing, plaintiffs indicated in the "final home inspection check list" that there was, inter alia, water in the basement. According to their amended complaint, however, plaintiffs closed on the property on the condition that "all [deficient] items would be corrected." Shortly thereafter, mold was discovered in the basement of the house. When defendants refused to remedy the deficiencies in the house, including the moisture problem in the basement, plaintiffs commenced this action asserting causes of action for, inter alia, breach of warranty and fraudulent misrepresentation. Defendants asserted a counterclaim for plaintiffs' breach of the restrictive covenants of the subdivision by, inter alia,

operating a business out of the residence.

Defendants moved for partial summary judgment seeking to dismiss all claims against defendant Howard D. Olinsky, the president of Oswego Builders, as well as the claim for breach of warranty with respect to mold. Defendants contended that the "assertion of claims against Defendant Olinsky personally is little more than an improper effort to restructure the transaction to insert [him] as an additional party to the Contract." Plaintiffs cross-moved for partial summary judgment with respect to their second cause of action, for fraudulent misrepresentation, and for dismissal of defendants' counterclaim. With respect to defendants' motion, Supreme Court denied that part with respect to Olinsky and granted that part for partial summary judgment dismissing the breach of warranty claim with respect to mold. With respect to plaintiffs' cross motion, the court denied the cross motion in its entirety and instead granted summary judgment in defendants' favor dismissing the second cause of action, for fraudulent misrepresentation, and in addition granted judgment to defendants on their counterclaim.

We agree with plaintiffs on their cross appeal that the court erred in granting that part of defendants' motion for partial summary judgment dismissing their breach of warranty claim with respect to mold. The " 'interpretation of an unambiguous contract provision is a function for the court, and matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument' " (*Chimart Assoc. v Paul*, 66 NY2d 570, 572-573; *see generally Abramo v HealthNow N.Y., Inc.*, 23 AD3d 986, 987, *lv denied* 6 NY3d 714). In determining whether a contract is ambiguous, the court first must determine whether the contract "on its face is reasonably susceptible of more than one interpretation" (*Chimart Assoc.*, 66 NY2d at 573; *see St. Mary v Paul Smith's Coll. of Arts & Sciences*, 247 AD2d 859). It is well settled that, "[i]f there is ambiguity in the terminology used . . . and determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence, then such determination is to be made by the jury . . . On the other hand, if the equivocality must be resolved wholly without reference to extrinsic evidence the issue is to be determined as a question of law for the court" (*Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172).

Defendants, as the movants seeking partial summary judgment dismissing the claim for breach of warranty with respect to mold, had the burden of establishing that their "construction of [that part of the contract] is the only construction which can fairly be placed thereon" (*Nancy Rose Stormer, P.C. v County of Oneida*, 66 AD3d 1449, 1450 [internal quotation marks omitted]; *see Jellinick v Naples & Assoc.*, 296 AD2d 75, 78-79). Here, defendants failed to meet that burden. Pursuant to the terms of the builder's warranty, any issues with moisture in the house *prior* to closing were within the builder's "control" to remedy and correct, while the waiver of damages for mold in the warranty applies to damages caused by mold *after* the closing.

The warranty further provides, however, that the builder is not responsible for "*any* damages caused by mold" (emphasis added). Because we thus conclude that the waiver for mold in the builder's warranty is ambiguous, extrinsic evidence is admissible to ascertain the parties' intent, but defendants failed to submit any such extrinsic evidence to establish their entitlement to judgment as a matter of law on this issue (*see Camperlino v Town of Manlius Mun. Corp.*, 78 AD3d 1674, 1676-1677, *lv dismissed* 17 NY3d 734). Indeed, defendants' submissions in support of their motion do not clarify the parties' intent with respect to the builder's warranty concerning mold, but merely address Olinsky's individual liability. Thus, the court should have denied that part of defendants' motion with respect to mold regardless of the sufficiency of plaintiffs' opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853), and we therefore modify the order accordingly.

We also conclude that the court erred in granting summary judgment to defendants dismissing plaintiffs' fraudulent misrepresentation claim pursuant to CPLR 3212 (b), which provides that, "[i]f it shall appear that any party other than the moving party is entitled to summary judgment, the court may grant such judgment without the necessity" of a cross motion. Here, plaintiffs cross-moved for partial summary judgment on their second cause of action, for fraudulent misrepresentation, but the court instead granted partial summary judgment to defendants dismissing that cause of action. "[A] misrepresentation of a material fact which is collateral to the contract and serves as an inducement to enter into the contract is sufficient to sustain a cause of action sounding in fraud" (*Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 898). Even "misrepresentations included in brochures and other materials, and not in the contract itself, may constitute the basis of a cause of action sounding in fraud" (*id*. at 899; *see Board of Mgrs. of Marke Gardens Condominium v 240/242 Franklin Ave., LLC*, 71 AD3d 935). Plaintiffs established their entitlement to partial summary judgment as a matter of law on their fraudulent misrepresentation cause of action, but defendants raised a triable issue of fact inasmuch as the conflicting affidavits of plaintiffs and Olinsky raise issues of credibility that can only be resolved by a trier of fact (*see Burgio v Ince*, 79 AD3d 1733, 1734-1735; *Harrington Group, Inc. v B/G Sales Assoc., Inc.*, 41 AD3d 1161, 1162). Additionally, contrary to the court's decision, the general language in the merger clause in the purchase offer "did not preclude the plaintiffs' claim of fraud in the inducement or the plaintiffs' use of parol evidence to establish their reliance upon certain representations made by the defendants' [real estate agent and Energy Star rater]" (*Lieberman v Greens at Half Hollow, LLC*, 54 AD3d 908, 909; *see Miller v Icon Group LLC*, 77 AD3d 586, 587). We therefore further modify the order accordingly.

Finally, the court also erred in granting judgment to defendants with respect to their counterclaim pursuant to CPLR 3212 (b) when in fact plaintiffs had cross-moved to dismiss the counterclaim. It is well settled that the doctrine of unclean hands may bar recovery where a party seeking such recovery "is guilty of immoral, unconscionable conduct" (*National Distillers & Chem. Corp. v Seyopp Corp.*, 17 NY2d

12, 15). A party "seeking equity must do equity, i.e., he [or she] must come into court with clean hands" (*Pecorella v Greater Buffalo Press*, 107 AD2d 1064, 1065). Here, the restrictive covenants provide, inter alia, that "[t]he premises shall be used exclusively for single family dwelling purposes and shall not be used or maintained as rental property." Olinsky testified at his deposition, however, that he rented 4 Jordan Way, a house also subject to the restrictive covenants alleged by defendants in their counterclaim to have been violated by plaintiffs. Olinsky therefore was also in violation of the restrictive covenants and was without "clean hands" (*Pecorella*, 107 AD2d at 1065; *see Kaufman v Kehler*, 25 AD3d 765). Thus, we additionally modify the order accordingly.

We have considered defendants' contention on their appeal, i.e., that the breach of warranty claim against Olinsky should be dismissed, and conclude that it is without merit.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1032

CA 11-00050

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

ALBERT P. TESLUK AND IRENE TESLUK,
PLAINTIFFS-APPELLANTS,

V ORDER

STEPHEN S. SZYMONIAK, DEFENDANT-RESPONDENT.

HOGAN WILLIG, GETZVILLE (AMANDA L. LOWE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, BUFFALO (BRIAN SUTTER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered September 24, 2010 in a legal malpractice action. The order granted the motion of defendant for summary judgment dismissing the complaint and denied the cross motion of plaintiffs for summary judgment.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1033

TP 11-00634

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

IN THE MATTER OF SAIFUDDIN ABDUS-SAMAD,
PETITIONER,

V ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT.

SAIFUDDIN ABDUS-SAMAD, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered March 23, 2011) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1034

KA 09-01054

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMETRIUS MCGEE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Shirley Troutman, J.), rendered May 20, 2009. The judgment convicted defendant, upon a jury verdict, of attempted murder in the first degree and reckless endangerment in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [i]) and reckless endangerment in the first degree (§ 120.25). We reject defendant's contention that the evidence is legally insufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant was charged as an accessory, and "[a]ccessorial liability requires only that defendant, acting with the mental culpability required for the commission of the crime, intentionally aid another in the conduct constituting the offense" (*People v Chapman*, 30 AD3d 1000, 1001, *lv denied* 7 NY3d 811 [internal quotation marks omitted]; *see* § 20.00). With respect to the attempted murder conviction, the People presented evidence establishing that defendant shared his codefendant's intent to kill the victim and intentionally aided the codefendant by, inter alia, driving the vehicle involved in the shooting, positioning the vehicle to enable the codefendant to get a clear shot at the victim and operating the vehicle at a high rate of speed in order to evade the police officers pursuing the vehicle (*see People v Cabassa*, 79 NY2d 722, 728, *cert denied* 506 US 1011; *People v Rutledge*, 70 AD3d 1368, *lv denied* 15 NY3d 777; *People v Zuhlke*, 67 AD3d 1341, *lv denied* 14 NY3d 774).

With respect to the reckless endangerment conviction, the People presented legally sufficient evidence that, "under circumstances

evincing a depraved indifference to human life, [defendant aided the codefendant, who] recklessly engage[d] in conduct [that] create[d] a grave risk of death to another person" (Penal Law § 120.25; *see People v Lozada*, 35 AD3d 969, 969-970, *lv denied* 8 NY3d 947; *People v Zanghi*, 256 AD2d 1120, 1122, *lv denied* 93 NY2d 881). The evidence at trial established that defendant drove down a residential street while the codefendant fired shots from the vehicle at numerous houses along the street. Two eyewitnesses testified that there were a number of children playing outside and residents in the street and on their porches at the time of the shooting. Several houses and a vehicle were struck by bullets.

Contrary to the further contention of defendant, we conclude that there is legally sufficient evidence to establish that he and the codefendant shared the requisite "community of purpose" for accomplice liability to attach (*People v Bray*, 99 AD2d 470 [internal quotation marks omitted]; *see generally People v Russell*, 91 NY2d 280, 288; *People v Rosario*, 199 AD2d 92, *lv denied* 82 NY2d 922, 927, 930, 83 NY2d 803). Defendant drove down the street at least twice prior to the shooting, operated the vehicle at a speed enabling the codefendant to fire multiple shots and strike several houses along the street and led the police on a high-speed chase in an attempt to evade capture. In addition, a jailhouse informant testified that the codefendant informed him that it was the driver of the vehicle, i.e., defendant, who initiated the events that led to the crimes at issue. We thus conclude that "there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime[s] proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [internal quotation marks omitted]).

To the extent that defendant contends that his conviction is not supported by legally sufficient evidence because his uncorroborated admission that he was driving the vehicle involved in the shooting was the only evidence identifying him as a participant in the crimes, we reject that contention. Defendant's admission was sufficiently corroborated by, inter alia, the testimony of civilian witnesses to the shooting and the testimony of police witnesses who were involved in the subsequent vehicle chase, as well as forensic evidence, which provided the requisite "additional proof that the offense[s] charged [had] been committed" (CPL 60.50; *see People v Chico*, 90 NY2d 585, 589-591; *People v Burrs*, 32 AD3d 1299, *lv denied* 7 NY3d 924). Contrary to defendant's contention, "[u]nder CPL 60.50[,] no additional proof need connect the defendant with the crime" (*People v Lipsky*, 57 NY2d 560, 571, *rearg denied* 58 NY2d 824; *see People v Daniels*, 37 NY2d 624, 629). In any event, defendant's identity as the driver of the vehicle was established not only by his admission to that fact but also by the testimony of an officer who observed defendant during the vehicle chase and then apprehended him shortly after the chase concluded.

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we reject defendant's contention that the verdict is against the weight of the

evidence (*see generally Bleakley*, 69 NY2d at 495). Contrary to the further contention of defendant, we conclude that he was not denied a fair trial based on ineffective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). Defendant failed to demonstrate the lack of a strategic basis for defense counsel's failure to request a lesser included offense charge (*see People v Clarke*, 55 AD3d 370, *lv denied* 11 NY3d 923; *see also People v Wicks*, 73 AD3d 1233, 1236, *lv denied* 15 NY3d 857; *People v Guarino*, 298 AD2d 937, *lv denied* 98 NY2d 768). Indeed, defendant's theory of the case was that he was "just the driver," i.e., that he did not share the codefendant's criminal intent, not that he only intended to "cause serious physical injury" rather than death (Penal Law § 120.05 [1]). We further conclude that defendant was not denied effective assistance of counsel based on defense counsel's failure to challenge the probable cause for his arrest inasmuch as any such challenge would have " 'ha[d] little or no chance of success' " (*People v Biro*, 85 AD3d 1570, 1572, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). 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).

Finally, the sentence is not unduly harsh or severe.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1038

KA 08-01709

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL C. LUGO, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, BATAVIA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Dennis S. Cohen, A.J.), rendered June 13, 2008. The judgment convicted defendant, upon a jury verdict, of burglary 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: Defendant appeals from a judgment convicting him, upon a jury verdict, of burglary in the first degree (Penal Law § 140.30 [4]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Contrary to defendant's contention, the People laid a proper foundation for the admission in evidence of a recording of the 911 call made by the victim. The victim testified at trial that the recording was "a complete and accurate reproduction of the [911 call] and [that it had] not been altered" (*People v Ely*, 68 NY2d 520, 527; *see People v Hurlbert*, 81 AD3d 1430, 1431, *lv denied* 16 NY3d 896). We reject defendant's further contention that County Court erred in finding the recording of the 911 call sufficiently audible to warrant its admission in evidence (*see People v Rivera*, 257 AD2d 172, 176, *affd* 94 NY2d 908; *People v Cleveland*, 273 AD2d 787, *lv denied* 95 NY2d 864).

Defendant contends that the admission in evidence of his codefendant's statements to the victims through their testimony and the recording of the 911 call violated his right of confrontation under *Crawford v Washington* (541 US 36), inasmuch as the codefendant did not testify. We reject that contention because the codefendant's statements "were not themselves testimonial in nature" (*People v Robles*, 72 AD3d 1520, 1521, *lv denied* 15 NY3d 777; *see generally Crawford*, 541 US at 51-54; *People v Goldstein*, 6 NY3d 119, 128-129, *cert denied* 547 US 1159). We further conclude that there was no violation of defendant's rights under *Bruton v United States* (391 US

123).

Defendant failed to preserve for our review his contention that the court failed to comply with CPL 300.10 (4) by failing to inform the parties of the charges to be submitted to the jury until after summations. In any event, we conclude that such error is harmless (*see People v Miller*, 70 NY2d 903, 907). The theory of the defense on summation was that the victims were not credible, "a theory that applies equally to the offenses" of burglary in the first degree and the lesser included offense of criminal trespass in the second degree under Penal Law § 140.15 (1) (*People v Kurkowski*, 83 AD3d 1595, 1596, *lv denied* 16 NY3d 896; *see People v Harvey*, 249 AD2d 951, 951). In addition, "the court offered defense counsel the opportunity to reopen summations [after it granted defendant's request to charge that] lesser included offense, thus alleviating any possible prejudice to defendant" (*Kurkowski*, 83 AD3d at 1595; *see People v Boisseau*, 193 AD2d 517, *lv denied* 81 NY2d 1070).

Defendant further contends that the burglary conviction is not supported by legally sufficient evidence because the People failed to establish his intent to commit a crime in the victims' apartment. That contention is not preserved for our review inasmuch as defendant failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, we conclude that the evidence is legally sufficient to establish defendant's intent to commit a crime within the dwelling (*see* Penal Law § 140.30 [4]; *see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the burglary count as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to that count is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). We reject defendant's contention that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Contrary to defendant's further contention, the court did not abuse its discretion in denying his request for youthful offender status. Defendant was convicted of two armed felonies (*see* CPL 1.20 [41]; Penal Law § 140.30 [4]; § 265.03 [3]), and thus he was eligible to be adjudicated a youthful offender only if the court determined that there were "mitigating circumstances that bear directly upon the manner in which the crime[s were] committed; or . . .[, inasmuch as] defendant was not the sole participant in the crime, [that] defendant's participation was relatively minor" (CPL 720.10 [3]; *see* CPL 720.10 [2] [a] [ii]; *People v Crawford*, 55 AD3d 1335, 1336, *lv denied* 11 NY3d 896). " 'Here, the defendant offered the . . . court no evidence of mitigating circumstances relating to the manner in which the subject [crimes were] committed, and his role in the [crimes] was not minor' " (*Crawford*, 55 AD3d at 1336; *see People v Parker*, 67 AD3d 1405, *lv denied* 15 NY3d 755; *People v Barski*, 66 AD3d 1381, 1383, *lv denied* 13 NY3d 905). Thus, defendant was not eligible to be adjudicated a youthful offender (*see* CPL 720.10 [3]; *Crawford*, 55 AD3d at 1336).

Finally, we conclude that the sentence is not unduly harsh or severe, particularly in light of the serious nature of defendant's conduct.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1041

CAF 10-01240

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

IN THE MATTER OF CHRISTOPHER FEWELL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JENNIFER M. KOONS, RESPONDENT-RESPONDENT.

DEBORAH J. SCINTA, KENMORE, FOR PETITIONER-APPELLANT.

M. KIM BABAT, ATTORNEY FOR THE CHILD, BUFFALO, FOR ISIAH S.K.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered April 27, 2010 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition alleging a violation of a prior order of visitation.

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

Memorandum: Petitioner father appeals from an order in this Family Court Act article 6 proceeding dismissing his petition alleging that respondent mother violated a prior order of visitation with respect to the parties' son. We reject the father's contention that Family Court erred in dismissing the petition without conducting a hearing. "It is well established that due process does not mandate a hearing in every instance where contempt is sought [based on the violation of a court order]; it need only be conducted if a factual dispute exists [that] cannot be resolved on the papers alone" (*Bowie v Bowie*, 182 AD2d 1049, 1050; *see also Matter of Lynda D. v Stacy C.*, 37 AD3d 1151; *cf. Matter of Lisa B.I. v Carl D.I.*, 46 AD3d 1451). Moreover, a hearing is not required even where a factual dispute exists when the allegations set forth in the petition are insufficient to support a finding of contempt (*see Matter of Palacz v Palacz*, 249 AD2d 930, *lv dismissed* 92 NY2d 920). Here, no hearing was required because the father failed to indicate how the mother allegedly violated the order. In addition, as the court properly noted, the order that the father sought to enforce was ambiguous.

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1042

CAF 10-01603

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

IN THE MATTER OF ELIZABETH J.

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

JOCELYN J., RESPONDENT-APPELLANT.

JOHN T. NASCI, ROME, FOR RESPONDENT-APPELLANT.

JOHN A. HERBOWY, COUNTY ATTORNEY, UTICA (DENISE J. MORGAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

WILLIAM L. KOSLOSKY, ATTORNEY FOR THE CHILD, UTICA, FOR ELIZABETH J.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered March 22, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: Respondent mother appeals from an order revoking a suspended judgment and terminating her parental rights with respect to her daughter. Contrary to the mother's contention, petitioner established by a preponderance of the evidence that she violated the terms of the suspended judgment (*see Matter of Janasia H.*, 71 AD3d 1524, *lv denied* 15 NY3d 701). In addition, Family Court properly concluded that termination of the mother's parental rights was in the child's best interests inasmuch as the foster family had expressed a desire to adopt the child, the mother was incarcerated and the suspended judgment expired more than two years prior to her earliest release date (*see Matter of Saboor C.*, 303 AD2d 1022). The court also properly determined that the mother failed to establish that it was in the child's best interests to have post-termination visitation with her (*see Matter of Sean H.*, 74 AD3d 1837, *lv denied* 15 NY3d 708).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1043

CAF 10-02162

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

IN THE MATTER OF PARKER E.R.

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-APPELLANT;

ORDER

RICKY R., RESPONDENT,
AND ERIN N.S., RESPONDENT-RESPONDENT.

MARY KAY YANIK, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.

MARY KAY YANIK, ATTORNEY FOR THE CHILD, MOUNT MORRIS, APPELLANT PRO SE.

JOHN T. SYLVESTER, MOUNT MORRIS, FOR PETITIONER-APPELLANT.

JUAN A. NEVAREZ, ROCHESTER, FOR RESPONDENT-RESPONDENT.

Appeals from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered September 13, 2010 in a proceeding pursuant to Family Court Act article 10. The order dismissed the petition against respondent mother.

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

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1048

CA 11-00506

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

IN THE MATTER OF ERIN DEVOGELAERE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

WEBSTER ZONING BOARD OF APPEALS,
RESPONDENT-RESPONDENT.

THE ANDERSON LAW FIRM, P.C., ROCHESTER (RICHARD F. ANDERSON OF COUNSEL), FOR PETITIONER-APPELLANT.

CHARLES J. GENESE, TOWN ATTORNEY, WEBSTER, FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David Michael Barry, J.), entered January 14, 2011 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner owns property in the Town of Webster (Town) located in a Large Lot Single Family Residential District. Beginning in 2007, she rented the property for periods ranging from one night to approximately three months. In 2010 the Town amended its zoning ordinance to prohibit transient rental, i.e, "[r]ental of a dwelling unit for a period of less than 28 continuous days" (Code of the Town of Webster § 225-3; *see* § 225-80 [B]). Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination denying her "application to appeal" from the determination of the Town's Code Enforcement Official that her use of the property for transient rentals was not permitted and directing her to cease the offending use.

Supreme Court properly dismissed the petition. " '[A] zoning board's interpretation of its zoning ordinance is entitled to great deference . . . and judicial review is generally limited to ascertaining whether [its] action was illegal, arbitrary and capricious, or an abuse of discretion' " (*Matter of Falco Realty, Inc. v Town of Poughkeepsie Zoning Bd. of Appeals*, 40 AD3d 635, 636, *lv denied* 9 NY3d 807). Here, respondent reasonably determined that petitioner's serial rental of the subject property was prohibited under the zoning ordinance and that it did not constitute a legal nonconforming preexisting use, and thus petitioner had no right to continue such use (*see generally Matter of Marino v Town of Smithtown*,

61 AD3d 761, 762; *Matter of Quatraro v Village of Kenmore Zoning Bd. of Appeals*, 277 AD2d 1001).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1049

CA 11-00471

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

GREECE TOWN MALL, LP,
PLAINTIFF-PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DENNIS M. MULLEN, COMMISSIONER, NEW YORK
STATE DEPARTMENT OF ECONOMIC DEVELOPMENT,
DEFENDANT-RESPONDENT-RESPONDENT.

FEERICK LYNCH MACCARTNEY PLLC, SOUTH NYACK (DENNIS E.A. LYNCH OF COUNSEL), FOR PLAINTIFF-PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David Michael Barry, J.), entered September 2, 2010 in a declaratory judgment action and CPLR article 78 proceeding. The judgment granted the motion of defendant-respondent to dismiss the complaint/petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion in part, reinstating the first cause of action and severing that cause of action, and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff-petitioner (plaintiff) commenced this hybrid declaratory judgment action/CPLR article 78 proceeding seeking, inter alia, to annul the determination decertifying plaintiff as an "Empire Zone" business pursuant to the Empire Zones Act (General Municipal Law § 955 *et seq*.). We conclude at the outset that plaintiff correctly concedes that the third and fourth causes of action seek relief pursuant to CPLR article 78, and we further conclude that the second and fifth causes of action also seek such relief. Those causes of action constitute challenges to the specific action of an administrative agency (*see Matter of Aubin v State of New York*, 282 AD2d 919, 921-922, *lv denied* 97 NY2d 606; *see also Matter of Peckham Materials Corp. v Westchester County*, 303 AD2d 511, 511-512; *Federation of Mental Health Ctrs. v DeBuono*, 275 AD2d 557, 558-560). Consequently, only the first cause of action properly seeks a declaration inasmuch as plaintiff thereby challenges certain regulations promulgated by defendant-respondent (defendant) as inconsistent with General Municipal Law § 959, rather than a particular agency determination or procedure (*see Matter of Highland Hall Apts., LLC v New York State Div. of Hous. & Community Renewal*, 66

AD3d 678, 681).

We reject the contention of plaintiff that Supreme Court erred in granting that part of defendant's motion to dismiss the CPLR article 78 proceeding, i.e., the second through fifth causes of action. "[A] proceeding under [CPLR article 78] shall not be used to challenge a determination . . . [that] is not final or can be adequately reviewed by appeal to a court or to some other body or officer" (CPLR 7801 [1]). "In order to determine whether an agency determination is final, a two-part test is applied. 'First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and[,] second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party' " (*Matter of County of Niagara v Daines*, 79 AD3d 1702, 1704, *lv denied* 17 NY3d 703, quoting *Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34, *rearg denied* 5 NY3d 824; *see Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194-195; *Stop-The-Barge v Cahill*, 1 NY3d 218, 223).

Here, plaintiff challenges defendant's determination rendered June 29, 2009, but the injury inherent in that determination could have been ameliorated by further administrative action through an appeal to the Empire Zone Designation Board (hereafter, EZDB) (*see* General Municipal Law § 959 [w]; 5 NYCRR 14.2). Indeed, plaintiff challenged defendant's determination in an administrative appeal to the EZDB, and the EZDB subsequently ruled on that appeal. Consequently, the determination challenged by plaintiff is nonfinal (*see generally Best Payphones, Inc.*, 5 NY3d at 34; *County of Niagara*, 79 AD3d at 1704), and the court properly dismissed the CPLR article 78 proceeding (*see* CPLR 7801 [1]).

We further conclude, however, that the court erred in granting that part of the motion to dismiss the declaratory judgment action, i.e., the first cause of action. That cause of action is governed by the six-year statute of limitations pursuant to CPLR 213 (1) (*see Solnick v Whalen*, 49 NY2d 224, 229-230), and thus the court erred to the extent that it concluded that the first cause of action is time-barred. We therefore modify the judgment by denying that part of the motion to dismiss the declaratory judgment action, and the first cause of action is reinstated and severed (*see generally Matter of Coalition to Save Cedar Hill v Planning Bd. of Inc. Vil. of Port Jefferson*, 51 AD3d 666, 668, *lv denied* 11 NY3d 702).

Entered: September 30, 2011 Patricia L. Morgan
Clerk of the Court

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

1052

CA 11-00394

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

MICHAEL METZGIER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ABE A. MILLER, DEFENDANT-APPELLANT.

BRINDISI, MURAD, BRINDISI, PEARLMAN, JULIAN & PERTZ, LLP, UTICA (ANTHONY J. BRINDISI OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered June 29, 2010 in a personal injury action. The order denied the motion of defendant for summary judgment.

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 commenced this action seeking damages for injuries he allegedly sustained while operating an all-terrain vehicle (ATV) on defendant's property when he struck a single strand of barbed wire fencing that defendant had strung between two trees on the property. At the time of the accident, plaintiff and his cousin were operating ATVs on defendant's property without the knowledge or permission of defendant. We conclude that Supreme Court erred in denying defendant's motion for summary judgment dismissing the complaint. Defendant met his initial burden on the motion by establishing that he was entitled to the benefit of the recreational use statute, i.e., General Obligations Law § 9-103, inasmuch as he was the owner of the property where plaintiff was operating an ATV (*see* § 9-103 [1] [a]; *Albright v Metz*, 88 NY2d 656, 662; *Bragg v Genesee County Agric. Socy.*, 84 NY2d 544, 551-552; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In opposition to defendant's motion, plaintiff failed to come forward with evidence in admissible form establishing that defendant's conduct in constructing the barbed wire fencing constituted a "willful or malicious failure to guard, or to warn against, a dangerous condition" such that the statute would not limit defendant's liability (§ 9-103 [2] [a]; *see Farnham v Kittinger*, 83 NY2d 520, 528-529; *Hinchliffe v Orange & Rockland Utils. Co.*, 216 AD2d 528, 529, *lv denied* 87 NY2d 801; *Wilkins v State of New York*, 165 AD2d 514, 518).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

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

1054

CAF 10-02459

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

IN THE MATTER OF AVIS M. BECK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT LEONARD BUTLER, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Ontario County (Maurice E. Strobridge, J.H.O.), entered November 24, 2010 in a proceeding pursuant to Family Court Act article 8. The order of protection, among other things, directed respondent to stay away from petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 8, respondent contends that Family Court erred in determining that he committed a family offense against petitioner. We reject that contention. "The court's 'assessment of the credibility of the witnesses is entitled to great weight, and the record supports the court's finding that petitioner was a more credible witness than respondent' " (*Matter of Threet v Threet*, 79 AD3d 1743). The record also supports the court's determination that petitioner met her burden of establishing by a preponderance of the evidence that respondent committed the family offense of harassment in the second degree (Penal Law § 240.26 [3]; *see Matter of Corey v Corey*, 40 AD3d 1253, 1254-1255; *see also Matter of Harrington v Harrington*, 63 AD3d 1618, 1619, *lv denied* 13 NY3d 705). Respondent verbally abused and threatened petitioner throughout a single day, and respondent left numerous threatening messages on petitioner's cellular phone that were played for the court (*see e.g. Matter of Amber JJ. v Michael KK.*, 82 AD3d 1558, 1559-1560; *Matter of Boulerice v Heaney*, 45 AD3d 1217, 1218-1219). Further, the "prior experience [of petitioner] with [respondent's] assaultive behavior made the threats credible" (*Matter of Cukerstein v Wright*, 68 AD3d 1367, 1369). Although "obscenities alone may not constitute criminal conduct . . ., we [conclude] that the verbal acts made in the context described by [petitioner] were not constitutionally protected" (*Corey*, 40 AD3d at 1255; *see People v Brown*, 13 AD3d 667, 668, *lv denied* 4 NY3d 742, 884).

Finally, we reject respondent's contention that the court abused its discretion in issuing a stay away order of protection (*see* Family Ct Act § 812 [2] [b]; § 842 [a]; *see generally Matter of Amy SS. v John SS.*, 68 AD3d 1262, 1264, *lv denied* 14 NY3d 704; *Harrington*, 63 AD3d at 1619).

Entered: September 30, 2011

Patricia L. Morgan
Clerk of the Court

MOTION NO. (901/83) KA 11-01167. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MATTHEW LEMON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND LINDLEY, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (761/89) KA 11-01311. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CARLTON BROWN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND GREEN, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (288/94) KA 10-01190. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHARLIE MIXON, DEFENDANT-APPELLANT. -- Motion to renew writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND GORSKI, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (777/99) KA 97-05259. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY YOUNGBLOOD, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, SCONIERS, AND GREEN, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (720/03) KA 02-00263. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FRANK D'ANTUONO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, SCONIERS, GREEN,

AND GORSKI, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (830/03) KA 02-00550. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DEMETRIUS COLEMAN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND GORSKI, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (1618/03) KA 03-00349. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAMION SMITH, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for reconsideration denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND GREEN, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (1619/03) KA 03-00350. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAMION SMITH, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reconsideration denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND GREEN, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (100/05) KA 03-01927. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER ARIOLA, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SCONIERS, GREEN, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (101/05) KA 03-01928. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER ARIOLA, DEFENDANT-APPELLANT. (APPEAL NO. 2.) --

Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SCONIERS, GREEN, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (748/06) KA 04-00217. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ERIC BOYER, DEFENDANT-APPELLANT. -- Upon the Court's own motion, the memorandum and order entered July 7, 2006 (31 AD3d 1136, *lv denied* 7 NY3d 865) is amended by adding the phrase "plus a period of postrelease supervision of five years" after the phrase "determinate term of imprisonment of seven years" in both the ordering paragraph and fifth paragraph of the memorandum. PRESENT: SCUDDER, P.J., GREEN, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (994/06) KA 03-02424. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSE RODRIGUEZ, DEFENDANT-APPELLANT. -- Upon the Court's own motion, the memorandum and order entered November 17, 2006 (34 AD3d 1181, *lv denied* 8 NY3d 926) is amended by adding the phrase "plus a period of postrelease supervision of five years" after the phrase "determinate term of imprisonment of seven years" in both the ordering paragraph and third paragraph of the memorandum. PRESENT: SCUDDER, P.J., GREEN, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (1006/06) KA 07-00713. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JARVIS LASSALLE, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, AND GORSKI, JJ.

(Filed Sept. 30, 2011.)

MOTION NO. (1123/06) KA 04-02221. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM M. NICHOLS, DEFENDANT-APPELLANT. -- Motion for reargument and reconsideration denied. PRESENT: SMITH, J.P., CENTRA, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (1009/09) KA 05-01142. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TYRONE PRESCOTT, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, LINDLEY, AND GORSKI, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (158/10) KA 08-00527. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V THOMAS GREGORY, DEFENDANT-APPELLANT. -- Motion for clarification denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND SCONIERS, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (483/10) KA 09-00206. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RONNIE WOODS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (689/10) KA 09-01075. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V NICHOLAS J. JOSEPH, DEFENDANT-APPELLANT. -- Motion for writ

of error coram nobis denied. PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (928/10) CA 09-02444. -- IN THE MATTER OF THE ACCOUNTING BY LAURIE C. KALKMAN, AS TRUSTEE UNDER L. WILLIAM COULTER FAMILY TRUST DATED JULY 20, 1994 UNDER WILL OF L. WILLIAM COULTER, DECEASED, RESPONDENT. GEOFFREY R. COULTER, APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., PERADOTTO, GREEN, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (1511/10) KA 09-02220. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DANA P. BROWN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (212.2/11) CA 10-02057. -- IN THE MATTER OF COLONIAL SURETY COMPANY, PETITIONER-APPELLANT, V LAKEVIEW ADVISORS, LLC, RESOLUTION MANAGEMENT, LLC, RESPONDENTS-RESPONDENTS, AND NATIONAL CREDIT ADJUSTERS, LLC, RESPONDENT. (APPEAL NO. 2.) -- Motion for reargument dismissed (*see* CPLR 321 [a]; *Hilton Apothecary v State of New York*, 89 NY2d 1024; *Michael Reilly Design, Inc. v Houraney*, 40 AD3d 592, 593). PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (278/11) CA 10-00367. -- DANIEL C. OAKES AND LISA M. OAKES,

PLAINTIFFS-RESPONDENTS, V RAJNIKANT PATEL, M.D., SATISH K. MONGIA, M.D., AND KALEIDA HEALTH, AS SUCCESSOR IN INTEREST TO MILLARD FILLMORE HOSPITALS, DOING BUSINESS AS MILLARD FILLMORE SUBURBAN HOSPITAL, DEFENDANTS-APPELLANTS. -- Motions for reargument denied. Motions for leave to appeal to the Court of Appeals granted. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (317/11) CA 10-01163. -- FRANK MCGUIRE, ET AL., PLAINTIFFS, AND MCGUIRE CHILDREN, LLC, PLAINTIFF-RESPONDENT, V WILLIAM L. HUNTRESS, ACQUEST HOLDINGS, INC., ACQUEST DEVELOPMENT, LLC, ACQUEST GOVERNMENT HOLDINGS OPP, LLC, ACQUEST GOVERNMENT HOLDINGS, U.S. GEOLOGICAL, LLC, AND LINCOLN PARK ASSOCIATES, LLC, DEFENDANTS-APPELLANTS. (APPEAL NO. 1.) -- Motion for renewal, reconsideration, reargument, and reversal denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, AND GORSKI, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (318/11) CA 10-01165. -- FRANK MCGUIRE, ET AL., PLAINTIFFS, AND MCGUIRE CHILDREN, LLC, PLAINTIFF-RESPONDENT, V WILLIAM L. HUNTRESS, ACQUEST HOLDINGS, INC., ACQUEST DEVELOPMENT, LLC, ACQUEST GOVERNMENT HOLDINGS OPP, LLC, ACQUEST GOVERNMENT HOLDINGS, U.S. GEOLOGICAL, LLC, AND LINCOLN PARK ASSOCIATES, LLC, DEFENDANTS-APPELLANTS. (APPEAL NO. 2.) -- Motion for renewal, reconsideration, reargument, and reversal denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, AND GORSKI, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (579/11) CA 10-01996. -- EARTH ENERGY CONSULTANTS, LLC, PLAINTIFF-APPELLANT, V SENECA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, SENECA COUNTY ECONOMIC DEVELOPMENT CORPORATION, AND ROBERT J. ARONSON, EXECUTIVE DIRECTOR, SENECA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (582/11) CA 10-02338. -- VICKI JEWETT AND JOHN JEWETT, PLAINTIFFS-RESPONDENTS-APPELLANTS, V M.D. FRITZ, INC., DOING BUSINESS AS THE BURGUNDY ROOM RESTAURANT & LOUNGE, DEFENDANT-APPELLANT-RESPONDENT, BARZMAN, KASIMOV & VIETH, D.D.S., P.C., B.K.V. REALTY CO., LLC, DEFENDANTS-RESPONDENTS, AND R.M.F. HOLDING CORPORATION, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (626/11) CA 10-02018. -- IN THE MATTER OF SISTERS OF CHARITY HOSPITAL, PETITIONER-RESPONDENT, V RICHARD F. DAINES, M.D., COMMISSIONER OF HEALTH, STATE OF NEW YORK, AND LAURA L. ANGLIN, DIRECTOR OF BUDGET, STATE OF NEW YORK, OR THEIR SUCCESSORS, RESPONDENTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (639/11) KA 09-01649. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V VIRGINIA RICHARDSON, DEFENDANT-APPELLANT. -- Motion for reargument granted and, upon reargument, the memorandum and order entered June 10, 2011 (85 AD3d 1556) is amended by deleting the third sentence of the memorandum and substituting the following sentence: "The record supports the findings of the suppression court that defendant's statement was not tainted by her statement made before she was given her *Miranda* warnings." PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, GREEN, AND GORSKI, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (662/11) KA 07-01369. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER JONES, DEFENDANT-APPELLANT. -- Motion for reargument and reconsideration denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (668/11) CA 11-00248. -- ELIZABETH L. HAIDT, PLAINTIFF-RESPONDENT, V JOSEPH F. KURNATH, M.D., DEFENDANT, HENRY WENGENDER AND LYNN WENGENDER, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (670/11) CA 10-02435. -- JASON THOME, PLAINTIFF-RESPONDENT, V BENCHMARK MAIN TRANSIT ASSOCIATES, LLC, CHRISTA CONSTRUCTION, LLC, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT. -- Motion for reargument or leave

to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (671/11) CA 11-00125. -- IN THE MATTER OF COMMUNICATION WORKERS OF AMERICA, LOCAL 1170, PETITIONER-APPELLANT, V 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. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (672/11) CA 10-02265. -- IN THE MATTER OF ROBERT P. MEEGAN, JR., INDIVIDUALLY AND AS PRESIDENT OF BUFFALO POLICE BENEVOLENT ASSOCIATION AND BUFFALO POLICE BENEVOLENT ASSOCIATION, INC., PETITIONERS-RESPONDENTS, V BYRON W. BROWN, AS MAYOR OF CITY OF BUFFALO, DANIEL DERENDA, AS ACTING COMMISSIONER OF POLICE, AND CITY OF BUFFALO, RESPONDENTS-APPELLANTS. (APPEAL NO. 1.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (672.1/11) CA 11-00160. -- IN THE MATTER OF THE ARBITRATION BETWEEN CITY OF BUFFALO, PETITIONER-APPELLANT, AND BUFFALO POLICE BENEVOLENT ASSOCIATION, INC., RESPONDENT-RESPONDENT. (APPEAL NO. 2.) --

Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (689/11) CA 10-00432. -- WALDEMAR H. JURKOWSKI, BY EDWARD C. COSGROVE, GUARDIAN OF HIS PERSON AND PROPERTY, PLAINTIFF-APPELLANT, V SHEEHAN MEMORIAL HOSPITAL, ET AL., DEFENDANTS, AND BHAVANSA PADMANABHA, M.D., DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (690/11) CA 10-00435. -- WALDEMAR H. JURKOWSKI, BY EDWARD C. COSGROVE, GUARDIAN OF HIS PERSON AND PROPERTY, PLAINTIFF-APPELLANT, V SHEEHAN MEMORIAL HOSPITAL, ET AL., DEFENDANTS, AND MADAN G. CHUGH, M.D., DEFENDANT-RESPONDENT. (APPEAL NO. 2.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (691/11) CA 10-00436. -- WALDEMAR H. JURKOWSKI, BY EDWARD C. COSGROVE, GUARDIAN OF HIS PERSON AND PROPERTY, PLAINTIFF-APPELLANT, V SHEEHAN MEMORIAL HOSPITAL, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS. (APPEAL NO. 3.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, GORSKI, AND MARTOCHE,

JJ. (Filed Sept. 30, 2011.)

MOTION NO. (696/11) CA 11-00319. -- IN THE MATTER OF ALFONS J. POHOPEK, PETITIONER-APPELLANT, V TOWN OF WESTERN ZONING BOARD OF APPEALS AND DONALD CROFT, RESPONDENTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (717/11) CA 10-02322. -- DORIS BAITY, ET AL., PLAINTIFFS-RESPONDENTS-APPELLANTS, V GENERAL ELECTRIC COMPANY, DEFENDANT-APPELLANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND GREEN, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (726/11) KA 11-00081. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V R. MICHAEL HILDRETH, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., FAHEY, CARNI, LINDLEY, AND GORSKI, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (741/11) TP 10-02283. -- IN THE MATTER OF SUSAN KRUSE, PETITIONER, V NEW YORK STATE DIVISION OF HUMAN RIGHTS, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES/COLLINS CORRECTIONAL FACILITY, NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, AND NEW YORK STATE, OFFICE OF STATE

COMPTROLLER, RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (749/11) KA 09-00194. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JEROME T. CISSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (778/11) CA 10-01399. -- JOHN T. GOWANS AND SHERRY BATCHELDER, PLAINTIFFS-APPELLANTS, V 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. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (799/11) CA 10-02402. -- JAMES R. BYRNES, PLAINTIFF-APPELLANT, V CLYDE SATTERLY, M.D., DEFENDANT-RESPONDENT, ET AL., DEFENDANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, SCONIERS, AND GREEN, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (803/11) CA 11-00333. -- NIAGARA FOODS, INC., BENLEY REALTY CO.

AND THE CHARTER OAK FIRE INSURANCE COMPANY, PLAINTIFFS-APPELLANTS-RESPONDENTS, V FERGUSON ELECTRIC SERVICE COMPANY, INC. AND TEGG CORPORATION, DEFENDANTS-RESPONDENTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, SCONIERS, AND GREEN, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (804.3/11) CA 10-01418. -- MARCIA A. WILD, THOMAS F. HORN, AS CO-EXECUTORS OF THE ESTATE OF MARGUERITE HORN, DECEASED, AND JOSEPH HORN, PLAINTIFFS-RESPONDENTS, V CATHOLIC HEALTH SYSTEM, DOING BUSINESS AS MERCY HOSPITAL OF BUFFALO, ET AL., DEFENDANTS, BUFFALO EMERGENCY ASSOCIATES, LLP AND RAQUEL MARTIN, D.O., DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, SCONIERS, AND GREEN, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (819/11) KA 08-01036. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAMIEN WARREN, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND, SCONIERS, JJ. (Filed Sept. 30, 2011.)

MOTION NO. (820/11) CA 11-00325. -- 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: 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. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed Sept. 30, 2011.)

KA 10-01911. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V STEVEN BARNEY, DEFENDANT-APPELLANT. -- Appeal dismissed as moot. Counsel's motion to be relieved of assignment granted. (Appeal from Judgment of Erie County Court, Sheila A. DiTullio, J. - Criminal Possession of a Weapon, 3rd Degree). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

KA 08-02480. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT J. BUCK, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's

motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Ontario County Court, Craig J. Doran, J. - Attempted Burglary, 2nd Degree). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

KA 09-00319. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KRISTA A. GANTZ, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Ontario County Court, Craig J. Doran, J. - Criminal Possession of a Controlled Substance, 5th Degree). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

KA 10-00811. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL E. KING, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Oneida County Court, John S. Balzano, A.J. - Driving While Intoxicated). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

KA 10-01089. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V NICHOLAS J. LASKOWSKI, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Ontario County

Court, Frederick G. Reed, A.J. - Driving While Intoxicated). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

KA 11-00797. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOYCE MALONE, DEFENDANT-APPELLANT. -- Motion to dismiss granted. Memorandum: The matter is remitted to Oswego County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application by the District Attorney or the attorney who appeared for appellant (*see People v Matteson*, 75 NY2d 745). PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Sept. 30, 2011.)

KA 10-00800. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ISAIAH MCCOY, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon a guilty plea of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree. Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38), on the ground that the appeal is wholly frivolous. We conclude, however, that a nonfrivolous issue exists as to whether the forfeiture of defendant's property was improper (*see People v Jacobson*, 60 AD3d 1326, *lv denied* 12 NY3d 916; *People v Sanders*, 289 AD2d 1019). Therefore, we relieve counsel of his assignment

and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Ontario County Court, Frederick G. Reed, A.J. - Criminal Sale of a Controlled Substance, 3rd Degree). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

CAF 10-00786. -- IN THE MATTER OF CYNTHIA M.R., PETITIONER-RESPONDENT, V MITCHELL M.R., RESPONDENT-APPELLANT, ASHLEY M.S., RESPONDENT-RESPONDENT, AND CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT. -- Appeal is dismissed as abandoned and counsel's motion is granted. (Appeal from Order of Family Court, Cattaraugus County, Michael L. Nenno, J. - Custody). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

CAF 10-00783. -- IN THE MATTER OF JARED R., AALIYAH R., AND NOAH S. CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MITCHELL R., RESPONDENT-APPELLANT. -- Appeal is dismissed as abandoned and counsel's motion is granted. (Appeal from Order of Family Court, Cattaraugus County, Michael L. Nenno, J. - Neglect). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

KAH 11-00327. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. CHARLES SMITH, PETITIONER-APPELLANT, V SUPERINTENDENT EKPE EKPE, WATERTOWN CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Judgment unanimously affirmed.

Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Jefferson County, Hugh A. Gilbert, J. - Habeas Corpus). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

KAH 10-01865. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. ROBERT VAN NESS, PETITIONER-APPELLANT, V NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT-RESPONDENT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Wyoming County, Mark H. Dadd, A.J. - Habeas Corpus). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

KA 06-01249. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V YOLANDA WILLIAMS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Monroe County Court, Patricia D. Marks, J. - Manslaughter, 2nd Degree). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)

KA 06-01248. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V YOLANDA WILLIAMS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d

38 [1979]). (Appeal from Judgment of Monroe County Court, Patricia D. Marks, J. - Assault, 1st Degree). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GORSKI, AND MARTOCHE, JJ. (Filed Sept. 30, 2011.)