SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 7, 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

523

CA 10-02316

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

NICK MALKIN AND ZINA MALKIN,
PLAINTIFFS-RESPONDENTS,

V ORDER

MARISA LYN BANKS, ET AL., DEFENDANTS,
ALYSSA Z. BENSON AND MARIA GIANNINO,
DEFENDANTS-APPELLANTS.

HAGELIN KENT LLC, BUFFALO (ELIZABETH A. BRUCE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (CHARLES S. DESMOND, II, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

GOLDBERG SEGALLA, LLP, BUFFALO (TROY S. FLASCHER OF COUNSEL), FOR DEFENDANT MARISA LYN BANKS.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered February 18, 2010. The order denied the motion of defendants Alyssa Z. Benson and Maria Giannino for summary judgment on the issue of proximate cause.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on April 29, 2011, and filed in the Erie County Clerk’s Office on June 29, 2011,

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

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

874

CA 10-01586

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

RICKY D. WEST, ROBERT H. WEST, ROXY G. BUSH, PAMELA J. JUDD, JODI M. (WHITE) LYNCH, CHARLES K. WEST, MICHAEL WEST AND JAMIE-SUE WEST, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MARK HOGAN AND ELIZABETH HOGAN, DEFENDANTS-APPELLANTS.

MARK HOGAN AND ELIZABETH HOGAN, THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

DAVID VANDEWATER, THIRD-PARTY DEFENDANT-RESPONDENT.

COLUCCI & GALLAHER, P.C., BUFFALO (PAUL G. JOYCE OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

SLYE & BURROWS, WATERTOWN (ROBERT J. SLYE OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

CONBOY MCKAY BACHMAN & KENDALL, LLP, WATERTOWN (PETER L. WALTON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Lewis County (Charles C. Merrell, A.J.), entered April 7, 2010. The order and judgment, inter alia, determined the title to certain real property upon a jury verdict.

It is hereby ORDERED that the order and judgment so appealed from is modified on the law by vacating the award of punitive damages and as modified the order and judgment is affirmed without costs, and a new trial is granted on punitive damages only unless plaintiffs, within 30 days of service of a copy of the order of this Court with notice of entry, stipulate to reduce the award of punitive damages to $15,000, in which event the order and judgment is modified accordingly and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking, inter alia, a determination that they acquired title to certain property by adverse possession. Plaintiffs own lot 8 on Hiawatha Lake I in the

Town of Grieg (Town), and that lot is improved by a camp that was built in approximately 1971. In October 2004 defendants-third-party plaintiffs (defendants) purchased lot 7, which was a vacant lot to the east of lot 8, and they commissioned a survey of the two lots. According to the property line that is depicted in that survey, the east side of plaintiffs' camp on lot 8 encroached on lot 7 by approximately 2½ feet. After purchasing lot 7, Mark Hogan (defendant) began asserting his rights to all of the property to the east of the property line depicted in the survey. Plaintiffs thereafter commissioned their own survey of the two lots and, according to that survey, the property line between lots 7 and 8 was approximately 10 to 12 feet to the east of the property line depicted in defendants' survey. Plaintiffs alleged that they acquired title to the area that fell within the property lines as depicted in the two surveys (hereafter, disputed area).

Supreme Court properly granted that part of plaintiffs' motion for a directed verdict on the issue of adverse possession inasmuch as there was " 'no rational process by which the fact trier could base a finding in favor of the nonmoving party' " (*Bennice v Randall*, 71 AD3d 1454, 1455, quoting *Szczerbiak v Pilat*, 90 NY2d 553, 556). Plaintiffs established by clear and convincing evidence that their possession of the disputed area was "(1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period . . . [of] at least 10 years" (*Walling v Przybylo*, 7 NY3d 228, 232). In addition, plaintiffs established that the disputed area was "usually cultivated or improved" pursuant to RPAPL 522 former (1), which was in effect when plaintiffs commenced this action. "The type of cultivation or improvement sufficient under the statute will vary with the character, condition, location and potential uses for the property" (*City of Tonawanda v Ellicott Cr. Homeowners Assn.*, 86 AD2d 118, 122-123, *appeal dismissed* 58 NY2d 824; *see Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 160). Plaintiffs, whose parents purchased lot 8 in 1983, and other witnesses testified that plaintiffs mowed and raked the disputed area, placed lawn chairs on it, and used it to access the hatchway doors that were installed in 1988 on the east side of the camp that led to the furnace, hot water heater and shower. Plaintiffs built a memorial for their father on the disputed area in 1992, consisting of a plaque fixed to a rock on a raised flower bed with a hand water pump next to it. Plaintiffs also placed a clothesline and their boats on the disputed area, and the septic system for lot 8 was in the middle of that area. Based on those facts, we conclude that plaintiffs usually cultivated or improved the disputed area (*see Hammond v Baker*, 81 AD3d 1288, 1289-1290; *West Middlebury Baptist Church v Koester*, 50 AD3d 1494, 1495).

We reject defendants' contention that plaintiffs failed to establish the required elements of hostility, claim of right or exclusivity. The evidence presented at trial established that plaintiffs and their predecessors used the disputed area exclusively from the time the camp was constructed in 1971 until defendants commissioned the survey in 2004. If all the other elements of adverse possession are established, it is presumed that the use was hostile and under a claim of right (*see DeRosa v DeRosa*, 58 AD3d 794, 796, *lv*

denied 12 NY3d 710; *Allen v Mastrianni*, 2 AD3d 1023, 1024; *Parsons v Hollingsworth*, 259 AD2d 1054). "By definition, a claim of right is adverse to the title owner[s] and also in opposition to the rights of the true owner[s]" (*Walling*, 7 NY3d at 232). Plaintiffs established that they and their predecessors used the disputed area openly and notoriously and that they and their predecessors had been in actual, exclusive, and continuous possession of the disputed area since 1971. Thus, a presumption of hostility under a claim of right arose, and defendants failed to rebut that presumption (*see Hammond*, 81 AD3d at 1289). The evidence submitted by defendants regarding events that occurred in 1998 is of no moment inasmuch as plaintiffs had already acquired the property by adverse possession at that time.

We reject defendants' further contention that the court erred in awarding plaintiffs punitive damages. "In order to recover punitive damages for trespass on real property, plaintiffs have the burden of proving that the trespasser acted with actual malice involving an intentional wrongdoing, or that such conduct amounted to a wanton, willful or reckless disregard of plaintiffs' rights" (*Ligo v Gerould*, 244 AD2d 852, 853; *see Litwin v Town of Huntington*, 248 AD2d 361). Although defendants' survey demonstrated that the disputed area was located within lot 7, it is undisputed that defendant thereafter granted plaintiffs permission to "continue to use th[at] portion of [their] camp on [his] property." Moreover, defendant admitted that he had held a lease option on lot 7 since 1996, and thus it would be reasonable to assume that he was aware of the fact that plaintiffs had exercised rights of ownership over the disputed area since that time. Defendant was also aware of the fact that plaintiffs contested his ownership over the disputed property inasmuch as the Town Code Enforcement Officer noted the "ongoing dispute" between the parties in a letter to defendant in August 2005. Despite granting plaintiffs permission to use their camp and knowing that they contested his ownership of the disputed area, defendant erected a fence that abutted plaintiffs' camp and prevented plaintiffs from accessing their cellar through the hatchway doors that were located in the disputed area. Defendant also padlocked those hatchway doors, moved and demolished portions of the memorial to plaintiffs' father and flipped over boats owned by plaintiffs that were stored in the disputed area.

Once the court determined that the property was owned by plaintiffs by reason of adverse possession, defendant was responsible for any damages that he caused to plaintiffs' property by reason of his trespass, and the jury properly awarded plaintiffs compensatory damages. It is undisputed that punitive damages may also be awarded for actions based on real property trespass (*see e.g. Western N.Y. Land Conservancy, Inc. v Cullen*, 66 AD3d 1461, 1463, *appeal dismissed* 13 NY3d 904, *lv denied* 14 NY3d 705, *rearg denied* 15 NY3d 746; *Ligo*, 244 AD2d at 853), but we agree with our dissenting colleagues that there does not appear to be any case awarding punitive damages where, as here, the trespass occurred as a result of adverse possession. We note, however, that there is also no case prohibiting the award of punitive damages in such a situation, and we conclude that this is an "exceptional" case where punitive damages are appropriate (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489; *cf. Litwin*, 248 AD2d 361).

We recognize that, at the time defendant committed his malicious acts, he possessed a survey indicating that he owned the disputed area. Nevertheless, defendant was aware that there was a dispute over the property line, and he granted plaintiffs permission to continue to use their camp. Despite those facts, defendant proceeded to destroy plaintiffs' property, including desecrating a memorial, and the evidence strongly suggests that he plugged plaintiffs' vent pipe, rendering their toilet unusable, and entered their cellar to cut and remove the new vent pipe that plaintiffs subsequently installed. Defendant's conduct was intentional, " 'evince[d] a high degree of moral turpitude and demonstrate[d] such wanton dishonesty as to imply a criminal indifference to [his] civil obligations' " (*Ross*, 8 NY3d at 489). At the very least, it was conduct that "amounted to a wanton, willful or reckless disregard of plaintiffs' rights" (*Ligo*, 244 AD2d at 853).

We conclude, however, that the award of $200,000 in punitive damages was "so grossly excessive 'as to show by its very exorbitancy that it was actuated by passion' " (*Nardelli v Stamberg*, 44 NY2d 500, 504). Based on awards in other trespass cases, we conclude that $15,000 is the amount that " 'bears a reasonable relation to the harm done and the flagrancy of the conduct causing it' " (*Western N.Y. Land Conservancy, Inc.*, 66 AD3d at 1464; *see e.g. Vacca v Valerino*, 16 AD3d 1159, 1160; *Ligo*, 244 AD2d at 853). We therefore modify the order and judgment by vacating the award of punitive damages, and we grant a new trial on punitive damages only unless plaintiffs, within 30 days of service of a copy of the order of this Court with notice of entry, stipulate to reduce that award to $15,000, in which event the order and judgment is modified accordingly.

We have considered defendants' remaining contentions and conclude that they are without merit.

All concur except CENTRA and FAHEY, JJ., who dissent in part and vote to modify in accordance with the following Memorandum: We respectfully dissent in part and would modify the order and judgment by vacating the award of punitive damages. Plaintiffs and defendants-third-party plaintiffs (defendants) own adjoining properties on Hiawatha Lake I in the Town of Grieg. Plaintiffs' lot is improved by a camp built in approximately 1971, and defendants' lot is vacant. When defendants purchased their lot in October 2004, they commissioned a survey that established that the east side of the camp owned by plaintiffs encroached on defendants' lot by approximately 2½ feet. According to plaintiffs, they acquired title to the disputed area, which extends between 10 and 12 feet to the east of their camp, by adverse possession. Although Mark Hogan (defendant) began asserting his right to the disputed area shortly after defendants purchased their lot, plaintiffs waited until October 2006 to commence this action seeking, inter alia, a determination that they acquired title to the disputed area by adverse possession.

We disagree with the majority's conclusion that punitive damages are appropriate in this case. "In order to recover punitive damages for trespass on real property, plaintiffs have the burden of proving

that the trespasser acted with actual malice involving an intentional wrongdoing, or that such conduct amounted to a wanton, willful or reckless disregard of plaintiffs' rights" (*Ligo v Gerould*, 244 AD2d 852, 853; *see Litwin v Town of Huntington*, 248 AD2d 361). In our view, this is not an "exceptional" case where punitive damages are appropriate (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489; *see Litwin*, 248 AD2d 361). The survey that defendants commissioned gave defendant a reasonable and factual basis to believe that he owned the disputed area. This is not a case where the trespasser knew that he or she had no ownership claim over the property (*cf. Western N.Y. Land Conservancy, Inc. v Cullen*, 66 AD3d 1461, 1463, *appeal dismissed* 13 NY3d 904, *lv denied* 14 NY3d 705, *rearg denied* 15 NY3d 746; *Ligo*, 244 AD2d 852). Notably, once plaintiffs commenced this action and placed defendants on notice that they were asserting title to the disputed area by adverse possession, there were no further incidents of trespass by defendant. We therefore agree with defendants that the award of punitive damages should be vacated.

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

894

CA 10-01731

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

GRAY WOLF CORP., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GLEASON ESTATES ASSOCIATES, LP,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LECLAIR RYAN, ROCHESTER (GREGORY J. MASCITTI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered April 30, 2010 in a foreclosure action. The order denied the motion of plaintiff for summary judgment and granted the cross motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendant's cross motion and reinstating the complaint and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this foreclosure action and thereafter moved for summary judgment on the complaint, and defendant cross-moved for summary judgment dismissing it. We note at the outset that Supreme Court properly concluded that defendant was under no obligation to provide plaintiff with certain annual financial statements in accordance with the terms of the various documents executed both between the parties and between the parties and the United States Department of Housing and Urban Development. We further conclude that the court properly denied plaintiff's motion for summary judgment on the foreclosure complaint because, on the record before us, there is an issue of fact whether defendant was in default (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). For that same reason, however, we conclude that the court erred in granting defendant's cross motion for summary judgment dismissing the complaint, and we therefore modify the order accordingly.

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

895

CA 10-01892

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

GRAY WOLF CORP., PLAINTIFF-APPELLANT,

V ORDER

GLEASON ESTATES ASSOCIATES, LP,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LECLAIR RYAN, ROCHESTER (GREGORY J. MASCITTI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered August 5, 2010 in a foreclosure action. The order denied the motion of plaintiff for leave to reargue and renew.

It is hereby ORDERED that said appeal from the order insofar as it denied reargument is unanimously dismissed (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984) and the order is affirmed without costs.

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

903

KA 05-01624

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY M. GARRETT, DEFENDANT-APPELLANT.

PETER J. PULLANO, ROCHESTER (ANDREW FISKE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Elma A. Bellini, J.), rendered July 6, 2004. The judgment convicted defendant, upon a jury verdict, of murder 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 murder in the first degree (Penal Law § 125.27 [1] [a] [vii]). 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 with respect to the element of intent (*see generally People v Bleakley*, 69 NY2d 490, 495). A different finding by the jury, i.e., a finding that defendant acted without intent to kill the victim, would have been unreasonable (*see generally id.*). Defendant admitted that he shot the victim intentionally in his statements to the police and one of his accomplices. Further, the evidence established that, during the course of the robbery, defendant warned the victim that he would shoot him in the event that the victim did not turn out his pockets within a count of three and that defendant followed through on that precise threat. The evidence also established that defendant committed the robbery in a calm and methodical manner prior to shooting the victim. In addition, the People presented ballistics evidence demonstrating that the gun used by defendant could not have been discharged accidently, and nothing concerning the nature of the victim's wounds cast any doubt on the conclusion that defendant shot the victim with the intent to kill him.

Defendant further contends that County Court erred in admitting evidence related to uncharged crimes that he committed in Cleveland immediately prior to being apprehended for the instant crime (*see*

generally People v Ventimiglia, 52 NY2d 350, 359; *People v Molineux*, 168 NY 264, 291-294). We conclude that evidence of defendant's criminal conduct in Cleveland was relevant "to complete the narrative" of the People's case insofar as it established that defendant fled from Rochester and explained why key pieces of evidence were located in Cleveland (*People v Mullings*, 23 AD3d 756, 758, *lv denied* 6 NY3d 756, 759; *see generally People v Resek*, 3 NY3d 385, 389-390). Each of those aspects of the narrative, however, could have been established without discussing the details of the Cleveland crimes, i.e., any holes or ambiguities in the narrative "could . . . have been easily dealt with by far less prejudicial means" (*Resek*, 3 NY3d at 390). We therefore conclude that the court erred in admitting testimony related to the details of the Cleveland crimes. Nevertheless, that error is harmless. The court's instructions severely limited the extent to which the jury could rely upon testimony related to the Cleveland crimes (*see People v Walker*, 84 AD3d 842, 843). The remaining evidence against defendant, which included his admission to the crime, was overwhelming, and there was no significant probability that defendant would have been acquitted had the evidence concerning the Cleveland crimes been excluded (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

We reject defendant's contention that the court erred in permitting the People to introduce evidence of prior consistent statements made by one of his accomplices. On cross-examination, defense counsel spent considerable time eliciting testimony from that accomplice regarding the fact that he was testifying pursuant to a plea agreement. Defense counsel's apparent strategy in pursuing that line of questioning was to suggest to the jury, however subtly, that the plea deal accepted by the accomplice provided him with a motive for lying about defendant's involvement in the robbery and murder. The People were free to elicit testimony from the accomplice concerning his statements that were consistent with his trial testimony and made prior to the date on which the plea agreement was reached in order to refute defendant's suggestion that the accomplice had fabricated his testimony (*see People v McDaniel*, 81 NY2d 10, 18; *People v McClean*, 69 NY2d 426, 428).

Finally, the sentence is not unduly harsh or severe.

Entered: October 7, 2011 Patricia L. Morgan
Clerk of the Court

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

912

CA 11-00639

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

MARGARET BEVAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DESMOND MURRAY, CHRISTINE MURRAY, AND MIKE WESTON, DOING BUSINESS AS MIKE WESTON CONTRACTING, DEFENDANTS-RESPONDENTS.

DESMOND MURRAY AND CHRISTINE MURRAY, THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

GRAYWOOD PROPERTIES, LLC, THIRD-PARTY DEFENDANT-RESPONDENT.

LAW OFFICE OF CHARLES A. HALL, ROCHESTER (CHARLES A. HALL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (LISA G. BERRITTELLA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS DESMOND MURRAY AND CHRISTINE MURRAY AND THIRD-PARTY PLAINTIFFS-RESPONDENTS.

LIPPMAN O'CONNOR, BUFFALO (THOMAS D. SEAMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT MIKE WESTON, DOING BUSINESS AS MIKE WESTON CONTRACTING.

GEIGER AND ROTHENBERG, LLP, ROCHESTER (ALEXANDER GEIGER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered June 24, 2010 in a personal injury action. The order, among other things, granted defendants' motions for summary judgment and granted the third-party defendant's cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by denying the motions of defendants-third-party plaintiffs and defendant, as well as the cross motion of third-party defendant, reinstating the complaint and the third-party complaint, and vacating that part of the fourth ordering paragraph denying plaintiff's cross motion insofar as it sought leave to amend the complaint and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in

accordance with the following Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she fell and struck her head on an unfinished deck at the house of defendants-third-party plaintiffs (defendants). We agree with plaintiff that Supreme Court erred in granting the motions of defendants and defendant Mike Weston, doing business as Weston Contracting (Weston), seeking summary judgment dismissing the complaint, as well as the cross motion of third-party defendant Graywood Properties, LLC (Graywood) seeking summary judgment dismissing the third-party complaint, on the ground that the unfinished deck was an open and obvious risk (*see generally Tagle v Jakob*, 97 NY2d 165, 169). We therefore modify the order accordingly.

In order to construct the deck, Weston removed the exterior staircase that had previously led from the dining room of the house down to the ground. The joists for the deck were in place on the day of plaintiff's accident, and some boards were stacked across the joists in the middle of the deck. Prior to the accident, plaintiff was in the dining room, and she recalls intending to place an inchworm outside that she had discovered on Christine Murray (defendant). Plaintiff has no memory of the accident and, although defendant observed plaintiff stand up to leave with the inchworm, defendant did not see the accident occur. Indeed, defendant did not discover plaintiff sitting on the ground at the far end of the deck, approximately 10 feet away from the house, until after she had cleaned up the dishes, put some things away in the refrigerator and started loading the dishwasher. In light of the lack of evidence with respect to the actual events that occurred during those moments surrounding plaintiff's accident, it cannot be said that the "only . . . conclusion [that] can be drawn from the established facts" is that the accident occurred in its entirety at the far side of the unfinished deck (*Liriano v Hobart Corp.*, 92 NY2d 232, 242).

We note that the court denied that part of plaintiff's cross motion seeking leave to amend the complaint to add Graywood as a defendant, presumably in light of the court's determination granting the motions of defendants and Weston seeking summary judgment dismissing the complaint against them. We therefore further modify the order by vacating that part of the fourth ordering paragraph denying plaintiff's cross motion insofar as it sought leave to amend the complaint, and we remit the matter to Supreme Court to determine that part of plaintiff's cross motion.

All concur except CENTRA, J.P., who dissents in part and votes to affirm in the following Memorandum: I respectfully dissent in part and would affirm the order in its entirety. Plaintiff commenced this action seeking damages for injuries that she sustained when she fell and struck her head on an unfinished deck at the home of defendants-third-party plaintiffs (defendants). While the deck was under construction, defendant Mike Weston, doing business as Weston Contracting (Weston), removed the exterior stairs leading from the sliding glass door located in the dining room of the house. Notably, at the time of the accident, there was a stack of boards placed across the joists in the middle of the deck. The accident occurred when

plaintiff, who was visiting defendants, noticed an inchworm on defendant-third-party plaintiff Christine Murray (defendant) and decided to remove it from her and put the inchworm outside. After plaintiff removed the inchworm, defendant walked toward the kitchen and did not witness the accident, although she looked out the window and observed plaintiff sitting on the ground in between joists at the far end of the unfinished deck. Plaintiff remembered taking the inchworm off of defendant, but she had no memory of the accident.

In my view, Supreme Court properly granted the motions of defendants and Weston and that part of the cross motion of third-party defendant for summary judgment dismissing the complaint. It is well settled that landowners do not have a duty to warn of an open and obvious condition on their property (*see Tagle v Jakob*, 97 NY2d 165, 169; *Faery v City of Lockport*, 70 AD3d 1375; *Cramer v County of Erie*, 23 AD3d 1145). In support of their motion, defendants submitted photographs and their deposition testimony establishing that the condition of the unfinished deck was open and obvious, and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiff contends that the photographs of the unfinished deck fail to demonstrate that the absence of stairs leading from the sliding glass door was an open and obvious condition from the vantage point of someone inside the house. I reject that contention inasmuch as plaintiff's theory that she fell because of the absence of the stairs is based on pure speculation. Rather, the record establishes that, based on the location of plaintiff after the accident, she fell after climbing onto the deck and maneuvering over a stack of boards in the middle of the deck. I therefore conclude that plaintiff was aware of the open and obvious condition of the unfinished deck (*see Tagle*, 97 NY2d at 169-170), and that the court properly dismissed the complaint insofar as it asserts a failure to warn claim.

I agree with plaintiff that " '[t]he duty to maintain premises in a reasonably safe condition is analytically distinct from the duty to warn' " (*Juoniene v H.R.H. Constr. Corp.*, 6 AD3d 199, 201), and that the court erred in ending its inquiry once it concluded that the allegedly dangerous condition was open and obvious. "The fact that a dangerous condition is open and obvious does not negate the duty to maintain premises in a reasonably safe condition but, rather, bears only on the injured person's comparative fault" (*Bax v Allstate Health Care, Inc.*, 26 AD3d 861, 863). I nevertheless conclude that the court properly dismissed the remainder of the complaint. "[L]andowner[s] . . . owe[] a duty to persons coming upon [their] land to keep it in a reasonably safe condition, considering all the circumstances, including the purpose of the person's presence on the land and the likelihood of injury" (*Gustin v Association of Camps Farthest Out*, 267 AD2d 1001, 1002 [internal quotation marks omitted]). " 'Foreseeability of injury is a limitation upon[] and defines the scope of duty' " (*id.*; *see generally Di Ponzio v Riordan*, 89 NY2d 578, 583). Defendants established that plaintiff's actions in maneuvering across the unfinished deck to free an inchworm were not foreseeable as a matter of law (*see Garcia v Northcrest Apts. Corp.*, 24 AD3d 208, 209; *Gustin*, 267 AD2d at 1002). Under the circumstances of this case,

defendants' duty to maintain the property in a reasonably safe condition did not extend to protecting plaintiff from her injuries (*see Gustin*, 267 AD2d at 1002; *see also Tedesco v Nowak*, 294 AD2d 911, *lv denied* 98 NY2d 610).

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

913

CA 10-02278

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

CRANE-HOGAN STRUCTURAL SYSTEMS, INC.,
CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 110250.)

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

GATES & ADAMS, P.C., ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Philip J. Patti, J.), entered August 12, 2010. The judgment awarded claimant money damages for breach of contract, after a trial.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the award of $1,399,589.87 to $489,992.24 and as modified the judgment is affirmed without costs.

Memorandum: Claimant commenced this action seeking damages for defendant's breach of a construction contract. Defendant contracted with claimant to rehabilitate the Veterans Memorial Bridge in Rochester for the sum of $18,535,215.42. The project involved partial removal and repair of the bridge deck and supporting beams and was to be completed by September 30, 1999. While the work was underway, the parties discovered that the bridge was in greater disrepair than the plans had reflected, and defendant halted construction in approximately May 1998. Thereafter, defendant issued new plans calling for, inter alia, the complete removal and replacement of the bridge deck, shoring of the bridge deck and removal and replacement of bridge beams. The new plans required additional labor and equipment and extended the construction time frame from 2½ years to 4½ years.

While the parties negotiated claimant's compensation for the additional work, claimant agreed to proceed by "force account," i.e., on a time and materials basis, pursuant to the Standard Specifications of the Department of Transportation (Standard Specifications). The Standard Specifications provided that, "[w]here there are no applicable unit prices for extra work ordered and agreed prices cannot be readily established or substantiated, the [c]ontractor shall be paid the actual and reasonable cost" of necessary materials, labor,

payroll taxes and insurance payments, sales tax, equipment, profit and overhead. The force account method required claimant to complete detailed forms listing labor, equipment and materials used on a daily, weekly and monthly basis. Claimant submitted proposed unit pricing to defendant in 1998 and 1999 but received no response, and claimant was ultimately advised that defendant had decided not to consider unit pricing for the additional work. As a result, the work proceeded entirely according to the force account method, with claimant reserving its right to seek additional compensation from defendant.

After claimant had completed the project and defendant had accepted the work on March 11, 2002, claimant sought additional compensation from defendant in the amount of $2,203,058.75, which included $693,314.56 in project or field overhead and $964,937.60 in corporate or home office overhead. According to claimant, 63.5% of those overhead costs were incurred completing work set forth in the original contract (hereafter, contract work), while 36.5% of those costs were incurred performing force account work, which is the subject of this action. In response to claimant's request, defendant issued a change order or "order on contract" in the amount of $612,400.58 for "time related dispute compensation," i.e., compensation for costs incurred beyond the expected contract completion date. That amount included $450,265 or 63.5% of the amount claimant sought for project overhead, representing the portion of the project overhead claim allocable to the contract work. Defendant refused to pay the remaining 36.5% of the claim attributable to force account work. Defendant also paid claimant $45,026.50 in corporate overhead, i.e., 10% of the amount that it awarded in project overhead, as well as $49,529.15 in profit, i.e., 10% of the amounts awarded for project and corporate overhead, based upon the Standard Specifications.

Claimant thereafter commenced this action seeking damages in the amount of $1,432,624.65, plus interest, for corporate overhead, project overhead, standby equipment and underutilized equipment. According to claimant, the project redesign "constitut[ed] a cardinal change to [its] contract" and, as a result, it "incurred significant additional costs for which it was not compensated, including additional labor, equipment and overhead[,] as well as lost profits." Claimant subsequently prepared a statement of damages in which it reduced the amount of damages sought to $1,367,795.54.

We note at the outset that defendant does not challenge the Court of Claims' determination that the redesigned project constituted a cardinal change to the contract or that quantum meruit is the proper measure of damages. Rather, defendant's sole contention is that the damages award of $1,399,589.87 with interest should be reduced. The court determined that claimant incurred "uncompensated costs" for home office overhead in the amount of $834,493.35, for project overhead in the amount of $189,909.46, for standby equipment in the amount of $63,242 and for underutilized equipment in the amount of $122,445, for a total amount of $1,210,089.81. In addition, the court determined that claimant was entitled to a " 'markup' " for overhead and profit in the amount of 15.66% of the uncompensated costs or $189,500.06.

" 'On our review of a verdict after a bench trial, we independently review the weight of the evidence and may grant the judgment warranted by the record' " (*Charles T. Driscoll Masonry Restoration Co., Inc. v County of Ulster*, 40 AD3d 1289, 1291; *see Evans-Freke v Showcase Contr. Corp.*, 85 AD3d 961, 962-963). As in any contract action, claimant bears the burden of establishing its damages (*see Manshul Constr. Corp. v Dormitory Auth. of State of N.Y.*, 79 AD2d 383, 387), and "damages are limited to awards based upon 'a definite and logical connection between what is proven and the damages sought to be recovered' " (*Clifford R. Gray, Inc. v State of New York*, 251 AD2d 728, 730). In construction contract cases, "[t]he customary method of calculating damages on a *quantum meruit* basis . . . is actual job costs plus an allowance for overhead and profits minus amounts paid" (*Najjar Indus. v City of New York*, 87 AD2d 329, 331-332, *affd* 68 NY2d 943; *see Whitmyer Bros. v State of New York*, 47 NY2d 960, 962, *affg* 63 AD2d 103; *Miranco Contr., Inc. v Perel*, 57 AD3d 956, 958).

We agree with defendant that the court erred in failing to credit defendant for the amounts that it paid to claimant for overhead and profit. The record demonstrates, and claimant correctly concedes, that defendant paid claimant $1,899,946.49 in markup for overhead and profit through the force account procedure. Indeed, defendant paid a 20% markup on labor costs, excluding overtime premiums, and materials for all force account work, as well as a 25% markup on subcontracted work. The court, however, failed to take those payments into account in its calculation of damages (*see generally Anthony L. Castiglia, Inc. v City of Lockport*, 85 AD2d 879, *lv denied* 55 NY2d 608). The court then compounded its error by awarding an additional markup of 15.66%, which was the markup percentage actually realized by claimant on the force account work, for "overhead and profit" on top of the overhead costs that it awarded. We agree with defendant that it was duplicative for the court to award an additional markup for overhead on top of overhead expenses (*see Whitmyer Bros.*, 63 AD2d at 108-109). Further, the claim for project overhead already included a 20% markup on wages and materials in the amount of $106,695.75. Thus, the court awarded overhead and profit upon an overhead figure that already included a markup, presumably for profit. That was error (*cf. Anthony L. Castiglia, Inc.*, 85 AD2d 879).

In our view, the court should have awarded damages based on the direct cost of the force account work, plus the indirect costs incurred by claimant and a reasonable allowance for profit, minus payments made by defendant (*see generally Clifford R. Gray, Inc.*, 251 AD2d at 729-730). We conclude that 13%, the percentage utilized by claimant in preparing its bid, is a reasonable allowance for profit. It is undisputed that the actual or direct cost of the work performed via force account was $12,129,945.16. With respect to indirect costs, the court determined that claimant incurred costs in the amount of $63,242 for standby equipment and $122,445 for underutilized equipment. Defendant has abandoned any challenge to those aspects of the award on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984), and we adopt those amounts. With respect to the award for project overhead, plaintiff's original claim was $693,314.56 for contract work

and force account work. From that amount, we deduct the markup of $106,695.75 included in the claim for project overhead, as well as the $53,140.10 in vehicle use included in the claim, which the court found to be unsupported by the evidence. That brings the total amount claimed for project overhead on contract and force account work to $533,478.71. Of that amount, claimant alleged that 36.5% is attributable to force account work, which results in a total of $194,719.73. As for corporate overhead, the original claim was $929,049 for both contract and force account work. Of that amount, claimant alleged that 36.5% is attributable to force account work, which results in a total of $339,102.88. Thus, the total indirect costs attributable to the force account work is $719,509.61. To the total direct costs in the amount of $12,129,945.16 and the indirect costs in the amount of $719,509.61, we add a 13% allowance for profit, i.e., $1,670,429.12, yielding a subtotal of $14,519,883.89 owed to claimant. From that subtotal, we deduct $14,029,891.65, the amount that defendant paid via the force account procedure, which results in a sum of $489,992.24 owed to claimant. We therefore modify the judgment accordingly.

Contrary to the further contention of defendant, we conclude that the court did not abuse its discretion in awarding interest from March 11, 2002, the date on which defendant accepted claimant's work under the contract, to September 11, 2002 (*see* CPLR 5001 [a]; *Pozament Corp. v AES Westover, LLC*, 51 AD3d 1080, 1080-1081; *see generally Precision Founds. v Ives*, 4 AD3d 589, 593).

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

914

CA 10-02510

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

JOHN J. WARREN, PLAINTIFF,

V ORDER

LAWRENCE ELLIS, III, WILLIAM CARL ELLIS, CHRISTINE A. KAPAKOS AND LILLIAN D. ELLIS, AS TRUSTEES UNDER THE WILL OF LAWRENCE R. ELLIS, JR., DECEASED, DATED DECEMBER 23, 1986, THE TRUST UNDER THE WILL OF LAWRENCE R. ELLIS, JR., DATED DECEMBER 23, 1986, DEFENDANTS-APPELLANTS, FINGER LAKES BOOK COMPANY AND ALL ABOUT BOOKS, LLC, DEFENDANTS-RESPONDENTS.

LAW OFFICES OF TAYLOR & SANTACROSE, BUFFALO (DESTIN C. SANTACROSE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

UNDERBERG & KESSLER LLP, BUFFALO (COLIN D. RAMSEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered September 2, 2010 in a personal injury action. The order, inter alia, denied the cross motion of defendants-appellants for summary judgment.

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

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

920

CA 11-00742

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

DEAN SCHREIBER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

UNIVERSITY OF ROCHESTER MEDICAL CENTER, AND ITS AGENTS, SERVANTS AND/OR EMPLOYEES, DEFENDANT-RESPONDENT.

COTE & VAN DYKE, LLP, SYRACUSE (JOSEPH S. COTE, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (THOMAS C. BURKE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered July 8, 2010 in a medical malpractice action. The judgment, among other things, dismissed plaintiff's complaint on the merits.

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

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for a skin ulceration and resulting leg injuries that he sustained after undergoing right ankle fusion surgery performed by defendant's "agents, servants and/or employees" (hereafter, agents). After a trial, the jury rendered a verdict in favor of defendant, finding that defendant was negligent but that its negligence was not a cause of the injuries. Supreme Court denied plaintiff's post-trial motion seeking, inter alia, to set aside the verdict as against the weight of the evidence and inconsistent. Plaintiff appeals from the judgment entered on that verdict. We affirm.

To the extent that plaintiff contends that the verdict is inconsistent, plaintiff failed to preserve that contention for our review inasmuch as he failed to raise it before the jury was discharged (*see Barry v Manglass*, 55 NY2d 803, 806, *rearg denied* 55 NY2d 1039; *Krieger v McDonald's Rest. of N.Y., Inc.*, 79 AD3d 1827, 1828, *lv dismissed* 17 NY3d 734). To the extent that plaintiff contends that the verdict is against the weight of the evidence, however, he preserved that contention by moving to set aside the verdict on that ground (*see Skowronski v Mordino*, 4 AD3d 782). We nevertheless reject that contention. A jury verdict will be set aside as against the weight of the evidence only when the evidence at trial

"so preponderated in favor of the [losing party] that the verdict could not have been reached on any fair interpretation of the evidence" (*id.* at 782-783). "A verdict finding that a defendant was negligent but that such negligence was not a proximate cause of the [plaintiff's injuries] is against the weight of the evidence only when [those] issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" (*Santillo v Thompson*, 71 AD3d 1587, 1588-1589 [internal quotation marks omitted]). Where a verdict " 'can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view' " (*Kunsman v Baroody*, 60 AD3d 1369, 1370).

We conclude that there is a fair interpretation of the evidence pursuant to which the jury could have found that defendant's agents acted negligently but did not cause the postsurgery leg injuries alleged by plaintiff. Plaintiff presented two theories of liability at trial. First, plaintiff alleged that defendant's agents negligently constructed and placed his leg in a cast and, second, he alleged that defendant's agents acted negligently in failing to treat him after the surgery, when he called to report that he was experiencing pain in his right leg. With respect to the theory of negligent construction and placement of the cast, testimony was presented suggesting that ulcerations can occur even with proper cast placement and that plaintiff's ulceration resulted from the surgical realignment of his ankle rather than from the cast. In light of that testimony, the jury reasonably could have found that, even in the event that defendant's agents were negligent in constructing and placing the cast, such negligence was not a substantial factor in causing plaintiff's skin ulceration and resulting injuries. With respect to the theory that defendant's agents acted negligently in failing to treat plaintiff on a certain occasion following his surgery, plaintiff offered no evidence establishing that the delay in treatment deprived him of the opportunity for a better outcome with respect to the ulceration (*see Poblocki v Todoro*, 49 AD3d 1239). Moreover, defendant's wound healing expert testified that treatment of plaintiff's ulceration on the date in question would not have prevented his subsequent leg injuries.

Finally, we note that plaintiff's reliance on the doctrine that a defendant takes a plaintiff as he or she finds that plaintiff is misplaced (*see e.g. Bartolone v Jeckovich*, 103 AD2d 632, 635). That doctrine stands only for the proposition that a defendant is liable for all of the damages that flow from a proven act of negligence, even in the event that some of those damages are the result of a susceptibility unique to the plaintiff (*see id.*). Notwithstanding plaintiff's preexisting condition, plaintiff was still required to prove that the negligence of defendant's agents caused his injuries.

Entered: October 7, 2011 Patricia L. Morgan
Clerk of the Court

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

922

CA 11-00241

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

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

V MEMORANDUM AND ORDER

HUNT CONSTRUCTION GROUP, INC.,
DEFENDANT-RESPONDENT.

THE ONEIDA INDIAN NATION, A SOVEREIGN NATION,
THIRD-PARTY PLAINTIFF,

V

BRENNAN BEER GORMAN/ARCHITECTS, LLP,
THIRD-PARTY DEFENDANT.

BRENNAN BEER GORMAN/ARCHITECTS, LLP,
FOURTH-PARTY PLAINTIFF-RESPONDENT,

V

BERTINO & ASSOCIATES, INC.,
FOURTH-PARTY DEFENDANT-APPELLANT,
STEVEN FELLER, P.E., STEVEN FELLER, P.E. INC.,
STEVEN FELLER, P.E., PL, S. DESIMONE
CONSULTING ENGINEERS, PLLC, FOURTH-PARTY
DEFENDANTS-RESPONDENTS,
ET AL., FOURTH-PARTY DEFENDANTS.

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

SUGARMAN LAW FIRM, LLP, SYRACUSE (SAMUEL M. VULCANO OF COUNSEL), FOR FOURTH-PARTY PLAINTIFF-RESPONDENT.

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

Appeals from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered January 21, 2011. The order, among other things, denied the motion of plaintiff for partial summary

judgment and denied the motion of fourth-party defendant Bertino & Associates, Inc. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of plaintiff-third-party plaintiff and dismissing defendant's first and second counterclaims to the extent that they seek amounts in excess of the contractual guaranteed maximum price, as modified by Change Orders or Construction Change Directives, and as modified the order is affirmed without costs.

Memorandum: Plaintiff-third-party plaintiff (plaintiff), the owner of Turning Stone Casino & Resort, commenced this action seeking damages resulting from the alleged breach by defendant, Hunt Construction Group, Inc. (Hunt), of its construction contract (contract) with plaintiff. On a prior appeal, we concluded that Supreme Court erred in denying those parts of plaintiff's motion to dismiss the second counterclaim in part and the fourth and fifth counterclaims, and we therefore modified the order accordingly (*Oneida Indian Nation v Hunt Constr. Group, Inc.*, 67 AD3d 1345). Plaintiff appeals from that part of an order that denied its motion for partial summary judgment dismissing Hunt's remaining counterclaims to the extent that they seek amounts in excess of the contractual guaranteed maximum price (GMP) as modified by Change Orders or Construction Change Directives executed pursuant to the terms of the contract. We agree with plaintiff that the court erred in denying its motion, and we therefore modify the order accordingly.

Article 7 of the General Conditions of the contract unambiguously provides that Hunt would not be reimbursed for any expense or paid a fee for any work that exceeded the GMP unless that expense or work was authorized either by a Change Order signed by plaintiff, third-party defendant-fourth-party plaintiff, Brennan Beer Gorman/Architects, LLP (BBG), the project architect, fourth-party defendant Bertino & Associates, Inc. (Bertino), the construction manager, and Hunt or by a Construction Change Directive signed by plaintiff, BBG and Bertino. The conduct of plaintiff and Hunt belies Hunt's contention that plaintiff waived that requirement set forth in Article 7 (*cf. Austin v Barber*, 227 AD2d 826, 828). Indeed, Hunt continued to seek, and in certain instances was granted, increases to the GMP pursuant to the executed Change Orders and Construction Change Directives (*see Charles T. Driscoll Masonry Restoration Co., Inc. v County of Ulster*, 40 AD3d 1289, 1292). Further, the limited authority granted to Bertino pursuant to the contract to act on behalf of plaintiff cannot be interpreted as authorization for Bertino to bind plaintiff to an increased GMP, inasmuch as such an interpretation would render the majority of Article 7 meaningless (*see Diamond Castle Partners IV PRC, L.P. v IAC/InterActiveCorp*, 82 AD3d 421, 422).

Bertino also appeals from that part of the order that denied its motion for summary judgment dismissing the fourth-party complaint against it and the cross claims of the other fourth-party defendants, Bertino's subcontractors on the project. Inasmuch as Bertino's contract with plaintiff expressly requires Bertino to indemnify BBG

for any damages resulting from Bertino's acts or omissions for which BBG is found liable, the court properly denied that part of the motion of Bertino with respect to BBG's contractual indemnification claim against it (*see Williams v City of New York*, 74 AD3d 479, 480). Finally, Bertino's contention that it is entitled to summary judgment dismissing the common-law indemnification and contribution claims against it is raised for the first time on appeal, and thus that contention is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

931

KA 10-02152

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER R. WOLF, ALSO KNOWN AS JENNIFER R. WOLFE, DEFENDANT-APPELLANT.

MARCEL J. LAJOY, ALBANY, 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 September 27, 2010. The judgment convicted defendant, upon her 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: On appeal from a judgment convicting her upon her plea of guilty of attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [1]), defendant contends that her waiver of the right to appeal was invalid. We reject that contention. Despite defendant's contention to the contrary, the record "establish[es] that [she] understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256; *see People v McKeon*, 78 AD3d 1617, *lv denied* 16 NY3d 799). Defendant further contends that County Court abused its discretion in denying her motion to withdraw the guilty plea on the ground that the plea was not knowing, voluntary or intelligent. Although defendant's contention survives her valid waiver of the right to appeal (*see People v Sparcino*, 78 AD3d 1508, 1509, *lv denied* 16 NY3d 746), it is without merit. "Permission to withdraw a guilty plea rests solely within the court's discretion . . ., and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Robertson*, 255 AD2d 968, *lv denied* 92 NY2d 1053). Here, defendant failed to submit her own affidavit, let alone any medical evidence, to substantiate her claim in support of her motion that her mental illness precluded her from entering a voluntary plea (*see People v Ashley*, 71 AD3d 1286, 1287, *affd* 16 NY3d 725; *People v Ramos*, 77 AD3d 773, 774, *lv denied* 16 NY3d 835). Further, "[d]efendant's contention is belied by the record of

the plea proceeding, which establishes that [her] factual allocution was lucid and detailed and that defendant understood both the nature of the proceedings and that [s]he was waiving various rights" (*People v Hayes*, 39 AD3d 1173, 1175, *lv denied* 9 NY3d 923). Defendant responded to the court's questions in a clear manner, repeatedly confirmed that she understood the proceedings, and declined opportunities to speak with her attorney. Thus, "nothing in the record of the plea proceeding establishes that defendant's alleged mental illness 'so stripped [defendant] of orientation or cognition that [s]he lacked the capacity to plead guilty' " (*People v Young*, 66 AD3d 1445, 1446, *lv denied* 13 NY3d 912, quoting *People v Alexander*, 97 NY2d 482, 486).

Defendant's further contention that her plea was coerced because the People informed defense counsel that they would pursue additional charges against defendant if she rejected the plea offer is "belied by [her] statement during the plea proceeding that [she] was not threatened, coerced or otherwise influenced against [her] will into pleading guilty" (*People v Irvine*, 42 AD3d 949, 949, *lv denied* 9 NY3d 962 [internal quotation marks omitted]). In any event, "[t]he fact that the possibility of [additional charges] may have influenced defendant's decision to plead guilty is insufficient to establish that the plea was coerced" (*People v Hobby*, 83 AD3d 1536, 1536; *see People v Coppaway*, 281 AD2d 754). Nor does "the fact that defendant was required to accept or reject the plea offer within a short time period . . . amount to coercion" (*People v Mason*, 56 AD3d 1201, 1202, *lv denied* 11 NY3d 927 [internal quotation marks omitted]).

Contrary to defendant's further contention, we conclude that the court did not err in failing to conduct an evidentiary hearing on her motion to withdraw her guilty plea. During the lengthy oral arguments on the motion, the court afforded defense counsel the opportunity to set forth each of his arguments in support of withdrawal. Defendant was thus "afforded . . . the requisite 'reasonable opportunity to present h[er] contentions' in support of that motion" (*People v Strasser*, 83 AD3d 1411, 1411, quoting *People v Tinsley*, 35 NY2d 926, 927; *see Irvine*, 42 AD3d at 949). Further, although defense counsel asserted the attorney-client privilege in response to certain questions by the court, the court was not required to appoint new counsel to represent defendant on the motion inasmuch as defense counsel "did not take an adverse position to defendant" or become a witness against her (*People v Milazo*, 33 AD3d 1060, 1061, *lv denied* 8 NY3d 883; *see People v McKoy*, 60 AD3d 1374, 1374-1375, *lv denied* 12 NY3d 856; *cf. People v Kirkland*, 68 AD3d 1794, 1795).

Finally, defendant contends that the drugs in question that were brought into the prison do not constitute "dangerous contraband" pursuant to Penal Law § 205.25 (1). To the extent that her contention may be deemed to be a jurisdictional challenge to the indictment that survives her valid waiver of the right to appeal (*see People v Hernandez*, 63 AD3d 1615, *lv denied* 13 NY3d 745), we reject that contention. The indictment alleges that defendant "committed acts constituting every material element of the crime charged" (*People v*

Iannone, 45 NY2d 589, 600), and the indictment therefore is not jurisdictionally defective (*see id.* at 600-601; *cf. People v Hines*, 84 AD3d 1591, 1591-1592; *People v Reeves*, 78 AD3d 1332, *lv denied* 16 NY3d 835; *People v Hurell-Harring*, 66 AD3d 1126, 1127-1128).

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

932

CAF 10-00960, CAF 10-01045

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

IN THE MATTER OF DAMIAN G. AND MADISON G.

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

JACQUELYN M. AND CHRISTOPHER G., RESPONDENTS-APPELLANTS.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR RESPONDENT-APPELLANT JACQUELYN M.

MARY R. HUMPHREY, NEW HARTFORD, FOR RESPONDENT-APPELLANT CHRISTOPHER G.

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

SUSAN B. MARRIS, ATTORNEY FOR THE CHILDREN, MANLIUS, FOR DAMIAN G. AND MADISON G.

Appeals from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered April 12, 2010 in a proceeding pursuant to Family Court Act article 10. The order adjudicated the subject children to be neglected.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent parents appeal from an order adjudicating their two children to be neglected. Contrary to the contentions of the parents, Family Court's findings of neglect are supported by the requisite preponderance of the evidence (*see* § 1046 [b] [i]). With respect to the mother, petitioner presented evidence establishing that she neglected the children by, inter alia, attempting to drive a motor vehicle in an intoxicated condition with the children in the vehicle. Although the mother vigorously disputed that she was intoxicated, witnesses testified that, on the evening in question, she exuded a strong odor of alcohol and was acting in a belligerent and an irrational manner.

With respect to the father, the record supports the court's determination that he deliberately failed to take anti-seizure medication so that he could consume alcohol on the day in question, and that he is aware that he is likely to become violent when he has a

seizure. The father did in fact suffer two seizures that day and, when the police responded to an emergency call on his behalf with respect to the first seizure, the father had the second seizure. The father did in fact become violent, as he threatened the officers and repeatedly challenged them to a fight. Although the children were not home at the time of the first seizure, they were approaching the home with their mother at the time of the second seizure, and had spent most of the evening with the father. We therefore conclude that the father, by deliberately failing to take his anti-seizure medication, failed to "exercise a minimum degree of care" for his children and thereby placed them in imminent danger of becoming impaired, physically, mentally or emotionally (§ 1012 [f] [i]). Although the father testified that he did in fact take his anti-seizure medication on the day in question, a caseworker for Child Protective Services testified that the father admitted to him that he did not do so, and the court's determination to credit the caseworker's testimony over the father's testimony is entitled to great deference (*see generally Matter of Irene O.*, 38 NY2d 776, 777).

All concur except SMITH, J.P., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent because I conclude that petitioner failed to establish that respondent parents neglected their children. It is well settled that, in order to establish neglect, petitioner "must show, by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]), first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent . . . to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368).

"The first statutory element requires proof of actual (or imminent danger of) physical, emotional or mental impairment to the child . . . This prerequisite to a finding of neglect ensures that the Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior. 'Imminent danger' reflects the Legislature's judgment that a finding of neglect may be appropriate even when a child has not actually been harmed; 'imminent danger of impairment to a child is an independent and separate ground on which a neglect finding may be based' . . . Imminent danger, however, must be near or impending, not merely possible" (*id*. at 369). Here, there was no allegation of actual harm, and I cannot conclude that petitioner established that either parent placed the children in imminent danger of physical, emotional or mental impairment.

With respect to the father, the majority concludes that "the record supports the court's determination that he deliberately failed to take anti-seizure medication so that he could consume alcohol on the day in question, and that he is aware that he is likely to become violent when he has a seizure." I agree that there is evidence in the record that supports the majority's conclusion, and it is well settled that Family Court's credibility determinations are entitled to great

deference (*see generally Eschbach v Eschbach*, 56 NY2d 167, 173). Even according the court's credibility determinations their requisite due deference, however, I conclude that the finding of neglect with respect to the father is not supported by the record. At most, the facts establish that the father knew that there was some unspecified possibility that he might have a seizure, that he could become violent if he did so, and that the children might be harmed if they were present. I thus conclude that the risk that was created by the father in failing to take his medication and in consuming alcohol was not sufficiently "near or impending" to support a finding of neglect (*Nicholson*, 3 NY3d at 369; *see Matter of William EE.*, 157 AD2d 974, 976).

Similarly, with respect to the mother, the court's finding of neglect is not supported by sufficient evidence establishing that her actions placed the children in imminent risk of danger. The majority concludes that a preponderance of the evidence in the record establishes that the mother placed the children at risk by "attempting to drive a motor vehicle in an intoxicated condition with the children in the vehicle . . . [and that her state of intoxication was established by evidence that] she exuded a strong odor of alcohol and was acting in a belligerent and an irrational manner." I conclude that there is no such preponderance of the evidence in the record. As the majority correctly acknowledges, the mother strongly disputed that she was intoxicated. Although as noted the court's credibility determinations are entitled to great deference (*see generally Eschbach*, 56 NY2d at 173), the determination that the mother was intoxicated is not supported by a preponderance of the evidence in this case. Assuming that the court properly credited the testimony of New York State Troopers who testified that the mother exuded an odor of alcohol, I nevertheless conclude that there was insufficient evidence that she was intoxicated, or that her actions placed the children in imminent risk of danger. The witnesses all testified that she never stumbled, swayed or slurred her speech. The Troopers who were present did not observe that the mother had glassy eyes, and indeed one Trooper indicated that the only signs of intoxication that he observed were that the mother smelled of alcohol and was belligerent. She was able to answer questions and to communicate with the Troopers. Although she was belligerent, I cannot conclude that such belligerence was a symptom of intoxication rather than a symptom of the mother's mental health difficulties, the presence of which the court had previously noted. Perhaps most importantly for the purposes of this neglect proceeding, however, even the Troopers testified that the children were not in the vehicle or even in the vicinity while these events involving belligerence took place, thus establishing that there was no imminent danger of harm to them at that time. In addition, the first Trooper on the scene testified that the mother and children were not present when he arrived in response to a 911 call regarding the father, thereby establishing that the mother in fact had removed the children from the father's presence prior to the arrival of the Troopers. Consequently, the court's determination that the mother "failed to remove the children from the environment when [the father] displayed dramatic mood swings" is not supported by a preponderance of the evidence.

The court's further conclusions are completely unsupported by the record, or do not establish neglect on the part of the mother. Prior to finding that the mother failed to remove the children from the environment, the court found that the mother "failed to monitor [the father's] medications and activities." There is no evidence that the mother was aware that the father had ceased taking his anti-seizure medication, and thus the record does not support the court's finding with respect to the medication. In addition, the record does not support the court's further finding that the mother "was intoxicated in the presence of the children and insisted on driving with the children in the vehicle while intoxicated." As discussed above, the finding of intoxication is not supported by the evidence, and all the evidence further establishes that the children were not present when the mother indicated that she was going to drive to the hospital. To the contrary, the evidence establishes that the children were being cared for by a neighbor at that time. Therefore, "[t]he record contains no affirmative proof to support a finding of neglect against the [mother] and thus, a fortiori, such a finding is not supported by a preponderance of the evidence" (*Matter of Kenneth V.* [appeal No. 2], 307 AD2d 767, 769; *see Matter of Rebecca W.*, 122 AD2d 582).

Entered: October 7, 2011 Patricia L. Morgan
Clerk of the Court

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

944

TP 11-00377

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

IN THE MATTER OF DOUGLAS J. GIAMBRONE AND MARCON ERECTORS, INC., PETITIONERS,

V MEMORANDUM AND ORDER

ALEXANDER B. GRANNIS, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, AND NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, RESPONDENTS.

JONATHAN D. ESTOFF, BUFFALO, MAGAVERN MAGAVERN GRIMM LLP, FOR PETITIONERS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ADAM J. DOBSON OF COUNSEL), FOR RESPONDENTS.

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 [Kevin M. Dillon, J.], entered February 7, 2011) to review a determination of respondents. The determination imposed a civil penalty on petitioners.

It is hereby ORDERED that the determination is unanimously modified on the law and in the exercise of discretion and the petition is granted in part by reducing the penalty to $25,000, and as modified the determination is confirmed without costs.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul the determination of respondent New York State Department of Environmental Conservation (DEC) dated March 17, 2010 that, inter alia, imposed a civil penalty of $109,500 for the violation of 12 DEC regulations involving the generation and storage of hazardous waste (*see* 6 NYCRR parts 372, 373), as well as two statutes involving the discharge of petroleum (*see* Navigation Law §§ 173, 175). In the mid-1980s, petitioner Douglas J. Giambrone, the president and chief executive officer of petitioner Marcon Erectors, Inc. (Marcon), directed that the top of a 25,000-gallon storage tank be removed. The tank was located on property owned by Giambrone and leased to Marcon, and the removal exposed the tank's contents to the environment. Those contents were subsequently determined to be sludge laden with polychlorinated biphenyls (PCBs) and other hazardous chemicals. In September 1995, the DEC received a complaint concerning a spill on the property where the tank was located, and petitioners

did not begin remediation efforts until 1997. Respondent DEC Commissioner (Commissioner) determined in a subsequent administrative enforcement proceeding that there was no issue of fact concerning petitioners' liability, and on the recommendation of the Administrative Law Judge he granted the DEC's motion in December 2000 for "order without hearing" pursuant to 6 NYCRR 622.12. In a subsequent CPLR article 78 proceeding, the liability determination was confirmed in a judgment entered March 25, 2002, but Supreme Court vacated the penalty imposed based on the lack of a hearing with respect to the amount. The penalty hearing was ultimately held on November 7, 2007.

Despite the inordinate delays that occurred in the administrative proceedings, we reject petitioners' contention that the proceedings should have been dismissed and the penalty vacated based on the failure to hold a hearing either "immediately" as provided in 6 NYCRR 622.12 (f) or "within a reasonable time" as provided in State Administrative Procedure Act § 301 (1). Moreover, we reject petitioners' further contention that dismissal of the proceedings is required due to the failure of the Commissioner to issue the decision and order within 60 days "after the close of the record" pursuant to 6 NYCRR 622.18 (b) (1). Time limitations imposed upon administrative agencies by their own regulations are not mandatory (*see Matter of Dickinson v Daines*, 15 NY3d 571, 575, *affg* 68 AD3d 1646), and petitioners failed to establish that they suffered substantial prejudice resulting from the delays (*see id.* at 577; *Matter of Cortlandt Nursing Home v Axelrod*, 66 NY2d 169, 178-179, *rearg denied* 66 NY2d 1035, *cert denied* 476 US 1115; *see also Matter of Corning Glass Works v Ovsanik*, 84 NY2d 619, 625-626). Additionally, we note that, "[w]here . . . legislation providing for an administrative determination explicitly prescribes the time frame for making a determination and provides that the agency is required to act within the specified time frame, there is 'an unmistakable limitation on the [agency's] authority to act' beyond that time frame" (*Dickinson*, 68 AD3d at 1647; *see Matter of City of New York v Novello*, 65 AD3d 112, 116, *lv denied* 14 NY3d 702; *see generally Cortlandt Nursing Home*, 66 NY2d at 177-182). Here, the Legislature provided no such time frame.

We agree with petitioners, however, that the civil penalty imposed " 'is so disproportionate to the offense as to be shocking to one's sense of fairness' " (*Matter of Waldren v Town of Islip*, 6 NY3d 735, 736, quoting *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 237). The record establishes that the remediation contractor retained by petitioners to perform cleanup work at the site was approved by the DEC, and the contractor mishandled materials and was partially responsible for the site conditions but was subjected to a substantially lower DEC penalty. We conclude that the maximum civil penalty warranted against petitioners in this case is $25,000, and in the exercise of our discretion we therefore modify the determination by reducing the penalty accordingly (*see generally Matter of Murray v Ilion Water Commn.*, 9 AD3d 903; *Matter of Vito v Jorling*, 197 AD2d

822, 824-825). We have considered petitioners' remaining contentions and conclude that they are without merit.

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

963

CA 11-00074

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

YVETTE HUFF, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ANITA L. RODRIGUEZ, FORMERLY KNOWN AS ANITA L. ROSARIO, AND ENRIQUE RODRIGUEZ, DEFENDANTS-APPELLANTS.

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

WAYNE C. FELLE, P.C., WILLIAMSVILLE (WAYNE C. FELLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered October 8, 2010 in a personal injury action. The judgment determined defendants to be 100% negligent.

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

Memorandum: As we noted when this case was previously before us on two prior appeals (*Huff v Rodriguez*, 64 AD3d 1221; *Huff v Rodriguez*, 45 AD3d 1430), hereafter *Huff I* and *Huff II*, plaintiff commenced this action seeking damages for injuries she sustained in a motor vehicle accident that occurred while she was a passenger in a vehicle owned by defendant Enrique Rodriguez and operated by Anita L. Rodriguez, formerly known as Anita L. Rosario (defendant). Following a trial, the jury found defendants 100% liable for the accident and awarded plaintiff damages. On the first appeal, we reversed the amended judgment and granted defendants' post-trial motion in part by, inter alia, setting aside the verdict on liability. We granted a new trial on liability and specified that, in the event that the new trial resulted in a finding of liability against defendants, a new trial on specified categories of damages was also granted unless plaintiff stipulated to reduce the award of damages for those categories to certain amounts (*Huff I*, 45 AD3d at 1434-1435). Plaintiff stipulated to the reduction in damages and, following a new trial on liability, the jury found in favor of defendants. On appeal from the judgment entered upon that jury verdict and an order settling the record, we reversed the judgment based on the improper comments made by defendants' attorney on summation and reinstated the complaint, and we granted a new trial on liability (*Huff II*, 64 AD3d at 1223-1224). Following the third trial, the jury found defendants 100% liable for

the accident.

On appeal from the judgment entered upon that jury verdict, defendants contend that Supreme Court committed reversible error in permitting plaintiff to introduce evidence that defendant did not possess a driver's license on the date of the accident. We reject that contention. It is well settled that "the absence or possession of a driver's license relates only to the authority for operating a vehicle, and not to its manner of operation" (*Almonte v Marsha Operating Corp.*, 265 AD2d 357; *see Firmes v Chase Manhattan Auto. Fin. Corp.*, 50 AD3d 18, 27, *lv denied* 11 NY3d 705; *Dalal v City of New York*, 262 AD2d 596, 597-598). Thus, the absence or possession of a driver's license is not relevant to the issue of negligence (*see Dance v Town of Southampton*, 95 AD2d 442, 447; *Phass v MacClenathen*, 274 App Div 535, 537-539; 1A NY PJI3d 2:26, at 287). The fact that a party does not possess a driver's license may, however, be relevant with respect to the issue of that party's credibility (*see Martin v Alabama 84 Truck Rental*, 47 NY2d 721; *Kenneth v Gardner*, 36 AD2d 575; *Phass*, 274 App Div at 537).

Here, plaintiff's counsel asked defendant on direct examination whether she had a New York State driver's license on the date of the accident. When defendant replied that she did, plaintiff's counsel confronted defendant with an abstract from the Department of Motor Vehicles (DMV), which indicated that defendant held a learner's permit, not a license, on the date of the accident. Over defendant's objection, the court then admitted the DMV abstract of her driving record (DMV abstract) in evidence. Although it was permissible for plaintiff's attorney to ask defendant whether she possessed a valid New York State driver's license at the time of the accident, plaintiff was bound by defendant's answer and should not have been permitted to impeach defendant by producing extrinsic evidence, i.e., the DMV abstract (*see generally Badr v Hogan*, 75 NY2d 629, 635-636; *Lichtman v Gibbons*, 30 AD3d 319; Prince, Richardson on Evidence, § 6-305 [Farrell 11th ed]).

We nevertheless conclude that reversal is not required inasmuch as the court properly instructed the jury that evidence concerning defendant's lack of a driver's license was not indicative of negligence, thereby alleviating any potential prejudice to defendants (*see generally Bethmann v Widewaters Group*, 306 AD2d 923). The court explained in the presence of the jury that, by ruling that the DMV abstract was admissible, it was not ruling "that [defendant] -- because she's unlicensed, that it had anything to do with the accident . . . In other words, ladies and gentlemen of the jury, you can be unlicensed, right, and still the operation of your vehicle has nothing to do with . . . negligence. . . ." After the close of proof, the court instructed the jury that "[e]vidence has been presented by the plaintiff that [defendant] did not have a New York driver's license at the time of [the] accident. [Defendant] testified that she had a valid New York [learner's] permit at the time of the accident[,] and [plaintiff] said that she was a licensed driver and that she was with [defendant] at the time of the accident. *Now, the absence or possession of a driver's license relates only to the authority for*

operation and not to the manner of operation itself. In other words, the fact that [defendant] did not have a New York driver's license would not necessarily make her negligent unless you find that her operation of the motor vehicle in question was performed by her in a negligent manner" (emphasis added). We conclude that the jury instructions, evaluated as a whole, conveyed the proper legal standard (*see generally Tojek v Root*, 34 AD3d 1210, 1211), and the jury is presumed to have followed those instructions (*see generally Murdoch v Niagara Falls Bridge Commn.*, 81 AD3d 1456, 1457, *lv denied* 17 NY3d 702; *Topczij v Clark*, 28 AD3d 1139).

Defendants further challenge the court's charge insofar as the court stated that "the fact that [defendant] did not have a New York driver's license would not *necessarily* make her negligent" (emphasis added). That contention is unpreserved for our review inasmuch as defendants failed to object to the charge prior to jury deliberations (*see Howlett Farms, Inc. v Fessner*, 78 AD3d 1681, 1682-1683; *Hageman v Santasiero*, 277 AD2d 1049; *see generally* CPLR 4110-b). After the court completed its charge, it asked the parties, outside the presence of the jury, if they had any requests or exceptions to the charge. Defendants' attorney requested a charge concerning admissions against interest, but no other requests or objections were made.

All concur except CARNI, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully disagree with the conclusion of my colleagues that the introduction of evidence concerning defendant's lack of a driver's license on the date of the accident does not require reversal. I therefore dissent.

It is well settled that "a driver's license relates only to the authority for operation [of a vehicle] and not to the manner thereof, and the absence of a license is not even presumptive evidence of negligence" (*Hanley v Albano*, 20 AD2d 644, 645). Here, when plaintiff's attorney attempted to cross-examine Anita L. Rodriguez, formerly known as Anita L. Rosario (defendant), using a Department of Motor Vehicles (DMV) driving abstract (hereafter, DMV abstract), defendants' attorney objected on the ground that the lack of a driver's license was "immaterial to the happening of [the] motor vehicle accident" and "never admissible in court to establish fault." In overruling defendants' objection, Supreme Court stated, in the presence of the jury, "No, I disagree with you. Might the [jurors] . . . infer something from the fact that [defendant] is an unlicensed driver? They may." Although the court attempted to clarify its ruling on the admission in evidence of the DMV abstract, it compounded the error by stating, again in the presence of the jury, "My ruling is not that she -- because she's unlicensed, that it had anything to do with the accident, so you can certainly ask her if it turns out that she is unlicensed, you can certainly ask her about whether or not the operation of the vehicle, her operation as an unlicensed driver had anything to do with the accident[.] I'm not precluding you from doing that. But I think it might be relevant to the jury that she was unlicensed . . . ."

Although there is authority for the proposition that proof of the

lack of a driver's license may be admitted on the issue of credibility (*see Martin v Alabama 84 Truck Rental*, 47 NY2d 721), the court must limit the jury's consideration of such evidence "solely on the issue of credibility" (*id.* at 722). That did not occur in this case. Indeed, the court's discussion of its ruling placed further improper emphasis upon the ability of the jury to consider defendant's lack of a license in connection with her operation of the vehicle.

In addition, the court later permitted plaintiff's expert accident reconstructionist to testify, over defendants' objection, that, upon learning that defendant did not possess a driver's license, he reached the additional conclusion "that [the] collision [was] consistent with driver inexperience." Subsequently during a conference with the court, the attorney for defendants further protested the jury's ability to consider the lack of a license in connection with the issue of negligence, and the court stated, "I don't think so. It kind of emphasizes the point I made, that [the jurors] could consider in evidence the fact that she didn't have a license but it would some way have to be based on operation of the vehicle. [The] conclusion [of plaintiff's expert accident reconstructionist] was that it shows that she had no experience when she -- or -- not say no experience, a lack of experience when she attempted to get across the lanes of Elmwood Avenue. Can they consider that? I think so. I think so. Is that determinative? No. But what you have to do is you have to put it all together and say -- conclude whether or not she was negligent in the operation of her vehicle." The court further stated that the jury could "consider the fact that [defendant] had no license" and that the jury "should know[] though that[,] as a matter of law[,] the fact that [an individual does not] have a license might have very, very little to do with the operation of [his or her] vehicle." To the contrary, however, the fact that one does not possess a license has absolutely nothing to do with the issue of negligence in the operation of a vehicle—as a matter of law (*see Firmes v Chase Manhattan Auto Fin. Corp.*, 50 AD3d 18, 27, *lv denied* 11 NY3d 705).

Further, the court charged the jury that defendant's lack of a driver's license "would not *necessarily* make her negligent unless [it] find[s] that her operation of the motor vehicle in question was performed by her in a negligent manner" (emphasis added). That is not a correct statement of the law, and it improperly and prejudicially instructed the jury that the lack of a license could be considered on the issue of negligence. I disagree with my colleagues that defendants' challenge to the charge was not preserved for our review. Such a challenge will be preserved if an objection is interposed to the ruling of the court on the same subject during the course of the trial (*see Elenkreig v Siebrecht*, 238 NY 254, 263; *Williams v City of New York*, 101 AD2d 835, 836). Here, defendants objected on multiple occasions during the course of the trial with respect to evidence concerning defendant's lack of a license and moved for a mistrial on that issue, thereby preserving their challenge to the charge for our review.

I would therefore reverse the judgment, grant defendants' post-

trial motion to set aside the verdict and grant a new trial on liability.

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

969

KA 10-01395

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWIN MONTANEZ, DEFENDANT-APPELLANT.

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

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (JOHN J. RASPANTE OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Barry M. Donalty, A.J.), entered October 2, 2009. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

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 the assessment of 15 points against him under the risk factor for drug or alcohol abuse is not supported by the requisite clear and convincing evidence (*see generally* § 168-n [3]; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 15 [2006]). The risk assessment instrument (RAI) presented by the People contained defendant's admissions that he began using marihuana at age 9, alcohol at age 12, cocaine at age 25 and crack cocaine by the time he was in his 30s. Although the RAI sets forth that defendant had stopped using all substances for a period of time, it further describes his relapse four years prior to the instant offense. In addition, defendant admitted that he was intoxicated at the time of the rape of which he was convicted, and that intoxication, standing alone, would warrant the assessment of 15 points under the risk factor for drug or alcohol abuse (Risk Assessment Guidelines and Commentary, at 15).

Defendant failed to preserve for our review his contention that he was denied due process because he did not receive all of the specified information set forth in Correction Law § 168-n (3) prior to the SORA hearing (*see People v Charache*, 9 NY3d 829; *see also People v Neuer*, 86 AD3d 926; *People v Palmer*, 68 AD3d 1364, 1365). In any event, the record demonstrates that defendant was timely and

adequately notified of the purpose of the SORA hearing and that his attorney was provided with the RAI, case summary and presentence report 37 days before the hearing. We therefore conclude that defendant and his attorney were afforded an ample opportunity to respond to all aspects of the risk level assessments of the People and the Board of Examiners of Sex Offenders and thus that defendant was not denied due process (*see generally People v Warren*, 42 AD3d 593, 593-594, *lv denied* 9 NY3d 810; *People v Cureton*, 299 AD2d 532, *lv denied* 99 NY2d 627).

We reject defendant's further contention that Supreme Court erred in assessing 30 points against him under the risk factor for the number and nature of prior crimes, including a prior violent felony. Defendant was convicted of two violent felonies in 1981 and contends that the lapse of time between those prior convictions and the instant offense renders the assessment of points under that risk factor "constitutionally unfair." That risk factor, however, does not take into account the timing of any particular prior violent felony (*see* Risk Assessment Guidelines and Commentary, at 13-14). In any event, the recency of an offender's prior felony or sex crime is taken into account in risk factor 10 and, inasmuch as defendant's prior felonies occurred more than three years prior to the instant offense, he was not assessed any points under that risk factor.

Finally, defendant failed to preserve for our review his contention that the court erred in failing to determine that he was entitled to a downward departure to a level two risk, having failed to request such a departure (*see People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708). In any event, we conclude that "defendant failed to present clear and convincing evidence of special circumstances justifying a downward departure" (*People v McDaniel*, 27 AD3d 1158, 1159, *lv denied* 7 NY3d 703; *see People v Fredendall*, 83 AD3d 1545).

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

996

KA 10-00362

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V OPINION AND ORDER

SEAN SANDERS, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Monroe County Court (Alex R. Renzi, J.), entered December 24, 2009. The order dismissed the indictment.

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

Opinion by LINDLEY, J.: The People appeal from an order granting that part of defendant's omnibus motion seeking to dismiss the indictment on double jeopardy grounds. For the reasons that follow, we conclude that County Court properly determined that prosecution of the indictment is barred by the Double Jeopardy Clauses of the federal and state constitutions.

I

By way of background, in August 2002 defendant was charged by felony complaint with assault in the second degree (Penal Law § 120.05 [1]) in connection with an incident in which he struck a man multiple times with a golf club. Defendant thereafter waived indictment and pleaded guilty in County Court (Marks, J.) to a superior court information (SCI) charging him with assault in the second degree pursuant to section 120.05 (2), a different subdivision of the statute than was charged in the felony complaint. The case had not been presented to the grand jury. Pursuant to the plea agreement, defendant was sentenced in February 2003 to a determinate term of imprisonment of five years and to five years of postrelease supervision (PRS). He was released from prison in March 2007 and commenced his period of PRS.

On June 29, 2008, while still subject to PRS, defendant killed a man by punching him in the back of the head during a fight at a softball game. Charged with assault in the third degree and

criminally negligent homicide, defendant was convicted of both charges following a nonjury trial in County Court (Connell, J.). The People sought persistent felony offender status for defendant based on the 2003 assault conviction and a 1998 burglary conviction. Defendant opposed persistent felony offender status on grounds that his 2003 guilty plea was to a charge not contained in the felony complaint and not a lesser included offense, and that his right to be indicted by a grand jury had thus been violated (*see* NY Const, art I, § 6; CPL 195.10 [1] [a]; *see generally People v Johnson*, 187 AD2d 990). The court agreed with defendant, finding "that the defendant's conviction . . . in 2003 was jurisdictionally defective and a nullity and cannot be counted in determining that he is a persistent felony offender" (*People v Sanders*, 24 Misc 3d 1232[A], 2009 NY Slip Op 51693[U], *2). Notably, defendant never moved to vacate the 2003 judgment of conviction (*see* CPL 440.10 [1] [a]).

Shortly after defendant was sentenced on his assault and criminally negligent homicide conviction in 2009, the People presented evidence of the August 2002 assault to a grand jury and obtained the indictment at issue in this case, charging defendant with assault in the first degree based upon the same incident for which he had pleaded guilty to assault in the second degree in 2003. Defendant moved to dismiss the indictment on statutory and constitutional double jeopardy grounds. In response, the People argued that the 2003 judgment of conviction was a nullity and that the reprosecution of defendant for the same offense was therefore not barred by principles of double jeopardy. County Court agreed with defendant, concluding that, although County Court (Connell, J.) determined that the 2003 judgment of conviction could not be used to support a finding that defendant was a persistent felony offender, it remained valid for double jeopardy purposes because it had not been vacated. The court also concluded that prosecution of the indictment was barred by CPL 40.40 because it charged an offense that was joinable with the offense to which defendant had previously pleaded guilty. We conclude that the order should be affirmed.

II

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall be "twice put in jeopardy of life or limb" for the same offense. There are three separate protections afforded by the Double Jeopardy Clause. First, "[i]t protects against a second prosecution for the same offense after acquittal. [Second, i]t protects against a second prosecution for the same offense after conviction. [Third,] it protects against multiple punishments for the same offense" (*North Carolina v Pearce*, 395 US 711, 717, *overruled in part on other grounds Alabama v Smith*, 490 US 794; *see People v Biggs*, 1 NY3d 225, 228-229; *see also* Muldoon, Handling a Criminal Case in New York, § 15:158 [2011 ed.]). The United States Supreme Court has "consistently interpreted [the Double Jeopardy Clause] to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense" (*Missouri v Hunter*, 459 US 359, 365 [internal quotation marks omitted]).

The New York State Constitution also contains a Double Jeopardy Clause (*see* NY Const, art 1, § 6), which provides the same protection as its federal counterpart (*see* Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 40.20). Defendants are afforded greater protection, however, under statutory law. While the constitutional Double Jeopardy Clauses merely prohibit separate prosecutions for the same offense, CPL 40.20 (2) provides that no person may "be separately prosecuted for two offenses based upon the same act or criminal transaction . . . ." Even broader is the protection afforded by CPL 40.40, which prohibits separate prosecution of "joinable offenses" (*see People v Tabor*, 87 AD3d 829).

III

There can be no dispute that assault in the first degree under Penal Law § 120.10 (1), as charged in the instant indictment, is the same offense for double jeopardy purposes as assault in the second degree under Penal Law § 120.05 (2), to which defendant pleaded guilty in 2003 (*see generally Blockburger v United States*, 284 US 299). Indeed, the People do not contend otherwise. The question presented is whether the 2003 conviction bars further prosecution under principles of double jeopardy, even though it was based on a jurisdictionally defective SCI. We conclude that it does.

Although the constitutional Double Jeopardy Clauses do not bar a second prosecution where the prior judgment of conviction has been vacated upon the defendant's motion or appeal because of an error in the proceedings (*see Lockhart v Nelson*, 488 US 33, 38; *United States v Tateo*, 377 US 463, 465-467), the 2003 judgment of conviction has never been vacated. The judgment of conviction is still on defendant's criminal record and would presumably remain on his record even if he were convicted in the instant prosecution. We do not see how there can be two separate convictions on defendant's record for the same offense without implicating the constitutional prohibition against double jeopardy.

IV

Such a result is consistent with the general principles set forth in *Matter of Campbell v Pesce* (60 NY2d 165). In *Campbell*, the defendant was charged by felony complaint with robbery in the first degree and criminal use of a firearm in the first degree and the prosecutor moved to reduce the charges in local court to petit larceny and criminal possession of a weapon in the fourth degree, both misdemeanors (*id.* at 167). The defendant then pleaded guilty to petit larceny in satisfaction of the charges (*id.*). That plea, however, violated CPL 180.50 (2) (b), which prohibits reduction of an armed felony offense to a misdemeanor unless the court determines that there was no reasonable cause to believe that the defendant committed an armed felony offense. After the misdemeanor plea was entered and defendant had been sentenced to nine months in jail, the People moved to vacate the conviction on the ground that the plea was entered in violation of CPL 180.50 (*Campbell*, 60 NY2d at 168). The Court of Appeals determined that the court erred in granting the motion and

reinstating the original charges, stating that, "[a]lthough acceptance of the plea was illegal, there exists no statutory authority for the court to vacate the plea and sentence at the prosecutor's request and reinstate the original charges" (*id.*). The Court thus concluded that "the original plea and sentence must be reinstated, *and further criminal proceedings on the first felony charges are barred by double jeopardy protection*" (*id.* at 169 [emphasis added]; *see also People v Moquin*, 77 NY2d 449, 452-453, *rearg denied* 78 NY2d 952; *Matter of Kisloff v Covington*, 73 NY2d 445, 449).

Here, we conclude that, inasmuch as the court lacked authority to vacate defendant's 2003 judgment of conviction even though it was jurisdictionally defective, the People should not be permitted to prosecute defendant again for the same offense. A second prosecution, if allowed to proceed while the original conviction has not and cannot be vacated except on defendant's motion, would accomplish the same result that was prohibited by the Court of Appeals in *Campbell* (60 NY2d at 168), where the defendant's prior conviction was also illegally entered (*see also United States v McIntosh*, 580 F3d 1222, 1224).

Finally, we reject the People's contention that the instant prosecution is authorized by CPL 40.30 (2) (a), which provides that "a person is not deemed to have been prosecuted for an offense, within the meaning of section 40.20, when . . . [s]uch prosecution occurred in a court [that] lacked jurisdiction over the defendant or the offense." Although that provision may be relevant to whether the prosecution is barred by CPL 40.40, it is not a defense to defendant's constitutional double jeopardy claims, inasmuch as there can be no statutory exception to a constitutional prohibition.

V

Accordingly, we conclude that the order should be affirmed.

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

998

CA 11-00470

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

IN THE MATTER OF ST. MATTHEW LUTHERAN CHURCH,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
RESPONDENT-APPELLANT.

CAROLINE J. DOWNEY, BRONX (MICHAEL K. SWIRSKY OF COUNSEL), FOR RESPONDENT-APPELLANT.

CHIACCHIA & FLEMING, LLP, HAMBURG (ANDREW P. FLEMING OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered May 17, 2010 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

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

Memorandum: In this CPLR article 78 proceeding, respondent appeals from a judgment granting the petition seeking to prohibit it from taking further action on a discrimination complaint filed by the former principal of the school operated by petitioner. We agree with respondent that Supreme Court erred in granting the petition. It is well established that "the extraordinary remedy of prohibition does not . . . lie to interfere with proceedings before [respondent]," inasmuch as the "[r]emedy for asserted error of law in the exercise of [respondent's] jurisdiction or authority lies first in administrative review and following exhaustion of that remedy in subsequent judicial review pursuant to section 298 of the Executive Law" (*Matter of Tessy Plastics Corp. v State Div. of Human Rights*, 47 NY2d 789, 791; *see Matter of Newfield Cent. School Dist. v New York State Div. of Human Rights*, 66 AD3d 1314, 1315-1316). Further, "a challenge to a nonfinal order of [respondent] is not available unless there is a showing of 'futility of the administrative remedy[,] irreparable harm in the absence of prompt judicial intervention[] or a claim of unconstitutional action' " (*Newfield Cent. School Dist.*, 66 AD3d at

1316), and that is not the case here (*see Matter of Diocese of Rochester v New York State Div. of Human Rights*, 305 AD2d 1000).

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

1002

CA 11-00277

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

IN THE MATTER OF NEW YORK MILLS REDEVELOPMENT COMPANY, LLC, AND LIBERTY AFFORDABLE HOUSING, INC., PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF WHITESTOWN, AND ITS ASSESSOR, DIANN GERLING, RESPONDENTS-RESPONDENTS.

NEW YORK MILLS UNION FREE SCHOOL DISTRICT, INTERVENOR-RESPONDENT.

BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (JOHN R. BRENNAN OF COUNSEL), FOR PETITIONERS-APPELLANTS.

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C., EAST SYRACUSE (BRIAN J. SMITH OF COUNSEL), FOR INTERVENOR-RESPONDENT.

GORMAN, WASZKIEWICZ, GORMAN & SCHMITT, UTICA (WILLIAM P. SCHMITT OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered May 26, 2009 in a proceeding pursuant to RPTL article 7. The order, inter alia, granted in part the motion of respondents Town of Whitestown, and its assessor Diann Gerling, to dismiss the petition.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion of respondents to dismiss the petition insofar as it challenged the assessed value of the property and granting petitioners' motion for leave to amend the petition upon condition that the amended petition is served within 20 days of service of a copy of the order of this Court with notice of entry and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following Memorandum: Petitioners own and operate a senior living facility located in the Village of Whitestown (Village), which is within respondent Town of Whitestown (Town) and intervenor New York Mills Union Free School District (School District). Petitioners commenced this proceeding pursuant to RPTL article 7 challenging an increase in the assessed value of their property and a determination that the property is no longer tax exempt. Supreme Court granted that part of petitioners' cross motion seeking summary judgment with respect to the

taxable status of their property, and the court remitted the issue to respondents to conduct a hearing on that issue. We note that petitioners have abandoned any further challenge to the tax status of the property (*see Ciesinski v Town of Aurora*, 292 AD2d 984). We agree with petitioners, however, that the court erred in granting that part of respondents' motion to dismiss the petition insofar as it challenged the assessed value of the property. More specifically, we conclude that the court erred in determining that petitioners failed to commence this proceeding in a timely manner, i.e., "within [30] days after the final completion and filing of the assessment roll containing such assessment" (RPTL 702 [2]).

Prior to purchasing the property from the Village in October 2006, petitioners entered into a payment in lieu of taxes (PILOT) agreement with the Village. Pursuant to the PILOT agreement, the property was exempt from "municipal" and School District taxes and, in lieu of taxes, petitioners agreed to pay to the Village 3% of "Shelter Rents," but not less than $5,000 annually. On May 1, 2008 respondents sent written notice to petitioners that the assessed value of the property had been increased from $120,000 in 2007 to $2,769,000 in 2008. At that time, the property was listed as exempt on the Town's tax rolls, as it had been since 2003. When the new tax roll was filed on July 1, 2008, however, the property was no longer listed as exempt. Petitioners learned of the change in taxable status of their property on August 14, 2008, when their attorney was so informed by the attorney for the School District. Respondent Town Assessor thereafter denied petitioners' request to remove the property from the tax rolls, and petitioners commenced this proceeding on September 17, 2008.

The court properly determined that the notice sent to petitioners on May 1, 2008 was sufficient pursuant to RPTL 510 (1). That statute requires a municipality to provide written notice to a property owner of an increased assessment for real property "not later than [10] days prior to the date for hearing complaints in relation to assessments . . . ." By neglecting to notify petitioners of the change in the property's taxable status, however, respondents failed to comply with RPTL 510-a, pursuant to which petitioners were entitled to written notice of the change in taxable status. In the absence of such notice, petitioners had no reason to know that the increased assessment would affect their tax bill. Because petitioners did not learn of the change in taxable status of their property until mid-August 2008, they did not commence this proceeding to challenge the assessment within 30 days after the filing of the assessment roll on July 1, 2008, as required by RPTL 702 (2).

Although not directly on point, the Court of Appeals' decision in *Matter of Adventist Home v Board of Assessors of Town of Livingston* (83 NY2d 878) is instructive. In that case, the petitioner taxpayer filed a timely grievance with the respondent Board of Assessors (Board) after the Board determined that the subject property no longer qualified for a charitable exemption (*id.* at 879). The Board rejected the challenge but failed to notify the petitioner of its decision pursuant to RPTL 525 (4). Although the tax roll filed in July of the year in question reflected the increased assessment, the petitioner

did not learn of the Board's decision until it received its tax bill in December of that year (*id.*). The petitioner thereafter commenced a combined hybrid CPLR article 78 proceeding and declaratory judgment action seeking review of the Board's determination to deny the petitioner tax exempt status (*id.*), and the Board moved to dismiss the action/proceeding on statute of limitations grounds. The Court of Appeals concluded that the four-month statute of limitations pursuant to CPLR 217 (1) did not begin to run until the petitioner received "actual notice" of the Board's determination, i.e., when the petitioner received its tax bill with the increased assessment (*id.* at 880). The Court stated that, "[t]o hold, as [the Board] urges, that the limitations period commences with publication of the assessment roll--whether or not the taxpayer has been given the required notice--would eviscerate" the notice requirement of RPTL 525 (4) (*id.*).

Here, based on the rationale of *Adventist Home*, we conclude that the 30-day limitations period set forth in RPTL 702 (2) did not commence until petitioners had actual notice that respondents sought to increase the assessed value of the property (*see generally Matter of Sisters of Resurrection v Daby*, 129 Misc 2d 879, 883-884). Petitioners did not have actual notice of that increase until August 20, 2008, when the Town Assessor formally rejected their request to remove the property from the tax roll as exempt and stated that any further communications should be directed to the Town's attorney. Thus, this proceeding was timely commenced on September 17, 2008. Respondents correctly note that RPTL 510 (1) and 510-a (2) each provide that the failure to provide a property owner with proper notice pursuant to the statute "shall not prevent the levy, collection and enforcement of the payment of . . . taxes on such real property." As the Court of Appeals stated in *Adventist Home* (83 NY2d at 881), however, "the validity of the assessment is not at issue here. We are concerned only with the timeliness of the proceeding."

We further conclude that the court erred in denying petitioners' motion for leave to amend the petition to include a challenge to the assessment for tax year 2009. Leave to amend pleadings "shall be freely given" (CPLR 3025 [b]), and we discern no prejudice to respondents from the proposed amendment.

We therefore modify the order by denying that part of respondents' motion to dismiss the petition insofar as it challenged the assessed value of the property and granting petitioners' motion for leave to amend the petition, and we remit the matter to Supreme Court for further proceedings on the petition or amended petition, if applicable. Finally, we decline to address petitioners' remaining contention that the assessed value of their property should be determined pursuant to the income approach set forth in RPTL 581-a. That issue should be determined in the first instance by the court upon remittal.

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

1012

KA 09-01372

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL A. OSBORNE, DEFENDANT-APPELLANT.

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

PAUL A. OSBORNE, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered May 11, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (three counts), robbery in the first degree (three counts), attempted robbery in the first degree, criminal use of a firearm in the first degree, criminal possession of a weapon in the second degree, and assault in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentences imposed on counts 1 through 3 of the indictment shall run concurrently with the sentence imposed on count 12 of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, three counts each of murder in the second degree (Penal Law § 125.25 [1], [3] [intentional and felony murder]) and robbery in the first degree (§ 160.15 [2] - [4]), two counts of assault in the second degree (§ 120.05 [2], [6]), and one count of attempted robbery in the first degree (§§ 110.00, 160.15 [2]). We reject defendant's contention in his main brief that County Court should have suppressed the DNA evidence. The evidence before the court established that defendant voluntarily agreed to provide a saliva sample for DNA testing (*see People v Dail*, 69 AD3d 873, 874, *lv denied* 14 NY3d 839, 845). "[T]he fact that the police officers did not advise the defendant . . . of [his] right to refuse consent does not, by itself, negate the consent otherwise freely given" (*People v Auxilly*, 173 AD2d 627, 628, *lv denied* 78 NY2d 1125). Defendant's further contention in his main brief that the court should have suppressed the identification evidence of one of the witnesses is also without merit. The People established "the reasonableness of the

police conduct and the lack of any undue suggestiveness . . . [and defendant did not meet his] ultimate burden of proving that the procedure was unduly suggestive" (*People v Chipp*, 75 NY2d 327, 335, *cert denied* 498 US 833).

Defendant in addition contends in his main brief that the court should have granted his motion to sever the trial from that of his codefendant because there was DNA and fingerprint evidence that implicated defendant but not the codefendant, and the codefendant's attorney emphasized that to the jury, in effect becoming a second prosecutor. Inasmuch as defendant sought severance on a different ground, his present contention is not preserved for our review (*see People v Hall*, 48 AD3d 1032, 1033, *lv denied* 11 NY3d 789). In any event, his contention is without merit. " '[T]he fact that [the codefendant's attorney] stressed the relative weakness of the case against his client did not present an irreconcilable conflict warranting severance' " (*People v Bolling*, 49 AD3d 1330, 1332). We further conclude that the codefendant's attorney did not act as a second prosecutor (*see id.*; *see generally People v Cardwell*, 78 NY2d 996, 998), inasmuch as he simply argued to the jury that there was no DNA or fingerprint evidence implicating his client (*see People v Peisahkman*, 29 AD3d 352, 352-353). Indeed, he "did not take an aggressive adversarial stance against defendant or elicit damaging evidence that had not been brought out by the People" (*People v Seeley*, 22 AD3d 225, 226, *lv denied* 6 NY3d 758).

Defendant also failed to preserve for our review his contention in his main brief that the evidence is legally insufficient to support the conviction of assault in the second degree under Penal Law § 120.05 (2) and two of the three counts of murder in the second degree (§ 125.25 [1], [3]; *see People v Gray*, 86 NY2d 10, 19). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We reject the further contention of defendant raised in his main and pro se supplemental briefs that he was denied the right to effective assistance of counsel based on the failure of defense counsel to challenge the legal sufficiency of the evidence on specific grounds and to make certain objections. Rather, viewing defense counsel's representation as a whole, we conclude that defendant received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant waived his contention in his pro se supplemental brief that he was denied his right to testify before the grand jury, inasmuch as he failed to move to dismiss the indictment on that ground within the requisite five-day statutory period (*see* CPL 190.50 [5] [c]; *People v Braction*, 26 AD3d 778, *lv denied* 6 NY3d 832, 846). Contrary to defendant's further contention in his pro se supplemental brief, he was not denied his right to counsel when the police questioned him in connection with this case. "Under New York's indelible right to counsel rule, a defendant in custody in connection with a criminal matter for which [the defendant] is represented by

counsel may not be interrogated in the absence of his [or her] attorney with respect to that matter or an unrelated matter unless [the defendant] waives the right to counsel in the presence of his [or her] attorney" (*People v Lopez*, 16 NY3d 375, 377). Here, defendant was represented by counsel on an unrelated matter, but he was not in custody for that unrelated matter at the time of the police questioning in this case. Defendant did not have a derivative right to counsel arising from that prior representation for which he was not in custody (*see People v Steward*, 88 NY2d 496, 500-502, *rearg denied* 88 NY2d 1018; *People v Scaccia*, 6 AD3d 1105, 1105-1106, *lv denied* 3 NY3d 681).

We agree with the contention of defendant in his pro se supplemental brief, however, that the sentence is illegal in part. The court directed that the sentences for the first three counts of the indictment, charging robbery in the first degree, shall run concurrently with each other but consecutively to the sentences for counts 11 through 13 of the indictment, charging intentional and felony murder in the second degree. We conclude that the sentences for the robbery counts must run concurrently with count 12 of the indictment, charging felony murder, because the robbery was the underlying felony for that count of felony murder and thus constituted a material element of that offense (*see People v Faulkner*, 36 AD3d 951, 953, *lv denied* 8 NY3d 922; *People v Tucker*, 33 AD3d 635, 636; *People v Smalls*, 185 AD2d 863, 864, *lv denied* 81 NY2d 794). We therefore modify the judgment accordingly. Contrary to defendant's further contention in his pro se supplemental brief, the sentence as modified is not illegal and, contrary to defendant's contention in his main brief, the sentence is not unduly harsh or severe.

We have considered the remaining contentions of defendant raised in his main and his pro se supplemental briefs and conclude that they are without merit.

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

1014

KA 11-00055

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL WALKER, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered January 4, 2011. 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 and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 460.50 (5).

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that the weapon seized by the police from the vehicle driven by him, as well as his subsequent statements to the police, should have been suppressed because the basis for the traffic stop was pretextual and the vehicle was unlawfully impounded and searched. We reject those contentions. The police lawfully stopped the vehicle based on a traffic violation observed by one of the officers (*see People v Dempsey*, 79 AD3d 1776, *lv denied* 16 NY3d 830; *see generally People v Robinson*, 97 NY2d 341, 349). Supreme Court's "determination to credit the [officer's] testimony that the stop was based on a traffic violation is entitled to great deference" (*People v Frazier*, 52 AD3d 1317, *lv denied* 11 NY3d 788). Upon determining that defendant's driver's license had been revoked and that the vehicle was owned by a third party who was not present at the scene, the police impounded the vehicle and performed a reasonable inventory search in accordance with written police procedure (*see People v Wilburn*, 50 AD3d 1617, 1618, *lv denied* 11 NY3d 742; *People v Mendez*, 239 AD2d 945, *lv denied* 90 NY2d 895). Contrary to defendant's further contention, the duration of the period of

postrelease supervision is not unduly harsh or severe.

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

1019

CA 11-00239

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

PATRICIA TERRIGINO AND MICHAEL TERRIGINO,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

VILLAGE OF BROCKPORT, DEFENDANT-RESPONDENT.

E. MICHAEL COOK, P.C., ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered October 22, 2010 in a personal injury action. The order denied the motion of plaintiffs for leave to serve a late notice of claim.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the notice of claim is deemed timely served nunc pro tunc.

Memorandum: Supreme Court abused its discretion in denying plaintiffs' motion for leave to serve a late notice of claim in this action in which plaintiffs seek damages for injuries sustained by plaintiff Patricia Terrigino when she tripped and fell on a sidewalk on defendant's property. We note at the outset that plaintiffs' motion was incorrectly characterized by the court in the order on appeal as one for summary judgment, inasmuch as the notice of motion specifies that plaintiffs seek leave to serve a late notice of claim. "[T]he failure to offer an excuse for the delay 'is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [defendant]' " (*Shane v Central N.Y. Regional Transp. Auth.*, 79 AD3d 1820, 1821; *see Matter of Hall v Madison-Oneida County Bd. of Coop. Educ. Servs.*, 66 AD3d 1434, 1435). The record establishes that defendant "acquired actual knowledge of the essential facts constituting the claim" within a reasonable time after the 90-day period in which the notice of claim was required to be served (General Municipal Law § 50-e [5]; *see* § 50-e [1] [a]). In addition, defendant " 'failed to substantiate [its] conclusory assertions that [it was] substantially prejudiced by the . . . delay' " (*Matter of LaMay v County of Oswego*, 49 AD3d 1351, 1352, *lv denied* 10 NY3d 715; *see Matter of Gilbert v Eden Cent. School Dist.*, 306 AD2d 925, 926-927).

Finally, we cannot conclude at the preliminary stage of this action that plaintiffs' claim is "patently meritless" due to the lack of prior written notice to defendant of the allegedly dangerous condition in the sidewalk, as required by section 39-3 of defendant's Code (*Matter of Catherine G. v County of Essex*, 3 NY3d 175, 179). The lack of such prior written notice will not bar a claim where "the locality created the defect or hazard through an affirmative act of negligence" (*Amabile v City of Buffalo*, 93 NY2d 471, 474; *see Oboler v City of New York*, 8 NY3d 888, 889). Indeed, plaintiffs alleged an affirmative act of negligence by defendant in their untimely served "Notice of Intention to File [a] Claim," and discovery is necessary in order to test the validity of that allegation (*see Miller v County of Sullivan*, 36 AD3d 994, 996-997).

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

1022

CA 11-00699

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

JANE DOE, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

NORTH TONAWANDA CENTRAL SCHOOL DISTRICT,
RESPONDENT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (JULIA M. HILLIKER OF COUNSEL), FOR RESPONDENT-APPELLANT.

O'BRIEN BOYD, P.C., WILLIAMSVILLE (CHRISTOPHER J. O'BRIEN OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered February 16, 2011. The order, insofar as appealed from, granted the application of claimant for leave to serve a late notice of claim.

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

Memorandum: Supreme Court did not abuse its discretion in granting claimant's application for leave to serve a late notice of claim upon respondent (*see* Education Law § 3813 [2-a]; General Municipal Law § 50-e [5]; *Matter of Melissa G. v North Babylon Union Free School Dist.*, 50 AD3d 901, 902). The claim seeks damages from respondent for injuries allegedly sustained by claimant as the result of alleged sexual abuse by a male teacher employed by respondent. At the time of the alleged sexual abuse, claimant was seven or eight years old. Claimant alleges, inter alia, that respondent was negligent in supervising that teacher and in failing to create and implement policies to prevent and address such abuse.

The record establishes that claimant had a reasonable excuse for her delay in serving the notice of claim based upon her infancy at the time the notice of claim should have been served (*see Matter of Trusso v Board of Educ. of Jamestown City School Dist.*, 24 AD3d 1302), along with the refusal of her legal guardians to initiate a claim on her behalf at that time. Claimant, moreover, filed the instant application the very day after her 18th birthday (*see Matter of Meredithe C. v Carmel Cent. School Dist.*, 192 AD2d 952, 953). The record further establishes that, during the time period in which the alleged sexual abuse occurred with respect to claimant, respondent conducted an investigation of the teacher's conduct based upon

accusations of sexual abuse made by other students. That conduct by the teacher resulted in his arrest, prosecution and conviction, and was the basis for civil actions initiated against respondent on behalf of those students. We conclude, therefore, that respondent had actual notice of the essential facts underlying the instant claim within a reasonable time (*see Matter of Drozdzal v Rensselaer City School Dist.*, 277 AD2d 645, 646; *Matter of Kelli A. v Galway Cent. School Dist.*, 241 AD2d 883, 884-885; *Meredithe C.*, 192 AD2d at 953). Finally, we conclude that there has been no substantial prejudice to respondent based on the delay and that, indeed, the evidence submitted by respondent fails to demonstrate that its ability to defend itself against the claim has been impaired (*see Mindy O. v Binghamton City School Dist.*, 83 AD3d 1335, 1337-1338; *Matter of Andrew T.B. v Brewster Cent. School Dist.*, 18 AD3d 745, 748).

All concur except CENTRA, J.P., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent and would reverse the order granting the application to serve a late notice of claim. In deciding an application for leave to serve a late notice of claim, Supreme Court is to consider the factors set forth in General Municipal Law § 50-e (5), but those factors are "nonexhaustive" and the decision whether to grant the application "compels consideration of all relevant facts and circumstances" (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539). The "key factors for the court to consider . . . are whether the claimant has demonstrated a reasonable excuse for the delay, whether [respondent] acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or within a reasonable time thereafter, and whether the delay would substantially prejudice [respondent] in maintaining a defense on the merits" (*Le Mieux v Alden High School*, 1 AD3d 995, 996).

Here, the only factor weighing in favor of granting the application is that claimant demonstrated a reasonable excuse for her delay in serving a notice of claim. Although claimant reported the abuse to her parents and the police, her parents decided not to commence a civil action on her behalf. On her 18th birthday, claimant retained the attorney who brought this application. While the delay of service was not solely caused by the infancy "since there was no indication that [claimant] lacked the capacity to complain and make the abuse known" (*Matter of Doe v Goshen Cent. School Dist.*, 13 AD3d 526, 526-527), I agree with the majority that her excuse for the delay is reasonable (*see generally Williams*, 6 NY3d at 538). In my view, however, the remaining factors weigh heavily against granting the application. Claimant failed to establish that respondent had timely actual notice of the claim, a factor on which courts place great emphasis (*see Williams*, 6 NY3d at 535; *Santana v Western Regional Off-Track Betting Corp.*, 2 AD3d 1304, 1304-1305, *lv denied* 2 NY3d 704; *Matter of Riordan v East Rochester Schools*, 291 AD2d 922, 923, *lv denied* 98 NY2d 603). Although respondent was aware that its teacher-employee abused several students, there is no evidence to suggest that it ever knew that claimant was one of the victims until almost a decade after the alleged abuse occurred (*see Doe*, 13 AD3d at 527; *cf. Matter of Trotman v Rochester City School Dist.*, 67 AD3d 1484; *Joyce*

P. v City of Buffalo, 49 AD3d 1268). I further agree with respondent that claimant's almost decade-long delay in seeking leave to serve a late notice of claim substantially prejudices its ability to investigate the alleged abuse and prepare a defense with respect to claimant (*see Matter of Friend v Town of W. Seneca*, 71 AD3d 1406).

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

1023

CA 11-00169

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

TRACY PRESTON, AS ADMINISTRATOR OF THE ESTATE OF ERIC S. LEHMAN, DECEASED, PLAINTIFF-RESPONDENT,

V OPINION AND ORDER

APCH, INC., ALSTOM POWER, INC., AND COMBUSTION ENGINEERING, INC., DEFENDANTS-APPELLANTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (JEFFREY F. BAASE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAWRENCE A. SCHULZ, ORCHARD PARK, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (James E. Euken, A.J.), entered May 14, 2010. The order, insofar as appealed from, denied in part the motion of defendants to dismiss the amended complaint.

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

Opinion by FAHEY, J.: Plaintiff commenced this action seeking damages for the wrongful death and conscious pain and suffering of plaintiff's decedent resulting from an accident that occurred while he was an employee of defendant Alstom Power, Inc. (Alstom). Defendants moved to dismiss the amended complaint against them, and Supreme Court granted that part of the motion with respect to the seventh cause of action against the three defendants to the extent that it seeks discovery, a procedural rather than a substantive remedy, and thus "fails to state a claim for which relief may be granted."

The primary issue before us on appeal is whether the court properly denied those parts of defendants' motion seeking dismissal of the remainder of the amended complaint against defendants APCH, Inc. (APCH) and Alstom, pursuant to CPLR 3211 (a) (1). We conclude, under the facts presented here, that the court properly denied those parts of the motion. In addition, we conclude that the court properly denied those parts of the motion with respect to defendant Combustion Engineering, Inc. (CEI).

I

On August 26, 2008, decedent was one of two welders assigned during the course of their employment to participate in the assembly of a rotor compartment weighing approximately five tons at an industrial facility in Wellsville (hereafter, plant). Decedent was positioned in front of the rotor compartment and was inspecting his work when the compartment fell from its stands. The compartment pinned decedent to the floor. His injuries were fatal. At the time of the accident, decedent was employed by Alstom, a Delaware corporation authorized to do business in New York.

The most significant question before us concerns which defendant owned the plant at the time of the accident. The plant was conveyed on July 31, 2002 to APCH, a Delaware corporation that was not authorized to do business in New York. APCH was a wholly-owned subsidiary of Alstom at the time of the conveyance. On August 13, 2007, Alstom merged with APCH and succeeded to the ownership of all of the assets, liabilities and obligations of APCH. A certificate of ownership reflecting the merger was filed with the Delaware Secretary of State on that date. However, there was no filing concerning the merger with the New York Secretary of State prior to the accident. Likewise, no deed or other record of conveyance transferring the plant from APCH to any person or entity was filed in the Allegany County Clerk's Office between July 31, 2002 and the time of the accident. Also noteworthy is the fact that CEI, a Delaware corporation authorized to do business in New York, previously had filed for bankruptcy and had been reorganized pursuant to chapter 11 of the Bankruptcy Code (11 USC). According to plaintiff, he was unable to resolve the issue whether the assets of APCH had been transferred to CEI after the bankruptcy reorganization of CEI and before the accident.

Plaintiff, decedent's father, was appointed administrator of decedent's estate following the accident, and he initially commenced this action by filing a summons and complaint against APCH. APCH made a pre-answer motion to dismiss the complaint, but before the return date thereof plaintiff filed an amended complaint naming APCH, Alstom and CEI as defendants and asserting against all defendants causes of action for, inter alia, negligence, violation of the Labor Law and conscious pain and suffering. Plaintiff also asserted a cause of action against Alstom, alleging that the exclusivity provisions of the Workers' Compensation Law do not apply to Alstom and that Alstom is liable to plaintiff based on its assumption of the obligations and liabilities of APCH. In that cause of action, plaintiff further alleged that he had been unable to determine whether ownership interest in the plant had been transferred to CEI after the bankruptcy reorganization of that corporation, and he sought disclosure of those corporate records of defendants necessary to determine the issue of the ownership of the plant.

In a pre-answer motion, defendants moved to dismiss the amended complaint pursuant to CPLR 3211 (a) (1), contending that Workers' Compensation Law § 11 bars plaintiff's action against Alstom, and that plaintiff is not entitled to recover from APCH because ownership of the plant was transferred from APCH to Alstom at the time of the

merger, which preceded the date of the accident. Defendants also sought relief pursuant to CPLR 3211 (a) (7), contending that the amended complaint should be dismissed against CEI given what defendants characterized as the absence of a factual basis for the allegation that CEI owned the plant. The court, as relevant to this appeal, granted the motion only to the extent that it sought dismissal of that part of the seventh cause of action seeking disclosure of all of defendants' corporate records necessary to determine the issue of the ownership of the plant.

II

We are first confronted with a procedural issue. In their notice of appeal, defendants specified that the appeal is from "each and every part of the . . . [o]rder . . . [that] denied the defendants' motion to dismiss the plaintiff's complaint in its entirety." Plaintiff contends that, by referencing only the complaint rather than the amended complaint, defendants waived their right to challenge that part of the order denying the motion to dismiss the amended complaint in its entirety (*see Erie Petroleum v County of Chautauqua*, 286 AD2d 854, 855). That contention lacks merit. " '[W]hen an amended complaint has been served, it supersedes the original complaint and becomes the only complaint in the case' " (*Aikens Constr. of Rome v Simons*, 284 AD2d 946, 947). Consequently, the second of the two pre-answer motions to dismiss, which was made on behalf of all defendants, was properly before the court after plaintiff served the amended complaint, and in that motion defendants were not required to specify that their challenge was to the amended complaint rather than the original complaint because there was only one active complaint, i.e., the amended complaint. We note in addition that the second of the two pre-answer motions was made by the three defendants named in the amended complaint, whereas the original complaint named only one of the three defendants.

III

Turning to the merits, defendants contend that the court erred in denying that part of the motion with respect to APCH because APCH did not own the plant at the time of the accident and thus cannot be held liable on that basis, and because APCH cannot be sued inasmuch as it no longer exists as a corporate entity. We reject those contentions.

Addressing first the contention that APCH did not own the plant at the time of the accident, we note that article 9 of the Business Corporation Law governs merger or consolidation, and that mergers involving foreign corporations are addressed in Business Corporation Law § 907. That section, however, is self-limiting to the extent that it addresses mergers involving only "[o]ne or more foreign corporations and one or more domestic corporations" (§ 907 [a]). By virtue of that restriction, section 907 does not govern the merger in this case, which involved two Delaware corporations (*see Kubiszyn v Terex Div. of Terex Corp.*, 212 AD2d 93, 96 n 3, *lv denied* 86 NY2d 711; *cf.* § 1319 [a] [6]).

In view of the inapplicability of New York law to the merger, as opposed to the property transfer, we turn to Delaware law to determine when the merger became effective. In order for Delaware corporations to effectuate a merger under Delaware law, each corporation must have its board of directors adopt a resolution approving the merger (*see* Del Code Ann, tit 8, § 251 [b]), and the surviving corporation must thereafter file either an agreement of merger or a certificate of merger with the Delaware Secretary of State (*see* tit 8, §§ 103, 251 [c], [f], [g]). Once the agreement of merger or certificate of merger is properly filed, the merger is deemed effective upon the date of its filing (*see* tit 8, § 103 [d]; § 251 [d]). Here, the record establishes that Alstom, the surviving corporation, filed a signed and dated "certificate of ownership and merger" with the Delaware Secretary of State on August 13, 2007 and, because the certificate did not provide otherwise (*see* tit 8, § 103 [d]), the merger became effective at that time (*see Termine v Continental Baking Co.*, 299 AD2d 406).

Nevertheless, the fact that the merger was effective prior to the date of the accident does not necessitate the conclusion that the plant was conveyed by APCH to Alstom upon the date of the merger. On this point, there is apparent discord between the laws of Delaware and New York with respect to such timing. Pursuant to Delaware law, when a merger becomes effective, property previously held by the non-surviving corporation vests in the surviving corporation (*see* Del Code Ann, tit 8, § 259 [a]). Likewise, New York law provides that "[a] foreign corporation . . . may convey [real property in this state] by deed or otherwise in the same manner as a domestic corporation" (Business Corporation Law § 1307), and domestic corporations are permitted to convey real property by merger (*see* § 906 [b] [2]). In addition to requiring that a "certificate of merger" must be filed with the Department of State once the constituent corporations agree upon a merger plan (*see* § 904 [a]), however, Business Corporation Law § 904 (b) further requires the surviving corporation to "cause a copy of such certificate, certified by the department of state, to be filed . . . in the office of the official who is the recording officer of each county in this state in which real property of a constituent corporation, other than the surviving corporation, is situated." Indeed, Business Corporation Law § 906, entitled "Effect of merger or consolidation," contains language indicating that a merger is not accomplished absent the filing of the certificate of merger with the Department of State, to wit: "Upon the filing of the certificate of merger . . . by the department of state or on such date subsequent thereto, not to exceed thirty days, as shall be set forth in such certificate, the merger or consolidation shall be effected" (§ 906 [a]).

"The rule is that the validity of a conveyance of a property interest is governed by the law of the place where the property is located" (*James v Powell*, 19 NY2d 249, 256-257, *rearg denied* 19 NY2d 862), and New York law thus controls our analysis of the issue whether the merger caused the plant to be conveyed from APCH to Alstom on the date on which the merger became effective. As noted, under New York law, domestic corporations may convey real property by merger

(*see* Business Corporation Law § 906 [b] [2]), but the merger, and thus the conveyance, is not effective in the absence of both filings with the Department of State (*see* § 904 [a]) and "the recording officer of each county in this state in which real property of a constituent corporation, other than the surviving corporation, is situated" (§ 904 [b]). Here, no such filings were made, and APCH thus failed to comply with the requirements for domestic corporations to convey property by way of merger.

We next turn to the contention that APCH cannot be held liable because it did not exist as a corporate entity at the time of the accident. A corporation merged out of existence typically "cease[s] to exist as a separate entity, and may no longer be a named party in litigation" (*Westside Fed. Sav. & Loan Assn. of N.Y. v Fitzgerald*, 136 AD2d 699; *see Zarzycki v Lan Metal Prods. Corp.*, 62 AD3d 788, 789; *Sheldon v Kimberly-Clark Corp.*, 105 AD2d 273, 276, *appeal dismissed* 65 NY2d 691). Here, however, neither APCH nor Alstom provided notice of the merger as required by the Business Corporation Law for domestic corporations to effect a transfer of real property by merger. For this Court to conclude that APCH and its successor in interest, Alstom, are immune from suit in spite of those failings would render illusory the Business Corporation Law's requirements for conveyance of real property by merger. Consequently, under the facts presented here, APCH is not immune from suit on the ground that it no longer exists as a corporate entity.

IV

Defendants further contend that the court erred in denying that part of the motion seeking dismissal of the amended complaint against Alstom on the ground that Workers' Compensation Law § 11 precludes plaintiff, Alstom's employee, from bringing an action against Alstom. Once again, we cannot agree with defendants.

Generally, " 'the sole remedy of an employee . . . injured in the course of employment against his [or her] . . . employer is recovery under the Workers' Compensation Law' " (*Testerman v Zielinski*, 68 AD3d 1751, 1752; *see* Workers' Compensation Law § 11; *Riggins v Stong*, 238 AD2d 950). There is, however, a narrow exception to that rule that was set forth in *Billy v Consolidated Mach. Tool Corp.* (51 NY2d 152, 162, *rearg denied* 52 NY2d 829), i.e., that an employer that voluntarily assumes the assets, obligations and liabilities of a third-party tortfeasor cannot avail itself of the exclusivity provision of Workers' Compensation Law § 11 (*see Oliver v N.L. Indus.*, 170 AD2d 959, 960).

Here, the court properly determined that the *Billy* exception applies. As in *Billy*, the merger at issue occurred before the accident, and the surviving corporation employed decedent (*see Billy*, 51 NY2d at 156-158). Moreover, similar to *Billy*, plaintiff seeks damages from decedent's employer, i.e., Alstom, on the ground that the employer is ineligible for the exclusivity provisions of the Workers' Compensation Law and liable to plaintiff because it independently assumed the assets, obligations and liabilities of a predecessor

corporation, i.e., APCH, through a merger. The fact that Alstom happened to be decedent's employer at the time of the accident is of no moment, inasmuch as the obligation giving rise to this lawsuit is not the employment relationship between Alstom and decedent but, rather, the controlling factor is the "independent business transaction" between Alstom and APCH (*id.* at 161).

Were we to conclude that defendants are contending that the denial of that part of the motion seeking dismissal of the amended complaint against Alstom violates the " 'dual capacity' " doctrine, and were we to conclude that such contention is properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985), we note that such a contention was rejected as fundamentally unsound in *Billy* (51 NY2d at 158). Indeed, the Court of Appeals in *Billy* rejected that doctrine as contrary to the legislative plan embodied in Workers' Compensation Law § 11 (*see id.* at 160) and, in any event, this case falls squarely into the *Billy* exception discussed above, i.e., that Alstom is liable because it voluntarily assumed the assets, obligations and liabilities of APCH.

V

Finally, we conclude that there is no merit to defendants' further contention that the court should have dismissed the amended complaint in its entirety against CEI as failing to state a cause of action against CEI. On a motion pursuant to CPLR 3211 (a) (7), we must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . '[T]he criterion is whether [plaintiff] has a cause of action, not whether he [or she] has stated one' " (*Leon v Martinez*, 84 NY2d 83, 87-88; *see Burton v Matteliano*, 81 AD3d 1272, 1274, *lv denied* 17 NY3d 703).

Applying that standard of review, we conclude that the court did not err in refusing to grant in its entirety defendants' motion with respect to CEI. Here, the amended complaint alleges that all defendants are liable for causing decedent's death. Specifically, the amended complaint alleges that decedent was fatally injured during the "construction, erection, alteration, repair and inspecting" of the compartment on *defendants'* property, that *defendants* were both negligent and grossly negligent in several ways with respect to the performance of the injury-producing work, and that *defendants* violated specified provisions of the Labor Law. Plaintiff further alleged that Alstom had issued a resolution pursuant to which it planned to transfer the property of APCH subsequent to the completion of CEI's bankruptcy reorganization and that plaintiff had not been able to determine whether such property had in fact been transferred.

Put differently, the amended complaint alleges that CEI is liable by virtue of its status as the owner of the premises on which the accident occurred, and addresses the possibility that CEI acquired an interest in the plant prior to the accident. Consequently, the court properly determined that CEI is not entitled to dismissal of the

remaining causes of action against it pursuant to CPLR 3211 (a) (7). We cannot agree with defendants to the extent they contend that the amended complaint against CEI should be dismissed because the allegations set forth therein are insufficiently particular to state a cause of action. In our view, the amended complaint is sufficient to advise the court and defendants of the transactions and occurrences intended to be proved (*see* CPLR 3013).

VI

Accordingly, we conclude that the order should be affirmed.

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

1024

CA 10-01225

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

TERRY D. HILLIARD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HIGHLAND HOSPITAL, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

ADAIR LAW FIRM, LLP, ROCHESTER (WILLIAM S. ROBY, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (THOMAS C. BURKE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered March 18, 2010 in a medical malpractice action. The order and judgment, insofar as appealed from, granted the cross motion of defendant Highland Hospital to dismiss the complaint.

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

Memorandum: Plaintiff commenced this medical malpractice action in 2002 alleging that he suffered injuries as a result of defendant Highland Hospital's malpractice over a 15-year period, extending from 1985 through 2000. Defendant thereafter served a 90-day demand on plaintiff, dated July 18, 2008, to serve and file a note of issue and statement of readiness. By way of background, we note that in October 2008 defendant moved to dismiss the complaint based upon plaintiff's failure to comply with the 90-day demand. Supreme Court denied the motion and issued a scheduling order that, inter alia, directed plaintiff to file a note of issue on or before November 1, 2009. When plaintiff failed to file a note of issue by that date, the court conducted a conference during which it directed plaintiff to file the note of issue by November 24, 2009.

Plaintiff did not file the note of issue as directed, however, and he subsequently made a motion in January 2010 based on defendant's alleged spoliation of the medical records of plaintiff. Defendant again cross-moved to dismiss the complaint based on plaintiff's failure to file the note of issue. With respect to the order and judgment in appeal No. 1, we conclude that the court erred in granting

defendant's cross motion. Although the court also denied plaintiff's motion, we note that plaintiff in his brief on appeal does not address his spoliation motion and thus is deemed to have abandoned any issues with respect thereto (*see Benshoff v Rakoczy*, 79 AD3d 1736; *Ciesinski v Town of Aurora*, 202 AD2d 984).

In connection with its cross motion, defendant did not serve a second 90-day demand before making that cross motion. "The conditions precedent to bringing a motion to dismiss for failure to prosecute under CPLR 3126 must be complied with strictly" (*Frank L. Ciminelli Constr. Co. v City of Buffalo*, 110 AD2d 1075, 1076, *appeal dismissed* 65 NY2d 1053). Therefore, "[w]hile the defendant's second motion to dismiss may have been warranted, [the court] could not reach the merits of the motion unless the defendant met the procedural requirements of CPLR 3216. Service of a demand for a note of issue is a condition precedent to a dismissal for failure to prosecute" (*Shickler v Nassau Trust Co.*, 111 AD2d 800, 800-801; *see Frank L. Ciminelli Constr. Co.*, 110 AD2d at 1076). Inasmuch as "defendant had not complied with this condition with respect to the second motion to dismiss," the court should have denied defendant's cross motion seeking dismissal of the complaint (*Shickler*, 111 AD2d at 801).

We reject defendant's contention that a second 90-day demand was not necessary because the court ordered that a note of issue be filed by November 1, 2009 and then by November 24, 2009. While an order may have the same effect as a valid 90-day demand, that order must advise as to the consequences for failing to comply, i.e., dismissal of the complaint (*see Koscinski v St. Joseph's Med. Ctr.*, 24 AD3d 421, 421-422; *see also Bort v Perper*, 82 AD3d 692, 694). Here, there is no indication that plaintiff was advised that his failure to file a note of issue either by November 1st or November 24th would result in dismissal of the complaint.

With respect to appeal No. 2, plaintiff sought leave to renew and reargue his spoliation motion and leave to reargue his opposition to defendant's cross motion, and in the alternative he sought relief pursuant to CPLR 5015 (a) (1) and (3). Although plaintiff characterized the motion as one seeking leave to renew and reargue, he failed to present any new evidence and thus he sought only leave to reargue, and it is well settled that no appeal lies from an order denying a motion for leave to reargue (*see Empire Ins. Co. v Food City*, 167 AD2d 983). Insofar as plaintiff also sought relief pursuant to CPLR 5015 (a) (1) and (3), we need not address the propriety of any request by plaintiff for relief pursuant to that statute in view of our decision in appeal No. 1.

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

1025

CA 11-00113

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

TERRY D. HILLIARD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HIGHLAND HOSPITAL, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

ADAIR LAW FIRM, LLP, ROCHESTER (WILLIAM S. ROBY, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (THOMAS C. BURKE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered August 6, 2010 in a medical malpractice action. The order denied the motion of plaintiff for, inter alia, leave to renew and reargue.

It is hereby ORDERED that said appeal insofar as it seeks leave to reargue is unanimously dismissed and the appeal is otherwise dismissed without costs as moot.

Same Memorandum as in *Hilliard v Highland Hosp.* ([appeal No. 1] ___ AD3d ___ [Oct. 7, 2011]).

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

1035

KA 10-01095

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHANIEL JOHNSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (PATRICK SHELDON 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 (Christopher J. Burns, J.), rendered March 23, 2010. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]). 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. The manager of the convenience store that was robbed (hereafter, manager) identified defendant at trial as the person who committed the robbery. The manager also testified that he was able to observe defendant's face when defendant approached the manager before defendant entered the store wearing a "translucent" scarf over his mouth and nose. "Although a different verdict would not have been unreasonable, we conclude that the jury did not fail to give the evidence the weight it should be accorded in rejecting the misidentification theory of the defense" (*People v Hennings*, 55 AD3d 1393, 1393, *lv denied* 12 NY3d 758; *see generally People v Bleakley*, 69 NY2d 490, 495).

We further conclude that Supreme Court properly refused to suppress the testimony of the manager with respect to the photo array in which he identified defendant (*see generally People v Chipp*, 75 NY2d 327, 335-336, *cert denied* 498 US 833). There is no evidence in the record that the photo array drew the manager's attention to the photograph of defendant or that the identification procedures employed

by the police were unduly suggestive (*see People v McCurty*, 60 AD3d 1406, 1407, *lv denied* 12 NY3d 856). Although the manager signed an affidavit after viewing the photo array in which he stated that the person he identified therein was a "possible robbery suspect," the police officer who presented the photo array to the manager testified at the *Wade* hearing that the manager unequivocally and without hesitation identified defendant in the photo array. In addition, the qualified language used by the manager in his affidavit merely mirrored the language used by the officer, who instructed him that the photo array may possibly contain a photograph of the person who committed the robbery. Under the circumstances of this case, we perceive no basis upon which to disturb the court's determination with respect to the identification testimony of the manager.

Defendant further contends that the People committed a *Brady* violation by withholding exculpatory evidence until after the trial had commenced. As defendant correctly concedes, however, that contention is unpreserved for our review (*see generally People v Caswell*, 56 AD3d 1300, 1303, *lv denied* 11 NY3d 923, 12 NY3d 781, *cert denied* ___ US ___, 129 S Ct 2775). In any event, the alleged *Brady* violation concerns matters outside the record on appeal and thus may properly be raised by way of a motion pursuant to CPL article 440 (*see People v Ellis*, 73 AD3d 1433, *lv denied* 15 NY3d 851; *see generally People v Wilson*, 49 AD3d 1224, *lv denied* 10 NY3d 966).

We agree with defendant, however, that the verdict sheet contains an impermissible annotation. The court included the language "an armed felony" in describing the sole count of the indictment, charging defendant with robbery in the first degree, but the record fails to demonstrate that defense counsel consented to the verdict sheet. In *People v Damiano* (87 NY2d 477, 483), the Court of Appeals concluded that, "when the court determines that listing statutory elements or terms of the crime--whether as labels or a shorthand for statutory text--on the verdict sheet will aid the jury in [its] deliberations, the court must permit [defense] counsel to review the annotated verdict sheet and obtain [defense] counsel's consent *prior* to submitting it to the jury." "[T]he lack of an objection to the annotated verdict sheet by defense counsel cannot be transmuted into consent" (*id*. at 484; *see People v Collins*, 99 NY2d 14, 17), and "[t]he submission of [an] annotated verdict sheet, not consented to by [defense] counsel, cannot be deemed harmless" error (*Damiano*, 87 NY2d at 485).

We note that *Damiano* was superseded in part by amendments to CPL 310.20 (2) (*see* L 1996, ch 630, § 2; L 2002, ch 588, § 1 [2]), which allow annotated verdict sheets where "the court submits two or more counts" to the jury and only for "the sole purpose of . . . distinguish[ing] between the counts." Here, however, the indictment contained only one count. Those statutory provisions are therefore inapplicable, and the annotation on the verdict sheet was impermissible pursuant to *Damiano*. We therefore hold the case, reserve decision and remit the matter to Supreme Court to determine, following a hearing if necessary, whether defense counsel consented to the annotated verdict sheet (*see People v Knight* [appeal No. 1], 274

AD2d 957; *People v Ross*, 230 AD2d 924; *People v Albert*, 225 AD2d 1097).

Finally, the contention of defendant with respect to the court's responses to the first two jury notes is not preserved for our review (*see* CPL 470.05 [2]; *People v Samuels*, 24 AD3d 1287, *lv denied* 7 NY3d 817; *People v Parker*, 304 AD2d 146, 159, *lv denied* 100 NY2d 585), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: October 7, 2011 Patricia L. Morgan
Clerk of the Court

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

1036

KA 11-00612

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD W. GAVENDA, JR., ALSO KNOWN AS DONALD GAVENDA, ALSO KNOWN AS DONALD W. GAVENDA, DEFENDANT-APPELLANT.

MICHAEL M. MOHUN, COWLESVILLE, 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 June 15, 2010. The judgment convicted defendant, upon a nonjury verdict, of driving while intoxicated, a class E felony.

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

Memorandum: On appeal from a judgment convicting him of felony driving while intoxicated ([DWI] Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (i)]), defendant contends that County Court erred in refusing to suppress all evidence obtained when he was stopped at a DWI checkpoint and thereafter arrested. According to defendant, the DWI checkpoint constituted an unreasonable seizure in violation of the Fourth Amendment of the United States Constitution and article I, section 12 of the New York Constitution. We reject that contention. The court properly determined that the roadblock jointly conducted by the Genesee County Sheriff's Department and the Batavia Police Department to detect persons who were driving while intoxicated was a constitutionally permissible seizure (*see People v LaFountain*, 283 AD2d 1013; *see generally People v Scott*, 63 NY2d 518). Defendant's vehicle was stopped "pursuant to a nonarbitrary, nondiscriminatory and uniform procedure, involving the stop of all vehicles" approaching the roadblock (*People v John BB.*, 56 NY2d 482, 488, *cert denied* 459 US 1010). Moreover, all of the police personnel involved were given explicit verbal instructions on the procedures to be used at the roadblock, including the nature of the questions to be asked of every

driver, and those instructions “afforded little discretion to [the] personnel” (*Scott*, 63 NY2d at 526).

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

1037

KA 07-01780

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD C. DAGGETT, DEFENDANT-APPELLANT.

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

RONALD C. DAGGETT, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered May 16, 2007. The judgment convicted defendant, upon a jury verdict, of felony driving while intoxicated, felony driving while ability impaired by drugs, and various traffic infractions.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentences imposed for felony driving while intoxicated and felony driving while ability impaired by drugs to indeterminate terms of incarceration of 15 years to life and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, felony driving while intoxicated ([DWI] Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (ii)]) and felony driving while ability impaired by drugs ([DWAI] § 1192 [4]; § 1193 [1] [c] [former (ii)]). Prior to defendant's first trial, which ended in a mistrial, County Court granted the People's motion to dismiss the DWAI count. Contrary to defendant's contention in his main and pro se supplemental briefs, the court properly concluded that the dismissal of the DWAI count was a nullity (*see People v Dexter*, 259 AD2d 952, 952-953, *affd* 94 NY2d 847), and thus permitted the People to prosecute defendant on that count at the retrial (*see generally People v Barnett*, 254 AD2d 12, *lv denied* 93 NY2d 871; *People v Clarke*, 203 AD2d 916, *lv denied* 83 NY2d 965). The court also properly denied defendant's motion to dismiss that count prior to the retrial on statutory speedy trial grounds, inasmuch as the retrial commenced within the applicable six-month period (*see* CPL 30.30 [5]).

The court properly denied the motion of defendant for a mistrial during jury deliberations based upon a juror's exposure to a radio broadcast concerning defendant's prior arrests for DWI (*see People v Matt*, 78 AD3d 1616, *lv denied* 15 NY3d 954; *People v Costello*, 104 AD2d 947, 948-949). Contrary to the contention of defendant in his main brief, the court provided a meaningful response to the jury's note requesting a readback of the instructions with respect to the DWAI charge (*see People v Malloy*, 55 NY2d 296, 301-302, *cert denied* 459 US 847). Viewing the evidence in light of the elements of the DWI and DWAI counts as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to those counts is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

The court properly rejected defendant's constitutional challenge to the persistent felony offender sentencing scheme (*see People v Battles*, 16 NY3d 54, 59; *People v Quinones*, 12 NY3d 116, 119, 130-131, *cert denied* ___ US ___, 130 S Ct 104). Defendant's contention that the court failed to comply with that scheme in sentencing him as a persistent felony offender is not preserved for our review (*see People v Proctor*, 79 NY2d 992, 994), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's further contention, his previous DWI convictions may properly serve as predicates both for his conviction of felony DWI and felony DWAI and for purposes of determining his eligibility for persistent felony offender treatment (*see generally People v Bowers*, 201 AD2d 830, 831, *lv denied* 83 NY2d 909; *People v Maldonado*, 173 Misc 2d 612, 616-617). We reject defendant's contention that the court abused its discretion in considering his prior youthful offender adjudication as relevant to his "history and character" (Penal Law § 70.10 [2]; *see People v O'Connor*, 6 AD3d 738, 740-741, *lv denied* 3 NY3d 639, 645). We conclude, however, that while the court did not abuse its discretion in sentencing defendant as a persistent felony offender, the sentence nevertheless is unduly harsh and severe. The instant offenses did not result in physical injury or property damage, and the evidence presented at the persistent felony offender hearing established that defendant's criminal history is the product of his alcoholism and mental health problems. As a matter of discretion in the interest of justice, we therefore modify the judgment by reducing the sentences imposed for DWI and DWAI to indeterminate terms of incarceration of 15 years to life (*see* CPL 470.20 [6]).

We have reviewed the remaining contentions of defendant in his pro se supplemental brief and conclude that none warrants further modification or reversal of the judgment.

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

1039

KA 09-02235

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM JAMIESON, DEFENDANT-APPELLANT.

NELSON S. TORRE, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered July 16, 2009. The judgment convicted defendant, upon a nonjury verdict, of burglary in the second degree, criminal mischief in the fourth degree and petit larceny (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that the evidence of his unlawful entry into the victim's home and intent to commit a crime at the time of the entry is insufficient to support the burglary conviction. Defendant's contention is unpreserved for our review inasmuch as he failed to move for a trial order of dismissal at the close of the People's case (*see People v Gray*, 86 NY2d 10, 19; *People v Brown*, 67 AD3d 1369, *lv denied* 14 NY3d 886). In any event, that contention is without merit. The evidence establishes "that defendant gained entry to the victim's home by means of deception, trickery or misrepresentation," and thus it is legally sufficient to establish the unlawful entry (*People v Mitchell*, 254 AD2d 830, 831, *lv denied* 92 NY2d 984). The victim testified that defendant, who was wearing a hard hat and a vest when he approached her home, informed the victim that he was "from the cable company" and that he was there to "see if [her] setup was okay." In addition, "[d]efendant's intent to commit a crime [at the time of entry] may be inferred from the circumstances of the entry, from defendant's unexplained or unauthorized presence on the premises and from defendant's actions and assertions when confronted" (*id.*). Here, defendant's intent to commit a crime at the time of entry may be inferred from evidence that, inter alia, he posed as a cable company employee to gain entry to the victim's home and engaged in a physical altercation with her brother after that individual confronted defendant concerning the property taken from the

victim’s home.

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

1040

CAF 10-02449

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

IN THE MATTER OF TIFFANY M. AND TONIKA M.

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

JOLANDA M., RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR TIFFANY M. AND TONIKA M.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered December 1, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order terminated respondent's parental rights on the ground of mental illness.

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 the two children who are the subject of this proceeding. The testimony of petitioner's expert psychologist at the hearing established by clear and convincing evidence that, based on the mother's mental illness and mental retardation, she is unable presently and for the foreseeable future to provide proper and adequate care for the children (*see Matter of Mathew Z.*, 279 AD2d 904, 906; *see also Matter of Cayden L.R.*, 83 AD3d 1550; *Matter of William C.B.*, 83 AD3d 1583, *lv dismissed in part and denied in part* 17 NY3d 790). Although the petition did not allege mental illness as a ground for termination of the mother's parental rights, the mother did not object to the evidence relating to that ground. In addition, although Family Court did not specifically refer in its decision to the mother's mental retardation, the court determined that the mother lacked the mental capacity to care for the children properly, and there was ample evidence of the mother's mental retardation. We therefore conclude that the court properly terminated the mother's parental rights.

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

1044

CAF 11-00372

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

IN THE MATTER OF LAVALLE W. AND LAVAR W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT.

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

MEMORANDUM AND ORDER

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, 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 adjudged that the permanency goal for the subject children 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 for Lavar W. of placement for adoption and modifying his permanency goal to placement in another planned permanent living arrangement 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 Children contends that Family Court erred in determining that continuation of the permanency goal of placement for adoption for the two subject children is in their best interests. We agree with the Attorney for the Children that the court's determination with respect to Lavar W. 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 for Lavar of placement for adoption and modifying his permanency goal to placement in another planned permanent living arrangement (APPLA).

Although the permanency hearing report for Lavar submitted by petitioner prior to the permanency hearing identified his permanency goal as placement for adoption, the evidence presented at the hearing by petitioner and the Attorney for the Children supports a modification of Lavar's permanency goal to APPLA (*see generally Matter of Sean S.*, 85 AD3d at 1575-1576). The Attorney for the Children

specifically requested such a modification at the hearing, and petitioner supports that modification on appeal. Lavar, who was 16 years old at the time of the hearing, testified that he did not want to be adopted, that he had been pressured into considering adoption in the past and that he would not consent to adoption in the event that petitioner found an adoptive home for him. Petitioner's caseworker confirmed that Lavar was not interested in adoption. Further, the record establishes that Lavar has "a significant connection to an adult willing to be a permanency resource for [him]," which is required for an APPLA placement (Family Ct Act § 1089 [d] [2] [i] [E]). At the time of the hearing, Lavar had resided with his foster parent for over a year, and the foster parent testified that he was willing to be a permanency resource for Lavar in the event that he did not wish to be adopted. Lavar testified that he enjoyed his living situation with his foster parent and that individual's 17-year-old son.

The further contention of the Attorney for the Children that Lavalle W.'s permanency goal should be modified to APPLA is not properly before us inasmuch as it is raised for the first time on appeal (*see generally Matter of Shania S.*, 81 AD3d 1380). The record establishes that neither petitioner nor the Attorney for the Children requested a modification of Lavalle's permanency goal at any time during the proceedings herein. Lavalle's permanency hearing report lists both the current permanency planning goal and anticipated permanency planning goal as placement for adoption, and petitioner confirmed at the hearing that Lavalle's goal had not changed. Although the Attorney for the Children requested that Lavar's goal be modified to APPLA in light of the testimony of that child, the record contains no such request on behalf of Lavalle.

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

1050

CA 11-00535

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

LHR, INC., PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

T-MOBILE USA, INC. AND SUNCOM WIRELESS OPERATING COMPANY, LLC, DEFENDANTS-APPELLANTS-RESPONDENTS.

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

SCHRÖDER, JOSEPH & ASSOCIATES, LLP, BUFFALO (LINDA H. JOSEPH OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered December 1, 2010. The order, among other things, denied in part the motion of defendants to dismiss the complaint and denied in part the cross motion of plaintiff seeking leave to amend the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of defendants' motion to dismiss the negligence cause of action against defendant T-Mobile USA, Inc. and granting that part of plaintiff's cross motion for leave to amend the complaint to add a conversion cause of action against that defendant and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a debt collection agency and New York corporation, commenced this action seeking damages resulting from defendants' alleged breach of contract and negligence with respect to the sales by defendant SunCom Wireless Operating Company, LLC (SunCom) of delinquent customer accounts to plaintiff. SunCom is a Delaware corporation with a chief executive office in Pennsylvania. In approximately September 2007, SunCom became a wholly-owned subsidiary of defendant T-Mobile USA, Inc. (T-Mobile), a Delaware corporation with retail stores throughout New York State. Defendants moved to dismiss the complaint against SunCom on the ground that Supreme Court lacked personal jurisdiction over SunCom. Defendants also moved to dismiss the negligence cause of action against T-Mobile for failure to state a claim pursuant to CPLR 3211 (a) (7). Plaintiff thereafter cross-moved for, inter alia, leave to amend the complaint to add causes of action for conversion and intentional interference with contract against T-Mobile.

On appeal, defendants contend that the court erred in denying that part of their motion to dismiss the complaint against SunCom. We reject that contention. Pursuant to New York's long-arm statute, "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR 302 [a] [1]). Plaintiff does not allege that the court acquired personal jurisdiction under the "transacts any business within the state" clause of the long-arm statute, but rather it contends that personal jurisdiction was acquired because SunCom "contract[ed] . . . to supply goods or services" in New York (*id.*). We agree with the court that, under the circumstances of this case, SunCom's sales to plaintiff of delinquent customer accounts (hereafter, accounts) render it subject to the court's jurisdiction (*see generally People v Concert Connection*, 211 AD2d 310, 315, *appeal dismissed* 86 NY2d 837). Here, the 28 purchase agreements executed by plaintiff and SunCom that are the subject of the breach of contract causes of action provide that "[a]ll [a]ccounts shall be delivered to [plaintiff] by [SunCom] simultaneously with the payment of the [p]urchase [p]rice" and that SunCom "shall provide . . . to [plaintiff] copies of all [r]ecords reasonably requested by [plaintiff]." The contracts therefore contemplated the delivery of goods into New York, the location of plaintiff's chief executive office. Further, plaintiff submitted evidence in opposition to the motion demonstrating that the information pertaining to the accounts and all records relating thereto were delivered via email to plaintiff's office in New York.

We agree with defendants, however, that the court erred in denying that part of their motion seeking to dismiss the negligence cause of action against T-Mobile (*see generally Makuch v New York Cent. Mut. Fire Ins. Co.*, 12 AD3d 1110, 1111; *East Meadow Driving School v Bell Atl. Yellow Pages Co.*, 273 AD2d 270), and we therefore modify the order accordingly. "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389; *see IBM Credit Fin. Corp. v Mazda Motor Mfg. [USA] Corp.*, 152 AD2d 451, 453). Although a "defendant may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316), such "duty must spring from circumstances extraneous to, and not constituting elements of, the contract" (*Clark-Fitzpatrick, Inc.*, 70 NY2d at 389; *see D'Ambrosio v Engel*, 292 AD2d 564, *lv denied* 99 NY2d 503).

Here, plaintiff alleged that T-Mobile, as a successor to the purchase agreements, breached those agreements by failing to provide plaintiff with documents necessary to verify its debt. Plaintiff further alleged that, regardless whether T-Mobile is a party to those agreements, T-Mobile is liable in tort on the basis that it had a duty pursuant to the federal Fair Debt Collection Practices Act ([FDCPA] 15 USC § 1692 *et seq.*) to preserve and retain such documents. We agree with defendants that there is no such duty under the FDCPA. The

purpose of that statute is to safeguard consumers from abusive practices by debt collectors (*see* 15 USC § 1692 [e]). Contrary to plaintiff's contention, the statute does not impose a duty on creditors to ensure that debt sold or otherwise transferred to a debt collector is in fact collectable. In the absence of the documents necessary to verify the debt purchased from SunCom, plaintiff may indeed be unable to collect such debt. Any duty to preserve and produce documents necessary to verify the debt sold to plaintiff, however, springs from the purchase agreements, not the FDCPA. Thus, "plaintiff failed to show that there was a legal duty imposed upon [T-Mobile] independent of the contract itself, or that [T-Mobile] engaged in tortious conduct 'separate and apart from [its alleged] failure to fulfill [its] contractual obligations' " (*D'Ambrosio*, 292 AD2d at 565, quoting *New York Univ.*, 87 NY2d at 316).

We agree with plaintiff on its cross appeal that the court abused its discretion in denying that part of plaintiff's cross motion seeking leave to amend the complaint to assert a cause of action for conversion against T-Mobile, and we therefore further modify the order accordingly. "Generally, [l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit" (*Anderson v Nottingham Vil. Homeowner's Assn., Inc.*, 37 AD3d 1195, 1198, *amended on rearg* 41 AD3d 1324 [internal quotation marks omitted]; *see* CPLR 3025 [b]). "To establish a cause of action in conversion, the plaintiff must show legal ownership *or an immediate superior right of possession* to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question . . . to the exclusion of the plaintiff's rights" (*Five Star Bank v CNH Capital Am., LLC*, 55 AD3d 1279, 1281 [internal quotation marks omitted and emphasis added]). Here, although plaintiff does not own the account records maintained by SunCom or T-Mobile, the purchase agreements specifically provide that SunCom "*shall provide*, at no cost to [plaintiff], copies of all [r]ecords reasonably requested by [plaintiff]" and that, "[i]n the event that [those r]ecords . . . are not available for a particular [a]ccount, [SunCom] *will give* [plaintiff], in lieu of such [r]ecords, a duly executed and notarized [a]ffidavit of [d]ebt" (emphasis added). Further, plaintiff alleged that T-Mobile failed or refused to deliver those documents to it upon request. We therefore conclude that plaintiff alleged sufficient facts to state a cause of action for conversion.

Entered: October 7, 2011 Patricia L. Morgan
Clerk of the Court

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

1051

CA 10-02273

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

JUAN MAZURETT AND THERESA MAZURETT,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ROCHESTER CITY SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

VALERIO & KUFTA, P.C., ROCHESTER (A. VINCENT BUZARD OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered August 19, 2010 in a personal injury action. The order, insofar as appealed from, granted the motion of plaintiffs for partial summary judgment on liability pursuant to Labor Law § 240 (1) and denied in part the cross motion of defendant for summary judgment.

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

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Juan Mazurett (plaintiff) when he fell from a collapsing scaffold at a construction site on property owned by defendant. The accident occurred while plaintiff was attempting to climb the scaffold, which had been provided to him by his employer, the general contractor at the construction site. Defendant contends that Supreme Court erred in granting plaintiffs' motion seeking partial summary judgment on liability with respect to the Labor Law § 240 (1) claim and erred in denying that part of defendant's cross motion seeking summary judgment dismissing the Labor Law § 240 (1) and § 241 (6) claims. We reject that contention.

Plaintiffs met their initial burden of establishing a prima facie violation of Labor Law § 240 (1). The fact that the scaffold collapsed "is sufficient to establish as a matter of law that the [scaffold] was not so 'placed . . . as to give proper protection' to plaintiff" pursuant to the statute (*Dean v City of Utica*, 75 AD3d 1130, 1131; *see Tapia v Mario Genovesi & Sons, Inc.*, 72 AD3d 800, 801; *see also Cantineri v Carrere*, 60 AD3d 1331). In opposition to the

motion, defendant failed to raise a triable issue of fact whether plaintiff's "own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of his accident" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40). We reject defendant's contention that plaintiff was a recalcitrant worker whose own actions were the sole proximate cause of the accident. Although defendant submitted evidence that plaintiff was instructed to use a more stable scaffold and to use a ladder to ascend the scaffold, defendant failed to submit any evidence that plaintiff refused to use a particular scaffold or ladder that was provided to him. "The mere presence of [other safety devices] somewhere at the work[]site" does not satisfy defendant's duty to provide appropriate safety devices (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524, *rearg denied* 65 NY2d 1054; *see Williams v City of Niagara Falls*, 43 AD3d 1426; *Whiting v Dave Hennig, Inc.*, 28 AD3d 1105, 1106). Even assuming, arguendo, that plaintiff was negligent, we conclude that his own conduct cannot be deemed the sole proximate cause of the accident inasmuch as plaintiffs established that a statutory violation was a proximate cause of plaintiff's injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290; *Calderon v Walgreen Co.*, 72 AD3d 1532, *appeal dismissed* 15 NY3d 900).

Entered: October 7, 2011 Patricia L. Morgan
Clerk of the Court

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

1053

CA 10-02487

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

NATIONAL GRANGE MUTUAL INSURANCE COMPANY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CROYLE, INC., JARED A. HOFFERT, JEFFREY M. KATZ,
TECH CONTRACTING AND NATIONAL GRID USA SERVICE
COMPANY, INC., DEFENDANTS-RESPONDENTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (CHRISTINA F. DEJOSEPH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

SMITH, MINER, O'SHEA AND SMITH, LLP, BUFFALO (TERRY D. SMITH OF COUNSEL), FOR DEFENDANT-RESPONDENT JARED A. HOFFERT.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, WHITE PLAINS (DEBRA A. ADLER OF COUNSEL), FOR DEFENDANT-RESPONDENT JEFFREY M. KATZ.

HISCOCK & BARCLAY LLP, SYRACUSE (ROBERT A. BARRER OF COUNSEL), FOR DEFENDANT-RESPONDENT NATIONAL GRID USA SERVICE COMPANY, INC.

Appeal from an amended judgment of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered August 27, 2010 in a declaratory judgment action. The amended judgment, inter alia, granted the motion of defendant Jared A. Hoffert for summary judgment and denied the cross motion of plaintiff for summary judgment.

It is hereby ORDERED that the amended judgment so appealed from is unanimously modified on the law by denying that part of the motion of defendant Jared A. Hoffert seeking attorneys' fees and expenses and that part of the cross motion of defendant Croyle, Inc. seeking attorneys' fees incurred in defending this action, and as modified the amended judgment is affirmed without costs.

Memorandum: Defendant Jared A. Hoffert commenced the underlying Labor Law and common-law negligence action against, inter alia, defendant Croyle, Inc. (Croyle) seeking damages for injuries he sustained on June 26, 2008, during the course of his employment on a construction project for which Croyle was the construction manager. The summons and complaint in that action were served on Croyle on November 29, 2008, along with a letter from Hoffert's attorney

requesting that Croyle deliver the pleadings to its liability insurance carrier. Plaintiff, Croyle's liability insurance carrier, received the summons and complaint and a letter from Croyle's insurance agent on December 9, 2008. Hoffert's attorney thereafter communicated with a representative of plaintiff, both orally and in writing, concerning the underlying action. Plaintiff subsequently sent a letter to Croyle disclaiming coverage based upon Croyle's failure to provide notice pursuant to the terms of the insurance policy. By letter dated January 5, 2009, Hoffert's attorney requested plaintiff to reconsider its decision in light of Hoffert's notice to plaintiff. Thereafter, plaintiff commenced the instant action seeking a declaration that, inter alia, it has no obligation to defend and indemnify Croyle in the underlying action.

Supreme Court properly granted that part of Hoffert's motion seeking summary judgment declaring that plaintiff has an obligation to defend and indemnify Croyle in the underlying action and properly denied plaintiff's cross motion seeking summary judgment declaring that it did not have such an obligation. Hoffert, as the injured party, exercised his independent right to provide written notice to plaintiff, and he is not bound by Croyle's allegedly late notice (*see* Insurance Law § 3420 [a] [3]; *Utica Mut. Ins. Co. v Gath*, 265 AD2d 805, 806). Plaintiff, however, never disclaimed coverage based on Hoffert's alleged failure to provide timely notice, and thus it is "estopped from raising [Hoffert's] alleged failure to provide timely notice of the claim as a ground for disclaiming coverage" (*Utica Mut. Ins. Co.*, 265 AD2d at 806; *see generally General Acc. Ins. Group v Cirucci*, 46 NY2d 862, 863-864; *Vacca v State Farm Ins. Co.*, 15 AD3d 473, 474-475).

Croyle failed to appeal from that part of the amended judgment denying its cross motion seeking summary judgment declaring that plaintiff has an obligation to defend and indemnify it in the underlying action. We therefore do not address Croyle's contention that the court erred in rejecting its contention that its failure to provide prompt notice to plaintiff is excused by its reasonable belief in nonliability (*see generally Matijiw v New York Cent. Mut. Fire Ins. Co.*, 292 AD2d 865). Inasmuch as Croyle did not prevail on the merits, we conclude that the court erred in granting that part of its cross motion seeking attorneys' fees incurred in defending this action (*see generally RLI Ins. Co. v Smiedala*, 77 AD3d 1293, 1294-1295). The court also erred in granting that part of the motion of Hoffert seeking attorneys' fees inasmuch as he does not have a contractual relationship with plaintiff (*see De Vore v Balboa Ins. Co.*, 118 AD2d 989, 991-992). We therefore modify the amended judgment accordingly.

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court

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

1055

CAF 10-02457

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

IN THE MATTER OF ANTWAN WALKER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JAMIKA CAMERON, RESPONDENT-APPELLANT.

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

REBECCA J. TALMUD, ATTORNEY FOR THE CHILD, WILLIAMSVILLE, FOR ANTWAN E.W., JR.

MELISSA A. CAVAGNARO, ATTORNEY FOR THE CHILD, BUFFALO, FOR DIAMOND S. W.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, A.J.), entered December 16, 2010 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted primary physical custody of the parties' children to petitioner.

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

Memorandum: Respondent mother appeals from an order that, inter alia, granted the petition seeking to modify the custody and visitation provisions of the judgment of divorce by awarding primary physical custody of the parties' children to petitioner father. We note at the outset that the mother failed to include in the record on appeal the judgment of divorce. "Although [such an] 'omission . . . ordinarily would result in dismissal of the appeal . . ., there is no dispute' " concerning the custody provisions contained in the judgment, and we therefore reach the merits (*Matter of Carey v Windover*, 85 AD3d 1574, 1574; *see Matter of Dann v Dann*, 51 AD3d 1345, 1346-1347).

We agree with the mother that Family Court erred in awarding primary physical custody of the parties' children to the father. Even assuming, arguendo, that the father made " 'a sufficient evidentiary showing of a change in circumstances to require a hearing on the issue whether the existing custody [provisions] should be modified' " (*Matter of Hughes v Davis*, 68 AD3d 1674, 1675), we nevertheless conclude that it is in the best interests of the children for primary physical custody to remain with the mother (*see generally Matter of*

Louise E. S. v W. Stephen S., 64 NY2d 946, 947). The record establishes that the mother has been the children's primary caregiver throughout their lives (*see Sitts v Sitts*, 74 AD3d 1722, 1723). In addition, the record establishes that the children have a close relationship with the half sibling residing in the mother's home. Although "the presence of [a] half sibling[] . . . is not dispositive, . . . it is a factor to be considered in making custody determinations" (*Matter of Slade v Hosack*, 77 AD3d 1409; *see Eschbach v Eschbach*, 56 NY2d 167, 173). We therefore reverse the order and dismiss the petition.

Entered: October 7, 2011

Patricia L. Morgan
Clerk of the Court