SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 8, 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. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

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CA 11-01783

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

DALE M. GARDNER AND SHERRY GARDNER,
PLAINTIFFS-RESPONDENTS,

V ORDER

STIVERS SENECA MARINE, INC., ROBERT STIVERS,
AND ROBERT J. BLOOD, DEFENDANTS-APPELLANTS.

DAVIDSON FINK LLP, ROCHESTER (PAUL D. KELLY OF COUNSEL), FOR DEFENDANTS-APPELLANTS STIVERS SENECA MARINE, INC. AND ROBERT STIVERS.

HURWITZ & FINE, P.C., BUFFALO (TODD C. BUSHWAY OF COUNSEL), FOR DEFENDANT-APPELLANT ROBERT J. BLOOD.

LAW OFFICES OF JAMES MORRIS, BUFFALO (WILLARD M. POTTLE, JR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered December 7, 2010. The order denied the motions of defendants for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for plaintiffs and defendants Stivers Seneca Marine, Inc. and Robert Stivers on October 11, 2011, and upon reading the stipulation of discontinuance signed by the attorneys for plaintiffs and defendant Robert J. Blood on October 4, 2011 and filed in the Ontario County Clerk’s Office on February 24, 2012,

It is hereby ORDERED that said appeals are dismissed without costs upon stipulation.

All concur except GORSKI, J., who is not participating.

Entered: June 8, 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 08-00634

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VICTOR A. DEPONCEAU, DEFENDANT-APPELLANT.

LORENZO NAPOLITANO, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Stephen R. Sirkin, A.J.), rendered February 22, 2008. The judgment convicted defendant, upon a jury verdict, of conspiracy in the second degree (two counts) and conspiracy in the fifth degree (two counts).

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of two counts each of conspiracy in the second degree (Penal Law § 105.15) and conspiracy in the fifth degree (§ 105.05 [1]), defendant contends that the August 5, 2005 extension to the eavesdropping warrant violated CPL 700.20 (2) (b) (iv), which was applicable to the extension pursuant to CPL 700.40. Inasmuch as defendant moved to suppress conversations intercepted pursuant to the warrant on a different ground at trial, he failed to preserve his present contention on appeal for our review (*see People v Manuli*, 156 AD2d 388, *lv denied* 75 NY2d 870; *see also People v Di Stefano*, 38 NY2d 640, 646-647; *see generally People v Tutt*, 38 NY2d 1011, 1012-1013; *People v Poole*, 55 AD3d 1354, 1355, *lv denied* 11 NY3d 929). 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 further contends that County Court erred in allowing him to proceed pro se at trial because his waiver of the right to counsel was not unequivocal, voluntary and intelligent. We reject that contention. Throughout these proceedings, defendant had four separate attorneys assigned to represent him. He was not satisfied with any of them and sought to have each replaced. The court properly denied defendant’s request to appoint a fifth attorney inasmuch as defendant did not present good cause for a substitution of counsel (*see People v Medina*, 44 NY2d 199, 207-208; *cf. People v Sides*, 75 NY2d 822, 824-825). When faced with the denial of his request,

defendant, "who was not totally unfamiliar with criminal procedure, so determinedly and so unequivocally insisted on rejecting counsel and proceeding [pro se], the court had no recourse but to permit him to do so" (*Medina*, 44 NY2d at 209; *see People v Allen*, 4 AD3d 479, *lv denied* 2 NY3d 795; *People v Robinson*, 244 AD2d 364, *lv denied* 91 NY2d 875, 879). We likewise conclude that the court conducted the requisite " 'searching inquiry' to insure that defendant's request to proceed pro se was accompanied by a 'knowing, voluntary and intelligent waiver of the right to counsel' " (*People v Providence*, 2 NY3d 579, 580, quoting *People v Arroyo*, 98 NY2d 101, 103; *see People v Duffy*, 299 AD2d 914, *lv denied* 99 NY2d 628; *People v Outlaw*, 184 AD2d 665, *lv denied* 80 NY2d 932).

We reject defendant's further contention that the court's imposition of consecutive sentences of an indeterminate term of incarceration of 10 to 20 years on each count of conspiracy in the second degree was illegal. "[S]entences imposed for two or more offenses may not run consecutively: (1) where a single act constitutes two offenses, or (2) where a single act constitutes one of the offenses and a material element of the other" (*People v Laureano*, 87 NY2d 640, 643; *see* Penal Law § 70.25 [2]; *People v Arroyo*, 93 NY2d 990, 991). "In resolving whether concurrent sentences are required, the sentencing court must first examine the statutory definitions of the crimes for which defendant has been convicted . . . [and] . . . determine whether the *actus reus* element is, by definition, the same for both offenses (under the first prong of the statute), or if the *actus reus* for one offense is, by definition, a material element of the second offense (under the second prong). If it is neither, then the People have satisfied their obligation of showing that concurrent sentences are not required" (*People v Taveras*, 12 NY3d 21, 25 [internal quotation marks omitted]). The crime of conspiracy in the second degree has two elements: the agreement to commit or to cause the commission of a class A felony (Penal Law § 105.15), and the overt act in furtherance thereof (*see* § 105.20; *People v McGee*, 49 NY2d 48, 57-58, *cert denied sub nom. Waters v New York*, 446 US 942; *People v Hamilton*, 263 AD2d 966, 967, *appeal dismissed* 94 NY2d 915; *cf. People v Hiladrio*, 291 AD2d 221, 222, *lv denied* 98 NY2d 676; *People v Miller*, 284 AD2d 724, 725, *lv denied* 97 NY2d 678, 685). Both elements constitute a distinct *actus reus*.

We conclude that the People satisfied their obligation of showing that concurrent sentences are not required. Addressing first the second prong of Penal Law § 70.25 (2), we conclude that, by definition, the *actus rei* of conspiracy, i.e., the agreement and an overt act, are not material elements of a second offense of conspiracy.

With respect to the first prong of Penal Law § 70.25 (2), the statutory elements of counts one and two are, by definition, identical inasmuch as they charge the same offense. That, however, does not end the inquiry. Even where there is some overlap in the elements of multiple statutory offenses, consecutive sentences can still be imposed if the People can demonstrate that the " 'acts or omissions'

committed by defendant were separate and distinct acts" (*Laureano*, 87 NY2d at 643; *see People v Frazier*, 16 NY3d 36, 41). Defendant contends that, because many of the overt acts alleged in the indictment are the same for both offenses, it is impossible to know whether the acts or omissions committed by defendant were separate and distinct *actus rei*. We conclude, however, that defendant's contention lacks merit. Where, as here, a defendant agrees to commit or to cause the commission of two separate and distinct class A felonies, i.e., the murder of two individuals, there are in fact two separate and distinct agreements, even if the same overt act is committed in furtherance of each. Thus, we conclude that the acts committed by defendant, i.e., the separate and distinct agreements, were separate and distinct acts (*cf. People v Kadry*, 63 AD3d 856, 857, *appeal dismissed* 13 NY3d 903). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: June 8, 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 11-00084

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

IN THE MATTER OF DREVONNE G., DESTINY G., AND DANTE G.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

DARRELL G., SR., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

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

BERNADETTE M. HOPPE, ATTORNEY FOR THE CHILD, BUFFALO, FOR DESTINY G.

KATHLEEN M. CONTRINO, ATTORNEY FOR THE CHILD, NORTH TONAWANDA, FOR DANTE G.

EUGENE P. ADAMS, ATTORNEY FOR THE CHILD, BUFFALO, FOR DREVONNE G.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered November 30, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent abandoned the subject children and transferred respondent's guardianship and custody rights to petitioner.

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

Memorandum: Respondent father appeals from an order terminating his parental rights with respect to his three children on the ground of abandonment. The father contends that his parental rights may not be terminated because the children's mother retained her parental rights and the children were not freed for adoption. We reject that contention (*see Matter of Cayden L.R.*, 83 AD3d 1550; *Matter of Peter GG.*, 33 AD3d 1104, 1105; *see also Matter of Charles FF.*, 44 AD3d 1137, 1139, *lv denied* 9 NY3d 817). Although "Social Services Law § 384-b clearly encourages placing children in permanent homes, its language does not prohibit termination of parental rights when the children are not freed for adoption" (*Peter GG.*, 33 AD3d at 1105). We conclude that Family Court properly terminated the father's parental rights inasmuch as petitioner established by clear and convincing evidence that the father "evince[d] an intent to forego his . . . parental rights and obligations" (§ 384-b [5] [a]; *see Matter of Annette B.*, 4 NY3d 509, 513, *rearg denied* 5 NY3d 783; *Matter of Julius P.*, 63 NY2d

477, 481). Contrary to his contention, the father failed to demonstrate that "there were circumstances rendering contact with the child[ren] or [petitioner] infeasible, or that he was discouraged from doing so by [petitioner]" (*Matter of Regina A.*, 43 AD3d 725, 725; *see also Matter of Alexander B.*, 277 AD2d 937; *Matter of Markus R.*, 273 AD2d 919).

Entered: June 8, 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 11-02068

PRESENT: CENTRA, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

MICHEL D. TYSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LAWRENCE NAZARIAN, DEFENDANT-RESPONDENT.

PARISI & BELLAVIA, ROCHESTER (TIMOTHY C. BELLAVIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BURGIO, KITA & CURVIN, BUFFALO (HILARY C. BANKER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered August 15, 2011 in a personal injury action. The order and judgment granted the motion of defendant for summary judgment, dismissed the complaint and denied the motion and cross motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when a vehicle operated by defendant collided with her vehicle in March 2008. According to plaintiff, her prior back and neck injuries were exacerbated by the accident. Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) and denied plaintiff's "motion and cross motion" for summary judgment on the issues of negligence and serious injury. Defendant met his initial burden on the motion "by submitting medical records and reports constituting 'persuasive evidence that plaintiff's alleged pain and injuries were related to . . . preexisting condition[s]' " rather than the 2008 accident (*Spanos v Fanto*, 63 AD3d 1665, 1666). Plaintiff's medical records demonstrated that she sustained injuries from a March 2002 motor vehicle accident. Plaintiff complained to her medical providers of severe neck and lower back pain after the 2002 accident and, in May 2006, she underwent a spinal fusion. In November 2006 she obtained Social Security disability benefits for a " 'severe' impairment" consisting of "lumbar back problems and status post surgery, with chronic pain." Plaintiff continued to complain of neck pain and lower back pain until the date of the 2008 accident.

Defendant also submitted the report of a physician who reviewed

plaintiff's medical records and examined her on defendant's behalf. The physician opined that "[t]he symptoms that [plaintiff] had before [and after] March . . . 2008 . . . are essentially one in the same," and that there were no new abnormalities or disc problems attributable to the 2008 accident. Defendant submitted the affirmation of another physician who reviewed plaintiff's medical records at defendant's request, and he also concluded that plaintiff's "imaging studies that were performed prior to and subsequent to the [2008] accident . . . are essentially the same[, and her] cervical spine and lumbar spine complaints prior to and subsequent to the [2008] motor vehicle accident . . . are virtually the same." In addition, defendant submitted the affirmation of a third physician who reviewed plaintiff's diagnostic films, and he too found no evidence of a traumatic injury to the spine attributable to the 2008 accident.

The burden therefore shifted to plaintiff "to come forward with evidence addressing defendant's claimed lack of causation" (*Carrasco v Mendez*, 4 NY3d 566, 580). Plaintiff submitted the affidavit of her treating physician, who noted "a significant disc herniation broad based with foraminal encroachment at L4-L5" on an MRI performed after the 2008 accident and recommended surgery. In April 2009 he performed "an acute discectomy at L4-5 with posterior lumbar interbody fusion to repair the L4-5," but plaintiff continued to have back pain after the surgery. Plaintiff's treating physician opined that the 2008 accident caused the "large lumbar disc herniation at L4-5" and accounted for a persistent worsening of her pain symptoms. Although that affirmation was sufficient to raise a triable issue of fact concerning the existence of a new injury, plaintiff failed to raise a triable issue of fact whether she had any new physical symptoms, i.e., worsening of her pain or limitations, that were attributable to the 2008 accident. Once defendant met his initial burden, plaintiff's treating physician was required "to adequately address plaintiff's preexisting . . . condition" (*Franchini v Palmieri*, 1 NY3d 536, 537). In light of the evidence submitted by defendant establishing that plaintiff had no new symptoms or pain complaints after the 2008 accident, plaintiff was required to offer some explanation with respect to how her current limitations were caused by that accident rather than the preexisting condition. In the event that plaintiff's treating physician was unable to do so by giving a quantitative comparison of plaintiff's limitations before and after the 2008 accident, he was required to give a qualitative comparison (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351). Here, however, he failed to provide either comparison. His statement that plaintiff had a "persistent worsening" of symptoms was conclusory, and he "failed to refute the opinion of defendant's expert[s] that plaintiff did not sustain a functional disability or limitation related to the [2008] accident by, for example, comparing plaintiff's pre- and post-accident range of motion restrictions in her neck or back or assessing her pre- and post-accident qualitative limitations" (*Overhoff v Perfetto*, 92 AD3d 1255, 1256).

In light of our determination, we do not address plaintiff's contention that she is entitled to summary judgment on the issue of defendant's negligence.

All concur except SCONIERS and MARTOCHE, JJ., who dissent and vote to modify in accordance with the following Memorandum: We respectfully dissent because we conclude that there are issues of fact with respect to whether plaintiff sustained a serious injury under the categories for "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system" within the meaning of Insurance Law § 5102 (d) as a result of the subject March 2008 accident (hereafter, 2008 accident). While plaintiff clearly suffered a serious injury to her back in 2002 that resulted in surgery in 2006, as well as significant ongoing pain and limitations, the evidence submitted by plaintiff in opposition to defendant's motion for summary judgment dismissing the complaint was sufficient to raise issues of fact with respect to whether plaintiff also sustained a serious injury in the 2008 accident.

In his affidavit, plaintiff's treating surgeon determined that an MRI taken after the 2008 accident "revealed a significant disc herniation broad based with foraminal encroachment at L4-[]5," which did not appear on several pre-accident lumbar spine MRIs. He opined "to a reasonable degree of medical certainty that the [2008] accident [caused that] large lumbar disc herniation at L4-5[and] account[ed] for a persistent worsening of [plaintiff's] pain symptoms." The treating surgeon further concluded that plaintiff's "pain symptoms, physical limitations and limitations with respect to activities of daily life caused by her lumbar large disc herniation at L4-5 should be considered both permanent and the direct result of the [2008] accident . . . ." He stated that the "traumatic injury to [plaintiff's] lumbar spine at L4-[]5 . . . necessitated surgery, [i.e.,] an acute discectomy at L4-5 with posterior lumbar interbody fusion."

Another of plaintiff's treating physicians compared her 2006 and 2008 MRIs, noting that the 2008 MRI "revealed a new disc herniation at L4-5." That physician opined that the 2008 accident resulted in both the L4-5 herniation and "an exacerbation of [plaintiff's] pre[]existing condition at L5-S1," which caused "increased symptoms and new symptoms . . . from which [plaintiff now] suffers." The physician further stated that those symptoms affected "any activities of daily life which require standing, sitting or walking for more than a brief period of time." In addition, in her reply papers, plaintiff submitted the report of a physician who examined plaintiff on behalf of her insurance company and found that plaintiff's "conditions are causally related to the [2008] accident" and that, if she was employed, her restrictions would include no prolonged positioning of the neck, overhead reaching, repetitive reaching, bending, twisting, stooping or lifting of greater than 15 to 20 pounds. Moreover, one of the physicians who examined plaintiff on behalf of defendant's insurance company opined, after his first examination of plaintiff, "that 75% of [plaintiff's] current disability with respect to the neck and back is due to the injury [resulting from the 2008 accident] and 25% [is] due to the prior injury and the documented disc abnormalities that were noted after the injury of 2002." While that physician later asserted that such opinion was expressed before he was fully and accurately informed of the extent of plaintiff's physical condition

prior to the 2008 accident, the physician's repudiation of his prior opinion presents an issue for the finder of fact.

Based on that evidence and other evidence in the record, we conclude that plaintiff presented objective proof in evidentiary form that she sustained a new injury in the 2008 accident and, in addition to the pain and limitations caused by that new injury, plaintiff lost all movement of her spine at L4-5 as a result of surgery in 2009 and suffered residual pain and limitations resulting from that surgery. While "an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury . . . [, an] expert's *qualitative* assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350). We conclude that the evidence submitted by plaintiff in opposition to defendant's motion was sufficient to raise issues of fact based on that standard. Moreover, we fear that the majority's conclusion to the contrary sets an almost impossible standard for persons with preexisting injuries and conditions to have their cases heard by a jury when those persons are injured in subsequent motor vehicle accidents.

In *Perl v Meher* (18 NY3d 208, 214), the Court of Appeals, quoting its decision in *Pommells v Perez* (4 NY3d 566, 571), noted that "[n]o-fault abuse still abounds today" and "that many courts, including ours, approach claims that soft-tissue injuries are 'serious' with a 'well-deserved skepticism.' " Nevertheless, in two of the three cases decided under *Perl*, the Court concluded that "the evidence [the] plaintiffs . . . put forward [was] legally sufficient" and that "the role of skeptic is properly reserved for the finder of fact" (18 NY3d at 215). Specifically, the Court held that the "plaintiffs' evidence of serious injury in [those two cases was] legally sufficient, [even though] both cases have troubling features" (*id*. at 219), which in one case included the sworn assertion by a defense physician accusing the plaintiff of malingering. Nevertheless, "[t]he issue presented by [such] evidence, of course, is one of credibility, which is not for this Court to decide" (*id*.). Moreover, the Court in *Perl* determined that "a rule requiring 'contemporaneous' numerical measurements of range of motion could have perverse results[because p]otential plaintiffs should not be penalized for failing to seek out, immediately after being injured, a doctor who knows how to create the right kind of record for litigation" (*id*. at 218). The Court "therefore reject[ed] a rule that would make contemporaneous quantitative measurements a prerequisite to recovery" (*id*.). The extraordinary burden the majority appears to be placing on automobile accident plaintiffs who have preexisting injuries or conditions "could have [even more] perverse results" by penalizing plaintiffs for not being prepared at all times with " 'contemporaneous' numerical measurements of [their] range of motion" (*id*.), inasmuch as no one can ever know if or when an automobile accident is going to occur. While the majority is understandably skeptical of the plaintiff's serious injury claims, as well as her credibility, this is one case where "the

role of skeptic is properly reserved for the finder of fact" (*id.* at 215).

Given the result reached by our colleagues in the majority, they understandably did not address the merits of plaintiff's contention that she is entitled to partial summary judgment on the issue of defendant's negligence. However, given that defendant turned left in front of plaintiff, who had the right-of-way, there can be no doubt that the evidence establishes as a matter of law that defendant was negligent and that his negligence was the sole proximate cause of the 2008 accident (*see Rogers v Edelman*, 79 AD3d 1803, 1804; *Guadagno v Norward*, 43 AD3d 1432, 1433). We would therefore modify the order and judgment by denying those parts of defendant's motion for summary judgment dismissing plaintiff's claims under the permanent consequential limitation of use and significant limitation of use categories of serious injury and granting that part of plaintiff's "motion and cross motion" for partial summary judgment on the issue of defendant's negligence.

Entered: June 8, 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 11-01973

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

LYNN STOCK, INDIVIDUALLY AND AS ADMINISTRATRIX
OF THE ESTATE OF DALE MCGLEN, DECEASED,
PLAINTIFF-RESPONDENT,

V ORDER

DENNIS DALY, M.D. AND LORETTO HEALTH AND
REHABILITATION CENTER, DEFENDANTS-APPELLANTS.

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

DINKES & SCHWITZER, P.C., NEW YORK CITY (LEIGH BERNSTEIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered May 3, 2011. The order, inter alia, denied the motion of defendants to preclude plaintiff from offering expert testimony and granted the cross motion of plaintiff to have the case marked off the calendar for restoration within one year.

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

Entered: June 8, 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 08-01439

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD G. KIRK, SR., DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (PAUL V. MULLIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD G. KIRK, SR., DEFENDANT-APPELLANT PRO SE.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (MICHAEL G. CIANFARANO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (James W. McCarthy, J.), rendered March 19, 2008. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree (4 counts), sexual abuse in the first degree (11 counts), sexual abuse in the second degree (4 counts) and endangering the welfare of a child (6 counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law and as a matter of discretion in the interest of justice by reversing those parts convicting defendant of endangering the welfare of a child under counts 11-14 and 35-36 of the indictment and dismissing those counts and by reversing those parts convicting defendant of criminal sexual act in the first degree under counts 2-4, sexual abuse in the first degree under counts 5-6, 19-20, 22 and 24 and sexual abuse in the second degree under counts 7 and 26-27 and dismissing those counts without prejudice to the People to re-present any appropriate charges under those counts of the indictment to another grand jury, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of 4 counts of criminal sexual act in the first degree (Penal Law § 130.50 [3], [4]), 11 counts of sexual abuse in the first degree (§ 130.65 [3]), 4 counts of sexual abuse in the second degree (§ 130.60 [2]), and 6 counts of endangering the welfare of a child (§ 260.10 [1]). 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). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily

questions to be determined by the jury . . ., and the testimony of the [witnesses] with respect to the [disclosure of the sexual abuse] was not so inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]).

We reject defendant's further contention that County Court erred in permitting testimony concerning child sexual abuse accommodation syndrome (CSAAS) inasmuch as "[t]he expert witness who testified with respect to CSAAS provided only a general explanation of the possible behaviors demonstrated by a victim of child sexual abuse, and [she] did not impermissibly offer an opinion on the issue whether defendant had committed the sex crimes charged in the indictment" (*People v Wallace*, 60 AD3d 1268, 1270, *lv denied* 12 NY3d 922; *see People v Carroll*, 95 NY2d 375, 387). Contrary to defendant's contention, we conclude that the testimony of his accomplice, who was his girlfriend and the mother of the victims, was sufficiently corroborated by other evidence tending to connect defendant to the commission of the crimes (*see generally People v Reome*, 15 NY3d 188, 191-192).

Defendant also contends that his original defense counsel was ineffective in failing to seek dismissal of counts 11-14 and 35-36 of the indictment, charging him with endangering the welfare of a child, as well as counts 25-28 of the indictment, charging him with sexual abuse in the second degree, because those counts were time-barred. Addressing first counts 25-28, we conclude that defendant's contention is academic to the extent that it is premised upon the failure of original defense counsel to seek dismissal of counts 25 and 28 inasmuch as those counts were dismissed during trial. To the extent that defendant's contention is premised upon the failure of original defense counsel to seek dismissal of counts 26 and 27, we conclude that it involves matters outside the record on appeal and thus must be raised by way of a motion pursuant to CPL article 440 (*see People v Peters*, 90 AD3d 1507, 1508; *see also* CPL 30.10 [2] [c], [3] [f]).

Addressing next counts 11-14 and 35-36, we note that the People do not dispute that those counts are governed by a two-year statute of limitations (*see* CPL 30.10 [2] [c]) and should have been dismissed as time-barred. We therefore modify the judgment accordingly. Under the circumstances of this case, however, we further conclude that defendant was not thereby deprived of effective assistance of counsel (*see People v Wise*, 49 AD3d 1198, 1200, *lv denied* 10 NY3d 940, 966). To the extent that the contention of defendant in his pro se supplemental brief that he was denied effective assistance of counsel is based on matters outside the record on appeal, it must be raised by way of a motion pursuant to CPL article 440 (*see e.g. Peters*, 90 AD3d at 1508; *People v McKnight*, 55 AD3d 1315, 1317, *lv denied* 11 NY3d 927), and we conclude on the record before us that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

We also conclude that there is no merit to the contention of defendant in his main and pro se supplemental briefs that his

indelible right to counsel had attached before he made statements to a police investigator. "The indelible right to counsel attaches in two situations: 'upon the commencement of formal proceedings, whether or not the defendant has actually retained or requested a lawyer . . . [, and] where an uncharged individual has actually retained a lawyer in the matter at issue or, while in custody, has requested a lawyer in that matter' " (*People v Foster*, 72 AD3d 1652, 1653, *lv dismissed* 15 NY3d 750, quoting *People v West*, 81 NY2d 370, 373-374; *see People v Lopez*, 16 NY3d 375, 380). Contrary to defendant's contention, the indelible right to counsel did not attach by virtue of an attorney-client relationship defendant had in a Family Court proceeding at that time. "[W]hile an attorney-client relationship formed in one criminal matter may sometimes bar questioning in another matter in the absence of [defense] counsel . . ., a relationship formed in a civil matter is not entitled to the same deference" (*People v Lewie*, 17 NY3d 348, 361; *see Foster*, 72 AD3d at 1653-1654). "We further conclude that the determination of the court to credit the testimony of the police officers that defendant did not invoke his right to counsel before signing the [written statements in question] is entitled to deference . . ., and we see no basis to disturb that determination" (*People v Alexander*, 51 AD3d 1380, 1382, *lv denied* 11 NY3d 733; *see generally People v Prochilo*, 41 NY2d 759, 761-762).

We reject the further contention of defendant in his main brief that his written statements to the police were involuntary and that the court therefore erred in refusing to suppress them. " 'The voluntariness of a confession is to be determined by examining the totality of the circumstances surrounding the confession' " (*People v Camacho*, 70 AD3d 1393, 1394, *lv denied* 14 NY3d 886, 887; *see also People v Kithcart*, 85 AD3d 1558, 1559, *lv denied* 17 NY3d 818) and, here, the record of the suppression hearing supports the court's determination that the statements at issue were not rendered involuntary by reason of any alleged coercion by the police (*see People v Peay*, 77 AD3d 1309, 1310, *lv denied* 15 NY3d 955; *see generally Prochilo*, 41 NY2d at 761-762).

Defendant's remaining contentions are raised in his pro se supplemental brief. Although defendant's contention that the indictment was duplicitous on its face is not preserved for our review (*see People v Becoats*, 17 NY3d 643, 650-651), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see People v Bracewell*, 34 AD3d 1197, 1198). Counts 2-7, 19-22, 24 and 26-27 of the indictment charged defendant with various crimes and alleged that defendant committed one act "and/or" a second act in furtherance of a single charge. We reject defendant's contention that those counts are duplicitous based on the language "and/or" (*see People v McGuire*, 152 AD2d 945, 945, *lv denied* 74 NY2d 849). We conclude, however, that counts 2-7, 19-20, 22, 24 and 26-27 "were rendered duplicitous by the trial evidence tending to establish the commission of [multiple] criminal acts during the time period[s] specified [with respect to those counts]" (*People v Bennett*, 52 AD3d 1185, 1186, *lv denied* 11 NY3d 734; *see generally People v Keindl*, 68 NY2d 410, 417-418, *rearg denied* 69 NY2d 823). We therefore further

modify the judgment by reversing those parts convicting defendant of criminal sexual act in the first degree under counts 2-4, sexual abuse in the first degree under counts 5-6, 19-20, 22 and 24 and sexual abuse in the second degree under counts 7 and 26-27 of the indictment and dismissing those counts without prejudice to the People to re-present any appropriate charges under those counts of the indictment to another grand jury (*see Bennett*, 52 AD3d at 1186; *Bracewell*, 34 AD3d at 1198-1199).

To the extent that defendant preserved for our review his further contention that the indictment gave unreasonably excessive time frames for the alleged offenses (*see generally People v Soto*, 44 NY2d 683, 684), we conclude that it lacks merit. In view of the young ages of the victims and what the record indicates was a delay of approximately two years in reporting the crimes, the time periods specified in the indictment with respect to the single-act crimes, i.e., criminal sexual act in the first degree, sexual abuse in the first degree and sexual abuse in the second degree, "provided defendant with adequate notice of the charges against him to enable him to prepare a defense" (*People v Coapman*, 90 AD3d 1681, 1682; *see generally People v Morris*, 61 NY2d 290, 295-296). Although we have dismissed the counts charging defendant with endangering the welfare of a child, we note that endangering the welfare of a child is a continuing crime (*see People v Furlong*, 4 AD3d 839, 841, *lv denied* 2 NY3d 739), and thus "the usual requirements of specificity with respect to time do not apply" to those counts (*People v Green*, 17 AD3d 1076, 1077, *lv denied* 5 NY3d 789).

Defendant's contention that he was denied a preliminary hearing is of no moment. " '[T]here is no constitutional or statutory right to a preliminary hearing . . ., nor is it a jurisdictional predicate to indictment' " (*People v Caswell*, 56 AD3d 1300, 1302, *lv denied* 11 NY3d 923, 12 NY3d 781) and, even assuming, arguendo, that defendant was denied a preliminary hearing, we conclude that the failure to hold such a hearing does not require dismissal of the indictment or a new trial (*see People v Bensching*, 117 AD2d 971, 972, *lv denied* 67 NY2d 939*; see also People v Russ*, 292 AD2d 862, *lv denied* 98 NY2d 713, 99 NY2d 539). In addition, there is no merit to the contention of defendant that he was denied his right to testify before the grand jury. Pursuant to CPL 190.50 (5) (a), a defendant "has a right to be a witness in a grand jury proceeding . . . if, prior to the filing of any indictment . . . in the matter, he serves upon the district attorney of the county a written notice making such request . . . ." "In order to preserve [that] right[] . . ., a defendant must assert [it] at the time and in the manner that the Legislature prescribes" (*People v Bailey*, 90 AD3d 1664, 1665 [internal quotation marks omitted]). "The requirements of CPL 190.50 are to be 'strictly enforced' " (*id.*) and, here, we conclude that defendant did not invoke his right to testify before the grand jury pursuant to that statute. Defendant's contention with respect to alleged juror misconduct concerns matters outside the record on appeal and thus must be raised by way of a motion pursuant to CPL article 440 (*see generally People v Carlisle*, 50 AD3d 1451, 1451, *lv denied* 10 NY3d 957).

Defendant's further contention that he was deprived of a fair trial based on prosecutorial misconduct is not preserved for our review (*see* CPL 470.05 [2]). In any event, that contention lacks merit. We agree with defendant that, " '[i]n the face of a prosecutor's knowledge that a witness'[s] testimony denying that a promise of leniency was given is false, he or she has no choice but to correct the misstatement and to elicit the truth' " (*People v Hendricks*, 2 AD3d 1450, 1451, *lv denied* 2 NY3d 762, quoting *People v Piazza*, 48 NY2d 151, 162-163; *see People v Morrice*, 61 AD3d 1390, 1391). Here, however, there is no evidence that defendant's accomplice mischaracterized the terms of her plea agreement or that the prosecutor elicited false testimony. Contrary to defendant's contention, the prosecutor did not impermissibly bolster the testimony of prior witnesses in eliciting testimony from an expert witness with respect to CSAAS. "[I]t is not uncommon for courts to permit expert testimony on . . . the behavior of . . . victim[s] of sexual abuse" (*People v Jerge*, 90 AD3d 1486, 1488), and the testimony of the expert witness "was properly introduced to explain the hesitancy of child abuse victims to disclose the abuse" (*People v Donk*, 259 AD2d 1018, 1019, *lv denied* 93 NY2d 924; *see People v Staples*, 61 AD3d 1418, 1418, *lv denied* 13 NY3d 800). We conclude that there is no merit to defendant's contention with respect to the remaining alleged instance of prosecutorial misconduct.

"[D]efendant failed to preserve for our review his contention that the sentence imposed constituted cruel and unusual punishment" (*People v Verbitsky*, 90 AD3d 1516; *see People v Rogers*, 63 AD3d 1631, *lv denied* 13 NY3d 745, 749; *People v Clark*, 61 AD3d 1426, 1427, *lv denied* 12 NY3d 913). In any event, that contention is without merit (*see Verbitsky*, 90 AD3d 1516). Finally, we have reviewed defendant's remaining contentions in his pro se supplemental brief and conclude that they are without merit.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

415

CA 11-00944

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

STEWART M. SHUTE, JR., PLAINTIFF-APPELLANT,

V ORDER

ROBERT MCLUSKY, DEFENDANT-RESPONDENT,
MICHAEL BLOOM, DEFENDANT.
(APPEAL NO. 1.)

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

HISCOCK & BARCLAY, LLP, SYRACUSE (TIMOTHY J. DEMORE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an amended judgment (denominated amended order) of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered July 14, 2010. The amended judgment granted the motion of defendant Robert McLusky for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

416

CA 11-00945

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

STEWART M. SHUTE, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT MCLUSKY, DEFENDANT-RESPONDENT,
MICHAEL BLOOM, DEFENDANT.
(APPEAL NO. 2.)

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

HISCOCK & BARCLAY, LLP, SYRACUSE (TIMOTHY J. DEMORE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered September 9, 2010. The judgment granted the motion of defendant Robert McLusky for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion of defendant Robert McLusky seeking summary judgment on his counterclaims is denied, and the respective motion and cross motion of defendants for summary judgment dismissing the complaint with respect to the destruction and removal of trees is denied and the complaint is reinstated to that extent.

Memorandum: Plaintiff appeals from a judgment granting the motion of Robert McLusky (defendant) seeking summary judgment on his counterclaims pursuant to RPAPL article 15, alleging that he has a right-of-way, devised to him by the will of Jean M. Miller, over property owned by plaintiff or, in the alternative, that he has established an easement by necessity over the property owned by plaintiff. We conclude that defendant established his entitlement to judgment determining that he has a right-of-way over plaintiff's land by establishing that Miller's will devised a 20-foot easement from a land-locked 40-acre parcel to Nichols Road. We further conclude, however, that plaintiff raised an issue of fact whether his predecessors in interest extinguished by adverse possession the easement over his land. Plaintiff established that both the north and south borders of the easement are blocked by fences and mature trees. We therefore conclude that plaintiff raised an issue of fact whether his predecessors in interest extinguished the easement by using it in a manner that was open, notorious, exclusive, and continuous for a

period of 10 years and under a claim of right, and thus adverse to Miller, the owner thereof (*see Spiegel v Ferraro*, 73 NY2d 622, 625-626). We conclude that the "narrow exception" to the general rule that an easement may be extinguished by adverse possession does not apply here (*id.* at 626), because it is undisputed that the easement is identifiable (*cf. Castle Assocs. v Schwartz*, 63 AD2d 481, 490), and thus is subject to extinguishment by adverse possession. The court therefore erred in granting defendant's motion on that ground.

We further conclude that the court also erred in granting defendant's motion on the alternative theory that he has an easement by necessity. It is well established that an easement by necessity requires a unity and subsequent separation of the dominant and servient estates and that, at the time of the severance, an easement over plaintiff's land was " '*absolutely necessary*' " (*Simone v Heidelberg*, 9 NY3d 177, 182; *see Stock v Ostrander*, 233 AD2d 816, 818). Inasmuch as Miller had access to Nichols Road from the 40-acre parcel over an adjacent parcel that she owned at the time she purchased the 40 acres, defendant has failed to establish that the easement was absolutely necessary (*see Klumpp v Freund*, 83 AD3d 790, 793; *Town of Pound Ridge v Golenbock*, 264 AD2d 773, 774; *see generally Michalski v Decker*, 16 AD3d 469, 470). We note that the parcel adjacent to the 40-acre parcel was devised by Miller's will to defendant (Lot 1).

We further conclude that the court erred in granting, inter alia, defendants' respective motion and cross motion for summary judgment dismissing the claims in the complaint seeking damages for the destruction and removal of trees from property devised to plaintiff by Miller's will (Lot 3), on the ground that the trees were cut and removed prior to the execution of the executor's deed. We note that the judgment in appeal No. 2 does not address the respective motion and cross motion. Nevertheless, we have determined in a related appeal by plaintiff from an order settling the record on this appeal that the court erred in concluding that the order entered October 1, 2009 deciding the motion and cross motion and dismissing those claims was a final order and was thus not reviewable upon an appeal from the judgment in appeal No. 2 herein (*Schute v McLusky* [appeal No. 2], ___ AD3d ___ [June 8, 2012]).

It is well established that, inasmuch as Lot 3 was specifically devised to plaintiff, title to that property vested in him at the moment of Miller's death (*see Waxson Realty Corp. v Rothschild*, 255 NY 332, 336; *Matter of Ballesteros*, 20 AD3d 414, 415). Although that parcel and Lot 1 were subdivided from a larger parcel pursuant to the terms of the will, and thus a survey and subdivision application were subsequently obtained by the executor, the parcel devised to plaintiff was nevertheless clearly identified by the will as the "area of trees [decedent] usually referred to during [her] lifetime as 'the woods,' " as well as by a definition of the intended boundaries. Indeed, the easterly border of the parcel was established by the terms of the will to be approximately 20 feet east of the "easterly edge of the forest of trees located on [the larger] parcel," and the destruction and removal of some of those trees is the gravamen of the complaint.

"[T]he remedy created by RPAPL 861 extends only to the actual owner of the property allegedly harmed" (*Cornick v Forever Wild Dev. Corp.*, 240 AD2d 980, 980). Inasmuch as plaintiff was the owner of Lot 3 at the time the trees were cut and removed, the court erred in granting the motion and cross motion for summary judgment dismissing the complaint with respect to the trees by the nonfinal order entered October 1, 2009, which as noted is reviewable on this appeal from the subsequent judgment pursuant to RPAPL 1521 (1) entered September 9, 2010.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

421

CA 11-02575

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

STEWART M. SHUTE, JR., PLAINTIFF-APPELLANT,

V ORDER

ROBERT MCLUSKY AND MICHAEL BLOOM,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

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

RIEHLMAN, SHAFER & SHAFER, TULLY (JOEL I. ROSS OF COUNSEL), FOR DEFENDANT-RESPONDENT MICHAEL BLOOM.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered November 4, 2011. The order settled the record for appeals from judgments entered July 14, 2010 and September 9, 2010.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see* CPLR 5511; *see also Town of Massena v Niagara Mohawk Power Corp.*, 45 NY2d 482, 488).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

422

CA 11-02596

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

STEWART M. SHUTE, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT MCLUSKY AND MICHAEL BLOOM,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

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

RIEHLMAN, SHAFER & SHAFER, TULLY (JOEL I. ROSS OF COUNSEL), FOR DEFENDANT-RESPONDENT MICHAEL BLOOM.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered November 4, 2011. The order directed that the order entered October 1, 2009 be included in the record for appeals from judgments entered July 14, 2010 and September 9, 2010 for informational purposes only.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second and third ordering paragraphs and as modified the order is affirmed without costs.

Memorandum: As limited by his notice of appeal, plaintiff contends that Supreme Court erred in granting that part of his motion to settle the record on the appeal from a judgment, denominated order, granting summary judgment on the counterclaims of Robert McLusky (defendant) to include a previous order dated October 1, 2009 (previous order) "*for informational purposes only*, so that the Appellate Division can have a full and complete record upon which to make [its] determinations" (emphasis added). By that previous order, the court granted defendants' respective motion and cross motion for summary judgment dismissing certain claims in the complaint. The court determined that the previous order was a final order and thus not reviewable on the appeal to this Court from the judgment granting the motion of defendant for summary judgment on the counterclaims (*Shute v McLusky* [appeal No. 2], ___ AD3d ___ [June 8, 2012]). We agree with plaintiff that the court erred in limiting the inclusion of the order "for informational purposes only." We therefore modify the order accordingly.

Both plaintiff and defendant are the beneficiaries of the will of

Jean M. Miller. Plaintiff inherited a wooded parcel (Lot 3), and defendant inherited two parcels. One of defendant's parcels, i.e., Lot 1, borders Lot 3, and the second parcel is bordered on the east by Lot 1 and on the north by other property owned by plaintiff and thus is landlocked. The complaint sought damages, inter alia, for trees that were cut and removed from Lot 3, while the counterclaims sought to establish defendant's right-of-way over land owned by plaintiff, pursuant to RPAPL 1501. The court granted defendants' respective motion and cross motion for summary judgment dismissing the claims in the complaint seeking damages with respect to the trees, but retained a claim for damages for trespass related to piling stones on Lot 3. That claim was later transferred to Town Court by stipulation of the parties and was thereafter resolved.

We conclude that the order granting defendants' respective motion and cross motion for summary judgment dismissing the claims regarding the trees is reviewable on appeal as a nonfinal order from the subsequent judgment on the counterclaims (*see* CPLR 5501 [a] [1]; RPAPL 1521 [1]). Because the order dismissing the claims regarding the trees "expressly contemplated further nonministerial proceedings to determine civil penalties," i.e., damages for trespass regarding the stones, the order was, by its terms, nonfinal (*Lake George Parks Commn. v Salvador*, 72 AD3d 1245, 1247, *lv denied* 15 NY3d 712; *see Burke v Crosson*, 85 NY2d 10, 17; *see generally Kimmel v State of New York*, 49 AD3d 1210, 1210, *lv dismissed* 11 NY3d 729). Furthermore, inasmuch as the claims contained in both the complaint and the counterclaims are derived from the same source, i.e., the will, the claims contained in the complaint "arise out of . . . the same legal relationship as the unresolved [claims contained in the counterclaims]" (*Burke*, 85 NY2d at 16). Thus, we further conclude that the court erred in determining that the doctrine of implied severance, which is a "very limited exception to the general rule of nonfinality," applies here (*id.*).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

423

CA 11-02265

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

GERTRUDE A. LANE AND GEORGE A. LANE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TEXAS ROADHOUSE HOLDINGS, LLC,
DEFENDANT-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (JONATHAN H. BARD OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD J. SARDANO, PC, LIVERPOOL (JOHN E. HEISLER, JR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered May 3, 2011 in a personal injury action. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action alleging that a "dangerous and defective condition" on defendant's property caused Gertrude A. Lane (plaintiff) to slip and fall. Defendant appeals from an order denying its motion for summary judgment dismissing the complaint. We reject the contention of defendant that it met its initial burden on the motion by establishing as a matter of law that plaintiffs were unable to identify what caused plaintiff to fall " 'without engaging in speculation' " (*Smart v Zambito*, 85 AD3d 1721, 1722). "It is well established . . . that '[a] moving party must affirmatively [demonstrate] the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof' " (*Dodge v City of Hornell Indus. Dev. Agency*, 286 AD2d 902, 903, quoting *Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980; *see Brown v Smith*, 85 AD3d 1648, 1649). "Although [mere] conclusions based upon surmise, conjecture, speculation or assertions are without probative value . . ., a case of negligence based wholly on circumstantial evidence may be established if the plaintiffs show[ ] facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred" (*Seelinger v Town of Middletown*, 79 AD3d 1227, 1229 [internal quotation marks omitted]). Here, although plaintiff was unable to identify the specific source of her fall at her deposition

due to the onset of unrelated mental status issues, plaintiffs "submitt[ed] evidence establishing that she fell in the immediate vicinity of [several uneven and unsteady pavement blocks of which defendant had actual notice], thereby rendering any other potential cause of her fall 'sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence' " (*Nolan v Onondaga County*, 61 AD3d 1431, 1432).

We have considered the remaining contentions of the parties and conclude that they are without merit, or need not be addressed in light of our determination.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

446

CA 11-02168

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

PATRICIA P. TUPER, PLAINTIFF-RESPONDENT,

V OPINION AND ORDER

KENNETH E. TUPER, DEFENDANT-APPELLANT.

BARNEY & AFFRONTI, LLP, ROCHESTER (FRANCIS C. AFFRONTI OF COUNSEL), FOR DEFENDANT-APPELLANT.

ZIMMERMAN & TYO, ATTORNEYS, SHORTSVILLE (JOHN E. TYO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered July 5, 2011 in a divorce action. The order denied the amended motion of defendant to dismiss the complaint.

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

Opinion by LINDLEY, J.: In this matrimonial action, defendant husband appeals from an order adopting the amended report of the Referee and denying defendant's amended motion to dismiss the complaint, which asserted a single cause of action under the "no-fault divorce" statute based on an alleged irretrievable breakdown in the parties' relationship for a period of at least six months (*see* Domestic Relations Law § 170 [7]). In support of his amended motion, defendant contended that the complaint should be dismissed pursuant to CPLR 3211 (a) (5) because the action was time-barred and pursuant to CPLR 3211 (a) (7) because the complaint failed to comply with the pleading requirements of CPLR 3016 (c). We conclude that Supreme Court properly denied defendant's amended motion.

The parties were married in 1973 and have been separated since November 1996, when plaintiff wife moved out of the marital residence and commenced a divorce action based on allegations of cruel and inhuman treatment. Defendant opposed the divorce and, following a nonjury trial, the court determined that plaintiff failed to establish grounds for the divorce and therefore dismissed the complaint with prejudice. In February 2011, approximately four months after the no-fault statute took effect, plaintiff commenced this action. The complaint alleges in conclusory fashion that the parties' relationship has been irretrievably broken for at least six months. No facts are alleged in support of that assertion. Defendant thus contends that

the complaint fails to comply with CPLR 3016 (c), which provides that, "[i]n an action for separation or divorce, the nature and circumstances of a party's alleged misconduct, if any, and the time and place of each act complained of, if any, shall be specified in the complaint . . . ." We reject that contention. Because a cause of action for divorce under Domestic Relations Law § 170 (7) does not require a showing of any "misconduct" by either party, the requirements of CPLR 3016 (c) are inapplicable.

In any event, even assuming, arguendo, that a plaintiff seeking a divorce under the no-fault statute is required to plead facts sufficient to demonstrate that the marriage is broken down irretrievably rather than simply allege as much in conclusory terms (*see generally* CPLR 3211 [a] [7]; *Goldin v Engineers Country Club*, 54 AD3d 658, 659-660, *lv dismissed in part and denied in part* 13 NY3d 763), we note that " '[i]n assessing a motion under CPLR 3211 (a) (7) . . . a court may freely consider affidavits . . . to remedy any defects in the complaint' " (*Parker v Leonard*, 24 AD3d 1255, 1256, quoting *Leon v Martinez*, 84 NY2d 83, 88; *see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636; *Thomas v Thomas*, 70 AD3d 588, 591). Here, the affidavit submitted by defendant in support of his amended motion to dismiss cured any alleged pleading defects in the complaint. Defendant stated that he and plaintiff have been separated since 1996 and that they have not communicated with each other within the past five years. Those allegations, accepted as true, clearly establish that the parties' relationship has been irretrievably broken for far more than the required six months, which leads us to defendant's remaining contention with respect to the statute of limitations.

We agree with defendant that a cause of action under the no-fault statute is subject to the five-year limitations period set forth in Domestic Relations Law § 210. We do not agree with defendant, however, that this action is time-barred inasmuch as plaintiff failed to commence it within five years of the date that the parties' relationship *initially* became irretrievably broken. In our view, a cause of action for divorce under the no-fault statute should be treated similarly to a cause of action for divorce based upon imprisonment of a spouse (*see* § 170 [3]), which is also governed by the five-year statute of limitations set forth in section 210. In *Covington v Walker* (3 NY3d 287, 291, *rearg denied* 4 NY3d 740, *cert denied* 545 US 1131), the Court of Appeals held that a cause of action for divorce based on imprisonment "continues to arise anew for statute of limitations purposes on each day the defendant spouse remains in prison for 'three or more consecutive years' until the defendant is released." Like a spouse serving a life sentence, an irretrievable breakdown in a married couple's relationship is a continuing state of affairs that, by definition, will not change. After all, the breakdown is "irretrievable." It thus stands to reason that a cause of action under the no-fault statute may be commenced at any time after the marriage has been "broken down irretrievably for a period of at least six months" (§ 170 [7]; *see Covington*, 3 NY3d at 292-293; *see also Strack v Strack*, 31 Misc 3d 258, 261).

We note that a contrary ruling would force a spouse such as

plaintiff "to unwillingly remain in a dead marriage" (*Covington*, 3 NY3d at 291). Indeed, if the accrual date of a no-fault cause of action were to be determined as defendant suggests so as to arise *only* on the day that the relationship initially became irretrievably broken, assuming that an exact date could even be pinpointed, the only couples who could get divorced under the no-fault statute would be those whose relationships irretrievably broke down within the past five years but not within the last six months. Couples whose relationships irretrievably broke down more than five years ago would have to remain married. That is inconsistent with the general intent of the Legislature in enacting the no-fault statute, which was to "enable[] parties to legally end a marriage which is, in reality, already over and cannot be salvaged" (Senate Introducer Mem in Support, Bill Jacket, L 2010, ch 384, at 13).

We further note that the purpose of the statute of limitations is "to afford protection to defendants against defending stale claims after a reasonable period of time had elapsed during which a person of ordinary diligence would bring an action" (*Flanagan v Mount Eden Gen. Hosp.*, 24 NY2d 427, 429; *see Matter of Depczynski v Adsco/Farrar & Trefts*, 84 NY2d 593, 596-597). That purpose is not impeded by our determination in this case inasmuch as plaintiff, in attempting to establish her cause of action, will be relying on facts and circumstances arising within 5½ years of commencement of the action.[1] Moreover, because the no-fault statute did not take effect until October 12, 2010, plaintiff could not have commenced this action before that date. It therefore cannot be said that plaintiff "slept on her rights" or otherwise acted in a dilatory manner to defendant's detriment.

Accordingly, we conclude that the order should be affirmed.

Entered: June 8, 2012 Frances E. Cafarell

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[1] During the debate in the New York State Assembly over the bill that became the no-fault statute, the Assembly sponsor of the legislation, Assemblyman Jonathan Bing, was asked directly by a fellow member of the Assembly whether a defendant in a no-fault case would have a right to contest the plaintiff's allegations at a jury trial. "Yes," Assemblyman Bing responded. "I can't imagine that happening frequently, but yes, technically, that possibility would exist" (NY Assembly Debate on Assembly Bill A9753-A, July 1, 2010, at 238). Bing repeatedly stated "that the legislation does not take away any grounds or any procedural maneuver or anything that currently exists under the law" (*id*. at 231, 237), and that the allegation of an irretrievable breakdown in the marital relationship can be "contested" (*id*. at 236). Bing's representations appear consistent with the fact that the Legislature, upon enacting the no-fault statute, did not amend Domestic Relations Law § 173, which reads: "In an action for divorce there is a right to trial by jury of the issues of the grounds for granting the divorce."

Clerk of the Court

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

450

CA 11-02197

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

KATHLEEN PRACHEL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF WEBSTER, DEFENDANT-APPELLANT.

CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD LLP, ROCHESTER (J. MICHAEL WOOD OF COUNSEL), FOR DEFENDANT-APPELLANT.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), AND RICHARD J. LIPPES & ASSOCIATES, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered January 3, 2011. The order denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking to limit plaintiff's recoverable property damages to those accruing within the 90 days prior to service of the notice of claim and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action asserting causes of action for trespass, nuisance and negligence. She sought damages for injuries she sustained and for damage to her property as the result of flooding allegedly caused by defendant's artificial diversion of surface water through its storm and surface water drainage system. Defendant moved for summary judgment dismissing the complaint on the ground that its drainage system was not the cause of the flooding on plaintiff's property. Alternatively, defendant moved for summary judgment dismissing the negligence cause of action and limiting the damages recoverable under the trespass and nuisance causes of action to those accruing within 90 days prior to the service of the notice of claim (*see* General Municipal Law § 50-e [1] [a]), or one year and 90 days prior to the commencement of the action (*see* § 50-i [1]). Supreme Court denied the motion in its entirety.

To establish liability for damages from the flow of surface water onto her property, plaintiff is required to demonstrate that defendant diverted the surface water by artificial means "or that the improvements [made by defendant] were not made in a good faith effort to enhance the usefulness of the defendant's property" (*Cottrell v Hermon*, 170 AD2d 910, 911, *lv denied* 78 NY2d 853; *see Kossoff v Rathgeb-Walsh*, 3 NY2d 583, 589-590; *Smith v Town of Long Lake*, 40 AD3d

1381, 1383). Paving alone—as opposed to pipes, sluices, drains or ditches—does not constitute an artificial means of diversion (*see Cottrell*, 170 AD2d at 911; *see also Friedland v State of New York*, 35 AD2d 755, 756). Here, it is undisputed that defendant owns a surface water drainage system that collects and diverts water across plaintiff's property. That system includes, inter alia, culvert pipe, a drainage ditch and a catch basin. Plaintiff alleges that defendant's drainage system has altered natural flows and created a storm water detention zone on her property. According to plaintiff, the detention zone created by the increased run-off from a new housing subdivision is inadequately drained and is a significant contributor to the excess water in the soil surrounding plaintiff's house.

Even assuming, arguendo, that defendant established its entitlement to summary judgment dismissing the complaint, we conclude that the affidavit of plaintiff's engineer submitted in opposition to the motion was sufficient to raise a triable issue of fact whether defendant's drainage system altered the natural flow of surface water to create a storm water detention zone and flooding on plaintiff's property (*see Pluchino v Village of Walden*, 63 AD3d 897, 897). Further, that affidavit was also sufficient to raise a triable issue of fact whether defendant was negligent in the maintenance of the drainage system and whether such negligence was a proximate cause of water intrusion into plaintiff's basement *(cf. Hongach v City of New York*, 8 AD3d 622, 622).

Contrary to defendant's contention, we conclude that plaintiff properly served the notice of claim within 90 days of her discovery of the alleged personal injuries (*see* CPLR 214-c [3]; General Municipal Law § 50-e [1] [a]). Further, inasmuch as plaintiff commenced this action within one year and 90 days from the date of that discovery, her personal injury claim based upon the growth of toxic mold allegedly caused by the water intrusion into her basement was timely interposed (*see* § 50-i [1]; CPLR 214-c [3]). We agree with defendant, however, that because plaintiff discovered the mold growth in her home several years prior to serving the notice of claim, any damages awarded under that part of the negligence cause of action based on property damage must be limited to those resulting from any negligent acts that defendant committed within the 90 days prior to service of the notice of claim (*see* General Municipal Law § 50-e [1] [a]).

Finally, inasmuch as plaintiff conceded in opposition to the motion that her damages under the trespass and nuisance causes of action insofar as they were based on property damage were limited to those damages sustained within 90 days prior to the date of filing of her notice of claim, she is estopped from taking a contrary position on appeal (*see generally Mitchell v La Barge*, 257 AD2d 834, 835). Although we agree with plaintiff that "[c]ompliance with sections 50-e and 50-i of the General Municipal Law is not required where a plaintiff seeks equitable relief to abate or enjoin a nuisance and incidentally seeks money damages for past conduct" (*Baumler v Town of Newstead*, 198 AD2d 777, 777), plaintiff's pleadings contain no claim for equitable relief. We therefore modify the order by granting that part of defendant's motion seeking to limit the damages plaintiff may

recover for property damage to those accruing within the 90 days prior to service of the notice of claim.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

484

KA 09-02374

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CALVIN BUTLER, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (RANDOLPH V. KRUMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Ontario County Court (William F. Kocher, J.), rendered November 9, 2009. Defendant was resentenced upon his conviction of criminal sale of a controlled substance in the fifth degree.

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

Memorandum: Defendant was convicted upon his plea of guilty of criminal sale of a controlled substance in the fifth degree (Penal Law § 220.31), and he appeals from the resentence on that conviction. Defendant contends that he raised various possible defenses during the plea colloquy and thus that County Court erred in failing to conduct a sufficient inquiry to ensure that the plea was knowingly, voluntarily, and intelligently entered. That contention is unpreserved for our review inasmuch as defendant did not move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Davis*, 37 AD3d 1179, 1179, *lv denied* 8 NY3d 983; *People v Swank*, 278 AD2d 861, 861, *lv denied* 96 NY2d 807; *see also People v Simpson*, 19 AD3d 945), and this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666) because nothing in the plea allocution calls into question the voluntariness of the plea or casts "significant doubt" upon defendant's guilt (*People v Lewandowski*, 82 AD3d 1602, 1602; *see Swank*, 278 AD2d at 861). In any event, there is no merit to defendant's contention.

We reject the further contention of defendant that his absence from a pretrial conference deprived him of the right to be present at a material stage of the criminal proceeding. Where a proceeding "involves only questions of law or procedure," a defendant's presence is not required (*People v Rodriguez*, 85 NY2d 586, 591; *see People v*

Levy, 52 AD3d 1025, 1028; *People v Afrika*, 13 AD3d 1218, 1222, *lv denied* 4 NY3d 827). Here, we conclude that defendant did not have a right to be present at the conference because "the subject legal discussion did not implicate his peculiar factual knowledge or otherwise present the potential for his meaningful participation" (*People v Fabricio*, 3 NY3d 402, 406; *see People v Robinson*, 28 AD3d 1126, 1128, *lv denied* 7 NY3d 794; *People v Houk*, 222 AD2d 1074, 1075).

Defendant failed to preserve for our review his contention that the People failed to comply with the procedural requirements of CPL 400.21 when he was resentenced as a second felony drug offender (*see People v Pellegrino*, 60 NY2d 636, 637; *People v Mateo*, 53 AD3d 1111, 1112, *lv denied* 11 NY3d 791; *People v Beu*, 24 AD3d 1257, *lv denied* 6 NY3d 809). In any event, defendant waived strict compliance with that statute by admitting the prior felony conviction in open court (*see People v Perez*, 85 AD3d 1538, 1541; *People v Vega*, 49 AD3d 1185, 1186, *lv denied* 10 NY3d 965). Defendant's further contention that he does not qualify as a second felony offender pursuant to Penal Law § 70.06 need not be preserved for our review and thus is properly before us (*see People v Samms*, 95 NY2d 52, 56-57; *People v Ramos*, 45 AD3d 702, 703, *lv denied* 10 NY3d 770). We conclude, however, that it is without merit. Although defendant's sentence upon the prior felony conviction was imposed more than 10 years before the commission of the present felony, the 10-year period is extended by any period of time during which he was incarcerated (*see* § 70.06 [1] [b] [iv], [v]), and we therefore conclude that defendant was properly resentenced as a second felony drug offender.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

487

KA 10-01400

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS F. CARRASQUILLO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered May 29, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for the filing of a predicate felony statement prior to resentencing.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that his sentence as a second felony drug offender is illegal because he was never given the opportunity to challenge the prior felony conviction. Here, although defendant admitted that he had a prior felony conviction, the certificate of conviction does not reflect that defendant was sentenced as a second felony drug offender. The sentence therefore is illegal, and we modify the judgment by vacating the sentence, and we remit the matter to County Court for the filing of a predicate felony statement pursuant to CPL 400.21 prior to resentencing (*see People v Scarbrough,* 66 NY2d 673, 674, *revg on dissenting op of Boomer, J. at* 105 AD2d 1107; *People v Ruddy*, 51 AD3d 1134, 1135, *lv denied* 12 NY3d 787).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

496

CA 10-02432

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

JAMES GRIBBINS, BERNADETTE MEDIGE, JOHN MEDIGE, NORMAN A. PIASECKI, PLAINTIFFS-APPELLANTS, ET AL., PLAINTIFFS,

V MEMORANDUM AND ORDER

RUSHFORD LAKE RECREATION DISTRICT (RLRD), ITS BOARD OF COMMISSIONERS, AND IN THEIR INDIVIDUAL CAPACITIES: BRADLEY COON, RICHMOND HUBBARD, MARGARET A. KRZYZANOWSKI, DAVID HIRSCH, DOUGLAS CRANDALL, DEBORAH AUMICH, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

JOHN A. CAPPELLINI, CUBA, FOR PLAINTIFFS-APPELLANTS.

HOGAN WILLIG, PLLC, GETZVILLE (TAMMY L. RIDDLE OF COUNSEL), FOR DEFENDANT-RESPONDENT BRADLEY COON.

UNDERBERG & KESSLER LLP, BUFFALO (COLIN D. RAMSEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS RUSHFORD LAKE RECREATION DISTRICT (RLRD), ITS BOARD OF COMMISSIONERS, AND IN THEIR INDIVIDUAL CAPACITIES: RICHMOND HUBBARD, MARGARET A. KRZYZANOWSKI, DAVID HIRSCH, DOUGLAS CRANDALL, AND DEBORAH AUMICH.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered July 8, 2010. The order denied the application of plaintiffs-appellants for a preliminary injunction, vacated a temporary restraining order and compelled plaintiffs-appellants to accept the late answer filed by defendants-respondents Rushford Lake Recreation District (RLRD), its Board of Commissioners and the members of the Board in their individual capacities: Richmond Hubbard, Margaret A. Krzyzanowski, David Hirsch, Douglas Crandall, and Deborah Aumich.

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

Memorandum: Plaintiffs-appellants (plaintiffs), owners of non-waterfront lots in defendant Rushford Lake Recreation District (RLRD), commenced this action seeking, inter alia, injunctive and declaratory relief requiring the RLRD to reinstate plaintiffs' dock licenses and prevent the removal and destruction of their docks, which are situated on lakefront property that abuts several waterfront lots owned by

defendant Bradley Coon. Supreme Court thereafter granted plaintiffs a temporary restraining order (TRO) preventing the removal of their docks. Plaintiffs appeal from an order that denied their application for a preliminary injunction, vacated the TRO and compelled plaintiffs to accept the late answer filed by defendants-respondents RLRD, its Board of Commissioners (Board) and the members of the Board in their individual capacities (collectively, RLRD defendants). We affirm.

We conclude that the court properly required plaintiffs to accept the late answer of the RLRD defendants. Contrary to plaintiffs' contention, the specific request made by counsel for the RLRD defendants that the court direct plaintiffs' counsel to accept the answer, while not made in a formal motion, was a sufficient "application . . . to . . . compel the acceptance of a pleading untimely served" pursuant to CPLR 3012 (d). Because the RLRD defendants "provide[d] a reasonable excuse for the default and demonstrate[d] a meritorious defense to the action" (*Krieger v Cohan*, 18 AD3d 823, 824; *see Watson v Pollacchi*, 32 AD3d 565, 565; *Huckle v CDH Corp.*, 30 AD3d 878, 879), the court did not abuse its discretion in requiring plaintiffs to accept the late answer (*see Ayres Mem. Animal Shelter, Inc. v Montgomery County Socy. for Prevention of Cruelty to Animals*, 17 AD3d 904, 905, *lv dismissed* 5 NY3d 824, *lv denied* 7 NY3d 712). We reject plaintiffs' further contention that the court acted without authority when it sua sponte stayed their applications for default pending the return date on their order to show cause seeking a preliminary injunction (*see generally* CPLR 2201; *Matter of Coburn v Coburn*, 109 AD2d 984, 985-986; *A.B. Med. Servs., PLLC v Travelers Indem. Co.*, 26 Misc 3d 69, 70-71).

Contrary to plaintiffs' contention, the court did not abuse its discretion in denying their application for a preliminary injunction and vacating the TRO (*see generally Marcone APW, LLC v Servall Co.*, 85 AD3d 1693, 1695; *Eastman Kodak Co. v Carmosino*, 77 AD3d 1434, 1435). In order to obtain a preliminary injunction, "the part[ies] seeking such relief [must] demonstrate[]: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving part[ies'] favor" (*Doe v Axelrod*, 73 NY2d 748, 750). Here, plaintiffs failed to demonstrate that they were likely to succeed on the merits because, inter alia, their dock licenses were revocable by the RLRD at any time and without cause. Moreover, because plaintiffs "have an adequate remedy in the form of monetary damages," they failed to establish that they would sustain irreparable injury (*Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 220; *see D&W Diesel v McIntosh*, 307 AD2d 750, 751). Finally, plaintiffs failed to demonstrate that the "balance of equities" was in their favor (*Doe*, 73 NY2d at 750).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

507

KA 08-02457

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON TARO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered September 5, 2008. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child, criminal sexual act in the first degree, sexual abuse in the first degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of criminal sexual act in the first degree and dismissing count two of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of predatory sexual assault against a child (Penal Law § 130.96), criminal sexual act in the first degree (§ 130.50 [3]), sexual abuse in the first degree (§ 130.65 [3]), and endangering the welfare of a child (§ 260.10 [1]). We note at the outset that defendant is correct that his conviction under count two of the indictment, charging criminal sexual act in the first degree (§ 130.50 [3]) must be reversed and that count dismissed as a lesser inclusory concurrent count of count one, charging predatory sexual assault against a child (*see People v Alford*, 65 AD3d 1392, 1394, *mod on other grounds* 14 NY3d 846; *see generally People v Scott*, 61 AD3d 1348, 1349-1350, *lv denied* 12 NY3d 920, 13 NY3d 799). We therefore modify the judgment accordingly. Defendant's further contention that counts one and two are multiplicitous is unpreserved for our review (*see* CPL 470.05 [2]), and we conclude in any event that his contention is without merit (*see People v Baker*, 67 AD3d 1446, 1447, *lv denied* 14 NY3d 769; *People v Dann*, 17 AD3d 1152, 1153, *lv denied* 5 NY3d 761).

Although defendant failed to preserve for our review his further contention that he was deprived of a fair trial by prosecutorial misconduct (*see* CPL 470.05 [2]), we would nevertheless reject that

contention even if defendant had preserved it for our review. "Reversal on grounds of prosecutorial misconduct 'is mandated only when the conduct has caused such substantial prejudice to the defendant that he [or she] has been denied due process of law' " (*People v Rubin*, 101 AD2d 71, 77, *lv denied* 63 NY2d 711), and that is not the case here. We reject defendant's further contentions that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147), and that the sentence is unduly harsh and severe. We have reviewed defendant's remaining contentions and conclude that none requires reversal or further modification of the judgment.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

524

CA 11-01871

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND SCONIERS, JJ.

NIKOLA K. NIKOLOV, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF CHEEKTOWAGA, TOWN OF CHEEKTOWAGA POLICE DEPARTMENT AND POLICE OFFICER TIMOTHY TURNBULL, DEFENDANTS-RESPONDENTS.

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

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ARTHUR A. HERDZIK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered June 3, 2011 in a personal injury action. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the vehicle he was operating collided at an intersection with a police vehicle operated by defendant Police Officer Timothy Turnbull (defendant officer) for defendant Town of Cheektowaga. Defendants thereafter moved to dismiss the complaint for failure to state a cause of action and for summary judgment dismissing the complaint. In support of the motion insofar as it sought summary judgment dismissing the complaint, defendants contended, inter alia, that the facts alleged did not rise to the level of "reckless disregard" required for the imposition of liability under Vehicle and Traffic Law § 1104 (e). Supreme Court granted the motion insofar as it sought summary judgment dismissing the complaint on that ground. We affirm.

At the time of the collision, defendant officer was operating a police vehicle while responding to a dispatch call concerning a driver on the highway operating a vehicle in a reckless manner. There is no dispute that defendant officer's vehicle entered the intersection against a red light.

We conclude that defendant officer was operating an authorized emergency vehicle while involved in an emergency operation (*see*

Vehicle and Traffic Law §§ 101, 114-b). Thus, the standard of liability pursuant to Vehicle and Traffic Law § 1104 (e), i.e., reckless disregard for the safety of others, rather than that of ordinary negligence, applies to his actions (*see Criscione v City of New York*, 97 NY2d 152, 157-158; *Hughes v Chiera*, 4 AD3d 872). Defendants established as a matter of law that defendant officer's conduct did not rise to the level of reckless disregard for the safety of others (*see Szczerbiak v Pilat*, 90 NY2d 553, 556-557), and plaintiff failed to raise a triable issue of fact in opposition to that part of the motion (*see Salzano v Korba*, 296 AD2d 393, 394-395; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Proceeding through a red light is expressly set forth in Vehicle and Traffic Law § 1104 (a) (2) as one of the privileges extended to an authorized police vehicle engaged in an emergency operation (*see Kabir v County of Monroe*, 16 NY3d 217, 222-223). Even assuming, arguendo, that defendant officer had not engaged the police vehicle's siren and emergency lights, we conclude that such fact alone cannot establish a predicate for liability inasmuch as the use of the siren and/or emergency lights is not required for police vehicles to obtain the benefits of the statute (*see* § 1104 [c]; *Herod v Mele*, 62 AD3d 1269, 1270, *lv denied* 13 NY3d 717). In addition, even assuming, arguendo, that defendant officer experienced a short-term reduction in visibility of the intersection where the collision occurred, we conclude that such factor also does not constitute reckless disregard for the safety of others under the circumstances of this case (*see Herod,* 62 AD3d at 1270). With respect to the speed at which the police vehicle entered the intersection, defendant officer testified at his deposition that he was traveling at 15 miles per hour. Plaintiff testified at his deposition, however, that he did not observe the police vehicle at any time prior to the collision and thus was not able to provide a competent estimate of its speed, and the passenger in plaintiff's vehicle testified at her deposition that she was "not a driver" and "can't tell" speed. "In the absence of a showing that [the passenger] was qualified to give an estimate of a specific speed at which a [vehicle] was traveling," her deposition testimony concerning the speed at which the police vehicle was traveling constitutes inadmissible opinion evidence (*Swoboda v We Try Harder*, 128 AD2d 862, 863; *see Larsen v Vigliarolo Bros.*, 77 AD2d 562, *lv denied* 52 NY2d 702). We therefore conclude that there is no evidence that defendant officer " 'intentionally [did] an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow' and [did] so with conscious indifference to the outcome" (*Saarinen v Kerr*, 84 NY2d 494, 501).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

526

TP 11-01795

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

IN THE MATTER OF ALBERTO RODRIGUEZ, PETITIONER,

V MEMORANDUM AND ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered August 30, 2011) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 102.10 (7 NYCRR 270.2 [B] [3] [i]) 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 inmate rule.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a Tier III disciplinary hearing, that he violated inmate rules 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusal to obey a direct order]), 118.30 (7 NYCRR 270.2 [B] [19] [viii] [cleanliness]), 118.22 (7 NYCRR 270.2 [B] [19] [iv] [unhygienic act]) and 102.10 (7 NYCRR 270.2 [B] [3] [i] [threats]). Respondent correctly concedes that the determination that petitioner violated inmate rule 102.10 is not supported by substantial evidence. We therefore modify the determination and grant the petition in part by annulling that part of the determination finding that petitioner violated inmate rule 102.10 (*see Matter of Vasquez v Goord*, 284 AD2d 903, 903-904), and we direct respondent to expunge from petitioner's institutional record all references to the violation of that inmate rule (*see generally Matter of Edwards v Fischer*, 87 AD3d 1328, 1330). Inasmuch as it appears from the record that petitioner has already served his administrative penalty, the appropriate remedy is

expungement of all references to the violation of that rule from his institutional record (*see Matter of Delgado v Hurlburt*, 279 AD2d 734, 735 n). Further, because the penalty has been served and there was no recommended loss of good time, there is no need to remit the matter to respondent for reconsideration of the penalty (*see Matter of Maybanks v Goord*, 306 AD2d 839, 840).

Petitioner failed to exhaust his administrative remedies with respect to his contentions that the Hearing Officer refused to investigate petitioner's claim of retaliation, failed to call a lieutenant as a witness and improperly limited his cross-examination of a sergeant, inasmuch as he failed to raise those issues in his administrative appeal, " 'and this Court has no discretionary authority to reach [those] contention[s]' " (*Matter of McFadden v Prack*, 93 AD3d 1268, 1269). Petitioner failed to preserve for our review his further contention that the Hearing Officer erred in denying his request for the videotape of the incident, inasmuch as he failed to raise that issue in his petition (*see Matter of Dawes v McClellan*, 225 AD2d 830, 831).

Contrary to petitioner's contention, the determination that he violated the remaining inmate rules is supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139). We have reviewed petitioner's remaining contentions and conclude that they are without merit.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

552

KA 08-01674

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES E. GUILFORD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered May 27, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) based on the charge that he killed the victim on or around February 6, 2007. The victim was the ex-girlfriend of defendant who lived with him in Syracuse and was the mother of his children. Within days after the victim's disappearance, defendant took the children to Georgia to stay with his mother. Detectives from the Syracuse Police Department (SPD) traveled to Georgia and interviewed defendant there on February 20, 2007. Defendant returned to Syracuse on March 20, 2007, and was interrogated by SPD detectives over a period of 49 hours. Near the end of the interrogation, defendant told the detectives that he wanted an attorney and that he wanted to speak with the Assistant District Attorney. An attorney was appointed for defendant and, after meeting with his attorney as well as a break in the interrogation, defendant made statements to the detectives in the presence of his attorney on March 23, 2007.

We reject defendant's contention that County Court erred in refusing to suppress the statements that he made to SPD detectives in Georgia on February 20, 2007. According to the decision of the suppression court, even assuming, arguendo, that defendant was in custody, the court determined that he knowingly and voluntarily waived his *Miranda* rights before speaking with the detectives. The evidence presented at the suppression hearing supports that determination (*see People v Sands*, 81 AD3d 1263, 1263, *lv denied* 17 NY3d 800). We

further agree with the court that defendant's statement, "[w]hen I asked them if I needed to speak to an attorney, they just made it seem like I couldn't get one at that time" was not an unequivocal request for counsel (*see generally People v Hicks*, 69 NY2d 969, 970, *rearg denied* 70 NY2d 796).

We reject defendant's further contention that the court erred in refusing to suppress the statements that he made to SPD detectives in Syracuse on March 23, 2007. The court suppressed the statements that defendant made during the preceding 49-hour interrogation. The court held that, although defendant was advised of his *Miranda* rights, under the totality of the circumstances the People did not meet their burden of proving that defendant's statements made during "this unprecedented and lengthy period were voluntary" beyond a reasonable doubt. We concur with the court that the length of the interrogation was unparalleled and should in no way be condoned. With respect to the March 23, 2007 statements, however, the court determined that they were admissible because there was an eight-hour "definite, pronounced break" between the 49-hour interrogation and those statements. The court explained that any taint from the prior interrogation was dissipated by the break in the interrogation, by the assignment of an attorney and opportunities to consult with that attorney before the March 23, 2007 statements were made, by defendant's removal from the interrogation room and his opportunity to sleep the remainder of the night before being arraigned, and by defendant's having made the statements in question while speaking with the detectives the following morning in the presence of his attorney. We agree. In particular, we note that, once an attorney was appointed for defendant and defendant had the opportunity to consult with the attorney before again speaking with the detectives, in the presence of his attorney, it cannot be said that the statements were involuntary or the "product of compulsion" (*Miranda v Arizona*, 384 US 436, 466).

Defendant failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct (*see People v Milton*, 90 AD3d 1636, 1637) and, in any event, that contention is without merit. Any alleged misconduct was not so egregious as to deny defendant a fair trial (*see People v Pringle*, 71 AD3d 1450, 1450-1451, *lv denied* 15 NY3d 777; *People v Foster*, 59 AD3d 1008, 1009, *lv denied* 12 NY3d 816). Defendant further contends that he received ineffective assistance of counsel because his attorney should not have allowed him to give a statement to the detectives. Defense counsel was not ineffective, however, for making a "strategic decision to encourage defendant to cooperate in order to receive favorable treatment" (*People v Carncross*, 14 NY3d 319, 332). Indeed, the evidence at the suppression hearing established that defendant wanted to "cut a deal" and was in fact offered a sentence cap if he cooperated. We have reviewed the remaining instances of alleged ineffective assistance of counsel raised by defendant and nevertheless conclude that he received meaningful representation (*see People v Baldi*, 54 NY2d 137, 147).

CENTRA and SCONIERS, JJ., concur; SCUDDER, P.J., concurs in the following Memorandum: I agree with the majority that County Court

properly refused to suppress defendant's inculpatory statements made in the presence of counsel. I write separately, however, to clarify that, in my view, those statements are voluntary not only because they were sufficiently attenuated from statements determined to be involuntary (*see generally People v Paulman*, 5 NY3d 122; *People v Bethea*, 67 NY2d 364; *People v Chapple*, 38 NY2d 112), but also, independently of the attenuation, because they were made following consultation with his counsel and in the presence of his counsel.

I am mindful of *People v Concepcion* (17 NY3d 192) and note that my analysis does not improperly recommend that we affirm the court's suppression ruling on a ground rejected by the suppression court, or on a ground upon which it ruled in defendant's favor (*cf. id.* at 196; *see generally People v LaFontaine*, 92 NY2d 470, 474). Indeed, *Concepcion* and *LaFontaine* are "only implicated when an appellate court affirms a case on a ground that was not decided *adversely* to the [defendant] at the trial level" (*Concepcion*, 17 NY3d at 197). Here, the court explicitly addressed defendant's opportunities to consult with counsel prior to making the statements and noted that the statements were made with the benefit of the assistance of counsel. Thus, I submit that, as part and parcel of its decision that the statement was voluntary, the court implicitly determined that the assistance of counsel rendered the statement voluntary, and thus decided that issue adversely to defendant.

Although defendant was required to endure 49 hours of interrogation, he nevertheless eventually invoked his right to counsel, whereupon the police ceased the interrogation. Defendant conferred with his assigned attorney for a period of two hours that evening and for approximately 15 minutes the following morning before again speaking to the police. With his counsel present, defendant told the police, "I killed her" and that he had placed the victim's body in a dumpster.

More than 50 years ago, the Supreme Court reiterated that "basic rights that are enshrined in our Constitution [are] that 'No person . . . shall be compelled in any criminal case to be a witness against himself,' and that 'the accused shall . . . have the Assistance of Counsel' " (*Miranda v Arizona*, 384 US 436, 442). The Court established "procedural safeguards . . . to secure the privilege against self-incrimination" (*id.* at 444), in order to ensure that the right "to remain silent . . . or to speak without intimidation, blatant or subtle," (*id.* at 466) is not "put in jeopardy . . . through official overbearing" (*id.* at 442). The *Miranda* Court was clear: "[t]he presence of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege [against self-incrimination]. His [or her] presence would insure that statements made in the government-established atmosphere are not the product of compulsion" (*id.* at 466). "The presence of counsel confers no undue advantage to the accused. Rather, the attorney's presence serves to equalize the positions of the accused and sovereign, mitigating the coercive influence of the State and rendering it less overwhelming" (*People v Rogers*, 48 NY2d 167, 173). Here, defendant exercised his right to

counsel and thereby safeguarded his right to remain silent or to speak without intimidation (*see Miranda*, 384 US at 466), and thus the court properly determined that defendant's statements were voluntary.

LINDLEY and MARTOCHE, JJ., dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent. We agree with the majority that County Court properly refused to suppress the statements by defendant in Georgia to detectives from the Syracuse Police Department (SPD). We also agree with the majority that the court properly suppressed the statements made by defendant during his interrogation that lasted from 11:30 P.M. on Friday, March 20, 2007 to 1:00 A.M. on Monday, March 23, 2007, a total of 49½ hours. We disagree with the majority, however, that the subsequent statements made by defendant eight hours later on March 23 were voluntarily made and thus admissible because there had been a break in the interrogation and because defendant had been assigned an attorney at his request, and was given the opportunity to consult with the attorney before making the subsequent statements to the detectives, in the presence of his attorney.

On February 8, 2007, defendant filed a missing person report regarding his ex-girlfriend and the mother of his three children. Although the relationship had ended, defendant and his ex-girlfriend were still living together and, immediately after making the missing person report, defendant left Syracuse to move to Georgia with the children. In the course of the investigation regarding the missing person report, the police identified defendant as a suspect in the disappearance. On February 19, detectives from the SPD traveled to Georgia to speak with defendant. Defendant voluntarily accompanied the detectives to a Sheriff's station house in Georgia, where he executed a *Miranda* waiver at 10:35 A.M. on February 20 and was questioned until 6:30 A.M. on February 21. In the course of that interrogation, defendant signed a consent-to-search form for his vehicle and took a polygraph examination. He also consented to a DNA swab test.

Shortly thereafter, defendant moved back to Syracuse. On March 20, defendant agreed to speak to the SPD detectives and was taken to the SPD's Criminal Investigation Division (CID). There, rotating teams of detectives interrogated defendant between March 20, 2007 at 11:30 P.M. and March 23, 2007 at 1:00 A.M. At the onset of the interrogation, defendant was advised of, and waived, his *Miranda* rights. One of the interrogating officers testified that, during the course of the 49½-hour interrogation, defendant was allowed to sleep "in the chair, on the floor, whatever he wanted to do," and would have had a blanket "if he had asked for one." Nevertheless, the court credited defendant's testimony at the suppression hearing that he never slept during that interrogation. Also during the course of that interrogation, defendant made numerous statements suggesting that he was involved in the disappearance of his ex-girlfriend. For example, in the early morning hours of March 21, he stated, "it makes me look guilty doesn't it?" Slightly later that morning, he stated, "I'm f***ed" and, "[i]f I were you guys, I wouldn't let me go." In the early morning hours of March 22, defendant made the following

statements: "[I]t's hard as f***," and "I'm gonna go to jail." Later that morning, he expressed his desire to go to jail and to kill himself. Finally, at about 8:30 P.M. on March 22, the lead detective who supervised the interrogation informed defendant that he would be charged with murder. According to the detective's hearing testimony, defendant told the detective that he wanted to "cut a deal basically to tell us where her body was" as long as the detective obtained an attorney for defendant and allowed him to speak to the Assistant District Attorney (ADA) with whom he had previously spoken. That ADA had spoken to defendant for 45 minutes at about 7:30 P.M. on March 22. The ADA testified that his conversation with defendant was a "last effort . . . to get him to open up." The ADA left when his "last effort" appeared unavailing, but he shortly thereafter received a telephone call from the detective requesting that he return and make arrangements for defendant to obtain counsel.

The ADA thereupon advised defense counsel that, if defendant revealed the location of the body, his sentence would be capped at a term of incarceration of 18 years to life. Defense counsel spoke to defendant, and then informed the SPD that defendant would not speak to them any further that night. Defendant was booked and placed in a holding cell at approximately 1:30 A.M. on March 23 and, following his arraignment in the morning, he returned to the SPD.

Defense counsel testified that he was not told how long defendant had been interrogated and was not shown any police reports. He further testified that defendant appeared "emotional and distraught," although he could not recall whether defendant appeared fatigued. Defendant testified that he offered to make a written statement after he told the police that he was so tired that he would sign anything they wrote. Immediately after defendant's arraignment at 9:30 A.M. on March 23, defendant advised defense counsel that he wanted to speak to the police and was willing to reveal the location of the body. He was then returned to the CID and was placed in the same room where he had been previously interrogated for 49½ hours. The lead detective questioned defendant in the presence of the ADA and defense counsel and, when the lead detective asked, "What happened?" defendant responded, "I killed her."

Defendant moved to suppress, inter alia, all statements made in Georgia and in Syracuse, between March 20 and March 23, 2007. The suppression court concluded that the statements made to the SPD detectives in Georgia were admissible because defendant had knowingly and voluntarily waived his *Miranda* rights and was not in custody. The suppression court further concluded that the statements made by defendant during the course of the 49½-hour interrogation between 11:30 P.M. on March 20, 2007 and 1:00 A.M. on March 23, 2007 were made involuntarily and were inadmissible at trial. Specifically, the court determined that the People failed to meet their burden of proving that the statements "made during this unprecedented and lengthy period" were voluntarily made beyond a reasonable doubt, citing *Greenwald v Wisconsin* (390 US 519). The suppression court further determined that those statements "were obtained in violation of *Miranda* rights; were made involuntarily in the 'traditional due process' and in

contravention of CPL [] 60.45," and could not be used against defendant at trial.

The suppression court further determined, however, that the statements made by defendant on March 23 after his arraignment were admissible because the statements were voluntarily made. The suppression court determined that any taint from the 49½-hour interrogation had been dissipated by "the break in interrogation; the assignment of counsel and opportunities to consult with that counsel; and by Defendant's removal from the interrogation room and opportunity to sleep for the remainder of the night before being arraigned and returning to speak with police in the presence of counsel the next morning." The court concluded that the roughly eight-hour break was sufficient to attenuate any taint from the prior 49½-hour interrogation and that the statements were not obtained as a result of a continuous chain of events.

Preliminarily, we note that the People contend that defendant failed to preserve for our review his challenge to the legal standard to be applied on the ground that defendant failed to raise that challenge before the suppression court. We reject the People's contention for the obvious reason that defendant could hardly have been expected to predict the legal standard that the court would apply in its decision. With respect to the merits of his challenge to the legal standard applied by the court, however, we conclude that there is no appreciable difference between the standard that he would urge upon this Court and that applied by the suppression court. The suppression court ruled that the taint from the initial circumstances of the interrogation was dissipated by the break in the interrogation, and by the assignment of counsel and the presence of counsel when defendant made the subsequent statements that were ruled admissible. In our view, the court's analysis properly considered the standards of the federal "fruit of the poisonous tree" cases relied upon by defendant (*see e.g. Oregon v Elstad*, 470 US 298, 305-308).

The suppression court and the majority conclude that two key factors attenuated defendant's clear admission of guilt from his prior 49½-hour interrogation, i.e., the break in the interrogation and the assignment and presence of counsel. In our view, under the circumstances of this case neither of those factors is sufficient to create an adequate attenuation.

We begin our analysis with a discussion of the 49½-hour continuous interrogation conducted by rotating teams of police officers. The interrogation occurred inside a locked room that was 10 feet by 10 feet. Except for bathroom breaks, during which defendant was accompanied by a detective, defendant spent the entire 49½-hour period in the interrogation room. As the suppression court stated in its findings of fact, the only food consumed by defendant during his continuous interrogation was a single sandwich, which he consumed early in the evening on March 21. That was approximately 20 hours after he was taken into custody and 40 hours before he confessed on the morning of March 23, a point that bears emphasis. From early Saturday evening to Monday morning when he confessed, defendant ate

not a morsel of food.

In addition, as the suppression court further stated in its findings of fact, there is no evidence that defendant slept during his 49½ hours in the interrogation room. In fact, the People, who as noted had the burden of proving the voluntariness of defendant's statements beyond a reasonable doubt (*see People v Rosa*, 65 NY2d 380, 386), offered no evidence that defendant slept while he was in the holding cell awaiting arraignment. The suppression court set forth in its findings of fact that defendant had an "opportunity to sleep" in the holding cell, but there was no evidence adduced at the hearing that defendant actually slept or that the conditions in the holding cell were such that it was even possible for defendant to sleep. Thus, it appears that defendant may have been awake for 50 hours immediately preceding his confession. That does not take into account the fact that defendant was picked up by the police at 10:30 P.M. on March 20 and probably had been awake for quite some time on that day (*see People v Anderson*, 42 NY2d 35, 39 ["As (defendant) had been transported to police headquarters an hour after midnight, his hours in the interrogation room must be added to those which had elapsed since the time he had arisen from his bed on the morning of the day before"]).

In *Ashcraft v State of Tennessee* (322 US 143), Justice Black, writing for a majority of the United States Supreme Court, considered the admissibility of a confession made following a continuous 36-hour interrogation conducted by rotating teams of police officers. The Court concluded that the interrogation was "so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear" (*id*. at 154). The Court continued, "It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross[-]examination for thirty-six hours without rest or sleep in an effort to extract a 'voluntary' confession" (*id.*). We recognize that *Ashcraft* predates the seminal ruling of the United States Supreme Court in *Miranda v Arizona* (384 US 436) and that, here, defendant, as found by the suppression court, waived his right to counsel. Thus, defendant and the suspect in *Ashcraft* were not in identical situations, given that the suspect in *Ashcraft* was not afforded the opportunity to have counsel present at his questioning. Despite that distinction, we note the Court's condemnation of a lengthy and continuous interrogation.

Indeed, research has shown that the possibility of a false confession increases based on the setting and length of the interrogation (*see* Gutierrez, *You Have The Right [to plead guilty]: How We Can Stop Police Interrogators From Inducing False Confessions,* 20 S Cal Rev L & Social Justice 317 [Spring 2011]). In fact, as noted in the above-referenced article, in a study of 125 confessions proven to be false, the mean interrogation time was 16.3 hours, which is substantially longer than the 4-hour interrogation time that is otherwise recommended (*id.* at 338-339). As the author notes, "the

long interrogation time combined with isolation, hunger, and sleep deprivation can lead to false confessions" (*id.* at 339). Even in the post-*Miranda* cases, the United States Supreme Court has "consistently indicated that the Due Process inquiry must focus on the propriety of the interrogation methods, not the reliability of the particular confession" (White, *What Is An Involuntary Confession Now?*, 50 Rutgers L Rev 2001, 2022 [Summer 1998]).

While the majority concludes, as do we, that the 49½-hour continuous interrogation conducted here offends basic principles of due process, we part ways with respect to whether "the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint' " (*Wong Sun v United States*, 371 US 471, 478; *see People v Stith*, 69 NY2d 313, 317-318; *People v Rogers*, 52 NY2d 527, 532-533, *rearg denied* 54 NY2d 753, *cert denied* 454 US 898, *reh denied* 459 US 898). With respect to the approximately eight-hour "break" in interrogation, the issue is whether "a definite, pronounced break in the interrogation . . . may be said to have returned [the defendant], in effect, to the status of one who is not under the influence of questioning" (*People v Chapple*, 38 NY2d 112, 115). In our view, the relatively brief "break" in interrogation, following a continuous 49½-hour interrogation, was not sufficient to return defendant to the status of one who is not under the influence of questioning. We consider not only the extraordinary and draconian length of the interrogation, but we also consider the fact that defendant may have believed himself "so committed by a prior statement that he [felt] bound to make another" (*People v Tanner*, 30 NY2d 102, 106). In *United States v Bayer* (331 US 532, 540, *reh denied* 332 US 785), the United States Supreme Court discussed that latter theory as follows: "[A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good."

Although defendant did not directly inculpate himself in his statements during the 49½-hour interrogation, there is no question that he made statements that were indicative of his involvement in the crime. Notably, his final statement at the end of the 49½ hours of interrogation was, "I'll give everybody what they want [in exchange for a plea deal and an attorney]," a statement that strongly suggests that defendant believed that he had no choice but to confess to the crime in order to receive a favorable plea deal and an attorney. In our view, the police exploited defendant's lengthy detention in such a way that it can be said to have "produced" his later inculpatory statements (*Rogers*, 52 NY2d at 535). This is not a case in which the defendant was released from the strictures of an interrogation during which he made no inculpatory remarks, and then made a "subsequent unprompted decision to make a statement" (*People v Kinnard*, 62 NY2d 910, 912; *see People v Dunn*, 83 AD3d 1421, *lv denied* 17 NY3d 794). As the United States Supreme Court noted in *Ashcraft*, persistent questioning, continuing hour after hour by relays of officers, along with the deprivation of sleep, "is the most effective torture and certain to produce any confession desired" (*Ashcraft*, 322 US at 150 n

6 [internal quotation marks omitted]).

The relatively brief break afforded to defendant after he essentially agreed to confess to the crime did not provide defendant with any freedom. Instead, he remained in his holding cell before he was taken to City Court for arraignment, whereupon he was immediately questioned by one of the same detectives who was involved in the 49½-hour interrogation. As noted, there is no evidence that defendant was provided food or that he slept during the eight hours he was in the holding cell. Under the circumstances, that "break" could hardly have "attenuated" defendant's statements immediately following arraignment from the prior coercive and extraordinarily lengthy interrogation.

We also reject the majority's reliance on the fact that counsel was present when defendant made his directly inculpatory statements. First, although defendant was represented by counsel during his post-arraignment statements, defendant was given comparatively little time to speak to defense counsel and in fact testified that he was concerned that the attorney was a disguised police officer, a suspicion that, given the rotating teams of police interrogators during the 49½-hour period, appears somewhat reasonable. There is no indication in the record that defense counsel was aware of the length of the interrogation and the fact that defendant had made implicitly inculpatory statements.

In addition, the presence of counsel did nothing to improve defendant's cognitive functioning, which necessarily was adversely affected by the prolonged lack of food and sleep. "The potential effect on human beings of the lack of such elemental needs as sleep and sustenance requires no elaboration. Case law repeatedly has emphasized the vital effect that the resultant 'slowly mounting fatigue' may be expected to have on a person's judgment and will" (*Anderson*, 42 NY2d at 40, quoting *Spano v New York*, 360 US 315, 320, *remittitur amended* 7 NY2d 729; *see Greenwald*, 390 US at 521 [defendant had no food for 12 hours while in custody]; *Sims v Georgia*, 389 US 404, 407 [defendant had no food for eight hours while in custody]).

As Justice Brennan and two other dissenters noted in a slightly different context in *McMann v Richardson* (397 US 759, 778 [Brennan, J., dissenting]), we should decline to "attach talismanic significance to the presence of counsel" where otherwise coercive pressures have been brought to bear upon a defendant. Certainly, the presence of counsel during his post-arraignment interrogation is a factor to be considered, but we conclude that the presence of counsel alone cannot, following a 49½-hour continuous interrogation proceeded by a brief break nullify the coercive effect of the prior interrogation. We agree with the reasoning of the Supreme Court of Iowa, as follows: "Consultation with an attorney would not insulate defendant from the psychological consequences of the promises made" to him (*State v Kase*, 344 NW2d 223, 226).

In our view, the specific circumstances of this case militate strongly in favor of suppression of the statements that followed the 49½-hour interrogation. In *Anderson* (42 NY2d 35), the Court of

Appeals considered the involuntariness of a confession under the totality of the circumstances and looked at the following factors: the length of the continuous interrogation (19 hours), the deprivation of sleep during that period, the use of rotating teams of officers conducting prolonged and persistent questioning, and the isolation of defendant from friends and family during that period (*id.* at 39-40). The only factor in *Anderson* that distinguishes it from this case is that the defendant in *Anderson* was not made aware of his right to counsel until the interrogation had been underway for 13 hours. Again, while we agree that the waiver of *Miranda* rights and the ultimate presence of an attorney are factors to be considered in determining the voluntariness of a confession, we conclude that they do not outweigh all of the other factors considered in *Anderson*.

Finally, we consider whether the failure to suppress defendant's confession constitutes harmless error. Confessions " 'are probably the most probative and damaging evidence' that can be introduced against the defendant" (*People v Carmona*, 82 NY2d 603, 614). That does not mean, however, that the admission of an inadmissible confession can never be harmless error. Here, there was significant circumstantial evidence implicating defendant in the crime. We cannot conclude, however, that there is no reasonable probability that the confession contributed to his conviction (*cf. id.* at 614-615; *People v Watson*, 90 AD3d 1666, 1667). We conclude, therefore, that defendant's statements made on March 23 immediately following his arraignment should have been suppressed, and we would grant a new trial.

Entered: June 8, 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 08-02239

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CRAIG A. HUNTSMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

WILLIAM G. PIXLEY, 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 (Craig J. Doran, J.), rendered October 3, 2008. The judgment convicted defendant, upon a jury verdict, of criminal mischief in the fourth degree (two counts), criminal mischief in the second degree, aggravated harassment in the second degree (four counts), burglary in the second degree, grand larceny in the fourth degree and criminal contempt 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 reducing the conviction of grand larceny in the fourth degree (Penal Law § 155.30 [1]) under count 11 of the indictment to petit larceny (§ 155.25) and vacating the sentence imposed on that count, and by reducing the conviction of criminal contempt in the first degree (§ 215.51 [d]) under count 12 of the indictment to criminal contempt in the second degree (§ 215.50 [3]) and vacating the sentence imposed on that count and as modified the judgment is affirmed, and the matter is remitted to Ontario County Court, for sentencing on the conviction of petit larceny and criminal contempt in the second degree.

Memorandum: On appeal from a judgment convicting him following a jury trial of 10 separate offenses stemming from multiple incidents, defendant contends, inter alia, that misconduct on the part of the prosecutor, Assistant District Attorney Jeffrey L. Taylor, requires reversal. Although defense counsel failed to object to any of the alleged acts of misconduct and thus failed to preserve defendant's present contention for our review (*see People v Paul*, 78 AD3d 1684, 1684-1685, *lv denied* 16 NY3d 834), we are nevertheless compelled to exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). This Court has repeatedly admonished Mr. Taylor for various acts of misconduct

(*People v Wildrick*, 83 AD3d 1455, 1458, *lv denied* 17 NY3d 803; *People v Morrice*, 61 AD3d 1390, 1391-1392; *People v Carter*, 31 AD3d 1167, 1169), yet the record on this appeal establishes that his misconduct has continued. We again admonish Mr. Taylor and remind him that prosecutors have "special responsibilities . . . to safeguard the integrity of criminal proceedings and fairness in the criminal process" (*People v Santorelli*, 95 NY2d 412, 421). With respect to the trial at issue on this appeal, however, we "cannot say that his [mis]conduct . . . jeopardize[d] the fairness of the trial" (*People v Johnson*, 62 AD2d 555, 560, *affd* 47 NY2d 785, *cert denied* 444 US 857; *see People v Alicea*, 37 NY2d 601, 603; *Paul*, 78 AD3d at 1685).

We reject defendant's further contention 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 on the record before us on this appeal that defendant received meaningful representation (*see generally People v Flores*, 84 NY2d 184, 186-187; *People v Baldi*, 54 NY2d 137, 147). Defense counsel investigated the allegations and presented a detailed alibi notice. He made numerous pretrial motions, including one for severance. He conceded counts for which the evidence was unassailable, but thoroughly defended against counts for which there was questionable evidence on the issue of identification. As a result, defendant was acquitted of three charges.

We agree with defendant that County Court erred in admitting his cell phone records in evidence. They were neither municipal records nor medical records, and thus they were not self-authenticating under CPLR 4518 (c) (*see People ex rel. Saafir v Mantello*, 163 AD2d 824, 825). Furthermore, the records were not "so patently trustworthy as to be self-authenticating" (*People v Kennedy*, 68 NY2d 569, 577 n 4). Because the People otherwise failed to present a foundation for the admission of the cell phone records under CPLR 4518 (a), they should have been excluded (*see People v Ramos*, 13 NY3d 914, 914-915). We conclude, however, that any error in the admission of those records is harmless because the evidence of guilt is overwhelming and there is no significant probability that the error infected the verdict (*see People v Crimmins*, 36 NY2d 230, 241-242).

Defendant failed to preserve for our review his further contention that the court erred in admitting in evidence documentation related to repair work that was performed on the complainant's vehicle (*see People v Bell*, 286 AD2d 443). We decline to exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

With respect to the second count of the indictment, charging him with criminal mischief in the second degree (Penal Law § 145.10), defendant contends that the evidence is legally insufficient to establish that the damage to the complainant's vehicle exceeded $1,500. Defendant failed to preserve that contention for our review, however, inasmuch as he did not raise it in his motion for a trial order of dismissal (*see People v Culver*, 34 AD3d 1270; *People v Chacon*, 11 AD3d 906, 906, *lv denied* 3 NY3d 755; *see generally People v*

Gray, 86 NY2d 10, 19). 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 further contentions that the verdict on that count is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495) and that he was entitled to an instruction on a lesser included offense (*see generally People v Glover*, 57 NY2d 61, 63-64). There is no reasonable view of the evidence that would have supported a finding that the amount of the repairs to the complainant's vehicle was less than the statutory threshold such that he committed the lesser but not the greater offense.

With respect to the 11th and 12th counts of the indictment, charging defendant with grand larceny in the fourth degree and criminal contempt in the first degree, defendant contends that the evidence is legally insufficient to establish the value of the items that were stolen and damaged. Even assuming, arguendo, that defendant failed to preserve those contentions for our review (*see generally Gray*, 86 NY2d at 19), we would nevertheless exercise our power to address them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Avino*, 34 AD3d 1251, 1252). We agree with defendant that the evidence on the monetary value of the items allegedly stolen and damaged is legally insufficient to support the conviction of those crimes.

The sole evidence concerning the value of the items that were allegedly stolen was the testimony of the complainant, who estimated that the value of the two family rings that were stolen was "probably over 1500 [*sic*] to $2,000." With respect to the clothing and other unidentified items that were taken, the complainant testified that the value of those items was "[a]t least 3500." Indeed, we note that an officer investigating the burglary testified that the complainant had informed him that the jewelry that was taken "had very sentimental value to her but little monetary value. The only other items missing were her jeans and panties." It is well established that " '[c]onclusory statements and rough estimates of value are not sufficient' " to establish the value of a stolen item under Penal Law § 155.20 (1) (*People v Pallagi*, 91 AD3d 1266, 1269; *see People v Smith*, 289 AD2d 1056, 1058-1059, *lv denied* 98 NY2d 641; *see generally People v Lopez*, 79 NY2d 402, 404-405).

We therefore modify the judgment by reducing the conviction under count 11 to petit larceny (*see* CPL 470.15 [2] [a]), and we remit the matter to County Court for sentencing on that conviction (*see Avino*, 34 AD3d at 1254; *Smith*, 289 AD2d at 1058). Based on our resolution of this issue, we do not address defendant's alternative contentions related to count 11.

With respect to count 12, the only evidence that the damage to the complainant's residence exceeded the monetary threshold required for criminal contempt in the first degree under Penal Law § 215.51 (d), was the testimony of a police investigator who stated that, based on his training and experience, the total amount of damage was "[p]robably around $500." "[T]he witness'[s] general approximation of

the cost of repairing or replacing various property items was insufficient to establish the amount of damage" (*People v Brantley*, 186 AD2d 1036, 1036, *lv denied* 81 NY2d 785; *see People v Quigley*, 70 AD3d 1411, 1412; *People v Jackson*, 269 AD2d 867, *lv denied* 95 NY2d 798). We therefore modify the judgment by reducing that conviction to criminal contempt in the second degree (§ 215.50 [3]), for which no proof of value is required (*see Quigley*, 70 AD3d at 1412), and we remit the matter to County Court for sentencing on that conviction as well. Based on our resolution of this issue, we do not address defendant's alternative contention related to count 12.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

557

KA 11-00567

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CRAIG A. HUNTSMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Ontario County Court (Craig J. Doran, J.), dated February 24, 2011. The order denied the motion of defendant to vacate his conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, defendant's CPL 440.10 motion is granted, the judgment is modified by vacating the conviction of counts 9 through 12, and a new trial is granted on counts 9 and 10, and counts 11 and 12 as reduced in *People v Huntsman* ([appeal No. 1], ___ AD3d ___ [June 8, 2012]), following suppression of defendant's statement.

Memorandum: Defendant appeals from an order that denied his CPL article 440 motion to vacate those parts of a judgment convicting him following a jury trial of burglary in the second degree (Penal Law § 140.25 [2]), criminal mischief in the fourth degree (§ 145.00 [1]), grand larceny in the fourth degree (§ 155.30 [1]) and criminal contempt in the first degree (§ 215.51 [d]) under counts 9 through 12 of the indictment. In the direct appeal from the judgment, we modified the judgment by reducing the conviction of grand larceny in the fourth degree under count 11 of the indictment to petit larceny (§ 155.25), reducing the conviction of criminal contempt in the first degree under count 12 of the indictment to criminal contempt in the second degree (§ 215.50 [3]), vacating the sentences imposed on those counts and remitting the matter to County Court for sentencing on those counts (*People v Huntsman* [appeal No. 1], ___ AD3d ___ [June 8, 2012]).

While the direct appeal was pending, defendant filed a CPL 440.10 motion, contending that reversal of the conviction under counts 9

through 12 was required because a statement admitted in evidence at trial was obtained in violation of his indelible right to counsel (*see People v Steward*, 88 NY2d 496, 501, *rearg denied* 88 NY2d 1018; *People v Rogers*, 48 NY2d 167, 170-171; *see also People v Lopez*, 16 NY3d 375, 380-382). He also contended that he was denied effective assistance of counsel based on defense counsel's failure to move to suppress his statement on that ground. We conclude that County Court erred in denying the CPL article 440 motion.

Following an all-day investigation and interview conducted jointly by an Ontario County Sheriff's Department (OCSD) investigator and a Seneca County Sheriff's Department (SCSD) deputy, defendant was arraigned on charges stemming from an incident in Seneca County. At the arraignment, in the presence of the SCSD deputy, defendant requested counsel on the Seneca County charges and was remanded into the custody of the SCSD. Defendant was thereafter transported to the Waterloo Police Department where he was again questioned by the OCSD investigator on the Ontario County charges. Although defendant purportedly waived his *Miranda* rights, it is well established that, "once a defendant in custody on a particular matter is represented by or requests counsel, custodial interrogation about any subject, whether related or unrelated to the charge upon which representation is sought or obtained, must cease" (*Steward*, 88 NY2d at 501; *see Rogers*, 48 NY2d at 170-171; *see also Lopez*, 16 NY3d at 380-382). Under the circumstances of this case, the OCSD investigator should be charged with the knowledge, actual or constructive, that defendant had requested counsel on the charges for which he had just been arraigned (*see Lopez*, 16 NY3d at 382; *People v Bongarzone-Suarrcy*, 6 NY3d 787, 789; *People v Kazmarick*, 52 NY2d 322, 328-329). We therefore conclude that defendant's statement was taken in violation of his indelible right to counsel and must be suppressed. The harmless error test for a constitutional violation is not met here, because it cannot be said that "there is no reasonable possibility that the error affected the jury's verdict" (*People v Douglas*, 4 NY3d 777, 779; *see People v Crimmins*, 36 NY2d 230, 240-241). The only other direct evidence of defendant's presence at the burglarized residence was a palm print on the window that the police deemed to be the point of entry, and the evidence established that defendant had resided in that residence until shortly before the burglary was committed, thus providing an explanation for the existence of his print on the window.

Contrary to the People's contention, defendant's original suppression motion did not include this meritorious contention, nor did sufficient facts appear on the record of the appeal from the judgment to permit adequate review of this contention on the direct appeal from the judgment. Thus, denial of the CPL article 440 motion was not mandatory under CPL 440.10 (2) (a), (b) or (c).

Pursuant to CPL 440.30 (3) (a) - (c), the motion must be granted without a hearing because the moving papers establish a legal basis for the motion; the ground is supported by sworn allegations thereof; and the sworn allegations are conclusively substantiated by unquestionable documentary proof. We note, however, that the new trial shall be conducted on counts 11 and 12 as reduced by our

decision in defendant's direct appeal from the judgment (*Huntsman* [appeal No. 1], ___ AD3d at ___).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

560

KA 07-00633

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSIE A. TURNER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered March 2, 2007. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (three counts), robbery in the second degree (eight counts) and grand larceny in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the surcharge imposed on the amount of restitution ordered from 10% to 5% and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of three counts of robbery in the first degree (Penal Law § 160.15 [4]), eight counts of robbery in the second degree (§ 160.10 [1]), and two counts of grand larceny in the third degree (former § 155.35). Defendant contends that County Court erred in characterizing the stop of defendant's vehicle by the police as a "stop and question" for which the police required only reasonable suspicion inasmuch as defendant was ultimately arrested, for which the police required probable cause. "Because that contention was not raised in defendant's pretrial omnibus motion or at the suppression hearing, it has not been preserved for our review" (*People v King,* 284 AD2d 941, *lv denied* 96 NY2d 920; *see People v Coleman*, 56 NY2d 269, 274; *People v Gonzalez*, 55 NY2d 887, 888).

Defendant further contends that the court erred in responding to a jury note submitted during deliberations on the issue whether the victims named separately in the three counts of robbery in the first degree had to be the persons who perceived that a participant in the robbery displayed "what appear[ed] to be a pistol, revolver, rifle, shotgun, machine gun or other firearm" (Penal Law § 160.15 [4]). We reject that contention. The court instructed the jury that "the perception of the use or threatened use of a gun by any person present

at the robbery is sufficient. It need not be limited to the particular victim named in that count." Given that the statute merely provides that the display need only be made at some point "in the course of the commission of the crime or of immediate flight therefrom" and does not specify who must view the display (§ 160.15), we conclude that the court's response to the jury note was proper (*see generally People v Williams*, 286 AD2d 918, 918, *lv denied* 97 NY2d 763).

As defendant contends and the People correctly concede, however, the court erred in imposing a restitution surcharge of 10%. Penal Law § 60.27 (8) provides that the surcharge on the amount of restitution or reparation ordered shall not exceed 5% unless there is a showing "that the actual cost of the collection and administration of restitution or reparation in a particular case exceeds five percent of the entire amount of the payment or the amount actually collected . . . ." Here, the record is devoid of any such evidence, to support the court's imposition of a 10% surcharge. We therefore modify the judgment accordingly. We have reviewed defendant's remaining contentions and conclude that none requires reversal or further modification of the judgment.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

571

CA 11-02199

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

RUSSEL VANBROCKLEN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIE COUNTY MEDICAL CENTER, DEFENDANT-APPELLANT.

RICOTTA & VISCO, ATTORNEYS & COUNSELORS AT LAW, BUFFALO (BRETT P. GLIOSCA OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered February 4, 2011. The order, insofar as appealed from, denied in part the cross motion of defendant for summary judgment.

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

Memorandum: Plaintiff was brought by ambulance to defendant, Erie County Medical Center, after suffering a severe panic attack at a movie theater. During the ensuing few hours of treatment administered to plaintiff in defendant's psychiatric unit, a doctor ordered injections of Haldol and Ativan, which were administered to plaintiff without his consent. In commencing this action, plaintiff asserted claims sounding in, inter alia, intentional infliction of emotional distress, medical malpractice, battery, and the violation of his constitutional rights. Supreme Court granted defendant's cross motion for summary judgment dismissing the complaint with the exception of the battery and constitutional claims. We reject defendant's contention that the court should have granted its cross motion in its entirety.

Contrary to defendant's contention, the claims asserting the complete absence of consent, as opposed to those asserting that defendant exceeded the scope of plaintiff's consent, properly may be treated as claims for battery rather than for medical malpractice. It is well settled that a medical professional may be deemed to have committed battery, rather than malpractice, if he or she carries out a procedure or treatment to which the patient has provided "no consent at all" (*Messina v Alan Matarasso, M.D., F.A.C.S., P.C.*, 284 AD2d 32, 35; *see Wiesenthal v Weinberg*, 17 AD3d 270, 270-271; *Cross v Colen*, 6 AD3d 306, 307). With respect to plaintiff's battery claims, we conclude that defendant failed to meet its initial burden of establishing that it "did not intentionally engage in offensive bodily contact without plaintiff's consent" (*Guntlow v Barbera*, 76 AD3d 760,

766, *appeal dismissed* 15 NY3d 906; *see generally* CPLR 3212 [b]). The medical records and affidavits submitted by defendant do not dispute that its agents intentionally contacted plaintiff's person when administering the injections, nor do they dispute that those injections were administered without his consent. Likewise, defendant failed to establish that the injections were non-offensive in nature, i.e., that they were not " 'wrongful under all the circumstances' " (*Messina*, 284 AD2d at 35). Thus, the court properly denied those parts of defendant's cross motion with respect to the claims for battery.

As to plaintiff's constitutional claims, we note that defendant, as a public hospital, is a state actor (*see Vanbrocklen v Gupta*, 2010 WL 5575325, at *2-3 [WD NY]; *cf. Nedd v Queens Hosp. Ctr.*, 2008 WL 2497428, *2 [ED NY]), and that due process protects the "fundamental right [of psychiatric patients] to refuse antipsychotic medication" (*Rivers v Katz*, 67 NY2d 485, 492, *rearg denied* 68 NY2d 808; *see Kulak v City of New York*, 88 F3d 63, 74). Under the circumstances of this case, in which the medication was administered before there was a "judicial determination of whether [plaintiff had] the capacity to make a reasoned decision with respect to proposed treatment" (*Rivers*, 67 NY2d at 497), defendant could lawfully administer the medication without consent only if plaintiff was "presently dangerous and the proposed treatment [was] the most appropriate reasonably available means of reducing that dangerousness" (14 NYCRR 527.8 [c] [1]). A patient is considered "dangerous" in this context if he or she "engages in conduct or is imminently likely to engage in conduct posing a risk of physical harm to himself[, herself] or others" (14 NYCRR 527.8 [a] [4]; *see Rivers*, 67 NY2d at 495-496).

Defendant failed to establish its entitlement to judgment as a matter of law on plaintiff's constitutional claims inasmuch as it failed to demonstrate that, at the time plaintiff received the injections, he was "engag[ing] in conduct or [was] imminently likely to engage in conduct posing a risk of physical harm to himself or others" (14 NYCRR 527.8 [a] [4]; *see Kulak*, 88 F3d at 73-75; *see generally* CPLR 3212 [b]). The medical records do not indicate that plaintiff was unruly, uncooperative, or belligerent, and they in fact suggest that plaintiff's behavior was unremarkable. Additionally, the affidavit of the physician who ordered the injections is ambiguous regarding his rationale for doing so. Specifically, many of the physician's statements suggest that he ordered the injections to *treat* plaintiff's psychiatric condition, not because he believed that plaintiff posed a risk of harm to himself or others. Because defendant failed to establish as a matter of law that it had a lawful basis for medicating plaintiff without his consent, it failed to establish its entitlement to summary judgment dismissing plaintiff's constitutional claims (*see generally* 14 NYCRR 527.8 [c] [1]; *Rivers*, 67 NY2d at 492-497; *Kulak*, 88 F3d at 73-75).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

572.1

CA 11-02058

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

IN THE MATTER OF FFT SENIOR COMMUNITIES, INC.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF CANANDAIGUA, BOARD OF ASSESSMENT REVIEW
FOR TOWN OF CANANDAIGUA AND COUNTY OF ONTARIO,
RESPONDENTS-APPELLANTS.

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

BIERSDORF & ASSOCIATES, P.A., MINNEAPOLIS, MINNESOTA (DAN BIERSDORF OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Kenneth R. Fisher, J.), entered December 20, 2010 in a proceeding pursuant to RPTL article 7. The order reduced the tax assessments for petitioner for the years 2006-2007, 2007-2008, and 2008-2009.

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

Memorandum: Respondents appeal from an order in which Supreme Court reduced the tax assessments of petitioner for the tax years 2006-2007, 2007-2008, and 2008-2009. Both respondents and petitioner presented expert testimony regarding the highest and best use of the property. We note that, in this bench trial, although our authority is as broad as that of the trial court (*see Don Vito v State of New York*, 182 AD2d 1070, 1071), we nevertheless will not disturb the decision of the fact-finding court on appeal unless it is obvious that the court's conclusions could not have been reached under any fair interpretation of the evidence (*see Farace v State of New York*, 266 AD2d 870, 870). We conclude that the court properly applied the principles enunciated in *Matter of Miriam Osborn Mem. Home Assn. v Assessor of City of Rye* (80 AD3d 118) with respect to the entrance fees charged by petitioner and that, under the circumstances, there is no reason to disturb the court's determination with respect to the assessment reductions.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

574

KA 10-01960

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOEQUELL E. SOLOMON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered July 20, 2010. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]), as a lesser included offense of the first count of the indictment charging him with assault in the first degree (§ 120.10 [1]), and criminal possession of a weapon in the fourth degree (§ 265.01 [2]). Contrary to defendant's contention, County Court properly denied his request to charge the jury on assault in the third degree (§ 120.00 [3]) as a lesser included offense of assault in the first degree. "There was no reasonable view of the evidence presented that would support a jury finding that the defendant acted with criminal negligence rather than [acted intentionally]" (*People v Beckford*, 49 AD3d 547, 548, *lv denied* 10 NY3d 859; *see People v Wright*, 105 AD2d 1088, 1089; *see generally* CPL 300.50 [1]). Further, we reject defendant's contention that the count charging criminal possession of a weapon in the fourth degree was an inclusory concurrent count of assault in the first degree (*see People v Mitchell*, 216 AD2d 863, *lv denied* 86 NY2d 798; *People v Sykes*, 194 AD2d 502, *lv denied* 82 NY2d 759; *see generally* CPL 300.30 [4]; *People v Perez*, 45 NY2d 204, 208-210).

We agree with defendant, however, that the court erred in charging the jury that the victim of the assault was justified to use physical force "to the extent that he . . . reasonably believe[d] such to be necessary to prevent or terminate what he . . . reasonably

believe[d] to be the commission . . . of larceny" (Penal Law § 35.25). " 'It is a fundamental rule of law that jury instructions are required to be responsive to the issues presented by the evidence' " (*People v Lewis*, 160 AD2d 815, 816, *lv dismissed* 76 NY2d 738; *see generally* CPL 300.10 [2]), and it is error for the court to submit to the jury " 'a theory of the facts which had no foundation in the evidence' " (*People v Rosenberg*, 293 NY 16, 17, *rearg denied* 293 NY 697, quoting *People v Barberi*, 149 NY 256, 274; *see People v Duncan*, 46 NY2d 74, 79, *rearg denied* 46 NY2d 940, *cert denied* 442 US 910, *rearg dismissed* 56 NY2d 646). We conclude that the court's justification charge was not responsive to the evidence because there is no view thereof that the *victim* was justified in using physical force against defendant or that the *victim* used such force in the first instance (*cf. People v Banks*, 2 AD3d 226, *lv denied* 2 NY3d 737; *see generally* Penal Law art 35). Under the circumstances of this case, we agree with defendant that the patently improper instruction was so prejudicial as to deny him a fair trial (*see generally People v Ashwal*, 39 NY2d 105, 111; *People v Lovello*, 1 NY2d 436, 439) and, because the evidence of defendant's guilt is not overwhelming, it cannot be said that the error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242). We therefore reverse the judgment, and we grant a new trial on the indictment.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

593

CA 11-01298

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

IN THE MATTER OF THE APPLICATION OF WILLIAM HOGE, PETITIONER-APPELLANT, FOR THE DISSOLUTION OF SELECT FABRICATORS, INC.;
SELECT FABRICATORS, INC., GARY W. WINCH, AND DAVID YEARSLEY, RESPONDENTS-RESPONDENTS.

SELECT FABRICATORS, INC., PLAINTIFF,

V

WILLIAM HOGE AND WILLIAM HOGE CONSULTING, INC., DEFENDANTS-APPELLANTS.

MEMORANDUM AND ORDER

WILLIAM S. ROBY, ROCHESTER, FOR PETITIONER-APPELLANT AND DEFENDANTS-APPELLANTS.

JASON S. DIPONZIO, ROCHESTER, FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Kenneth R. Fisher, J.), entered February 3, 2011. The order granted the motion of respondents for partial summary judgment dismissing petitioner's "counterclaims."

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

Memorandum: Select Fabricators, Inc. (SFI) commenced an action against William Hoge and William Hoge Consulting, Inc. (WHC) seeking, inter alia, damages for misconduct pursuant to Business Corporation Law § 720 and unjust enrichment. Hoge (hereafter, petitioner), a shareholder of SFI, thereafter commenced a proceeding pursuant to Business Corporation Law § 1104-a seeking, inter alia, dissolution of SFI, a respondent in that proceeding, and asserting what the parties characterize as "counterclaims" against it and its other shareholders, respondents Gary W. Winch and David Yearsley. The action and proceeding were subsequently consolidated. Petitioner and WHC appeal from an order granting the motion of respondents, i.e., SFI, Winch and Yearsley, for partial summary judgment dismissing the counterclaims in the proceeding. We affirm. We note, however, that WHC, which is not a party to the proceeding, is not a proper appellant (*see* CPLR 5511).

Petitioner's contention that Supreme Court erred in granting respondents' motion because issue had not been joined at the time it was made pursuant to CPLR 3212 (a), or because respondents failed to

submit the requisite supporting proof pursuant to CPLR 3212 (b) is raised for the first time on appeal and thus is not properly before us (*see e.g. Chapman v Pyramid Co. of Buffalo*, 63 AD3d 1623, 1624; *Blazynski v A. Gareleck & Sons, Inc.*, 48 AD3d 1168, 1169, *lv dismissed in part and denied in part* 11 NY3d 825). To the extent that petitioner advanced that contention in support of his motion for leave to reargue his opposition to the prior motion of respondents, we note that "[r]eargument does not provide a party an opportunity to advance arguments different from those tendered on the original application" (*Garland v RLI Ins. Co.*, 79 AD3d 1576, 1577 [internal quotation marks omitted], *lv dismissed* 17 NY3d 774, 18 NY3d 877). Petitioner's further contention that the court erred in granting that part of the motion for partial summary judgment dismissing the counterclaim for "Unfair Competition - Customer Lists" is raised for the first time in his reply brief, and thus it also is not properly before us (*see Pieri v B&B Welch Assoc.*, 74 AD3d 1727, 1730).

In addition, petitioner contends that the court erred in denying his request to "replead" in the event that the court awarded respondents partial summary judgment (*see generally* CPLR 3025 [a], [b]). We are unable to review that contention, however, inasmuch as the record contains no evidence concerning the timing, nature or substance of that request, and "a party alleging error must present an adequate record for appellate review" (*de Vries v Metropolitan Tr. Auth.*, 11 AD3d 312, 312-313).

We conclude that the court properly granted that part of respondents' motion seeking partial summary judgment dismissing the counterclaim for "Defamation - Abuse of Process." "[O]ral or written statements made in the course of a judicial proceeding are absolutely privileged, notwithstanding the motive with which they are made, so long as they are material and pertinent to the litigation . . . In determining whether an allegedly defamatory statement is pertinent and material to a judicial proceeding, the court must accord the statement an extremely liberal construction" (*Solomon v Larivey*, 49 AD3d 1274, 1275-1276 [internal quotation marks omitted]). Here, the allegedly defamatory statements were pertinent and material to the action (*see id.* at 1275), and they were made " 'in good faith and without malice' " (*Lacher v Engel*, 33 AD3d 10, 13).

Contrary to petitioner's further contention, the court properly granted that part of respondents' motion for partial summary judgment dismissing the counterclaim for "Defamation - Libel" inasmuch as the statements at issue with respect thereto are protected by a qualified privilege. "A qualified privilege arises when a person makes a good[ ]faith, bona fide communication upon a subject in which he or she has an interest, or a legal, moral or societal interest to speak, and the communication is made to a person with a corresponding interest" (*Cusimano v United Health Servs. Hosps., Inc.*, 91 AD3d 1149, 1150 [internal quotation marks omitted]; *see Liberman v Gelstein*, 80 NY2d 429, 437; *Mancuso v Allergy Assoc. of Rochester*, 70 AD3d 1499, 1500). Here, respondents established that Yearsley's statements on behalf of SFI regarding purchases made by petitioner using SFI's credit card were of mutual interest to SFI and the company to which

those statements were made (*see East Point Collision Works v Liberty Mut. Ins. Co.*, 271 AD2d 471, 471-472; *Present v Avon Prods.*, 253 AD2d 183, 187-188, *lv dismissed* 93 NY2d 1032; *see also Anas v Brown*, 269 AD2d 761, 763). Petitioner failed to defeat the defense of qualified privilege by demonstrating that Yearsley made the statements in question with malice (*see generally Liberman*, 80 NY2d at 437-439; *Kondo-Dresser v Buffalo Pub. Schools*, 17 AD3d 1114, 1115).

We further conclude that the court properly granted that part of respondents' motion for partial summary judgment dismissing the counterclaim for "Conspiracy" because " 'New York does not recognize civil conspiracy to commit a tort as an independent cause of action' " (*Thyroff v Nationwide Mut. Ins. Co.*, 57 AD3d 1433, 1435, *appeal dismissed* 12 NY3d 911, *lv denied* 13 NY3d 710). Finally, we have reviewed petitioner's remaining contention and conclude that it is without merit.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

594

CA 11-01299

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

IN THE MATTER OF THE APPLICATION OF WILLIAM HOGE, PETITIONER-APPELLANT, FOR THE DISSOLUTION OF SELECT FABRICATORS, INC.;
SELECT FABRICATORS, INC., GARY W. WINCH, AND DAVID YEARSLEY, RESPONDENTS-RESPONDENTS.

ORDER

SELECT FABRICATORS, INC., PLAINTIFF,

V

WILLIAM HOGE AND WILLIAM HOGE CONSULTING, INC., DEFENDANTS-APPELLANTS.

WILLIAM S. ROBY, ROCHESTER, FOR PETITIONER-APPELLANT AND DEFENDANTS-APPELLANTS.

JASON S. DIPONZIO, ROCHESTER, FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Kenneth R. Fisher, J.), entered April 27, 2011. The order denied petitioner's motion to reargue his opposition to respondents' motion for partial summary judgment seeking the dismissal of his "counterclaims."

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

598

CA 11-02408

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, AND LINDLEY, JJ.

IN THE MATTER OF CENTERPOINTE CORPORATE PARK PARTNERSHIP 350, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MONY, ALSO KNOWN AS THE MONY GROUP, ALSO KNOWN AS THE MONY GROUP, INC., ET AL., RESPONDENTS.

BROKER ALLIANCE GROUP, INC., APPELLANT.

ROSCETTI & DECASTRO, P.C., NIAGARA FALLS (JAMES C. ROSCETTI OF COUNSEL), FOR APPELLANT.

MATTAR, D'AGOSTINO & GOTTLIEB, LLP, BUFFALO (DIANA B. CAVALL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered February 25, 2011. The order, inter alia, denied the cross motion of the Broker Alliance Group, Inc. to intervene and to dismiss the petition.

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

Memorandum: Petitioner commenced this turnover proceeding pursuant to CPLR 5225 and 5227 seeking funds held in escrow by MONY (respondent), which had settled an action commenced against it by, inter alia, proposed intervenor Broker Alliance Group, Inc. (Broker) for the sum of $600,000. The other plaintiffs in the action against respondent were Empire Financial Services, Inc. (Empire) and its parent company, EFS Holdings LLC (EFS), which had transferred Empire's assets to Broker. In a separate action, petitioner had obtained a judgment against Empire for $115,221.51. In this proceeding, petitioner asserted that the funds owed by respondent to Broker from the settlement were actually owed to Empire, petitioner's judgment debtor. Petitioner moved for an order directing respondent to release to it the portion of those funds held in escrow, and Broker cross-moved to intervene and to dismiss the petition, contending that Empire, and thus petitioner, had no right to the escrowed funds. Broker appeals from an order that denied its cross motion and granted the petition, thereby directing respondent to turn over the escrowed funds to petitioner.

We conclude that Supreme Court properly determined that

petitioner is entitled to turnover of the funds held in escrow to satisfy its judgment against Empire. At the outset, we reject Broker's contention that it should have been named as a necessary party to the proceeding. Pursuant to CPLR 5225 (b), only the stakeholder must be named as a party to a turnover proceeding, and joinder of the judgment debtor and "any adverse claimant" is permissive (*see generally Colonial Sur. Co. v Lakeview Advisors, LLC*, 93 AD3d 1253, 1256). In any event, even assuming, arguendo, that Broker should have been named as a necessary party in this proceeding, we conclude that petitioner's failure to do so would not mandate dismissal because Broker was on notice of the proceeding and actively sought to intervene (*see generally* CPLR 1003, 1012; *L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 13).

We also reject Broker's contention that the court erred in summarily denying its cross motion to intervene and granting the petition on the papers submitted. In a summary proceeding such as a turnover proceeding pursuant to CPLR 5225 (b), "a court is authorized to 'make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised' " (*Matter of TNT Petroleum, Inc. v Sea Petroleum, Inc.*, 72 AD3d 694, 695, quoting CPLR 409 [b]). A court in a turnover proceeding "will apply summary judgment analysis and[,] absent a factual issue requiring a trial," the matter will be summarily determined on the papers presented (*Matter of Trustco Bank, N.A. v Strong*, 261 AD2d 25, 27). Thus, "a petition in [such] a . . . proceeding must be accompanied by competent evidence raising a material issue of fact" (*id.*). Where an adverse claimant attempts to intervene and "the defenses pleaded in [that claimant's papers] are without merit, a denial of the application [to intervene is] warranted because intervention would merely serve to unduly delay the determination of a summary proceeding and prejudice a substantial right of the judgment creditor to receive payment" (*Vanderbilt Credit Corp. v Chase Manhattan Bank*, 100 AD2d 544, 545).

Here, petitioner established that, as a judgment creditor of Empire, it was entitled to turnover of a portion of the proceeds of Empire's settlement with respondent. In response, Broker failed to submit sufficient evidence to entitle it to a hearing on the merits of its claim to the escrowed settlement funds. Notably, Broker submitted no documentary evidence to substantiate its claim to the funds—not even the settlement agreement, the complaint in the action against respondent or the purchase contract demonstrating which assets of Empire were "sold" to Broker by EFS. Indeed, we agree with petitioner that Broker's submissions in support of its cross motion further demonstrated petitioner's entitlement to the escrowed funds. Broker submitted an affidavit from its principal, who denied that Empire was a party to the purchase agreement between Broker and EFS. In addition, Broker's principal acknowledged that the settlement of the action against respondent was based upon the unjust enrichment cause of action only, and the complaint in that action demonstrates that the unjust enrichment cause of action was pleaded in Empire's name alone. Broker's submissions in support of its contention that the unjust enrichment cause of action inured to its benefit as well consist of

nothing more than the "conclusory, unsubstantiated assertions [of Broker's principal, which] are insufficient to meet [its] burden" on the cross motion (*Villager Constr. v Kozel & Son*, 222 AD2d 1018, 1018). Even in the event that Broker had some interest in the escrowed funds by virtue of its undocumented contractual relationship to EFS, we nevertheless conclude that, as a judgment creditor of Empire, petitioner was entitled to those funds ahead of Broker (*see generally Matter of Sanford v Bennett*, 11 AD3d 758, 759, *lv denied* 4 NY3d 702).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

599

TP 11-01702

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

IN THE MATTER OF TAUREAN HAYWOOD, PETITIONER,

V ORDER

ROBERT A. KIRKPATRICK, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, RESPONDENT.

TAUREAN HAYWOOD, 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, Erie County [M. William Boller, A.J.], entered August 17, 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 said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

600

TP 11-02389

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

IN THE MATTER OF MICAIAH ALLEN, PETITIONER,

V ORDER

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

MICAIAH ALLEN, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered November 17, 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 said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

601

KA 10-00661

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL R. TENNEY, ALSO KNOWN AS PAUL RYAN TENNEY,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (MELISSA L. CIANFRINI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered January 4, 2010. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the third degree (Penal Law § 155.35 [1]) and imposing a sentence of a term of incarceration and, in appeal No. 2, he appeals from a judgment ordering him to pay restitution in the amount of $108,091.10. Addressing first appeal No. 1, defendant's sole contention is that the sentence is unduly harsh and severe, and we reject that contention. As for appeal No. 2, defendant waived his sole contention therein, i.e., that County Court erred in failing to conduct a restitution hearing, inasmuch as he stipulated to the amount of restitution owed (*see People v Faso*, 82 AD3d 1584, 1584-1585, *lv denied* 17 NY3d 816, 952; *People v Brown*, 70 AD3d 1378, 1379).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

602

KA 11-01305

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL R. TENNEY, ALSO KNOWN AS PAUL RYAN TENNEY,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (MELISSA L. CIANFRINI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered February 11, 2010. The judgment ordered defendant to pay restitution.

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

Same Memorandum as in *People v Tenney* ([appeal No. 1] ___ AD3d ___ [June 8, 2012]).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

605

KA 09-02644

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDUARDO JIMENEZ, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered December 10, 2009 pursuant to the 2009 Drug Law Reform Act. The order denied defendant's application to be resentenced upon defendant's 2004 conviction of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree and criminal possession of a controlled substance in the seventh degree.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order denying his application for resentencing pursuant to CPL 440.46. The People correctly concede that County Court erred in determining that defendant is ineligible for resentencing on the ground that he had a prior conviction for an "exclusion offense" as defined in CPL 440.46 (5) (a) (ii). The court made that determination by erroneously calculating the look-back period of 10 years set forth in the statute from the date on which defendant committed the crimes for which he seeks resentencing, rather than from the date on which he filed the application for resentencing (*see People v Sosa*, 18 NY3d 436, 440; *People v Hill*, 82 AD3d 77, 79-80). We therefore reverse the order and remit the matter to County Court for further proceedings on defendant's application for resentencing.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

607

KA 11-00677

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EVERETT C. MCINTOSH, II, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered October 28, 2010. The judgment convicted defendant, upon a nonjury verdict, of attempted robbery in the second degree and attempted grand larceny in the third degree.

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

Memorandum: On appeal from a judgment convicting him after a bench trial of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [3]) and attempted grand larceny in the third degree (§§ 110.00, 155.35 [1]), defendant contends that the verdict is against the weight of the evidence in two respects, i.e., that defendant was attempting to exercise control of the victims' vehicle in a manner inconsistent with their ownership rights, and that he used force in an attempt to retain control of the property. We reject defendant's contention and conclude that the verdict is supported by the weight of the evidence in both of those respects (*see generally People v Bleakley*, 69 NY2d 490, 495).

By failing to object to County Court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his contention that the ruling constitutes an abuse of discretion (*see People v Walker*, 66 AD3d 1331, *lv denied* 13 NY3d 942). In any event, "the proof of defendant's guilt is overwhelming, and there is no significant probability that the [court] would have acquitted defendant had it not been for the [alleged] error. Thus, the [alleged] error is harmless" (*People v Arnold*, 298 AD2d 895, 896, *lv denied* 99 NY2d 580; *see generally People v Grant*, 7 NY3d 421, 423-425).

Contrary to defendant's further contention, he was not denied effective assistance of counsel by defense counsel's failure to raise

an intoxication defense, "inasmuch as there was 'a paucity of evidence that defendant exhibited significant signs of intoxication or that his mental state was affected by alcohol' " (*People v Murphy*, 68 AD3d 1730, 1731, *lv denied* 14 NY3d 843). Finally, the sentence is not unduly harsh or severe.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

608

KA 11-00792

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NORMAN M. BLOOM, JR., DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA, LLP, BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered January 3, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). Defendant failed to move to withdraw his guilty plea or to vacate the judgment of conviction and thus failed to preserve for our review his contention that the plea was not knowingly, voluntarily, and intelligently entered (*see People v Morrison*, 78 AD3d 1615, 1616, *lv denied* 16 NY3d 834; *People v Cannon*, 59 AD3d 962, 963, *lv denied* 12 NY3d 815) and, in any event, his contention is without merit. Contrary to defendant's contention, County Court did not misinform him of the sentencing range to which he was exposed (*cf. Morrison*, 78 AD3d at 1616), but in fact the court correctly informed him that he could receive, inter alia, a split sentence of up to six months in jail and probation (*see* § 60.01 [2] [d]; § 60.04 [4], [5]; § 70.70 [3] [c] - [e]). Contrary to defendant's additional contention, the sentence is not unduly harsh or severe.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

611

CAF 10-02034

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

IN THE MATTER OF SAMED S., MAURICE R., MALIK S., JOSEFT A., FRANSHESKA D., AMAURI R., AND ADELL H.-S.

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

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

SALEH A., RESPONDENT-APPELLANT, AND BRAUNA S., RESPONDENT.

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

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

SHEILA SULLIVAN DICKINSON, ATTORNEY FOR THE CHILDREN, BUFFALO, FOR SAMED S., MAURICE R., MALIK S., JOSEFT A., AMAURI R., AND ADELL H.-S.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered September 10, 2010 in a proceeding pursuant to Family Court Act article 10. The order adjudicated the subject children to be neglected and abused.

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

Memorandum: Respondent father appeals from an order adjudging several children under his care and control to be neglected and abused. Prior to the hearing on the issue whether the father was "a person legally responsible" pursuant to Family Court Act § 1012 (g), the father had pleaded guilty to sexually abusing one child (hereafter, victim) and was sentenced to a term of incarceration. We reject the father's contention that the petition should have been dismissed because he pleaded guilty to a count in the indictment that alleged sexual contact in December 2004, not July 2006, as alleged in the Family Court petition. The proof adduced at the hearing on the issue whether the father was a "person legally responsible" established that the sexual contact occurred in December 2004. Thus, inasmuch as the proof does not conform to the allegations of the petition, the court may amend the allegations to conform to the proof (*see* § 1051 [b]), and the petition is not subject to dismissal on that

ground. We have considered the father's remaining contentions and conclude that they are without merit.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

612

CAF 10-02472

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

IN THE MATTER OF LOUIS JACKSON, II,
PETITIONER-APPELLANT,

V ORDER

DEBBRA BEACH, RESPONDENT-RESPONDENT.

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

RICHARD L. SOTIR, JR., ATTORNEY FOR THE CHILD, JAMESTOWN, FOR MARCEL J.

Appeal from an order of the Family Court, Chautauqua County (Stephen W. Cass, A.J.), entered October 13, 2010 in a proceeding pursuant to Family Court Act article 6. The order denied the violation petitions and modification petitions.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

613

CA 11-00681

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

SANDRA TINCH-MCNEILL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALCOHOL AND DRUG DEPENDENCY SERVICES, INC.,
DEFENDANT-RESPONDENT.

FRANK S. FALZONE, BUFFALO (RONALD HART OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MILBER MAKRIS PLOUSADIS & SEIDEN, LLP, WILLIAMSVILLE (BRIAN WISNIEWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered September 24, 2010. The order, among other things, denied plaintiff's motion for leave to serve and file a first amended complaint.

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

Memorandum: Plaintiff commenced this action alleging that defendant, plaintiff's former employer, unlawfully discriminated against her by terminating her employment based on her age, gender, and race in violation of Executive Law § 296. Plaintiff appeals from an order denying her motion for leave to serve and file a first amended complaint containing new causes of action and adding a defendant. We affirm. " 'Leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit' " (*McFarland v Michel,* 2 AD3d 1297, 1300; *see* CPLR 3025 [b]; *Tag Mech. Sys., Inc. v V.I.P. Structures, Inc.*, 63 AD3d 1504, 1505). Where, however, "there has been an extended delay in moving [for leave] to amend, the party seeking leave to amend must establish a reasonable excuse for the delay" (*Jablonski v County of Erie*, 286 AD2d 927, 928). Here, the court properly denied the motion with respect to the additional causes of action inasmuch as plaintiff failed to establish a reasonable excuse for her delay of nearly seven years in making the motion (*see id.*; *cf. Boxhorn v Alliance Imaging, Inc.,* 74 AD3d 1735, 1736).

Plaintiff further contends that she should have been allowed to add Richard J. Gallagher, defendant's executive director, as a defendant in the action. We reject that contention. Plaintiff does not dispute that the action against Gallagher is untimely, but instead

contends that the claims against him relate back to the timely complaint filed against defendant in August 2003. The relation-back doctrine, which is codified in CPLR 203 (b), allows the addition of a party after the expiration of the statute of limitations under three conditions: (1) both claims arose out of the same conduct, transaction, or occurrence, (2) the additional party is united in interest with the original party, and by reason of that relationship may be charged with notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits, and (3) the additional party knew or should have known that, but for a mistake by the plaintiff concerning the identity of the proper parties, the action would have been brought against the additional party as well (*see Buran v Coupal*, 87 NY2d 173, 178). Here, plaintiff and her attorneys knew from the time of her termination that Gallagher was the individual who made the decision to terminate her, and plaintiff offers no reason for failing to name Gallagher as a defendant in the complaint. Thus, the third prong of the relation-back doctrine is not satisfied because it cannot be said that, "but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against [Gallagher] as well" (*id.* at 178; *see Doe v HMO-CNY*, 14 AD3d 102, 105-106).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

616

CA 12-00261

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

RLI INSURANCE COMPANY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LESLIE SMIEDALA, ET AL., DEFENDANTS,
AND REGIONAL INTEGRATED LOGISTICS, INC.,
DEFENDANT-APPELLANT.

SLIWA & LANE, BUFFALO (KEVIN A. LANE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Frank Caruso, J.), entered May 23, 2011. The judgment, insofar as appealed from, denied the motion of defendant Regional Integrated Logistics, Inc. for a declaration.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant-appellant is granted and judgment is granted in favor of defendant-appellant as follows:

> It is ADJUDGED and DECLARED that plaintiff is obligated to defend and indemnify defendant-appellant for the obligations it assumed pursuant to its indemnification agreement with defendant Michael J. Hale, and
>
> It is further ADJUDGED and DECLARED that a hearing to determine the legal services that should be apportioned between defendant-appellant and defendant Michael J. Hale is no longer necessary.

Memorandum: Plaintiff commenced this action seeking judgment declaring that it is not obligated to defend or indemnify defendant Michael J. Hale and defendant-appellant, Regional Integrated Logistics, Inc. (Regional), in the underlying personal injury action and related third-party action under the commercial automobile insurance policy issued by plaintiff to Regional. Defendant Leslie Smiedala commenced the underlying personal injury action seeking damages for injuries he allegedly sustained when the vehicle in which he was a passenger collided with a vehicle driven by Hale, which Hale had leased from Audi Financial Services and VW Leasing, Ltd.

(Audi/VW), defendants-third-party plaintiffs in the underlying action. Hale, an employee of Regional, was driving to the bank at the time of the accident in order to make a deposit for Regional. Audi/VW commenced the third-party action against Regional seeking contribution and/or indemnification for any liability arising from Hale's negligence under the doctrine of respondeat superior.

Hale and Regional moved for summary judgment declaring that plaintiff must defend and indemnify them under the policy. Before that motion was decided, Regional and Hale entered into an indemnification agreement (R-H Agreement) pursuant to which Regional agreed to indemnify and hold harmless Hale "from and against any and all claims, damages, losses, expenses, liability and exposure, including, but not limited to, counsel fees, costs and disbursements, imposed upon or awarded against Hale as a result of and/or in connection with" the motor vehicle accident. Although Supreme Court denied the initial motion of Hale and Regional, the court thereafter granted their motion for leave to reargue and, upon reargument, granted the initial motion and issued the requested declaration. On a prior appeal, we concluded that the court should have granted the declaration only in favor of Regional but not Hale. We thus modified the judgment accordingly (*RLI Ins. Co. v Smiedala*, 71 AD3d 1553 [first appeal]).

While the first appeal was pending, Hale and Regional moved for summary judgment declaring that plaintiff was obligated to pay the costs and legal fees incurred by them in defending the declaratory judgment action commenced by plaintiff. The court granted that motion but, on appeal, we modified the judgment by denying that part of the motion with respect to Hale, based on our earlier determination that plaintiff was not obligated to defend or indemnify Hale in the underlying personal injury action (*RLI Ins. Co. v Smiedala*, 77 AD3d 1293 [second appeal]). We also remitted the matter to Supreme Court "to determine the amount of reasonable attorneys' fees to which Regional is entitled in the declaratory judgment action following a hearing, if necessary," on the ground that the same attorney represented Hale and Regional in the declaratory judgment action, and it was not possible on the record before us to determine that part of the attorneys' fees attributable to each (*id.* at 1295).

Following our decision in the second appeal, Regional moved for summary judgment seeking a declaration that plaintiff was "obligated to provide coverage to [Hale] for the contractual indemnification agreement that [Regional] entered into with [Hale]." Regional also sought a declaration that a hearing was no longer needed to determine the amount of attorneys' fees that should be attributed to Hale and Regional. Regional contended in support of the motion, as it does on this appeal, that plaintiff was "obligated to provide coverage for the [R-H] [A]greement that Regional entered into with [Hale]," including coverage for Regional's obligation "to pay the counsel fees of [Hale]." We conclude that the court erred in denying Regional's motion.

We agree with Regional that our decision in the first appeal does

not preclude us from deciding the merits of the issues raised on this appeal inasmuch as our earlier decision neither addressed nor resolved the contention that plaintiff is obligated to defend and indemnify Regional for liabilities it assumed under the R-H Agreement (*see New York State Thruway Auth. v KTA-Tator Eng'g Servs., P.C.*, 78 AD3d 1566, 1567; *Matter of El-Roh Realty Corp.*, 74 AD3d 1796, 1798).

We further agree with Regional that the insurance policy issued by plaintiff to Regional would cover the liability assumed by Regional but for a policy exclusion providing that the insurance does not apply to "[l]iability assumed under any contract or agreement." Nevertheless, the policy further provides that there is an exception to that exclusion, which states that the exclusion does not apply to liability "[a]ssumed in a contract or agreement that is an 'insured contract' provided the 'bodily injury' or 'property damage' occurs *subsequent* to the execution of the contract or agreement" (emphasis added).

We reject plaintiff's contention that the liability coverage section in the policy is not triggered by the R-H Agreement. "It is well settled that a contract must be read as a whole to give effect and meaning to every term . . . Indeed, '[a] contract should be interpreted in a way [that] reconciles all [of] its provisions, if possible' " (*New York State Thruway Auth.*, 78 AD3d at 1567; *see El-Roh Realty Corp.*, 74 AD3d at 1799). If the policy had not been intended to cover indemnification agreements such as the one at issue herein, there would be no need to include an express provision excluding from coverage indemnification agreements that were entered into *after* the bodily injury or property damage occurred. Therefore, we must interpret the policy in such a way that indemnification agreements are encompassed by the coverage section. Regional does not dispute the fact that the liability it assumed in the R-H Agreement would normally be excluded from coverage because the R-H Agreement was executed *after* the bodily injury or property damage occurred. Regional likewise does not dispute that it violated a provision of the policy by assuming an obligation without plaintiff's consent. Regional correctly contends, however, that plaintiff is precluded from relying on the exclusion or the policy condition violated by Regional because plaintiff did not timely disclaim coverage or deny liability.

Insurance Law § 3420 (d) (2) requires an insurer who is seeking to disclaim liability or to deny coverage to "give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured." The timely disclaimer requirement applies whether the insurer is relying on a policy exclusion (*see HBE Corp. v Sirius Am. Ins. Co.*, 63 AD3d 1509, 1510) or the violation of a policy condition (*see Oster v Aetna Cas. & Sur. Co.*, 283 AD2d 409, 410), and "[t]he timeliness of an insurer's disclaimer [or denial] is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage" (*Matter of New York Cent. Mut. Fire Ins. Co. v Steiert*, 68 AD3d 1120, 1121; *see Continental Cas. Co. v Stradford*, 11 NY3d 443, 449; *Matter of Allcity Ins. Co. [Jimenez]*, 78 NY2d 1054, 1056, *rearg denied* 79 NY2d 823; *George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh,*

PA, 92 AD3d 104, 106).

Regional established that plaintiff was notified as early as April 2010 and on multiple occasions thereafter that Regional was seeking coverage for the obligations it assumed under the R-H Agreement. It is undisputed that plaintiff never formally disclaimed liability or denied coverage, although we agree with plaintiff that its opposition to the instant motion, which is dated December 10, 2010, may be deemed such a disclaimer or denial (*see Allcity Ins. Co.*, 78 NY2d at 1056; *Matter of New York Cent. Mut. Fire Ins. Co. v Gonzalez*, 34 AD3d 816, 816). We conclude, however, that plaintiff's disclaimer and denial were untimely as a matter of law (*see e.g. First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 70; *Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1030, *rearg denied* 47 NY2d 951), and thus plaintiff is obligated to defend and indemnify Regional for the obligations Regional assumed in the R-H Agreement. Based on our determination, we agree with Regional that a hearing is no longer required to apportion the legal services associated with the defense and indemnification of Regional and Hale.

We note that we have not addressed Regional's contention that a potential third-party action by plaintiff against Hale would violate the antisubrogation rule. That contention is not preserved for our review inasmuch as Regional did not raise that contention in the motion underlying this appeal. In view of our determination, we need not address Regional's remaining contention.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

617

CA 11-02181

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

IN THE MATTER OF TOM THOMAS AND THOMAS ESTATES WEST, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

CYNTHIA L. BOHEEN DAVIS, ASSESSOR, AND BOARD OF ASSESSMENT REVIEW OF TOWN OF CLARENDON, ORLEANS COUNTY, RESPONDENTS-RESPONDENTS.

JACOBSON LAW FIRM, P.C., PITTSFORD (ROBERT L. JACOBSON OF COUNSEL), FOR PETITIONERS-APPELLANTS.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (JOEL R. KURTZHALTS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered January 25, 2011 in a proceeding pursuant to RPTL article 7. The order denied the petitions.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part the petitions challenging the assessments for the 2005-2006, 2006-2007 and 2007-2008 tax years by reducing the assessment on tax parcel number 99-1-16.1 for those tax years to $12,350,000, $12,390,000 and $12,510,000, respectively, and reducing the assessments on tax parcel number 99-2-39.21 for those tax years to $2,745,000, $3,615,000 and $4,095,000, respectively, and as modified the order is affirmed without costs.

Memorandum: Petitioners, Tom Thomas and the company by which he runs his mobile home park, commenced this RPTL article 7 proceeding seeking review of the real property tax assessments for the mobile home park, which is situated on two contiguous parcels of real property, for the tax years 2005-2006, 2006-2007 and 2007-2008. Contrary to petitioners' contentions, Supreme Court properly concluded that they failed to meet their burden of establishing by a preponderance of the evidence that the assessments were excessive. "Our analysis begins with the recognition that a property valuation by the tax assessor is presumptively valid . . . and thus 'obviates any necessity, on the part of the assessors, of going forward with proof of the correctness of their valuation' . . . However, when a petitioner challenging the assessment comes forward with 'substantial evidence' to the contrary, the presumption disappears" (*Matter of FMC Corp. [Peroxygen Chems. Div.] v Unmack*, 92 NY2d 179, 187; *see Matter of Carriage House Motor Inn v City of Watertown*, 136 AD2d 895, 895-

896, *affd* 72 NY2d 990). "In the context of tax assessment cases, the 'substantial evidence' standard merely requires that petitioner demonstrate the existence of a valid and credible dispute regarding valuation" (*FMC Corp.*, 92 NY2d at 188; *see Matter of East Med. Ctr., L.P. v Assessor of Town of Manlius*, 16 AD3d 1119, 1120). "Once this initial burden has been met, the reviewing court 'must weigh the entire record, including evidence of claimed deficiencies in the assessment, to determine whether [the] petitioner has established by a preponderance of the evidence that its property has been overvalued' " (*Matter of United Parcel Serv. v Assessor of Town of Colonie*, 42 AD3d 835, 837, quoting *FMC Corp.*, 92 NY2d at 188).

Initially, we note that petitioners' contention that Supreme Court was required to reject respondents' appraisal is of no moment. The court unequivocally stated that it did not consider that appraisal because petitioners failed to establish that the assessment was excessive. Inasmuch as the court did not rely upon respondents' appraisal, its validity is not before us except insofar as it operates as a party admission, as discussed herein.

Petitioners' further contention, that the court erred by, in effect, striking their appraisal, is without merit. The court did not strike petitioners' appraisal. Indeed, the court reached the second step of the *FMC Corp.* analysis by concluding that petitioners failed to establish by a preponderance of the evidence that the assessment was excessive, which is a step that the court correctly concluded it could take "[o]nce a petitioner meets it burden of overcoming the presumption of validity." Inasmuch as petitioners' appraisal is the only evidence upon which the court could have relied in concluding that petitioners met their initial burden, the court implicitly concluded that the appraisal was sufficient to "demonstrate the existence of a valid and credible dispute regarding valuation" (*FMC Corp.*, 92 NY2d at 188).

Petitioners' further contention that they established by a preponderance of the evidence that the assessments at issue were excessive is without merit. Petitioners relied upon a single appraisal encompassing all of the challenged tax years. Petitioners' expert submitted an appraisal report that used two methods of calculating the value of the subject parcels, the income and market approaches, but he affixed a different value to each parcel than would be reached by either method. In his report and at trial, he failed to explain how he reconciled those values to arrive at the final value that he placed on the subject parcels. Consequently, "[t]he trial court properly determined that the submission of an appraisal without ascertainable or verifiable data supporting the appraiser's conclusions of value constituted a violation of 22 NYCRR 202.59 (g)(2), which provides, in pertinent part, that: '[t]he appraisal reports shall contain a statement of the method of appraisal relied on and the conclusions as to value reached by the expert, together with the facts, figures and calculations by which the conclusions were reached' " (*Matter of Orange & Rockland Utils. v Williams*, 187 AD2d 595, 596). Thus, the court properly refused to rely upon petitioners' "appraisal report on the ground that it consistently made 'conclusions

without supporting calculations, rendering it impossible . . . to analyze' the report" (*Matter of John P. Burke Apts. v Swan*, 137 AD2d 321, 325).

Furthermore, when testifying regarding the report, petitioners' expert repeatedly indicated that he assigned a value to individual units within the two parcels that was hundreds or thousands of dollars lower than the price for which those units had been sold during the period in question. Although several methods of valuing real property are acceptable, "the market value method of valuation is preferred as the most reliable measure of a property's full value for assessment purposes" (*Matter of General Elec. Co. v Town of Salina*, 69 NY2d 730, 731), because "[t]he best evidence of value, of course, is a recent sale of the subject property between a seller under no compulsion to sell and a buyer under no compulsion to buy" (*Matter of Allied Corp. v Town of Camillus*, 80 NY2d 351, 356, *rearg denied* 81 NY2d 784). Here, the court properly refused to credit that valuation because the expert repeatedly and consistently valued individual units on the subject properties at amounts that were less than willing buyers had paid to sellers under no compulsion to sell. Indeed, we note that many of the units were sold by petitioners themselves, and we conclude therefrom that the failure of petitioners' expert to use those sale prices as evidence of value demonstrates the invalidity of the expert's conclusions.

We conclude, however, that the court erred in dismissing the petitions. Notwithstanding petitioners' failure to meet their ultimate burden, "the court was required to consider the entire record and that respondents' appraisals, received in evidence, constituted admissions against interest by respondents that the assessments were excessive to the extent that they exceeded those appraisals, despite the fact that the supporting data was rejected by the court" (*Matter of South Slope Holding Corp. v Comstock*, 280 AD2d 883, 885; *see Matter of Arsenal Hous. Assoc. v City Assessor of City of Watertown*, 298 AD2d 830, 831; *Matter of Boyce-Canandaigua, Inc. v Brown*, 289 AD2d 971, 971, *rearg granted on other grounds* 294 AD2d 960). Inasmuch as respondents' assessments exceeded the appraisals for each of the tax years at issue, we modify the order accordingly.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

624

TP 11-00161

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

IN THE MATTER OF JESSIE J. BARNES, PETITIONER,

V MEMORANDUM AND ORDER

RONALD HARLING, SUPERINTENDENT, MONROE COUNTY JAIL, RESPONDENT.

JESSIE J. BARNES, PETITIONER PRO SE.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Thomas A. Stander, J.], entered December 9, 2009) to review determinations of respondent. The determinations found that petitioner had violated various jail rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding challenging the determinations that he violated certain rules and regulations while he was an inmate at the Monroe County Jail, and Supreme Court transferred the proceeding to this Court pursuant to CPLR 7804 (g) inasmuch as the petition raised an issue of substantial evidence. We conclude that petitioner is not entitled to any of the relief he seeks. Petitioner failed to establish that respondent ever violated a court order or willfully failed to comply with his disclosure request, and thus he is not entitled to a default judgment or any other relief based on any alleged violation or willful failure to comply with his disclosure request (*see* CPLR 3126; *Matter of Seneca Foods Corp. v Jorling*, 168 AD2d 967, 968, *lv denied* 77 NY2d 808). Petitioner's sentencing during the pendency of this proceeding and his subsequent incarceration render moot the applicability of the conditions and policies of the Monroe County Jail to petitioner, where he previously was housed (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

625

OP 11-02595

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

IN THE MATTER OF MICHAEL R. PETRONE, PETITIONER,

V ORDER

VICTORIA M. ARGENTO, MONROE COUNTY COURT JUDGE,
RESPONDENT.

MULDOON & GETZ, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR PETITIONER.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to annul the determination of respondent revoking the pistol permit of petitioner.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

626

TP 11-01936

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

IN THE MATTER OF CARLOS ABREU, PETITIONER,

V ORDER

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

CARLOS ABREU, PETITIONER PRO SE.

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, Seneca County [Dennis F. Bender, A.J.], entered September 22, 2011) to review determinations of respondent. The determinations found after Tier III hearings that petitioner had violated various inmate rules.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

627

TP 12-00223

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

IN THE MATTER OF JOSHUA LINER, PETITIONER,

V MEMORANDUM AND ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered January 27, 2012) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling those parts of the determination finding that petitioner violated inmate rule 180.17 (7 NYCRR 270.2 [B] [26] [vii]) and vacating the recommended loss of good time and as modified the determination is confirmed without costs, respondent is directed to expunge from petitioner's institutional record all references to the violations of that inmate rule, and the matter is remitted to respondent for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a Tier III disciplinary hearing, that he violated inmate rules 113.20 (7 NYCRR 270.2 [B] [14] [x] [possessing excess or altered clothing]), 113.22 (7 NYCRR 270.2 [B] [14] [xii] [possessing property in unauthorized area]), 113.27 (7 NYCRR 270.2 [B] [14] [xvii] [soliciting, possessing or exchanging other inmate crime information]) and 180.17 (7 NYCRR 270.2 [B] [26] [vii] [providing unauthorized legal assistance]). We conclude that there is substantial evidence to support the determination with respect to inmate rule 113.20 inasmuch as petitioner pleaded guilty to the violation of that rule (*see Matter of Holdip v Travis*, 9 AD3d 825, 826). We further conclude that there is substantial evidence to support the determination with respect to inmate rules 113.22 and 113.27 (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966; *People ex rel. Vega v Smith*, 66 NY2d 130, 140). "Contrary to petitioner's

contention, the record does not establish 'that the Hearing Officer was biased or that the determination flowed from the alleged bias' " (*Matter of Colon v Fischer*, 83 AD3d 1500, 1502; *see Matter of Rodriguez v Herbert*, 270 AD2d 889, 890). "The mere fact that the Hearing Officer ruled against the petitioner is insufficient to establish bias" (*Matter of Edwards v Fischer*, 87 AD3d 1328, 1329 [internal quotation marks omitted]).

As respondent correctly concedes, however, the determination with respect to inmate rule 180.17 is not supported by substantial evidence (*see generally Vega*, 66 NY2d at 139). We therefore modify the determination and grant the petition in part by annulling those parts of the determination finding that petitioner violated inmate rule 180.17, and we direct respondent to expunge from petitioner's institutional record all references to the violations of that rule. "Although there is no need to remit the matter to respondent for reconsideration of those parts of the penalty already served by petitioner, we note that there was also a recommended loss of good time, and the record does not reflect the relationship between the violations and that recommendation" (*Matter of Monroe v Fischer*, 87 AD3d 1300, 1301). We therefore further modify the determination by vacating the recommended loss of good time, and we remit the matter to respondent for reconsideration of that recommendation.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

628

KA 07-01252

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS J. MORGAN, ALSO KNOWN AS “MAN,”
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O’BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered May 24, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fifth degree and unlawful possession of marihuana.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [2]). Defendant failed to preserve for our review his contention that Supreme Court erred in intervening during the testimony of a prosecution witness and in permitting the prosecutor to impeach that witness (*see* CPL 470.05 [2]). Indeed, defendant acquiesced in the court’s chosen course of conduct (*see generally People v Alston*, 264 AD2d 685, 685-686, *lv denied* 94 NY2d 876). Defendant also failed to preserve for our review his challenge to the jury instructions inasmuch as he did not raise that challenge at trial (*see People v Knapp*, 79 AD3d 1805, 1807, *lv denied* 17 NY3d 807, 808), and we decline to exercise our power to review that contention and challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant’s further contention that he was denied effective assistance of counsel based upon defense counsel’s failure to cross-examine the People’s firearms examiner and certain remarks made by defense counsel on summation. “[D]efendant failed to

establish that there was no legitimate or strategic reason for defense counsel's alleged error" in declining to cross-examine the firearms examiner (*People v Roman*, 60 AD3d 1416, 1418, *lv denied* 12 NY3d 928; *see People v Cancer*, 16 AD3d 835, 840, *lv denied* 5 NY3d 826; *People v Philbert*, 267 AD2d 607, 607-608, *lv denied* 94 NY2d 905). Contrary to the contention of defendant, defense counsel did not concede on summation that the People met their burden of proof. Rather, defense counsel "chose in a forthright though brief statement to submit his client to the mercy and fair-mindedness of the jury," which does not render him ineffective (*People v Mapp*, 47 NY2d 939, 940; *see generally People v Forbes*, 203 AD2d 609, 611). 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).

Defendant further contends that the court erred in refusing to suppress two eyewitness identifications of him because the successive identification procedures were unduly suggestive. Even assuming, arguendo, that defendant's contention is preserved for our review (*see* CPL 470.05 [2]), we conclude that it is without merit. It is well settled that "[m]ultiple pretrial identification procedures are not inherently suggestive" (*People v Johnson*, 52 AD3d 1286, 1286, *lv denied* 11 NY3d 738; *see People v Peterkin*, 81 AD3d 1358, 1359, *lv denied* 17 NY3d 799) and, here, "[t]here was nothing unduly suggestive about having [the first witness in question] view defendant in a lineup after [he] had already selected [defendant's] photograph from an array" (*People v Ervin*, 5 AD3d 316, 317, *lv denied* 3 NY3d 639). With respect to the second witness in question, we likewise conclude that showing the witness a photo array followed by a lineup was not unduly suggestive under the circumstances of this case (*see Peterkin*, 81 AD3d at 1359; *People v McKinley*, 283 AD2d 777, 777, *lv denied* 97 NY2d 731; *People v Carroll*, 200 AD2d 630, 630, *lv denied* 83 NY2d 850). "In contrast to the suspect nature of the repeated display of a defendant's photograph in successive arrays until a positive identification is obtained, 'the potential for irreparable misidentification is not manifest when the eyewitness views an array containing a photograph of the defendant and subsequently views the defendant in person during a lineup' " (*McKinley*, 283 AD2d at 777; *see Carroll*, 200 AD2d at 630). We further note that the photo array and the lineup were separated by eight hours and that there are no other circumstances indicating police suggestiveness (*see generally People v Moore*, 202 AD2d 1046, 1046, *lv denied* 84 NY2d 830). Thus, "the record supports the court's determination that the photo array and subsequent lineup 'were not so suggestive as to create the substantial likelihood that defendant would be misidentified' " (*Johnson*, 52 AD3d at 1286; *see McKinley*, 283 AD2d at 777; *Carroll*, 200 AD2d at 630).

Finally, defendant failed to preserve for our review his contention that this case was improperly transferred from County Court to Supreme Court for trial and sentencing (*see People v Perez*, 89 AD3d 1393, 1395; *People v Ott*, 83 AD3d 1495, 1496, *lv denied* 17 NY3d 808; *see also People v Woodrow*, 91 AD3d 1188, 1189), and we decline to exercise our power to review it as a matter of discretion in the

interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's contention, the alleged transfer error does not constitute a mode of proceedings error such that preservation is not required (*see Perez*, 89 AD3d at 1395).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

631

KA 11-00486

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENT D. SPRATLEY, DEFENDANT-APPELLANT.

CHRISTOPHER JUDE PELLI, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered November 17, 2010. The judgment convicted defendant, after a nonjury trial, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that the verdict is against the weight of the evidence because any injury to the victim was not caused by a deadly weapon and such injury did not constitute a " '[p]hysical injury' " within the meaning of Penal Law § 10.00 (9). Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention (*see generally People v Bleakley*, 69 NY2d 490, 495). We conclude that a finding by County Court that the victim's injury was not caused by a deadly weapon would have been unreasonable (*see generally Danielson*, 9 NY3d at 348; *Bleakley*, 69 NY2d at 495).

With respect to the element of physical injury, we note that " '[p]hysical injury' " is defined as "impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]). Substantial pain means "more than slight or trivial pain[, but it] need not . . . be severe or intense to be substantial" (*People v Chiddick*, 8 NY3d 445, 447). "A variety of factors are relevant in determining whether physical injury has been established, including 'the injury viewed objectively, the victim's subjective description of the injury and [his or] her pain, and whether the victim sought medical treatment' " (*People v Dixon*, 62 AD3d 1036, 1039, *lv denied* 12 NY3d 912, 914; *see Chiddick*, 8 NY3d at 447-448).

Here, the victim was injured by a bullet that grazed his face, "an experience that would normally be expected to bring with it more than a little pain" (*Chiddick*, 8 NY3d at 447). He went to the hospital for treatment of his injury and received several stitches. The victim testified that he was in "excruciating pain" at the hospital and that he still has pain, as well as difficulty eating and talking. The hospital records admitted in evidence, however, demonstrated that the victim described his pain as "zero" out of 10 and that he was not prescribed any pain medication. We conclude that, although an acquittal based on the lack of a physical injury would not have been unreasonable, it cannot be said that the court failed to give the evidence the weight it should be accorded (*see People v Dove*, 86 AD3d 715, 717, *lv denied* 17 NY3d 903, 18 NY3d 882; *People v Moye*, 81 AD3d 408, 408-409, *lv denied* 16 NY3d 861; *see also People v Slater*, 13 AD3d 732, 734, *lv denied* 4 NY3d 803; *see generally Danielson*, 9 NY3d at 348-349; *Bleakley*, 69 NY2d at 495).

As defendant correctly notes, the court failed to rule on his renewed motion to dismiss the indictment based on allegedly prejudicial conduct during the grand jury proceeding. Contrary to the People's contention, pursuant to *People v Concepcion* (17 NY3d 192, 197-198) and *People v LaFontaine* (92 NY2d 470, 474, *rearg denied* 93 NY2d 849), we cannot deem the court's failure to rule on the renewed motion as a denial thereof (*see People v Chattley*, 89 AD3d 1557, 1558). We therefore hold the case, reserve decision and remit the matter to County Court for a ruling on defendant's renewed motion to dismiss the indictment.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

633

KA 08-02353

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRY L. HOLMES, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered August 11, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that County Court erred in refusing to suppress the gun that he discarded while fleeing from the police. We reject that contention. It is well settled that "a defendant's flight in response to an approach by the police, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, may give rise to reasonable suspicion, the necessary predicate for police pursuit" (*People v Sierra*, 83 NY2d 928, 929; *see People v Gray*, 77 AD3d 1308, 1308). Here, the police received a 911 call reporting that three black males were engaged in suspicious activity, i.e., they had emerged from behind the house of the caller's sister and entered a blue vehicle. The responding officer, who arrived at the scene within a few minutes of the call, observed defendant driving away in the vehicle described in the 911 call with two other black males. When the officer turned to follow defendant's vehicle in his marked police car, the vehicle abruptly swerved out of the driving lane and toward the curb. The passenger front door opened, the vehicle struck the curb and the two passengers jumped out of the vehicle as it rolled along the curb. At that point, the officer pulled behind the vehicle and activated his lights, whereupon defendant jumped out of the vehicle as it rolled and the

officer pursued defendant on foot. Contrary to defendant's contention, we conclude that the information provided by the 911 caller, together with defendant's conduct in driving the vehicle into a curb, abandoning the moving vehicle and fleeing on foot in response to observing the marked police car, provided the officer with the requisite reasonable suspicion to pursue defendant (*see People v Martinez*, 59 AD3d 1071, 1072, *lv denied* 12 NY3d 856; *People v Johnson*, 19 AD3d 1163, 1164, *lv denied* 5 NY3d 829).

Contrary to defendant's further contention, the sentence is not unduly harsh or severe, particularly in light of his criminal history and the nature of the offense.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

634

KAH 11-00852

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
NATHAN LEWIS, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

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

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered March 7, 2011 in a proceeding pursuant to CPLR article 70. The judgment granted the motion of respondent to dismiss and dismissed the petition for a writ of habeas corpus.

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

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus. We conclude that Supreme Court properly dismissed the petition. Habeas corpus relief is unavailable because petitioner's contention in support of the petition "could have been, or [was], raised on direct appeal or by a motion pursuant to CPL article 440" (*People ex rel. Mills v Poole*, 55 AD3d 1289, 1290, *lv denied* 11 NY3d 712; *see People ex rel. Robinson v Graham*, 68 AD3d 1706, *lv denied* 14 NY3d 706). "Habeas corpus relief also is unavailable because petitioner would not be entitled to immediate release from custody even in the event that his contention[] had merit" (*People ex rel. Almodovar v Berbary*, 67 AD3d 1419, 1420, *lv denied* 14 NY3d 703; *see People ex rel. Kaplan v Commissioner of Correction of City of N.Y.*, 60 NY2d 648, 649). Finally, "[b]ecause the petition lacked any justiciable basis upon which a writ of habeas corpus could be sustained, the court did not abuse its discretion in denying petitioner's application for assigned counsel" (*People ex rel. Gloss v Costello*, 309 AD2d 1160, 1161, *lv denied* 1 NY3d 504 [internal quotation marks omitted]; *see People ex rel. Hinton v Graham*, 66 AD3d 1402, 1402, *lv denied* 13 NY3d 934, *rearg denied* 14 NY3d 795).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

635

CAF 11-01521

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

IN THE MATTER OF AUSTIN M.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, ORDER
PETITIONER-APPELLANT.
(APPEAL NO. 1.)

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

TANYA CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER, FOR AUSTIN M.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered June 23, 2011. The order, among other things, adjudged that petitioner did not engage in reasonable efforts to effectuate the adoption of Austin M.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see generally Fox v Fox*, 93 AD3d 1224, 1224).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

636

CAF 11-01522

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

IN THE MATTER OF AUSTIN M.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, ORDER
PETITIONER-APPELLANT.
(APPEAL NO. 2.)

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

TANYA CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER, FOR AUSTIN M.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered July 6, 2011. The order, among other things, adjudged that petitioner did not engage in reasonable efforts to effectuate the adoption of Austin M.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

637

CAF 11-01028

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

IN THE MATTER OF ALEXIA L.

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

SHU L., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT.

JANE E. LOVE, MAYVILLE, FOR PETITIONER-RESPONDENT.

SHERRY A. BJORK, ATTORNEY FOR THE CHILD, FREWSBURG, FOR ALEXIA L.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered April 27, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

638

CAF 11-01029

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

IN THE MATTER OF BRANDON L.

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

SHU L., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT.

JANE E. LOVE, MAYVILLE, FOR PETITIONER-RESPONDENT.

SHERRY A. BJORK, ATTORNEY FOR THE CHILD, FREWSBURG, FOR BRANDON L.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered April 27, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

641

CAF 11-00869

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

IN THE MATTER OF CARYN A. CONSILIO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHRISTOPHER TERRIGINO, RESPONDENT-RESPONDENT.

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

DAVIDSON FINK, LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER, FOR PEYTON T.

Appeal from an order of the Family Court, Monroe County (Thomas W. Polito, R.), 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: In this proceeding pursuant to article 6 of the Family Court Act, petitioner mother appeals from an order that denied her petition to modify a prior stipulated order of custody and visitation. The prior stipulated order, inter alia, granted the mother visitation with the parties' child on alternate Saturdays at the correctional facility where she was incarcerated. The mother sought to modify the prior stipulated order to permit overnight visitation with the child through the Family Reunion Program at the correctional facility. The Referee concluded that the mother failed to establish a sufficient change in circumstances warranting modification of the prior stipulated order, but the Referee nevertheless stated that, based on the evidence presented at the hearing, it was not in the best interests of the child to have overnight visitation with the mother at the correctional facility.

Even assuming, arguendo, that the mother established a change in circumstances sufficient to warrant an inquiry into whether overnight visitation was in the best interests of the child (*see Matter of Black v Watson*, 81 AD3d 1316, 1316, *lv dismissed in part and denied in part* 17 NY3d 747; *see also Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417-1418), we see no basis to disturb the Referee's determination "inasmuch as it was based on [his] credibility assessments of the

witnesses and 'is supported by a sound and substantial basis in the record' " (*Matter of Krug v Krug*, 55 AD3d 1373, 1374; *see Black*, 81 AD3d at 1316-1317). We further conclude that any error by the Referee in admitting certain photographs in evidence without proper authentication is harmless (*see generally Matter of Shane MM. v Family & Children Servs.*, 280 AD2d 699, 701), inasmuch as the Referee did not rely on those photographs in denying the mother's petition to modify the prior stipulated order (*see Matter of Graham v Thering*, 55 AD3d 1319, 1320, *lv denied* 11 NY3d 714; *Matter of Tracy v Tracy*, 309 AD2d 1252, 1253; *Matter of Michael G.*, 300 AD2d 1144, 1145).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

642

CA 11-02239

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

ERIE COUNTY SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BETH 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 February 3, 2011. The order, among other things, directed defendant to post a cash security payment of $13,993.40 pursuant to Agriculture and Markets Law § 373 (6).

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by increasing the amount of the security set forth in the first ordering paragraph by $6,258.60 and the amounts set forth in the third and fourth ordering paragraphs by $3,129.30 each, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, reimbursement for all reasonable expenses incurred in caring for and sheltering certain animals seized from defendant pursuant to a warrant. In a prior appeal, we affirmed the order that, inter alia, directed plaintiff to return 40 of the 73 horses that had been seized (*Erie County Socy. for the Prevention of Cruelty to Animals v Hoskins*, 91 AD3d 1354, 1355). Pursuant to Agriculture and Markets Law § 373 (6) (a), plaintiff sought an order directing defendant to post a security in an amount sufficient to secure payment for all reasonable expenses that plaintiff expected to incur in caring and providing for, inter alia, the remaining 33 seized horses pending disposition of the criminal action against defendant. Plaintiff appeals from an order following a hearing that directed defendant, inter alia, to post a security in the amount of $13,993.40 for the reasonable expenses incurred by plaintiff in caring for those horses for a one-month period.

We agree with plaintiff that Supreme Court erred in failing to award expenses under the category of “boarding,” and we therefore modify the order by increasing the amount of the security set forth in

the first ordering paragraph by $2,267.10 and the amounts set forth in the third and fourth ordering paragraphs by $1,133.55 each. We also agree with plaintiff that the court's calculation of the expenses for employee wages is erroneous inasmuch as it fails to account for one of plaintiff's part-time employees and is based upon a 28-day month. We therefore further modify the order by increasing the amount of the security set forth in the first ordering paragraph by $3,991.50, i.e., the difference between the amount determined by the court and the reasonable expenses that plaintiff expected to incur for employee wages during the relevant period, and by increasing the amounts set forth in the third and fourth paragraphs by $1,995.75 each.

Contrary to plaintiff's contention, however, we conclude that, "after taking into consideration all of the facts and circumstances of the case," the court properly determined that the amounts sought by plaintiff for security and miscellaneous expenses were not reasonable (Agriculture and Markets Law § 373 [6] [a]). Finally, plaintiff failed to preserve for our review its contention that the court erred in ordering defendant to post a security for a one-month period rather than "pending disposition of the charges" against her (*id.*; *see generally* CPLR 4017).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

643

CA 11-02459

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

IN THE MATTER OF THE ESTATE OF HELEN WERNER,
DECEASED.

JAMES CONNIFF, PETITIONER-RESPONDENT; ORDER

EDWARD DUDEK, OBJECTANT-APPELLANT.

SAKOWSKI & MARKELLO, LLP, ELMA (JOSEPH A. SAKOWSKI OF COUNSEL), FOR OBJECTANT-APPELLANT.

MISKELL & MOXHAM, LOCKPORT, PETER J. BREVORKA, P.C., AMHERST (PETER J. BREVORKA OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered July 6, 2011. The order granted the motion of petitioner for summary judgment, dismissed the objections to probate and directed that the last will and testament of decedent, dated July 2, 2009, be admitted to probate.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

645

OP 12-00096

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

IN THE MATTER OF NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, PETITIONER,

V ORDER

CATHERINE NUGENT PANEPINTO, J.S.C., STEPHEN LOBCZOWSKI, VICTORIA HOLLENBAUGH, JOHN HOLLENBAUGH, JR., SAMUEL L. ALVORD AND DOUGLAS COPPOLA, ESQ., RESPONDENTS.

BURGIO, KITA & CURVIN, BUFFALO (STEVEN P. CURVIN OF COUNSEL), FOR PETITIONER.

THE HIGGINS KANE LAW GROUP, P.C., BUFFALO (TERRENCE P. HIGGINS OF COUNSEL), FOR RESPONDENT VICTORIA HOLLENBAUGH.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KIM S. MURPHY OF COUNSEL), FOR RESPONDENT CATHERINE NUGENT PANEPINTO, J.S.C.

BOUVIER PARTNERSHIP, LLP, BUFFALO (GEORGE W. COLLINS, JR., OF COUNSEL), FOR RESPONDENT STEPHEN LOBCZOWSKI.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (CHARLES S. DESMOND, II, OF COUNSEL), FOR RESPONDENT JOHN HOLLENBAUGH, JR.

BROWN & KELLY, LLP, BUFFALO (H. WARD HAMLIN OF COUNSEL), FOR RESPONDENT SAMUEL L. ALVORD.

LAW OFFICES OF DOUGLAS COPPOLA, BUFFALO (DOUGLAS COPPOLA OF COUNSEL), RESPONDENT PRO SE.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to prohibit enforcement of an order of the Supreme Court, Niagara County, dated December 21, 2011.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 26, 2012,

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

646

CA 12-00165

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

PROVIDENZA M. FRACCOLA, PLAINTIFF-RESPONDENT,

V ORDER

ALAN P. FRACCOLA, DEFENDANT-APPELLANT.

COHEN & COHEN LLP, UTICA (DANIEL S. COHEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

KALIL & EISENHUT, LLC, UTICA (CLIFFORD C. EISENHUT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered August 2, 2011 in a divorce action. The judgment, inter alia, equitably distributed the marital property.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

648

CA 11-02279

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

IN THE MATTER OF BASSET GROUP, INC., BASSET FAMILY, LLC, CHARLES LISSOW AND LAKESIDE BUILDERS AND DEVELOPERS, INC., PETITIONERS-APPELLANTS,

V ORDER

TOWN OF GREECE TOWN BOARD AND 4320 WEST RIDGE, LLC, RESPONDENTS-RESPONDENTS.

PHILLIPS LYTLE LLP, ROCHESTER (MARK J. MORETTI OF COUNSEL), FOR PETITIONERS-APPELLANTS.

RAYMOND S. DIRADDO, TOWN ATTORNEY, ROCHESTER, FOR RESPONDENT-RESPONDENT TOWN OF GREECE TOWN BOARD.

NIXON PEABODY LLP, ROCHESTER (CHRISTOPHER D. THOMAS OF COUNSEL), FOR RESPONDENT-RESPONDENT 4320 WEST RIDGE, LLC.

Appeal from a judgment of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered August 4, 2011. The judgment declared that the June 15, 2010 resolution of respondent Town of Greece Town Board does not violate Town Law § 272-a (11) and is not inconsistent with the Town's master plan and denied and dismissed the petition.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

650

KA 10-02500

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY CLARK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Gerald J. Whalen, J.), rendered November 30, 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.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that the waiver of the right to appeal was not knowingly, intelligently and voluntarily entered. We reject that contention (*see generally People v Lopez*, 6 NY3d 248, 256). The valid waiver by defendant of the right to appeal does not encompass his contention with respect to the severity of the sentence, however, because the record establishes that Supreme Court "failed to advise defendant of the 'potential periods of incarceration that could be imposed before he waived his right to appeal' " (*People v McLean*, 302 AD2d 934; *cf. People v Lococo*, 92 NY2d 825, 827). We conclude, however, that the sentence is not unduly harsh or severe.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

651

KA 10-02302

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRAVIS SERVEY, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA, LLP, BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered August 5, 2010. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20). Defendant contends that County Court erred in sentencing him without first receiving and considering a presentence report pursuant to CPL 390.20 (1). Although defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]), he further contends that this Court nevertheless should review it pursuant to the "narrow exception to preservation where a mode of proceedings error affects a court's jurisdiction and power over a defendant" (*People v Williams*, 14 NY3d 198, 220, *cert denied* ___ US ___, 131 S Ct 125). Here, however, the record establishes that the prosecutor indicated that the pre-plea report would serve as the presentence report, whereupon defendant indicated that he was ready to proceed with the plea and sentencing that same day. We thus conclude that defendant is deemed to have waived his present contention concerning the presentence report. In any event, even assuming, arguendo, that defendant did not waive his present contention, we conclude that this is not such an error "implicating the integrity of the process" such that preservation would not be required in the absence of the waiver (*People v Hansen,* 95 NY2d 227, 231).

Contrary to defendant's further contention, the sentence is not

unduly harsh or severe.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

652

KA 11-01084

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD A. SIMMONS, JR., DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), 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, 2011. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [2]). Defendant's valid unrestricted waiver of the right to appeal forecloses any challenge to the severity of the sentence (*see generally People v Lopez*, 6 NY3d 248, 256; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

654

KA 11-01322

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KHALLIN D. BIGBY, ALSO KNOWN AS KO, ALSO KNOWN AS CALI, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered September 7, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that County Court erred in sentencing him in the absence of defense counsel. As the People correctly concede, defendant is correct. "Sentencing is a critical stage of a criminal proceeding which implicates the right to counsel" (*People v Harris*, 79 NY2d 909, 910). Although defendant failed to appear at sentencing, he did not, by virtue of his absence alone, waive his right to counsel at sentencing (*see Matter of Root v Kapelman*, 67 AD2d 131, 137-138, *lv denied* 47 NY2d 706; *see also People v Aiken*, 45 NY2d 394, 397-398). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing (*see People v Read*, 134 AD2d 462, 463). In light of our decision, we do not address defendant's challenge to the severity of the sentence.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

655

KA 11-00404

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LASHAWN J. SCOTT, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered January 24, 2011. 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 reversed on the law without costs and the matter is remitted to Monroe County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We agree with defendant that County Court erred in granting the People's request, made for the first time at the SORA hearing, to assess 20 additional points for risk factors that were not included in the risk assessment instrument, and therefore to determine that defendant is a level three risk rather than a level two risk. As the People correctly concede, they failed to provide defendant with the requisite 10-day notice that they intended to seek a determination different from that recommended by the Board of Examiners of Sex Offenders (*see* § 168-n [3]; *People v Gardner*, 59 AD3d 604), and the court otherwise failed to provide defendant with "a meaningful opportunity to respond to the proposed amendment" (*People v Ferguson*, 53 AD3d 571, 572; *cf. People v Warren*, 42 AD3d 593, 594, *lv denied* 9 NY3d 810). Furthermore, defendant properly objected to the People's request (*cf. People v Charache*, 9 NY3d 829, 830). Because defendant was denied his due process rights by the assessment of the additional points, we reverse the order, thereby vacating defendant's risk level determination, and we remit the matter to County Court for further proceedings in compliance with Correction Law § 168-n (3) (*see People v Hackett,* 89 AD3d 1479, 1479-

1480).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

656

KA 10-01006

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRADLEY I. KYLER, DEFENDANT-APPELLANT.

WAGNER & HART LLP, OLEAN (JANINE FODOR 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 January 4, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (two counts).

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 two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that he is entitled to be resentenced because the prosecutor failed to provide *Brady* material, i.e., the details of defendant's alleged cooperation with law enforcement agents and any promises that he received in return for such cooperation. Initially, we note that defendant is correct that "*Brady* concerns exculpatory evidence that is relevant . . . to punishment" (*People v Reese*, 23 AD3d 1034, 1036, *lv denied* 6 NY3d 779; *see generally Brady v Maryland*, 373 US 83, 87). Even assuming, arguendo, that defendant's contention survives his valid waiver of the right to appeal (*see generally People v Johnson*, 60 AD3d 1496, 1497, *lv denied* 12 NY3d 926), however, we conclude that it is unavailing. Defendant "failed to establish the existence of the [alleged *Brady* material] . . ., and its potential [mitigation] value is purely speculative" (*id.*; *see People v Little*, 23 AD3d 1117, 1118, *lv denied* 6 NY3d 777; *People v Mellerson*, 15 AD3d 964, 965, *lv denied* 5 NY3d 791). In addition, " 'it is well settled that evidence is not deemed to be *Brady* material when the defendant has knowledge of it,' and here the record establishes that defendant was aware [of the extent of his cooperation with law enforcement agents and any promises that were made to him]" (*People v Wall*, 38 AD3d 1341, 1341, *lv denied* 9 NY3d 852; *see People v Archie*, 78 AD3d 1560, 1562, *lv denied* 16 NY3d

856).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

661

CA 12-00134

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

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

V 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, Erie County (Donna M. Siwek, J.), entered April 1, 2011 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs (*see Matter of County of Niagara v Daines*, 91 AD3d 1288).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

662

CAF 08-01780

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

IN THE MATTER OF LAMONT HAYWOOD, SR.,
PETITIONER-APPELLANT,

V ORDER

MELISSA ANZALONE, RESPONDENT-RESPONDENT.

CARA A. WALDMAN, FAIRPORT, FOR PETITIONER-APPELLANT.

PAUL B. WATKINS, ATTORNEY FOR THE CHILDREN, FAIRPORT, FOR LAMONT H., JR. AND SIMONE H.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered July 15, 2008 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

664

CA 11-02434

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

BLUEROCK ENERGY HOLDINGS, INC., AND ITS AFFILIATES NEW YORK ENERGY, INC., BLUEROCK ENERGY, INC., BLUEROCK ENERGY SERVICES, INC., AND BENCHMARK ENERGY, INC., PLAINTIFFS-APPELLANTS,

V ORDER

ANGELO F. CHAMBRONE, DEFENDANT-RESPONDENT. (APPEAL NO. 1.)

HISCOCK & BARCLAY, LLP, SYRACUSE (ALAN R. PETERMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered July 18, 2011. The order granted the motion of defendant for partial summary judgment on his first counterclaim.

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: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

665

CA 11-02435

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

BLUEROCK ENERGY HOLDINGS, INC., AND ITS AFFILIATES NEW YORK ENERGY, INC., BLUEROCK ENERGY, INC., BLUEROCK ENERGY SERVICES, INC., AND BENCHMARK ENERGY, INC., PLAINTIFFS-APPELLANTS,

V ORDER

ANGELO F. CHAMBRONE, DEFENDANT-RESPONDENT. (APPEAL NO. 2.)

HISCOCK & BARCLAY, LLP, SYRACUSE (ALAN R. PETERMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered September 19, 2011. The order approved defendant's application for attorney's fees.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

666

CA 11-02552

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

LAWRENCE D. SEGUIN AND KATHLEEN M. SEGUIN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MATTHEW J. LANDFRIED, M.D., GENESEE
ORTHOPAEDICS AND SPORTS MEDICINE, LLP,
VALERIE S. THOMAS, P.A., PETER T. JANES, M.D.,
DEBRA M. OMIATEK, M.D., JOHN A. BRACH, M.D.,
MICHAEL D. MERRILL, M.D., JOSEPH V. OTTEN, M.D.,
UNITED MEMORIAL MEDICAL CENTER,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (J. MARK GRUBER OF COUNSEL), FOR DEFENDANTS-APPELLANTS MATTHEW J. LANDFRIED, M.D., GENESEE ORTHOPAEDICS AND SPORTS MEDICINE, LLP, VALERIE S. THOMAS, P.A., AND JOSEPH V. OTTEN, M.D.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ANGELO S. GAMBINO OF COUNSEL), FOR DEFENDANTS-APPELLANTS PETER T. JANES, M.D., DEBRA M. OMIATEK, M.D., JOHN A. BRACH, M.D., AND MICHAEL D. MERRILL, M.D.

FELDMAN KIEFFER, LLP, BUFFALO (RANDY C. MALLABER OF COUNSEL), FOR DEFENDANT-APPELLANT UNITED MEMORIAL MEDICAL CENTER.

BRIAN P. FITZGERALD, P.C., BUFFALO (DEREK J. ROLLER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered July 19, 2011 in a medical malpractice action. The order denied the motions of defendants-appellants for a change of venue.

It is hereby ORDERED that the order so appealed from is unanimously reversed in the exercise of discretion without costs and the motions are granted.

Memorandum: We agree with defendants-appellants (defendants) that Supreme Court improvidently exercised its discretion in denying their respective motions pursuant to CPLR 510 (3) seeking to change the venue of this medical malpractice action from Erie County to Genesee County (*see Costello v Forbes*, 294 AD2d 856). In support of their motions, defendants provided, inter alia, the physicians'

affirmations and nurses' affidavits of 14 nonparty witnesses who treated Lawrence D. Seguin (plaintiff) at defendant United Memorial Medical Center in Genesee County and at Strong Memorial Hospital in Monroe County. The nonparty witnesses stated the nature of their treatment of plaintiff and their respective reasons for the inconvenience of traveling from their respective homes or places of work to Erie County (*see McLaughlin v City of Buffalo*, 259 AD2d 1014, 1015; *cf. Rochester Drug Coop., Inc. v Marcott Pharmacy N. Corp.*, 15 AD3d 899). Plaintiff Kathleen M. Seguin, who has asserted a derivative cause of action, moved to Erie County several months following plaintiff's treatment and it is upon the basis of her residence that the action was commenced in Erie County. Plaintiffs have "failed to demonstrate any other consideration that would favor [Erie] County as the proper venue of this action" (*McLaughlin*, 259 AD2d at 1015; *see Costello,* 294 AD2d at 856-857). We therefore conclude that defendants established that "the convenience of material witnesses and the ends of justice will be promoted by the change" of venue (CPLR 510 [3]; *cf. 1093 Group, LLC v Canale*, 72 AD3d 1561, 1562).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

667

CA 11-02505

PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND MARTOCHE, 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 in part the petition and directed respondents to pay petitioner $62,831.58.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by deleting that part of the first decretal paragraph following the words “are hereby rejected” until the words “and it is further,” and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding to compel respondents to reimburse it for $62,831.58 in medical assistance payments that it made on behalf of a specified individual. Respondents contend on appeal that Supreme Court erred in directing them to pay petitioner’s claim. In addition, they contend that the court erred in directing them to use a certain type of report to determine future claims for similar “621-eligible expenditures” (*see* L of 1974, chs 620, 621), i.e., medical assistance expenditures made by a social services district for persons who are discharged or released after spending at least five years in a state mental hygiene facility.

Initially, we note that judicial review of an interpretation by an administrative agency of the statutes governing its operations varies, depending on the nature of the determination to be reviewed. “Where interpretation involves knowledge and understanding of underlying operational practices or entails an evaluation of factual

data within the agency's particular expertise . . ., great deference is accorded the agency's judgment . . . On the other hand, where as here, the question is one of pure statutory construction dependent only on accurate apprehension of legislative intent [with] little basis to rely on any special competence . . ., judicial review is less restricted as statutory construction is the function of the courts" (*Matter of Rosen v Public Empl. Relations Bd.*, 72 NY2d 42, 47-48 [internal quotation marks omitted]; *see Matter of Toys "R" Us v Silva*, 89 NY2d 411, 418-419).

We conclude that the court's judicial review of the interpretation by respondents of Social Services Law § 365 (5) was proper, and thus that the court properly directed respondents to pay the claim. " '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 County of Niagara v Daines*, 91 AD3d 1288, 1289). In addition, "[t]he 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).

Here, Social Services Law § 365 (5) states that "the [D]epartment [of Health (DOH)] shall be responsible for determining eligibility of and furnishing medical assistance to [an] eligible person[] when such person is in need of such medical assistance at the time he [or she] is *discharged or released* or *conditionally released* from a state department of mental hygiene facility pursuant to the mental hygiene law when such person was admitted to such facility and has been a patient therein for a continuous period of five or more years prior to his *discharge or release*" (emphasis added). Thus, the term "conditionally released" is included only in the initial part of the sentence, which defines those patients who are eligible for medical assistance, and it is excluded from the second part of the sentence, which sets the period of time in which those patients must have been admitted to a mental hygiene facility. The term "discharge or release," on the other hand, is included in both parts of the sentence. In addition, in three other instances in the following sentence in subdivision (5), a variant of the term "discharge or release" is used to define the parameters of the five-year period, but the term "conditionally released" is not included in that sentence. Thus "an irrefutable inference must be drawn that [the term 'conditionally released'] was intended to be omitted or excluded" from the parts of the statute that delineate the period of time in which a patient must have been admitted to a mental hygiene facility (Statutes § 240). We therefore agree with petitioner that the five-year period is not tolled where, as here, a patient is only conditionally released

from a mental hygiene facility, rather than released or discharged, before the expiration of the five-year period. Consequently, the DOH's interpretation of the statute is "affected by an error of law" (CPLR 7803 [3]), and thus the court properly directed respondents to pay petitioner the amount sought.

We agree with respondents, however, that the court erred in directing them to rely upon a certain type of report when determining whether a person is "621-eligible" with respect to future claims. Although respondents raise that contention for the first time on appeal and it therefore is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985), we nevertheless cannot allow what constitutes an improper advisory opinion to stand (*see Matter of County of Niagara v Daines,* 79 AD3d 1702, 1705-1706, *lv denied* 17 NY3d 703; *see generally New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531). We therefore modify the judgment accordingly.

We have reviewed respondents' remaining contentions and conclude that they are without merit, or are moot in light of our determination.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

668

CA 11-02021

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

IN THE MATTER OF THE ARBITRATION BETWEEN
CITY OF BUFFALO, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

BUFFALO PROFESSIONAL FIREFIGHTERS ASSOCIATION,
IAFF LOCAL 282, RESPONDENT-RESPONDENT.

HODGSON RUSS LLP, BUFFALO (JOSHUA FEINSTEIN OF COUNSEL), FOR PETITIONER-APPELLANT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (JONATHAN G. JOHNSEN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 16, 2011 in a proceeding pursuant to CPLR article 75. The order denied the petition to modify an arbitration award.

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

Memorandum: Petitioner (hereafter, City) appeals from an order denying its petition to modify an arbitration award in favor of respondent. On July 1, 2004, the City modified the health insurance plan provided to members of unions such as respondent that represent City employees. The unions, including respondent, filed a grievance with respect to the modified plan, alleging that the modified plan violated the parties' collective bargaining agreement (CBA). In 2008, an arbitrator issued an award finding that the City's actions violated the CBA and awarded relief to both active members and retired former members of respondent. The City filed the instant petition seeking to vacate the award to the extent that it granted relief to the retirees.

Contrary to the City's contention, the arbitrator did not exceed his authority in fashioning an award that granted relief to the retirees. The issue whether respondent had standing to represent retired employees was for the arbitrator to determine (*see generally Matter of City of Ithaca [Ithaca Paid Fire Fighters Assn., IAFF, Local 737]*, 29 AD3d 1129, 1130-1131; *City of Buffalo v A.F.S.C.M.E. Council 35, Local 264*, 107 AD2d 1049, 1049-1050), and the record is devoid of any evidence that the elimination of health insurance options did not affect the retirees such that respondent would lack standing to represent them. Thus, the City failed to demonstrate that the

arbitrator exceeded his authority (*see Matter of City of Elmira [Elmira Professional Firefighter's Assn., AFL-CIO, I.A.F.F.-Local 709]*, 34 AD3d 1075, 1077; *see also Baker v Board of Educ., Hoosick Falls Cent. School Dist.*, 3 AD3d 678, 680-681).

The City further contends that the arbitration award was "indefinite" because the arbitrator granted its request to delay implementation of the award until a related police union case completed the appeal process and thus was finalized. We reject that contention. "An award is subject to vacatur as indefinite or nonfinal 'only if it leaves the parties unable to determine their rights or obligations, if it does not resolve the controversy submitted, or if it creates a new controversy' " (*Matter of Board of Educ. of Amityville Union Free School Dist. v Amityville Teacher's Assn.*, 62 AD3d 992, 993), and that is not the case here.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

670

CA 11-01200

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

IN THE MATTER OF JOSEPH A. CAMARDO, JR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF AUBURN, RESPONDENT-RESPONDENT.

UNDERBERG & KESSLER, LLP, ROCHESTER (RONALD G. HULL OF COUNSEL), FOR PETITIONER-APPELLANT.

JOHN C. ROSSI, CORPORATION COUNSEL, AUBURN (ANDREW S. FUSCO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Cayuga County (Joseph D. Valentino, J.), entered April 26, 2011 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition is granted, and the matter is remitted to respondent for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding challenging the issuance of a negative declaration of environmental significance with respect to the proposed demolition of a building and the subsequent transfer of the property and construction of a performing arts center. Petitioner challenged the negative declaration on the ground that respondent failed to take the requisite hard look at environmental impact, improperly deferred resolution of environmental concerns until after demolition, and improperly amended the negative declaration and the notice of determination of non-significance. We conclude that Supreme Court erred in dismissing the petition and instead should have granted it.

We agree with petitioner that the negative declaration was improper inasmuch as it identified the potential for a significant adverse environmental impact resulting from the project. Respondent recognized that additional environmental monitoring of the property after demolition was recommended because of the possibility of contaminants on the property. Respondent, however, did not require that additional measures take place in the event that such contamination was discovered after demolition. We conclude that the statement in the negative declaration that further action may be needed based on future monitoring was an improper delegation of authority (*see Matter of Citizens Against Retail Sprawl v Giza,* 280

AD2d 234, 237). Rather, when faced with a potential future impact, respondent should have issued a conditioned negative declaration, which is appropriate for this "[u]nlisted action, . . . in which the action as initially proposed may result in one or more significant adverse environmental impacts [but] mitigation measures identified and required by the lead agency . . . will modify the proposed action so that no significant adverse environmental impacts will result" (6 NYCRR 617.2 [h]; *see Matter of Merson v McNally*, 90 NY2d 742, 752). There are additional procedural requirements when the lead agency issues a conditioned negative declaration in an unlisted action, none of which was satisfied here (*see* 6 NYCRR 617.7 [d]). We therefore grant the petition and annul the negative declaration, and we remit the matter to respondent for further proceedings.

We reject respondent's contention that the appeal should be dismissed as moot. Although the building has been demolished and it appears that construction on the project has begun or is about to begin, petitioner sought injunctive relief both at the trial court and in this Court and thus should not be precluded from raising his present challenge (*see Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 2 NY3d 727, 728-729). We have considered petitioner's remaining contentions with respect to respondent's alleged noncompliance with the State Environmental Quality Review Act (ECL art 8), and we conclude that they are without merit.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

671

CA 12-00131

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

SALVATORE J. LICARI, ALSO KNOWN AS SAM LICARI, ANNA LICARI AND LICARI FAMILY HOLDINGS LLC, PLAINTIFFS-RESPONDENTS,

V ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, DEFENDANT-APPELLANT.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

GUSTAVE J. DETRAGLIA, JR., UTICA (MICHELE E. DETRAGLIA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered April 6, 2011 in a breach of contract action. The judgment, among other things, denied defendant's motion for summary judgment dismissing plaintiffs' complaint.

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: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

675

KA 11-01490

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

GEORGE P. SQUIRES, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Cayuga County Court (Thomas G. Leone, J.), rendered June 22, 2011. Defendant was resentenced upon his conviction of aggravated unlicensed operation of a motor vehicle in the first degree and misdemeanor driving while intoxicated.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

676

KA 11-00544

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LEONARD JAMES, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, 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 February 7, 2011. 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.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

678

KA 11-00249

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT J. THOUSAND, 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 (Sara S. Sperrazza, J.), rendered December 22, 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 following his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his waiver of the right to appeal was invalid. We reject that contention (*see generally People v Porter*, 55 AD3d 1313, *lv denied* 11 NY3d 899). Defendant's valid waiver of the right to appeal encompasses his challenges to the severity of the sentence (*see id.*), the decision of the suppression court (*see People v Kemp*, 94 NY2d 831, 833), and the factual sufficiency of the plea allocution (*see People v Zimmerman*, 219 AD2d 848, 848, *lv denied* 88 NY2d 856). We reject defendant's contention that County Court erred in denying his motion to withdraw his guilty plea on the ground that his plea colloquy negated the elements of manslaughter in the second degree. Defendant pleaded guilty to a crime lesser than that charged in the indictment, and a factual colloquy thus was not required (*see id.*).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

679

KA 11-02514

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

JAMELL HOWINGTON, DEFENDANT-RESPONDENT.

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

JAMES K. WEEKS, FAYETTEVILLE, FOR DEFENDANT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), dated October 29, 2010. The amended order granted the motion of defendant to suppress certain physical evidence.

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

Memorandum: Having filed the requisite statement pursuant to CPL 450.50, the People appeal from an amended order granting defendant's motion to suppress the physical evidence seized by the police after a traffic stop. A Syracuse police officer testified at the suppression hearing that he stopped a vehicle operated by defendant after observing several traffic infractions, and that he detected the odor of unburned marihuana when he approached the vehicle. The hearing testimony further established, however, that the only marihuana found in the vehicle was in a closed plastic bag inside a pocket in defendant's clothing. In addition, the evidence at the suppression hearing established that defendant drove the vehicle with the windows open for several blocks prior to the stop, and that they remained open after the vehicle was stopped by the police. Supreme Court expressly stated that it did "not credit the testimony that the [odor] of raw mari[h]uana was present," and the court thus concluded that the officers did not have probable cause to arrest defendant for possession of marihuana. The court therefore concluded that the officers did not have the right to search defendant incident to an arrest for possession of marihuana and granted defendant's motion seeking to suppress the items discovered during the search, including the marihuana, money and other drugs possessed by defendant.

Initially, we note that the People raised an alternative basis for the search at the suppression hearing, but they have "failed to address in their brief on appeal any issues with respect to [that

alternative basis], and thus they are deemed to have abandoned any contentions with respect thereto" (*People v Hunter*, 92 AD3d 1277, 1279; *see People v Sorrells*, 58 AD3d 1080, 1080 n, *lv denied* 12 NY3d 921). Rather, the People contend on appeal that the court erred in suppressing the evidence because the odor of the unburned marihuana provided probable cause for the search, and that the court erred in refusing to credit the officer's testimony that he smelled the marihuana. "It is well settled that the suppression court's credibility determinations and choice between conflicting inferences to be drawn from the proof are granted deference and will not be disturbed unless unsupported by the record" (*People v Esquerdo*, 71 AD3d 1424, 1424, *lv denied* 14 NY3d 887 [internal quotation marks omitted]; *see People v McAvoy*, 70 AD3d 1467, 1467, *lv denied* 14 NY3d 890; *People v Layboult*, 227 AD2d 773, 775). Here, the court's determination that the officer could not have smelled the unburned marihuana is supported by the evidence in the record and was based solely upon the court's assessment of the credibility of the witnesses at the suppression hearing, and we perceive no basis to disturb that determination (*see People v Vaughan*, 48 AD3d 1069, 1071, *lv denied* 10 NY3d 845, *cert denied* 555 US 910; *see generally People v Gerena*, 49 AD3d 1204, 1205, *lv denied* 10 NY3d 958). In view of our conclusion that the court's determination that the officer could not have detected the odor of unburned marihuana has support in the record and should not be disturbed, we do not address the further contention of the People that such odor, combined with defendant's "furtive movements," justified the search.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

680

KA 11-00401

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EVAN P. GUZMAN, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered January 25, 2011. 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: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in relying upon facts set forth solely in the case summary. We reject that contention. The case summary may constitute clear and convincing evidence of the facts alleged therein and, where, as here, the defendant does not dispute the facts contained in the case summary, the case summary alone is sufficient to support the court's determination (*see People v Hubel*, 70 AD3d 1492, 1493; *People v Girup*, 9 AD3d 913, 913-914; *see generally People v Mingo*, 12 NY3d 563, 571-573). Here, in the absence of evidence to the contrary, the court correctly relied upon the case summary in assessing points against defendant under the risk factor for failure to accept responsibility and expulsion from treatment (*see People v Murphy*, 68 AD3d 832, 833, *lv dismissed* 14 NY3d 812), as well as the risk factor for improper conduct while confined (*see People v Vaughn*, 26 AD3d 776, 777). Further, defendant failed to establish his entitlement to a downward departure from the presumptive risk level (*see People v Vacanti*, 26 AD3d 732, 733, *lv denied* 6 NY3d 714; *People v Hamelinck*, 23 AD3d 1060).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

681

KA 11-00543

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JESSE ALSTON, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, 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 February 4, 2011. 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.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

684

CAF 11-01814

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

IN THE MATTER OF ANASTASHIA S.

CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TONYA R., RESPONDENT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, III, OF COUNSEL), FOR RESPONDENT-APPELLANT.

JANE E. LOVE, MAYVILLE, FOR PETITIONER-RESPONDENT.

MICHAEL J. SULLIVAN, ATTORNEY FOR THE CHILD, FREDONIA, FOR ANASTASHIA S.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered May 10, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order denied the motion of respondent to vacate a default judgment.

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

Memorandum: Contrary to the contention of respondent mother, Family Court did not abuse its discretion in denying her motion to vacate a judgment entered upon her default in this permanent neglect proceeding. The mother's contention that she had a reasonable excuse for her failure to appear based upon her lack of knowledge of the fact-finding hearing and upon her incarceration at the time of that hearing is not preserved for our review, inasmuch as she did not seek vacatur on those grounds (*see Matter of Derrick T.*, 261 AD2d 108, 109). In any event, we conclude that the mother failed to establish a reasonable excuse for her failure to appear (*see Matter of Raymond Anthony A.*, 192 AD2d 529, *lv dismissed* 82 NY2d 706; *cf. Matter of Danner-Nepage v Nepage*, 60 AD3d 1495, 1495-1496). In addition, the mother's unsubstantiated and conclusory assertion of partial compliance with the prior dispositional order is insufficient to establish a meritorious defense to the petition (*see Matter of Gloria Marie S.*, 55 AD3d 320, 321, *lv dismissed* 11 NY3d 909; *see also Matter of Kenneth L.*, 92 AD3d 1245, 1247; *Matter of Alexis C.R.*, 71 AD3d 1511, *lv dismissed* 14 NY3d 922).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

685

CAF 11-01129

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

IN THE MATTER OF KIM MONTAGUE,
PETITIONER-APPELLANT,

V ORDER

JASON A. BROOKS, RESPONDENT-RESPONDENT.

IN THE MATTER OF JASON A. BROOKS,
PETITIONER-RESPONDENT,

V

KIM MONTAGUE, RESPONDENT-APPELLANT.

ELIZABETH CIAMBRONE, BUFFALO, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

CATHARINE VENZON, BUFFALO, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

AYOKA TUCKER, ATTORNEY FOR THE CHILD, BUFFALO, FOR NATHAN B.

Appeal from an order of the Family Court, Chautauqua County (Kevin M. Carter, J.), entered May 10, 2011 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent-petitioner sole custody of the subject child.

Now, upon reading and filing the stipulation of discontinuance signed by petitioner-respondent, the attorneys for the parties, and by the Attorney for the Child on March 12, 2012,

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

686

CA 12-00138

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

IN THE MATTER OF ALEXANDRA VANBUREN,
CLAIMANT-RESPONDENT,

V ORDER

WILLIAMSVILLE CENTRAL SCHOOL DISTRICT,
RESPONDENT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO, CONGDON FLAHERTY O'CALLAGHAN REID DONLON TRAVIS & FISHLINGER, UNIONDALE (GREGORY A. CASCINO OF COUNSEL), FOR RESPONDENT-APPELLANT.

MARK R. MULTERER, BUFFALO (JASON H. STERNE OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered April 4, 2011. The order granted claimant's application for leave to serve a late notice of claim.

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: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

690

CA 12-00089

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

MARY J. KNIGHT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

REALTY USA.COM, INC., DIANNE SHAW, REALTY USA,
DEFENDANTS-APPELLANTS,
FRANK ROBERTACCIO, ET AL., DEFENDANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (MICHELLE M. DAVOLI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JOHN J. DELMONTE, NIAGARA FALLS, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered October 25, 2011 in a personal injury action. The order, insofar as appealed from, denied the motion of defendants Realty USA.com, Inc. and Dianne Shaw, Realty USA for summary judgment dismissing plaintiff's complaint against them and granted plaintiff's cross motion for leave to amend the summons and complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendants-appellants is granted, the complaint against them is dismissed, and the cross motion of plaintiff is denied.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when, during an open house at a home owned by defendants Frank Robertaccio and Kathleen Robertaccio, she tripped and fell over a platform located in the basement. The Robertaccios had hired defendant Realty USA.com, Inc. and defendant Dianne Shaw, Realty USA, a real estate agent (collectively, defendant brokers) to sell their home. Shaw arranged the open house with the help of her assistant, and it was administered by a hostess employed by Shaw. Neither the Robertaccios nor Shaw were present during the open house.

As limited by their brief, defendant brokers contend that Supreme Court erred in denying their motion for summary judgment dismissing the complaint against them and in granting plaintiff's cross motion for leave to amend the summons and complaint. We agree. With respect to the motion for summary judgment, it is well settled that " '[l]iability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of [the] premises' " (*Clifford v Woodlawn Volunteer Fire Co., Inc.*, 31 AD3d

1102, 1103). " 'The existence of one or more of these elements is sufficient to give rise to a duty of care[, but w]here none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property' " (*id.*). Defendant brokers, whose only connection to the property was listing it for sale and showing it to prospective buyers, met their initial burden on their motion by establishing that they did not occupy, own, or control the Robertaccios' home and did not employ it for a special use, and thus did not owe plaintiff a duty of care (*see Rackowski v Realty USA*, 82 AD3d 1475, 1476; *Eichelbaum v Douglas Elliman, LLC*, 52 AD3d 210). In response thereto, plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to plaintiff's contentions, the evidence does not establish that Shaw assumed a duty to repair the platform or to warn others about it (*see generally Gauthier v Super Hair*, 306 AD2d 850, 851-852), nor does it establish that defendants may be liable under a "special use" theory of liability (*see generally Kaufman v Silver*, 90 NY2d 204, 207).

We further conclude that the court erred in granting plaintiff's cross motion for leave to amend her summons and complaint to raise additional causes of action sounding in "general negligence" and to add Shaw's employee who hosted the open house as a defendant (*see generally* CPLR 3025 [b]). As previously noted, defendants established that they did not owe plaintiff a duty of care with respect to any defective or dangerous conditions on the premises, and that principle applies equally to plaintiff's proposed causes of action, which likewise are based in negligence. It also applies equally to Shaw's employee, whose sole connection to the premises was hosting the open house, allowing plaintiff entry into the home, and showing her where to access the basement (*see Rackowski*, 82 AD3d at 1476; *Eichelbaum*, 52 AD3d 210). Inasmuch as the proposed amendments were "patently lacking in merit" (*Letterman v Reddington*, 278 AD2d 868; *see Nastasi v Span, Inc.*, 8 AD3d 1011, 1013), the court erred in granting plaintiff's cross motion for leave to amend her summons and complaint (*cf. McFarland v Michel*, 2 AD3d 1297, 1300; *see generally C-Kitchens Assoc., Inc. v Travelers Ins. Cos. [Travelers Ins. Co.]*, 15 AD3d 905, 907; *Boccio v Aspin Trucking Corp.*, 93 AD2d 983, 983).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

691

CA 11-02220

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

DAWN M. CLOSE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DARIEN LAKE THEME PARK AND CAMPING RESORT, INC., DEFENDANT-RESPONDENT.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (MAURA C. SEIBOLD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAMON MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered January 28, 2011 in a personal injury action. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained on a water ride in an amusement park owned by defendant. Contrary to plaintiff's contention, Supreme Court properly granted the motion of defendant for summary judgment dismissing the complaint. "[B]y engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484; *see Anand v Kapoor*, 15 NY3d 946, 947-948; *Turcotte v Fell*, 68 NY2d 432, 439; *Maddox v City of New York*, 66 NY2d 270, 277-278). Awareness of the risk is " 'to be assessed against the background of the skill and experience of the particular plaintiff' " (*Morgan*, 90 NY2d at 486, quoting *Maddox*, 66 NY2d at 278). Here, "defendant sustained its burden of proving its prima facie entitlement to judgment as a matter of law . . . by presenting evidence that the plaintiff understood and voluntarily assumed the risks inherent in the activity at issue" (*Leslie v Splish Splash at Adventureland, Inc.*, 1 AD3d 320, 321). Contrary to plaintiff's contention, she failed to raise a triable issue of fact whether defendant engaged in reckless or intentional conduct or whether there existed a dangerous condition that concealed or unreasonably increased the risks of the ride (*see Youmans v Maple Ski Ridge, Inc.*, 53 AD3d 957, 959; *see also Loewenthal*

v Catskill Funland, 237 AD2d 262, 263-264).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

692

CA 11-02098

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

PHILIP D. RUPERT, JR., PLAINTIFF-APPELLANT,

V ORDER

GATES & ADAMS, P.C., DOUGLAS S. GATES,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

ALFRED P. KREMER, ROCHESTER, FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (ROBERT A. BARRER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (James P. Murphy, J.), entered July 20, 2011. The order, inter alia, granted the motion of defendants for leave to serve an amended answer.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

693

CA 11-02099

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

PHILIP D. RUPERT, JR., PLAINTIFF-APPELLANT,

V ORDER

GATES & ADAMS, P.C., DOUGLAS S. GATES,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

ALFRED P. KREMER, ROCHESTER, FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (ROBERT A. BARRER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (James P. Murphy, J.), entered October 5, 2011. The order granted the motion of defendants for summary judgment and dismissed the amended complaint.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

694

CA 12-00183

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

BARBARA ANDERSON AND DAN FAULKNER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RAY JUSTICE, ET AL., DEFENDANTS,
AND STEVE EZARD, DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (NICHOLAS B. DAVIS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (Thomas M. Van Strydonck, J.), entered August 19, 2011 in a personal injury action. The order, insofar as appealed from, denied that part of the motion of defendants for summary judgment dismissing the complaint against defendant Steve Ezard.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries they allegedly sustained when they fell through a dock owned by Steve Ezard (defendant). Defendants moved for summary judgment dismissing the complaint on the ground that, inter alia, defendant did not have actual or constructive notice of any defective or dangerous condition of the dock. We agree with defendant that Supreme Court erred in denying that part of the motion dismissing the complaint against him, and we therefore reverse the order insofar as appealed from, grant the motion in its entirety and dismiss the complaint. Defendant met his initial burden of establishing that he neither created nor had actual or constructive notice of the allegedly dangerous or defective condition of the dock, and plaintiffs failed to raise a triable issue of fact in opposition (*see generally King v Sam's E., Inc.*, 81 AD3d 1414, 1414-1415).

It is well established that, "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant[] . . . to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837). Here, defendant met his initial burden of

establishing that he lacked constructive notice of any defective or dangerous condition with respect to the dock by submitting, inter alia, his deposition testimony and an affidavit in which he averred that he inspected the dock every spring when he placed it in the water, that he and his family regularly used the dock and that they encountered no problems with the dock prior to plaintiffs' accident. Defendant also submitted plaintiffs' bill of particulars in which they alleged that the defect in the dock was "latent," thus acknowledging that the defect was not "visible and apparent" (*id.*), as well as plaintiffs' deposition testimony in which they testified that they observed no problems with the dock before the accident.

In opposition to the motion, plaintiffs alleged that there were questions of fact concerning the reasonableness of defendant's inspections of the dock and whether such inspections would have disclosed the alleged defect that caused the dock to collapse. "The duty of landowners to inspect their property is measured by a standard of reasonableness under the circumstances" (*Pommerenck v Nason*, 79 AD3d 1716, 1717; *see Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500, 501, *lv denied* 9 NY3d 809; *Weller v Colleges of the Senecas*, 217 AD2d 280, 285). "Where . . . there is nothing to arouse the [property owner's] suspicion, he [or she] has no duty to inspect" (*Appleby v Webb*, 186 AD2d 1078, 1079; *see Scoppettone v ADJ Holding Corp.*, 41 AD3d 693, 695). Here, as noted above, defendant inspected the dock prior to placing it in the water each year, used the dock regularly without incident and received no complaints from his neighbors, including plaintiff Barbara Anderson, who likewise routinely used the dock without incident. Further, there is no evidence in the record that the dock showed signs of deterioration, such as rusted nails, rotted or discolored wood or corroded metal (*cf. Serna v 898 Corp.*, 90 AD3d 560, 560; *Babcock v County of Albany*, 85 AD3d 1425, 1426-1427; *Oates v Iacovelli*, 80 AD3d 1059, 1060-1061). Under the circumstances of this case, we conclude that it was reasonable for defendant to conduct a pre-season inspection of the dock and thereafter to rely upon personal observations and any complaints to determine whether further inspection or maintenance was required (*see generally Gover v Mastic Beach Prop. Owners Assn.*, 57 AD3d 729, 731). Thus, plaintiffs failed to raise a triable issue of fact concerning defendant's constructive notice of the alleged dangerous or defective condition of the dock.

We reject plaintiffs' alternative contention that notice to defendant was not required because the doctrine of res ipsa loquitur applies. That doctrine "does not apply here because, inter alia, defendant was not in exclusive control of the instrumentality that allegedly caused plaintiff[s'] injuries," i.e., the dock (*Moore v Ortolano*, 78 AD3d 1652, 1653; *see Warren v Ellis*, 61 AD3d 1351, 1352-1353). Indeed, Anderson testified at her deposition that the dock was a "community dock" and that she regularly used the dock to enter the lake from the right-of-way shared by defendant, Anderson and other neighboring property owners.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

697

CA 11-02503

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

IN THE MATTER OF CITY OF SYRACUSE,
PETITIONER-APPELLANT,

V ORDER

CENTRAL NEW YORK ASSOCIATION OF DELTA KAPPA
EPSILON, RESPONDENT-RESPONDENT.

MARY ANNE DOHERTY, CORPORATION COUNSEL, SYRACUSE (THOMAS R. BABILON OF COUNSEL), FOR PETITIONER-APPELLANT.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (TERESA M. BENNETT OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Onondaga County Court (Anthony F. Aloi, J.), entered March 14, 2011. The order, insofar as appealed from, denied the motion of petitioner to dismiss the appeal of respondent.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

699

KA 06-03122

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON M. STUBBS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Elma A. Bellini, J.), rendered August 28, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence on the conviction of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree is unanimously dismissed and the judgment is modified on the law by vacating the sentence imposed for murder in the second degree and as modified the judgment is affirmed and the matter is remitted to Monroe County Court for the filing of a predicate felony offender statement and resentencing on count one of the indictment.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]), criminal possession of a weapon in the second degree (§ 265.03 [former (2)]), and criminal possession of a weapon in the third degree (§ 265.02 [former (4)]), arising from the shooting death of the victim. In appeal No. 2, he appeals from a resentence on the weapons possession counts. Viewing the evidence in light of the elements of the crime of murder in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict on that count is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that the jury did not fail to give the evidence of defendant's intent the weight that it should be accorded (*see id.*).

Defendant's objection with respect to the cross-examination of a

defense witness by the People was sustained, and defendant failed to request a curative instruction with respect to that testimony. Defendant thus failed to preserve for our review his contention that County Court erred in failing to give a curative instruction (*see generally People v Rogers*, 70 AD3d 1340, 1340, *lv denied* 14 NY3d 892, *cert denied* ___ US ___, 131 S Ct 475). In any event, defendant's contention lacks merit.

By failing to request that the court give an expanded charge on identification, defendant failed to preserve for our review his contention that the court erred in failing to do so (*see generally People v Robinson*, 88 NY2d 1001, 1001-1002). In any event, that contention is without merit inasmuch as the court's charge "reasonably mirrored the expanded identification charge . . . and 'sufficiently apprised the jury that the reasonable doubt standard applied to identification' " (*People v Brooks*, 26 AD3d 867, *lv denied* 6 NY3d 892).

We further conclude, however, that the record establishes that defendant is a predicate felon and that the People failed to file the requisite predicate felony offender statement. The court therefore sentenced defendant as a first violent felony offender. "When it became apparent at sentencing that defendant had a prior felony conviction, the People were required to file a second felony offender statement in accordance with CPL 400.21 and, if appropriate, the court was then required to sentence defendant as a second felony offender . . . '[I]t is illegal to sentence a known predicate felon as a first offender' " (*People v Griffin*, 72 AD3d 1496, 1497). Because we cannot permit an illegal sentence to stand (*see People v VanValkinburgh*, 90 AD3d 1553, 1554), we modify the judgment in appeal No. 1 and reverse the resentence in appeal No. 2 by vacating the sentences imposed, and we remit the matter to County Court for the filing of a predicate felony offender statement and resentencing in accordance with the law (*see People v Worth*, 83 AD3d 1547, 1548).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

700

KA 06-03701

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON M. STUBBS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Monroe County Court (Elma A. Bellini, J.), rendered October 31, 2006. Defendant was resentenced upon his conviction of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the resentence so appealed from is unanimously reversed on the law and the matter is remitted to Monroe County Court for the filing of a predicate felony offender statement and resentencing.

Same Memorandum as in *People v Stubbs* ([appeal No. 1] ___ AD3d ___ [June 8, 2012]).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

701

KA 12-00141

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PRASHANT AGARWAL, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Mark H. Fandrich, A.J.), dated June 20, 2011. 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: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court's upward departure from his presumptive classification as a level one risk to a level two risk is not supported by the requisite clear and convincing evidence (*see* § 168-n [3]). We reject that contention. There is clear and convincing evidence that defendant used the internet to engage in sexually explicit conversations with an undercover police officer posing as a 14-year-old girl, instructed her to masturbate, provided her with Web sites to educate her about sexual positions, communicated to her that he wanted to engage in sexual activity with her, and " 'exhibited a willingness to act on his compulsions' " by arranging to meet with her and then arriving at the arranged meeting with various items demonstrating his intent to engage in sexual activity (*People v Blackman*, 78 AD3d 803, 804, *lv denied* 16 NY3d 707). In our view, the People thereby presented evidence of aggravating factors " '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).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

702

KA 10-02442

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DONTAE E. COBLE, ALSO KNOWN AS “D-MONEY,”
DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered November 23, 2010. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

703

KA 10-02512

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT MILLER, DEFENDANT-APPELLANT.

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

VINCENT MILLER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered July 27, 2010. The judgment convicted defendant, upon a jury verdict, of promoting prison contraband in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of promoting prison contraband in the first degree (Penal Law § 205.25 [2]). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence by his general motion for a trial order of dismissal at the close of the People's case (*see People v Gray*, 86 NY2d 10, 19). Even assuming, arguendo, that he made a specific objection at that time, we note that he failed to renew his motion after presenting evidence and thus failed to preserve his challenge for that reason as well (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, the evidence is legally sufficient to support the conviction inasmuch as the People established that defendant, who was incarcerated, knowingly possessed "dangerous contraband" in violation of Penal Law § 205.25 (2).

Defendant likewise failed to preserve for our review his challenge to the testimony of a correction officer, inasmuch as he failed to raise a specific objection to that testimony at trial (*see* CPL 470.05 [2]; *People v Huebert*, 30 AD3d 1018, 1018, *lv denied* 7 NY3d 813). We nevertheless conclude that County Court did not err in admitting that testimony inasmuch as the correction officer testified based upon personal knowledge and did not offer any opinion concerning ultimate factual issues that were "more properly within the province of the jury" (*People v Rivera*, 212 AD2d 1040, 1041, *lv denied* 85 NY2d

979; *see generally People v Truscio*, 251 AD2d 966, 967, *lv denied* 92 NY2d 986). There also is no merit to defendant's contention that the court erred in precluding evidence of defendant's prior prison disciplinary hearing inasmuch as such evidence was irrelevant and may merely have confused the jurors (*see People v Venditto*, 171 AD2d 952, 953-954, *lv denied* 78 NY2d 1130). The sentence is not unduly harsh or severe.

Contrary to defendant's contention in his pro se supplemental brief, he was not deprived of effective assistance of counsel based on the failure of defense counsel to move to dismiss the indictment on the ground that defendant was deprived of his right to appear before the grand jury pursuant to CPL 190.50 (5) (c). Indeed, the record establishes that defendant was transported to the grand jury proceeding and that, after being provided with the opportunity to consult with defense counsel, defendant elected not to testify. Furthermore, we conclude that defense counsel's preparation for trial was more than adequate, and we reject defendant's contention that he did not receive meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). We have reviewed defendant's remaining contentions in his main and pro se supplemental brief and conclude that they are without merit.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

704

KA 11-00194

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JEREMY HASLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered December 1, 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: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

705

KA 11-00062

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PLIEKOU IRVIN, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (DAVID M. PARKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Ontario County Court (William F. Kocher, J.), dated June 7, 2010 pursuant to the 2009 Drug Law Reform Act. The order denied defendant's application to be resentenced upon defendant's 2002 conviction of criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Ontario County Court for further proceedings in accordance with the following Memorandum: On defendant's appeal from an order denying his application for resentencing pursuant to the 2009 Drug Law Reform Act (*see* CPL 440.46), the People correctly concede that defendant's status as a reincarcerated parole violator did not render him ineligible to apply for resentencing (*see People v Paulin*, 17 NY3d 238, 242; *People v Cobb*, 90 AD3d 779; *People v Wallace*, 87 AD3d 824, 824). Although County Court also denied his application on the ground that substantial justice dictated that the application be denied, we conclude that the court erred in making that determination without the benefit of a hearing (*cf. People v Beasley*, 47 AD3d 639, 640-641; *People v Rivers*, 43 AD3d 1247, 1247-1248, *lv dismissed* 9 NY3d 993). At the very least, the court should have permitted defendant and his attorney to appear and explain " 'why resentencing was warranted' " (*People v Morales*, 46 AD3d 1395, 1395, *lv dismissed* 10 NY3d 768).

We therefore reverse the order and remit the matter to County Court for further proceedings on defendant's application for resentencing pursuant to CPL 440.46.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

707

KA 11-02547

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID W. SCHREIER, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA, LLP, BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered February 16, 2011. The judgment convicted defendant, upon a nonjury verdict, of unlawful surveillance in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of unlawful surveillance in the second degree (Penal Law § 250.45 [1]), defendant contends that the conviction is not supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We reject that contention. The evidence established that defendant videotaped the victim through a window as she stood naked in her bathroom. Although defendant concedes that he videotaped the victim without her knowledge or consent, he contends that the People failed to establish the remaining three elements of unlawful surveillance in the second degree (*see* § 250.45 [1]). We disagree. County Court was entitled to infer from the evidence the first two remaining elements, i.e., that defendant made the recording for his own amusement or entertainment, and that he "intentionally use[d] . . . an imaging device to surreptitiously . . . record" the victim (*id.*). With respect to the surreptitious nature of the recording, we note that defendant videotaped the victim in the early morning hours, around dawn, obscured himself and his compact camera from the victim's view and, when confronted by the police, initially denied that a recording existed.

We likewise conclude that the court was entitled to infer from the evidence the third remaining element of the crime, i.e., that the recording was made at "a place and time when a reasonable person would believe that he or she could fully disrobe in privacy" (§ 250.40 [1];

see § 250.45 [1]). The victim was recorded at 7:30 A.M. in the second-floor bathroom of her home as she was preparing for work. Her location was largely obscured from outside view, except from a particular vantage point through a certain window that could be obtained only by a person of above-average height, standing immediately outside her door. Even from that vantage point, the victim was only partially visible. The victim testified that she did not believe that an individual standing outside her home could see her bathroom through the window because she was unable to see through the window while standing at the front door, and "[she] didn't realize anyone [c]ould have [the necessary] angle."

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

708

KA 10-01794

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRES P. GUTIERREZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered January 9, 2009. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree and robbery 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 robbery in the first degree (Penal Law § 160.15 [4]) and robbery in the second degree (§ 160.10 [1]). Defendant failed to preserve for our review his contention that the integrity of the grand jury proceeding was impaired pursuant to CPL 210.35 (5) inasmuch as he did not move to dismiss the indictment on that ground (*see People v West*, 4 AD3d 791, 792-793; *see also People v Workman*, 277 AD2d 1029, 1031, *lv denied* 96 NY2d 764; *People v Volious*, 244 AD2d 871, 872, *lv denied* 93 NY2d 1029). In any event, we conclude that the prosecutor's questioning of defendant before the grand jury was not improper.

We reject defendant's further contention that County Court erred in refusing to suppress his statements to the police. The record reflects that defendant was not given " 'false legal advice' " by the police (*People v Salgado*, 130 AD2d 960, 961, *lv denied* 70 NY2d 754). "Even assuming, arguendo, that the police misled defendant, we conclude that such deception did not create a substantial risk that the defendant might *falsely* incriminate himself" (*People v Alexander*, 51 AD3d 1380, 1382, *lv denied* 11 NY3d 733 [internal quotation marks omitted and emphasis added]), nor can it be said that the alleged deception was " 'so fundamentally unfair as to deny [defendant] due process' " (*People v Brown*, 39 AD3d 886, 887, *lv denied* 9 NY3d 873, quoting *People v Tarsia*, 50 NY2d 1, 11).

Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence with respect to the alleged absence of corroboration of the accomplice testimony, inasmuch as he failed to renew his motion for a trial order of dismissal on that ground after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, we conclude that defendant's contention lacks merit. The People presented sufficient corroborative evidence connecting defendant to the commission of the robbery (*see People v Reome*, 15 NY3d 188, 191-192). Defendant likewise failed to preserve for our review his contention that the evidence is legally insufficient to establish that he participated in the robbery inasmuch as he failed to move for a trial order of dismissal on that ground (*see People v Gray*, 86 NY2d 10, 19; *People v Washington*, 89 AD3d 1516, 1517, *lv denied* 18 NY3d 963). In any event, that contention lacks merit as well (*see generally People v Bleakley*, 69 NY2d 490, 495). We reject defendant's contention that the court erred in refusing to use his proposed language in charging the jury with respect to the issue of accessorial liability (*see People v Leach*, 293 AD2d 760, 761, *lv denied* 98 NY2d 677; *People v Gonzalez*, 279 AD2d 637, *lv denied* 96 NY2d 800), and we conclude that the court's charge on that issue was proper (*see* Penal Law § 20.00; *People v Perez*, 89 AD3d 1393, 1394-1395, *lv denied* 18 NY3d 961; *People v Delphin*, 26 AD3d 343, 343-344, *lv denied* 6 NY3d 893).

Finally, defendant contends that he was denied a fair trial by prosecutorial misconduct on summation. He failed to preserve that contention for our review (*see* CPL 470.05 [2]; *People v Wallace*, 59 AD3d 1069, 1070-1071, *lv denied* 12 NY3d 861), and in any event it has no merit. Contrary to defendant's contention, "[t]he majority of the comments in question were within the broad bounds of rhetorical comment permissible during summations . . ., and they were either a fair response to defense counsel's summation or fair comment on the evidence . . . Even assuming, arguendo, that some of the prosecutor's comments were beyond those bounds, we conclude that they were not so egregious as to deprive defendant of a fair trial" (*People v McEathron*, 86 AD3d 915, 916 [internal quotation marks omitted]).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

710

CAF 10-01623

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ.

IN THE MATTER OF CHRISTOPHER A. NICHOLSON,
PETITIONER-APPELLANT,

V ORDER

DONNA M. NICHOLSON, RESPONDENT-RESPONDENT.

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

KAREN SMITH CALLANAN, ATTORNEY FOR THE CHILD, ROCHESTER, FOR SADIE N.

Appeal from an order of the Supreme Court, Monroe County (Alex R. Renzi, J.), entered June 17, 2010. The order denied the petition for visitation.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

711

CA 11-01520

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ.

HAROLD ALEXANDER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL, DEFENDANT-RESPONDENT.

MICHAEL J. KIEFFER, ROCHESTER, FOR PLAINTIFF-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (TIMOTHY P. BARNA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (David Michael Barry, J.), entered March 25, 2011. The judgment granted the motion of defendant for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the provision dismissing the complaint and granting judgment in favor of defendant as follows:

> It is ADJUDGED and DECLARED that defendant is not obligated to indemnify plaintiff for any property theft losses arising from the burglary of plaintiff's residence on December 19, 2008,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking a judgment declaring, inter alia, that defendant is obligated to indemnify plaintiff for the property theft losses resulting from the burglary of his home. Supreme Court properly resolved the merits of the action in favor of defendant, but erred to the extent that it granted defendant's motion for summary judgment dismissing the complaint rather than declaring the rights of the parties (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954), and we therefore modify the judgment accordingly. "When an insurer gives its insured written notice of its desire that proof of loss under a policy of . . . insurance be furnished and provides a suitable form for such proof, failure of the insured to file proof of loss within 60 days after receipt of such notice, or within any longer period specified in the notice, is an absolute defense to an action on the policy, absent waiver of the requirement by the insurer or conduct on its part estopping its assertion of the defense" (*Igbara Realty Corp. v New York Prop. Ins. Underwriting Assn.*, 63 NY2d 201, 209-210; *see* Insurance Law § 3407 [a]; *Aryeh v Westchester Fire Ins. Co.*, 138 AD2d

337, 338, *lv denied* 73 NY2d 703). It is undisputed that defendant demanded that plaintiff submit a sworn proof of loss and provided the necessary form, and that plaintiff failed to comply with the demand. Defendant therefore has an absolute defense to the action on the policy (*see Anthony Marino Constr. Corp. v INA Underwriters Ins. Co.*, 69 NY2d 798, 800; *Stopani v Allegany Co-op Ins. Co.*, 83 AD3d 1446, 1447; *Bailey v Charter Oak Fire Ins. Co.*, 273 AD2d 691, 692).

Contrary to plaintiff's contention, his unsworn statement of loss and receipts for the stolen items were not sufficient to comply with the demand (*see Maleh v New York Prop. Ins. Underwriting Assn.*, 64 NY2d 613, 614; *Darvick v General Acc. Ins. Co.*, 303 AD2d 540; *Aryeh,* 138 AD2d at 338). The policy required that plaintiff provide defendant, "within 60 days after [its] request, your signed, sworn proof of loss," and thus the "unsworn statement[] of loss do[es] not satisfy the contractual or statutory requirement to serve defendant[] with sworn proofs of loss" (*Bailey*, 273 AD2d at 693).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

712

TP 12-00139

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

IN THE MATTER OF SURF CITY ENTERPRISES OF SYRACUSE, INC., PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE LIQUOR AUTHORITY, RESPONDENT.

SCICCHITANO & PINSKY, PLLC, SYRACUSE (BRADLEY M. PINSKY OF COUNSEL), FOR PETITIONER.

MARK D. FRERING, NEW YORK STATE LIQUOR AUTHORITY, ALBANY, FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Brian F. DeJoseph, J.], entered January 11, 2012) to review a determination of respondent. The determination imposed a civil penalty against petitioner.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination that it violated Alcoholic Beverage Control Law § 65 (1) (selling alcohol to minors), 9 NYCRR 48.2 (conduct of licensed premises) and 9 NYCRR 48.3 (conformance with local and other regulations). Contrary to the contention of petitioner, we conclude that the determination that it violated Alcoholic Beverage Control Law § 65 (1) and 9 NYCRR 48.2 is supported by substantial evidence (*see generally Matter of Shorts Bar of Rochester Inc. v New York State Liq. Auth.*, 17 AD3d 1101, 1102). Several law enforcement officers who participated in the raid of petitioner's establishment testified at the hearing that they observed numerous underage patrons consuming alcohol, and the record includes several supporting depositions of underage patrons who admitted consuming alcohol on the premises (*see Matter of JMH, Inc. v New York State Liq. Auth.*, 61 AD3d 1260, 1262). We do not address petitioner's contention that the admissions were obtained in violation of the patrons' constitutional rights inasmuch as petitioner lacks standing to raise that contention (*cf. People v Wesley*, 73 NY2d 351, 355; *see generally Warth v Seldin*, 422 US 490, 498-500; *Tileston v Ullman*, 318 US 44, 46).

We further conclude that the determination that petitioner violated 9 NYCRR 48.3 by employing unlicensed security guards in violation of state regulations is supported by substantial evidence (*see generally Shorts Bar of Rochester*, 17 AD3d at 1102). Petitioner's contention with respect to that charge concerns the resolution of conflicting testimony, and it is well established that the findings of an Administrative Law Judge that turn on the credibility of witnesses are entitled to great weight (*see Matter of Grossberg v Christian*, 245 AD2d 118; *see also Matter of Café La China Corp. v New York State Liq. Auth.*, 43 AD3d 280, 281). We see no basis to disturb those findings.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

713

CAF 11-00619

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ.

IN THE MATTER OF AUBREY A.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

REBECCA B., RESPONDENT-APPELLANT.

EVELYNE O'SULLIVAN, 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 AUBREY A.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered February 24, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to her daughter.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to her daughter. Contrary to the mother's contention, Family Court did not err in basing its determination in part upon a psychological report prepared in 2007 in connection with a parental evaluation of the mother at that time. The report concerned the mental fitness of the mother and was therefore relevant to the court's determination of the best interests of the child (*see generally Matter of Louise D.*, 227 AD2d 177, 178; *Matter of Robin QQ.*, 226 AD2d 805, 806).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

716

CA 12-00021

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ.

RUTH S. HARRIS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAM STOELZEL AND SHIRLEY STOELZEL,
DEFENDANTS-RESPONDENTS.

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

LAW OFFICE OF NORMAN J. CHIRCO, AUBURN (NORMAN J. CHIRCO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered March 30, 2011. The judgment dismissed the complaint upon a jury verdict.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, a judgment declaring that she acquired an easement by prescription on three portions of defendants' property, for the benefit of her property. Following a trial, the jury returned a verdict in favor of defendants. Plaintiff failed to preserve for our review her contention that the verdict is against the weight of the evidence inasmuch as she failed to make a timely motion to set aside the verdict on that ground (*see Murdoch v Niagara Falls Bridge Commn.*, 81 AD3d 1456, 1457, *lv denied* 17 NY3d 702; *Homan v Herzig* [appeal No. 2], 55 AD3d 1413, 1413-1414). In any event, it cannot be said that "the evidence so preponderated in favor of the plaintiff that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Martinez v Wascom*, 57 AD3d 1415, 1416 [internal quotation marks omitted]; *see Manouselis v Woodworth Realty, LLC*, 83 AD3d 801; *see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

717

CA 11-01437

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ.

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

V MEMORANDUM AND ORDER

JOHN HALL, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), dated June 7, 2011 in a proceeding pursuant to Mental Hygiene Law article 10. The order determined that respondent is a dangerous sex offender requiring confinement and committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order determining that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10 and committing him to a secure treatment facility. We reject respondent's contention that petitioner failed to establish by clear and convincing evidence at the dispositional hearing that "respondent is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.07 [f]). Indeed, the experts for both petitioner and respondent recommended inpatient treatment. Thus, Supreme Court's determination that respondent should be committed to a secure treatment facility is supported by the requisite clear and convincing evidence (*see generally id.*).

Contrary to the further contention of respondent, the court did not err in permitting petitioner's expert to testify concerning statements in the various records he reviewed in forming his opinion. "The professional reliability exception to the hearsay rule 'enables an expert witness to provide opinion evidence based on otherwise inadmissible hearsay, provided it is demonstrated to be the type of material commonly relied on in the profession' " (*Matter of State of New York v Motzer*, 79 AD3d 1687, 1688, quoting *Hinlicky v Dreyfuss*, 6 NY3d 636, 648). We reject respondent's contention that the court

abused its discretion in permitting petitioner to call respondent's expert as a rebuttal witness (*see generally Matter of Roth v S & H Grossinger*, 284 AD2d 746, 748-749), and the record belies the further contention of respondent that the court limited his cross-examination of petitioner's expert concerning recidivism statistics related to the Static 99 assessment.

Finally, there is no merit to the contention of respondent that the court's delay in rendering a decision denied him due process. The dispositional hearing concluded on April 26, 2011, and the court's decision was issued 42 days later, on June 7, 2011, well within the 60-day limitation (*see* Mental Hygiene Law § 10.07 [b]; CPLR 4213 [c]).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

718

CA 11-02554

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ.

CAROL D. CONTI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF CONSTANTIA, DEFENDANT-APPELLANT.

SHANTZ & BELKIN, LATHAM (TODD C. ROBERTS OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered March 9, 2011 in a personal injury action. The order denied in part defendant's motion for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she fell on a road owned and maintained by defendant. Defendant thereafter moved for summary judgment dismissing the complaint on the grounds that it had no prior written notice of the alleged defect as required by Town Law § 65-a, and that it was not negligent with respect to plaintiff's contention that there was inadequate lighting. Supreme Court granted the motion insofar as the complaint alleged that there was inadequate lighting but otherwise denied the motion on the ground that defendant failed to meet its initial burden of establishing that it lacked constructive notice of the alleged defect, as required by Town Law § 65-a. We affirm.

"Pursuant to Town Law § 65-a (1), a town may be liable for a dangerous highway condition if it had either prior written notice or constructive notice of the dangerous condition" (*Horan v Town of Tonawanda*, 83 AD3d 1565, 1565; *see Moss v Town of Kingsbury*, 248 AD2d 797, 797-798; *Adam v Town of Oneonta*, 217 AD2d 894, 895). In support of its motion, defendant established as a matter of law that it had no prior written notice of the alleged dangerous condition of the road, but it failed even to address whether it lacked constructive notice thereof. Thus, defendant failed to establish its entitlement to judgment as a matter of law pursuant to Town Law § 65-a (1) because it failed to meet its initial burden with respect to the constructive notice prong of the statute (*see id.*; *Horan*, 83 AD3d at 1566-1567; *see also Moss*, 248 AD2d at 797-798; *Adam*, 217 AD2d at 895). "Failure to make such 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, citing *Winegrad v New York Univ.*

Med. Ctr., 64 NY2d 851, 853). Further, defendant's " 'reply papers [cannot] serve to supplement [its] initial moving papers inasmuch as it is well established that [t]he function of [reply papers] is to address arguments made in opposition to the position taken by the movant[] and not to permit [it] to introduce new arguments in support of the motion' " (*Gross v Hertz Local Edition Corp.*, 72 AD3d 1518, 1519). Finally, defendant's contention that it is entitled to summary judgment dismissing the complaint in its entirety on the ground that the road was not maintained in a dangerous or defective condition 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).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

720

CA 11-02592

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ.

ELEANOR M. SMITH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CRYSTAL M. CORNELL AND CHRISTINA CORNELL,
DEFENDANTS-APPELLANTS.

THOMAS P. DURKIN, ROCHESTER (STEPHANIE A. MACK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JONES & SKIVINGTON, GENESEO (PETER K. SKIVINGTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (Ann Marie Taddeo, J.), entered September 9, 2011 in a personal injury action. The order denied the motion of defendants to dismiss the complaint for failure to comply with the court's scheduling order and denied the motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint, as amplified by the bill of particulars, with respect to the 90/180-day category of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when her vehicle was rear-ended by a vehicle driven by defendant Crystal M. Cornell and owned by defendant Christina Cornell. Although plaintiff failed to comply with the scheduling order with respect to completing discovery and filing a note of issue, the record establishes that plaintiff's surgery for injuries she allegedly sustained as a result of the accident was delayed on several occasions for reasons outside of her control. Thus, in the absence of a "clear abuse of discretion," we conclude that Supreme Court properly denied that part of defendants' motion seeking to dismiss the complaint based on the failure of plaintiff to comply with the scheduling order (*Roswell Park Cancer Inst. Corp. v Sodexo Am., LLC*, 68 AD3d 1720, 1721; *see Eaton v Hungerford*, 79 AD3d 1627, 1628; *cf. Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81; *Arts4All, Ltd. v Hancock*, 54 AD3d 286, *affd* 12 NY3d 846, *rearg denied* 13 NY3d 762, *cert denied* ___ US ___, 130 S Ct 1301).

With respect to that part of defendants' motion seeking summary

judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury pursuant to Insurance Law § 5102 (d), we agree with defendants that they established their entitlement to judgment as a matter of law with respect to the 90/180-day category and that plaintiff failed to raise an issue of fact (*see generally Harrity v Leone*, 93 AD3d 1204, 1205-1206). We therefore modify the order accordingly. With respect to the significant limitation of use category of serious injury, however, we conclude that, although defendants met their initial burden, plaintiff raised an issue of fact sufficient to defeat the motion concerning that category by presenting the sworn reports of two physicians who performed independent medical examinations of plaintiff on behalf of her insurance carrier. One of the physicians determined that plaintiff had significant limited range of motion of the cervical spine and shoulders and that 50% of the limitation was attributable to the accident and the other 50% was attributable to rheumatoid arthritis, which had been dormant prior to the accident but became symptomatic as a result of the accident. Upon a further examination approximately two years later, that physician determined that 25% of plaintiff's limitations, which had increased, were attributable to the accident and that 75% were attributable to the ongoing progression of the disease. The second physician agreed with plaintiff's treating orthopedic surgeon that surgery was necessary to correct bilateral ulnar impaction syndrome, 100% of which was attributable to the accident. We therefore conclude that plaintiff presented objective medical evidence of her injuries and resulting limitations sufficient to defeat the motion with respect to the significant limitation of use category of serious injury (*see id.* at 1206).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

721

CA 11-02520

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ.

IN THE MATTER OF THEODORE S. LIAROS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TED'S JUMBO RED HOTS, INC., SPIRO T. LIAROS,
PETER T. LIAROS AND THECLY LIAROS ORTOLANI,
RESPONDENTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (ALAN J. BOZER OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (JEFFREY C. STRAVINO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (John A. Michalek, J.), dated March 17, 2011 in a proceeding pursuant to CPLR article 78. The judgment, among other things, granted the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the first decretal paragraph and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for a hearing in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding to compel respondents to produce certain records for inspection pursuant to Business Corporation Law § 624, CPLR 3102 (c), and the common law. Petitioner is a former employee of respondent corporation, Ted's Jumbo Red Hots, Inc., and is the majority equity shareholder of the corporation. In seeking access to the records, petitioner alleged that his purposes were to protect his interests as a shareholder, to ascertain whether the corporation was being mismanaged, and to evaluate his shareholdings. Supreme Court, inter alia, granted the petition. We agree with respondents that the court abused its discretion in granting the petition without first holding a hearing to determine whether petitioner was acting in good faith and sought inspection for a proper purpose and, if so, without holding a hearing to determine the proper scope of inspection. We therefore modify the judgment accordingly, and we remit the matter to Supreme Court to conduct such a hearing.

Initially, we note that this appeal is not moot. The parties entered into a stipulated order after entry of the judgment on appeal. Although the stipulated order states that the parties conferred about

the judgment on appeal, the stipulated order does not explicitly or implicitly supersede or modify the judgment and specifically states that the parties otherwise reserved all rights (*cf. Matter of Burkhart v Webber*, 273 AD2d 125, *lv denied* 96 NY2d 702).

" 'It is well settled that a shareholder has both statutory and common-law rights to inspect the books and records of a corporation if inspection is sought in good faith and for a valid purpose' " (*Matter of Dwyer v Di Nardo & Metschl, P.C.*, 41 AD3d 1177, 1178; *see* Business Corporation Law § 624; *Matter of Crane Co. v Anaconda Co.*, 39 NY2d 14, 18-20). Petitioner sufficiently pleaded and proved under both section 624 and the common law that he had a proper purpose (*see Crane Co.*, 39 NY2d at 18-20; *Matter of Troccoli v L & B Contr. Indus.*, 259 AD2d 754, 754-755; *Matter of Tatko v Tatko Bros. Slate Co.*, 173 AD2d 917, 917-918). Thus, it was respondents' burden to show bad faith or an improper purpose such that a hearing is required to resolve the issue (*see Matter of Dyer v Indium Corp. of Am.*, 2 AD3d 1195, 1196; *Matter of Marcato*, 102 AD2d 826, 826), and we conclude that they met their burden.

"Improper purposes are those which are inimical to the corporation, for example, to discover business secrets to aid a competitor of the corporation, [or] to secure prospects for personal business" (*Tatko*, 173 AD2d at 917-918). Respondents raised an issue of fact whether petitioner was acting for the improper purpose of obtaining personal business or a competitive advantage by stating their belief that petitioner intended to open competing restaurants, the basis for their belief, and the ways in which the documents requested were overbroad for petitioner's stated purposes and would grant petitioner a competitive advantage. Thus, a hearing is required to determine whether petitioner is acting in good faith and with a proper purpose.

If the court determines that petitioner is acting with a proper purpose, then the court must further determine the proper scope of the documents to which petitioner is entitled. Petitioner has admitted on appeal that he does, in fact, operate a business similar to respondents' business. Although his status as a competitor does not in itself render him ineligible to receive access to the information he requested (*see generally People ex rel. Ludwig v Ludwig & Co.*, 126 App Div 696, 702), his right of inspection should be limited to those documents, records, and information relevant and necessary to his proper purposes, and a hearing is necessary to define the scope of inspection (*see Dwyer*, 41 AD3d at 1179; *Dyer*, 2 AD3d at 1197; *Tatko*, 173 AD2d at 919). "Additionally, if inspection is granted, certain information might need to be expunged because of the parties' competitive relationship" (*Marcato*, 102 AD2d at 826), and "the inspection . . . may not unduly disturb the corporation in the conduct of its affairs" (*Matter of Bondi v Business Educ. Forum*, 52 AD2d 1046, 1047).

Finally, we reject petitioner's alternative ground for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546). Contrary to petitioner's contention, the court did not

grant the petition based upon CPLR 3102 (c), governing pre-action disclosure. In any event, petitioner was not entitled to pre-action disclosure (*see Matter of Zeigler v City of New York*, 65 AD3d 1159, 1159-1160; *Matter of Henry [CSX Transp., Inc.]*, 43 AD3d 1445, 1446; *Matter of Uddin v New York City Tr. Auth.*, 27 AD3d 265, 266).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

722

KA 11-00153

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JULIUS GRAVES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL C. WALSH 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 (Sheila A. DiTullio, J.), rendered December 13, 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 trespass.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed for trespass under count three of the indictment and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for resentencing on that count of the indictment.

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 trespass (§ 140.05). "Despite defendant's contention to the contrary, the record 'establish[es] that [he] understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Lyons*, 86 AD3d 930, 930, *lv denied* 17 NY3d 954, quoting *People v Lopez*, 6 NY3d 248, 256; *see People v Gleen*, 73 AD3d 1443, 1443-1444, *lv denied* 15 NY3d 773). We conclude that defendant's waiver of the right to appeal was knowingly, intelligently and voluntarily entered (*see Lopez*, 6 NY3d at 256; *Gleen*, 73 AD3d at 1444). Contrary to defendant's further contention, the valid waiver of the right to appeal encompasses his challenge to the severity of the sentence inasmuch as County Court informed defendant of the sentencing promise before he waived the right to appeal (*see Lopez*, 6 NY3d at 255-256; *People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

As the People correctly concede, however, the sentence of a

definite term of incarceration of one year for the violation of trespass is illegal (*see* Penal Law § 70.15 [4]), and defendant's challenge to the legality of the sentence is not foreclosed by the valid waiver of the right to appeal (*see People v Seaberg*, 74 NY2d 1, 9). We therefore modify the judgment by vacating the sentence imposed on count three of the indictment, and we remit the matter to County Court for resentencing on that count.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

723

KA 11-01263

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY RIVERA, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered May 18, 2011. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree (two counts) and burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of burglary in the second degree (Penal Law § 140.25 [2]) and one count of burglary in the third degree (§ 140.20). We agree with defendant that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence because he waived his right to appeal before Supreme Court informed him of the potential periods of imprisonment that could be imposed (*see People v Mingo*, 38 AD3d 1270, 1271; *see generally People v Lococo*, 92 NY2d 825, 827). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

726

KA 11-01340

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL ROTTERMAN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Erie County Court (Kenneth F. Case, J.), entered June 3, 2011. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court complied with the statutory mandate to set forth "the findings of fact and conclusions of law on which the determination [is] based" (§ 168-n [3]; *see People v Carter*, 35 AD3d 1023, 1023-1024, *lv denied* 8 NY3d 810). We reject defendant's further contention that the People failed to present clear and convincing evidence to support the assessment of 30 points against him for being armed with a dangerous instrument during the commission of one of the underlying crimes. That assessment is supported by the reliable hearsay contained in the case summary and the presentence report (*see People v Thompson*, 66 AD3d 1455, 1456, *lv denied* 13 NY3d 714; *see generally People v Mingo*, 12 NY3d 563, 573). Defendant failed to preserve for our review his contention that a downward departure from his presumptive risk level was warranted (*see People v Quinones*, 91 AD3d 1302, 1303). Finally, we reject defendant's contention that he was denied effective assistance of counsel at the SORA hearing (*see People v Bowles*, 89 AD3d 171, 181, *lv denied* 18 NY3d 807).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

727

KA 11-00376

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAY PECK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered January 26, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, grand larceny in the third degree and conspiracy in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the surcharge to 5% of the amount of restitution ordered and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of burglary in the second degree (Penal Law § 140.25 [2]), grand larceny in the third degree (former § 155.35) and conspiracy in the fourth degree (§ 105.10 [1]). The charges stem from defendant's participation in a conspiracy to break into the apartment of the victim, who was being detained with defendant at the Onondaga County Jail. Through a series of recorded telephone conversations between defendant, who was incarcerated, and his sister, defendant directed his sister and her boyfriend to the victim's apartment. Once they arrived, defendant told them how to break into the victim's apartment and where to locate $9,000 in cash. Contrary to defendant's contention, County Court properly denied that part of his omnibus motion seeking to dismiss the indictment on the ground that the integrity of the grand jury proceeding was impaired when the tape-recorded conversations were improperly admitted in evidence (*see* CPL 210.35 [5]). Although the People do not dispute the court's determination that they failed to establish an adequate foundation for the admission of those recordings (*see generally People v Ely*, 68 NY2d 520, 527-528), they contend that the error did not require dismissal of the indictment. We agree. " '[T]he submission of some inadmissible evidence [to the grand jury] will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment' . . . and, here, the remaining evidence was legally sufficient to

support the indictment" (*People v Tuszynski*, 71 AD3d 1407, 1408, *lv denied* 15 NY3d 810, quoting *People v Huston*, 88 NY2d 400, 409; *see People v Jeffery*, 70 AD3d 1512, 1512-1513; *cf. People v Barabash*, 18 AD3d 474, 474-475).

Defendant further contends that the court erred in allowing a court officer to permit a deliberating juror to separate from the other jurors to make a telephone call without first investigating the necessity of such a telephone call or ensuring that the call was supervised. It is undisputed that defendant raised no objection to the procedures utilized by the court in handling the matter. We reject defendant's contention that his challenge may be reviewed even in the absence of an objection. Violations of the sequestration provision of CPL 310.10 are not errors that fall within the "very narrow category of so-called 'mode of proceedings' errors" that are reviewable even in the absence of a timely objection (*People v Agramonte*, 87 NY2d 765, 770). That is because "the sequestration requirement does not 'entail[] a part of the process . . . essential to the form and conduct of the actual trial' " (*id.*, quoting *People v Webb*, 78 NY2d 335, 339; *see e.g. People v Williams*, 221 AD2d 246, 247, *lv denied* 87 NY2d 926; *People v Thurman*, 186 AD2d 484, 484-485, *lv denied* 81 NY2d 795). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention, he was not punished for asserting his right to trial. " 'The mere fact that [the] sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial' " (*People v Powell*, 81 AD3d 1307, 1308, *lv denied* 17 NY3d 799; *see People v Glynn*, 93 AD3d 1341, 1342-1343; *see generally People v Pena*, 50 NY2d 400, 411-412, *rearg denied* 51 NY2d 770, *cert denied* 449 US 1087). "In addition, '[t]he fact that defendant's sentence was greater than that of his codefendant[s, who accepted plea agreements,] does not substantiate his [contention] that he was improperly punished for going to trial' " (*People v Smith*, 90 AD3d 1565, 1567, quoting *People v Elwood*, 80 AD3d 988, 990, *lv denied* 16 NY3d 858; *see People v Eddins*, 168 AD2d 630, 631, *lv denied* 78 NY2d 954).

Although we conclude that the sentence is not unduly harsh or severe, we note that the People correctly concede that the court erred in imposing a 10% surcharge on the amount of restitution ordered and instead should have imposed a surcharge of 5% (*see* Penal Law § 60.27 [8]; *People v Lagasse*, 68 AD3d 1718, *lv denied* 14 NY3d 889; *People v Gahrey M.O.*, 231 AD2d 909, 909-910). We therefore modify the judgment accordingly.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

728

KA 11-01163

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HARRY WILSON, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARY P. DAVISON 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 September 30, 2010. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree and petit larceny (four counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the third degree (Penal Law § 140.20) and four counts of petit larceny (§ 155.25). Contrary to defendant's contention, he was not denied a fair trial based on cumulative errors made by County Court. The court properly denied his request to charge trespass as a lesser included offense of burglary in the third degree inasmuch as "there was no reasonable view of the evidence, viewed most favorably to defendant, that he entered [the mall in question] without criminal intent and only subsequently formed an intent to steal" (*People v Zokari*, 68 AD3d 578, *lv denied* 15 NY3d 758; *see People v Smalls*, 92 AD3d 420, 421; *People v Mercado*, 294 AD2d 805, 805, *lv denied* 98 NY2d 731).

Contrary to defendant's further contention, the court properly admitted evidence concerning the barring notice issued to defendant prohibiting him from entering onto the mall property because it was relevant to establish that defendant knowingly entered the mall unlawfully (*see* Penal Law § 140.20; *see generally People v Alvino*, 71 NY2d 233, 241-242). In addition, the court properly admitted evidence with respect to the circumstances surrounding the issuance of that barring order as necessary background and narrative information (*see generally People v Resek*, 3 NY3d 385, 390). The probative value of that evidence exceeded its potential for prejudice (*see People v Comfort*, 60 AD3d 1298, 1301, *lv denied* 12 NY3d 924). Defendant failed

to request a limiting instruction concerning evidence of the barring order and thus did not preserve for our review his contention that the court should have issued such an instruction after that evidence was admitted (*see People v Moore* [appeal No. 2], 78 AD3d 1658, 1659). In any event, the court issued such an instruction at the People's request following the close of evidence and during the jury charge. We have considered the remaining instances of alleged cumulative error and conclude that they are without merit. The sentence is not unduly harsh or severe.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

731

CAF 11-01515

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ.

IN THE MATTER OF MAURICE REEVES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
RESPONDENT-RESPONDENT.

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

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

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR JORDAN B. AND JAYDEN G.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 8, 2011. The order dismissed the petitions with prejudice.

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

Memorandum: Petitioner appeals from an order dismissing his petitions seeking visitation with his stepsons on the ground that the evidence presented at the hearing was insufficient to determine whether visitation would be in the children's best interests. We affirm, but for a different reason. Contrary to the determination of Family Court, we conclude that petitioner lacks standing to seek visitation with the subject children (*see Bank v White*, 40 AD3d 790, 791, *lv dismissed* 9 NY3d 1002; *Matter of Boland v Boland*, 186 AD2d 1065, 1065).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

732

CAF 12-00118

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ.

IN THE MATTER OF LAUREN F.S.,
RESPONDENT-APPELLANT.
---------- ORDER
YATES COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MARYBETH D. BARNET, ATTORNEY FOR THE CHILD, CANANDAIGUA, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Yates County (W. Patrick Falvey, J.), entered May 31, 2011 in a proceeding pursuant to Family Court Act article 3. The order adjudged that respondent is a juvenile delinquent and placed respondent in the custody of the Yates County Department of Social Services for a period of one year.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Alex N.*, 255 AD2d 626, 627).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

733

CAF 11-00442

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ.

IN THE MATTER OF NOAH V.P.

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

GINO P., SR., RESPONDENT-APPELLANT.

JOHN J. RASPANTE, UTICA, FOR RESPONDENT-APPELLANT.

JOHN A. HERBOWY, COUNTY ATTORNEY, UTICA (DENISE J. MORGAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

PETER J. DIGIORGIO, JR., ATTORNEY FOR THE CHILD, UTICA, FOR NOAH V.P.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered January 5, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred custody and guardianship of the subject child to petitioner.

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

Memorandum: On appeal from an order of disposition that, inter alia, terminated his parental rights, respondent father contends that petitioner failed to establish by clear and convincing evidence that it made diligent efforts to unite the father and his child who is the subject of this proceeding before seeking to terminate his parental rights (*see* Social Services Law § 384-b [7] [a]). We reject that contention because we conclude that petitioner made the requisite "diligent efforts," i.e., "reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child" (§ 384-b [7] [f]).

Here, the father has three other children with the mother of the subject child, and he took custody of the other children in March or April 2008. In July 2008, the subject child was removed from the mother's home and placed in foster care. The child was adjudicated a neglected child with respect to the mother in September 2008, and the mother's parental rights were terminated in May 2010. When the child was placed in foster care, petitioner asked the father to take custody of him but he declined and, indeed, he did not believe that he was the father of the child. The caseworker for petitioner encouraged the father to file a paternity petition, but the father waited until

February 2009 to do so and was not adjudicated the father until July 2009. The caseworker met with the father twice a month from the time the child entered foster care and kept him updated on the child. The caseworker invited the father to all the service plan reviews regarding the child, but he attended only one of them. Even after the paternity adjudication, the father expressed no desire to have custody of the child and instead was in favor of an adoption plan for the child.

"[W]hen it is clear that the birth parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought for the child" (Social Services Law § 384-b [1] [a] [iv]). In addition, "[a]n agency which has tried diligently to reunite a [parent] with [his or] her child but which is confronted by an uncooperative or indifferent parent is deemed to have fulfilled its duty" (*Matter of Star Leslie W.*, 63 NY2d 136, 144). We conclude that petitioner established the requisite diligent efforts by demonstrating that it made reasonable attempts to develop and encourage a relationship between the father and the child.

We reject the father's further contention that petitioner failed to establish by clear and convincing evidence that he permanently neglected the child. Permanent neglect "may be found only after it is established that the parent has failed substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so" (*id.* at 142, citing Social Services Law § 384-b [7] [a]). The term " 'to plan for the future of the child' " means "to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent" (§ 384-b [7] [c]; *see Matter of Orlando F.*, 40 NY2d 103, 110). Here, the father sought custody of the child only when petitioner filed its petition seeking to terminate his parental rights, after he refused to sign a judicial surrender to allow the adoption to proceed. Contrary to the father's contention, the evidence at the fact-finding hearing establishes that he was financially able to take custody of the child since the time he was placed in foster care. The father obtained public assistance for the child's siblings, and could have done the same for the subject child. Moreover, the father had an additional child with his girlfriend in May 2009 and was able to care for him financially. We conclude that petitioner thus established that the father failed to plan to have the child reside with him, although the father was physically and financially able to do so, and therefore permanently neglected him.

Finally, we reject the father's contention that the court abused its discretion in refusing to issue a suspended judgment. The court at the dispositional hearing is concerned only with the best interests of the child (*see* Family Ct Act § 631; *Star Leslie W.*, 63 NY2d at 147). At the time of the dispositional hearing, the child had been living in a kinship foster home in Florida for six months, had bonded with the foster mother, and was doing very well. As the court noted,

the foster mother's actions in coming to New York once or twice a month for the first half of the year so that the child could bond with her showed her commitment to the child, whom she planned to adopt. In contrast, the father has had minimal contact with the child since his birth and has little to no bonding with the child (*see Matter of Emmeran M.*, 66 AD3d 1490). We thus conclude that the court properly terminated the father's parental rights and freed the child for adoption.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

734

CA 11-02540

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ.

BARBARA GERMAIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KOHL'S CORPORATION, KOHL'S DEPARTMENT STORES, INC., AND KOHL'S NEW YORK D.C., INC., ALL DOING BUSINESS AS KOHL'S DEPARTMENT STORES, DEFENDANTS-RESPONDENTS.

THE ROTHSCHILD LAW FIRM, P.C., EAST SYRACUSE (MARTIN J. ROTHSCHILD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA, LLP, SYRACUSE (CORY A. DECRESENZA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered May 17, 2011 in a personal injury action. The order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she allegedly tripped and fell on carpeting at defendants' store. We conclude that Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The allegedly defective condition was created by two rugs inside an entrance to defendants' store. The first rug was permanent, inset into the floor and flush with the tile surrounding it. The second rug was seasonal, approximately one-quarter-inch thick, and it was placed on top of the tile floor and adjacent to the permanent rug during inclement weather. The permanent and seasonal rugs were duct taped together at the edge where they met.

Plaintiff testified at her deposition that she tripped and fell on a portion of the duct tape covering the "raised" area or "hump" created by the adjoining rugs. Although plaintiff did not testify with respect to the extent of the height differential between the rugs, plaintiff's friend, who was with plaintiff at the time of the accident and who felt the raised area under the duct tape immediately thereafter, estimated at her deposition that the height differential was one-half of an inch. Defendants' expert engineer measured that

the height differential between the rugs was between five-sixteenths and three-eighths of an inch. Although plaintiff testified that it felt as though her foot got caught in the duct tape, which, according to plaintiff, was "raised a little" and "wrinkled," plaintiff did not observe the tape before she fell, and she could not recall whether the tape was "pulled up" from the rugs thereafter. Plaintiff's friend testified that, after the accident, the tape was "still secured to the carpet," was not "raised up or bubbled up" and was not "lifted up or pulled up in any way." The accident occurred on a sunny day, and plaintiff testified that there were no other customers in the vicinity and that nothing blocked her view of the area in which she was walking.

"After examining the photograph[] depicting the width, depth and irregularity of the defect in the [carpeting], and in view of the time, place and circumstances of plaintiff's injury, we conclude that defendants established as a matter of law that the defect is too trivial to be actionable" (*Sharpe v Ulrich Dev. Co., LLC*, 52 AD3d 1319, 1320; *see e.g. Taussig v Luxury Cars of Smithtown, Inc.*, 31 AD3d 533, 534; *Trionfero v Vanderhorn*, 6 AD3d 903, 903-904; *cf. Seivert v Kingpin Enters., Inc.*, 55 AD3d 1406, 1407). We further conclude that plaintiff "failed to raise a triable issue of fact whether the alleged defect has the characteristics of a trap, snare or nuisance" (*Gigliotti v St. Stanislaus Kostka R.C. Church*, 261 AD2d 951, 952; *see Trionfero*, 6 AD3d at 904; *Maloid v New York State Elec. & Gas Corp.*, 257 AD2d 712, 713; *cf. McKenzie v Crossroads Arena*, 291 AD2d 860, 861, *lv dismissed* 98 NY2d 647).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

739

CA 11-00260

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ.

IN THE MATTER OF BRYON K. RUSS, SR.,
PETITIONER-APPELLANT,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES, AND
HAROLD GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENTS-RESPONDENTS.

BRYON K. RUSS, SR., PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered December 17, 2010 in a proceeding pursuant to CPLR article 78. The judgment denied and dismissed the petition.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

743

CA 11-00383

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ.

IN THE MATTER OF DONTIE S. MITCHELL,
PETITIONER-APPELLANT,

V ORDER

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

DONTIE S. MITCHELL, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Christopher J. Burns, J.), entered October 6, 2010 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

744

CA 11-02506

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ.

IN THE MATTER OF NASTRI REAL ESTATE, LLC,
DOING BUSINESS AS KELLER WILLIAMS REALTY
SYRACUSE, PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

DOLORES BEBLO, RESPONDENT-APPELLANT-RESPONDENT.
(APPEAL NO. 1.)

DOLORES BEBLO, RESPONDENT-APPELLANT-RESPONDENT PRO SE.

HISCOCK & BARCLAY, LLP, SYRACUSE (ROBERT J. LYDFORD OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered October 13, 2011. The order and judgment granted respondent's motion to reargue, and upon reargument, adhered to the prior order granting the petition in part.

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

Memorandum: Petitioner, which provided real estate brokerage services to respondent, commenced this proceeding pursuant to Real Property Law § 294-b seeking, inter alia, an order for the payment of monies deposited with the Onondaga County Clerk and thereafter transferred to the Onondaga County Chief Fiscal Officer (*see* § 294-b [5]). In appeal No. 1, respondent contends that Supreme Court, upon reargument, erred in adhering to its decision granting the petition in part by awarding petitioner the remainder of its 6% commission. We reject that contention. Petitioner established its entitlement to the sum awarded as "the unpaid portion of the compensation agreed to in" the parties' Exclusive Right to Sell Contract (§ 294-b [5] [a]; *see* § 294-b [5] [d]). The court properly concluded that petitioner's affidavit of entitlement to commission for completed brokerage services was in substantial compliance with the filing requirements of the statute (*see* § 294-b [2]), that petitioner timely served respondent with such affidavit (*see* § 294-b [4] [a]), and that any technical defect in the affidavit did not cause a forfeiture of petitioner's rights to the funds at issue. With respect to the order in appeal No. 2, we reject petitioner's contention that the court erred in denying that part of the petition seeking an award of attorneys' fees and costs, inasmuch as the statute does not authorize

such an award in this proceeding.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

745

CA 11-02511

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ.

IN THE MATTER OF NASTRI REAL ESTATE, LLC,
DOING BUSINESS AS KELLER WILLIAMS REALTY
SYRACUSE, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DOLORES BEBLO, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

DOLORES BEBLO, RESPONDENT-RESPONDENT PRO SE.

HISCOCK & BARCLAY, LLP, SYRACUSE (ROBERT J. LYDFORD OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered September 15, 2011. The order, among other things, denied petitioner's request for attorneys' fees and costs.

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

Same Memorandum as in *Nastri Real Estate, LLC v Beblo* ([appeal No. 1] ___ AD3d ___ [June 8, 2012]).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

746

CA 12-00103

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ.

RICHARD T. ANDREWS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF CAYUGA, DEFENDANT-APPELLANT.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (BRYAN GEORGIADY OF COUNSEL), FOR DEFENDANT-APPELLANT.

KUEHNER LAW FIRM, PLLC, SYRACUSE (KEVIN P. KUEHNER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered April 13, 2011. The order, among other things, denied defendant's motion for dismissal and summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while he was a detainee at the Cayuga County Jail. He alleged that, while he was detained in the jail, defendant withheld his prescribed medications, including psychiatric medications, and failed "to exercise reasonable care and provide medical services within the standard of care and . . . to exercise care and prudence in the care and treatment of [plaintiff] during his medical emergency." It is undisputed that plaintiff suffered a seizure while at the jail and that, following the seizure, he had injuries to both of his shoulders.

Defendant failed to respond to plaintiff's multiple requests for discovery and depositions and, instead, moved to dismiss the complaint and for summary judgment dismissing the complaint contending, inter alia, that plaintiff "failed to meet applicable pleading standards . . . and failed to adduce evidence raising a triable issue of fact." We conclude that Supreme Court properly denied defendant's motion.

"It is well settled that the State owes a duty to its incarcerated citizens to provide them with adequate medical care (*Kagan v State of New York*, 221 AD2d 7). Moreover, when the medical care provided by the State includes the provision of psychiatric services, the State will be held to the same duty of care as a private institution engaged in such activity (*Rattray v State of New York*, 223 AD2d 356; *Amadon v State of New York*, 182 AD2d 955, 957[, *lv denied* 81

NY2d 701])" (*Arias v State of New York*, 195 Misc 2d 64, 70). That "duty has been defined in terms of both negligence . . . and medical malpractice" (*Kagan*, 221 AD2d at 16). The evidence submitted by defendant establishes that plaintiff was not given certain medications while he was detained at the jail. One of those medications was a controlled substance, and defendant contends that there was a policy prohibiting it from dispensing that medication in the jail. In an affidavit submitted by defendant in support of its motion, one of the mental health nurses averred that, during her nine years at the jail, she had observed psychiatrists order controlled substances, albeit "on rare occasions." Thus, there is a question whether there was an absolute prohibition on the dispensation of that medication or whether there was a medical determination not to dispense the medication. Defendant also submitted evidence that, when plaintiff informed jail personnel of the potential for withdrawal symptoms in the event that he did not receive his legally prescribed medications, he was told "[W]ell, too bad." The facts presented by defendant establish that plaintiff "communicated legitimate medical complaints to prison personnel [that] were either ignored or discounted by the very individuals whose duty it was to listen and arrange for appropriate diagnosis and treatment. The evidence further establishes that [plaintiff's shoulders] were damaged as a direct result of these omissions" (*Kagan*, 221 AD2d at 17). We thus conclude that defendant failed to meet its burden of establishing its entitlement to judgment as a matter of law on those claims (*see Kagan*, 221 AD2d at 16-17; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Even assuming, arguendo, that defendant is correct and plaintiff's claim is actually a "claim for denial-of-care owing to institutional factors, not professional error," we conclude that defendant, as the movant, failed to establish its entitlement to judgment as a matter of law (*cf. Tatta v State of New York*, 19 AD3d 817, 819, *lv denied* 5 NY3d 712).

Defendant further contends that it is entitled to summary judgment because plaintiff's theory for the injuries he sustained during the seizure is "completely speculative." We reject that contention. "It is well established . . . that [a] moving party must affirmatively [demonstrate] the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof" (*Atkins v United Ref. Holdings, Inc.*, 71 AD3d 1459, 1459-1460 [internal quotation marks omitted]; *see Brown v Smith*, 85 AD3d 1648, 1649; *Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980).

Finally, we conclude that defendant has failed to establish as a matter of law that it should be relieved of any liability based on the emergency doctrine. Pursuant to that doctrine " 'when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that [he or she] must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context' " (*Caristo v Sanzone*, 96 NY2d 172, 174, quoting *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327, *rearg*

denied 77 NY2d 990). "[I]t generally remains a question for the trier of fact to determine whether an emergency existed and, if so, whether the defendant's response thereto was reasonable" (*Schlanger v Doe*, 53 AD3d 827, 828; *see Patterson v Central N.Y. Reg. Transp. Auth. [CNYRTA]*, 94 AD3d 1565).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

747

CA 11-01131

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ.

IN THE MATTER OF THE ESTATE OF ALEX G. SCHMIDT,
ALSO KNOWN AS ALEXANDER GEORGE SCHMIDT,
DECEASED.

ANN L. MCLAUGHLIN, PETITIONER-RESPONDENT;

ORDER

THOMAS E. WEBB, JR., AS EXECUTOR OF THE ESTATE
OF ALEX G. SCHMIDT, ALSO KNOWN AS ALEXANDER
GEORGE SCHMIDT, DECEASED, RESPONDENT-APPELLANT,
ET AL., RESPONDENTS.
(APPEAL NO. 1.)

DAMON MOREY LLP, BUFFALO (GREGORY ZINI OF COUNSEL), FOR RESPONDENT-APPELLANT.

JOSEPH G. MAKOWSKI, BUFFALO (MICHAEL J. FLAHERTY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered March 15, 2011. The order, insofar as appealed from, granted the motion of petitioner for a protective order with respect to certain interrogatories.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

748

CA 11-01132

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ.

IN THE MATTER OF THE ESTATE OF ALEX G. SCHMIDT,
ALSO KNOWN AS ALEXANDER GEORGE SCHMIDT,
DECEASED.

ANN L. MCLAUGHLIN, PETITIONER-RESPONDENT;

ORDER

THOMAS E. WEBB, JR., AS EXECUTOR OF THE ESTATE
OF ALEX G. SCHMIDT, ALSO KNOWN AS ALEXANDER
GEORGE SCHMIDT, DECEASED, RESPONDENT-APPELLANT,
ET AL., RESPONDENTS.
(APPEAL NO. 2.)

DAMON MOREY LLP, BUFFALO (GREGORY ZINI OF COUNSEL), FOR RESPONDENT-APPELLANT.

JOSEPH G. MAKOWSKI, BUFFALO (MICHAEL J. FLAHERTY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered March 15, 2011. The order, insofar as appealed from, granted in part the motion of petitioner to dismiss various affirmative defenses.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

749

KA 11-01022

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WENFORD N. MCCRAY, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), 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 (Matthew J. Murphy, III, J.), rendered March 8, 2010. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the third degree and criminal sexual act in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of sexual abuse in the third degree (Penal Law § 130.55) and criminal sexual act in the third degree (§ 130.40 [2]), defendant contends that the verdict is against the weight of the evidence. We reject that contention. "The credibility of the victim and the weight to be accorded [his] testimony were matters for the jury" (*People v Halwig*, 288 AD2d 949, 949, *lv denied* 98 NY2d 710; *see People v Gray*, 15 AD3d 889, 890, *lv denied* 4 NY3d 831). Although defendant was acquitted of the other felony offenses charged in the indictment involving the same victim, the jury was entitled to reject certain portions of the victim's testimony while crediting other portions (*see People v Reed*, 40 NY2d 204, 208).

Contrary to defendant's further contentions, County Court properly denied his oral motion to suppress his statements to the police and the evidence seized from his apartment upon determining that defendant's initial statements to the police were the result of investigatory questioning, and that he voluntarily consented to the search of his apartment. With respect to the determination that defendant's initial statements resulted from investigatory questioning, we reject defendant's contention that the police should have ceased questioning him and placed him under arrest after their initial investigatory questioning because they had probable cause to arrest him at that time. "There is no constitutional right to be

arrested and the police are not required to stop their investigation at the first indication that they may have probable cause in order to effect an arrest" (*People v Keller*, 148 AD2d 958, 960, *lv denied* 73 NY2d 1017; *see Hoffa v United States*, 385 US 293, 310, *reh denied* 386 US 940; *People v Ahmed*, 72 AD3d 502, 505, *lv denied* 15 NY3d 801).

With respect to defendant's contention that he did not voluntarily consent to the search, it is well settled that the People have the heavy burden of establishing voluntary consent (*see People v Gonzalez*, 39 NY2d 122, 127-128; *People v Whitehurst*, 25 NY2d 389, 391). The determination whether consent was voluntarily given is based on the totality of the circumstances (*see Schneckloth v Bustamonte*, 412 US 218, 226; *Gonzalez*, 39 NY2d at 128; *People v Hyla*, 291 AD2d 928, 929, *lv denied* 98 NY2d 652). The fact that defendant was in custody does not require suppression (*see generally People v Edwards*, 46 AD3d 698, 699, *lv denied* 10 NY3d 764), and "[t]he voluntariness of a consent to search is not vitiated, per se, by the failure to give *Miranda* warnings to an accused while subject to custodial interrogation" (*People v Tremblay*, 77 AD2d 807, 807). Here, the totality of the circumstances establishes that defendant "not only consented to the search, but also cooperated with the [search by tossing his apartment keys to the searching officer] to accomplish the search. Such conduct signified the defendant's voluntary consent and willingness to cooperate with the police officers in their search" (*People v Quagliata*, 53 AD3d 670, 672, *lv denied* 11 NY3d 834; *see People v DePace*, 127 AD2d 847, 848-849, *lv denied* 69 NY2d 879).

Contrary to defendant's final contention, the sentence is not unduly harsh or severe.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

750

KA 09-00282

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENNY L. WALKER, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered July 8, 2008. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the second degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts of sexual abuse in the second degree (Penal Law § 130.60 [2]). Defendant contends that Supreme Court committed reversible error when, at the start of the second day of jury selection, it questioned and then discharged a sworn juror in the absence of defendant and defense counsel. Although defendant did not object to the procedure employed by the court, we agree with defendant that preservation of his contention is not required where, as here, the court committed a mode of proceedings error (*see generally People v Patterson*, 39 NY2d 288, 295, *affd* 432 US 197). The court's in camera questioning and discharge of the sworn juror deprived defendant of, inter alia, his "constitutional right to counsel at trial" (*People v Johnson*, 189 AD2d 318, 320; *see People v McLean*, 15 NY3d 117, 120-121; *People v Ahmed*, 66 NY2d 307, 310, *rearg denied* 67 NY2d 647; *People v Kinchen*, 60 NY2d 772, 773). Nevertheless, "[w]aiver and preservation are separate concepts" (*Ahmed*, 66 NY2d at 311; *see People v Webb*, 78 NY2d 335, 339-340; *People v Moore*, 233 AD2d 670, 671-672, *lv denied* 89 NY2d 987), and we agree with the People that, by consenting to the procedure employed by the court, defendant waived his right to appellate review of the court's allegedly improper discharge of the sworn juror (*see People v Barner*, 30 AD3d 1091, 1092, *lv denied* 7 NY3d 809; *cf. People v Noguel*, 93 AD3d 1319, 1320; *see also People v Davis*, 83 AD3d 860, 861; *People v Pennisi*, 217 AD2d 562, 563, *lv denied* 86 NY2d 800; *see generally*

People v Colon, 90 NY2d 824, 825-826).

Defendant's further contention that the court erred in permitting a police impact investigator to use the word "victim" during his testimony concerning his interview of the complainant lacks merit. He did not testify to the contents of his interview with the complainant, nor did he give an opinion relating to the complainant's credibility or defendant's guilt, and thus he did not thereby bolster the complainant's testimony (*see generally People v Buie*, 86 NY2d 501, 509-510), or otherwise usurp the jury's role as factfinder (*see generally People v Hartzog*, 15 AD3d 866, 867, *lv denied* 4 NY3d 831). In any event, the court instructed the jury both during the investigator's testimony and its charge that the jurors were the ultimate finders of fact and resolvers of credibility, and the jury is presumed to have followed the court's instructions (*see generally People v Moore*, 71 NY2d 684, 688; *People v Thagard*, 28 AD3d 1097, 1098, *lv denied* 7 NY3d 795). Even assuming, arguendo, that the court erred in admitting the investigator's testimony, however, we conclude that the error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

752

KA 10-01591

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARYL HAMM, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 16, 2010. The judgment convicted defendant, upon a nonjury verdict, of assault in the first degree and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating that part convicting defendant of assault in the second degree and dismissing count three of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, following a nonjury trial, of assault in the first degree (Penal Law § 120.10 [1]) and assault in the second degree (§ 120.05 [1]). We reject defendant's contention that certain evidentiary rulings made by Supreme Court deprived him of the right to present a defense and the right to a fair trial. The court did not abuse its discretion in determining that defendant's proposed cross-examination of the victim's father "was too speculative to establish a motive for fabrication" (*People v Poole*, 55 AD3d 1349, 1350, *lv denied* 11 NY3d 929). Nor did the court improperly curtail the cross-examination of another prosecution witness with respect to the sworn statement made by her the day after the assault. That statement was not inconsistent with her trial testimony, and thus there was no basis for impeachment of her trial testimony based on that statement (*see People v Wise*, 176 AD2d 595, 596, *lv denied* 79 NY2d 866; *People v Jones*, 136 AD2d 740, 741, *lv denied* 71 NY2d 969).

Defendant further contends that the verdict is against the weight of the evidence because the court erred in rejecting his affirmative defense that he lacked criminal responsibility by reason of mental disease or defect (*see* Penal Law § 40.15). We reject that contention. "Where, as here, there was conflicting expert testimony on the issue

of defendant's mental condition, the determination of the trier of fact to accept or reject the opinion of an expert, in whole or in part, is entitled to deference" (*People v Amin*, 294 AD2d 863, 863, *lv denied* 98 NY2d 672, 674; *see People v Stoffel*, 17 AD3d 992, 993, *lv denied* 5 NY3d 795).

As the People correctly concede, however, assault in the second degree under Penal Law § 120.05 (1) is a lesser included offense of assault in the first degree under Penal Law § 120.10 (1) (*see People v Basciano*, 54 AD3d 637), and thus should have been considered only in the alternative as a lesser inclusory concurrent count of assault in the first degree (*see* CPL 300.40 [3] [b]; *People v Johnson*, 81 AD3d 1428, 1429, *lv denied* 16 NY3d 896). We therefore modify the judgment accordingly. The sentence is not otherwise unduly harsh or severe.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

753

KA 10-01781

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KENNETH L. THOMPSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered August 9, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the fifth degree.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

754

KA 10-00286

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KERRY COLEMAN, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARY ELLEN GILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered December 3, 2009. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of criminal contempt in the first degree (Penal Law § 215.51 [c]) and sentencing him to a term of incarceration. Contrary to defendant's contention, the People established by the requisite preponderance of the evidence at the violation hearing that he committed acts that constitute harassment in the second degree and thus committed an additional offense in violation of the terms and conditions of his probation (*see* CPL 410.10 [2]; 410.70 [1], [3]; *People v Bergman*, 56 AD3d 1225, *lv denied* 12 NY3d 756; *People v Schneider*, 188 AD2d 754, 755-756, *lv denied* 81 NY2d 892). We reject defendant's further contention that he was denied effective assistance of counsel based on an alleged conflict of interest with defense counsel at the violation hearing. Defendant failed to "show that 'the conduct of his defense was in fact affected by the operation of the conflict of interest,' or that the conflict 'operated on' the representation" (*People v Ortiz*, 76 NY2d 652, 657; *see People v Konstantinides*, 14 NY3d 1, 10).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

755

KA 10-01173

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAFIQ SALIM, DEFENDANT-APPELLANT.

KEVIN J. BAUER, ALBANY, FOR DEFENDANT-APPELLANT.

RAFIQ SALIM, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered April 15, 2010. The judgment convicted defendant, upon a nonjury verdict, of harassment in the second degree and assault in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of assault in the third degree (Penal Law § 120.00 [1]) and harassment in the second degree (§ 240.26 [1]). Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495). We further conclude, however, that Supreme Court abused its discretion in admitting rebuttal evidence concerning defendant's relationship with a woman other than his wife, requiring reversal of the judgment and a new trial. "The general rule of evidence in this State concerning the impeachment of witnesses with respect to collateral matters is 'that the cross-examiner is bound by the answers of the witness to questions concerning collateral matters inquired into solely to affect credibility' " (*People v Pavao*, 59 NY2d 282, 288; *see People v Bellamy*, 26 AD3d 638, 641). Defendant's extramarital relationship "was not a material issue in this case . . . [, and t]he rebuttal testimony served solely to attack defendant's credibility on a collateral issue" (*Bellamy*, 26 AD3d at 641).

In view of our decision to reverse, we need not address defendant's remaining contentions, including those raised in his pro se supplemental brief.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

756

KA 10-02502

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENJAMIN FINCH, DEFENDANT-APPELLANT.

JAMES 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 20, 2010. The judgment convicted defendant, upon his plea of guilty, of arson in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of arson in the third degree (Penal Law § 150.10 [1]). We reject defendant's contention that County Court made an insufficient inquiry regarding his waiver of the right to appeal and thus that the waiver is invalid. "The court need not engage in any particular litany regarding a waiver of the right to appeal, so long as the court 'make[s] certain that a defendant's understanding of the terms and conditions of a plea agreement is evident on the face of the record' " (*People v Miller*, 87 AD3d 1303, 1303, *lv denied* 18 NY3d 926, quoting *People v Lopez*, 6 NY3d 248, 256). Here, the record establishes that defendant's waiver of the right to appeal was knowing, intelligent, and voluntary (*see Lopez*, 6 NY3d at 256; *Miller*, 87 AD3d at 1303).

Defendant failed to preserve for our review his contention that his plea was not voluntarily entered "because . . . he failed to move to withdraw the plea or to vacate the judgment of conviction" (*People v Connolly*, 70 AD3d 1510, 1511, *lv denied* 14 NY3d 886). In any event, that contention lacks merit. The record of the plea colloquy establishes that defendant stated that he understood the nature of the rights that he was relinquishing by pleading guilty, that he had not been coerced into entering the plea, and that he was not promised anything in exchange for his guilty plea. Indeed, he expressly stated that he was entering the plea voluntarily after having sufficient time to consult with his attorney. "[T]he record [thus] establishes that

defendant understood the nature and consequences of his actions" (*People v Watkins*, 77 AD3d 1403, 1403-1404, *lv denied* 15 NY3d 956). Defendant's challenge to the validity of his waiver of his *Miranda* rights is encompassed by his waiver of the right to appeal (*see People v Kemp*, 94 NY2d 831, 833; *People v Mitchell*, 93 AD3d 1173, 1174).

Finally, we agree with defendant that his challenge to the jurisdictional requirements of the waiver of indictment and the superior court information need not be preserved for our review (*see People v Boston*, 75 NY2d 585, 589 n; *People v Waid*, 26 AD3d 734, 734-735, *lv denied* 6 NY3d 839), and that his challenge is not precluded by his valid waiver of the right to appeal (*see Waid*, 26 AD3d at 734-735; *People v Verrone*, 266 AD2d 16, 18). Nevertheless, we conclude that defendant's contention lacks merit.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

757

KA 07-02335

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRACI L. WEIR, DEFENDANT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (KRISTYNA S. MILLS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered April 25, 2005. The judgment convicted defendant, upon her 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 her upon a guilty plea of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that she was denied effective assistance of counsel based, inter alia, upon defense counsel's failure to request a mental health examination of defendant or an independent autopsy of the victim. That contention does not survive the guilty plea inasmuch as defendant fails even to allege, nor has she shown, that "the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [her] attorney's allegedly poor performance" (*People v Robinson*, 39 AD3d 1266, 1267, *lv denied* 9 NY3d 869 [internal quotation marks omitted]; *see People v Socrates*, 307 AD2d 546). In any event, defendant's contention lacks merit. The record establishes that defense counsel made appropriate pretrial motions, sought relevant discovery and preserved defendant's right to raise defenses by filing a notice of intent to offer psychiatric evidence, and defendant failed to demonstrate that defense counsel lacked a legitimate reason for not pursuing such defenses (*see People v Wheeler*, 249 AD2d 774, 775). Defendant also failed to demonstrate that there was any basis for defense counsel to request an independent autopsy (*see generally id.*; *People v Radtke*, 152 Misc 2d 744). Finally, to the extent that defendant relies upon matters outside the record in support of her contention, those matters must be raised by way of a motion pursuant to CPL article 440 (*see People v Lopez*, 28 AD3d 234, 235, *lv denied* 7

NY3d 758).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

758

CAF 11-00433

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

IN THE MATTER OF ALBERTO C., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TIBET H., 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 ALBERTO C., JR.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered February 22, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: Respondent contends on appeal that Family Court erred in granting the petition to terminate her parental rights based on mental illness (*see* Social Services Law § 384-b [4] [c]). We agree with the court that petitioner established by clear and convincing evidence that respondent could not adequately care for her child by presenting the testimony of a psychiatrist regarding respondent's mental illness (*see* Social Services Law § 384-b [6] [c], [e]). The expert testified that respondent was presently and for the foreseeable future unable, by reason of her mental illness, to provide proper and adequate care for the child (*see Matter of Vincent E.D.G.*, 81 AD3d 1285, 1285, *lv denied* 17 NY3d 703). We further conclude that the court did not err in refusing to hold a dispositional hearing. There is no requirement that a separate dispositional hearing be held following a determination that a parent is incapable of caring for his or her child based on mental illness (*see id.* at 1286).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

759

CAF 11-01599

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

IN THE MATTER OF MELVIN M. JELKS, III,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KIM WRIGHT, RESPONDENT-APPELLANT.

VENZON LAW FIRM PC, BUFFALO (CATHARINE M. VENZON OF COUNSEL), FOR RESPONDENT-APPELLANT.

MELVIN M. JELKS, III, PETITIONER-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Erie County (Debra L. Givens, A.J.), entered June 14, 2011 in a proceeding pursuant to Family Court Act article 4. The order, among other things, determined that respondent willfully violated a child support order.

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

Memorandum: By order entered June 14, 2011, Family Court confirmed the determination of the Support Magistrate that respondent had willfully violated a prior child support order and directed that she be incarcerated if she did not pay certain arrears within two weeks. The court issued a further order, entered June 29, 2011, in which the court concluded that respondent had paid the arrears and imposed no further sanction. Respondent appeals from the latter order, but her sole contention, that the finding of a willful violation of the order is not supported by the evidence, concerns the order of June 14th. Although the appeal properly lies from the first order (*see Matter of Dakin v Dakin*, 75 AD3d 639, 639-640, *lv dismissed* 15 NY3d 905; *see generally Matter of Huard v Lugo*, 81 AD3d 1265, 1266, *lv denied* 16 NY3d 710), respondent's notice of appeal recites that the appeal is taken from the second order. Nevertheless, in the absence of any prejudice, we deem the notice of appeal to be taken from the first order (*see generally Matter of Leach v Santiago*, 20 AD3d 715, 716 n 1, *lv denied* 6 NY3d 702, 844), and we address her contention. We note in addition that the appeal is not moot merely because respondent paid the arrears and no further sanction was imposed. "[E]nduring consequences potentially flow from an order" determining that an individual willfully failed to obey a prior order (*Matter of Bickwid v Duetsch*, 87 NY2d 862, 863). We conclude, however, that respondent's contention lacks merit. "There is a presumption that a respondent has sufficient means to support his or her . . . minor

children . . ., and the evidence that respondent failed to pay support as ordered constitutes 'prima facie evidence of a willful violation' " (*Matter of Christine L.M. v Wlodek K.*, 45 AD3d 1452, 1452, quoting Family Ct Act § 454 [3] [a]). Consequently, the evidence that respondent failed to pay support as set forth in the prior order to which she stipulated was sufficient to establish that she willfully violated that prior order, which shifted the burden to her to submit "some competent, credible evidence of [her] inability to make the required payments" (*Matter of Powers v Powers*, 86 NY2d 63, 70; *see Matter of Hunt v Hunt*, 30 AD3d 1065, 1065). Respondent failed to present evidence establishing that she made reasonable efforts to obtain gainful employment to meet her support obligation, and she thus failed to meet that burden (*see Hunt*, 30 AD3d at 1065; *Matter of Fallon v Fallon*, 286 AD2d 389).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

761

CA 11-02292

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

ANTHONY CHAVIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SYRACUSE COMMUNITY HEALTH CENTER, INC., ET AL., DEFENDANTS, AND PASQUALE SCUTARI, JR., D.D.S., INDIVIDUALLY AND DOING BUSINESS AS VITKUS & SCUTARI, D.D.S., P.C., DEFENDANT-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (ASHLEY D. HAYES OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREENE & REID, PLLC, SYRACUSE (EUGENE LANE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered August 5, 2011. The order denied the motion of defendant Pasquale Scutari, Jr., D.D.S., individually and doing business as Vitkus & Scutari, D.D.S., P.C., for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries allegedly resulting from the malpractice of Pasquale Scutari, Jr., D.D.S., individually and doing business as Vitkus & Scutari, D.D.S., P.C. (defendant). Plaintiff alleges that defendant was negligent, inter alia, in failing to remove dental packing and/or foreign material following dental surgery. The surgery was performed in August 2000 and the action was commenced in November 2008. Defendant moved for summary judgment dismissing the complaint against him on alternative grounds, i.e., that the action is time-barred and that defendant performed the surgery in accordance with accepted standards of dental practice. We conclude that Supreme Court properly denied defendant's motion.

First, defendant failed to meet his initial burden on that part of the motion alleging that the action is time-barred. Where, as here, a malpractice "action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is

earlier" (CPLR 214-a). It is undisputed that plaintiff discovered the foreign object within one year of the commencement of the action. Further, defendant submitted medical records and other evidence establishing that plaintiff made timely and persistent inquiries to medical and dental professionals with respect to his condition following the surgery. Thus, defendant's own submissions raise a triable issue of fact whether plaintiff discovered facts that would reasonably have led to the discovery of the foreign object more than one year prior to commencing the action (*cf. Cooper v Edinbergh*, 75 AD2d 757, 757-758; *see generally Wiegand v Berger*, 151 AD2d 343, 344-345).

Second, the court properly concluded that defendant failed to meet his initial burden of establishing that he is entitled to judgment on the ground that the surgery was performed in accordance with accepted standards of dental practice. Defendant testified at his deposition that he did not recall plaintiff's surgery, and his further deposition testimony concerning his general surgical procedures is insufficient to establish that he did not depart from applicable professional standards during plaintiff's surgery (*see Gushlaw v Roll*, 290 AD2d 667, 670). In any event, even assuming, arguendo, that defendant met his initial burden, we conclude that the affirmation of plaintiff's expert raised a triable issue of fact (*see Howard v Kennedy*, 60 AD3d 905, 906).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

762

CA 10-01871

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

MICHELLE L. DUKE, PLAINTIFF-RESPONDENT,

V ORDER

BRIAN A. DUKE, DEFENDANT-APPELLANT.

BRIAN A. DUKE, DEFENDANT-APPELLANT PRO SE.

MATTAR, D'AGOSTINO & GOTTLIEB, LLP, BUFFALO (JONATHAN SCHAPP OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered March 25, 2010. The order amended a judgment of divorce.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

764

CA 11-01856

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

WILLIAM M. MURRAY, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK AND NEW YORK STATE
THRUWAY AUTHORITY, DEFENDANTS-RESPONDENTS.

COLLINS & COLLINS, LLC, BUFFALO (MICHAEL P. QUINN, JR., OF COUNSEL), FOR CLAIMANT-APPELLANT.

MACDONALD & HAFNER, ESQS., BUFFALO (PHYLISS A. HAFNER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered May 17, 2011 in a personal injury action. The order denied the motion of claimant for leave to file and serve a late notice of claim.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

766

CA 10-02509

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

PATRICK PROPERTIES, LLC, AS A MEMBER OF 2900 TRANSIT ROAD, LLC, SUING IN THE RIGHT OF 2900 TRANSIT ROAD, LLC, PLAINTIFF-APPELLANT,

V ORDER

KEVIN T. STOCKER, DEFENDANT, AND WAYNE FELLE, DEFENDANT-RESPONDENT.

THE GARAS LAW FIRM, LLP, BUFFALO (JOHN C. GARAS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WAYNE C. FELLE, P.C., WILLIAMSVILLE (WAYNE C. FELLE OF COUNSEL), DEFENDANT-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered March 21, 2011. The order denied the motion of plaintiff for leave to renew.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

768

CA 11-02518

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

ROUTE 104 & ROUTE 21 DEVELOPMENT, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHEVRON U.S.A., INC., DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered February 18, 2011. The order, insofar as appealed from, dismissed the complaint against defendant Chevron U.S.A., Inc.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part and the complaint against defendant Chevron U.S.A., Inc. is reinstated with respect to the claims under the Navigation Law.

Memorandum: Plaintiff commenced this action seeking to recover the costs of its remediation of subsurface oil and gasoline contamination discovered prior to its purchase of the subject property, asserting statutory and common-law causes of action. Plaintiff purchased the subject property in April 2003 and shortly thereafter conveyed the property to a nonparty, and the remediation occurred during plaintiff's ownership of the property. Chevron U.S.A., Inc. (defendant) subsequently moved for summary judgment dismissing the complaint against it, as the successor to Gulf Oil Corporation (Gulf), which was the owner of two underground storage tanks installed on the property in 1970. Defendant contends that there was no proof that it or Gulf, as its predecessor in interest, was a discharger of petroleum products during their ownership of the property.

We note at the outset that plaintiff has addressed only its claims under the Navigation Law against defendant on appeal, and thus is deemed to have abandoned its other claims against defendant (*see Popolizio v City of Schenectady*, 269 AD2d 670, 671; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984). We agree with

plaintiff that Supreme Court erred in granting defendant's motion with respect to the Navigation claims. With respect to the Navigation Law § 181 (5) claim against defendant, the elements of such a claim are that the defendant caused or contributed to a discharge of petroleum and that no discharge occurred during the period in which plaintiff owned the property (*see 1093 Group, LLC v Canale*, 72 AD3d 1561, 1562). Here, defendant had the initial burden of establishing that it did not cause or contribute to the contamination of the property (*see Nappi v Holub*, 79 AD3d 1110, 1112-1113). We conclude that defendant failed to meet its burden by merely asserting that plaintiff had "no evidence" that defendant was a discharger. It is well settled that defendant cannot establish its entitlement to judgment as a matter of law simply by pointing to gaps in plaintiff's proof (*see Baity v General Elec. Co.*, 86 AD3d 948, 950; *Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980). The remaining Navigation Law claim against defendant seeks contribution "from any responsible party" (§ 176 [8]), and we likewise conclude that defendant failed to meet its initial burden of establishing that it was not a responsible party under that section.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

769

KA 11-00399

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JEFFREY MASTERSON, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered January 24, 2011. 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.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

770

KA 10-02077

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM LONG, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered September 2, 2010. The judgment convicted defendant, upon a nonjury verdict, of criminal contempt in the second degree and stalking in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, after a nonjury trial, of criminal contempt in the second degree (Penal Law § 215.50 [3]) and stalking in the fourth degree (§ 120.45 [2]). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence supporting the conviction inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). We reject defendant's further contention that the verdict is against the weight of the evidence. Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), and affording great deference to County Court's credibility determinations (*see People v White*, 43 AD3d 1407, 1408, *lv denied* 9 NY3d 1010), we conclude that the alleged deficiencies in the evidence are not so substantial as to render the verdict against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We also reject defendant's contention that the court erred in its *Molineux* ruling. It is well settled that evidence of a defendant's prior bad acts is admissible "to show (1) intent, (2) motive, (3) knowledge, (4) common scheme or plan, or (5) identity of the defendant," where, as here, its probative value outweighs its risk of prejudice to defendant (*People v Alvino*, 71 NY2d 233, 242; *see People v Arafet*, 13 NY3d 460, 465; *People v Ventimiglia*, 52 NY2d 350, 359).

Defendant's prior behavior toward the complainant was admissible "to explain the issuance of an order of protection, to establish the defendant's motive and intent in the commission of the crimes, and to establish the complainant's state of mind" (*People v Melendez*, 8 AD3d 680, 681, *lv denied* 3 NY3d 741; *see People v Morris*, 82 AD3d 908, 908-909, *lv denied* 17 NY3d 808).

Defendant's contention that he was denied the right to effective assistance of counsel likewise is lacking in merit. Defendant failed to "demonstrate the absence of strategic or other legitimate explanations" for the failure of defense counsel to file a more thorough CPL 250.10 notice of intent to proffer psychiatric evidence (*People v Rivera*, 71 NY2d 705, 709). Upon our review of the record as a whole, we conclude that defense counsel provided meaningful representation (*see generally People v Benevento*, 91 NY2d 708, 712; *People v Baldi*, 54 NY2d 137, 147).

Contrary to defendant's remaining contention, the sentence is not unduly harsh or severe. We note, however, that the certificate of conviction incorrectly reflects that defendant was sentenced to a three-year term of probation upon the conviction of stalking in the fourth degree, a class B misdemeanor. The sentencing minutes establish that the court imposed a one-year term of probation upon that count, to be served concurrently with the sentence of probation imposed on the remaining charge. The certificate of conviction must therefore be amended accordingly (*see e.g. People v Carrasquillo*, 85 AD3d 1618, 1620, *lv denied* 17 NY3d 814; *People v Afrika*, 79 AD3d 1678, 1680, *lv denied* 17 NY3d 791).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

772

KA 09-01943

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CURTIS PALMS, DEFENDANT-APPELLANT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROSEANN B. MACKECHNIE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered April 20, 2009. The judgment convicted defendant, upon his plea of guilty, of conspiracy in the second degree, criminal sale of a controlled substance in the second degree (two counts), criminal possession of a controlled substance in the third degree (three counts) and resisting arrest.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

773

KA 11-00975

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON M. MEDEN, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), 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 (Matthew J. Murphy, III, J.), rendered April 12, 2011. 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 modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Niagara County Court for resentencing in accordance with the following Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed and convicting him of violating the terms and conditions of his probation. He was sentenced to a determinate term of incarceration of three years, to be followed by three years of postrelease supervision. We reject defendant's challenge to the severity of the sentence, but we conclude that the sentence imposed is illegal and cannot stand despite the failure of either defendant or the People to raise the issue in County Court or on appeal (*see People v Davis*, 37 AD3d 1179, 1180, *lv denied* 8 NY3d 983). Defendant pleaded guilty to attempted assault in the second degree, a class E felony and, although he was convicted of rape in the second degree in 2007, there is no indication in the record that he was adjudicated a second felony offender. Defendant therefore faced an indeterminate term of incarceration ranging from a minimum of 1 to 3 years to a maximum of 1a to 4 years (*see* Penal Law § 70.00 [2] [e]; [3] [b]). However, the court erroneously imposed a sentence of a determinate term of three years. The certificate of conviction correctly reflects that defendant was convicted of attempted assault in the second degree but it also reflects the illegal sentence. We therefore modify the judgment by vacating the sentence imposed, and we

remit the matter to County Court for resentencing.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

775

KA 08-01881

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARLOS SANTIAGO, JR., DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Thomas R. Morse, A.J.), rendered June 30, 2008. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (two counts) and unlawful imprisonment in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law and as a matter of discretion in the interest of justice by reversing that part convicting defendant of sexual abuse in the first degree under the fourth count of the indictment and dismissing that count 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, two counts of sexual abuse in the first degree (Penal Law § 130.65 [1]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although "an acquittal would not have been unreasonable" (*Danielson*, 9 NY3d at 348), "[w]here, as here, witness credibility is of paramount importance to the determination of guilt or innocence, [we] must give '[g]reat deference . . . [to the jury's] opportunity to view the witnesses, hear the testimony and observe demeanor' " (*People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831, quoting *Bleakley*, 69 NY2d at 495). Contrary to defendant's further contention, the testimony of the prosecution witnesses was not incredible as a matter of law, that is, it was not " 'impossible of belief because it [was] manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*People v Garafolo*, 44 AD2d 86, 88; *see People v Rumph*, 93 AD3d 1346, 1347; *People v Wallace*, 306 AD2d 802, 802-803).

We reject defendant's contention that County Court erred in refusing to suppress the in-court identification by the victim on the ground that it was based on an unduly suggestive photo array identification procedure. Contrary to the People's contention, defendant preserved that contention for our review inasmuch as the suppression court "specifically confronted and resolved [the] issue" (*People v Feingold*, 7 NY3d 288, 290). We conclude, however, that the People met their initial burden of establishing the reasonableness of the police conduct with respect to the photo array, and defendant failed to meet his ultimate burden of proving that the identification procedure was unduly suggestive (*see generally People v Chipp*, 75 NY2d 327, 335, *cert denied* 498 US 833).

Defendant failed to preserve for our review his further contention that the indictment is multiplicitous (*see* CPL 470.05 [2]). We nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). As the People correctly concede, the fourth count of the indictment, charging sexual abuse in the first degree, must be dismissed because where, as here, "the evidence . . . shows a single, uninterrupted attack in which the attacker gropes several parts of a victim's body, the attacker may be charged with only one count of sexual abuse" (*People v Alonzo*, 16 NY3d 267, 268). We therefore modify the judgment accordingly.

Defendant contends that the court erred in sentencing him as a second felony offender. At sentencing, defendant challenged the prior conviction from Pennsylvania solely upon the ground that he would have been eligible to be adjudicated a youthful offender upon the conviction if it had occurred in New York but that such relief was not available in Pennsylvania. On appeal, however, he contends that the Pennsylvania conviction would not constitute a conviction in New York because he was 15 years old at the time of conviction, and a 15-year-old could not be convicted in New York of manslaughter in the second degree, one of the offenses encompassed by the Pennsylvania conviction of murder in the third degree (*see* 18 Pa Cons Stat Ann § 2502 [c]).

The Court of Appeals has stated that, in order "[t]o determine whether a foreign crime is equivalent to a New York felony[,] the court must examine the elements of the foreign statute and compare them to an analogous Penal Law felony, for '[i]t is the statute upon which the indictment was drawn that necessarily defines and measures the crime' " (*People v Gonzalez*, 61 NY2d 586, 589, quoting *People v Olah*, 300 NY 96, 98). The Court added, however, that, "[a]s an exception to the . . . rule [set forth in *People v Olah*, it has] permitted a sentencing court to go beyond the statute and scrutinize the accusatory instrument in the foreign jurisdiction where the statute renders criminal not one act but several acts which, if committed in New York, would in some cases be felonies" and in others would not constitute felonies (*id.* at 590). Preservation is required when the defendant's contention requires that the sentencing court determine "whether a particular out-of-State conviction is the equivalent of a New York felony[, which] may involve production and examination of foreign accusatory instruments and, conceivably, the

resolution of evidentiary disputes, all in the context of comparisons with the law of other jurisdictions" (*People v Samms*, 95 NY2d 52, 57). That is the case here, inasmuch as defendant contends that the Pennsylvania conviction encompasses several crimes, some of which he could not be convicted upon in New York. Inasmuch as defendant failed to contend before the sentencing court that the Pennsylvania conviction would not constitute a conviction in New York based on his age at the time of the crimes, he failed to preserve his contention for our review (*see id.*), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

778

CAF 11-00382

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

IN THE MATTER OF ANDREW J. FOSTER,
PETITIONER-RESPONDENT,

V ORDER

CANDIE A. FOSTER, RESPONDENT-APPELLANT.

JOHN G. KOSLOSKY, ESQ., ATTORNEY FOR THE
CHILDREN, APPELLANT.

JOHN G. KOSLOSKY, ATTORNEY FOR THE CHILDREN, UTICA, APPELLANT PRO SE.

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

COHEN & COHEN LLP, UTICA (RICHARD COHEN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Oneida County (Louis P. Gigliotti, A.J.), entered January 31, 2011 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner primary physical custody of the subject children.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

779

CAF 11-00022

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

IN THE MATTER OF TIOSHA J., TAMARI J., AND KAMARI J.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

KACHOYA H., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

DAVID J. PAJAK, ALDEN, 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 TIOSHA J., TAMARI J., AND KAMARI J.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered December 21, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: Respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to three of her children on the ground of permanent neglect. We affirm. It is undisputed that the mother cared for the oldest child for a period of only 10 months following the child's birth and that her twin daughters were removed at birth and were never returned to her care. Contrary to the mother's contention, petitioner met its burden of proving "by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between [the mother] and [her] child[ren]" *(Matter of Ja-Nathan F.*, 309 AD2d 1152; *see* Social Services Law § 384-b [7] [a]). The record establishes that petitioner tailored services to her needs with respect to domestic violence, parenting, and substance abuse (*see Matter of La'Derrick J.W.*, 85 AD3d 1600, 1601, *lv denied* 17 NY3d 709; *see generally Matter of Star Leslie W.*, 63 NY2d 136, 142). Petitioner also established that the mother failed to plan for the future of her children, although able to do so (*see La'Derrick J.W.*, 85 AD3d at 1601-1602). Although the mother completed a parenting and a domestic violence program and regularly attended supervised weekly visitation with the children, she refused to attend another domestic violence program after the children's

father assaulted her and damaged furniture and the interior of her home. The mother also refused to attend recommended drug treatment; failed to provide petitioner's employees access to her home, the condition of which resulted in the removal of her oldest child; and failed to verify her income.

The court properly determined that it was in the best interests of the children to terminate the mother's parental rights. In the nearly three years from the date on which the petition was filed until the date on which the dispositional hearing was conducted, the mother failed adequately to address the issues that caused the removal of her children (*see Matter of Rachael N.*, 70 AD3d 1374, *lv denied* 15 NY3d 708). We have reviewed the mother's remaining contentions and conclude that they are without merit.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

780

CAF 11-01673

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

IN THE MATTER OF VIOLETTE K.

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

SHEILA E.K., RESPONDENT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-APPELLANT.

ALAN P. REED, COUNTY ATTORNEY, BATH (CRAIG A. PATRICK OF COUNSEL), FOR PETITIONER-RESPONDENT.

CHRISTINE M. VALKENBURGH, ATTORNEY FOR THE CHILD, BATH, FOR VIOLETTE K.

Appeal from an order of the Family Court, Steuben County (Joseph W. Latham, J.), entered July 27, 2011 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed the subject child in the custody of petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order, entered upon her consent without admission, in which Family Court, inter alia, placed the subject child in petitioner's custody upon a finding that the mother neglected the child. The appeal must be dismissed. A party may not appeal from an order entered upon that party's consent (*see Matter of Selena O.*, 84 AD3d 1648; *Matter of Bambi C.*, 238 AD2d 942, 942-943, *lv denied* 90 NY2d 805). Moreover, because the mother never moved to withdraw her consent to the entry of an order of fact-finding of neglect without admission, her contention that her consent was not knowing, voluntary and intelligent is also not properly before us (*see Matter of Julia R.*, 52 AD3d 1310, 1311, *lv denied* 11 NY3d 709; *cf. Matter of Gabriella R.*, 68 AD3d 1487, 1487, *lv dismissed* 14 NY3d 812).

We reject the mother's further contention that her attorney was ineffective in failing to move to withdraw her consent to the entry of the neglect order. The mother "neither alleged nor demonstrated that [she] was actually prejudiced by any of counsel's shortcomings. [Her] contention that counsel was ineffective 'is impermissibly based on speculation' " (*Matter of Michael C.*, 82 AD3d 1651, 1652, *lv denied* 17

NY3d 704).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

783

CA 12-00064

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

LEONARD M. ENGLERT AND YVONNE ENGLERT,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

GERALD W. SCHAFFER, JR., ESQ., CELLINO &
BARNES, P.C., DEFENDANTS-APPELLANTS,
STEVEN BARNES, ESQ., INDIVIDUALLY AND DOING
BUSINESS AS THE BARNES FIRM, AS SUCCESSORS IN
INTEREST TO CELLINO & BARNES, AND ROSS CELLINO,
INDIVIDUALLY AND AS A PARTNER IN THE LAW FIRM
OF CELLINO & BARNES, DEFENDANTS.

MARK R. UBA, WILLIAMSVILLE, FOR DEFENDANTS-APPELLANTS.

BURKE AND BURKE, ROCHESTER (PATRICK J. BURKE OF COUNSEL), AND S. ROBERT WILLIAMS, PLLC, SYRACUSE, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered April 4, 2011 in a legal malpractice action. The order denied in part defendants' motion for summary judgment.

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

Memorandum: Plaintiffs commenced this legal malpractice action, and we previously dismissed all but the third cause of action for breach of fiduciary duty (*Englert v Schaffer*, 61 AD3d 1362, *rearg denied* 64 AD3d 1200). Supreme Court granted in part the summary judgment motion of defendants by dismissing the third cause of action against defendants Steven Barnes and Ross Cellino, but denied the motion with respect to defendants Gerald W. Schaffer, Jr., Esq., and Cellino & Barnes, P.C. (defendants).

We reject defendants' contention that summary judgment in their favor is required on the ground that plaintiffs could not establish that they would have accepted a settlement offer made in the underlying personal injury case if Schaffer had notified them of that offer. When the alleged negligence of defendant involves a failure to communicate a settlement offer, the plaintiff must "demonstrate that, but for the [defendant's] alleged negligence, [plaintiff] would have accepted the offer of settlement and would not have sustained any damages" *(Magnacoustics, Inc. v Ostrolenk, Faber, Gerb & Soffen*, 303

AD2d 561, 562, *lv denied* 100 NY2d 511). Even assuming, arguendo, that defendants met their initial burden, we conclude that plaintiffs raised a triable issue of fact whether they would have accepted the settlement offer if Schaffer had promptly communicated it to them (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

784

CA 11-02510

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

TIMOTHY T. JOHNSON, AS PARENT AND NATURAL GUARDIAN OF KYRELL JOHNSON, AN INFANT, PLAINTIFF-APPELLANT,

V ORDER

GENESEE MANAGEMENT, INC., RURAL HOUSING ACTION CORPORATION, MIG BUILDING SYSTEMS, INC., MONROE INSULATION AND GUTTER, INC., AND MONROE INSULATION AND GUTTER, INC., DOING BUSINESS AS MIG BUILDING SYSTEMS, INC., DEFENDANTS-RESPONDENTS.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (ALISON M.K. LEE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS MIG BUILDING SYSTEMS, INC., MONROE INSULATION AND GUTTER, INC., AND MONROE INSULATION AND GUTTER, INC., DOING BUSINESS AS MIG BUILDING SYSTEMS, INC.

PETRONE & PETRONE, P.C., WILLIAMSVILLE (JAMES H. COSGRIFF, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT RURAL HOUSING ACTION CORPORATION.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (ERICA M. DIRENZO OF COUNSEL), FOR DEFENDANT-RESPONDENT GENESEE MANAGEMENT, INC.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered March 23, 2011 in a personal injury action. The order granted the motions of defendants for summary judgment and dismissed the amended 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: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

785

CA 12-00104

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

SUSAN MURPHY, CLAIMANT-RESPONDENT,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 115287.)

SUGARMAN LAW FIRM, LLP, SYRACUSE (DAVID C. BRUFFETT, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (MICHELLE M. DAVOLI OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (Diane L. Fitzpatrick, J.), entered March 15, 2011 in a personal injury action. The order sanctioned defendant for spoliation of evidence.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on May 21, 2012,

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

790

CA 11-02594

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

TERRY CHECKSFIELD, PLAINTIFF-RESPONDENT,

V ORDER

JOHN C. SIEDLICKI, SR., DEFENDANT-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (SARAH P. RERA OF COUNSEL), FOR DEFENDANT-APPELLANT.

KENNY & KENNY, PLLC, SYRACUSE (ERIN K. SKUCE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered July 14, 2011. The order, insofar as appealed from, denied the motion of defendant to dismiss the complaint pursuant to CPLR 3126.

Now, upon reading and filing the stipulation of discontinuance of appeal signed by the attorneys for the parties on March 26, 2012,

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

804

CA 11-02005

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

DONOVAN HUMPHREY, PLAINTIFF-APPELLANT,

V ORDER

EDWARD CAMPANY, ET AL., DEFENDANTS,
AND BEN PENNETTA, DEFENDANT-RESPONDENT.

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

SLIWA & LANE, BUFFALO (STANLEY J. SLIWA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered May 31, 2011 in a personal injury action. The order, inter alia, granted the motion of defendant Ben Pennetta to videotape the deposition of plaintiff.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

811.1

CAF 12-00468

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

IN THE MATTER OF NICOLE L. LOWTHER,
PETITIONER-RESPONDENT,

V ORDER

CHRISTOPHER A. EASTMAN, RESPONDENT-APPELLANT.

ADAM R. MATTESON, LOWVILLE, FOR RESPONDENT-APPELLANT.

LIONEL LEE HECTOR, WATERTOWN, FOR PETITIONER-RESPONDENT.

JOHN W. HALLETT, ATTORNEY FOR THE CHILD, WATERTOWN, FOR ELIZEBETH E.

Appeal from an order of the Family Court, Jefferson County (Diana D. Trahan, R.), entered January 24, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner's application to relocate to Maryland with the subject child.

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

859/11

KA 08-00219

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUINTRELL JOE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered August 31, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree. The judgment was affirmed by order of this Court entered September 30, 2011 (87 AD3d 1266), and defendant on December 16, 2011 was granted leave to appeal to the Court of Appeals from the order of this Court (18 NY3d 859), and the Court of Appeals on May 8, 2012 reversed the order and remitted the case to this Court for clarification of the basis of this Court's decision (___ NY3d ___ [May 8, 2012]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously affirmed.

Memorandum: On a prior appeal (*People v Joe*, 87 AD3d 1266, *revd* ___ NY3d ___ [May 8, 2012]), we summarily affirmed the judgment convicting defendant of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]). Defendant's sole contention was that his sentence was unduly harsh and severe. In reversing our order, the Court of Appeals concluded that it was impermissible for this Court to affirm the judgment summarily "without indicating whether [we] relied on the waiver [of the right to appeal] or determined that the sentencing claim lacked merit" (*Joe*, ___ NY3d at ___). The Court remitted the matter to this Court "for clarification of the basis of [our] decision" (*id.* at ___).

Upon remittitur, we conclude that defendant's waiver of the right to appeal is invalid inasmuch as the minimal perfunctory inquiry made by Supreme Court was "insufficient to establish that the court 'engage[d] the defendant in an adequate colloquy to ensure that the

waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, *lv denied* 98 NY2d 767; *see People v Hamilton*, 49 AD3d 1163, 1164). We further conclude, however, that the sentence is not unduly harsh or severe.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

1209

CA 11-00918

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

IN THE MATTER OF MARK C. POLONCARZ, INDIVIDUALLY AND AS COMPTROLLER OF ERIE COUNTY, PLAINTIFF-PETITIONER-APPELLANT,

V ORDER

CHRISTOPHER C. COLLINS, COUNTY EXECUTIVE OF ERIE COUNTY, ERIE COUNTY LEGISLATURE, DANIEL M. KOZUB, TIMOTHY M. KENNEDY, BARBARA MILLER-WILLIAMS, RAYMOND W. WALTER, DINO J. FUDOLI, MARIA R. WHYTE, BETTY JEAN GRANT, THOMAS J. MAZUR, CHRISTINA W. BOVE, KEVIN R. HARDWICK, LYNN M. MARINELLI, LYNNE M. DIXON, JOHN J. MILLS, THOMAS A. LOUGHRAN AND EDWARD A. RATH, III, AS DULY ELECTED LEGISLATORS CONSTITUTING THE ERIE COUNTY LEGISLATURE, GREGORY G. GACH, ERIE COUNTY DIRECTOR OF BUDGET AND MANAGEMENT, AND COUNTY OF ERIE, DEFENDANTS-RESPONDENTS-RESPONDENTS.

JEROME D. SCHAD, WILLIAMSVILLE, FOR PLAINTIFF-PETITIONER-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-RESPONDENTS CHRISTOPHER C. COLLINS, COUNTY EXECUTIVE OF ERIE COUNTY, GREGORY G. GACH, ERIE COUNTY DIRECTOR OF BUDGET AND MANAGEMENT, AND COUNTY OF ERIE.

BENNETT, DIFILIPPO & KURTHALTS, LLP, HOLLAND (RONALD P. BENNETT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-RESPONDENTS JOHN J. MILLS, RAYMOND W. WALTER, DINO J. FUDOLI, KEVIN R. HARDWICK, LYNNE M. DIXON AND EDWARD A. RATH, III.

LAW OFFICE OF SHAWN P. MARTIN, WEST SENECA (SHAWN P. MARTIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-RESPONDENTS ERIE COUNTY LEGISLATURE, DANIEL M. KOZUB, TIMOTHY M. KENNEDY, BARBARA MILLER-WILLIAMS, MARIA R. WHYTE, BETTY JEAN GRANT, THOMAS J. MAZUR, CHRISTINA W. BOVE, LYNN M. MARINELLI AND THOMAS A. LOUGHRAN.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Gerald J. Whalen, J.), dated November 19, 2010 in a declaratory judgment action/CPLR article 78 proceeding. The judgment dismissed the complaint/petition (denominated petition).

Now upon reading and filing the stipulations of discontinuance of

appeal signed by the attorneys for the parties on December 21, 2011 and January 23, 2012,

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

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

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

1388

CA 11-01042

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

RICHARD HANN, RITA HANN,
PLAINTIFFS-RESPONDENTS,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

STEPHEN R. BLACK AND J&R SCHUGEL
TRUCKING, INC., DEFENDANTS-APPELLANTS.

RUSSO, KEANE & TONER, LLP, NEW YORK CITY (NAOMI M. TAUB OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FARACI LANGE, LLP, ROCHESTER (CAROL A. MCKENNA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered December 22, 2010 in a personal injury action. The order granted the motion of plaintiffs Richard Hann and Rita Hann, struck the answer of defendants and granted Richard Hann and Rita Hann partial summary judgment on the issue of liability.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Richard Hann (plaintiff) when the tractor trailer driven by him collided with a tractor trailer driven by defendant Stephen R. Black and owned by defendant J&R Schugel Trucking, Inc. (J&R Schugel). Defendants contend on appeal that Supreme Court erred in granting the motion of plaintiffs-respondents (plaintiffs) to strike defendants' answer pursuant to CPLR 3126 (3) based, inter alia, on their failure to comply with a prior order directing Black to be produced for a deposition, and for partial summary judgment on liability. We reject that contention.

We are compelled to note at the outset that Black left the employment of J&R Schugel in October 2007 and that the accident occurred in late January 2007, and thus the decision of the dissent is based upon the well-established principle that a party may not be compelled to produce a former employee for a deposition (*see McGowan v Eastman*, 271 NY 195, 198). We of course acknowledge the validity of that principle. We do not rely upon it, however, because defendants, who were represented by the same counsel, raised no such contention in

opposition to the motion, nor indeed is that contention raised for the first time on appeal, which in any event would be improper (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

We reject the dissent's position that the issue of control was raised by defense counsel during the proceedings. In opposition to plaintiffs' motion to strike the answer, defendants' attorney raised the issue of control of Black as a basis for determining that J&R Schugel's failure to produce him was not willful or contumacious. Defendants' attorney did not argue that J&R Schugel had no legal obligation to produce him for a supplemental deposition because it no longer employed Black. Rather, J&R Schugel implicitly concedes its control over Black by virtue of its contention on appeal that it was ready and willing to produce Black at a second deposition but was unable to locate him. Indeed, defendants' attorney expressly stated in his opposing affirmation that Black would be produced "directly before the trial." Furthermore, contrary to the position taken by the dissent, we do not view the representation of Black and J&R Schugel by the same counsel as an arrangement of convenience. At the time of his original deposition, Black was not employed by J&R Schugel, yet the transcript of that deposition establishes that there was one attorney of record for both defendants. In a letter to Black, dated after the court had ordered a supplemental deposition, the attorney of record stated that he was working "on the defense of your case." Moreover, when the court denied plaintiffs' renewed motion for summary judgment, it also ordered that "*[d]efendants* shall produce Stephen R. Black" for a supplemental deposition (emphasis added), and we note that J&R Schugel did not appeal from that part of the order (*see generally* CPLR 5501 [a] [1]). Parties "to a civil dispute are free to chart their own litigation course" (*Mitchell v New York Hosp.*, 61 NY2d 208, 214), and "may fashion the basis upon which a particular controversy will be resolved" (*Cullen v Naples*, 31 NY2d 818, 820). We see no reason to reach the issue, raised sua sponte by the dissent (*see CB Richard Ellis, Buffalo, LLC v D.R. Watson Holdings, LLC*, 60 AD3d 1409, 1410), whether J&R Schugel had control over Black.

We thus turn to the merits of the contentions raised by the parties on appeal. "It is well settled that '[t]rial courts have broad discretion in supervising disclosure and, absent a clear abuse of that discretion, a trial court's exercise of such authority should not be disturbed' " (*Carpenter v Browning-Ferris Indus.*, 307 AD2d 713, 715). We have "repeatedly held that the striking of a pleading is appropriate only where there is a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith" (*Perry v Town of Geneva*, 64 AD3d 1225, 1226 [internal quotation marks omitted]). "Once a moving party establishes that the failure to comply with a disclosure order was willful, contumacious or in bad faith, the burden shifts to the nonmoving party to offer a reasonable excuse" (*WILJEFF, LLC v United Realty Mgt. Corp.*, 82 AD3d 1616, 1619). Contrary to defendants' contention, plaintiffs met that initial burden, "thereby shifting the burden to defendant[s] to offer a reasonable excuse" (*Hill v Oberoi*, 13 AD3d 1095, 1096). Here, the court's determination "[t]hat the conduct of [defendants] was willful and contumacious could be inferred from their failure to comply" with

an order to produce Black for a deposition, along with their protracted delay in providing a response to plaintiffs' demands for the disclosure of photographs of the accident scene (*Leone v Esposito*, 299 AD2d 930, 931, *lv dismissed* 99 NY2d 611; *see Kopin v Wal-Mart Stores*, 299 AD2d 937, 937-938).

We further conclude that defendants failed to meet their burden of offering a reasonable excuse for failing to comply with the court's order to produce Black for a deposition or to provide the photographs of the accident scene in a timely manner (*see Hill*, 13 AD3d at 1096). J&R Schugel contends that it could not comply with the order to produce Black because it was unable to locate him. However, "[t]he fact that [a defendant's] whereabouts are unknown is no bar to plaintiffs' requested sanction" of striking defendants' answer (*Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171), and in any event J&R Schugel "offered insufficient proof of a good faith effort to locate" Black (*Mason v MTA N.Y. City Tr.*, 38 AD3d 258; *see Reidel*, 13 AD3d at 171).

Defendants contend for the first time on appeal that plaintiffs were not prejudiced by defendants' conduct, and thus that contention is not properly before us (*see Ciesinski*, 202 AD2d at 985). Finally, defendants' contention that the court based its determination on impermissible credibility determinations is not properly before us because it is raised for the first time in defendants' reply brief (*see generally Matter of State of New York v Zimmer* [appeal No. 4], 63 AD3d 1563; *Turner v Canale*, 15 AD3d 960, 961, *lv denied* 5 NY3d 702).

All concur except CENTRA and CARNI, JJ., who dissent and vote to modify in accordance with the following Memorandum: We respectfully dissent in part inasmuch as we cannot agree with our colleagues that Supreme Court did not abuse its discretion in granting the motion of plaintiffs-respondents (plaintiffs) to strike defendants' answer pursuant to CPLR 3126 (3) and for partial summary judgment on liability.

Initially, we note that, in October 2007, defendant Stephen R. Black left the employment of the trucking company owned by defendant J&R Schugel Trucking, Inc. (J&R Schugel). The accident had occurred on January 26, 2007, and plaintiffs commenced this action on December 19, 2008. Black was initially deposed on July 21, 2009 and testified that he was no longer employed by J&R Schugel. Thus, plaintiffs were adequately informed well before trial that Black was no longer under the control of J&R Schugel (*see Schneider v Melmarkets Inc.*, 289 AD2d 470, 471). It is well settled that a party may not be compelled to produce a former employee for a deposition (*see McGowan v Eastman*, 271 NY 195, 198). Here, plaintiffs made no effort - except to compel J&R Schugel to produce a party over whom it had no control - to conduct a further deposition of Black, although plaintiffs and J&R Schugel were equally apprised of his whereabouts by Black himself, at his first deposition (*see Schneider*, 289 AD2d 470).

Plaintiffs' misguided effort to compel J&R Schugel to produce Black led to a motion by plaintiffs for leave to renew a motion for partial summary judgment on negligence, based on Black's original

deposition testimony. That motion, as well as a motion by the third plaintiff, resulted in an order signed on May 18, 2010, which denied plaintiffs' motions and provided that "[d]efendants shall produce Stephen R. Black on the earliest possible date for a further deposition concerning Defendants' January 6, 2010 Supplemental Response to Notice for Discovery and Inspection." That order was patently inappropriate on its face in that it required one defendant, J&R Schugel, to produce a codefendant over whom it had no control. The order went much further than simply requiring J&R Schugel to use its "best efforts" to produce Black (*MS Partnership v Wal-Mart Stores*, 273 AD2d 858, 858). Contrary to the majority's position, J&R Schugel specifically raised its lack of control over Black when it opposed plaintiffs' motion. Indeed, we have no difficulty concluding that J&R Schugel's statement that "[i]t had no clue nor should it be charged with knowledge of [Black's] current whereabouts as he is merely an owner/operator of a truck on dispatch to [J&R] Schugel, not an employee under their control" more than adequately raises the issue. Additionally, counsel for J&R Schugel specifically raised the issue at oral argument of plaintiffs' motion to strike defendants' answer when, in responding to the court's query whether Black was still employed by J&R Schugel, counsel stated, "He was never actually employed by them. He's an owner/operator of a truck. So we actually tried to find out from J&R Schugel if they knew where he was and he's not an actual employee so that made it more difficult as well." Thus, the majority incorrectly asserts that it is raised "sua sponte" herein. Moreover, even if the issue had not been raised in opposition to plaintiffs' motion, the fact of the matter is that the order of May 18, 2010 compelling J&R Schugel to produce a former employee - who was also a codefendant - was unlawful in that the court was without power to issue such an order (*see McGowan*, 271 NY at 198; *Zappolo v Putnam Hosp. Ctr.*, 117 AD2d 597; *Holloway v Cha Cha Laundry*, 97 AD2d 385; *Sparacino v City of New York*, 85 AD2d 688; *Frankel v French & Polyclinic Med. School & Health Ctr.*, 70 AD2d 947).

The majority also incorrectly concludes that the issue was not raised on appeal. In any event, such an error of law is reviewable " 'despite the fact that it is raised for the first time on appeal inasmuch as [plaintiffs] could not have opposed that contention by factual showings or legal countersteps before [the court]' " (*Britt v Buffalo Mun. Hous. Auth.*, 48 AD3d 1181, 1182; *see Oram v Capone,* 206 AD2d 839, 840). The lack of an employment relationship between J&R Schugel and Black, and therefore the lack of control, is undisputed and apparent from the face of the record. Thus, the reality of the situation is that the majority has concluded that J&R Schugel's answer should be stricken and that plaintiffs are entitled to partial summary judgment on liability because J&R Schugel failed to comply with an order that, at least with respect to J&R Schugel, the court had no power to issue (*see McGowan*, 271 NY at 198).

The majority also concludes that J&R Schugel "implicitly concedes its control over Black by virtue of its contention on appeal that it was ready and willing to produce Black at a second deposition but was unable to locate him." However, we are unable to conclude that a party's good faith attempts to comply with an unlawful order should be

used thereafter as a sword to strike down a patently meritorious contention regarding the unlawfulness of the order in the first instance. The majority further concludes that parties to a civil dispute are " 'free to chart their own litigation course.' " We hardly view J&R Schugel as having been "free" to chart its own litigation course when it was restricted by an order that the majority recognizes was made in error as a matter of law.

Although we acknowledge that Black and J&R Schugel Trucking were represented by the same counsel, we surmise that such an arrangement was no doubt the product of a cost-saving decision made by the insurance carrier rather than a calculated decision of J&R Schugel to seal its fate by linking itself to a former employee over whom it had no control. The majority fails to provide any authority for the proposition that the answer of one defendant can be stricken based on a codefendant's noncompliance with an order - which is precisely what the majority has approved here. *Reidel v Ryder TRS, Inc.* (13 AD3d 170, 171), relied upon by the majority, involves the striking of the answers of two defendants whose whereabouts were unknown - not the answer of a codefendant that had no control over the noncompliant party. Although plaintiffs were free to use contempt proceedings or a warrant of commitment and arrest to secure Black's presence at the further deposition, they failed to pursue those remedies (*see Mermelstein v Kalker*, 294 AD2d 413, 414; *Quintanilla v Harchack*, 259 AD2d 681, 682).

Moreover, in evaluating whether to strike the answer of one of two or more defendants, "[it] is incumbent upon the trial court to protect the rights of any innocent party whose cause of action or defense would be unfairly impaired by the imposition of a CPLR 3126 penalty on another, contumacious party" (*Quintanilla*, 259 AD2d at 682). Indeed, cases in which a court refuses, even if only conditionally, to strike a codefendant's answer where the adverse impact would fall most heavily upon the remaining defendant that is vicariously liable under Vehicle and Traffic Law § 388 are legion (*see e.g. Mermelstein*, 294 AD2d 413; *Quintanilla*, 259 AD2d at 682; *Magee v City of New York*, 242 AD2d 239; *Gonzalez v National Car Rental*, 178 AD2d 116; *Briley v Morriseau*, 99 AD2d 524; *Di Giantomaso v Kreger Truck Renting Co.*, 34 AD2d 964; *Rozakis v Tilo Co.*, 32 AD2d 930; *Rogonia v Ferguson*, 52 Misc 2d 298).

An identical factual setting was presented in *Mermelstein* (294 AD2d 413), where the former employee/driver refused to cooperate in defending the action against himself and his former employer, a codefendant. The Second Department concluded that Supreme Court erred in granting plaintiff's motion to strike the answer of the former employee/driver and that the more appropriate sanction was to preclude him from offering evidence on his own behalf at trial unless he appeared for an examination before trial no later than 30 days prior to trial (*id.* at 414).

Insofar as the photographs of the accident scene are concerned, after Black testified on July 21, 2009 with respect to their existence and potential location, plaintiffs made a specific request for them on

September 15, 2009 and they were produced less than four months later, on January 6, 2010. The trial was scheduled for December 1, 2010. Thus, plaintiffs had possession of the photographs for nearly a year before the trial date. It is also of no small significance to our analysis that plaintiffs never moved for or obtained an order compelling the production of the photographs. Although in February 2009 plaintiff served boilerplate demands for the production of photographs, it was not until Black's examination before trial in July 2009 that it was confirmed that he took photos at the accident scene. As noted, J&R Schugel produced those photos in their entirety within four months of plaintiffs' specific letter request therefor.

Additionally, although plaintiffs claim prejudice from the delay in producing the photos, Black was deposed on July 21, 2009 and plaintiffs did not make a written request for the specific photos identified by Black until September 15, 2009. This was four days *after* plaintiffs initially moved for partial summary judgment on the issue of negligence on September 11, 2009, and approximately two months after Black's deposition. Plaintiffs made no attempt to obtain an extension of the scheduling order, which contained a cut-off date for the filing of summary judgment motions. Further, plaintiffs claim that the photographs belied Black's deposition testimony that, at the time of the accident, it was sunny and the road was dry. However, Black testified at his deposition that at the scene of the accident "[t]he road conditions changed from I would say from dry to at least three seconds before the accident to wet." Thus, it cannot be said that the availability of the photos at the time of plaintiffs' summary judgment motion would have eliminated all issues of fact in plaintiffs' favor such that plaintiffs were substantively prejudiced by the delay in disclosure. Here, there has been complete, albeit belated, compliance with plaintiffs' demand for photographs.

CPLR 3126 provides that, when a party refuses to obey an order to disclose or fails to disclose information that the court finds ought to have been disclosed, "the court may make such orders with regard to the failure or refusal *as are just*" (emphasis added). We conclude that, under the circumstances, it was unjust and an abuse of discretion for the court to invoke the extreme and drastic penalty of striking defendants' answer (*see Greene v Mullen*, 70 AD3d 996, 996-997). The more appropriate remedy with respect to the failure of Black to appear for a further deposition is to preclude Black from offering evidence on his own behalf at trial unless he appears for a further deposition no later than 30 days prior to trial (*see Mermelstein*, 294 AD2d at 414). The more appropriate remedy for J&R Schugel's delay in producing the photographs is to impose a monetary sanction. Plaintiffs have the photographs, and the matter should proceed to trial in accordance with the paramount goal of resolving cases on their merits (*see Mironer v City of New York*, 79 AD3d 1106, 1107).

We therefore would modify the order by reinstating the answer and granting plaintiffs' motion to the extent of precluding Black from offering evidence on his own behalf at trial unless he appears for a further deposition no later than 30 days prior to trial and by

directing that J&R Schugel pay plaintiffs the sum of $1,250 as a sanction for the delay in producing the photographs.

Entered: June 8, 2012

Frances E. Cafarell
Clerk of the Court

MOTION NO. (459/96) KA 12-00581. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAMON SULLIVAN, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ. (Filed June 8, 2012.)

MOTION NO. (132/01) KA 99-05549. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER STENSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND SCONIERS, JJ. (Filed June 8, 2012.)

MOTION NO. (445/06) KA 05-00193. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD F. MILLS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (1632/06) KA 05-01269. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHARLES J. FISHER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (1648/06) KA 04-02967. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLEOTIS MERCER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (485/07) KA 04-02062. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RONALD A. MCFADDEN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (468/09) KA 07-02187. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY WOODS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (1009/09) KA 05-01142. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TYRONE PRESCOTT, DEFENDANT-APPELLANT. -- Motion for reconsideration denied. PRESENT: CENTRA, J.P., FAHEY, LINDLEY, AND SCONIERS, JJ. (Filed June 8, 2012.)

MOTION NO. (1585/09) KA 07-02429. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V AHMIR COLE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, AND LINDLEY, JJ. (Filed June 8, 2012.)

MOTION NO. (291/10) KA 09-00599. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RYAN J. CLEMENT, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (713/10) KA 08-01142. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT E. ANTHONY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, SCONIERS, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (1150/10) KA 07-00132. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL J. HENDERSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed June 8, 2012.)

MOTION NO. (1274/10) KA 09-00201. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HENRY COX, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed June 8, 2012.)

MOTION NO. (391/11) KA 07-02491. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TUREMAIL MCCULLOUGH, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, AND LINDLEY, JJ. (Filed June 8, 2012.)

MOTION NO. (422/11) KA 08-01897. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V GEORGE BASTIAN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., FAHEY, PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (749/11) KA 09-00194. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JEROME T. CISSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed June 8, 2012.)

MOTION NO. (829/11) KA 09-00514. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL T. CHICHERCHIA, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, CARNI, AND SCONIERS, JJ. (Filed June 8, 2012.)

MOTION NO. (1255/11) CA 11-00842. -- RACHEL L. STERN, PLAINTIFF-RESPONDENT-APPELLANT, V GUY H. EASTER, INDIVIDUALLY AND DOING BUSINESS AS BROOKLAWN GOLF CLUB, MIDCOURT BUILDERS CORP., DEFENDANTS-APPELLANTS-RESPONDENTS, PEMCO PROPERTIES III, PG ASSOCIATES, DEFENDANTS-RESPONDENTS, AND JOHN DOE, DEFENDANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (4/12) KA 10-00813. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARK J. DAVIS, DEFENDANT-APPELLANT. -- Motion for reargument and reconsideration denied. Motion for writ of error coram nobis granted. Memorandum: Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal

that would have resulted in reversal, specifically, in failing to argue that the court erred when it failed to comply with CPL 310.30 in regard to Court Exhibit #4. Upon our review of the trial court proceedings, we conclude that the issue may have merit. Therefore, the order of January 31, 2012 is vacated and this Court will consider the appeal de novo (*see People v LeFrois*, 151 AD2d 1046). Defendant is directed to perfect his appeal on or before September 6, 2012. PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ. (Filed June 8, 2012.)

MOTION NO. (32/12) CA 11-01429. -- IN THE MATTER OF THE STATE OF NEW YORK, PETITIONER-APPELLANT, V NUSHAWN WILLIAMS, ALSO KNOWN AS SHYTEEK JOHNSON, RESPONDENT-RESPONDENT. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (38/12) CA 11-01430. -- IN THE MATTER OF THE STATE OF NEW YORK, PETITIONER-RESPONDENT, V NUSHAWN WILLIAMS, ALSO KNOWN AS SHYTEEK JOHNSON, RESPONDENT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (40/12) CA 11-01546. -- IN THE MATTER OF KELI-KORAN LUCHEY, PETITIONER-RESPONDENT-APPELLANT, V BOARD OF EDUCATION OF CITY SCHOOL DISTRICT OF THE CITY OF NIAGARA FALLS AND CYNTHIA A. BIANCO, IN HER

CAPACITY AS SUPERINTENDENT OF SCHOOLS, RESPONDENTS-APPELLANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (88/12) CA 11-01509. -- RICHARD HUNT, PLAINTIFF, V CIMINELLI-COWPER CO., INC., ET AL., DEFENDANTS. CIMINELLI-COWPER CO., INC., THIRD-PARTY PLAINTIFF-APPELLANT, V THE PHOENIX INSURANCE COMPANY, MERCHANTS MUTUAL INSURANCE COMPANY, THIRD-PARTY DEFENDANTS-RESPONDENTS, ET AL., THIRD-PARTY DEFENDANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (90/12) CA 11-00643. -- PATRICIA KARAM, AS ADMINISTRATRIX OF THE ESTATE OF TONY KARAM, DECEASED, AND PATRICIA KARAM, INDIVIDUALLY, PLAINTIFF-APPELLANT, V ADIRONDACK NEUROSURGICAL SPECIALISTS, P.C., ET AL., DEFENDANTS, ST. ELIZABETH MEDICAL CENTER AND TIMOTHY EDWARD PAGE, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (187/12) CA 11-01555. -- IN THE MATTER OF THAD L. KEMPISTY AND MICHAEL KEMPISTY, PETITIONERS-APPELLANTS, V TOWN OF GEDDES, EMANUELE

FALCONE, SUPERVISOR, CHRISTOPHER RYAN, JERRY ALBRIGO, DANIEL PATALINO, E. ROBERT CZAPLICKI, PAUL VALENTI AND VINCENT PALERINO, CONSTITUTING THE TOWN BOARD OF TOWN OF GEDDES, TOWN OF GEDDES PLANNING BOARD, AND PETER J. ALBRIGO, AS CODE ENFORCEMENT OFFICER OF TOWN OF GEDDES, RESPONDENTS-RESPONDENTS. -- Motion for reargument denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed June 8, 2012.)

MOTION NO. (187/12) CA 11-01555. -- IN THE MATTER OF THAD L. KEMPISTY AND MICHAEL KEMPISTY, PETITIONERS-APPELLANTS, V TOWN OF GEDDES, EMANUELE FALCONE, SUPERVISOR, CHRISTOPHER RYAN, JERRY ALBRIGO, DANIEL PATALINO, E. ROBERT CZAPLICKI, PAUL VALENTI AND VINCENT PALERINO, CONSTITUTING THE TOWN BOARD OF TOWN OF GEDDES, TOWN OF GEDDES PLANNING BOARD, AND PETER J. ALBRIGO, AS CODE ENFORCEMENT OFFICER OF TOWN OF GEDDES, RESPONDENTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed June 8, 2012.)

MOTION NO. (197/12) TP 11-01963. -- IN THE MATTER OF REGINALD MCFADDEN, PETITIONER, V ALBERT PRACK, DIRECTOR, SPECIAL HOUSING/INMATE DISCIPLINARY, RESPONDENT. -- Motion for reconsideration denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (210/12) CA 11-01309. -- IN THE MATTER OF ERIC J. KOCH, D.O., PETITIONER-RESPONDENT, V JAMES G. SHEEHAN, NEW YORK STATE MEDICAID INSPECTOR GENERAL, RESPONDENT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (211/12) CA 11-01940. -- JOSEPH TUPPER, AS PRESIDENT AND ON BEHALF OF SYRACUSE PROPERTY OWNERS ASSOCIATION, STAMPEDE VI, LLC, HAMR, INC., AVON, INC., 867 SUMNER AVE, L.L.C., JAKE AND BUCK, LLC, OCOMSTOCK COMPANY, LLC, NORMAN ROTH, WILLIAM OSUCHOWSKI, DAVID EADE, DAVID PATRUNO, JENNIFER PATRUNO, BARBARA HUMPHREY, RENEE MURRAY, YAJAIRA BRIZUELA, PAUL WALSH, CAROL STONE AND BENJAMIN TUPPER, PLAINTIFFS-APPELLANTS, V CITY OF SYRACUSE, COMMON COUNCIL OF CITY OF SYRACUSE AND PLANNING COMMISSION OF CITY OF SYRACUSE, DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (234/12) CA 11-00173. -- PATRICIA J. CURTO, CLAIMANT-APPELLANT, V NEW YORK STATE THRUWAY AUTHORITY AND NEW YORK STATE, DEFENDANTS-RESPONDENTS. (CLAIM NO. 116804-A.) (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND SCONIERS, JJ. (Filed June 8, 2012.)

MOTION NO. (235/12) CA 11-00175. -- PATRICIA J. CURTO, CLAIMANT-APPELLANT, V NEW YORK STATE THRUWAY AUTHORITY AND NEW YORK STATE, DEFENDANTS-RESPONDENTS. (CLAIM NO. 116804-A.) (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND SCONIERS, JJ. (Filed June 8, 2012.)

MOTION NO. (296/12) CA 11-01257. -- ELLEN J. GALLAGHER, PLAINTIFF-RESPONDENT-APPELLANT, V EDWARD R. GALLAGHER, DEFENDANT-APPELLANT-RESPONDENT. (APPEAL NO. 1.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (300/12) TP 11-01956. -- IN THE MATTER OF PUTNAM COMPANIES, DOING BUSINESS AS ACORN MARKETS, INC., PETITIONER, V NIRAV R. SHAH, M.D., M.P.H., COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (313/12) CAF 11-00708. -- IN THE MATTER OF JOHN B. AND SHAWN B. ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; JULIE W., RESPONDENT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER,

P.J., SMITH, CARNI, AND SCONIERS, JJ. (Filed June 8, 2012.)

MOTION NO. (317/12) CA 11-01301. -- JASON BURLEW, ET AL., PLAINTIFFS, AND RICHARD KATCHUK, PLAINTIFF-RESPONDENT, V TALISMAN ENERGY USA INC., DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, AND SCONIERS, JJ. (Filed June 8, 2012.)

MOTION NO. (318/12) CA 11-01302. -- JASON BURLEW, ET AL., PLAINTIFFS, AND RICHARD KATCHUK, PLAINTIFF-RESPONDENT, V TALISMAN ENERGY USA INC., DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, AND SCONIERS, JJ. (Filed June 8, 2012.)

MOTION NO. (351/12) CA 11-01884. -- EKLECCO NEWCO, LLC, PLAINTIFF-APPELLANT, V Q OF PALISADES, LLC, DOING BUSINESS AS QDOBA MEXICAN GRILL, AND ROBERT A. LYON, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) -- Motion to modify memorandum and order denied. PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed June 8, 2012.)

MOTION NO. (372/12) CA 11-02147. -- OPHELIA KWEH, AS GUARDIAN OF THE PERSON AND PROPERTY OF JOHN KWEH, AND OPHELIA KWEH, PLAINTIFF-RESPONDENT, V CHRISTOPHER C. EDMUNDS, PATRICK D. SAMPSON, SKINNER SALES, INC.,

DEFENDANTS-APPELLANTS, ET AL., DEFENDANT. (ACTION NO. 1.) OPHELIA KWEH, AS ADMINISTRATRIX OF THE ESTATE OF SAMPSON KWEH, DECEASED, PLAINTIFF-RESPONDENT, V CHRISTOPHER C. EDMUNDS, PATRICK D. SAMPSON, SKINNER SALES, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT. (ACTION NO. 2.) PHILIP KWEH, PLAINTIFF-RESPONDENT, V CHRISTOPHER C. EDMUNDS, PATRICK D. SAMPSON, SKINNER SALES, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT. (ACTION NO. 3.) KADRA DAYOW, AS ADMINISTRATRIX OF THE ESTATE OF MOHAMED DAYOW, DECEASED, PLAINTIFF-RESPONDENT, V OPHELIA KWEH, AS ADMINISTRATRIX OF THE ESTATE OF JUTY KWEH, DECEASED, DEFENDANT, PATRICK D. SAMPSON AND CHRISTOPHER C. EDMUNDS, DEFENDANTS-APPELLANTS. (ACTION NO. 4.) KADRA DAYOW, AS ADMINISTRATRIX OF THE ESTATE OF MOHAMED DAYOW, DECEASED, PLAINTIFF-RESPONDENT, V SKINNER SALES, INC., DEFENDANT-APPELLANT. (ACTION NO. 5.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ. (Filed June 8, 2012.)

KA 10-02099. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KATISHA BEATY, DEFENDANT-APPELLANT. -- Resentence unanimously affirmed. Counsel’s motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Resentence of Erie County Court, Michael F. Pietruszka, J.). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ. (Filed June 8, 2012.)

KAH 10-01329. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. DELANO BROWN, PETITIONER-APPELLANT, V NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT-RESPONDENT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Wyoming County, Mark H. Dadd, A.J. - Habeas Corpus). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ. (Filed June 8, 2012.)

KA 11-00999. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL J. CANTINERI, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Steuben County Court, Joseph William Latham, J. - Criminal Possession of a Controlled Substance, 5th Degree). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ. (Filed June 8, 2012.)

KAH 11-00663. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL., DAVID GARCIA, PETITIONER-APPELLANT, V MARK BRADT, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Wyoming County, Mark H. Dadd, A.J. - Habeas Corpus). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ. (Filed June 8, 2012.)