SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JANUARY 31, 2012

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. JEROME C. GORSKI

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1402

KA 10-01131

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER KALB, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered April 14, 2010. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, criminal possession of a weapon in the third degree, criminal contempt in the first degree and intimidating a victim or witness in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by providing that the order of protection shall expire on March 9, 2029, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]). Defendant contends that County Court's handling of a jury note violated the requirements set forth in CPL 310.30 and *People v O'Rama* (78 NY2d 270), inasmuch as he was denied the opportunity to have meaningful input or time to fashion an appropriate response to the note. We conclude that defendant failed to preserve his contention for our review. The record establishes that defendant, defense counsel and the prosecutor knew the contents of the brief note, which only requested additional instructions on the elements of the charged offenses. Further, it is apparent from the record that defendant and defense counsel were present throughout the proceedings and that no objection or request was made with respect to the content of the note or the manner in which the court responded to it. Thus, unlike *O'Rama* (78 NY2d at 278-279), this is not a case where there was "a failure to provide [defense] counsel with meaningful notice of the contents of the jury note or an opportunity to respond" (*People v Kadarko*, 14 NY3d 426, 429), and defendant therefore was required to preserve his contention for our review (*see People v Starling*, 85 NY2d 509, 516).

Defendant further contends that the court erred in fixing the duration of the order of protection. Although defendant failed to preserve that contention for our review (*see People v Nieves*, 2 NY3d 310, 315-317), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). The court sentenced defendant to a determinate term of imprisonment of 12 years for burglary in the second degree and to indeterminate terms of imprisonment of 2 to 4 years for criminal contempt in the first degree (Penal Law § 215.51 [b] [iii]) and intimidating a victim or witness in the third degree (§ 215.15 [1]). The order of protection expires on March 9, 2033, which is eight years after the expiration of the determinate sentence and the indeterminate sentences, which were to run concurrently to each other and consecutively to the determinate sentence. The version of CPL 530.13 (4) (A) (ii) in effect at the time the judgment was rendered provided that the duration of an order of protection entered with respect to a felony conviction shall not exceed "eight years from the date of the expiration of the maximum term of *an* indeterminate *or* the term of *a* determinate sentence of imprisonment actually imposed . . . " (emphasis added). Thus, the statute permits the order of protection to run, at most, eight years from the end of the term of the longest sentence imposed for the counts upon which the order of protection was based, i.e., the determinate term imposed for the burglary count (*see People v Jackson*, 85 AD3d 1697, 1699, *lv denied* 17 NY3d 817). We therefore modify the judgment by providing that the order of protection shall expire on March 9, 2029 (*see People v Cameron*, 87 AD3d 1366).

Defendant failed to preserve for our review his contentions concerning an exhibit that was inadvertently provided to the jury, one of his statements that was not included in the People's CPL 710.30 notice and alleged prosecutorial misconduct (*see* CPL 470.05 [2]). We decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

1407

CA 11-01404

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

IN THE MATTER OF THE ESTATE OF HENRY P. BAUER, DECEASED.

GARY BAUER, AS ADMINISTRATOR OF THE ESTATE OF HENRY P. BAUER, DECEASED, PETITIONER-RESPONDENT-APPELLANT;

MEMORANDUM AND ORDER

MEGAN WOLFE, RESPONDENT-PETITIONER-RESPONDENT, AND MARC I. WOLTAG, AS GUARDIAN AD LITEM FOR WINSTON GABRIEL BAUER-WOLFE, RESPONDENT-RESPONDENT.

WOODS OVIATT GILMAN LLP, ROCHESTER (GORDON S. DICKENS OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

BERWITZ & DITATA LLP, GARDEN CITY (MAUREEN ROTHSCHILD DITATA OF COUNSEL), FOR RESPONDENT-PETITIONER-RESPONDENT.

EMBSER & WOLTAG, P.C., WELLSVILLE (MARC I. WOLTAG OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Allegany County (Thomas P. Brown, S.), entered December 15, 2010. The order, inter alia, granted the cross motion of the guardian ad litem for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion of respondent guardian ad litem and as modified the order is affirmed without costs, and the matter is remitted to Surrogate's Court, Allegany County, for further proceedings in accordance with the following Memorandum: Petitioner-respondent (petitioner), as administrator of the estate of Henry P. Bauer (decedent), appeals from an order that, inter alia, granted the cross motion of respondent guardian ad litem (hereafter, respondent) for summary judgment determining that decedent's son (hereafter, child) is the sole heir and distributee of decedent's estate. The child was born in North Carolina in 2006 to respondent-petitioner Megan Wolfe. Two days later, decedent and Wolfe, who were never married to each other, executed an "Affidavit of Parentage for Child Born out of Wedlock" (hereafter, affidavit) in North Carolina. After decedent's death in 2009, petitioner filed, inter alia, a petition for probate and letters of administration. Wolfe subsequently filed a cross petition for probate and letters of administration, after which Surrogate's Court

appointed her as guardian of the child's property and appointed respondent as guardian ad litem for the child. Wolfe also filed a petition seeking to remove petitioner as administrator of decedent's estate. Petitioner moved to dismiss the petition and cross petition of Wolfe, and respondent cross-moved for summary judgment determining that the child is the sole distributee of decedent's estate.

We agree with petitioner that the Surrogate erred in granting respondent's cross motion. The Surrogate erred in determining that the requirement that the affidavit be filed, under either New York law (*see* EPTL 4-1.2 [a] [2] [B]) or North Carolina law (*see* NC Gen Stat § 29-19 [b] [2]; *see also* § 130A-101 [f]), was either unnecessary or could be performed posthumously in this proceeding in order to establish the child's right to inherit. As the Surrogate noted, the record is not clear whether the affidavit was filed in North Carolina. A posthumous filing, however, is insufficient to establish the child's right to inherit. Absent evidence that there was a filing of the affidavit pursuant to either the New York or North Carolina statutes, respondent failed to establish as a matter of law that the child is entitled to inherit. We reject petitioner's further contention that the Surrogate erred in denying his motion, inasmuch as he failed to establish as a matter of law that the requisite filing had not occurred. We therefore modify the order by denying respondent's cross motion, and we remit the matter to Surrogate's Court for further proceedings on the petition and cross petition of Wolfe.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

1408

CA 10-02017

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

DAVID HOME BUILDERS, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TARA A. MISIAK AND DR. MATTHEW M. MISIAK,
DEFENDANTS-APPELLANTS.

VINAL & VINAL, BUFFALO (JEANNE M. VINAL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MOSEY PERSICO, LLP, BUFFALO (JENNIFER C. PERSICO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered June 18, 2010. The judgment awarded plaintiff money damages.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the post-trial motion and reinstating the verdict in its entirety and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages resulting from defendants' breach of a real estate contract for a 10-acre parcel of land and a newly constructed home (hereafter, property). We agree with defendants that Supreme Court erred in granting the motion of plaintiff seeking to set aside the jury's determination concerning the fair market value of the property that served as the basis for the calculation of damages (*see generally* CPLR 4404 [a]). We therefore modify the judgment accordingly. The jury was free to reject the opinion of plaintiff's expert on that issue, even where, as here, the expert's opinion was uncontradicted at trial (*see Quigg v Murphy*, 37 AD3d 1191, 1193; *Galimberti v Carrier Indus.*, 222 AD2d 649). Further, there was a rational basis for the jury to reject that opinion (*see generally Calderon v Irani*, 296 AD2d 778, 779). Inasmuch as the appraisal report of plaintiff's expert was never admitted in evidence, his vague testimony was unsupported by specific evidence of the value of comparable properties. The expert's conclusion with respect to the fair market value of the property was further undermined by the testimony of plaintiff's owner, a licensed real estate broker, that he listed the newly constructed home and 2 acres of the 10-acre property for approximately $50,000 more than the expert concluded the entire property was worth.

We reject the further contention of defendants, however, that plaintiff's consequential damages were not reasonably foreseeable and contemplated by the parties. Plaintiff is a business engaged in the construction and sale of new homes, and thus the jury was permitted to conclude that the additional carrying, maintenance and marketing costs incurred by plaintiff as a result of defendants' breach of the real estate contract were both reasonably foreseeable and contemplated by the parties (*see American List Corp. v U.S. News & World Report*, 75 NY2d 38, 41). Moreover, inasmuch as plaintiff did not benefit from the occupation, use and enjoyment of the property following that breach, we conclude that the rule precluding, as a matter of law, the recovery of consequential damages by a seller who continues in the use and enjoyment of the property after such a breach does not apply here (*see generally Di Scipio v Sullivan*, 30 AD3d 677).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

1410

CA 11-01242

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

IN THE MATTER OF J-P GROUP, LLC,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT, EMPIRE STATE DEVELOPMENT CORPORATION, COMMISSIONER OF ECONOMIC DEVELOPMENT, DENNIS MULLEN (ACTING), EMPIRE ZONE DESIGNATION BOARD,
RESPONDENTS-APPELLANTS,
ET AL., RESPONDENT.

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

MOSEY PERSICO, LLP, BUFFALO (SHANNON M. HENEGHAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered August 25, 2010 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, granted the petition to annul the determination of respondent New York State Department of Economic Development revoking petitioner's certification as a qualified Empire zone enterprise.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the first and third through seventh decretal paragraphs and as modified the judgment is affirmed without costs.

Memorandum: Petitioner owns and manages commercial rental properties within an Empire zone and was certified as a qualified Empire zone enterprise effective March 19, 2002 (*see* General Municipal Law § 955 *et seq.*). In April 2009, the Legislature amended General Municipal Law § 959 (a) to revise the eligibility for businesses receiving Empire zone benefits (*see* L 2009, ch 57, part S-1, § 3) and, by the same legislation, amended numerous sections of the Tax Law that provided tax credits to businesses receiving those benefits (*see* L 2009, ch 57, part S-1, §§ 11-22). Sections 11 through 17 of that legislation stated that "[a]ny carry over of a credit from prior taxable years will not be allowed if an [E]mpire zone retention certificate is not issued pursuant to [General Municipal Law § 959 (w)] to the [E]mpire zone enterprise [that] is the basis of the

credit," and sections 18 through 22 contained similar provisions. The subject amendments were to "take effect immediately," with the exception of, inter alia, the Tax Law amendments in sections 11 through 22 of the legislation, which were to "apply to taxable years beginning on and after January 1, 2008" (L 2009, ch 57, part S-1, § 44 [a]).

On June 29, 2009, respondent New York State Department of Economic Development (DED) revoked petitioner's certification as a qualified Empire zone enterprise retroactive to January 1, 2008 on the ground that petitioner "failed to provide economic returns to the [S]tate in the form of total remuneration to its employees (i.e. wages and benefits) and investments in its facility greater in value to the tax benefits [petitioner] used and had refunded to it" (General Municipal Law § 959 [a] [v] [6]). Petitioner appealed to respondent Empire Zones Designation Board (EZDB), but the EZDB upheld the revocation of petitioner's certification. Petitioner then commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination revoking its certification as a qualified Empire zone enterprise and reinstating its certification as such an enterprise. Supreme Court granted the petition in its entirety, and it declared that, inter alia, the amendments to General Municipal Law § 959 (a) are not retroactive, that the emergency regulations promulgated by the DED Commissioner pursuant to General Municipal Law § 959 were null and void inasmuch as they were improperly filed and otherwise defective, and that the revocation of petitioner's Empire zone certification was arbitrary and capricious and thus null and void.

We note at the outset that the court erred in granting declaratory relief inasmuch as petitioner did not seek such relief in this CPLR article 78 proceeding. We agree with the court, however, to the extent that it determined that the amendments to General Municipal Law § 959 are prospective only (*see James Sq. Assoc. LP v Mullen* [appeal No. 2], ___ AD3d ___ [Nov. 18, 2011]). Although the Legislature intended that the subject amendments were to apply retroactively, we have recently held that such "retroactive application . . . violates [a party's] due process rights" (*id.* at ___).

We agree with respondents, however, that the court erred in determining that there was no rational basis for the determination to revoke petitioner's Empire zone certification. "It is well established that [j]udicial review of an administrative determination is limited to whether the administrative action is arbitrary and capricious or lacks a rational basis . . . Such a determination is entitled to great deference . . ., and [a] reviewing court may not substitute its own judgment for that of the agency" (*Matter of Walker v State Univ. of N.Y. [Upstate Med. Univ.]*, 19 AD3d 1058, 1059, *lv denied* 5 NY3d 713 [internal quotation marks omitted]).

General Municipal Law § 959 (a) (v) (6) authorized the DED Commissioner to promulgate emergency regulations governing "the decertification by the [C]ommissioner . . . of business enterprises for benefits referred to in [section 966] with respect to an [E]mpire

zone . . . upon a finding [that] . . . the business enterprise has failed to provide economic returns to the [S]tate in the form of total remuneration to its employees (i.e. wages and benefits) and investments in its facility greater in value to the tax benefits the business enterprise used and had refunded to it . . . .” Thus, businesses producing less than $1 in actual wages and benefits and investments for every $1 in State tax incentives (hereafter, 1:1 cost-benefit test) were to be decertified from the program. The emergency regulation promulgated pursuant to General Municipal Law § 959 (a) (v) (6) is set forth in part in 5 NYCRR 11.9 (c) (2), which provides that the DED Commissioner “shall revoke the certification of a business enterprise upon a finding that . . . a business enterprise that has submitted at least three years of business annual reports has failed to provide economic returns to the [S]tate in the form of total remuneration to its employees (i.e., wages and benefits) and investments in its facility that add to a greater value than the tax benefits the business enterprise used and had refunded to it . . . .” That regulation further provides that “a business enterprise that has submitted at least three years of business annual reports shall have failed [the 1:1 cost-benefit test] if the sum of . . . all wages and benefits paid to all employees of the business enterprise in the zone . . . and . . . the value of capital investments in the zone, as indicated in the business enterprise’s business annual reports submitted and reporting for any of the years from and including [2001] through and including . . . [2007], does not exceed the total amount of [S]tate tax benefits the business enterprise used and had refunded to it or its members, partners or shareholders under the [E]mpire zones program as indicated in the business annual reports submitted and reporting for any of the years from and including [2001] through and including [2007] . . . .”

Here, the revocation of petitioner’s Empire zone certification had a rational basis based on the business annual reports that petitioner submitted to respondents. Those reports establish that petitioner has a cost-benefit ratio of .9 for the years 2002 through 2007 and thus produced less than $1 in actual wages and benefits and investments for every $1 in State tax incentives it received. The data contained in the schedule that petitioner submitted to the EZDB on administrative appeal indicates that petitioner had an even lower cost-benefit ratio of .795. Respondents, albeit tersely, relied on petitioner’s data in revoking its Empire zone certification inasmuch as the EZDB upheld the determination by the DED revoking petitioner’s certification on the ground that it “failed to provide economic returns to the [S]tate in the form of total remuneration to its employees (i.e. wages and benefits) and investments in its facility greater in value to the tax benefits [that petitioner] used and had refunded to it.” The language used by the DED and upheld by the EZDB is consistent with the language of General Municipal Law § 959 (a) (v) (6), and those respondents thereby concluded that petitioner failed the 1:1 cost-benefit test. Contrary to petitioner’s contention, respondents were not required to rely only on the business annual reports for the three years during the 2002-2007 period in which petitioner passed the 1:1 cost-benefit test. General Municipal Law § 959 (w) requires that decertification “be based upon an analysis of

data contained in *at least three* business annual reports filed by the business enterprise" (emphasis added), and the emergency regulations promulgated by the DED Commissioner pursuant to section 959 condition decertification upon an analysis of a data set to be derived from "the business annual reports *submitted and reporting for any of the years from and including [2001] through and including [2007]*" (5 NYCRR 11.9 [c] [2] [emphasis added]). Contrary to petitioner's further contention, we conclude that it was not entitled to a hearing concerning the revocation of its Empire zone certification (*see* 5 NYCRR 11.9 [c], [d]). We therefore modify the judgment by vacating the first decretal paragraph, which granted the petition in its entirety, the fifth and sixth decretal paragraphs, which determined that the revocation of petitioner's Empire zone certification was arbitrary and capricious and thus null and void, and the seventh decretal paragraph, which required respondents to take any actions necessary to ensure petitioner is deemed certified as a qualified Empire zone enterprise continuously from its original date of certification.

Respondents further contend that, because the petition did not allege that the emergency regulations and the subsequent 2009 amendments promulgated by the DED Commissioner pursuant to General Municipal Law § 959 and set forth in 5 NYCRR 11.9 were defective and improperly filed seriatim, the court should not have reached that issue (*see generally Matter of Town of Rye v New York State Bd. of Real Prop. Servs.*, 10 NY3d 793, 795; *Matter of Violet Realty, Inc. v City of Buffalo Planning Bd.*, 20 AD3d 901, 903, *lv denied* 5 NY3d 713). Even assuming, arguendo, that the court did not err in reaching that issue because the papers submitted by both parties specifically addressed it (*see Matter of Mathis v New York State Dept. of Correctional Servs.* [appeal No. 2], 81 AD3d 1435, 1436; *Matter of Roth v Syracuse Hous. Auth.*, 270 AD2d 909, *lv denied* 95 NY2d 756), we conclude that the court erred in determining that the emergency regulations and amendments promulgated by the DED Commissioner pursuant to General Municipal Law § 959 were null and void as improperly filed and otherwise defective (*see* 5 NYCRR 11.9). Here, the substantive requirements for filing of an emergency regulation were sufficiently met (*see* State Administrative Procedure Act § 202 [6] [d]; [8]; *see also Matter of Industrial Liaison Comm. of Niagara Falls Area Chamber of Commerce v Williams*, 72 NY2d 137, 144-145; *Matter of Gioia v Lynch*, 306 AD2d 280, *lv denied* 100 NY2d 514). In any event, the improper filing of the 2009 amendments to the subject regulations would be of no consequence to petitioner inasmuch as petitioner was decertified as an Empire zone business on June 29, 2009, before the amendments were filed (*cf. Matter of NRG Energy, Inc. v Crotty*, 18 AD3d 916, 919). We therefore further modify the judgment by vacating the third and fourth decretal paragraphs, which determined that the emergency regulations promulgated by respondents pursuant to General Municipal Law § 959 were improperly filed and otherwise defective and thus that they were null and void.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

1413

CA 11-01218

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

KAREN STROUP, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHARLES NAZZARO AND SARAH NAZZARO,
DEFENDANTS-RESPONDENTS.

HOGAN WILLIG, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BRAUTIGAM & BRAUTIGAM, LLP, FREDONIA (DARYL P. BRAUTIGAM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered September 14, 2010. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, damages for allegedly defamatory statements made by then 13-year-old Sarah Nazzaro (defendant) and her father, defendant Charles Nazzaro (hereafter, father), who is sued individually and as parent and natural guardian of defendant. Those statements were made in connection with an incident that occurred during a return bus ride from a gymnastics meet. Supreme Court granted defendants' motion seeking summary judgment dismissing the complaint. We affirm.

We reject plaintiff's contention that the court erred in granting that part of the motion with respect to the cause of action for defamation per se. In determining whether defendant's statement during the incident is actionable, the statement must be "considered in its applicable context" (*Gross v New York Times Co.*, 82 NY2d 146, 155) and "in terms of [its] effect upon the average listener" (*Park v Capital Cities Communications*, 181 AD2d 192, 195, *appeal dismissed* 80 NY2d 1022, *lv dismissed in part and denied in part* 81 NY2d 879). Defendant's statement that plaintiff was an "abuser," viewed in the context of the heated incident on the bus, "amounted to no more than name-calling or a general insult, a type of epithet not to be taken literally and not deemed injurious to reputation" (*DePuy v St. John Fisher Coll.*, 129 AD2d 972, 973, *lv denied* 70 NY2d 602; *see Ram v Moritt*, 205 AD2d 516).

The court properly determined that the statements made by the father in connection with the investigation of the incident are protected by a qualified privilege (*see Mancuso v Allergy Assoc. of Rochester*, 70 AD3d 1499, 1500-1501). We further conclude that defendant's statements to school officials and the police about what transpired during the incident on the bus are similarly protected by a qualified privilege, and plaintiff failed to raise a triable issue of fact whether those statements of defendant and her father were motivated solely by malice (*see id.*). In addition, defendants established that defendant made no further statements about the incident at school, and plaintiff's submissions in opposition to the motion are based upon hearsay and thus insufficient to raise a triable issue of fact (*see Scaccia v Dolch*, 231 AD2d 885).

Finally, we note that plaintiff does not contend in her brief that the court erred in granting those parts of defendants' motion seeking summary judgment dismissing the remaining causes of action, and we therefore deem abandoned any issues with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

All concur except CARNI, J., who dissents in part and votes to modify in accordance with the following Memorandum: I respectfully disagree with the conclusion of my colleagues that Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint in its entirety. Inasmuch as I conclude that there are questions of fact whether Sarah Nazzaro (defendant) uttered words concerning plaintiff that are either defamatory per se or susceptible of a defamatory meaning, I dissent in part and would modify the order by denying that part of the motion for summary judgment dismissing the cause of action for defamation per se against defendant and defendant Charles Nazzaro, as parent and natural guardian of defendant (hereafter, father).

In October 2007, plaintiff was employed as a physical education teacher and varsity girls gymnastics coach by the Jamestown City School District (School District). Plaintiff also owned and operated a gymnastics instructional business. Defendant was in the seventh grade and was a member of the varsity gymnastics team. During a return bus ride from a gymnastics meet, plaintiff, in her capacity as gymnastics coach, had a dispute with defendant in the presence of the team concerning defendant's performance and behavior at the meet. The parties sharply dispute whether plaintiff attempted to pull defendant out of her seat to make her sit in the front of the bus. Plaintiff testified at her deposition that she tripped on the rubber matting on the floor of the bus and fell forward, landing partially on the seat occupied by defendant and partially on defendant herself. Although defendant initially reported to the police that plaintiff attempted to "choke" her during the incident, she later testified at her deposition that such conduct did not occur. Defendant admitted, however, that she called plaintiff a "f*** abuser" in the presence of the team during the incident. One member of the team that witnessed the incident testified at her deposition that defendant called plaintiff a "child abuser."

As a result of defendant's statements and allegations, the School District filed a report of suspected child abuse with law enforcement authorities. Plaintiff was suspended from her employment for approximately six months and a criminal investigation ensued, although no criminal charges were ever brought against plaintiff. Plaintiff retired from teaching, as she had previously planned, at the end of the 2007-2008 school year. She thereafter commenced this action seeking, inter alia, damages for the alleged false and defamatory words, i.e., "child abuser," allegedly spoken by defendant in the presence of the gymnastics team. The complaint includes a cause of action alleging that the words "child abuser" constitute defamation per se.

Initially, I cannot agree with the majority's decision to affirm that part of the order granting the motion with respect to the cause of action for defamation per se against defendant and her father in his parental capacity, inasmuch as I conclude that there is a question of fact whether defendant called plaintiff a "f*** abuser" or a "child abuser."

Further, even if the jury accepts defendant's version of the words spoken, I conclude that the word "abuser," spoken in the educational setting and context and directed at a high school athletic coach, is susceptible of the defamatory interpretation that plaintiff presents a risk of harm to her students and athletes (*see Wilcox v Newark Val. Cent. School Dist.*, 74 AD3d 1558, 1561). At the very least, if the words are susceptible of several interpretations, a question for the jury is presented (*see Rovira v Boget*, 240 NY 314, 316; *Rozanski v Fitch*, 134 AD2d 944, 945, *appeal dismissed* 70 NY2d 1002).

Alternatively, the phrase "child abuser" "has a precise meaning that is capable of being proven true or false" (*Rabushka v Marks*, 229 AD2d 899, 902; *see generally 600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 142, *rearg denied* 81 NY2d 759, *cert denied* 508 US 910). In the educational setting, it imputes one or more of the following specific acts to an individual: "(a) intentionally or recklessly inflicting physical injury, serious physical injury or death, or (b) intentionally or recklessly engaging in conduct which creates a substantial risk of such physical injury, serious physical injury or death, or (c) any child sexual abuse as defined in [Education Law § 1125], or (d) the commission or attempted commission against a child of the crime of disseminating indecent materials to minors pursuant to [Penal Law article 235]" (Education Law § 1125 [1]). Indeed, the School District conducted a "child abuse" investigation concerning the incident pursuant to Education Law article 23-B, titled "Child Abuse in an Educational Setting." During that investigation, plaintiff was suspended from her employment. Moreover, the phrase "child abuser" also imputes criminal conduct to plaintiff and charges plaintiff with one or more crimes that are undoubtedly "serious" (*Liberman v Gelstein*, 80 NY2d 429, 435). Because the phrase "child abuser" charges plaintiff with a serious crime or tends to injure plaintiff in her trade, business or profession, "the law presumes that [special] damages will result, and they need not be alleged or proven" (*id.* at

434-435).

Therefore, I would modify the order by denying that part of defendants' motion seeking summary judgment dismissing the cause of action for defamation per se against defendant and her father in his parental capacity.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

1

KA 10-01524

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MALIK I. AYALA, ALSO KNOWN AS MALIK AYALA,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered July 6, 2010. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 11-00745

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SASHALEE N. PALLAGI, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CONNORS & VILARDO, LLP, BUFFALO (TERRENCE M. CONNORS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered March 2, 2011. The judgment convicted defendant, upon a jury verdict, of grand larceny in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law and the indictment is dismissed without prejudice to the People to file any appropriate charge.

Memorandum: In these two appeals, defendants appeal, respectively, from judgments convicting them following a single jury trial of grand larceny in the fourth degree (Penal Law § 155.30 [1]). The convictions arose from an incident in which defendants, according to the testimony of a store loss prevention officer presented by the People, stole numerous items of property by removing the store security sensors and hangers from the items, and then removing the items from the store by unknown means. Certain merchandise was apparently never recovered. Defendants were apprehended as they left the store, but no merchandise was recovered.

The People served CPL 710.30 notices of their intent to offer statements that defendants made to law enforcement officers at the time of their arrest, although the notices indicated that defendants made only exculpatory statements. During the trial, however, a sheriff’s deputy testified that he asked defendant Sashalee N. Pallagi how defendants arrived at the mall, and she replied that a friend had given them a ride. Defendants objected, and replied in the affirmative when County Court asked if they were moving to strike the testimony. The court denied the motion, however, and the prosecutor thereafter cross-examined Sashalee on that point. In addition, the prosecutor argued during summation that the friend was part of the scheme to steal property.

We agree with defendants that the court erred in denying their motion to strike. Initially, we note that the People failed to preserve for our review their present contention that defendants' objection was untimely (*see generally People v Hunter*, 17 NY3d 725, 727-728; *People v Whitley*, 68 AD3d 790, 791, *lv denied* 14 NY3d 807; *People v Garcia*, 296 AD2d 509, 510).

"Whenever the people intend to offer at a trial . . . evidence of a statement made by a defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressible upon motion pursuant to subdivision three of section 710.20, . . . they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered" (CPL 710.30 [1]). The People need not provide all statements verbatim, "but they must be described sufficiently so that the defendant can intelligently identify them" (*People v Lopez*, 84 NY2d 425, 428). We conclude that the notice at issue is insufficient because it failed to provide defendants "with notice that adequately set out the sum and substance of [the] statements [presented by the People at trial] and permitted [defendants] to intelligently identify them" (*People v Sturdevant,* 74 AD3d 1491, 1492, *lv denied* 15 NY3d 810; *cf. People v Chanowitz*, 298 AD2d 767, 768-769, *lv denied* 99 NY2d 613). Contrary to the People's further contention, the statements were not pedigree information exempt from the notice requirement (*cf. People v Rodney*, 85 NY2d 289, 293). We therefore reverse the judgments. If this were the only meritorious argument presented by defendants, we would grant a new trial on the grand larceny charge of which they were convicted. We also conclude for the reasons that follow, however, that defendants are correct that the evidence is legally insufficient to support the conviction of grand larceny and thus that a new trial on that charge is not warranted. We therefore reverse the judgment in each appeal and dismiss the indictments, each of which charged the respective defendant solely with grand larceny in the fourth degree. Nevertheless, because we further conclude that the evidence is legally sufficient to support a conviction of petit larceny, we dismiss the indictments without prejudice to the People to file any appropriate lesser charge (*see generally People v Holmes*, 302 AD2d 936).

As noted, defendants further contend that the evidence is legally insufficient to support the conviction. Specifically, they contend that it is legally insufficient to establish that they stole property, that they took property from an owner thereof, and that the value of the stolen property exceeded $1,000. We note at the outset that defendants failed to preserve for our review their contention that the evidence is legally insufficient to establish that they took property "from an owner thereof" (Penal Law § 155.05 [1]; *see People v Gray*, 86 NY2d 10, 19-20). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is legally sufficient evidence establishing that the store's loss prevention officer "had a possessory right which, however limited or contingent, was superior to that of defendant[s]" (*People v Hutchinson*, 56 NY2d 868, 869).

Contrary to defendants' further contention, there is legally

sufficient evidence establishing that they stole property. The essential element of taking with respect to a larceny "is satisfied where the defendant 'exercised dominion and control over the property for a period of time, however temporary, in a manner wholly inconsistent with the owner's continued rights' " (*People v Zombo*, 28 AD3d 1233, 1234, *lv denied* 7 NY3d 794, 797, quoting *People v Jennings*, 69 NY2d 103, 118). Here, the People presented evidence establishing that defendants removed hangers and store security sensors from an unknown number of items and then concealed the items, and that certain items were removed from the store. Thus, the evidence is legally sufficient to establish that defendants "exercised control wholly inconsistent with the owner's continued rights" (*People v Olivo*, 52 NY2d 309, 319).

We agree with defendants, however, that the conviction is not supported by legally sufficient evidence that the value of the stolen property exceeded $1,000. The value of stolen property is "the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime" (Penal Law § 155.20 [1]). The People therefore were required to establish beyond a reasonable doubt that the value of the stolen property exceeded $1,000. "The Court of Appeals has unequivocally held that 'a victim must provide a basis of knowledge for his [or her] statement of value before it can be accepted as legally sufficient evidence of such value' " (*People v Gonzalez*, 221 AD2d 203, 204, quoting *People v Lopez*, 79 NY2d 402, 404). "Conclusory statements and rough estimates of value are not sufficient" (*People v Loomis*, 56 AD3d 1046, 1047; *see People v Selassie*, 166 AD2d 358, 359, *lv denied* 77 NY2d 911).

Here, the sole evidence of value consisted of the testimony of a store loss prevention officer, who indicated that three specific missing items were valued at $49.99, $128, and $108, respectively, and that the total value of the property taken was $2,200. In reaching the latter value, however, the store loss prevention officer inferred that certain property was taken based on a review of a grainy stop-action video recording of defendants' movement in the store, and she admitted that she could not clearly ascertain the items that were taken. She also testified that defendants took approximately 20 items of merchandise into the dressing room area, and that the merchandise was not recovered. She admitted, however, that approximately 20 items were found in the dressing room area, and the People failed to establish that those items were not some of those allegedly taken by defendants. Furthermore, the store loss prevention officer assigned a minimum value to the items that she concluded were taken, based merely upon her estimate of the minimum sale price of some of the items in that area of the store. No further evidence was introduced with respect to the value of any item, or with respect to the basis for her estimated minimum sale price. "Consequently, we cannot on this record conclude 'that the jury ha[d] a reasonable basis for inferring, rather than speculating, that the value of the property exceeded the statutory threshold' of $1,000" (*People v Brink*, 78 AD3d 1483, 1484, *lv denied* 16 NY3d 742, *rearg denied* 16 NY3d 828). We therefore conclude that the evidence is legally insufficient to establish that

the value of the property taken exceeded $1,000. The evidence is legally sufficient, however, to establish that defendants committed the lesser included offense of petit larceny. Moreover, viewing the evidence in light of the elements of the crime of petit larceny (*see People v Danielson*, 9 NY3d 342, 349), we conclude that a verdict convicting defendants of that crime would not be against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Absent the CPL 710.30 violation, we would modify the judgments by reducing the convictions to that crime (*see e.g. Brink*, 78 AD3d at 1484). Inasmuch as the proper remedy for the CPL 710.30 violation is a new trial, however, we dismiss the indictments without prejudice to the People to file any appropriate charge.

In light of our determination, we do not address defendants' contentions with respect to the sentences imposed.

All concur except SCUDDER, P.J., who dissents and votes to modify in accordance with the following Memorandum: I respectfully dissent and would modify the respective judgments in each appeal by reducing the convictions of grand larceny in the fourth degree (Penal Law § 155.30 [1]) to petit larceny (§ 155.25; *see* CPL 470.15 [2] [a]), and I would remit the matters to County Court for resentencing (*see* CPL 470.20 [4]).

I disagree with the majority that the court erred in refusing to strike the testimony that Sashalee N. Pallagi, the defendant in appeal No. 1, stated that a friend drove the two defendants to the mall. Rather, in my view, the CPL 710.30 notices adequately set out the sum and substance of defendants' statements and permitted them to identify those statements, which were essentially denials that they removed sensors from clothing or knew anything about the missing property (*see People v Sturdevant*, 74 AD3d 1491, 1492, *lv denied* 15 NY3d 810). Although the notice does not contain the statement that defendants now contend was inculpatory, "[t]he statutory notice does not require a verbatim recitation of an oral statement" (*People v Cooper*, 158 AD2d 743, 744, *revd on other grounds* 78 NY2d 476). Furthermore, the "purpose of the notice requirement is to enable defendant[s] to challenge the voluntariness of [their] statement[s] before trial . . ., [and thus] defendant[s] waived [their] objection to the adequacy of the notice by making [their respective] suppression motion[s]" (*Sturdevant*, 74 AD3d at 1492). The fact that defendants ultimately withdrew their request for a *Huntley* hearing is of no moment. The CPL 710.30 notice served its purpose, i.e., it provided defendants with the opportunity to challenge the voluntariness of their respective statements. Even assuming, arguendo, that the statement in question is inculpatory, I conclude that it is not thereby rendered involuntary. Indeed, in my view, there is no basis for concluding that the court would have suppressed the statement as involuntary even in the event that the *Huntley* hearing had been conducted. Thus, I conclude that the court did not commit reversible error by refusing to strike the testimony on the ground that defendants did not have notice of the statement.

I agree with the majority that the evidence is legally

insufficient to support the conviction of grand larceny in the fourth degree in each appeal. Thus, as noted, I would therefore modify the judgments by reducing the convictions to petit larceny (*see* CPL 470.15 [2] [a]), and I would remit the matters to County Court for resentencing (*see* CPL 470.20 [4]).

I submit, however, that the majority may not determine that the evidence supports a lesser included offense but then fail to modify the judgments by reducing the convictions to that lesser included offense (*see* CPL 470.15 [2] [a]). The rationale set forth by the majority for failing to do so is that the majority has determined that there is a trial error. As I previously set forth, I do not agree with the majority that there was a trial error. Nevertheless, for the reasons that follow, I submit that, if there also had been a trial error, the appropriate remedy would be to grant a new trial on the indicted charges. Indeed, in the event that a defendant raises meritorious contentions of both legal insufficiency and trial error, the corrective actions that a court is permitted by statute to implement may conflict, as is the case with the majority's analysis. Specifically, the majority has determined both that the evidence is legally sufficient to support the lesser included offense of petit larceny, which requires modification of the judgments to convictions of petit larceny and remittal for resentencing on those convictions (*see* CPL 470.15 [2] [a]; 470.20 [4]), while at the same time there is a trial error, which requires reversal of the judgments and remittal for a new trial (*see* CPL 470.20 [1]). The conundrum faced by the majority, however, is that we may not both modify a judgment by reducing the conviction to a lesser included offense (*see* CPL 470.20 [2] [a]), and simultaneously grant defendant a new trial (*see* CPL 470.20 [1]). Based upon the Court of Appeals' implicit holding in *People v Wright* (17 NY3d 643, *revg* 63 AD3d 1700), I submit that, if there is a trial error that deprived defendant of a fair trial, the error deprives this Court of the authority to review a further contention that the conviction is not based upon legally sufficient evidence and to reduce the conviction to a lesser included offense. Instead, the judgment must be reversed and a new trial granted on the indictment, without regard to the legal sufficiency of the evidence.

In *Wright*, the Court of Appeals reversed our order in which we had, inter alia, modified a judgment convicting defendant of murder in the second degree (Penal Law § 125.25 [2] [depraved indifference murder]) by reducing the conviction to the lesser included offense of manslaughter in the second degree (§ 125.15 [1]). On appeal from our order, the Court of Appeals determined that the trial court had erred in prohibiting defendant from introducing certain testimony, and the Court of Appeals remitted the matter to Supreme Court "for a new trial" (*id.* at 656). Inasmuch as the accusatory instrument charged defendant with murder, and not manslaughter, it is implicit in the decision of the Court of Appeals that the new trial was to be held on the indicted count of murder in the second degree. Had the Court intended that the trial be held on the reduced conviction of manslaughter, it necessarily would have granted the People leave to re-present the charges to another grand jury in order to obtain an accusatory instrument upon which to try defendant (*see People v*

Gonzalez, 61 NY2d 633). Thus, I further submit that it is also implicit in the Court's decision that the trial error deprived this Court of the authority to review the legal sufficiency of the evidence, inasmuch as this Court's conviction of the lesser included offense was overturned. In my view, where there is a trial error that denies defendant a fair trial, the corrective action that may properly be taken is to reverse the judgment and grant a new trial (*see* CPL 470.20 [1]). Here, because the majority has determined that there is a trial error, the judgments must be reversed and a new trial must be granted on the indicted counts of grand larceny (*see Wright*, 17 NY3d at 655-656).

Finally, in my view, the majority's resolution of this matter violates the double jeopardy rights of defendants (*see* US Const 5th Amend; NY Const, art I, § 6; CPL 40.20). Although double jeopardy would not be implicated if there were an offense with which to charge defendants that was not a lesser included offense (*see e.g. Matter of Suarez v Byrne*, 10 NY3d 523, 538, *rearg denied* 11 NY3d 753; *People v Gilmore*, 41 AD3d 1162, *lv denied* 9 NY3d 875), upon this record, the only charge available to the People is petit larceny. That is, of course, a lesser included offense of grand larceny because " 'the lesser offense . . . requires no proof beyond that which is required for conviction of the greater' " (*People v Biggs*, 1 NY3d 225, 230), and thus the People would be precluded from charging defendants again with respect to the theft of property for which they have previously been tried.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 11-00747

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TATIANA S. PALLAGI, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CONNORS & VILARDO, LLP, BUFFALO (TERRENCE M. CONNORS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered March 2, 2011. The judgment convicted defendant, upon a jury verdict, of grand larceny in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law and the indictment is dismissed without prejudice to the People to file any appropriate charge.

Same Memorandum as in *People v Pallagi* ([appeal No. 1] ___ AD3d ___ [Jan. 31, 2012]).

All concur except SCUDDER, P.J., who dissents and votes to modify in accordance with the same dissenting Memorandum as in *People v Pallagi* ([appeal No. 1] ___ AD3d ___ [Jan. 31, 2012]).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 10-00813

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK J. DAVIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered May 18, 2009. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class D felony, and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of felony driving while intoxicated (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [ii]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]). We reject defendant's contention that the stop of his vehicle was improper. Rather, we conclude that the stop was lawful inasmuch as the officer observed defendant committing a traffic violation (*see People v Robinson*, 97 NY2d 341, 348-349; *People v White*, 27 AD3d 1181). Contrary to defendant's further contention, County Court did not abuse its discretion in denying his request for an adjournment (*see People v Jones*, 79 AD3d 1773, 1774, *lv denied* 16 NY3d 832; *People v Green*, 74 AD3d 1899, 1900-1901, *lv denied* 15 NY3d 852; *see generally People v Diggins*, 11 NY3d 518, 524). Defendant failed to preserve for our review his contention that the court violated CPL 270.05 (2) in conducting the jury selection (*see People v Hayes*, 71 AD3d 1477, *lv denied* 15 NY3d 751), 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]).

Defendant also failed to preserve for our review his contention that the evidence is legally insufficient to establish that he was intoxicated by alcohol (*see People v Gray*, 86 NY2d 10, 19; *see also People v Rawleigh*, 89 AD3d 1483). In any event, his contention is

without merit. Defendant did not contest that he was driving erratically and that he failed the sobriety tests, but he blamed his inability to pass the sobriety tests on the prescription medication he was taking. The arresting officer, however, testified that he smelled alcohol, particularly beer, on defendant's breath. In addition, defendant admitted to him that he drank three beers at a local bar, and defendant refused to take a breathalyzer test, which permitted the jury to infer that he refused to take the test because he knew that the results would be incriminating (*see* Vehicle and Traffic Law § 1194 [2] [f]; *People v Schuh*, 4 AD3d 751, *lv denied* 2 NY3d 806). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to support the conviction (*see People v Scroger*, 35 AD3d 1218, *lv denied* 8 NY3d 950; *People v Shank*, 26 AD3d 812, 813-814; *People v Milo*, 300 AD2d 680, 681, *lv denied* 99 NY2d 630). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant contends that he was denied a fair trial by prosecutorial misconduct on summation. The court sustained defendant's objection to the comment made by the prosecutor on summation and issued a curative instruction. In the absence of any further objection, "the curative instruction[] must be deemed to have corrected the error to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944; *see People v Cox*, 78 AD3d 1571, 1571-1572, *lv denied* 16 NY3d 742). We reject the further contention of defendant that he was denied effective assistance of counsel. Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Finally, the sentence is not unduly harsh or severe.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 10-02295

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BILLIE JO WEBSTER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered September 13, 2010. The judgment convicted defendant, upon her plea of guilty, of attempted forgery in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment of County Court convicting her upon her guilty plea of attempted forgery in the second degree (Penal Law §§ 110.00, 170.10). In appeal No. 2, defendant appeals from a judgment of the same court revoking her sentence of probation for a misdemeanor charge to which she previously had pleaded guilty and resentencing her to one year in jail. Defendant's plea in appeal No. 1 necessarily constituted an admission that she violated the terms and conditions of her probation in appeal No. 2.

Defendant's primary contention in each appeal is that she did not receive the sentence promised by the court and thus that her pleas in both appeals were not knowingly, voluntarily and intelligently entered. Although that contention survives defendant's valid waiver of the right to appeal entered in connection with the plea in appeal No. 1 and thus in connection with the plea in appeal No. 2, defendant failed to preserve that contention for our review by moving to withdraw her pleas or to vacate the judgments of conviction (*see People v Montanez*, 89 AD3d 1409). 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]). Defendant's contention that she received ineffective assistance of counsel because her attorney failed to move to vacate the judgments is based on matters outside the record

and therefore is not reviewable on direct appeal (*see People v Rodriguez*, 59 AD3d 173, 173-174, *lv denied* 12 NY3d 858). Contrary to defendant's further contention, the sentence imposed with respect to both appeals is legal, and her challenge to the severity of the sentence in each appeal is foreclosed by her valid waiver of the right to appeal (*see People v Lopez*, 6 NY3d 248, 256).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 08-01799

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALINA PHELPS, DEFENDANT-APPELLANT.

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

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH, FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered May 14, 2008. The judgment convicted defendant, upon her plea of guilty, of attempted burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Steuben County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). We agree with defendant that County Court erred in directing that the determinate sentence of imprisonment of four years for the instant offense run concurrently with a determinate sentence of imprisonment of three years imposed on a prior felony conviction without making "a statement on the record of the facts and circumstances" warranting that determination (§ 70.25 [former (2-b)]; *see People v Davis*, 37 AD3d 1179, 1180, *lv denied* 8 NY3d 983). Defendant committed the instant offense while released on bail or recognizance pending sentencing on the prior felony and, thus, in the absence of mitigating factors set forth on the record, the court was required to direct that the sentence run consecutively to the sentence imposed on the prior felony conviction (*see* § 70.25 [former (2-b)]; *Davis*, 37 AD3d at 1180). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court to afford defendant the opportunity to withdraw her plea or to be resentenced in compliance with Penal Law § 70.25 (former [2-b]) (*see People v Lee*, 64 AD3d 1236, 1237).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 10-01214

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

AKAMEAK KYSER, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (ROBERT R. REITTINGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered July 1, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree and assault in the second degree.

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

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 10-02420

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HOWARD B. WASHINGTON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered October 29, 2010. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court's determination that he established a relationship with the victim for the purpose of victimization is supported by the requisite clear and convincing evidence (*see* § 168-n [3]). "The guidelines assess 20 points if the offender's crime . . . was directed at . . . a person with whom a relationship had been established . . . for the primary purpose of victimization" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 12 [2006]). Here, the record establishes that defendant invited the victim, a 13-year-old girl who had run away from home and with whom he had no prior relationship, into his home and then had sexual intercourse with her several times in the ensuing two days. Thus, the record supports the determination of the court that defendant's primary purpose in establishing the relationship with the 13-year-old girl was for the purpose of victimizing her (*see generally People v Carlton*, 307 AD2d 763).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 10-00664

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON DENNIS, DEFENDANT-APPELLANT.

MARK D. FUNK, ROCHESTER, FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER 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]). We reject defendant's contention that County Court erred in giving a jury instruction on consciousness of guilt. According to the evidence presented by the People at trial, defendant became a suspect in the murder approximately one month after it occurred, and the police attempted to locate him at the address listed on his driver's license, as well as at the addresses of his former and current girlfriend. The police also informed defendant's family members that they were looking for him. Defendant was arrested almost six months later, when the police received information concerning his whereabouts. Defendant was driving his current girlfriend's vehicle and rammed it into a police vehicle before surrendering. We conclude that the People thereby presented evidence warranting the instruction on consciousness of guilt (*see People v Solimini*, 69 AD3d 657, *lv denied* 14 NY3d 893; *People v Young*, 51 AD3d 1055, 1056-1057, *lv denied* 11 NY3d 796) and, contrary to defendant's contention, the People were not required to

prove that defendant was aware that the police were searching for him.

Defendant did not preserve for our review his further contention that the admission of his codefendant's statement violated the Confrontation Clause (*see People v Pearson*, 82 AD3d 475, *lv denied* 17 NY3d 809). In any event, that contention is without merit. The codefendant's statement did not implicate defendant in any wrongdoing and thus did not deprive defendant of his US Constitution Sixth Amendment right to confront witnesses against him (*see People v Mack*, 89 AD3d 864, 865-866; *People v Lewis*, 83 AD3d 1206, 1208-1209, *lv denied* 17 NY3d 797). We reject defendant's contention that the court erred in allowing a police investigator to testify for the People that he saw defendant and the codefendant together earlier on the day of the murder. Inasmuch as the court prohibited the police investigator from testifying that he purchased drugs from the codefendant during that encounter, we reject defendant's contention that the testimony constituted evidence of a prior bad act of defendant. Even assuming, arguendo, that the jury would infer that defendant had committed a prior bad act based on the investigator's testimony that he had seen defendant and the codefendant together, we conclude that the court did not err in allowing that testimony. The police investigator's testimony served as background information and completed the narrative of the events (*see People v Lesson*, 48 AD3d 1294, 1296, *affd* 12 NY3d 823; *see generally People v Resek*, 3 NY3d 385, 390), i.e., it informed the jury that defendant and the codefendant were together hours before the murder occurred and explained how the police identified defendant as a suspect in the case. Defendant further contends that the court erred in allowing a police lieutenant to testify that two police departments assembled photo arrays with defendant's photograph, thus allegedly giving rise to the inference that defendant committed prior bad acts by virtue of his having been arrested on two prior occasions. Defendant's contention is not preserved for our review (*see People v Woods*, 72 AD3d 1563, 1564, *lv denied* 15 NY3d 811), 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 note, however, that testimony regarding the pretrial identification of defendant in a photo array was first elicited by defense counsel during his cross-examination of a prosecution witness.

Defendant also failed to preserve for our review his contention that the court erred in failing to discharge two sworn jurors (*see People v Sanderson*, 68 AD3d 1716, 1717, *lv denied* 14 NY3d 844). In any event, the court did not err in allowing the jurors to remain on the jury. The jurors were not "grossly unqualified to serve in the case" (CPL 270.35 [1]), inasmuch as they did not " 'possess[ ] a state of mind which would prevent the rendering of an impartial verdict' " (*People v Buford*, 69 NY2d 290, 298; *see People v Clark*, 28 AD3d 1190). Although defendant failed to preserve for our review his contention that two instances of alleged prosecutorial misconduct deprived him of a fair trial (*see People v Heide*, 84 NY2d 943, 944), we conclude in any event that the prosecutor did not in fact engage in any misconduct. We reject defendant's further contention that he was

denied the right to effective assistance of counsel based on the failure of defense counsel, inter alia, to object to certain testimony and the admission of the autopsy photographs in evidence. 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). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We agree with defendant, however, that the sentence is illegal in part insofar as the sentences for the first three counts of the indictment, charging robbery in the first degree, must run concurrently with rather than consecutively to count 12 of the indictment, charging felony murder. We therefore modify the judgment accordingly. As we held on the codefendant's appeal, "the robbery was the underlying felony for that count of felony murder and thus constituted a material element of that offense" (*People v Osborne*, 88 AD3d 1284, 1286). We reject defendant's further contentions that the sentence as modified is illegal or is unduly harsh or severe.

Finally, we note that the certificate of conviction does not reflect that defendant was convicted of murder in the second degree under count 13 of the indictment, and it fails to recite that the sentences imposed on the first three counts of the indictment shall run concurrently with each other but consecutively to the sentences imposed on counts 11 and 13 of the indictment. The certificate of conviction must therefore be amended accordingly (*see e.g. People v Carrasquillo*, 85 AD3d 1618, 1620, *lv denied* 17 NY3d 814).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 10-02296

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BILLIE JO WEBSTER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered September 13, 2010. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Same Memorandum as in *People v Webster* ([appeal No. 1] ___ AD3d ___ [Jan. 31, 2012]).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

11

KA 10-02351

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRENDAN J. RHODES, DEFENDANT-APPELLANT.

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

KEITH A. SLEP, DISTRICT ATTORNEY, BELMONT, FOR RESPONDENT.

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered July 19, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Allegany County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [4]). By failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that his plea was not knowingly, voluntarily and intelligently entered (*see People v Diaz*, 62 AD3d 1252, *lv denied* 12 NY3d 924), as well as his challenge to the factual sufficiency of the plea allocution (*see People v Lopez*, 71 NY2d 662, 665; *People v Dowdell*, 35 AD3d 1278, 1279, *lv denied* 8 NY3d 921). This case does not fall within the rare exception to the preservation requirement inasmuch as the plea allocution does not "cast[] significant doubt upon the defendant's guilt or otherwise call[] into question the voluntariness of the plea" (*Lopez*, 71 NY2d at 666, *see People v Neal*, 56 AD3d 1211, *lv denied* 12 NY3d 761).

By failing to object to the imposition of restitution at sentencing, which was not a part of the plea agreement, defendant failed to preserve for our review his contention that County Court erred in enhancing the sentence by imposing restitution at sentencing without affording him the opportunity to withdraw the plea (*see People v Delair*, 6 AD3d 1152). We nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we conclude that, because restitution was not part of the plea agreement, the court should have afforded

defendant the opportunity to withdraw his plea before ordering him to pay restitution (*see People v Therrien*, 12 AD3d 1045, 1046). In addition, defendant failed to preserve for our review his contention that the record is insufficient to support the amount of restitution ordered (*see generally People v Cooke*, 21 AD3d 1339). We further exercise our power to review that contention as a matter of discretion in the interest of justice, however, and we conclude that the court erred in failing to conduct a hearing to determine the amount of restitution (*see id.*). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court to impose the promised sentence or to afford defendant the opportunity to withdraw his plea.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 08-02060

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER NEWTON, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Monroe County Court (Patricia D. Marks, J.), rendered September 24, 2008. Defendant was resentenced by imposing concurrent terms of postrelease supervision.

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

Memorandum: Defendant appeals from a resentence upon his motion pursuant to CPL 440.20, in which he alleged that his sentence was illegal inasmuch as Supreme Court (Mark, J.) had failed to impose a term of postrelease supervision when it sentenced him as a second felony offender on his conviction of, inter alia, three counts of robbery in the first degree (Penal Law § 160.15 [2] - [4]). Although not raised in his motion, County Court (Marks, J.) entertained defendant's contention at oral argument of the motion that Supreme Court had erred in sentencing him as a second felony offender. Defendant contended in County Court and contends on appeal that, although he had been sentenced to a period of probation in 1998 based on his conviction of a felony drug offense, his probation was revoked after he committed the robberies. Defendant thus contends that, because he was "resentenced" on the drug offense, Supreme Court violated Penal Law § 70.06 (1) (b) (ii) inasmuch as the sentence on the prior felony drug offense was not imposed before the commission of the present felony robberies. We reject that contention. Rather, we conclude that the revocation of probation on the prior drug offense may not be "employed . . . to leapfrog [the] sentence forward so as to vitiate its utility as a sentencing predicate" (*People v Acevedo*, 17 NY3d 297, 302).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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CAF 11-00829

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

IN THE MATTER OF SARAH C.B.,
RESPONDENT-APPELLANT.

LIVINGSTON COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

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

Appeal from an amended order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered March 9, 2011 in a proceeding pursuant to Family Court Act article 7. The amended order, among other things, adjudged that respondent is a person in need of supervision.

It is hereby ORDERED that said appeal from that part of the amended order that directed respondent to abide by certain conditions is unanimously dismissed, and the amended order is otherwise affirmed without costs.

Memorandum: Respondent appeals from an amended order adjudicating her to be a person in need of supervision (PINS) and directing her to abide by certain conditions, including an order of protection. We note at the outset that respondent's contentions regarding those conditions have been rendered moot inasmuch as that part of the amended order has expired by its own terms (*see generally Matter of Demitrus B.*, 89 AD3d 1421; *Matter of Donna Marie M. v Timothy A.M.*, 30 AD3d 1012). We therefore dismiss the appeal from that part of the amended order.

Contrary to respondent's contention, Family Court "may, with the consent of petitioner, substitute a petition alleging that respondent is a person in need of supervision for a petition alleging that . . . she is a juvenile delinquent" (*Matter of Felix G.*, 56 AD3d 1285; *see* Family Ct Act § 311.4 [1]). Here, respondent not only agreed to such a substitution but she in fact moved to substitute a PINS petition for the juvenile delinquency petition that was filed originally, and we thus conclude that she waived her current contentions concerning that substitution. Furthermore, by consenting to the amendment of the juvenile delinquency petition, respondent also waived her contentions regarding that amendment.

Finally, we reject respondent's contention that the original juvenile delinquency petition was defective. Contrary to respondent's

contention, the "non-hearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged and the respondent's commission thereof" (Family Ct Act § 311.2 [3]). Specifically, the petition sufficiently alleged that the victim suffered an "impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]; *see generally People v Chiddick*, 8 NY3d 445, 447).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01363

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND GORSKI, 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 June 30, 2011. The order denied the motion of respondent for leave to renew the application of claimant for leave to serve a late notice of claim.

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

Memorandum: On a prior appeal, we held that Supreme Court did not abuse its discretion in granting claimant's application for leave to serve a late notice of claim based on allegations that one of respondent's teachers had sexually abused her when she was a student at respondent's elementary school (*Doe v North Tonawanda Cent. School Dist.*, 88 AD3d 1289). Respondent now appeals from an order denying its motion for leave to renew claimant's application for leave to serve a late notice of claim. The court properly denied the motion. A motion for leave to renew "shall be based upon new facts not offered on the prior [application] that would change the prior determination" (CPLR 2221 [e] [2]), and "shall contain reasonable justification for the failure to present such facts on the prior [application]" (CPLR 2221 [e] [3]). Although we agree with respondent that certain information obtained during claimant's examination pursuant to General Municipal Law § 50-h constitutes new evidence that respondent could not have submitted in opposition to the prior application, we conclude that the new evidence would not have changed the prior determination (*see Davidoff v East 13th St. Tifereth Place, LLC*, 84 AD3d 1302, 1303; *Garcea v Battista*, 53 AD3d 1068, 1070; *Webb v Torrington Indus., Inc.*, 28 AD3d 1216, 1217).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-00620

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

DARNELL BACKUS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DOING BUSINESS AS BUFFALO GENERAL HOSPITAL, KENNETH BEASLEY, M.D., MARK LAFTAVI, M.D., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

RICOTTA & VISCO, BUFFALO (KEVIN A. RICOTTA OF COUNSEL), FOR DEFENDANT-APPELLANT KENNETH BEASLEY, M.D.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (GREGORY T. MILLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS KALEIDA HEALTH, DOING BUSINESS AS BUFFALO GENERAL HOSPITAL, AND MARK LAFTAVI, M.D.

CAMPBELL & SHELTON, LLP, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from a judgment of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 10, 2011 in a medical malpractice action. The judgment awarded plaintiff money damages upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting the post-trial motions in part and setting aside the verdict with respect to the award of damages for future lost earnings and past and future pain and suffering only and as modified the judgment is affirmed without costs, and a new trial is granted on those elements of damages only unless plaintiff, within 20 days of service of a copy of the order of this Court with notice of entry, stipulates to reduce the award of damages for future lost earnings to $1,133,922, for past pain and suffering to $250,000, and for future pain and suffering to $750,000, in which event the judgment is modified accordingly and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries he sustained during a donor kidney transplant operation performed at defendant Kaleida Health, doing business as Buffalo General Hospital (Hospital). Defendant Kenneth Beasley, M.D. was the physician primarily responsible for plaintiff's surgery, and defendant Mark Laftavi, M.D. was the physician primarily responsible for transplanting the kidney into the recipient,

plaintiff's mother, but he assisted at various times in plaintiff's surgery as well. Following a trial, the jury returned a verdict finding that both Dr. Beasley and Dr. Laftavi were negligent and apportioning fault 80% to Dr. Beasley and 20% to Dr. Laftavi. The jury awarded plaintiff damages totaling $4,145,000, including, as relevant to this appeal, $2,000,000 for future lost earnings, $500,000 for past pain and suffering, and $1,250,000 for future pain and suffering. The Hospital and Dr. Laftavi, who have taken an appeal separate from that of Dr. Beasley, made a post-trial motion seeking three types of alternative relief, including a reduction in the amount of damages awarded, and Dr. Beasley made his own post-trial motion also seeking that relief in the alternative.

We reject the contention of defendants-appellants (defendants) that Supreme Court erred in charging the doctrine of res ipsa loquitur to the jury. We note at the outset that such a charge is appropriate where a plaintiff establishes three elements, i.e., "the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; . . . it must be caused by an agency or instrumentality within the exclusive control of the defendant; and . . . it must not have been due to any voluntary action or contribution on the part of the plaintiff" (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494). As a result of the operation to harvest his right kidney, plaintiff sustained injuries to his cervical spine and rhabdomyolysis of muscles on the left side of his body. The operation, which all of the experts agreed normally should be only 2 to 3 hours in duration, took over 6 hours to complete. During most of that time, plaintiff was positioned on his left side with both his head and lower body angled downward. We have recognized that generally where, as here, "an unexplained injury occurs in an area remote from the operation while the patient is anesthetized, the doctrine of [res ipsa loquitur] is available to establish a prima facie case" (*Fogal v Genesee Hosp.*, 41 AD2d 468, 475; *see Ceresa v Karakousis*, 210 AD2d 884).

Defendants contend that the res ipsa doctrine is not applicable here because plaintiff's injuries were not "caused by an agency or instrumentality within the exclusive control of [either] defendant" (*Kambat*, 89 NY2d at 494). Specifically, Dr. Beasley contends that the anesthesiologist, whose motion for a directed verdict at the close of proof was granted, also had responsibility for plaintiff's positioning, while Dr. Laftavi contends that he had no control over plaintiff's positioning. There was evidence, however, that both plaintiff's positioning, which Dr. Beasley primarily controlled, and the length of the surgery, for which Dr. Laftavi was at least partly responsible, contributed to plaintiff's injuries, and we have held that, "[i]n a multiple defendant action in which a plaintiff relies on the theory of res ipsa loquitur, a plaintiff is not required to identify the negligent actor" (*Schmidt v Buffalo Gen. Hosp.*, 278 AD2d 827, 828, *lv denied* 96 NY2d 710).

Contrary to defendants' further contention, the jury was entitled to credit the testimony of plaintiff's expert establishing that the injuries sustained by plaintiff were "of a kind that ordinarily do[ ]

not occur in the absence of someone's negligence" (*Kambat*, 89 NY2d at 494; *see Ceresa*, 210 AD2d at 884). A plaintiff need not conclusively eliminate the possibility of all other causes of the injuries to be entitled to a charge on the doctrine of res ipsa loquitur. Rather, such a charge is appropriate if the evidence supporting the three requisite elements affords a rational basis for concluding that " 'it is more likely than not' that the injur[ies were] caused by defendant[s'] negligence" (*Kambat*, 89 NY2d at 494).

The Hospital and Dr. Laftavi further contend that the verdict against Dr. Laftavi was based on legally insufficient evidence and against the weight of the evidence because there was no proof that he unreasonably delayed the surgery. We reject that contention. There is circumstantial evidence in the record from which the jury could have rationally found that Dr. Laftavi was responsible for delaying the surgery for a substantial period of time, and the evidence does not "preponderate[] so greatly in [his] favor that the jury could not have reached its conclusion on any fair interpretation of the evidence" (*Stewart v Olean Med. Group, P.C.*, 17 AD3d 1094, 1095-1096 [internal quotation marks omitted]). There was testimony that Heparin, which was administered to plaintiff more than two hours before his kidney was harvested, normally would not be administered until the kidney was ready for removal. While Dr. Beasley testified that he administered Heparin to plaintiff on two occasions during the surgery, the surgical notes do not reflect as much. Moreover, both physicians were evasive in their testimony concerning the amount of time it took for Dr. Laftavi to arrive at the operating room to harvest plaintiff's kidney, and it was within the jury's province to discredit their testimony that there was no inordinate delay (*see id.* at 1096).

We reject defendants' contention that the remarks of plaintiff's counsel on summation require a new trial. Even assuming, arguendo, that such comments were improper, we conclude that they were not "so flagrant or excessive" as to warrant a new trial (*Winiarski v Harris* [appeal No. 2], 78 AD3d 1556, 1558 [internal quotation marks omitted]). Defendants' further contention that the verdict is inconsistent is not preserved for our review (*see Potter v Jay E. Potter Lbr. Co., Inc.*, 71 AD3d 1565, 1567).

We agree with defendants, however, that the jury's awards of damages for future lost earnings and past and future pain and suffering deviate materially from what would be reasonable compensation (*see* CPLR 5501 [c]). Based on the evidence presented at trial, we conclude that $1,133,922 for future lost earnings, $250,000 for past pain and suffering, and $750,000 for future pain and suffering are the maximum amounts the jury could have awarded. We therefore modify the judgment accordingly, and we grant a new trial on damages for future lost earnings and past and future pain and suffering only unless plaintiff, within 20 days of service of a copy of the order of this Court with notice of entry, stipulates to reduce the award of damages for future lost earnings to $1,133,922, for past pain and suffering to $250,000, and for future pain and suffering to

$750,000, in which event the judgment is modified accordingly.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01549

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

ANDREWS, PUSATERI, BRANDT, SHOEMAKER & ROBERSON, P.C. AND ROBERT S. ROBERSON, ESQ., PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

COUNTY OF NIAGARA, DEFENDANT-RESPONDENT.

BRANDT, ROBERSON & BRANDT, P.C., LOCKPORT (ROBERT S. ROBERSON OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

WEBSTER SZANYI LLP, BUFFALO (CHARLES E. GRANEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered November 22, 2010. The order denied plaintiffs' motion for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for breach of contract and unjust enrichment based upon defendant's alleged failure to pay for legal services rendered by plaintiffs. Supreme Court properly denied plaintiffs' motion seeking summary judgment on the complaint and dismissal of the counterclaims. With respect to the complaint, plaintiffs' own submissions in support of the motion raise triable issues of fact whether defendant owes plaintiffs further compensation pursuant to the legal services contract, and whether plaintiffs performed services in addition to those covered by that contract (*see generally Ulrich v Estate of Zdunkiewicz*, 8 AD3d 1014, 1015). Plaintiffs also failed to meet their initial burden of establishing their entitlement to judgment dismissing the counterclaims (*see generally Birt v Ratka*, 39 AD3d 1238; *Home Sav. Bank v Arthurkill Assoc.*, 173 AD2d 776, 777-778, *lv dismissed* 78 NY2d 1071). Thus, the motion was properly denied, "regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01219

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

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

V MEMORANDUM AND ORDER

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

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

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

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered March 3, 2011 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, granted the petition in part.

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

Memorandum: Petitioner, a county that is also a social services district for the purposes of this appeal (*see Matter of County of St. Lawrence v Daines*, 81 AD3d 212, 217, *lv denied* 17 NY3d 703), commenced this CPLR article 78 proceeding seeking to annul the denial of its claim for reimbursement for certain Medicaid expenditures known as overburden expenditures (*see generally Matter of Krauskopf v Perales*, 139 AD2d 147, *affd* 74 NY2d 730). Respondents appeal, as limited by their brief, from the judgment insofar as it granted that part of the petition seeking reimbursement for certain pre-2006 overburden expenditures. On appeal, respondents contend that Supreme Court erred in granting the petition in part because a 2010 amendment (L 2010, ch 109, part B, § 24) to the law known as the Medicaid Cap Statute (L 2005, ch 58, part C, § 1, as amended by L 2006, ch 57, part A, § 60) extinguished petitioner's right to reimbursement for overburden expenditures made prior to July 2006. We reject that contention.

Initially, we note that we have consistently ruled that respondents' duty to reimburse social services districts for overburden expenditures incurred prior to January 1, 2006 was not extinguished by the original Medicaid Cap Statute (*see Matter of*

County of Erie v Daines, 83 AD3d 1506; *Matter of County of Herkimer v Daines*, 83 AD3d 1510; *Matter of County of Niagara v Daines*, 79 AD3d 1702, *lv denied* 17 NY3d 703; *see also County of St. Lawrence*, 81 AD3d 212). Thus, that duty continues unless it was extinguished by the 2010 amendment to the Medicaid Cap Statute. The plain language of the 2010 amendment does not address overburden expenditures or respondents' duty to pay them but, rather, it states that, "[s]ubject to the provisions of subdivision four of section six of this part, the state/local social services district relative percentages of the non-federal share of medical assistance expenditures incurred prior to January 1, 2006 shall not be subject to adjustment on and after July 1, 2006" (L 2010, ch 109, part B, § 24). " 'Where words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation' . . ., and the intent of the Legislature must be discerned from the language of the statute . . . without resort to extrinsic material such as legislative history or memoranda" (*Matter of Rochester Community Sav. Bank v Board of Assessors of City of Rochester*, 248 AD2d 949, 950, *lv denied* 92 NY2d 811; *see Matter of Aquilone v Board of Educ. of City School Dist. of City of N.Y.*, 86 NY2d 198, 204). Consequently, inasmuch as the plain language of the 2010 amendment does not mention overburden expenditures or respondents' preexisting duty to reimburse petitioner for such expenses incurred prior to 2006, that duty is not extinguished by the amendment.

In addition, the 2010 amendment states that "this act shall not be construed to alter, change, affect, impair or defeat any rights, obligations, duties or interests accrued, incurred or conferred prior to the effective date of this act" (L 2010, ch 109, part B, § 40 [c]). Thus, for that reason as well, respondents' contention that the 2010 amendment defeats their preexisting duty to reimburse petitioner for the overburden expenditures is without merit.

In any event, an examination of the legislative history of the 2010 amendment fails to support respondents' contentions. There is nothing in the legislative history indicating that the Legislature acted in response to the prior judicial decisions concerning the Medicaid Cap Statute (*cf. Brothers v Florence*, 95 NY2d 290, 299-300). The New York State Senate Sponsor's memorandum states, however, that the law "would clarify the State's authority to withhold payments to local social services districts for past due youth facility reimbursement, and authorize the transfer of up to $27 million from the Youth Facility per diem account to the General Fund." "The maxim *expressio unius est exclusio alterius* is applied in the construction of the statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" (McKinney's Cons Laws of NY, Book 1, Statutes § 240; *see Golden v Koch*, 49 NY2d 690, 694). Because the Legislature included a provision permitting respondents to withhold payments for certain reimbursements while at the same time failed to include a provision indicating that the Legislature intended to permit respondents to withhold or deny claims for reimbursement of overburden

expenditures, we conclude that "an irrefutable inference must be drawn that" the legislators intentionally omitted such a provision (Statutes § 240).

We reject respondents' reliance upon an affidavit prepared after the enactment of the 2010 amendment by the New York State Department of Health's former Director of the Bureau of Health Insurance Programs, Division of Legal Affairs, which purports to set forth the legislative history of the Medicaid Cap Statute and the 2010 amendment. The affidavit, "written [almost] a year after passage of the [2010] amendment and constituting, therefore, no part of the legislative process, is not entitled to consideration as legislative history" (*Matter of Lorie C.*, 49 NY2d 161, 169).

Based on our determination, we see no need to address petitioner's further contentions.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

19

CA 11-00816

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

JUSTIN DECARLO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CLYDE BERGEMANN US, INC., DOING BUSINESS AS CLYDE BERGEMANN EEC, DUNKIRK POWER LLC, PATENT CONSTRUCTION SYSTEMS, DEFENDANTS-RESPONDENTS, AND RAYMOND C. BELTER, DEFENDANT.

MAXWELL MURPHY, LLC, BUFFALO (ALAN D. VOOS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, BUFFALO (BRIAN G. MANKA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CLYDE BERGEMANN US, INC., DOING BUSINESS AS CLYDE BERGEMANN EEC, AND DUNKIRK POWER LLC.

LAW OFFICES OF DOUGLAS S. COPPOLA, BUFFALO (WILLIAM K. KENNEDY OF COUNSEL), FOR DEFENDANT-RESPONDENT PATENT CONSTRUCTION SYSTEMS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered November 23, 2010 in a personal injury action. The order denied plaintiff's motion for partial summary judgment.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell from a ladder. Supreme Court properly denied plaintiff's motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) claim. "A worker injured by a fall from an elevated worksite must . . . generally prove that the absence of or defect in a safety device was the proximate cause of his or her injuries" (*Felker v Corning Inc.*, 90 NY2d 219, 224). Here, while plaintiff submitted evidence in support of his motion establishing that the ladder was allegedly defective in several respects, he failed to establish that any of those defects caused him to fall (*see generally Grove v Cornell Univ.*, 17 NY3d 875; *Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1415-1416; *Davis v Brunswick*, 52 AD3d 1231, 1232).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

20.1
CA 12-00070
PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND GORSKI, JJ.

WILLIAM E. DECKER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PATRICIA A. DECKER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CAROL A. CONDON, BUFFALO, FOR DEFENDANT-APPELLANT.

PALMER, MURPHY & TRIPI, BUFFALO (THOMAS A. PALMER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Janice M. Rosa, J.), entered February 8, 2011 in a divorce action. The judgment, among other things, directed plaintiff to pay the sum of $2,000 towards defendant's outstanding legal bills.

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

Memorandum: Following the settlement of the parties' matrimonial action but before judgment was entered, defendant moved for an award of counsel fees in excess of $19,000 dollars, contending that she was entitled to such fees on a quantum meruit basis. Supreme Court granted her motion only to the extent of awarding her the sum of $2,000, and in appeal No. 2 defendant appeals from the judgment granting her motion in part. We note that in appeal No. 1 defendant also appeals from the underlying order deciding her motion, but that order is subsumed in the final judgment and thus the appeal therefrom must be dismissed (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts, Inc.*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

" 'The award of reasonable counsel fees is a matter within the sound discretion of the trial court' " (*Dellafiora v Dellafiora*, 54 AD3d 715, 716; *see Panek v Panek*, 231 AD2d 959), and such awards are intended "to redress the economic disparity between the monied spouse and the non-monied spouse" (*O'Shea v O'Shea*, 93 NY2d 187, 190; *see Matter of William T.M. v Lisa A.P.*, 39 AD3d 1172). In exercising its discretion to award such fees, "a court may consider all of the circumstances of a given case, including the financial circumstances of both parties, the relative merit of the parties' positions . . ., the existence of any dilatory or obstructionist conduct . . ., and 'the time, effort and skill required of counsel' " (*Blake v Blake*

[appeal No. 1], 83 AD3d 1509).

Here, it is undisputed that there was a significant disparity in the parties' incomes. In the years leading up to the parties' divorce, plaintiff's annual income averaged approximately $183,000, while defendant's annual income averaged approximately $27,000. In the judgment, however, defendant was awarded maintenance in the amount of $3,750 per month. Taking maintenance into account, the parties' annual incomes are now approximately $140,000 and $69,000, respectively. Thus, plaintiff has 67% of the parties' adjusted combined income. The total amount of counsel fees billed to defendant was $31,646.50, excluding interest, costs and disbursements. Of that amount, plaintiff has paid $12,050, including the $2,000 required by the judgment from which defendant appeals. The amount of the counsel fees incurred by plaintiff is not set forth in the record because defendant's request for counsel fees was filed before October 12, 2010, the effective date for the amendment to Domestic Relations Law § 237 (a) that requires *both* parties to a fee application to submit affidavits setting forth the amount paid in fees to date. If we assume, however, that plaintiff incurred roughly the same amount in counsel fees as did defendant, and there is no basis in the record from which to conclude that he paid any less, we would thus conclude that plaintiff has paid approximately 65% of the total amount of counsel fees incurred by both parties, after affording defendant a one-half credit for the initial retainer paid by plaintiff with marital funds to his first attorney. That percentage is commensurate with plaintiff's pro rata share of the parties' combined income. Under the circumstances, it cannot be said that the court's award constitutes either an abuse or an improvident exercise of discretion.

Finally, we reject defendant's contention that a higher award of counsel fees was warranted due to obstructionist tactics engaged in by plaintiff that hindered a more timely settlement of the disputed issues. The trial court stated in its decision that "each party took difficult positions at different times throughout this litigation. In essence, each party held settlement of this matter 'hostage' to gain leverage over the other during negotiations." It thus appears that the court found the parties to be equally at fault for the prolonged litigation. In that regard, we afford great deference to the trial court, which presided over the case from its inception and is more familiar with the parties' positions during settlement negotiations. We therefore cannot agree with defendant that the record clearly establishes that plaintiff is more at fault for engaging in obstructionist tactics that led to increased counsel fees.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

20

CA 11-01815

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

WILLIAM E. DECKER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PATRICIA A. DECKER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CAROL A. CONDON, BUFFALO, FOR DEFENDANT-APPELLANT.

PALMER, MURPHY & TRIPI, BUFFALO (THOMAS A. PALMER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Janice M. Rosa, J.), entered November 26, 2010 in a divorce action. The order, among other things, directed plaintiff to contribute the sum of $2,000 towards defendant's outstanding legal bills.

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

Same Memorandum as in *Decker v Decker* ([appeal No. 2] ___ AD3d ___ [Jan. 31, 2012]).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

21

CA 11-01244

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

IN THE MATTER OF TOWN OF HENDERSON TOWN BOARD,
PETITIONER-APPELLANT,

V ORDER

TOWN OF HOUNSFIELD PLANNING BOARD,
UPSTATE NY POWER CORP., AND
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, RESPONDENTS-RESPONDENTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (HOLLY K. AUSTIN OF COUNSEL), FOR PETITIONER-APPELLANT.

SCHWERZMANN & WISE, P.C., WATERTOWN (DENNIS G. WHELPLEY OF COUNSEL), FOR RESPONDENT-RESPONDENT TOWN OF HOUNSFIELD PLANNING BOARD.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MORGAN A. COSTELLO OF COUNSEL), FOR RESPONDENT-RESPONDENT NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION.

YOUNG, SOMMER, WARD, RITZENBERG, BAKER & MOORE, LLC, ALBANY (JAMES A. MUSCATO, II, OF COUNSEL), FOR RESPONDENT-RESPONDENT UPSTATE NY POWER CORP.

Appeal from a judgment (denominated decision judgment and order) of the Supreme Court, Jefferson County, (Joseph D. McGuire, J.), entered August 18, 2010 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, dismissed the amended petition.

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

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

44

TP 11-01451

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

IN THE MATTER OF ANWATZ HAQUE, PETITIONER,

V ORDER

JOHN LEMPKE, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY AND ALBERT PRACK, DIRECTOR, SPECIAL HOUSING, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENTS.

ANWATZ HAQUE, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF 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, Seneca County [Dennis F. Bender, A.J.], entered July 18, 2011) to review a determination of respondents. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

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

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

45

TP 11-01636

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

IN THE MATTER OF DARRYL HARRIS, PETITIONER,

V ORDER

WILLIAM HULIHAN, SUPERINTENDENT, MID-STATE CORRECTIONAL FACILITY, RESPONDENT.

DARRYL HARRIS, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Anthony F. Shaheen, J.], entered August 3, 2011) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 180.17 (7 NYCRR 270.2 [B] [26] [vii]) and as modified the determination is confirmed without costs, and respondent is directed to expunge from petitioner's institutional record all references to the violation of that rule.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

46

TP 11-01547

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

IN THE MATTER OF ALBERTO RODRIGUEZ, PETITIONER,

V ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered July 7, 2011) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

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

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

47

TP 11-01540

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

IN THE MATTER OF ALAYNA GODFREY, BY HER PARENT AND NATURAL GUARDIAN MICHELLE GODFREY, PETITIONER,

V MEMORANDUM AND ORDER

NIRAV R. SHAH, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH AND PHILLIP NOSTRAMO, COMMISSIONER'S DESIGNEE, RESPONDENTS.

NEIGHBORHOOD LEGAL SERVICES, INC., BUFFALO (DIANA M. STRAUBE OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE 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 [Joseph R. Glownia, J.], entered June 22, 2011) to review a determination of respondents. The determination denied petitioner's request for a Bantam Stander standing device with options.

It is hereby ORDERED that the determination is unanimously annulled on the law and facts without costs and the petition is granted.

Memorandum: Petitioner commenced this CPLR article 78 proceeding to challenge the determination made following a fair hearing that denied her request seeking approval to purchase a Bantam Stander standing device with options (Bantam). Petitioner is a seven-year-old Medicaid recipient with multiple disabilities who is wheelchair-bound and unable to stand unassisted. The pediatrician and physical therapist requested approval for the purchase of a Bantam, and the request was denied on the ground that petitioner failed to establish that the Bantam was the least costly medical device that would meet her medical needs. Following a fair hearing, the Administrative Law Judge (ALJ) affirmed the denial of petitioner's request.

We agree with petitioner that the request for the Bantam should have been approved because the Bantam is medically necessary. As the intended recipient of the Bantam, petitioner was "responsible for establishing that . . . [it was] medically necessary to prevent, diagnose, correct or cure a medical condition and that any specific

statutory or regulatory requirements for prior approval of the care, services or supplies [were] met" (18 NYCRR 513.3 [a]). According to New York State Department of Health regulations, "*[n]ecessary to prevent, diagnose, correct or cure a condition* means that [the] requested medical . . . supplies would: meet the recipient's medical needs; reduce the recipient's physical or mental disability; restore the recipient to his or her best possible functional level; or improve the recipient's capacity for normal activity" (18 NYCRR 513.1 [c]). The regulations further provide that "[n]ecessity to prevent, diagnose, correct or cure a condition must be determined in light of the recipient's specific circumstances and the recipient's functional capacity to use or make use of the requested care, services or supplies and appropriate alternatives" (*id*.).

At the fair hearing, petitioner established that the Bantam would allow her to engage in weight bearing, would assist with her reflux, bowel and bladder health, and would increase her bone density. Petitioner also established that there were no less costly alternatives that would provide those precise benefits while also enabling petitioner to be transferred safely to and from her wheelchair. Consequently, petitioner met her burden of establishing that the Bantam was necessary to restore the recipient to her best possible functional level (*see id*.). Moreover, the testimony of the physical therapist that petitioner is at risk for being dropped and injured without the use of the Bantam "is entitled to significant weight . . . and cannot be outweighed solely by the opinions of non-medical personnel or persons not within the same medical profession as the ordering or treating practitioner" (18 NYCRR 513.6 [e]). In addition, she testified that the Bantam would increase petitioner's ability to lead a more normal life (*see* 18 NYCRR 513.6 [a] [3] [iv]). In view of the evidence presented by the parties at the fair hearing, we cannot agree with the ALJ's determination that the Bantam is not the least costly device that is medically necessary for petitioner. Thus, because the determination is not supported by the requisite substantial evidence, it must be annulled (*see Matter of Sorrentino v Novello*, 295 AD2d 945; *Matter of Gartz v Wing*, 236 AD2d 890; *Matter of Dobson v Perales*, 175 AD2d 628; *cf. Matter of Coffey v D'Elia*, 61 NY2d 645).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

48

KA 08-00031

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JASON J. BROOKS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MATTHEW D. NAFUS, SCOTTSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), rendered September 27, 2007. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

49

KA 10-01766

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARIO BRACY, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (KRISTI M. AHLSTROM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered May 21, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree and unlawful possession of marihuana.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law and the facts by vacating the part convicting defendant of unlawful possession of marihuana, granting the omnibus motion insofar as it sought to suppress the marihuana found on defendant's person, and dismissing the third count of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), criminal possession of a weapon in the third degree (§ 265.02 [3]) and unlawful possession of marihuana (§ 221.05). After indictment, defendant moved, inter alia, to suppress a loaded handgun and marihuana that were seized from his person by a police officer. County Court denied the motion, and defendant pleaded guilty to the indictment. Defendant's sole contention on appeal is that the court erred in denying that part of his omnibus motion seeking to suppress the handgun and marihuana seized from his person. We conclude that the court properly refused to suppress the handgun that was seized from the pocket of defendant's pants, but we agree with defendant that the court should have suppressed the marihuana seized from the waistband of his pants. We therefore modify the judgment accordingly.

We reject defendant's initial contention that the arresting officer violated his rights by approaching him and asking for identification. According to the testimony presented by the People at

the suppression hearing, when the officer approached defendant, he and another man were standing in a street next to an occupied parked vehicle in an area that the officer knew to be subject to violence. Defendant and the other man were standing in the street in a manner that forced any passing vehicles to drive around them, into the opposing traffic lane. Thus, "[t]he testimony at the suppression hearing establishes that the police officer[] had an objective, credible reason for initially approaching defendant and requesting information from him" (*People v Hill*, 302 AD2d 958, 959, *lv denied* 100 NY2d 539; *see generally People v Hollman*, 79 NY2d 181, 190-193; *People v De Bour*, 40 NY2d 210, 213).

Contrary to defendant's further contention, the evidence presented at the suppression hearing establishes that the arresting officer had reasonable suspicion to believe that defendant posed a threat to her safety at the time of the frisk. When the officer first asked if the four men present, i.e., defendant, the other man outside the car, and two additional men inside the car, had identification, the only person who responded was the person in the driver's seat of the car, and his response was merely that he was not driving. The officer exited her vehicle, stood next to defendant and the other man outside the car, and again asked if the four men had identification. This time no one spoke, but both defendant and the other man quickly reached toward their pockets or the waistbands of their pants. In addition, both men were wearing long hooded jackets that covered their pants below the pockets, and as previously noted the officer was aware that the area in which the incident occurred was subject to violence. The officer was thus confronted by two men in proximity to her, both of whom were reaching for their pockets or the waistbands of their pants. The officer grabbed the sweatshirts of both men, placed one man in her vehicle, and frisked defendant. The officer therefore was justified in lifting defendant's sweatshirt to check for weapons, and in patting down the outside of defendant's clothing. While doing so, the officer felt a hard object that she concluded was a handgun, which led to the seizure of the loaded firearm from defendant's pocket. Based on that evidence, we conclude that the frisk of defendant was a "constitutionally justified intrusion designed to protect the safety of the officer[]" (*People v Robinson*, 278 AD2d 808, 809, *lv denied* 96 NY2d 787; *see People v Mack*, 49 AD3d 1291, 1292, *lv denied* 10 NY3d 866).

We note that, although the men may have been reaching for their identification papers in response to the officer's inquiry, the officer "had a reasonable basis for fearing for [her] safety and was not required to 'await the glint of steel' " (*People v Stokes*, 262 AD2d 975, 976, *lv denied* 93 NY2d 1028, quoting *People v Benjamin*, 51 NY2d 267, 271). Moreover, given that the police officer touched a bulging pocket and felt a hard object that she reasonably feared to be a weapon, the officer did not act unlawfully in reaching into the pocket and removing the object (*see People v Davenport*, 9 AD3d 316, *lv denied* 3 NY3d 705).

We agree with defendant, however, that the court erred in refusing to suppress the bag of marihuana that the officer removed

from his waistband. The information that the officer possessed when she seized the bag justified only a limited pat frisk to protect her safety. Indeed, " '[t]he purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his [or her] investigation without fear of violence' " (*Minnesota v Dickerson*, 508 US 366, 373). "Rather, a protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be strictly 'limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby' " (*id.*; *see People v Cantor*, 36 NY2d 106, 110-111; *People v Lazcano*, 66 AD3d 1474, *lv denied* 13 NY3d 940). Here, to the contrary, the officer testified that she observed the bag when she lifted defendant's sweatshirt, and she thought that it was a kit used to test for marihuana. Thus, the officer exceeded the permitted scope of the search by removing the bag from the suspect's waistband to identify its contents (*see People v Dobson*, 41 AD3d 496, 497, *lv denied* 9 NY3d 874). The court's finding that the officer knew that the bag contained marihuana before she removed it from defendant's waistband is not supported by the evidence at the suppression hearing, including the testimony of the officer herself.

Finally, insofar as defendant contends that the improper seizure of the marihuana requires suppression of the handgun, we reject that contention. The evidence presented at the suppression hearing establishes, and the court properly concluded, that the officer found the handgun as part of a pat frisk that she conducted for her safety. Finding the bag of marihuana before discovering the handgun neither eliminated nor diminished the safety factors confronting her. Thus, she was permitted to continue frisking defendant's clothing, which is when she discovered the weapon.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 09-01875

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADRIENNE WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered May 27, 2009. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the fourth degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting her upon a plea of guilty of two counts of grand larceny in the fourth degree (Penal Law § 155.30 [1]). Defendant's challenge to the factual sufficiency of the plea allocution is encompassed by her waiver of the right to appeal (*see People v Jorge N.T.*, 70 AD3d 1456, 1457, *lv denied* 14 NY3d 889), the validity of which she does not contest on appeal. In any event, defendant's challenge is also unpreserved for our review inasmuch as she did not move to withdraw her plea or to vacate the judgment of conviction on that ground (*see People v Lopez*, 71 NY2d 662, 665; *People v Moorer*, 63 AD3d 1590, *lv denied* 13 NY3d 837). Although the waiver by defendant of the right to appeal does not encompass her contention that the plea was not knowingly, intelligently or voluntarily entered, she failed to preserve that contention for our review by failing to move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Montanez*, 89 AD3d 1409; *People v Thomas,* 77 AD3d 1325, 1326, *lv denied* 16 NY3d 800). This case does not fall within the rare exception to the preservation requirement because the plea colloquy did not "clearly cast[] significant doubt upon the defendant's guilt or otherwise call[] into question the voluntariness of the plea" (*Lopez*, 71 NY2d at 666). To the extent that defendant's contention that she was denied effective assistance of counsel survives her guilty plea and waiver of the right to appeal (*see People v Bryant*, 87 AD3d 1270, 1271-1272), we conclude that it is without merit (*see generally People v Ford,* 86 NY2d 397, 404; *People v Jermain*, 56 AD3d 1165, *lv denied* 11

NY3d 926). Finally, County Court did not err in failing sua sponte to order a competency hearing (*see Bryant*, 87 AD3d at 1271-1272; *Jermain*, 56 AD3d at 1165). We note, however, that the certificate of conviction incorrectly recites that defendant was convicted of one count of grand larceny in the fourth degree when she in fact was convicted of two such counts. The certificate of conviction must therefore be amended accordingly (*see People v Saxton,* 32 AD3d 1286).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

51

KA 08-00176

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VANESSA MCKINNEY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, COVINGTON & BURLING LLP, NEW YORK CITY (BRIAN D. GINSBERG OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered November 26, 2007. The judgment convicted defendant, upon a jury verdict, of leaving the scene of a personal injury incident and failure to obey a traffic control device.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of leaving the scene of a personal injury incident without reporting as a class D felony under Vehicle and Traffic Law § 600 (2) to leaving the scene of a personal injury incident without reporting as a class E felony and by vacating the sentence imposed on count one of the indictment and imposing a sentence of 1a to 4 years on that count and as modified the judgment is affirmed in accordance with the following Memorandum: Defendant appeals from a judgment convicting her following a jury trial of, inter alia, leaving the scene of a personal injury incident as a class D felony (Vehicle and Traffic Law § 600 [2] [a]). As defendant contends, and the People correctly conceded at oral argument of this appeal, the indictment as filed charged defendant with only a class E felony under section 600 (2) (a), for having caused “serious physical injury” to the victim, and thus Supreme Court erred in granting the People’s oral motion at trial to amend the indictment to allege that the victim died, thereby raising the offense to a class D felony (*see* § 600 [2] [c]). Because the People proved at trial beyond a reasonable doubt that defendant left the scene of a personal injury incident that resulted in serious physical injury to another person, we modify the judgment by reducing the conviction from a class D felony to a class E felony. Inasmuch as defendant has already served the maximum term of imprisonment permitted for the class E felony, there is no need to remit the matter to Supreme Court for resentencing on count one (*see People v Jackson*, 269 AD2d 867, *lv denied* 95 NY2d 798). Rather, in the interest of judicial economy, we instead further

modify the judgment by vacating the sentence imposed on count one and by imposing the maximum allowed for a class E felony, i.e., an indeterminate term of imprisonment of 1a to 4 years.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

52

KA 09-01461

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JORGE DENIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered September 30, 2004. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance 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 criminal sale of a controlled substance in the first degree (Penal Law § 220.43 [1]). We reject defendant's contention that he was unlawfully arrested in his home without an arrest warrant in violation of *Payton v New York* (445 US 573), and that County Court therefore erred in refusing to suppress his statements to the police as the fruits of an unlawful arrest. Police officers were in defendant's home pursuant to a valid search warrant and, "[s]ince the requirements for a search warrant were satisfied, there was no constitutional infirmity in the failure of the police to also secure an arrest warrant" (*People v Lee*, 205 AD2d 708, 709, *lv denied* 84 NY2d 828; *see People v Barfield*, 21 AD3d 1396, *lv denied* 5 NY3d 881; *People v Battista*, 197 AD2d 486, *lv denied* 82 NY2d 891, 83 NY2d 869).

We reject defendant's further contention that there was insufficient evidence to corroborate the accomplice's testimony. Rather, the testimony of the accomplice was amply corroborated by, inter alia, police testimony concerning defendant's conduct while under surveillance, the cocaine seized from the accomplice's van, the large amount of cash found in defendant's home during the execution of the search warrant, and defendant's statements following his arrest (*see generally* CPL 60.22 [1]; *People v Reome*, 15 NY3d 188, 191-192; *People v Taylor*, 87 AD3d 1330, *lv denied* 17 NY3d 956; *People v Cole*, 68 AD3d 1763, *lv denied* 14 NY3d 839). Viewing the evidence in light

of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), and affording the appropriate deference to the jury's credibility determinations (*see People v Hill*, 74 AD3d 1782, *lv denied* 15 NY3d 805), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant contends in addition that he was deprived of a fair trial by prosecutorial misconduct. The record establishes, however, that defendant waived his contention because, near the end of the prosecutor's summation, defense counsel consulted with defendant and expressly declined the court's offer of a mistrial based on the prosecutor's misconduct (*see People v Myers*, 87 AD3d 1286, *lv denied* ___ NY3d ___ [Dec. 20, 2011]; *People v Harris*, 74 AD3d 1844, *lv denied* 15 NY3d 893; *see also People v Santos*, 41 AD3d 324, *lv denied* 9 NY3d 926). Finally, we reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to move for a mistrial or to accept the court's sua sponte offer to grant one. Defendant has failed " 'to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcoming[]" in that respect (*People v Benevento*, 91 NY2d 708, 712, quoting *People v Rivera*, 71 NY2d 705, 709).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

53

KA 08-00032

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JASON J. BROOKS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MATTHEW D. NAFUS, SCOTTSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), rendered September 27, 2007. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree and attempted murder in the second degree.

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

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

54

KA 10-02010

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID QUINONES, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered August 10, 2010. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: We reject the contention of defendant that Supreme Court erred in determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). Defendant failed to request a downward departure to a level two risk, and thus he failed to preserve for our review his contention that the court erred in failing to afford him that downward departure from his presumptive level three risk (*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 Cummings*, 81 AD3d 1261, *lv denied* 16 NY3d 711).

Insofar as defendant contends that the court erred in treating his prior youthful offender adjudication as a conviction pursuant to risk factor nine in the criminal history section of the risk assessment instrument (RAI), that contention is without merit. "As used [in the criminal history section of the RAI], the term 'crime' includes criminal convictions, youthful offender adjudications and juvenile delinquency findings. The Board [of Examiners of Sex Offenders] concluded that these determinations are reliable indicators of wrongdoing and, therefore, should be considered in assessing an offender's likelihood of reoffense and danger to public safety" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary,

at 6 [2006]; *see People v Wilkins*, 77 AD3d 588, *lv denied* 16 NY3d 703; *People v Irving*, 45 AD3d 1389, 1389-1390, *lv denied* 10 NY3d 703).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

55

KA 10-02078

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHESTER L. DEBIASO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered September 29, 2010. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

56

CAF 10-01802

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

IN THE MATTER OF MIRANDA F., BRANDY D. AND NICOLE D.

---------- MEMORANDUM AND ORDER

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

KEVIN D., RESPONDENT-APPELLANT.

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

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

EMILY A. VELLA, ATTORNEY FOR THE CHILD, SPRINGVILLE, FOR MIRANDA F.

BERT R. DOHL, ATTORNEY FOR THE CHILDREN, SALAMANCA, FOR BRANDY D. AND NICOLE D.

Appeal from a reamended order of the Family Court, Cattaraugus County (Larry M. Himelein, J.), entered August 19, 2010 in a proceeding pursuant to Family Court Act article 10. The reamended order adjudicated the subject children abused.

It is hereby ORDERED that the reamended order so appealed from is unanimously modified on the law by denying those parts of the motion with respect to respondent's two biological daughters and as modified the reamended order is affirmed without costs, and the matter is remitted to Family Court, Cattaraugus County, for further proceedings on the petition with respect to the biological daughters.

Memorandum: In these consolidated abuse proceedings pursuant to article 10 of the Family Court Act, respondent father appeals from a "re-amended" order granting petitioner's motion for summary judgment and adjudging that the father abused his stepdaughter by having raped her, and that he derivatively abused his two biological daughters. As a preliminary matter, we reject the contention of the Attorney for the Child representing the stepdaughter that the appeal should be dismissed insofar as it concerns the stepdaughter based on the father's failure to serve that Attorney for the Child with the notice of appeal. Because the Attorney for the Child representing the stepdaughter filed a timely brief and appeared in this Court for oral argument of the appeal, we excuse the defect in service "and treat the appeal as timely taken pursuant to CPLR 5520 (a)" (*Matter of Nicole J.R. v Jason M.R.*, 81 AD3d 1450, 1451, *lv denied* 17 NY3d 701; *see Dalton v City of Saratoga Springs*, 12 AD3d 899, 899-900).

With respect to the merits, petitioner correctly conceded at oral argument on this appeal that Family Court erred in granting those parts of the motion with respect to the father's biological daughters, inasmuch as petitioner failed to submit the requisite evidence of derivative abuse in support of its motion for summary judgment with respect to them (*see generally Matter of Suzanne RR.*, 35 AD3d 1012, 1012-1013). Indeed, "evidence of the sexual abuse of one child, standing alone, does not, ipso facto, establish a prima facie case of derivative abuse or neglect against others" (*Matter of Amanda LL.*, 195 AD2d 708, 709), and petitioner set forth in support of its motion only that the stepdaughter was abused and did not otherwise provide evidence of derivative abuse. We note in any event that the biological daughters are subject to a separate neglect order issued against the father. We therefore modify the reamended order accordingly.

We reject the father's contention, however, that the court erred in granting the motion with respect to his stepdaughter. Before petitioner made the instant summary judgment motion, the father had been convicted following a jury trial in County Court of, inter alia, rape in the third degree with respect to his stepdaughter (Penal Law § 130.25 [2]). It is well settled that evidence that a parent has been convicted of having raped or sexually abused a child is sufficient to support a finding of abuse of that child within the meaning of the Family Court Act (*see* § 1012 [e] [iii]; *Matter of Doe*, 47 AD3d 283, 285, *lv denied* 10 NY3d 709). Although petitioner in support of the motion failed to submit nonhearsay evidence establishing that the father had been convicted of the rape in question, the judge in Family Court who decided the motion was the same judge who presided over the criminal trial in County Court and thus was able to take judicial notice that the father had been found guilty of raping the stepdaughter (*see Matter of A.R.*, 309 AD2d 1153).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

57

CAF 10-01814

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

IN THE MATTER OF PATRICIA ORZECH,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

GARY A. NIKIEL, RESPONDENT-RESPONDENT.

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

V

PATRICIA ORZECH, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

KUSTELL LAW GROUP, LLP, BUFFALO (CARL B. KUSTELL OF COUNSEL), FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

MCCREADY & TODARO, BUFFALO (MAUREEN A. MCCREADY OF COUNSEL), FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

FRANCINE E. MODICA, ATTORNEY FOR THE CHILD, TONAWANDA, FOR HANNAH G.N.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, A.J.), entered August 13, 2010 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded sole custody of the parties' child to Gary A. Nikiel.

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

Memorandum: Petitioner-respondent (hereafter, mother) appeals from the order in appeal No. 1 denying her petition for sole custody and granting the cross petition of respondent-petitioner (hereafter, father) for sole custody of the parties' child. With respect to appeal No. 1, Family Court properly concluded that there was " 'a sufficient evidentiary showing of a change in circumstances to require a hearing on the issue whether the existing custody order should be modified' " (*Matter of Hughes v Davis*, 68 AD3d 1674, 1675). Pursuant to a prior order incorporating a stipulated custody and access agreement, the mother's residence was designated as the child's primary residence, and neither parent had primary physical custody. Notably, however, "the deterioration of the parties' relationship and their inability to coparent render[ed] the existing joint custody

arrangement unworkable" (*Matter of York v Zullich*, 89 AD3d 1447, 1448; *see Matter of Ingersoll v Platt*, 72 AD3d 1560, 1561; *Matter of Francisco v Francisco*, 298 AD2d 925, *lv denied* 99 NY2d 504). Here, the record, which included the testimony of three psychologists, established that the mother interfered with the father's relationship with the child by, inter alia, omitting the father's name and contact information on school enrollment forms, changing the child's pediatrician and dentist without consulting or informing the father, permitting her husband to take the child to an activity that was specifically intended to be included in the father's time with the child, and denying access to the father so that the child could attend her paternal grandfather's birthday celebration. The expert testimony uniformly supports the court's conclusion that the mother engaged in a pattern of behavior to exclude the father from the child's life. "It is well settled . . . that [a] concerted effort by one parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent" (*Matter of Marino v Marino*, 90 AD3d 1694, ___ [internal quotation marks omitted]; *see Matter of Howden v Keeler*, 85 AD3d 1561; *Matter of Amanda B. v Anthony B.*, 13 AD3d 1126, 1127).

We further conclude that, contrary to the mother's contention, there is a sound and substantial basis in the record for the court's determination that an award of sole custody to the father is in the best interests of the child (*see generally Matter of Deborah E.C. v Shawn K.*, 63 AD3d 1724, 1725, *lv denied* 13 NY3d 710; *Matter of Jeremy J.A. v Carley A.*, 48 AD3d 1035). Here, there is ample support in the record for the court's conclusion that, as between the two parents, the father is less likely than the mother to interfere with the other parent's relationship with the child.

We dismiss the appeal from the order in appeal No. 2. That order denied the mother's motion to reopen the proof at the custody hearing and thus is subsumed in the final custody order in appeal No. 1 (*see* CPLR 5501 [a] [1]). On the merits, we reject the mother's contention that the court abused its discretion in denying her motion to reopen the proof at the custody hearing (*see generally Matter of Markham v Comstock*, 38 AD3d 1262, 1263-1264). Finally, we reject the mother's contention that the court abused its discretion in denying her motion for an award of attorney's fees (*see generally McCarthy v McCarthy*, 172 AD2d 1040).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

58

CAF 11-01213

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

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

V MEMORANDUM AND ORDER

PATRICIA ORZECH, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

KUSTELL LAW GROUP, LLP, BUFFALO (CARL B. KUSTELL OF COUNSEL), FOR RESPONDENT-APPELLANT.

MCCREADY & TODARO, BUFFALO (MAUREEN A. MCCREADY OF COUNSEL), FOR PETITIONER-RESPONDENT.

FRANCINE E. MODICA, ATTORNEY FOR THE CHILD, TONAWANDA, FOR HANNAH G.N.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, A.J.), entered July 14, 2010 in a proceeding pursuant to Family Court Act article 6. The order denied the motion of Patricia Orzech to reopen trial testimony.

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

Same Memorandum as in *Matter of Orzech v Nikiel* (___ AD3d ___ [Jan. 31, 2012]).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

59

CAF 10-01420

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

IN THE MATTER OF SVETLANA SOROKINA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOHN MOODY, RESPONDENT-RESPONDENT.

THOMAS N. MARTIN, ROCHESTER, FOR PETITIONER-APPELLANT.

LIONEL LEE HECTOR, WATERTOWN, FOR RESPONDENT-RESPONDENT.

RUTHANNE G. SANCHEZ, ATTORNEY FOR THE CHILD, WATERTOWN, FOR NICKOLAI M.

Appeal from an order of the Family Court, Jefferson County (Kim H. Martusewicz, A.J.), entered April 20, 2010 in a proceeding pursuant to Family Court Act article 6. The order denied the petitions.

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

Memorandum: Petitioner mother appeals from an order denying her amended petition seeking modification of prior orders of custody and visitation, as well as her petition alleging that the father violated those orders. Contrary to the contention of the mother, we conclude that the record supports the determination of Family Court that the mother "failed to make the requisite evidentiary showing of a change of circumstances warranting a reexamination of the existing custody arrangement" (*Matter of Jackson v Beach*, 78 AD3d 1549, 1550 [internal quotation marks omitted]). With respect to the violation petition, we further conclude that the record is insufficient to establish that the father wilfully violated a clear mandate of the prior orders (*see Matter of Maurice H. v Charity C.*, 49 AD3d 1248, 1249).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

60

CAF 10-02409

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

IN THE MATTER OF SUZALYN E. HOFFMEIER,
PETITIONER-APPELLANT,

V ORDER

THOMAS BYRNES, RESPONDENT-RESPONDENT.

EMILY KARR-COOK, ELMIRA, FOR PETITIONER-APPELLANT.

CAROLYN KELLOGG JONAS, ATTORNEY FOR THE CHILDREN, WELLSVILLE, FOR CHRISTOPHER B. AND JAYDEN C.

Appeal from an order of the Family Court, Steuben County (Gerald J. Alonzo, J.H.O.), entered November 5, 2010 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded legal and physical custody of the subject children to respondent.

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

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

61

CAF 11-00222

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

IN THE MATTER OF JUANITA AIKENS,
PETITIONER,

V MEMORANDUM AND ORDER

KENNETH MARK NELL, RESPONDENT-RESPONDENT.

ANGELA S., APPELLANT.

KIMBERLY WHITE WEISBECK, ATTORNEY FOR THE CHILD, ROCHESTER, FOR APPELLANT.

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered January 4, 2011 in a proceeding pursuant to Family Court Act article 4. The order denied the petition seeking a determination that respondent is the father of appellant and an award of child support.

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

Memorandum: As we noted when this case was before us on a prior appeal (*Matter of Aikens v Nell*, 63 AD3d 1662, *revd* 15 NY3d 1), petitioner mother commenced this proceeding seeking both a determination that respondent is the father of her then-12-year-old child and an award of child support. We had previously affirmed an order denying respondent's objections to the order of the Support Magistrate, directing him to pay child support following the entry of an order of filiation. The issue before the Court of Appeals on the prior appeal to that Court in *Aikens* was "whether a biological father may assert an equitable estoppel defense in paternity and child support proceedings," and the Court held that, "[u]nder the circumstances of this case, where another father figure is present in the child's life, [the biological father] may assert such a claim" (*id.* at 3). The Court of Appeals thus remitted the matter to Family Court to conduct a hearing on the merits of respondent biological father's claim of equitable estoppel and to determine the best interests of the subject child (*id.* at 6). The Attorney for the Child now contends on appeal that Family Court erred in refusing to determine that respondent is the father of the subject child. We affirm.

The Attorney for the Child waived her contention that the court erred in conducting a *Lincoln* hearing and in relying upon the

statements of the subject child adduced at that hearing, inasmuch as the record establishes that the hearing was conducted at her request (*see generally Matter of Clime v Clime*, 85 AD3d 1671, 1672; *Delong v County of Chautauqua* [appeal No. 2], 71 AD3d 1580, 1580-1581; *Matter of James Jerome C. v Mary Elizabeth J.*, 31 AD3d 1184, 1184-1185). In any event, we conclude that the court did not abuse its discretion in conducting a *Lincoln* hearing (*see Matter of Lincoln v Lincoln*, 24 NY2d 270, 272-274; *Matter of Farnham v Farnham*, 252 AD2d 675, 677; *cf. Matter of Thillman v Mayer*, 85 AD3d 1624, 1625), or in considering the child's statements at the *Lincoln* hearing in determining her best interests (*see generally Eschbach v Eschbach*, 56 NY2d 167, 173; *Fox v Fox*, 177 AD2d 209, 210; *see also Matter of Flood v Flood*, 63 AD3d 1197, 1199).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

63

CA 11-01698

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

PETER E. GREVELDING, JR., AS EXECUTOR OF THE ESTATE OF JASON M. RHOADES, DECEASED, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT. (CLAIM NO. 109855.)

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PAUL GROENWEGEN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Diane L. Fitzpatrick, J.), entered November 8, 2010 in a wrongful death action. The judgment dismissed the claim after a trial on liability.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the claim is reinstated, judgment on liability is granted in favor of claimant and the matter is remitted to the Court of Claims for a new trial on the issues of decedent's contributory negligence, if any, and damages in accordance with the following Memorandum: Claimant commenced this wrongful death action seeking damages for the fatal injuries sustained by decedent when the vehicle he was driving slid across the roadway while passing over the Park Street bridge (bridge) on Interstate 81 in the City of Syracuse, struck a snowbank packed against the concrete barrier guard at the edge of the bridge, and vaulted off the bridge onto the road below. The evidence presented at trial established that defendant removed the snowbank from the bridge only after a second fatal vaulting accident occurred, approximately 36 hours after decedent's accident. According to claimant, defendant was negligent in, inter alia, creating the dangerous condition of the snowbank, which rendered the concrete barrier guard ineffective, failing to maintain the bridge in a safe condition, failing to warn of that dangerous condition, and failing to close the bridge in the event that it could not be made safe for travelers.

Following the trial, the Court of Claims determined that the snowbank, which had a hard core and extended above the highway's concrete barrier, constituted a dangerous condition and was a proximate cause of decedent's accident. The court found that

defendant created the snowbank by its snow plowing methods, but that it did not thereby create the dangerous condition, which resulted from "passive accumulation to an unsafe height and consistency, or nonfeasance in removal," coupled with the extreme and persistent weather. The court also found that defendant did not have actual or constructive notice of the dangerous condition and that, even if it could be deemed to have constructive notice, defendant did not have an opportunity to remedy the condition. Viewing the evidence in the light most favorable to the prevailing party, we conclude that the court's conclusions could not have been reached under any fair interpretation of the evidence (*see generally Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170; *Farace v State of New York*, 266 AD2d 870).

Defendant has a duty to maintain its roadways "in a reasonably safe condition for foreseeable uses, including those uses resulting from a driver's negligence or an emergency" (*Stiuso v City of New York*, 87 NY2d 889, 891; *see Carollo v Town of Colden*, 27 AD3d 1077, 1078). That duty includes "an obligation to provide and maintain adequate and proper barriers along its highways" (*Gomez v New York State Thruway Auth.*, 73 NY2d 724, 725). We conclude that defendant was negligent in creating the dangerous condition by its snow plowing methods. As we determined in *Gardner v State of New York* (79 AD3d 1635), the case involving the fatal accident on the same bridge that occurred 36 hours later, defendant's reliance on New York State Department of Transportation guidelines for snow and ice removal is misplaced. "[T]hose guidelines were 'evolved without adequate study or lacked reasonable basis' . . . inasmuch as they provide for the correction of a dangerous condition, such as a slippery roadway, before the correction of a *deadly* condition, such as the snowbank 'ramp' at issue" (*id*. at 1636-1637; *see generally Weiss v Fote*, 7 NY2d 579, 589, *rearg denied* 8 NY2d 934).

As demonstrated by the evidence presented at trial, vaulting accidents are rare. Nevertheless, although they are rare, the evidence presented at trial also established that certain state highway bridges are much more susceptible than others to winter vaulting accidents, and it is undisputed that a vaulting accident had previously occurred on the instant bridge 10 years earlier. We further note that decedent's accident was the first of two accidents that occurred on the instant bridge over a single weekend. We thus conclude under the circumstances of this case that defendant is liable for creating the dangerous condition, which was a proximate cause of decedent's accident. However, we reject claimant's further contention that there is no evidence that decedent was negligent or that his negligence was a proximate cause of the accident. We therefore reverse the judgment, reinstate the claim, conclude as a matter of law that defendant was negligent and that its negligence was a proximate cause of decedent's accident, and remit the matter to the Court of Claims for a new trial on the issues of decedent's alleged contributory negligence and damages, to be apportioned in the event that contributory negligence on the part of decedent is found (*see*

CPLR 1411).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01464

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

ELIZABETH ALDEN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BRINDISI, MURAD, BRINDISI, PEARLMAN, JULIAN AND PERTZ (“THE PEOPLE’S LAWYER”), DEFENDANT-RESPONDENT.

ELIZABETH ALDEN, PLAINTIFF-APPELLANT PRO SE.

BRINDISI, MURAD, BRINDISI, PEARLMAN, JULIAN & PERTZ, LLP, UTICA (RICHARD PERTZ OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered April 6, 2011 in a legal malpractice action. The order and judgment granted the motion of defendant to dismiss the complaint pursuant to CPLR 3211 (a) (7) and dismissed the complaint.

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

Memorandum: Supreme Court properly granted defendant’s motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) in this legal malpractice action. Accepting as true the facts set forth in the complaint and according plaintiff the benefit of all favorable inferences arising therefrom, as we must in the context of the instant motion (*see generally Leon v Martinez*, 84 NY2d 83, 87-88), we conclude that the complaint fails to plead a cognizable theory for legal malpractice because it does not permit the inference that any alleged negligence by defendant was a proximate cause of plaintiff’s damages (*see Pyne v Block & Assoc.*, 305 AD2d 213). The proximate cause of any damages sustained by plaintiff was not the alleged legal malpractice of defendant but, rather, the proximate cause of plaintiff’s damages was either “the intervening and superseding failure” of plaintiff to retain successor counsel in a timely manner or the failure of successor counsel to commence a timely medical malpractice action on plaintiff’s behalf (*Pyne*, 305 AD2d 213). Indeed, we note that the record establishes that defendant afforded plaintiff and her successor counsel “sufficient time and opportunity to adequately protect plaintiff’s rights” (*Somma v Dansker & Aspromonte Assoc.*, 44 AD3d 376, 377; *see Maksimiak v Schwartzapfel Novick Truhowsky Marcus, P.C.*, 82 AD3d 652; *Katz v Herzfeld & Rubin, P.C.*, 48 AD3d 640, 641; *cf. Wilk v Lewis & Lewis, P.C.*, 75 AD3d 1063, 1066-1067). We have reviewed

plaintiff’s remaining contentions and conclude that they are either unpreserved for our review or they are without merit.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01757

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

ABDULLA ALGHEIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

UTICA FIRST INSURANCE COMPANY,
DEFENDANT-RESPONDENT.

GUSTAVE J. DETRAGLIA, JR., UTICA (MICHELLE E. DETRAGLIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FARBER BROCKS & ZANE L.L.P., MINEOLA (SHERRI N. PAVLOFF OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered December 3, 2010 in a breach of contract action. The order, insofar as appealed from, granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this breach of contract action, alleging that defendant breached its insurance contract with plaintiff by failing to provide coverage for losses from a fire at plaintiff's place of business. Defendant moved for summary judgment dismissing the complaint, and plaintiff cross-moved for summary judgment and an inquest on damages. Supreme Court granted the motion and denied the cross motion, but on appeal plaintiff contends only that the court erred in granting the motion and does not contend that his cross motion should have been granted. We agree with plaintiff that the court erred in granting defendant's motion.

In order to meet its initial burden on the motion, defendant was required to "establish[ ] as a matter of law that the exclusion . . . upon which defendant relied unambiguously applied to plaintiff's loss" (*Gravino v Allstate Ins. Co.*, 73 AD3d 1447, 1448, *lv denied* 15 NY3d 705). Here, although defendant relied upon an exclusion that permitted it to deny coverage in the event that plaintiff failed to maintain a central station fire alarm, defendant failed to submit evidence establishing that plaintiff did not have such an alarm at the time of the loss. Defendant's contention that the deposition testimony of plaintiff established that there was no such alarm is without merit, inasmuch as plaintiff was not questioned with respect

to the existence of such an alarm, nor did he otherwise testify about one. We thus conclude that defendant failed to meet its initial burden of establishing its entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). "Failure [of the moving party] to make [a] prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

In light of our determination, we need not address plaintiff's remaining contentions.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-00495

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

ARDA MAKARCHUK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD MAKARCHUK, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEVITT & GORDON, ESQS., NEW HARTFORD (DEAN L. GORDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered October 27, 2010. The judgment awarded plaintiff the sum of $53,869.16 plus interest against defendant.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating that part awarding plaintiff the sum of $9,494.43 plus prejudgment interest thereon and as modified the judgment is affirmed without costs.

Memorandum: As we noted when this case previously was before us on appeal (*Makarchuk v Makarchuk*, 59 AD3d 1094), plaintiff commenced this action in 2006 seeking to enforce defendant's obligation to pay carrying costs, i.e., taxes, insurance, and most of the maintenance costs, on the marital residence pursuant to a separation agreement (agreement) executed by the parties in 1970. The agreement provided that it would "survive any decree of divorce . . . [and would] not merge in[ ] nor be superseded by any divorce decree or judgment." As we further noted, the decree of divorce entered in 1971 expressly incorporated the agreement but did not contain a nonmerger clause. The decree was modified in 1975 by Supreme Court (John R. Tenney, J.), who ordered that defendant was no longer responsible for paying the carrying costs on the marital residence (hereafter, 1975 order). On the prior appeal, we agreed with plaintiff that Supreme Court (Robert F. Julian, J.) erred in granting that part of defendant's motion seeking to dismiss the complaint for breach of contract, concluding that "plaintiff retained the right to enforce the agreement notwithstanding the 1975 order modifying the decree" (*id.* at 1095). We therefore reversed the order, denied the motion in its entirety, and reinstated the complaint.

After the complaint was reinstated, defendant moved by order to show cause to find plaintiff in contempt for "violating the terms and conditions of [the 1975 order] by seeking to compel [him] to pay

exactly the expenses which were excused by [that order].” Defendant further sought “to enforce” the 1975 order, thereby precluding plaintiff’s breach of contract action. Supreme Court (Samuel D. Hester, J.) reserved decision and, after a nonjury trial, denied defendant’s application to hold plaintiff in contempt and awarded plaintiff the sum of $53,869.16 in damages plus interest. In appeal No. 1, defendant appeals from the judgment enforcing his obligation to pay carrying costs on the marital residence pursuant to the parties’ agreement and awarding damages to plaintiff in the amount of such costs, plus prejudgment interest, costs and disbursements. In appeal No. 2, defendant appeals from the order that, inter alia, denied his application to hold plaintiff in contempt.

Addressing first the order in appeal No. 2, we reject defendant’s contention that the court erred in refusing to hold plaintiff in contempt of the 1975 order for the same reasons we articulated on the prior appeal, which constitutes the law of the case (*see generally Johnson v Optometrix, Inc.*, 85 AD3d 1542, 1544, *lv denied* 17 NY3d 710). As we previously noted, “[i]t is well settled that ‘[a] separation agreement that is incorporated into but not merged with a divorce decree is an independent contract binding on the parties unless impeached or challenged for some cause recognized by law’ ” (*Makarchuk*, 59 AD3d at 1094, quoting *Merl v Merl*, 67 NY2d 359, 362). Where, as here, a separation agreement is incorporated but not merged in a divorce decree, “a change in the divorce decree cannot modify the separation agreement absent a clear expression by the parties of such an intent” (*Kleila v Kleila*, 50 NY2d 277, 283), and no such intent was expressed here (*Makarchuck*, 59 AD3d at 1094-1095). Plaintiff thus retained the right to enforce the agreement with respect to the carrying costs by way of a plenary action for breach of contract (*see Makarchuk*, 59 AD3d at 1094-1095; *see also Kleila*, 50 NY2d at 283). Contrary to defendant’s further contention, we conclude that the judgment in appeal No. 1 does not violate the 1975 order because the judgment enforces the terms of the agreement, which was not modified by the 1975 order.

With respect to appeal No. 1, we reject defendant’s contention that plaintiff breached the agreement by “entertaining males” and that such breach excused his failure to pay the carrying costs on the marital residence. Initially, we agree with the court that defendant’s contention that he was excused from his obligations under the agreement based on that alleged breach by plaintiff “is essentially a claim based on a breach of contract, which occurred in 1975 and thus is barred by the six year statute of limitations” (*see generally* CPLR 213 [2]). In any event, we likewise agree with the court that defendant failed to establish by a preponderance of the evidence that plaintiff breached the agreement by “entertaining males” (*see Famoso v Famoso*, 267 AD2d 274, 274-275; *Lefkon v Drubin*, 143 AD2d 400, *lv dismissed* 74 NY2d 791, *lv denied* 74 NY2d 612; *see generally Graev v Graev*, 11 NY3d 262).

We agree with defendant, however, that the court erred in applying tenancy-in-common principles to the agreement, and thus erred in awarding plaintiff one half of the maintenance costs. Upon entry

of the divorce decree, the parties' tenancy by the entirety in the marital residence converted to a tenancy in common as a matter of law (*see Goldman v Goldman*, 95 NY2d 120, 122; *Kahn v Kahn*, 43 NY2d 203, 207). "The distinguishing feature of [a tenancy-in-common] is the right of each cotenant to use and enjoy the entire property as would a sole owner . . . whether or not they are in actual possession of the premises" (*Butler v Rafferty*, 100 NY2d 265, 269). Generally, "[a]bsent an ouster, tenants-in-common equally bear the costs incurred in maintaining the property" (*Degliuomini v Degliuomini*, 45 AD3d 626, 629; *see McIntosh v McIntosh*, 58 AD3d 814, 814-815). However, the general rules governing tenancies-in-common " 'will not control where there is a contrary agreement' " (*Butler*, 100 NY2d at 270). Here, the agreement in question in fact departed from the general rules governing tenancies-in-common by granting plaintiff exclusive use of the marital residence, except for storage in the garage and basement, and by directing defendant to be solely responsible for maintenance costs, with the exception of "grass cutting and snow removal" as well as "fuel and utilities." Thus, the court erred in awarding plaintiff $9,494.43, representing one half of the maintenance costs, and we therefore modify the judgment in appeal No. 1 accordingly.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-00496

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

ARDA MAKARCHUK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD MAKARCHUK, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEVITT & GORDON, ESQS., NEW HARTFORD (DEAN L. GORDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered December 21, 2010. The order, among other things, denied defendant's application to hold plaintiff in willful contempt.

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

Same Memorandum as in *Makarchuk v Makarchuk* ([appeal No. 1] ___ AD3d ___ [Jan. 31, 2012]).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-00779

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

IN THE MATTER OF MARQUEZ MACK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TIMOTHY HOWARD, IN HIS OFFICIAL CAPACITY AS SHERIFF OF ERIE COUNTY, MARK N. WIPPERMAN, IN HIS OFFICIAL CAPACITY AS UNDERSHERIFF OF ERIE COUNTY, AND CHERYL GREEN, ESQ., IN HER OFFICIAL CAPACITY AS ERIE COUNTY ATTORNEY,
RESPONDENTS-RESPONDENTS.

LIPSITZ & PONTERIO, LLC, BUFFALO (JOHN NED LIPSITZ OF COUNSEL), FOR PETITIONER-APPELLANT.

JEREMY A. COLBY, COUNTY ATTORNEY, BUFFALO (JEREMY TOTH OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

COREY STOUGHTON, NEW YORK CITY, FOR NEW YORK CIVIL LIBERTIES UNION FOUNDATION, AMICUS CURIAE.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered February 3, 2011 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, denied the petition to compel the release of certain video records.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting the petition to the extent of directing respondents forthwith to provide petitioner with that portion of the videotape entitled “Annex B Prison B 26,” depicting his detention in Court Hold #2, and as modified the judgment is affirmed without costs.

Memorandum: Petitioner, an inmate at a correctional facility, commenced this CPLR article 78 proceeding seeking to compel respondents to comply with his request pursuant to the Freedom of Information Law ([FOIL] Public Officers Law art 6) for a copy of a videotape taken of Court Hold #2 in the Erie County Holding Center on a specified date. The videotape depicts an altercation between petitioner and several deputy sheriffs in that Court Hold, which is a small cell used to detain inmates temporarily on their way to and from court. We note at the outset that petitioner has abandoned his request in the petition for disclosure of various other videotapes

from the Holding Center depicting petitioner before he entered Court Hold #2 (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

We agree with petitioner that Supreme Court erred in denying that part of the petition with respect to the videotape from Court Hold #2, and we therefore modify the judgment accordingly. Contrary to the court's determination, the videotape is not exempt from disclosure pursuant to Public Officers Law § 87 (2) (f), inasmuch as respondents failed to meet their burden of demonstrating that the release of the videotape could "endanger the life or safety of any person." Respondents' contention that the videotape demonstrates the manner in which an inmate can create a disturbance that draws deputies away from their transport duties and thereby ties up manpower is improperly based solely upon speculation, because it is not apparent from the video that the three officers involved in the altercation with petitioner were drawn away from other duties to help quell the disturbance. In addition, the possibility that an inmate disturbance might result in a redistribution of correctional manpower is obvious. As in *Matter of Buffalo Broadcasting Co. v New York State Dept. of Correctional Servs.* (174 AD2d 212, 215, *lv denied* 79 NY2d 759), another FOIL case involving video recordings from a correctional facility, "the depictions [at issue] were of scenes witnessed by the general prison population and . . . the techniques, weapons and equipment used by correction officers and officials as shown on the tapes were not only observable by the inmates but completely conventional in nature."

Respondents' reliance on *Matter of Lonski v Kelly* (149 AD2d 977) is misplaced. In *Lonski*, the videotape at issue depicted an inmate's transfer to the special housing unit at a correctional facility, rather than merely the interior of a single cell in a holding center. We determined that it was exempt from disclosure under Public Officers Law § 87 (2) (f) because the videotape revealed "the geographical layout of [the] special housing unit and disclose[d] the identities of inmates and officers who occup[ied] that portion of the prison" (*id.* at 978). Here, because the videotape depicts only the inside of a single cell, the videotape reveals no information about the geographical layout of the Holding Center.

We thus conclude that respondents must provide petitioner with a copy of the videotape entitled "Annex B Prison B 26," showing the altercation in Court Hold #2. We further conclude, however, that petitioner is not entitled to an award of attorney's fees pursuant to Public Officers Law § 89 (4) (c). Even assuming, arguendo, that respondents had "no reasonable basis" for failing to disclose the videotape (§ 89 [4] [c] [i]), it cannot be said that petitioner "substantially prevailed" in this proceeding inasmuch as he established his entitlement to only one of the numerous videotapes requested in the petition (§ 89 [4] [c]).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01158

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

FRED MUHLEMAN, PLAINTIFF-APPELLANT,

V ORDER

NATIONWIDE INSURANCE AND NATIONWIDE FIRE INSURANCE COMPANY, DEFENDANTS-RESPONDENTS.

LAW OFFICE OF RONALD J. PASSERO, ROCHESTER (RONALD J. PASSERO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF EPSTEIN, GIALLEONARDO & HARTFORD, GETZVILLE (JENNIFER V. SCHIFFMACHER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered February 2, 2011 in a declaratory judgment action. The order, among other things, granted defendants' cross motion for dismissal and summary judgment.

Now, upon reading and filing the stipulation discontinuing action signed by the attorneys for the parties on January 18 and 20, 2012,

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

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01679

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

XIAO XIA ZHANG, PLAINTIFF-RESPONDENT,

V ORDER

HERBERT E. WILLIS, DEFENDANT-APPELLANT.

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

R. THOMAS BURGASSER, PLLC, NORTH TONAWANDA (HELENE DIPASQUALE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 23, 2011. The order, among other things, denied defendant's application to vacate a default judgment.

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

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

119

KA 10-00306

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN KELLEY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered July 9, 2009. The judgment convicted defendant, upon a nonjury verdict, of burglary in the third degree and criminal mischief in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him, after a nonjury trial, of burglary in the third degree (Penal Law § 140.20) and criminal mischief in the fourth degree (§ 145.00 [1]), defendant contends that County Court erred in refusing to suppress his statements to the police because, inter alia, he was subjected to custodial interrogation and thus *Miranda* warnings were required. We reject that contention. In determining whether a defendant was in custody for *Miranda* purposes, "[t]he test is not what the defendant thought, but rather what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant's position" (*People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851). "[T]he court 'should consider: (1) the amount of time the defendant spent with the police, (2) whether his freedom of action was restricted in any significant manner, (3) the location and atmosphere in which the defendant was questioned, (4) the degree of cooperation exhibited by the defendant, (5) whether he was apprised of his constitutional rights, and (6) whether the questioning was investigatory or accusatory in nature' " (*People v Lunderman*, 19 AD3d 1067, 1068-1069, *lv denied* 5 NY3d 830). In addition, "[t]he determination of a suppression court must be accorded great weight 'because of its ability to observe and assess the credibility of the witnesses[,] and its findings should not be disturbed unless clearly erroneous' " (*People v Jones*, 9 AD3d 837, 838-839, *lv denied* 3 NY3d 708, 4 NY3d 745).

Here, defendant was questioned for a maximum of 20 minutes in his sister's home, rather than at a police station, and there is no evidence indicating that his freedom of movement was restricted in any way. Indeed, the evidence at the suppression hearing established that defendant was moving around within the room and changed his shirt while the police spoke with him, and that his brother and sister were present in the same room during the questioning. "Although the questioning . . . may have been accusatory, that fact alone did not render the interrogation custodial in nature" (*People v Davis*, 48 AD3d 1086, 1087, *lv denied* 10 NY3d 861; *see generally Lunderman*, 19 AD3d at 1068-1069). Consequently, the court properly concluded that defendant was not in custody for *Miranda* purposes. We have considered defendant's remaining contention with respect to the suppression ruling and conclude that it is without merit.

Defendant failed to move for a trial order of dismissal, and thus he failed to preserve for our review his further contention that the conviction is not supported by legally sufficient evidence (*see People v Hawkins*, 11 NY3d 484, 492; *People v Gray*, 86 NY2d 10, 19). In any event, that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 10-01778

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHAZ D. FRAZIER, DEFENDANT-APPELLANT.

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

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (LAURIE M. BECKERNICK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered July 26, 2010. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that County Court erred in sentencing him without the benefit of an adequate presentence report. Defendant failed to preserve that contention for our review (*see People v Pomales*, 37 AD3d 1098, *lv denied* 8 NY3d 949; *People v Diaz*, 26 AD3d 768). In any event, it is without merit (*see People v Harrington*, 3 AD3d 737, 739; *see also People v Rudduck*, 85 AD3d 1557, *lv denied* 17 NY3d 861). The sentence is not unduly harsh or severe.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

122

KA 10-00307

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LEEANN B. MACARTHUR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered March 30, 2009. The judgment convicted defendant, upon her plea of guilty, of burglary in the second degree.

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

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

123

TP 11-01675

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

IN THE MATTER OF WILLIAM EDWARDS, PETITIONER,

V ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER.

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

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

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

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

124

CAF 10-02395

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

IN THE MATTER OF GERALD G., JR., AND
SYLVANNA G.

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

ORENA G., RESPONDENT-APPELLANT.

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

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

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR GERALD G., JR.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO, FOR SYLVANNA G.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered September 23, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject children.

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

Memorandum: Respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to two of her children. Contrary to the mother's contention, "[p]etitioner met its initial burden of establishing by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen the [mother's] relationship with the child[ren]" (*Matter of Rachael N.*, 70 AD3d 1374, *lv denied* 15 NY3d 708; *see Matter of Geoffrey N.*, 16 AD3d 1167). Petitioner was not required to ensure that the mother succeeded in overcoming her obstacles but, rather, the mother was required to assume some responsibility in dealing with those challenges (*see Matter of La'Derrick J.W.*, 85 AD3d 1600, 1601, *lv denied* 17 NY3d 709; *Matter of Whytnei B.*, 77 AD3d 1340). Here, the record establishes that the mother was unable to keep her house clean, to budget properly or to parent the children properly. Indeed, during the three years in which the proceeding was pending, the mother never progressed beyond supervised visitation with the children. Further, the expert psychologists for both petitioner and the mother testified

that the mother was not yet able to assume parenting duties for the children. Although the mother attended parenting and domestic violence classes, the evidence establishing that she was "inconsistently applying the knowledge and benefits she obtained from the services provided[and] arguing with various service providers and professionals" sufficiently supported a finding that she failed to articulate a realistic plan for the children's return to her care (*Matter of Douglas H.*, 1 AD3d 824, 825, *lv denied* 2 NY3d 701; *see Matter of Elijah NN.*, 20 AD3d 728, 730). Thus, the evidence in the record establishes that the mother failed to "plan for the future of the child[ren], although physically and financially able to do so" (Social Services Law § 384-b [7] [a]; *see* Family Ct Act § 611).

We reject the mother's further contention that terminating her parental rights was not in the best interests of the children. Upon a finding of permanent neglect, "[a]n order of disposition shall be made . . . solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular disposition" (Family Ct Act § 631). The record establishes that the subject children had been in petitioner's care for approximately four years when the order on appeal was entered, and that they were thriving in their foster home. In contrast, the record establishes that, when the children were removed from the mother's care, the son was often nervous and uncontrollable, and the daughter was experiencing a physical failure to grow. Contrary to the contention of the mother, " '[t]he progress made by [her] in the months preceding the dispositional determination was not sufficient to warrant any further prolongation of the child[ren]'s unsettled familial status' " (*Matter of Roystar T.*, 72 AD3d 1569, 1569, *lv denied* 15 NY3d 707). Finally, we reject the mother's further contention that Family Court abused its discretion in denying her request for a suspended judgment (*see Matter of Arella D.P.-D.*, 35 AD3d 1222, *lv denied* 8 NY3d 809).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

125

CAF 11-01019

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

IN THE MATTER OF NICHOLAS R.Y.,
RESPONDENT-APPELLANT.

JOANNE Y., PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

ARDETH L. HOUDE, ATTORNEY FOR THE CHILD, ROCHESTER, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Livingston County (Dennis S. Cohen, J.), entered April 4, 2011 in a proceeding pursuant to Family Court Act article 7. The order, among other things, adjudged that respondent is a person in need of supervision.

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

Memorandum: Respondent appeals from an order adjudicating him a person in need of supervision and placing him on probation for one year. We agree with respondent that Family Court erred in denying his motion to dismiss the petition. In a report attached to the petition, representatives of the Livingston County Probation Department (LCPD), the lead agency pursuant to Family Court Act § 735 (a), merely stated in a conclusory fashion that the LCPD provided the requisite diversion services to respondent and his family prior to the filing of the petition. Thus, the petition failed to demonstrate that the LCPD had "exert[ed] what the statute refers to as documented diligent attempts to avoid the necessity of filing a petition" (*Matter of James L.* [appeal No. 2], 74 AD3d 1775, 1775 [internal quotation marks omitted]; *see* § 735 [b], [d]; *Matter of Leslie H. v Carol M.D.*, 47 AD3d 716). " '[T]he failure to comply with such substantive statutory requirements constitutes a nonwaivable jurisdictional defect' requiring dismissal of the petition" (*James L.*, 74 AD3d at 1776).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

126

CAF 10-00359

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

IN THE MATTER OF CARRIE JO YAMONACO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS FEY, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered January 20, 2010 in a proceeding pursuant to Family Court Act article 4. The order, among other things, adjudged that respondent willfully violated an order to pay child support and incarcerated respondent for a period of six months.

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

Memorandum: Respondent father appeals from an order confirming the Support Magistrate's determination that he willfully violated a prior order to pay child support with respect to the parties' child and sentencing him to a term of six months in jail. We affirm. It is well settled that a parent is presumed to be able to support his or her minor children (*see* Family Ct Act § 437; *Matter of Christine L.M. v Wlodek K.*, 45 AD3d 1452). A "failure to pay support as ordered itself constitutes 'prima facie evidence of a willful violation' . . . [and] establishes [the] petitioner's direct case of willful violation, shifting to [the] respondent the burden of going forward" (*Matter of Powers v Powers*, 86 NY2d 63, 69). To meet that burden, the respondent must "offer some competent, credible evidence of his [or her] inability to make the required payments" (*id.* at 70-71). In the event that the respondent "testifie[s] that he [or she] was unable to meet [the] support obligation because physical [or mental] disabilities interfered with his [or her] ability to maintain employment, [the respondent must] offer competent medical evidence to substantiate that testimony" (*Matter of Fogg v Stoll*, 26 AD3d 810, 810-811; *see Matter of Greene v Holmes*, 31 AD3d 760, 762). Such evidence must establish that the condition "affected [his or] her ability to work" (*Matter of Lewis v Cross*, 72 AD3d 1228, 1230).

Great deference should be given to the determination of the Support Magistrate (*see Matter of Manocchio v Manocchio*, 16 AD3d 1126, 1128). Here, petitioner mother established that the father willfully violated the prior order by demonstrating that the father had not made

the required child support payments. The father failed to meet his burden to present sufficient evidence of his inability to make such payments, inasmuch as he failed to offer competent medical evidence to substantiate that claim.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

127

CAF 11-00591

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

IN THE MATTER OF RICARDO L. SMITH,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TEEOHMBAYE S. INCE, RESPONDENT-APPELLANT.

KELLY M. CORBETT, FAYETTEVILLE, FOR RESPONDENT-APPELLANT.

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

RAYMOND D. GRINNALS, ATTORNEY FOR THE CHILD, SYRACUSE, FOR TYRESE I.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered February 24, 2011 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole legal custody and primary physical custody of the subject child.

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

Memorandum: Respondent mother appeals from an order that granted sole legal custody and primary physical custody of the parties' child to petitioner father, with visitation to the mother. We affirm. Following a hearing, Family Court determined that the father has a strong bond with the child and is better suited to provide a stable home to the child (*see generally Fox v Fox*, 177 AD2d 209, 211–212). The court also determined that neither the mother nor the maternal grandmother was a credible witness and that, in the event that it awarded custody to the mother, she would continue to undermine the father's relationship with the child. "[T]he court's assessment of the credibility of the witnesses is entitled to great weight, and the court was entitled to credit the testimony of the father over that of the mother" and the maternal grandmother (*Matter of Kobel v Holiday*, 78 AD3d 1660; *see Matter of Danielle S. v Larry R.S.*, 41 AD3d 1188). Contrary to the contention of the mother, we conclude that there is a sound and substantial basis in the record for the court's determination that an award of sole custody to the father is in the best interests of the child (*see Matter of Deborah E.C. v Shawn K.*, 63 AD3d 1724, 1725, *lv denied* 13 NY3d 710; *Matter of Jeremy J.A. v Carley*

A., 48 AD3d 1035; *Matter of Angel M.S. v Thomas J.S.*, 41 AD3d 1227).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

128

CAF 11-00271

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

IN THE MATTER OF CLAUDINA E.P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

STEPHANIE M., RESPONDENT-APPELLANT,
AND JOHNNY N., RESPONDENT.
(APPEAL NO. 1.)

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR CLAUDINA E.P.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered January 26, 2011 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed respondent Stephanie M. under the supervision of petitioner.

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

Memorandum: Respondent mother appeals from three orders, each of which adjudicated one of her three children to be neglected and placed the mother under the supervision of petitioner. The findings of neglect were based on, inter alia, the mother's violation of an order of protection requiring respondent father to stay away from the mother and her home and prohibiting him from visiting the children unless a court order was entered authorizing such visitation. We reject the contention of the mother in each appeal that the evidence at the fact-finding hearing was insufficient to support the adjudications of neglect (*see generally* Family Ct Act § 1051 [a]). The record establishes that the mother left at least one of the subject children at her home in the care of the father, despite her awareness of his violent tendencies and in knowing violation of the order of protection. We therefore conclude "that there is a sound and substantial basis to support Family Court's finding that the child[ren were] in imminent danger of impairment as a result of [the mother's] failure to exercise a minimum degree of care" (*Matter of Paul U.*, 12 AD3d 969, 971; *see* § 1012 [f] [i]; *Matter of Angelina W.*, 43 AD3d

1370).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

129

CAF 11-00272

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

IN THE MATTER OF JOSEPH D.A.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

STEPHANIE M., RESPONDENT-APPELLANT,
AND JOHNNY N., RESPONDENT.
(APPEAL NO. 2.)

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered January 26, 2011 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed respondent Stephanie M. under the supervision of petitioner.

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

Same Memorandum as in *Matter of Claudina E.P.* (___ AD3d ___ [Jan. 31, 2012]).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

130

CAF 11-00273

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

IN THE MATTER OF SINCERE N.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

STEPHANIE M., RESPONDENT-APPELLANT,
AND JOHNNY N., RESPONDENT.
(APPEAL NO. 3.)

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

EUGENE P. ADAMS, ATTORNEY FOR THE CHILD, BUFFALO, FOR SINCERE N.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered January 26, 2011 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed respondent Stephanie M. under the supervision of petitioner.

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

Same Memorandum as in *Matter of Claudina E.P.* (___ AD3d ___ [Jan. 31, 2012]).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

131

CAF 11-00295

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

IN THE MATTER OF LILIANA G.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ORENA G., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

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

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered October 29, 2010 in a proceeding pursuant to Family Court Act article 10. The order granted the motion of petitioner for summary judgment determining that respondent had neglected her child.

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

Same Memorandum as in *Matter of Liliana G.* ([appeal No. 2] ___ AD3d ___ [Jan. 31, 2012]).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

132

CAF 11-00296

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

IN THE MATTER OF LILIANA G.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ORENA G., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

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

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

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered January 10, 2011 in a proceeding pursuant to Family Court Act article 10. The order granted the motion of petitioner for a determination that reasonable efforts to reunify respondent with her child are no longer required.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following Memorandum: In appeal No. 1 in this permanent neglect proceeding with respect to respondent mother's youngest child, the mother appeals from an order granting petitioner's motion for summary judgment on the petition and determining that the mother derivatively neglected the child. In appeal No. 2, the mother appeals from an order granting petitioner's motion for a determination that reasonable efforts to reunite the mother and the child are no longer required.

We conclude at the outset that appeal No. 1 must be dismissed. Family Court Act § 1113 provides in relevant part that such an appeal "must be taken no later than . . . [35] days from the mailing of the order to the appellant by the clerk of the court . . . ." The record establishes that Family Court mailed the order appealed from with notice of entry to the mother and her attorney on the date of entry (*cf. Matter of Tynell S.*, 43 AD3d 1171, 1172). The notice of appeal, however, was not filed until more than three months later, and thus it is untimely (*see* § 1113; *Matter of Deandre GG.*, 79 AD3d 1384, *lv denied* 16 NY3d 708; *see also Matter of Jennifer G.*, 190 AD2d 1095).

With respect to the order in appeal No. 2, we agree with the mother that the court erred in determining that petitioner was no longer required to use reasonable efforts to reunite the mother and the child. In its motion for such relief, petitioner alleged that the mother's parental rights with respect to two of her other children had been involuntarily terminated (*see* Family Ct Act § 1039-b [b] [6]). Although there is nothing in the record before us establishing that such an involuntary termination took place, the record indicates that the court examined its records in the proceeding involving those two other children (*see Matter of Gerald G.*, ___ AD3d ___ [Jan. 31, 2012]). Consequently, we take judicial notice of our records in that case with respect to the appeal from the order terminating the mother's parental rights with respect to those children (*see Matter of Allen v Strough*, 301 AD2d 11, 18-19; *see also Matter of A.R.*, 309 AD2d 1153). Our records establish that the mother's parental rights with respect to those children had been involuntarily terminated.

Pursuant to Family Court Act § 1039-b (b), where the parent's parental rights with respect to siblings of the subject child have been involuntarily terminated, the petitioner is not required to use reasonable efforts to reunite the parent and child "unless the court determines that providing reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and the child in the foreseeable future." Further, "[a]lthough the statute does not specifically direct that an evidentiary hearing be held, we conclude that the constitutional due process rights of [the] respondent require such a hearing when genuine issues of fact are created by the answering papers" (*Matter of Damion D.*, 42 AD3d 715, 716; *see generally Matter of Marino S.*, 100 NY2d 361, 371, *cert denied* 540 US 1059). Here, the mother's answering papers state that a caseworker for Child Protective Services testified at a remand hearing that the child could safely be returned to the mother, and the transcript of that testimony is included in the record. In addition, when granting petitioner's motion for summary judgment on the neglect petition, the court indicated that it wished to conduct a dispositional hearing to ascertain the progress of the mother and "what she's been doing with respect to [the] child." No such hearing was held, however, and the record contains no further evidence with respect to the issues raised by the mother's answering papers. Inasmuch as the record establishes that there was a genuine issue of fact whether using reasonable efforts to reunite the mother and the child was in the child's best interests, we conclude that the court should have held a hearing before deciding petitioner's motion for a determination with respect to the reasonable efforts requirement (*cf. Matter of Carlos R.*, 63 AD3d 1243, 1245, *lv denied* 13 NY3d 704). We therefore reverse the order in appeal No. 2, and we remit the matter to Family Court for further proceedings.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

133

CAF 11-00568

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

IN THE MATTER OF ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF RENEE E. WISER, PETITIONER-RESPONDENT,

MEMORANDUM AND ORDER

V

ANDREW R. THOMPSON, RESPONDENT-APPELLANT.

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

JOHN S. CIPOLLA, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered January 21, 2011 in a proceeding pursuant to Family Court Act article 4. The order denied the objection to the determination of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the objections to the order of the Support Magistrate entered August 16, 2010 are granted and the motion to vacate the order of the Support Magistrate entered June 19, 2009 is granted, and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following Memorandum: Petitioner commenced this proceeding pursuant to article 4 of the Family Court Act based on respondent father's alleged willful violation of a child support order. The Support Magistrate entered an order in favor of petitioner upon the father's alleged default. We conclude that Family Court erred in denying the father's objections to a second order of the Support Magistrate, which denied the motion of the father to vacate the order entered upon his alleged default. The father's "failure to appear at the fact-finding hearing . . . 'does not automatically constitute a default,' in view of the fact that the attorney for the [father] appeared on [his] behalf and requested an adjournment" (*Matter of Isaiah H.*, 61 AD3d 1372, 1373; *see Matter of David A.A. v Maryann A.*, 41 AD3d 1300; *Matter of Shemeco D.*, 265 AD2d 860). "A party who is represented at a scheduled court appearance by an attorney has not failed to appear" (*Matter of Sales v Gisendaner*, 272 AD2d 997, 997).

We therefore reverse the order, grant the objections to the order of the Support Magistrate entered August 16, 2010 and grant the motion to vacate the order of the Support Magistrate entered June 19, 2009, and we remit the matter to Family Court for further proceedings on the

petition.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

134

CA 11-01760

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

BARBARA BRIODY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTEN L. MELECIO, DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (ALISON M.K. LEE OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (TIMOTHY R. HEDGES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered April 5, 2011 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when the vehicle she was driving was rear-ended by a vehicle driven by defendant. We conclude that Supreme Court erred in denying in part defendant's motion seeking summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Defendant met her initial burden of establishing that plaintiff did not sustain a serious injury under the permanent consequential limitation of use and significant limitation of use categories, and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We therefore reverse the order insofar as appealed from, grant defendant's motion in its entirety and dismiss the complaint.

Contrary to plaintiff's contention, defendant may establish her entitlement to judgment as a matter of law by submitting the medical records provided by counsel for plaintiff (*see Wiegand v Schunck*, 294 AD2d 839). In support of her motion, defendant also submitted the affidavit of an orthopedic surgeon who reviewed plaintiff's medical records at the request of defendant. That expert concluded that the only objective medical findings with respect to any alleged injury related to a preexisting degenerative condition of the spine. "[W]ith persuasive evidence that plaintiff's alleged pain and injuries were

related to a preexisting condition, plaintiff had the burden to come forward with evidence addressing defendant's claimed lack of causation" and, here, plaintiff failed to meet that burden (*Carrasco v Mendez*, 4 NY3d 566, 580; *see Hartman-Jweid v Overbaugh*, 70 AD3d 1399, 1400). Although plaintiff submitted the affirmation of her treating neurosurgeon in opposition to the motion, his affirmation did not address the conclusion of defendant's expert that the changes in the spine of plaintiff were degenerative in nature (*see Marsh v City of New York*, 61 AD3d 552; *Valentin v Pomilla*, 59 AD3d 184, 186). Plaintiff's expert asserted that a central disc protrusion in the cervical spine at C5-6 and C6-C7 was a "new" injury resulting from the motor vehicle accident in question. Defendant's expert, however, established that such injury was revealed on a CT scan taken of plaintiff's cervical spine several years prior to the accident, after plaintiff had fallen down a flight of stairs and fractured a cervical vertebrae at C6. The affirmation of plaintiff's expert did not discuss that CT scan but, rather, it compared plaintiff's condition following the subject accident to an MRI report dated the year prior to the CT scan. In addition, the reports of an orthopedic surgeon submitted by plaintiff failed to address defendant's evidence of a preexisting degenerative condition and the results of the CT scan. We therefore conclude that plaintiff's "submissions in opposition to the motion did not 'adequately address how [her] current medical problems, in light of [her] past medical history, are causally related to the subject accident' " (*Anania v Verdgeline*, 45 AD3d 1473, 1474; *see D'Angelo v Litterer*, 87 AD3d 1357).

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

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

135

CA 11-01472

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

R. BROOKS ASSOCIATES, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HARTER SECREST & EMERY LLP, DEFENDANT-APPELLANT.

GEIGER AND ROTHENBERG, LLP, ROCHESTER (DAVID ROTHENBERG OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROEMER WALLENS GOLD & MINEAUX, LLP, ALBANY (MATTHEW J. KELLY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered April 4, 2011 in a legal malpractice action. The order denied defendant's motion for summary judgment.

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

Memorandum: Defendant appeals from an order denying its motion for summary judgment dismissing the complaint in this legal malpractice action. We agree with defendant that the action is time-barred, and we therefore reverse the order, grant the motion and dismiss the complaint.

Pursuant to CPLR 214 (6), an action to recover damages for legal malpractice must be commenced within three years of accrual. A legal "malpractice claim accrues 'when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court' " (*Guerra Press, Inc. v Campbell & Parlato, LLP*, 17 AD3d 1031, 1032, quoting *Ackerman v Price Waterhouse*, 84 NY2d 535, 541). Here, defendant met its initial burden on the motion by submitting evidence establishing that the alleged malpractice occurred, at the latest, on August 3, 1999 and thus that the action was time-barred when commenced on May 4, 2004.

In opposition to the motion, plaintiff failed to raise a triable issue of fact whether the continuous representation doctrine applied to toll the statute of limitations (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Pursuant to that doctrine, the running of the limitations period is tolled during the time that an attorney continues to represent a client on the matter that is the subject of the malpractice action because the client must be able "to repose

confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered" (*Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1, 9 [internal quotation marks omitted]). The doctrine tolls the limitations period "where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (*McCoy v Feinman*, 99 NY2d 295, 306), and " 'where the continuing representation pertains specifically to [that] matter' " (*International Electron Devices [USA] LLC v Menter, Rudin & Trivelpiece, P.C.*, 71 AD3d 1512, 1513, quoting *Shumsky v Eisenstein*, 96 NY2d 164, 168; *see Chicago Tit. Ins. Co. v Mazula*, 47 AD3d 999, 1000).

Here, although plaintiff submitted bills from defendant for legal work performed within three years of the commencement of the action, it failed to establish that the bills were for work on the matter that was the subject of the alleged malpractice. Indeed, the evidence submitted by defendant established that the last work that it performed for plaintiff with respect to the subject of the alleged malpractice occurred in January or February 2001, and plaintiff failed to submit evidence raising a triable issue of fact whether the work performed after that time was related to the alleged malpractice. We therefore conclude that the evidence submitted by plaintiff established no "more than simply an extended general relationship between the [parties]" (*Zaref v Berk & Michaels*, 192 AD2d 346, 348). Such evidence is insufficient to raise a triable issue of fact whether "(1) plaintiff[] and defendant . . . were acutely aware of the need for further representation[concerning the subject of the alleged malpractice,] i.e., they had a mutual understanding to that effect[], and (2) plaintiff[was] under the impression that defendant . . . was actively addressing [its] legal needs" with respect to the subject of the alleged malpractice (*Williamson*, 9 NY3d at 10). Consequently, the doctrine of continuous representation does not apply, and Supreme Court erred in denying the motion (*see Gotay v Brietbart*, 12 NY3d 894; *see generally Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 295-297).

Defendant's remaining contentions are moot in light of our determination.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

136

CA 11-00868

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

RAUL RIVERA, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 110682.)

THE LEGAL AID SOCIETY, NEW YORK CITY (MILTON ZELERMYER OF COUNSEL), FOR CLAIMANT-APPELLANT.

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

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered July 28, 2010. The order granted the motion of defendant for leave to amend its answer and for summary judgment and dismissed the claim.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of defendant's motion seeking summary judgment dismissing the claims for negligence and medical malpractice and reinstating those claims, and as modified the order is affirmed without costs.

Memorandum: Claimant, an inmate at Auburn Correctional Facility, previously commenced a CPLR article 78 proceeding seeking to annul the determination of the Department of Correctional Services (DOCS) denying him medical treatment for hepatitis C based upon his refusal to participate in the residential substance abuse treatment (RSAT) program. Claimant also sought judgment directing DOCS to provide him with such medical treatment. Supreme Court dismissed the petition, concluding that, inter alia, the determination of DOCS requiring claimant to participate in RSAT as a condition to receiving medical treatment for hepatitis C was not arbitrary and capricious or an abuse of discretion (*Matter of Rivera v Goord*, 10 Misc 3d 302).

Claimant thereafter commenced the instant action seeking damages for injuries allegedly resulting from defendant's denial of medical treatment for hepatitis C. The Court of Claims erred in granting those parts of defendant's motion seeking summary judgment dismissing the claims for negligence and medical malpractice on the ground that those claims are barred by the doctrine of res judicata or collateral estoppel. "In the prior CPLR article 78 proceeding[, claimant] could not have sought the relief [he] seek[s] in this action" (*Margerum v*

City of Buffalo, 63 AD3d 1574, 1580). Moreover, whether defendant was negligent or deviated from accepted standards of care "was not actually and necessarily decided" in that proceeding (*Reynolds v Krebs*, 81 AD3d 1269, 1271). We therefore modify the order accordingly.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

137

CA 11-01710

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

JUDY T. READER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT W. READER, DEFENDANT-APPELLANT.

THE BROCKLEBANK FIRM, CANANDAIGUA (DEREK G. BROCKLEBANK OF COUNSEL), FOR DEFENDANT-APPELLANT.

MERKEL AND MERKEL, ROCHESTER (DAVID A. MERKEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (Philip A. Litteer, R.), entered November 20, 2010 in a divorce action. The judgment, inter alia, equitably distributed the assets of the parties.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Ontario County, for further proceedings in accordance with the following Memorandum: As limited by his brief, defendant appeals from those parts of a judgment of divorce determining that certain assets constituted marital property subject to equitable distribution and valuing those assets. Defendant contends, inter alia, that the Referee erred in determining that a purported bank account at Canandaigua National Bank (hereafter, bank account) constituted marital property subject to equitable distribution. The Referee concluded that the bank account was valued at $194,000, which was to be distributed equally between the parties. In making that determination, the Referee relied upon certain exhibits that were admitted in evidence at trial upon stipulation of the parties, but those exhibits were not included in the record on appeal. In addition, the Referee noted that there was a dispute regarding that bank account, but he failed to indicate the basis upon which he resolved that dispute. In the absence of the evidence upon which the Referee relied in making his determination and the reasoning used to resolve the dispute regarding the bank account, we are unable to review defendant's contention. We therefore hold the case, reserve decision and remit the matter to Supreme Court for a determination with respect to the content of the missing exhibits, after a reconstruction hearing if necessary (*see generally Matter of Garner v Garner*, 88 AD3d 708; *Matter of Wendy L.K. v Jeffrey S.*, 278 AD2d 785), and for the Referee to state the reasoning for his determination that defendant possessed the bank account and for his

valuation thereof.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

139

CA 11-01044

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

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111 MAIN STREET, LLC, PLAINTIFF-APPELLANT,

V ORDER

COUNTY OF NIAGARA, DEFENDANT-RESPONDENT.

GOLDBERG SEGALLA LLP, BUFFALO (BRIAN R. BIGGIE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (BRIAN P. CROSBY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered February 24, 2011. The order, among other things, granted defendant's motion for summary judgment dismissing the complaint.

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

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

140

CA 11-00129

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

GAIL E. RYE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LIFT LINE, INC. AND ROCHESTER GENESEE REGIONAL TRANSPORTATION AUTHORITY, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

CELLINO & BARNES, P.C., ROCHESTER (CHARLES F. BURKWIT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (GRETA K. KOLCON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered April 28, 2010 in a personal injury action. The order denied plaintiff's motion to set aside the jury verdict regarding pain and suffering damages awarded to plaintiff and for a new trial relating to past and future pain and suffering.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the post-trial motion is granted, the verdict is set aside and a new trial is granted on damages for past and future pain and suffering unless defendants, within 30 days of service of a copy of the order of this Court with notice of entry, stipulate to increase the award of damages for past pain and suffering to $45,000 and for future pain and suffering to $15,000, in which event judgment shall be entered accordingly.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained while a passenger on a bus operated by defendants. The incident in question occurred when the bus stopped suddenly and plaintiff was ejected from her wheelchair, causing her to slide head first into a partition located behind the driver's seat. Defendants conceded liability and, after a trial on damages only, the jury awarded plaintiff damages in the amount of $10,000 for past pain and suffering and zero damages for future pain and suffering. We agree with plaintiff that Supreme Court erred in denying her post-trial motion to set aside the verdict and for a new trial on damages inasmuch as the verdict deviates materially from what would be reasonable compensation (*see* CPLR 5501 [c]). Plaintiff's injuries included a slightly displaced fracture of her right femoral medial condyle, i.e., knee joint. The injuries plaintiff sustained in the accident, combined with her preexisting medical conditions, forced her

to spend just over two months in the hospital and a rehabilitation facility. We therefore reverse the order, grant the post-trial motion and set aside the verdict, and we grant a new trial on damages for past and future pain and suffering, unless defendants, within 30 days of service of a copy of the order of this Court with notice of entry, stipulate to increase the award of damages for past pain and suffering to $45,000 and for future pain and suffering to $15,000, in which event judgment shall be entered accordingly (*see Inya v Ide Hyundai, Inc.*, 209 AD2d 1015; *see also LaPort v Bojedla*, 262 AD2d 1025; *cf. Miller v Reynolds*, 298 AD2d 836).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

141

CA 11-00130

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

GAIL E. RYE, PLAINTIFF-APPELLANT,

V ORDER

LIFT LINE, INC. AND ROCHESTER GENESEE REGIONAL TRANSPORTATION AUTHORITY, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

CELLINO & BARNES, P.C., ROCHESTER (CHARLES F. BURKWIT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (GRETA K. KOLCON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered October 28, 2010 in a personal injury action. The order denied plaintiff's motion for leave to renew and reargue.

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: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

144

KA 11-00064

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHAN INSKEEP, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Onondaga County Court (Joseph E. Fahey, J.), dated November 19, 2010. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We reject defendant's contention that County Court erred in granting the request of the Board of Examiners of Sex Offenders for an upward departure from defendant's presumptive level two risk to a level three risk. The court's determination is supported by clear and convincing evidence of " 'an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines' " (*People v McCollum*, 41 AD3d 1187, 1188, *lv denied* 9 NY3d 807). Defendant admitted that, while he was incarcerated in Texas, it was "common practice" to masturbate in the presence of female correction officers and that he therefore sought out women in public places in order to masturbate. Defendant was convicted of attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]), arising from an incident in which he entered a store and began to masturbate in front of a woman who was working alone late at night. He then attacked the woman when she attempted to force him to leave the store. Defendant was also charged in connection with two prior incidents of masturbating in public. Further, defendant had previously been convicted of a violent felony in Texas and was charged with the instant offense after absconding from parole supervision in Texas. Where, as here, " 'the risk of a repeat offense is high and there is a threat to the public safety, a level three designation is appropriate' " (*McCollum*, 41 AD3d at 1188;

see Correction Law § 168-*l* [6] [c]).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

145

TP 11-01688

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

IN THE MATTER OF LASEAN BROWN, PETITIONER,

V MEMORANDUM AND ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI OF COUNSEL), FOR RESPONDENT.

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

It is hereby ORDERED that the determination is unanimously annulled on the law and facts without costs, the petition is granted and respondent is directed to expunge from petitioner's institutional record all references to the violation of inmate rules 102.10 (7 NYCRR 270.2 [B] [3] [i]) and 107.20 (7 NYCRR 270.2 [B] [8] [iii]).

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a Tier III disciplinary hearing, that he violated inmate rules 102.10 (7 NYCRR 270.2 [B] [3] [i] [threats of violence]) and 107.20 (7 NYCRR 270.2 [B] [8] [iii] [false statements]). We agree with petitioner that the determination is not supported by substantial evidence.

Petitioner was charged with violating the two rules at issue based upon allegations that he wrote a threatening letter to a counselor at a correctional facility. Respondent contends that the inmate misbehavior report, the testimony of the correction officer who wrote that report, and several handwriting exemplars submitted by or seized from petitioner constitute substantial evidence establishing that he violated the rules in question. We reject that contention. The misbehavior report contains no firsthand information. Rather, the correction officer who wrote it interviewed a counselor who told him that unnamed inmate informants said that petitioner was going to write a letter after the counselor discharged petitioner from certain duties

at the facility. Similarly, the correction officer who wrote the report testified that he interviewed the counselor and compared the letter that petitioner purportedly wrote to handwriting exemplars that he obtained from petitioner, and the correction officer concluded therefrom that petitioner had written the letter.

It is well settled that misbehavior reports may constitute substantial evidence to support a determination (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139). Where, however, "the misbehavior report was not written by a correction officer who witnessed the conduct in question, the record must contain facts establishing some indicia of reliability to the hearsay before the report may be considered sufficiently relevant and probative to constitute substantial evidence" (*Matter of McIntosh v Coughlin*, 155 AD2d 762, 763). We note that a hearing officer is not required to interview informants to determine the credibility of their hearsay statements in the misbehavior report but, rather, New York courts apply the federal standard that "any reasonable method for establishing the informant's reliability will suffice" to establish the credibility of such inmates (*Matter of Abdur-Raheem v Mann*, 85 NY2d 113, 121). An informant's credibility may be established where the information provided by the informant is "sufficiently detailed" to enable a hearing officer to assess the informant's reliability (*Matter of Debose v Selsky*, 12 AD3d 1003, 1004), or the information provided to the hearing officer establishes that the informant provided the information based on personal knowledge (*cf. Matter of Holmes v Senkowski*, 238 AD2d 629). Here, however, the Hearing Officer had no information to enable him to assess the credibility of the unnamed inmate informants who spoke to the counselor about the letter that petitioner allegedly wrote, and thus the misbehavior report does not constitute substantial evidence supporting the petition (*see Matter of Daise v Giambruno*, 279 AD2d 911, 911-912).

Furthermore, respondent is correct that "the trier of fact (here, the Hearing Officer) may make his or her own comparison of handwriting samples in the absence of expert testimony on the subject . . . Thus, the handwriting samples alone—the . . . letter[] and exemplars—can form the basis for a determination of guilt in a case such as this if there are sufficient similarities between the two to comprise substantial evidence that they were written by the same person" (*Matter of Smith v Coughlin*, 198 AD2d 726, 726). Upon our independent review of those exemplars, we are unable to find that there are sufficient similarities between them "to comprise substantial evidence that they were written by the same person" (*id.*). Consequently, we conclude that the determination is not supported by substantial evidence and must be annulled. Because it appears from the record that petitioner has already served his administrative penalty, the appropriate remedy is expungement of all references to the violations of those rules from his institutional record (*see Matter of Cody v Fischer*, 46 AD3d 1371).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

146

KA 10-01836

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BRANDON C. DODD, ALSO KNOWN AS BRANDON DODD,
DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, 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 September 2, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

147

TP 11-01776

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

IN THE MATTER OF CLETUS LEON, PETITIONER,

V ORDER

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

CLETUS LEON, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Norman I. Siegel, A.J.], entered August 23, 2011) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

149

KA 10-01388

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MARIO J. HODGES, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered June 1, 2010. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

151

KA 11-00200

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REMOND BOWYER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered September 15, 2010. The judgment convicted defendant, upon a jury verdict, of arson in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of arson in the second degree (Penal Law § 150.15). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although a different result would not have been unreasonable, it cannot be said that the jury failed to give the testimony, including the conflicting inferences that may be drawn therefrom, the weight it should be accorded (*see generally id.*). The People presented evidence establishing that the fire was neither accidental nor the result of natural causes, and they presented evidence that defendant had both an opportunity and a motive to set the fire (*see People v Gardner*, 26 AD3d 741, 741-742, *lv denied* 6 NY3d 848). Finally, the sentence is not unduly harsh or severe.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

152

KA 08-02638

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACK COMER, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (SUSAN C. AZZARELLI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered June 30, 2008. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the fourth degree (§ 265.01 [2]). Supreme Court properly denied that part of defendant's omnibus motion seeking to dismiss the indictment pursuant to CPL 30.30 (1) (a) and 210.20 (1) (g). The record supports the court's determination that the People met their burden of establishing that the period of defendant's absence was not chargeable to them by showing that defendant's location was unknown and that he was attempting to avoid apprehension or prosecution (*see* CPL 30.30 [4] [c] [i]; *People v Flagg*, 30 AD3d 889, 891, *lv denied* 7 NY3d 848). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Upon our review of the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, we conclude that defense counsel afforded defendant "meaningful representation" (*People v Baldi*, 54 NY2d 137, 147). Finally, defendant failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct during summation (*see* CPL 470.05 [2]; *People v Romero*, 7 NY3d 911), 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]).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

153

KA 08-02528

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT L. WORDEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered September 2, 2008. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following his plea of guilty, of rape in the third degree (Penal Law § 130.25 [3]). Defendant contends that County Court erred in denying his motion to withdraw his plea because he did not understand the nature of the charge to which he pleaded guilty and thus the plea was not knowingly, voluntarily and intelligently entered. That ground in support of the motion to withdraw the plea is raised for the first time on appeal, however, and thus is not preserved for our review (*see* CPL 470.05 [2]). Rather, defendant's motion was based on a purported recantation by the victim. We conclude that the court properly denied defendant's motion to withdraw his plea on that ground because, as the court properly noted, recantations are inherently unreliable (*see People v Nichols*, 302 AD2d 954, *lv denied* 99 NY2d 657). In any event, the court further noted that the victim's recantation was "equivocal at best." To the extent that defendant may be deemed to challenge the factual sufficiency of the plea allocution, we note that he had failed to preserve his contention for our review (*see People v Lopez*, 71 NY2d 662, 665), and this case does not fall within the rare exception to the preservation requirement (*see id.* at 666). Furthermore, to the extent that defendant's further contention that he was denied effective assistance of counsel survives his plea of guilty (*see People v Carmody*, 90 AD3d 1526), we conclude that it lacks merit (*see*

generally People v Ford, 86 NY2d 397, 404).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

154

KA 10-02424

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VICTORIA L. CONNORS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered November 10, 2010. The judgment convicted defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third degree (two counts) and criminal sale of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of, inter alia, two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). To the extent that defendant's contention that she was denied effective assistance of counsel survives her plea of guilty, we conclude that it is without merit (*see People v Garner*, 86 AD3d 955, 956). Defendant received an advantageous plea, and "nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404).

We also reject defendant's contention that County Court abused its discretion in failing sua sponte to order an examination pursuant to CPL 730.30 (1) in light of her history of mental illness and her psychiatric hospitalization for suicidal ideation. It is well established that a defendant is presumed to be competent and that a "history of psychiatric illness does not in itself call into question defendant's competence to stand trial" (*People v Tortorici*, 92 NY2d 757, 765, *cert denied* 528 US 834). Defendant was represented by two attorneys during the course of the proceedings, who were " 'in the best position to assess defendant's capacity and request an examination,' " and neither of them did so (*People v Chicherchia*, 86 AD3d 953, 954), despite the fact that the court asked the first attorney whether an examination should be conducted while defendant was hospitalized. The court had the opportunity to observe defendant

at the time of her arraignment and during the joint plea-sentencing proceedings, at which time the court questioned defendant regarding her treatment and her understanding of the proceedings. Defendant informed the court that the medication she was taking helped her condition, that it did not impair her ability to understand the proceedings, and that she understood that the decision to plead guilty was her own. We therefore conclude that the court, as well as defendant's own attorneys, had an adequate opportunity to assess her competency.

Defendant contends for the first time on appeal that the court improperly ordered her to pay restitution to a law enforcement agency for buy money without an affidavit attesting, inter alia, that the funds were expended in the actual purchase of a controlled substance, as required by Penal Law § 60.27 (9) (*see People v Diallo*, 88 AD3d 1152, 1153), and thus her contention is not preserved for our review (*see* CPL 470.05 [2]). In any event, defendant agreed to the amount of restitution as a condition of her plea, and she therefore is deemed to have waived her contention (*see People v Farewell* [appeal No. 1], 90 AD3d 1502). Finally, defendant has served the imprisonment portion of her sentence, and we conclude that the imposition of two years of postrelease supervision is not unduly harsh or severe.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

155

CAF 10-02508

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

IN THE MATTER OF ATREYU G. AND REYAUNA G.

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

JANA M., RESPONDENT-APPELLANT,
ET AL., RESPONDENT.

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

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

SUSAN B. MARRIS, ATTORNEY FOR THE CHILDREN, MANLIUS, FOR ATREYU G. AND REYAUNA G.

Appeal from an order of the Family Court, Onondaga County (Martha E. Mulroy, J.), entered December 10, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondents' parental rights and transferred custody of the subject children to petitioner.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the two subject children and ordered that they be freed for adoption. "An appeal from a dispositional order of Family Court brings up for review the propriety of a fact-finding order" (*Matter of Lisa E.* [appeal No. 1], 207 AD2d 983; *see generally Matter of Jason S.*, 36 AD3d 618; *Matter of Baby Boy C.*, 13 AD3d 619). The mother contends that she was denied procedural due process because Family Court conducted a fact-finding hearing in her absence, while she was incarcerated. The mother has raised that contention for the first time on appeal, however, and thus has failed to preserve it for our review (*see Matter of Derrick T.M.*, 286 AD2d 938; *see generally Matter of Vanessa S.*, 20 AD3d 924). In any event, " '[a] parent's right to be present for fact-finding and dispositional hearings in termination cases is not absolute' " (*Matter of Giovannie M.-V.*, 35 AD3d 1244, 1245; *see Matter of Eric L.*, 51 AD3d 1400, 1401, *lv denied* 10 NY3d 716). Here, the court initially adjourned the fact-finding hearing when the mother appeared without

counsel, and the court re-appointed her prior attorney to represent her. The hearing was rescheduled for several weeks later, but the mother failed to appear in court on the adjourned date. Although the mother's attorney appeared, he stated that he had no information regarding the mother's whereabouts, and that she had not met with him to prepare for the hearing. In addition, the record reflects that the mother was aware of the proceeding, that she changed her place of residency frequently throughout the pendency of the proceeding, and that she refused to apprise petitioner or her attorney of her addresses prior to court appearances. Furthermore, although the mother stated that she had been "in jail until that morning," she made no attempt to contact the court or her attorney to seek an adjournment of the hearing, and her statement fails to establish that she was still in jail when the hearing took place. Thus, "[i]n light of the amount of time that the children had spent in foster care and the fact that the mother's attorney vigorously represented her interests at the [fact-finding] hearing, we conclude that the court did not abuse its discretion in conducting the hearing in her absence" (*Matter of La'Derrick J.W.*, 85 AD3d 1600, 1602, *lv denied* 17 NY3d 709).

The mother did not request a suspended judgment and thus failed to preserve for our review her contention that the court should have granted that relief (*see Matter of Rosalinda R.*, 16 AD3d 1063, *lv denied* 5 NY3d 702). "Finally, the mother did not ask the court to consider post-termination contact with the children in question or to conduct a hearing on that issue, and we conclude in any event that she 'failed to establish that such contact would be in the best interests of the children' " (*Matter of Christopher J.*, 60 AD3d 1402, 1403; *see Matter of Andrea E.*, 72 AD3d 1617, *lv denied* 15 NY3d 703).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

156

CAF 11-00439

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

IN THE MATTER OF MCKAYLA J. AND RAYQUAN J.

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

ANNIE 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 MCKAYLA J. AND RAYQUAN J.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered February 1, 2011 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed respondent under the supervision of petitioner.

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

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

157

CAF 11-00826

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

IN THE MATTER OF MICHAEL L.T. SHIELDS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CRYSTAL TOWERY, RESPONDENT-APPELLANT.

LABIN & BUFFOMANTE, WILLIAMSVILLE (CLAYTON J. LENHARDT OF COUNSEL), FOR RESPONDENT-APPELLANT.

CARNEY & GIALLANZA, BUFFALO (JASON R. DIPASQUALE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered August 17, 2010 in a proceeding pursuant to Family Court Act article 4. The order denied the objection of respondent to the order of the Support Magistrate.

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

Memorandum: In this proceeding pursuant to Family Court Act article 4, respondent mother appeals from an order denying her objection to the order of the Support Magistrate that modified a prior order by, inter alia, reducing the weekly child support obligation of petitioner father and his share of child care and unreimbursed health-related expenses. We affirm. The father presented evidence that his income from employment decreased as the result of an involuntary reduction in his overtime hours. The Support Magistrate's determination that his loss of income was sufficiently substantial to warrant a downward modification of his child support obligation is entitled to great deference (*see generally Matter of Manocchio v Manocchio*, 16 AD3d 1126, 1128). Contrary to the mother's contention, moreover, the Support Magistrate properly exercised her discretion in concluding that the amount of rental income calculated at the time of the prior order constituted the most reliable amount to be imputed to the father for purposes of the instant proceeding (*see Matter of Niagara County Dept. of Social Servs. v Hueber*, 89 AD3d 1440; *see generally Matter of Gravenese v Marchese*, 57 AD3d 992, 993).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

158

CAF 11-00694

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

IN THE MATTER OF JAYDEN B. AND NATHAN F.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-APPELLANT; MEMORANDUM AND ORDER

ERICA R., RESPONDENT-RESPONDENT.

NELSON LAW FIRM, MEXICO (ANNALISE M. DYKAS OF COUNSEL), FOR PETITIONER-APPELLANT.

COURTNEY S. RADICK, ATTORNEY FOR THE CHILD, OSWEGO, FOR JAYDEN B.

STEPHANIE N. DAVIS, ATTORNEY FOR THE CHILD, OSWEGO, FOR NATHAN F.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered March 24, 2011 in a proceeding pursuant to Family Court Act article 10. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is granted, and the matter is remitted to Family Court, Oswego County, for further proceedings in accordance with the following Memorandum: We conclude that Family Court erred in determining that petitioner failed to prove by a preponderance of the evidence that the children who are the subject of this proceeding are neglected children based upon, inter alia, domestic violence between respondent and the mother of the children and in therefore dismissing the petition herein (*see* Family Ct Act § 1046 [a]). We note at the outset that the respective Attorneys for the Children did not take an appeal from the order, and thus to the extent that their briefs raise contentions not raised by petitioner, they have not been considered (*see Matter of Sharyn PP. v Richard QQ.*, 83 AD3d 1140, 1143-1144).

Upon our review of the record, we conclude that petitioner established by a preponderance of the evidence that the children were in imminent danger of emotional impairment based upon the alleged incidents of domestic violence between the children's mother and respondent (*see* Family Ct Act § 1012 [f] [i] [B]; *Matter of Afton C.*, 17 NY3d 1, 8-9). We note that, in connection with her admission in the separate neglect proceeding brought against her, the mother admitted that she and respondent "had several disagreements and arguments . . . in the presence of the children and [that] sometimes [the children] were afraid." Respondent failed to appear at the instant fact-finding hearing, and thus we draw the "strongest

inference [against her] that the opposing evidence permits" based upon her failure to testify at the hearing (*Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79; *see Matter of Kennedie M.*, 89 AD3d 1544, 1545).

According to the evidence presented at the fact-finding hearing, when the police responded to the residence on a specified date, both the mother and respondent admitted that they had been engaged in a loud argument in the living room, during which they struck each other. The police officer observed a scratch on the mother's neck, which the mother admitted she received while she and respondent were "fighting." The police officer further observed that the one-year-old child (younger child) was crying in a bedroom, and he described the child as "shook up" and "scared." We conclude that the younger child's proximity to the physical and verbal fighting that occurred in the living room, together with the evidence of a pattern of ongoing domestic violence in the home, placed him in imminent risk of emotional harm (*see Kennedie M.*, 89 AD3d at 1545; *cf. Matter of Larry O.*, 13 AD3d 633).

Although the hearing court's determinations are entitled to great deference (*see generally Matter of Syira W.*, 78 AD3d 1552, 1553), we conclude that the court's determination that the statements of the five-year-old child (older child) were not corroborated is not supported by a sound and substantial basis in the record. "Corroboration, for purposes of article 10 proceedings, is defined to mean '[a]ny other evidence tending to support the reliability of the previous statements' " of the child (*Matter of Christina F.*, 74 NY2d 532, 536), and here we conclude that the older child's statements were sufficiently corroborated.

The caseworker for Child Protective Services testified at the fact-finding hearing that the body language of the older child changed when he spoke about his mother and respondent, and that he refused to talk to her while he was at his mother's house. While at his father's house, however, the older child explained to the caseworker that he did not want to speak with her at his mother's house because his mother repeatedly entered and then left the room. He told the caseworker that his mother and respondent fought often; that respondent had locked them out of the house; and that he was afraid of respondent. He demonstrated with the use of two "Barbie" dolls a physical fight that involved hair-pulling and pushing, which ended with the intervention of a male doll, who represented a police officer. Furthermore, the evidence at the fact-finding hearing established that the police responded to the home of respondent and the mother on several occasions for reports of domestic violence. A neighbor testified that she heard loud fighting between respondent and the mother on a weekly basis and that she observed the police responding to those fights at least once per month. The neighbor further testified that she had seen that the mother had been locked out of the house by respondent on more than one occasion. The child care provider for the children testified that the older child told her on several occasions that respondent hurt his mother, and the child care provider in fact observed a large bruise on the mother's face.

When she questioned the mother about the bruise, the mother explained that it had happened in a bar, but after his mother left the house the older child told the child care provider that "[respondent] did it." We therefore further conclude that the ongoing pattern of domestic violence also placed the older child in imminent risk of emotional harm, thus compelling the conclusion that both children are neglected based upon the actions of respondent (*see Kennedie M.*, 89 AD3d at 1545). We thus reverse the order, grant the petition, and remit the matter to Family Court for a dispositional hearing.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

159

CAF 11-00650

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

IN THE MATTER OF ADELYN RAMIREZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ERIC L. VELAZQUEZ, RESPONDENT-RESPONDENT.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR PETITIONER-APPELLANT.

MARY R. HUMPHREY, NEW HARTFORD, FOR RESPONDENT-RESPONDENT.

ANDREW MICHAEL DUNN, ATTORNEY FOR THE CHILDREN, ONEIDA, FOR MADELYN V., ERIC V. AND LOUIS V.

Appeal from an order of the Family Court, Oneida County (John E. Flemma, J.H.O.), entered March 17, 2011 in a proceeding pursuant to Family Court Act article 6. The order denied the petition.

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

Memorandum: Petitioner mother appeals from an order denying her petition seeking permission for the parties' three children to relocate from Utica to New York City with her. On a prior appeal, we concluded that the mother had established a prima facie case that the relocation was in the best interests of the children and thus that Family Court erred in granting respondent father's motion to dismiss the petition at the close of the mother's proof (*Matter of Ramirez v Velazquez*, 74 AD3d 1756, 1757). We therefore reinstated the petition and remitted the matter to Family Court for further proceedings on the petition (*id.*). Upon remittal, the court continued the hearing, whereupon the father presented evidence regarding his contact and involvement with the children. The record establishes that, upon the consent of the parties, the father has alternate weekend visitation with the children as well as visitation during all school vacations and extensive visitation during the summer. In addition to the agreed-upon visitation schedule, the parties frequently agree to additional visitation between the father and the children when the father is not working, and they occasionally agree to additional visitation at the mother's request. The record further establishes that the children share a close bond with the father's mother and sister, with whom he lives. Furthermore, we note that the Attorney for the Children opposes the relocation petition because of, inter

alia, the negative effect the relocation would have on the relationship between the children and the father. We thus conclude on the record before us that the court properly determined that the relationship between the children and the father, along with other relatives, would be adversely affected by the proposed relocation (*see Matter of Webb v Aaron*, 79 AD3d 1761, 1761-1762). Inasmuch as the court's determination that the best interests of the children will not be served by permitting the mother to relocate with them to New York City is supported by a sound and substantial basis in the record, it will not be disturbed (*see Matter of Murphy v Peace*, 72 AD3d 1626, 1626-1627; *see generally Matter of Tropea v Tropea*, 87 NY2d 727, 738-739).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

160

CAF 11-00162

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

IN THE MATTER OF LASHAWNDA G.

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

SHAWN G., RESPONDENT-APPELLANT.

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

DAVID VAN VARICK, COUNTY ATTORNEY, ROCHESTER (ROBIN UNWIN OF COUNSEL), FOR PETITIONER-RESPONDENT.

LISA J. MASLOW, ATTORNEY FOR THE CHILD, ROCHESTER, FOR LASHAWNDA G.

Appeal from an order of the Family Court, Monroe County (John J. Rivoli, J.), entered December 21, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights and denied respondent post-termination visitation with the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child. Contrary to the father's contention, Family Court did not err in denying his request for post-termination visitation. It is well settled that a parent seeking post-termination visitation must "establish that such contact would be in the best interests of the child[ ]" (*Matter of Andrea E.*, 72 AD3d 1617, 1618, *lv denied* 15 NY3d 703 [internal quotation marks omitted]; *see Matter of Sean H.*, 74 AD3d 1837, 1838, *lv denied* 15 NY3d 708; *Matter of Malashia B.*, 71 AD3d 1493, 1495, *lv denied* 15 NY3d 701). The record establishes that the court reviewed the relevant factors before determining that post-termination visitation was not in the child's best interests (*see Matter of Kahlil S.*, 35 AD3d 1164, 1166, *lv dismissed* 8 NY3d 977). The evidence presented at the hearing established that the father was serving a 50-year to life sentence in state prison, and he admitted that he had a single unsupervised visit with the child in the 18 months preceding the filing of the instant petition. His only other visitation during that period and the pendency of these proceedings occurred when petitioner's employees brought the child for supervised

visitation with the father in jail or in prison. In addition, the child has severe mental challenges and becomes agitated while traveling to the prison. Furthermore, the child has never resided with the father. "We thus conclude that [the father] 'failed to establish that such [post-termination] contact would be in the best interests of the child[ ]' " (*Malashia B.*, 71 AD3d at 1495).

The father further contends that the order erroneously fails to include the court's recommendation that he receive yearly photographs of the child from her foster or adoptive parents. We note, however, that the court expressly noted that its recommendation was not binding on petitioner or any foster or adoptive parents. "The role of the judiciary is to give the rule or sentence . . ., and thus the courts may not issue judicial decisions that can have no immediate effect and may never resolve anything" (*Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354 [internal quotation marks omitted]; *see generally New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 529-531). Consequently, such a mere "recommendation" would not properly be included in an order. In any event, there is no dispute that the recommendation has in fact been communicated to the child's foster parents.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

161

CA 11-01659

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

IN THE MATTER OF DAVID ZEHNER,
PETITIONER-PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION OF JORDAN-ELBRIDGE CENTRAL
SCHOOL DISTRICT, RESPONDENT-DEFENDANT-APPELLANT.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (FRANK W. MILLER OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered January 20, 2011 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment, among other things, adjudged that respondent-defendant violated the Open Meetings Law on three separate occasions.

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

Memorandum: Petitioner-plaintiff (petitioner) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action alleging that respondent-defendant (respondent) engaged in a pattern of violating New York's Open Meetings Law (Public Officers Law § 100 *et seq*.) and seeking reimbursement for his attorney fees. We note at the outset that this is properly only a CPLR article 78 proceeding inasmuch as petitioner does not "challenge the constitutionality of any statutes or regulations" (*Matter of Custom Topsoil, Inc. v City of Buffalo*, 63 AD3d 1511, 1511).

We reject respondent's contention that Supreme Court erred in determining that it violated the Open Meetings Law on three occasions. "Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with [section 105]" (Public Officers Law § 103 [a]). At such an executive session, i.e., "that portion of a meeting not open to the general public" (§ 102 [3]), the topics that may be discussed are circumscribed by statute and include matters involving public safety, proposed, pending or current litigation, collective bargaining, and matters concerning the appointment or employment status of a particular person (§ 105 [1]).

The purpose of the Open Meetings Law is to prevent public bodies from debating and deciding in private matters that they are required to debate and decide in public, i.e., "deliberations and decisions that go into the making of public policy" (*Matter of Sciolino v Ryan*, 81 AD2d 475*; see Matter of Gordon v Village of Monticello*, 87 NY2d 124, 126-127, *revg* 207 AD2d 55 *insofar as appealed from on other grounds*). In this case, the court properly determined that respondent violated the Open Meetings Law on three occasions by merely reciting statutory categories for going into executive session without setting forth more precise reasons for doing so. Given the overriding purpose of the Open Meetings Law, section 105 is to be strictly construed, and the real purpose of an executive session will be carefully scrutinized "lest the . . . mandate [of the Open Meetings Law] be thwarted by thinly veiled references to the areas delineated thereunder" (*Daily Gazette Co. v Town Bd., Town of Cobleskill*, 111 Misc 2d 303, 304 [Sup Ct, Schoharie County 1981]; *see e.g. Gordon*, 207 AD2d 55).

We further reject respondent's contention that the court abused its discretion in awarding attorney fees to petitioner. Pursuant to the Open Meetings Law, "costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party" (Public Officers Law § 107 [2]). Determining the appropriate remedy for respondent's actions is thus expressly a matter of judicial discretion (*see Matter of Sanna v Lindenhurst Bd. of Educ*., 85 AD2d 157, 159, *affd* 58 NY2d 626), and we perceive no abuse of the court's discretion in awarding attorney fees to petitioner (*see Matter of Goetschius v Board of Educ. of Greenburg Eleven Union Free School Dist.*, 281 AD2d 416, 417).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

163

CA 11-00744

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

IN THE MATTER OF YOUNG DEVELOPMENT, INC. AND PEOPLE, INC., PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF WEST SENECA, WEST SENECA TOWN BOARD AND WALLACE C. PIOTROWSKI, SHEILA M. MEEGAN AND DALE F. CLARKE, SAID PERSONS CONSTITUTING THE WEST SENECA TOWN BOARD, RESPONDENTS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (AUDREY SEELEY OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (RALPH C. LORIGO OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated decision, order and judgment) of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered March 1, 2011 in a proceeding pursuant to CPLR article 78. The judgment granted the petition, vacated respondents' denial of petitioners' application for a special permit and directed respondents to issue the special permit.

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

Memorandum: Respondents appeal from a judgment granting the petition to annul the determination of respondent West Seneca Town Board (Board) denying petitioners' application for a special use permit. Preliminarily, we reject respondents' contention that the petition was not timely filed within 30 days of the Board's determination pursuant to Town Law § 274-b (9). Rather, we conclude that, "[b]ecause the petition seeks to review the determination of the . . . Board, the four-month limitation period of CPLR 217 applies" (*Matter of Sucato v Town Bd. of Boston*, 187 AD2d 1045), thus rendering the petition timely filed. We further conclude that Supreme Court properly held that the Board's denial of the application for a special use permit was illegal, arbitrary and capricious and an abuse of discretion (*see generally Matter of Violet Realty, Inc. v City of Buffalo Planning Bd.*, 20 AD3d 901, 902, *lv denied* 5 NY3d 713). It is well settled that town boards have broad discretion and that their determinations should be sustained on judicial review if such determinations have a rational basis in the record (*see Matter of Pelican Point LLC v Hoover*, 50 AD3d 1497, 1498). Furthermore, a

reviewing court may not substitute its judgment for that of a town board, "even if there is substantial evidence supporting a contrary determination" (*Matter of Conway v Town of Irondequoit Zoning Bd. of Appeals*, 38 AD3d 1279, 1280). Here, however, we conclude that there is no support in the record for the Board's determination. Contrary to respondents' contention, petitioners established that the sewer system of respondent Town of West Seneca would have sufficient capacity to support the project and, in any event, petitioners agreed to engage in remediation efforts recommended by the New York State Department of Environmental Conservation. There is no expert evidence in the record that the remediation proposed by petitioners is unsatisfactory. With respect to the comprehensive plan issue, it is well settled that the inclusion of a permitted use in a zoning code "is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood" (*Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d 238, 243). Given the absence of support in the record for the Board's determination, we conclude that the Board impermissibly based its determination on "generalized community objections" (*Matter of Ifrah v Utschig*, 98 NY2d 304, 308).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

164

CA 11-01785

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

GREENHOMES AMERICA, LLC, AS SUCCESSOR BY MERGER TO HUGHESCO, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FARM FAMILY CASUALTY INSURANCE COMPANY, DEFENDANT-RESPONDENT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (HOWARD E. BERGER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered May 10, 2011. The order denied the motion of plaintiff for partial summary judgment on its first cause of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting judgment in favor of defendant on the first cause of action as follows:

> It is ADJUDGED and DECLARED that defendant is not obligated to defend and indemnify plaintiff in the underlying action and is not obligated to pay the attorney's fees and costs incurred by plaintiff in the defense of that action,

and as modified the order is affirmed without costs.

Memorandum: Plaintiff appeals from an order denying its motion for partial summary judgment on the first cause of action seeking, inter alia, a declaration that defendant is obligated to defend and indemnify it in the underlying subrogation action. It is undisputed that there was a de facto merger of plaintiff and HughesCo, Inc. (HughesCo) in September 2005 and that the operations formerly performed by HughesCo remained unchanged following the merger. In November 2005, there was a fire in a residence allegedly caused by plaintiff's negligence in connection with the installation of insulation. In the underlying action, the homeowners' insurer seeks reimbursement for the losses incurred as a result of the alleged negligence of plaintiff and HughesCo, which was sued as a separate entity. Plaintiff commenced the instant action seeking, inter alia, a declaration that defendant is obligated to defend and indemnify it in

the underlying action. We conclude that Supreme Court properly determined that the anti-transfer clause contained in the liability policy issued by defendant to HughesCo prohibited HughesCo from transferring its rights under the policy to plaintiff. That clause unequivocally provides that "[y]our rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual Named Insured."

"As a general matter, New York follows the majority rule that [a no-transfer clause] is valid with respect to transfers that were made prior to, but not after, the loss has occurred . . . The idea behind the majority rule is that, once the insured-against loss has occurred, the policy-holder essentially is transferring a cause of action [or its liability] rather than a particular risk profile" (*Globecon Group, LLC v Hartford Fire Ins. Co.*, 434 F3d 165, 170-171; *see Kittner v Eastern Mut. Ins. Co.*, 80 AD3d 843, 846 n 3, *lv dismissed* 16 NY3d 890; *Cremo Light Co. v Parker*, 118 App Div 845, 847).

We have considered plaintiff's remaining contentions and conclude that they are without merit. Inasmuch as the court failed to declare the rights of the parties in connection with plaintiff's motion for partial summary judgment on the first cause of action, we modify the order accordingly by making the requisite declaration.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01764

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

BELINDA MUHAMMAD, INDIVIDUALLY AND AS MOTHER AND NATURAL GUARDIAN OF ASALAH ABDUL-MAALIX, AN INFANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN K. FITZPATRICK, M.D., CATHOLIC HEALTH SYSTEMS, SISTERS OF CHARITY FAMILY HEALTH CENTER AND SISTERS OF CHARITY HOSPITAL OF BUFFALO, DEFENDANTS-APPELLANTS.

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

LAW OFFICES OF JOSEPH M. LICHTENSTEIN, P.C., MINEOLA (JOSEPH M. LICHTENSTEIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered February 15, 2011 in a medical malpractice action. The order, among other things, granted plaintiff's motion to preclude.

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

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries sustained by her infant daughter while plaintiff was giving birth to her. Defendants appeal from an order granting plaintiff's pretrial motion to preclude defendants' experts from testifying with respect to the defense theory that the injuries sustained by plaintiff's daughter were caused by the birthing process, and thus were unrelated to any action by defendants. We conclude on the record before us that Supreme Court did not abuse its discretion in granting plaintiff's motion.

Initially, we note that "it is axiomatic that a pretrial order which limits the legal theories of liability to be tried will constitute an appealable order . . . [but] an order which merely limits the admissibility of evidence, even when made in advance of trial on motion papers, constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission" (*Strait v Arnot Ogden Med. Ctr.*, 246 AD2d 12, 14 [internal quotation marks omitted]). Here, we conclude that the order in question is "[a]n order deciding . . . a motion [that] clearly involves the merits of

the controversy . . . and affects a substantial right . . . and thus is appealable" (*Rondout Elec. v Dover Union Free School Dist.*, 304 AD2d 808, 811; *see Matter of City of New York v Mobil Oil Corp.*, 12 AD3d 77, 80-81).

Based on the record before us, we conclude that the court did not abuse its discretion in precluding the testimony pursuant to *Frye v United States* (293 F 1013). We agree with plaintiff that defendants' theory that the claimed injuries to her daughter were sustained as the result of the birthing process was a novel theory subject to a *Frye* analysis, and that defendants failed to rebut plaintiff's showing that their theory was not generally accepted within the relevant medical community.

Furthermore, even assuming, arguendo, that the evidence was admissible under the *Frye* test, we conclude that the court did not err in precluding evidence of defendants' theory on the ground that it lacked an adequate foundation for its admissibility. "The *Frye* inquiry is separate and distinct from the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case" (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 447, *rearg denied* 8 NY3d 828). Contrary to defendants' contention, *Parker*'s applicability is not confined to toxic tort cases (*see Lugo v New York City Health & Hosps. Corp.*, 89 AD3d 42, 62; *Rowe v Fisher*, 82 AD3d 490, 491). Therefore, the opinion of defendants' experts on causation should set forth the "exposure [of plaintiff's daughter] to a [harmful in utero event], that the [event] is capable of causing the particular [injury] (general causation) and that plaintiff[']s daughter] was exposed to [a sufficiently harmful event] to cause the [injury] (specific causation)" (*Parker*, 7 NY3d at 448). Even if it can be said that defendants established that plaintiff's daughter was exposed to a harmful event unrelated to their actions with respect to her birth, we conclude that the court properly determined that defendants failed to meet both the specific causation and general causation prongs of the test set forth in *Parker* and thus that the court properly refused to admit the testimony at issue.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01107

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

THE ERIE COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BETH L. HOSKINS, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered August 13, 2010. The order, among other things, directed plaintiff to return a specified number of horses to defendant.

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

Memorandum: Plaintiff appeals from an order that, inter alia, directed it to return 40 horses to defendant, which were seized pursuant to a warrant. After receiving complaints that defendant had failed to provide adequate care for the animals housed on her property, plaintiff executed a warrant and thereby seized 73 horses and 51 cats from defendant. The animals were kept in plaintiff's custody and, according to the complaint, defendant violated Agriculture and Markets Law § 353 and was charged by the Erie County District Attorney with 10 misdemeanor counts of cruelty to animals. This action was commenced by plaintiff seeking, inter alia, reimbursement in a minimum amount of $125,000 "for all reasonable expenses incurred in caring for and sheltering the subject animals since the date of seizure." Plaintiff's contention that Supreme Court lacked statutory authority under the Agriculture and Markets Law, or otherwise, to order that seized animals be returned to their owner is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In any event, plaintiff's contention lacks merit. While plaintiff's ability to obtain a warrant to enter private property and seize privately owned animals is necessarily dependant on statutory authority (*see* Agriculture and Markets Law §§ 353, 372), the ability of an owner to seek the return of the seized property and a court's inherent authority to order that such property be returned is founded on

principles of due process (*see Fuentes v Shevin*, 407 US 67, 86, *reh denied* 409 US 902; *see generally Property Clerk of Police Dept. of City of N.Y. v Harris*, 9 NY3d 237, 246). Indeed, the Supreme Court has expressly stated that due process protection extends to "[a]ny significant taking of property" (*Fuentes*, 407 US at 86). We have considered plaintiff's remaining contentions and conclude that they are without merit.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01544

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

LOUISE RAMUNNO, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

PAUL RAMUNNO, DEFENDANT-APPELLANT-RESPONDENT.

DEBORAH J. SCINTA, BUFFALO, FOR DEFENDANT-APPELLANT-RESPONDENT.

BARBARA A. KILBRIDGE, BUFFALO, FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered April 29, 2011. The order, among other things, declared null and void those clauses of an Antenuptial Agreement which could be read as plaintiff's waiver of maintenance or distribution of defendant's pension.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the determination that those clauses in the parties' Antenuptial Agreement that could be interpreted as plaintiff's waiver of maintenance or distribution of defendant's pension are null and void and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking a determination that the parties' Antenuptial Agreement is null and void on the grounds of duress and overreaching. Following a hearing, Supreme Court properly determined that defendant's threat to cancel the wedding unless plaintiff signed the agreement does not amount to duress (*see Colello v Colello*, 9 AD3d 855), and that the circumstances surrounding the execution of the agreement do not support a finding of overreaching (*see Darrin v Darrin*, 40 AD3d 1391, 1393, *lv dismissed* 9 NY3d 914; *Cron v Cron*, 8 AD3d 186, *lv dismissed* 7 NY3d 864, *lv denied* 10 NY3d 703). The court erred, however, in sua sponte determining that plaintiff could not, prior to the marriage, waive her right to equitable distribution of defendant's pension (*see Strong v Dubin*, 75 AD3d 66, 72-73; *see generally* Domestic Relations Law § 236 [B] [3] [2]), or her right to maintenance (*see generally* § 236 [B] [3] [3]). We therefore modify the order accordingly.

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01788

PRESENT: SMITH, J.P., SCONIERS, GORSKI, AND MARTOCHE, JJ.

CORNELL DAVIS, JR., CLAIMANT-RESPONDENT,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 114998.)
(APPEAL NO. 1.)

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

MULDOON & GETZ, ROCHESTER (JON P. GETZ OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered February 2, 2010. The order, among other things, granted claimant's motion for partial summary judgment on the issue of liability.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01800

PRESENT: SMITH, J.P., SCONIERS, GORSKI, AND MARTOCHE, JJ.

CORNELL DAVIS, JR., CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 114998.)
(APPEAL NO. 2.)

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

MULDOON & GETZ, ROCHESTER (JON P. GETZ OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Renee Forgensi Minarik, J.), entered March 25, 2011. The judgment awarded claimant the sum of $149,985 against defendant.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, and the claim is dismissed.

Memorandum: Claimant commenced this action seeking damages for defendant's alleged breach of a statutory duty owed to claimant under Correction Law former § 601-a. In 2001, claimant pleaded guilty to a nonviolent, class E felony. Because claimant was a second felony offender, the maximum period of incarceration to which he could be sentenced was an indeterminate term of two to four years. Claimant was sentenced, however, to a determinate term of incarceration of four years, to be followed by five years of postrelease supervision (PRS).

An employee with the Department of Correctional Services (DOCS) noticed the error and informed the sentencing court thereof. No further action was taken by DOCS or the sentencing court, and claimant was released to PRS on December 10, 2004. While claimant was on PRS he had multiple PRS violations and was reincarcerated. Eventually, claimant learned that his original sentence was unlawful, and he moved pursuant to CPL 440.20 to set aside his original sentence. On January 29, 2008, claimant's original sentence was set aside as unlawful, and he was resentenced to an indeterminate term of incarceration of two to four years, with a maximum expiration date of July 9, 2005.

Claimant moved for partial summary judgment on the issue of liability, alleging that DOCS had a duty under Correction Law former §

601-a to inform the District Attorney of claimant's unlawful sentence, rather than the sentencing court. The Court of Claims granted the motion on the ground that, based on former section 601-a, defendant had breached a duty owed to claimant, and that the breach resulted in claimant's unlawful confinement. After a brief trial on the issue of damages, the court by the judgment on appeal awarded claimant monetary damages for his unlawful confinement. Defendant contends that the court erred in doing so, and we agree.

We reject defendant's narrow interpretation of its obligations under Correction Law former § 601-a. " '[W]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning' " (*Pultz v Economakis*, 10 NY3d 542, 547; *see Kash v Jewish Home & Infirmary of Rochester, N.Y., Inc.*, 61 AD3d 146, 149), and there is no need to resort to rules of construction (*see generally Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 107). Here, the plain meaning of former section 601-a is that the warden had a duty to contact the District Attorney when a person was sentenced as a multiple felony offender and the warden believed that the person was erroneously sentenced. Claimant thus was correct in contending in support of his motion for partial summary judgment on liability that this case falls within the plain meaning of the former statute, and that the District Attorney should have been contacted.

Nevertheless, we agree with defendant that it is not liable to claimant because there is no private right of action under Correction Law former § 601-a. Although defendant did not advance that contention before the trial court, we conclude that it is "[a] question of law appearing on the face of the record . . . [that] could not have been avoided by the opposing party if brought to its attention in a timely manner," and thus it may be raised for the first time on appeal (*Oram v Capone*, 206 AD2d 839, 840). Pursuant to the plain language of the statute, there is no explicit private right of action under former section 601-a, and such a private right of action therefore must be inferred from the former statute in order for claimant to recover for breach of a duty owed to him under that statute (*see Sheehy v Big Flats Community Day*, 73 NY2d 629, 633-634). Such a private right of action may not be inferred here, however, because to do so "would be inconsistent with the legislative scheme" (*McLean v City of New York*, 12 NY3d 194, 200; *see generally Uhr v East Greenbush Cent. School Dist.*, 94 NY2d 32, 38-42). It is beyond cavil that the Legislature knew how to include a private right of action in the former statute if it intended to do so and, "[c]onsidering that the statute gives no hint of any private enforcement remedy for money damages," we will not infer that the Legislature in fact intended to do so (*Mark G. v Sabol*, 93 NY2d 710, 721). We therefore conclude that the court erred in finding defendant liable to claimant under the former statute and in granting judgment in favor of claimant.

To the extent that claimant contends as an alternative ground for affirmance that defendant's actions were not privileged, that contention is without merit (*see Collins v State of New York*, 69 AD3d 46, 51-52). Finally, claimant contends as an alternative ground for affirmance that there was a valid, nonstatutory cause of action

against defendant because DOCS created a special relationship with claimant when it notified the sentencing court of the error. That contention is not properly before us because it was not raised before the trial court (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985), and in any event it is without merit. There is no evidence in the record that claimant knew of the letter to the sentencing court and justifiably relied on the affirmative undertaking of DOCS in communicating with that court (*see McLean*, 12 NY3d at 201-202; *cf. De Long v County of Erie*, 60 NY2d 296, 305).

Entered: January 31, 2012

Frances E. Cafarell
Clerk of the Court