SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 5, 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

858

KA 10-01416

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW WHEELER, DEFENDANT-APPELLANT.

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

MATTHEW WHEELER, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered June 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.

Memorandum: Defendant was convicted, upon his plea of guilty, of sexual abuse in the first degree (Penal Law § 130.65 [3]), for having subjected a five-year-old girl to sexual contact by rubbing her buttocks for his own sexual gratification. Defendant was sentenced to a split sentence of incarceration and probation and was subsequently adjudicated a level three sex offender (*see People v Wheeler*, 59 AD3d 1007, *lv denied* 12 NY3d 711). Pursuant to condition No. 5 of his probation, defendant is required to obtain "suitable employment" or "pursue a course of study or vocational training." Pursuant to condition No. 16 of his probation, which was imposed based on his status as a sex offender, defendant is not permitted to "own, possess or have under [his] control items deemed by the probation officer or treatment provider to be pornographic or sexually stimulating."

During defendant's period of probation, defendant's probation officer and other members of the probation department conducted a search of defendant's home. During the search, the probation officers discovered a laptop computer with 113 images of prepubescent girls in various explicit poses and stages of undress stored therein (images). Defendant's probation officer filed an information for delinquency alleging that defendant violated condition No. 16 of his probation based on defendant's possession of the images on his computer. The officer also alleged that defendant violated condition No. 5 of his

probation based on his failure to be suitably employed or enrolled in school. Following a hearing, Supreme Court determined that defendant violated his probation, revoked his probation and sentenced him to a determinate term of incarceration. Defendant appeals. All of the contentions addressed herein are contained in defendant's main brief unless otherwise noted.

"A violation of probation proceeding is summary in nature and a sentence of probation may be revoked if the defendant has been afforded an opportunity to be heard" (*People v Perna*, 74 AD3d 1807, 1807, *lv denied* 17 NY3d 716 [internal quotation marks omitted]; *see People v DeMarco*, 60 AD3d 1107, 1108). The People are required to establish by a preponderance of the evidence that defendant violated the terms and conditions of his probation (*see* CPL 410.70 [3]; *People v Pringle*, 72 AD3d 1629, 1629, *lv denied* 15 NY3d 855; *People v Bergman*, 56 AD3d 1225, 1225, *lv denied* 12 NY3d 756), and "the decision to revoke his probation will not be disturbed, [absent a] 'clear abuse of discretion' " (*People v Barber*, 280 AD2d 691, 694, *lv denied* 96 NY2d 825; *see Bergman*, 56 AD3d at 1225).

Defendant contends in his main and pro se supplemental briefs that the People failed to establish by a preponderance of the evidence that he violated condition No. 5 (*see People v Garner*, 56 AD3d 951, 952, *lv denied* 12 NY3d 783; *People v Green*, 255 AD2d 923, 923, *lv denied* 93 NY2d 853; *see generally Bergman*, 56 AD3d at 1225). That contention lacks merit. We defer to the court's determination crediting the testimony of defendant's probation officer, who testified that defendant failed to obtain "suitable employment" or "pursue a course of study or vocational training" despite his ability to do so (*see Perna*, 74 AD3d at 1807; *DeMarco*, 60 AD3d at 1108).

Defendant further contends in his main and pro se supplemental briefs that the court erred in refusing to suppress the evidence recovered by the probation officers when they searched his home and computer. We reject that contention. While on probation, a defendant still retains the constitutional right to be free from "unreasonable searches and seizures" (*People v Huntley*, 43 NY2d 175, 181; *see People v Hale*, 93 NY2d 454, 459). Nevertheless, pursuant to a condition of his probation, defendant consented to warrantless searches by probation officers of, inter alia, his home in order for those officers to monitor his compliance with the conditions of his probation, and defendant further consented to "seizures of any items found to be in violation" of those conditions (*see Hale*, 93 NY2d at 460). Condition No. 16 of his probation, which as noted prohibits defendant from owning, possessing or having under his control "pornographic" or "sexually stimulating" items, was "individually tailored" to defendant's underlying sex offense and "reasonably related" to his rehabilitation and supervision (*id.* at 462; *see People v Wahl*, 302 AD2d 976, 976, *lv denied* 99 NY2d 659; *People v Schunk*, 269 AD2d 857, 857). "As such, [those conditions] provided an appropriate basis for the search and seizure of [defendant's home and computer]" (*Hale*, 93 NY2d at 462). Further, the record establishes that defendant violated the terms of his probation on two prior occasions by failing to participate in a sex offender treatment program, and we

thus conclude that the decision of defendant's probation officer to search his home and computer was " 'rationally and reasonably related to the performance of the [probation] officer's duty' " to monitor the terms of defendant's probation (*People v Johnson*, 49 AD3d 1244, 1245, *lv denied* 10 NY3d 865, quoting *Huntley*, 43 NY2d at 181; *see Hale*, 93 NY2d at 462).

Defendant also contends that the term "sexually stimulating" as used in condition No. 16 is unconstitutionally vague and unenforceable. Preliminarily, we note that defendant does not challenge the term "pornographic" as used in that condition as being unconstitutionally vague and unenforceable. Consequently, even assuming, arguendo, that the term "sexually stimulating" is unconstitutionally vague, we conclude that reversal is not required because, as discussed *infra*, the court properly determined that the images were pornographic in nature and thus condition No. 16 is enforceable (*see People v Tucker*, 302 AD2d 752, 753). In any event, we conclude that the term "sexually stimulating" as used in condition No. 16 "is sufficiently explicit to inform a reasonable person of the conduct to be avoided" and therefore is not unconstitutionally vague (*id.*; *see People v York*, 2 AD3d 1158, 1160; *People v Howland*, 108 AD2d 1019, 1020; *see generally People v Stuart*, 100 NY2d 412, 420-421). Given the nature of defendant's underlying sex offense and his status as a level three sex offender, we conclude that defendant could not have reasonably believed that his possession of the images, which depict prepubescent females in various states of undress and sexually suggestive poses, was permitted by condition No. 16 (*see People v Bologna*, 67 AD2d 1004, 1004; *see also Farrell v Burke*, 449 F3d 470, 491; *see generally Stuart*, 100 NY2d at 420-421).

Defendant next contends that the images are not "pornographic" or "sexually stimulating" and that the People thus failed to prove by a preponderance of the evidence that he violated condition No. 16 (*see* CPL 410.70 [3]; *Pringle*, 72 AD3d at 1629; *Bergman*, 56 AD3d at 1225). We reject that contention, although we note in any event that sufficient evidence of the violation of condition No. 5 alone provided a proper basis for the court to conclude that defendant violated his probation. Here, because the images depicted children, we must consider the definition of "child pornography" in resolving the issue whether the images are "pornographic." In determining whether the images were "pornographic," the court considered the federal definition of the term "child pornography," and we agree that federal law provides guidance under these circumstances (*see generally People v Horner*, 300 AD2d 841, 842-843). Federal law provides that "the lascivious exhibition of the genitals or pubic area of a minor constitutes child pornography" (*United States v Hill*, 459 F3d 966, 969 n 2, *cert denied* 549 US 1299; *see* 18 USC § 2256 [2] [B] [iii]; [8]). The question whether a visual depiction of a minor constitutes a "lascivious exhibition of the genitals or pubic area" is determined by consideration of the following factors: "1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; 3) whether the child is depicted in an unnatural pose, or in

inappropriate attire, considering the age of the child; 4) whether the child is fully or partially clothed, or nude; 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; [and] 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer" (*United States v Dost*, 636 F Supp 828, 832, *affd* 812 F2d 1239, 813 F2d 1231, *cert denied* 484 US 856; *see Horner*, 300 AD2d at 842-843). Notably, "all of the aforementioned factors need not be present" in order to determine that materials constitute child pornography where, as here, there is no statutory provision to the contrary, and nothing in *Dost* requires that "the genitalia be uncovered" (*Horner*, 300 AD2d at 843). "Hence, one must consider the combined effect of the setting, attire, pose and emphasis on the genitals and whether it is designed to elicit a sexual response in the viewer, 'albeit perhaps not the "average viewer", but perhaps in the pedophile viewer' " (*id.*, quoting *Dost*, 636 F Supp at 832).

Based on the foregoing, we agree with the court that the images are "pornographic" inasmuch as the focal point of many of the images is on the child's genitalia or pubic area. Further, although no child's genitalia is actually uncovered in the images, many of the children are in unnatural poses and are dressed in age-inappropriate attire; most of the children are only partially clothed; many of the images suggest sexual coyness or willingness on the part of the child to engage in sexual activity; and, most importantly, the "combined effect" of the foregoing factors appears to have been "designed to elicit a sexual response" in defendant, who was convicted of sexually abusing a five-year-old girl (*id.*). We further agree with the court in any event that the images were "sexually stimulating" based on the common meaning of that term (*see* Webster's Third New International Dictionary 2082, 2244 [2002] [defining "sexually" as "in a sexual manner" or "with regard to or by means of sex" and defining "stimulate" as "to excite to activity or growth or to greater activity or exertion" or "stir up," as in to "animate," "liven" or "arouse"]), particularly given the age, dress, and poses of the children depicted in the images and considering the nature of defendant's underlying conviction and his status as a sex offender.

Contrary to defendant's further contention in his main and pro se supplemental briefs, the People were not required pursuant to condition No. 16 to prove that he "knowingly possessed" the images and instead were required to prove only that he "own[ed], possess[ed] or [had them] under [his] control." The testimony at the hearing establishes that the probation officers discovered the computer during their search of defendant's home and that defendant admitted to the probation officers at the time of the search that the computer belonged to him. We therefore conclude that the court properly determined that the People met their burden of proving by a preponderance of the evidence that defendant owned, possessed, or controlled the images in violation of condition No. 16 (*see Pringle*, 72 AD3d at 1629; *Tucker*, 302 AD2d at 753; *see generally Bergman*, 56 AD3d at 1225). We further conclude that the sentence is not unduly harsh or severe.

Finally, we have reviewed the remaining contentions in defendant's pro se supplemental brief and conclude that none requires modification or reversal of the judgment.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

859

KA 09-01480

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MYCHAL A. CARR, DEFENDANT-APPELLANT.

KEVIN J. BAUER, ALBANY, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered May 20, 2009. The judgment convicted defendant, upon a jury verdict, of attempted murder in the first degree, reckless endangerment in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [i], 20.00), reckless endangerment in the first degree (§§ 120.25, 20.00) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Defendant contends that the People failed to establish his identity as the shooter and thus that the evidence is legally insufficient to support the conviction of attempted murder and reckless endangerment. We reject that contention. The evidence, when viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish defendant's identity as the shooter (*see People v Adams*, 96 AD3d 1588, 1589). We further conclude that the verdict on those counts is not against the weight of the evidence on the issue of identification (*see id.*; *see generally People v Bleakley*, 69 NY2d 490, 495). The two police officers and the two civilian witnesses who observed the drive-by shooting on Cambridge Avenue testified unequivocally that the shooter was situated in the front passenger seat of the vehicle. During the shooting, the shooter's hat blew off of his head and landed in the middle of the street, and subsequent DNA testing matched defendant's DNA to that found on the hat. Defendant was also the source of the major DNA profile extracted from the .380 semiautomatic handgun recovered in the parking lot where defendant was apprehended, and four fired .380 cartridge cases recovered by the police in the area of Cambridge Avenue exhibited

"class characteristics" that were consistent with being fired from that gun. In addition, a jailhouse informant testified that defendant admitted to the informant that he was the shooter. Although the informant has an extensive criminal history and received a favorable plea deal in exchange for his testimony, we reject defendant's contention that his testimony was incredible as a matter of law (*see People v Morgan*, 77 AD3d 1419, 1420, *lv denied* 15 NY3d 922; *People v Monk*, 57 AD3d 1497, 1499, *lv denied* 12 NY3d 785; *People v Pace*, 305 AD2d 984, 985, *lv denied* 100 NY2d 585). The jury was informed of the nature of the informant's plea deal as well as the details of his prior criminal conduct, including his rape of a six-year-old girl, and we see no basis to disturb its credibility determination (*see Morgan*, 77 AD3d at 1420; *Pace*, 305 AD2d at 985).

Defendant further contends that the evidence is legally insufficient to support his conviction of criminal possession of a weapon in the second degree because the .380 semiautomatic handgun was not loaded when defendant was apprehended by the police and the gun was recovered. We reject that contention. "[B]ased on the evidence adduced at the trial, a rational jury could have inferred that, at some point before the defendant's apprehension by the police and the concomitant recovery of the weapon, he possessed a firearm loaded with operable ammunition with the intent to use it unlawfully against another" (*People v Bailey*, 19 AD3d 431, 432, *lv denied* 5 NY3d 785). The People introduced, inter alia, testimony that the handgun at issue holds up to six bullets, five in the magazine and one in the chamber. As noted above, the police recovered four .380 caliber casings on Cambridge Avenue, and a police witness testified that defendant fired two shots at his police car while he was pursuing defendant after the drive-by shooting.

We also reject the contention of defendant that County Court erred in refusing to suppress DNA and fingerprint evidence as the fruit of an unlawful arrest. The police observed defendant and two other males in a parking lot around the corner from the abandoned vehicle involved in the drive-by shooting within a minute after the vehicle was discovered. The three individuals matched the general description of the perpetrators. As the police approached the three men in a marked patrol vehicle, two of the individuals fled and defendant attempted to evade the police by forcing his way into an apartment building. We conclude that defendant's attempt to evade the police and the flight of the other two individuals, coupled with defendant's temporal and geographic proximity to the abandoned vehicle, provided the police with the requisite reasonable suspicion that defendant had committed a crime, i.e., that he was one of the occupants of the vehicle involved in the drive-by shooting and high-speed chase (*see People v Knight*, 94 AD3d 1527, 1529; *People v Butler*, 81 AD3d 484, 485, *lv denied* 16 NY3d 893; *People v Jackson*, 78 AD3d 1685, 1685-1686, *lv denied* 16 NY3d 743). Further, defendant provided inconsistent explanations to the police regarding the reason for his presence in the parking lot, and the female resident who blocked defendant's entrance to the apartment building told the police that she did not know defendant. Once the police located the handgun in the parking lot where defendant and the two other individuals had been

found, the police had probable cause to arrest defendant. We thus conclude that the court properly denied defendant's suppression motion (*see Knight*, 94 AD3d at 1528; *see generally Butler*, 81 AD3d at 485).

Contrary to the further contention of defendant, we conclude that the court properly granted the People's motion to amend the first count of the indictment to specify Erie County as the situs of the crime (*see* CPL 200.70; *People v Cruz*, 61 AD3d 1111, 1112; *People v DeSanto*, 217 AD2d 636, 636, *lv denied* 87 NY2d 972). The indictment was amended "during [the] trial" as required by CPL 200.70 (*see generally* CPL 260.30; *People v Griffin*, 9 AD3d 841, 843), and the amendment did not change the prosecution's theory or prejudice defendant (*see Cruz*, 61 AD3d at 1112). The caption of the indictment specifies Erie County, the first count of the indictment states that "THE GRAND JURY OF THE COUNTY OF ERIE" accuses defendant of attempted murder in the first degree and the remaining counts of the indictment all include the language "in this County." Further, the bill of particulars specifies with respect to count one of the indictment that the alleged crime occurred "in the vicinity of Goodyear Avenue in the City of Buffalo, County of Erie." We thus conclude that the court "providently exercised its discretion in permitting the prosecution to amend [count one of] the indictment to allege the county where the alleged offense occurred" (*Matter of Blumen v McGann*, 18 AD3d 870, 870-871; *see People v Eaddy*, 181 AD2d 946, 947-948, *lv denied* 79 NY2d 1048).

Defendant contends that the grand jury proceedings were defective because the People failed to present allegedly exculpatory evidence. We reject that contention. It is well established that "[t]he People have broad discretion in presenting a case to the grand jury and need not 'present all of their evidence tending to exculpate the accused' " (*People v Radesi*, 11 AD3d 1007, 1007, *lv denied* 3 NY3d 760, quoting *People v Mitchell*, 82 NY2d 509, 515; *see People v Morris*, 204 AD2d 973, 974, *lv denied* 83 NY2d 1005). Here, the testimony of one of the officers at the felony hearing that another codefendant was situated in the front passenger seat of the vehicle involved in the shooting was not "entirely exculpatory" (*People v Gibson*, 260 AD2d 399, 399, *lv denied* 93 NY2d 924), and the failure to present such testimony at the grand jury "did not result in a 'needless or unfounded prosecution' " (*People v Smith*, 289 AD2d 1056, 1057, *lv denied* 98 NY2d 641, quoting *People v Valles*, 62 NY2d 36, 38). Thus, the People's failure to present such evidence to the grand jury does not require dismissal of the indictment (*see Smith*, 289 AD2d at 1057; *Gibson*, 260 AD2d at 399; *People v Dillard*, 214 AD2d 1028, 1028).

Defendant failed to preserve for our review his contention that he is entitled to a new trial based upon the People's delay in turning over prior statements of the jailhouse informant (*see People v Rodriguez*, 293 AD2d 336, 337, *lv denied* 98 NY2d 713; *People v Perdomo*, 280 AD2d 617, 617; *People v Bradl*, 231 AD2d 895, 895), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

860

KA 09-00469

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STACEY R. CASTOR, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

BIANCO LAW OFFICE, SYRACUSE (RANDI JUDA BIANCO 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 March 5, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, attempted murder in the second degree and offering a false instrument for filing in the first 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 her following a jury trial of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), based upon the death of her second husband from poisoning with antifreeze, and attempted murder in the second degree (§§ 110.00, 125.25 [1]), based upon the poisoning of her daughter with a combination of pharmaceutical drugs and alcohol. In appeal No. 2, defendant appeals from an order denying her motion pursuant to CPL 440.10 seeking to vacate the judgment, inter alia, on the ground that her statement to the police on September 7, 2007 was taken in violation of her indelible right to counsel.

Defendant's second husband was found dead on August 22, 2005, and his death from poisoning with antifreeze was determined by the Medical Examiner to be a suicide. More than two years later, on September 7, 2007, defendant agreed to discuss her husband's death with the police, and she waived her *Miranda* rights and provided a statement. Two days before speaking to defendant, the police had received the results of an autopsy performed on the exhumed body of defendant's first husband, who had died in 2000, which established that he too had died from poisoning with antifreeze. On September 14, 2007, defendant's youngest daughter found her 20-year-old sister, defendant's eldest daughter (daughter), unresponsive in her bedroom as a result of

ingesting prescription drugs and alcohol. In a one-page typed document that was purported to be the daughter's suicide note (purported suicide note), it was stated that the daughter had killed both her father, defendant's first husband, and her stepfather, defendant's second husband. When the daughter regained consciousness, she denied that she had attempted to kill herself and that she had written the purported suicide note.

We address first defendant's contentions in appeal No. 1. We reject defendant's contention that County Court abused its discretion in permitting the People to introduce evidence in their direct case of the uncharged murder of defendant's first husband. Contrary to defendant's contention, the court properly determined that there was clear and convincing evidence that defendant committed that uncharged murder. It is well established that where, as here, the identity of the perpetrator of the uncharged crime is unknown, the court must determine that there is clear and convincing evidence of both a unique modus operandi and defendant's identity as the perpetrator of the uncharged crime before allowing the People to present evidence of the uncharged crime on the issue of identity in their direct case against defendant (*see People v Robinson*, 68 NY2d 541, 550). First, we conclude that "the People presented clear and convincing evidence that defendant committed the [uncharged murder of her first husband] by using a distinctive and unique modus operandi," i.e., poisoning with antifreeze (*People v Curry*, 82 AD3d 1650, 1650, *lv denied* 17 NY3d 805; *see People v Beam*, 57 NY2d 241, 252-253; *cf. People v Crawford*, 4 AD3d 748, 749, *lv denied* 2 NY3d 797). Second, we conclude that the People presented clear and convincing evidence that defendant was the perpetrator of her first husband's uncharged murder. The People's evidence at trial establishes that defendant had purchased a life insurance policy on the life of her first husband; that the daughter was 12 years old when her father, defendant's first husband, died and thus was unlikely to have committed the fairly sophisticated murder of her father; that defendant had refused to consent to an autopsy of her first husband, who was 38 years old at the time of his death; that the purported suicide note referenced the fact that defendant's first husband also had ingested rat poison, a fact that could be known only by the person who killed him; and that defendant admitted to having rat poison in their home.

Contrary to defendant's further contention, the court properly determined that the evidence of the uncharged murder was inextricably interwoven with the evidence of the charged crimes inasmuch as the uncharged murder was discussed in the purported suicide note and was probative evidence of the motive for the attempted murder of the daughter. In order "[t]o be inextricably interwoven . . . the evidence must be explanatory of the acts done or the words used in the otherwise admissible part of the evidence" (*People v Ventimiglia*, 52 NY2d 350, 361). Here, the People's expert explained that the first draft of the purported suicide note had been written on the family's computer four days after defendant learned that the body of her first husband had been exhumed. Further, the purported suicide note explained why the daughter killed both of defendant's husbands and included numerous references to the uncharged murder. Thus, the

evidence of the uncharged murder provided necessary background information to explain references to that crime in the purported suicide note, was probative of the motive for the attempted murder of defendant's daughter, and placed the timing of the writing of the purported suicide note and attempted murder of the daughter "in context" (*People v Dorm*, 12 NY3d 16, 19; *see People v Carey*, 92 AD3d 1224, 1225, *lv denied* 18 NY3d 992).

Defendant failed to preserve for our review her contention that the court erred in failing to charge the jury that it could consider evidence of the uncharged murder only if it determined that the People proved by clear and convincing evidence that defendant killed her first husband (*see People v Perez*, 89 AD3d 1393, 1394, *lv denied* 18 NY3d 961). In any event, that contention lacks merit inasmuch as the court, rather than the jury, must make the determination whether the People have presented clear and convincing evidence that defendant was the perpetrator of the uncharged crime (*see Robinson*,68 NY2d at 550). We further conclude that the court properly instructed the jury that the evidence of the uncharged murder could be considered only for the limited purpose of determining the identity of the "perpetrator in this case" (*see id.* at 549-550).

We reject defendant's contention that the court erred in refusing to suppress a statement she made to the police on September 14, 2007 at the hospital regarding the substances that the daughter may have ingested. The People correctly concede that defendant's attorney had advised the police on September 12, 2007 that he had been retained by defendant in connection with the investigation of the death of defendant's second husband and that she was not to be questioned concerning that matter. We conclude, however, that the record establishes that the police did not question defendant regarding her second husband's death, nor can it be said that the discussion regarding the daughter's condition would "inevitably elicit incriminating responses" regarding the second husband's death (*People v Cohen*, 90 NY2d 632, 638).

Defendant's contention that the court erred in refusing to suppress items seized from her home on September 14, 2007 because the police had entered her home without her consent while waiting for the search warrant is without merit. We note as a preliminary matter that the purported suicide note was not seized by the police, but instead was in their possession because defendant requested that a police officer take the note from her younger daughter (*see People v Carrier*, 270 AD2d 800, 801, *lv denied* 95 NY2d 864). With respect to the items seized from defendant's home, we conclude that, because the police initially entered the home with defendant's consent in response to the 911 call regarding the daughter, they were entitled to remain there while awaiting the warrant (*see generally People v Lubbe*, 58 AD3d 426, 426, *lv denied* 12 NY3d 818). In any event, the police had probable cause to believe that defendant was responsible for the daughter's condition and were therefore justified in securing the residence to prevent the removal or destruction of evidence (*see People v Osorio*, 34 AD3d 1271, 1272, *lv denied* 8 NY3d 883). The record establishes that no search occurred before the warrant arrived and that the police

entered defendant's home only to read the purported suicide note to the person preparing the search warrant application and to provide water to defendant's dogs (*see People v Pickney*, 90 AD3d 1313, 1316).

We reject defendant's contention that the court erred in permitting a police witness to testify that, when he questioned the daughter at the hospital, she denied that she had attempted to kill herself and denied that she had written a suicide note. We conclude that the daughter's statements were admissible under the excited utterance exception to the hearsay rule because they were made shortly after she became coherent, i.e., "before there [had] been time to contrive and misrepresent" whether she had attempted to kill herself and written the purported suicide note (*People v Johnson*, 1 NY3d 302, 306 [internal quotation marks omitted]). We also reject defendant's contention that the court erred in refusing to permit defendant's friend to testify with respect to a statement made by the daughter to defendant's friend inasmuch as that statement was too ambiguous to be considered a statement against penal interest (*see People v Simmons*, 84 AD3d 1120, 1121, *lv denied* 18 NY3d 928). In any event, the daughter testified at trial, and thus that exception to the hearsay rule is inapplicable (*see People v Ennis*, 11 NY3d 403, 412, *cert denied* ___ US ___, 129 S Ct 2383).

Defendant failed to raise before the court her contention that its rulings on certain evidentiary issues deprived her of the right to present a defense, and she thus failed to preserve that contention for our review (*see People v Haddock*, 79 AD3d 1148, 1149, *lv denied* 16 NY3d 798; *see generally People v Gonzalez*, 54 NY2d 729, 730). In any event, we conclude that defendant's contention is without merit. Defendant also failed to preserve for our review her contention that her right of confrontation was violated by the People's failure to call as witnesses the technicians who performed toxicology tests (*see People v Liner*, 9 NY3d 856, 856-857, *rearg denied* 9 NY3d 941). In any event, that contention also lacks merit. The toxicology analysis performed by the technicians at independent laboratories involved making a "contemporaneous record of objective facts" and the results did not "directly link defendant to the crime[s]," but instead concerned only the substances ingested by the victims (*People v Freycinet*, 11 NY3d 38, 41). Thus, it is not likely that the content of the reports was influenced by a pro-law-enforcement bias (*see id.*). We therefore conclude that the toxicology evidence was not testimonial in nature, and defendant's right of confrontation was not implicated by the People's failure to call as witnesses the technicians who performed the toxicology tests (*see id.* at 42; *People v Meekins*, 10 NY3d 136, 158-160, *cert denied* ___ US ___, 129 S Ct 2856; *cf. People v Rawlins*, 10 NY3d 136, 157-158).

We agree with defendant that the court erred in permitting a police witness to testify in the People's direct case that, during the interview that took place on September 7, 2007, defendant invoked her right to remain silent (*see People v Capers*, 94 AD3d 1475, 1476; *see generally People v Basora*, 75 NY2d 992, 993). We nevertheless conclude that the error is harmless beyond a reasonable doubt inasmuch as there is no reasonable possibility that the error might have

contributed to defendant's conviction (*see Capers*, 94 AD3d at 1476; *see generally People v Crimmins*, 36 NY2d 230, 237).

Defendant made only a general motion for a trial order of dismissal at the close of the People's case and failed in any event to renew her motion to dismiss following the close of her case. She thus failed to preserve for our review her contention that the circumstantial evidence of the attempted murder of the daughter is legally insufficient to support the conviction (*see People v Roman*, 85 AD3d 1630, 1630, *lv denied* 17 NY3d 821). In any event, we conclude that defendant's contention is without merit. The daughter denied that she had intentionally ingested pharmaceutical drugs mixed with alcohol. The daughter testified that, on the afternoon of September 13, 2007, defendant had prepared an alcoholic drink for her that tasted "horrible," and the daughter further testified that she thereafter went to bed because she felt ill. It is undisputed that the daughter did not leave her bedroom until she was taken by medical personnel to the hospital the following morning. Further, the daughter denied that she wrote a suicide note, and the evidence establishes that the drafts of the purported suicide note were written on September 11 and September 12, at times when the daughter was not at home. We therefore conclude that the conviction of attempted murder in the second degree is supported by legally sufficient evidence inasmuch as a rational trier of fact could determine that the elements of that crime were proven beyond a reasonable doubt (*see People v Rossey*, 89 NY2d 970, 971-972; *People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence with respect to the crime of attempted murder in the second degree (*see Bleakley*, 69 NY2d at 495).

We reject defendant's contention that the evidence presented by the People at trial changed the theory of the prosecution because it established that the daughter ingested drugs during the early morning hours of September 14, 2007. The indictment charged that defendant attempted to kill the daughter "on or about" September 13, 2007 "by poisoning her with a lethal combination of pharmaceutical substances that were mixed with an alcoholic beverage." We therefore conclude that defendant received fair notice of the allegations against her and that she was able to prepare a defense (*see People v Dawson*, 79 AD3d 1610, 1611, *lv denied* 16 NY3d 894).

We also reject defendant's contention that she was denied a fair trial by prosecutorial misconduct (*see People v Shaw*, 66 AD3d 1417, 1418, *lv denied* 14 NY3d 773). We have reviewed defendant's remaining contentions in appeal No. 1 and conclude that none requires modification or reversal of the judgment.

Addressing defendant's contentions in appeal No. 2, we agree with defendant that the court erred in summarily denying her CPL article 440 motion. In support of her motion, defendant contended that her indelible right to counsel attached on September 12, 2005, when the police contacted her attorney regarding the investigation of her

second husband's death, and thus that the police were prohibited from questioning her without counsel on September 7, 2007 (*see People v Grice*, 100 NY2d 318, 323; *People v Arthur*, 22 NY2d 325, 329).

As a preliminary matter, we agree with defendant that the court erred in determining that the issue regarding the alleged attachment of defendant's indelible right to counsel could have been raised in the direct appeal. With respect to that issue, the record on the direct appeal establishes that, on September 12, 2005, the police requested that defendant provide her fingerprints as part of the investigation of her second husband's death. When defendant advised the police that she had retained an attorney in connection with her second husband's estate, the police contacted the attorney with respect to their request for defendant's fingerprints. Defendant also spoke with her attorney and thereafter agreed to cooperate with the police. The right to counsel attaches in criminal matters only when the attorney represents the defendant in the criminal matter, and not solely in a civil matter (*see People v Lewie*, 17 NY3d 348, 361), and the record in the direct appeal here does not provide a sufficient basis for determining whether defendant's attorney represented her with respect to the investigation of her second husband's death or only with respect to his estate (*cf. People v Foster*, 72 AD3d 1652, 1653-1654, *lv dismissed* 15 NY3d 750; *People v Arena*, 69 AD3d 867, 868, *lv denied* 14 NY3d 838). We therefore conclude that "the record [on the direct appeal] falls short of establishing conclusively the merit of defendant's claim," and thus that claim was properly raised by way of a motion pursuant to CPL 440.10 (*People v McLean*, 15 NY3d 117, 121).

We conclude that defendant's submissions in support of her motion raise a factual issue whether her indelible right to counsel attached in September 2005, thus requiring a hearing (*see generally People v Frazier*, 87 AD3d 1350, 1351). We therefore reverse the order in appeal No. 2 and remit the matter to County Court to determine defendant's motion following a hearing on that issue (*see generally id.*; *People v Liggins*, 56 AD3d 1265, 1266).

Finally, contrary to defendant's further contention in appeal No. 2, she was not deprived of meaningful representation based upon defense counsel's failure to seek suppression of the September 7, 2007 statement on the additional ground that her indelible right to counsel had attached. That single error does not constitute a sufficiently egregious error in an otherwise competent performance so as to deny defendant a fair trial (*see People v Cummings*, 16 NY3d 784, 785, *cert denied* ___ US___, 132 S Ct 203).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

861

KA 10-01984

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STACEY R. CASTOR, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

BIANCO LAW OFFICE, SYRACUSE (RANDI JUDA BIANCO OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL 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 Onondaga County Court (Joseph E. Fahey, J.), dated August 12, 2010. The order denied the motion of defendant pursuant to CPL 440.10 seeking to vacate the judgment convicting her of murder in the second degree, attempted murder in the second degree and offering a false instrument for filing in the first 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 a hearing on the motion in accordance with the same Memorandum as in *People v Castor* ([appeal No. 1] ___ AD3d ___ [Oct. 5, 2012]).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

865

CA 12-00529

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

ASHLEY FERGUSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROCHESTER CITY SCHOOL DISTRICT,
DEFENDANT-RESPONDENT.

ELLIOTT, STERN & CALABRESE, LLP, ROCHESTER (DAVID S. STERN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CHARLES G. JOHNSON, ROCHESTER (MICHAEL E. DAVIS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), entered June 13, 2011 in a personal injury action. The judgment, upon a jury verdict in favor of defendant, awarded costs.

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs, the posttrial motion is granted, the verdict is set aside, the complaint is reinstated and a new trial is granted.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell on a snow- and ice-covered walkway on school premises owned by defendant. After trial, the jury returned a verdict finding that defendant was not negligent. We agree with plaintiff that Supreme Court erred in denying her posttrial motion to set aside the verdict and for a new trial inasmuch as the verdict is contrary to the weight of the evidence (*see* CPLR 4404 [a]). Although plaintiff appeals from the order denying her posttrial motion and not the subsequently-entered judgment, we nevertheless exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the judgment (*see* CPLR 5520 [c]; *Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988).

With respect to the merits, we conclude that "the evidence so preponderate[d] in favor of the [plaintiff] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [internal quotation marks omitted]; *see Higgins v Armored Motor Serv. of Am., Inc.*, 13 AD3d 1087, 1088). It is well established that "[a] landowner must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and

the burden of avoiding the risk" (*Basso v Miller*, 40 NY2d 233, 241 [internal quotation marks omitted]; *see Witherspoon v Columbia Univ.*, 7 AD3d 702, 702-703). "Once a [landowner] has actual or constructive notice of a dangerous condition, the [landowner] has a reasonable time to undertake remedial actions that are reasonable and appropriate under all of the circumstances" (*Friedman v Gannett Satellite Info. Network*, 302 AD2d 491, 491-492; *see Sartin v Amerada Hess Corp.*, 256 AD2d 857, 857).

Here, as conceded by the dissent, it is undisputed that the compacted snow and ice remaining on the walkway at the time of plaintiff's accident constituted a dangerous condition and that defendant had actual notice of the dangerous condition. Indeed, defendant's head custodian in charge of snow removal repeatedly testified that the walkway at issue, which was regularly used by students and faculty entering and exiting the school, was "very icy" on the morning of the accident. The accident occurred sometime between 7:00 a.m. and 7:30 a.m., when classes began. The head custodian and another custodial employee testified that, prior to that time, they dragged snow from the walkway using the back blade of a tractor and spread salt on the walkway using a snow blower with a salt spreader attachment. Nevertheless, the walkway was still covered in ice and snow and thus was slippery at the time of plaintiff's fall. The head custodian confirmed that, when he responded to the accident site after learning of plaintiff's fall, "ice covered the entire [walkway]" and that he found plaintiff "laying on top of ice." Plaintiff similarly testified that the walkway was "covered with ice and snow" and that she could not see the pavement. Plaintiff described the ice as hard, thick and rough. Plaintiff's mother, who visited the school the day after the accident, described the surface of the snow- and ice-covered walkway as "white and hard". She confirmed that it looked as though the snow had melted and had frozen again, resulting in "hard ice." Plaintiff's mother took photographs of the area where plaintiff fell, which depict compacted snow and ice covering the majority of the walkway with spots of bare pavement showing through and snow piles lining the walkway. Significantly, the head custodian testified that the photographs did not accurately depict the conditions that existed on the date of plaintiff's accident because the photographs showed "dry spots . . . where [he] believe[d] the salt had penetrated," and those dry spots had not been there when plaintiff fell.

We conclude that the trial evidence establishes that defendant's efforts to ameliorate the dangerous condition were not reasonable and appropriate under the circumstances and thus that defendant was negligent (*see generally McGowan v State of New York*, 79 AD3d 984, 985-987; *Chase v OHM, LLC*, 75 AD3d 1031, 1033). Notably, defendant did not contend at trial, nor does it contend on appeal, that there was a storm in progress or that it lacked sufficient time to remedy the dangerous condition of the walkway before plaintiff fell (*see generally Salvanti v Sunset Indus. Park Assoc.*, 27 AD3d 546, 546; *Lyons v Cold Brook Cr. Realty Corp.*, 268 AD2d 659, 659). Rather, defendant contends, in essence, that it fulfilled its duty by plowing and salting on the morning of the accident, that it had no obligation

to remove any of the remaining snow or ice and that, in any event, it was impossible to remove any of the remaining snow or ice. In support of that position, the head custodian testified that defendant had no written procedures or usual practice for removing ice because "that's just part of mother nature" and that the custodial employees "don't remove the ice, [they] just spread the salt." He admitted that the back blade of the tractor is not effective in removing accumulated ice from the walkways and that defendant owned no other tools or machines to be used for that purpose. Thus, where there is a thaw followed by freezing temperatures resulting in hardened snow, defendant's employees simply drag snow from the walkways using the tractor's back blade and then "spread as much salt as possible to get better traction on the surface of the sidewalks leading to and from the school." With respect to the date of the accident, the head custodian testified that it was "very, very cold that morning" and that "*even if [defendant] did throw as much salt as possible [on the walkway]*, it just didn't penetrate the ice[,] . . . [i]t was only . . . good for traction" (emphasis added).

Defendant's contentions that it was "impossible" to remedy the dangerous condition of the walkway and that it took adequate measures to remove the snow and ice were refuted by the undisputed testimony of plaintiff's expert meteorologist and the certified weather records admitted in evidence. Both the meteorologist and the head custodian testified that salt becomes ineffective at around 10 degrees. In the two days prior to the date of the accident, however, area temperatures ranged from a low of 22 degrees to a high of 39 degrees, which the meteorologist testified were "well within the range for salting to be effective in melting snow and ice". The temperature at 7:00 a.m. on the date of the accident was 25 degrees. Additionally, the evidence at trial establishes that defendant allowed the snow and ice to build up on the walkway over several days. Plaintiff's meteorologist testified that there was no sleet or rainfall in the area in the four days preceding the date of the accident and that the only significant snowfall occurred four days prior to the date of the accident, when 2.9 inches fell. That storm occurred on the Saturday before the accident occurred, and the head custodian admitted that defendant undertook no snow removal efforts over that weekend. Plaintiff testified that the condition of the walkway on the Monday and Tuesday prior to her fall was "pretty much the same" as on the Wednesday when the accident occurred, i.e., that the walkway was covered in hard packed snow and ice.

Although defendant and the dissent cite several Third Department cases for the proposition that the failure to remove *all* snow and ice from a surface does not constitute negligence (*see Cardinale v Watervliet Hous. Auth.*, 302 AD2d 666, 666-667; *Gentile v Rotterdam Sq.*, 226 AD2d 973, 974), those cases involve situations where the plaintiff fell on scattered patches or a thin layer of snow or ice (*see Cardinale*, 302 AD2d at 666-667; *Gentile*, 226 AD2d at 974). Here, by contrast, plaintiff fell on a snow- and ice-covered walkway under circumstances in which defendant had ample opportunity to remedy the dangerous condition, and defendant's remedial efforts were plainly insufficient to render the walkway reasonably safe (*see generally*

McGowan, 79 AD3d at 986-987; *Priester v City of New York*, 276 AD2d 766, 766-767).

The dissent contends that the meteorologist's testimony is inconsistent and, at times, directly contradicts the documentary exhibits concerning a lake effect snow band in the greater Rochester area on the morning of plaintiff's accident. We disagree. The meteorologist consistently testified that the Doppler imagery depicted a band of light-to-moderate lake effect snow across the City of Rochester beginning at approximately 5:30 a.m. the morning of the accident; that the snow band lasted approximately 30 to 45 minutes and resulted in a total snow accumulation of less than one inch in the city; and that the heaviest snowfall from the snow band was focused north of route 104, while the school is south of that roadway. Inasmuch as the meteorologist was the only witness qualified to interpret the documentary exhibits relating to the weather conditions on the date of the accident, there is no basis to conclude that his testimony contradicts those exhibits.

Contrary to the further contention of the dissent, the evidence establishes that the icy condition of the walkway did not result from the weather conditions that occurred close in time to the accident. The meteorologist testified without contradiction that the "fluffy," "dry" flurries of lake effect snow that fell in the Rochester area in the hours leading up to the accident could not have caused the compacted snow and ice depicted in plaintiff's photographs and testified to by plaintiff. Rather, the meteorologist testified that the condition of the walkway appeared to have been created by the melting and refreezing of earlier snow accumulation (*see generally Bojovic v Lydig Bejing Kitchen, Inc.*, 91 AD3d 517, 518; *Sheldon v Henderson & Johnson Co., Inc.*, 75 AD3d 1155, 1156; *Ferrer v City of New York*, 49 AD3d 396, 397). Indeed, the head custodian testified that, even though defendant removed snow from and applied salt to the walkway shortly before plaintiff's accident, "large areas of ice" remained due to the accumulation of snow and ice in the days leading up to plaintiff's accident.

Moreover, we note that none of defendant's employees testified at trial that it was snowing at the school on the morning of the accident. Instead, the head custodian testified that he "believe[d]" that there was "heavy rain" on the Monday and Tuesday prior to the accident "because that's the only way that the ice would have frozen up that hard where we [were not] able to remove it, even spreading the salt," and that there was freezing rain on the morning of the accident. Defendant's other custodial employee testified that he "thought" that it had rained the day or week prior to the accident. The meteorologist unequivocally testified, however, that it did not rain in the five days up to and including the day of the accident. According to the meteorologist, there were no official reports of rainfall and the area weather conditions were not conducive to rain. Thus, the testimony of defendant's employees regarding the rainy conditions in the days preceding and on the day of the accident are not credible as a matter of law (*see Dorazio v Delbene*, 37 AD3d 645, 646).

In light of our determination, we do not address plaintiff's contention that reversal is required based on the court's charge to the jury concerning the applicable standard of care.

We therefore reverse the judgment, grant the posttrial motion, set aside the verdict, reinstate the complaint and grant a new trial (*see Canazzi v CSX Transp., Inc.* [appeal No. 2], 61 AD3d 1347, 1348; *Pellegrino v Youll*, 37 AD3d 1064, 1064).

All concur except SCUDDER, P.J., and SMITH, J., who dissent and vote to affirm in the following Memorandum: We respectfully disagree with the majority and conclude that Supreme Court properly denied plaintiff's motion to set aside the verdict pursuant to CPLR 4404 (a). It is well established that "[a] motion to set aside a jury verdict of no cause of action should not be granted unless the preponderance of the evidence in favor of the moving party is so great that the verdict could not have been reached upon any fair interpretation of the evidence" (*Dannick v County of Onondaga*, 191 AD2d 963, 964; *see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746). Here, there was no such preponderance of the evidence in favor of plaintiff.

"In general, to impose liability for an injury proximately caused by a dangerous condition created by weather . . ., a defendant must either have created the dangerous condition, or had actual or constructive notice of the condition, and a reasonable time to undertake remedial actions . . . Once a defendant has actual or constructive notice of a dangerous condition, the defendant has a reasonable time to undertake remedial actions that are reasonable and appropriate under *all* of the circumstances" (*Friedman v Gannett Satellite Info. Network*, 302 AD2d 491, 491-492 [emphasis added]*; see Campanella v 1955 Corp.*, 300 AD2d 427, 427). Where, as here, the dangerous condition consists of ice or snow, the "standard must be applied with an awareness of the realities of the problems caused by winter weather" (*Marcellus v Littauer Hosp. Assn.*, 145 AD2d 680, 681; *see Fusco v Stewart's Ice Cream Co.*, 203 AD2d 667, 668; *see generally Williams v City of New York*, 214 NY 259, 263-264). The reason for such a rule is simple—" 'snow and ice conditions are unpredictable, natural hazards against which no one can insure and which in their nature cannot immediately be alleviated' " (*Hilsman v Sarwil Assoc., L.P.*, 13 AD3d 692, 693). Furthermore, " '[t]he danger arising from the slipperiness of ice or snow . . . is one which is familiar to everybody residing in our climate and which everyone is exposed to who has occasion to traverse the streets of cities and villages in the winter season' " (*Williams*, 214 NY at 264, quoting *Harrington v City of Buffalo*, 121 NY 147, 150). Based on the realities of winter weather, it has become well settled that "the mere failure to remove *all* snow and ice from a sidewalk or parking lot does not constitute negligence" (*Gentile v Rotterdam Sq.*, 226 AD2d 973, 974; *see Wheeler v Grande'Vie Senior Living Community*, 31 AD3d 992, 992-993; *Cardinale v Watervliet Hous. Auth.*, 302 AD2d 666, 667; *Klein v Chase Manhattan Bank*, 290 AD2d 420, 420; *see generally Spicehandler v City of New York*, 279 App Div 755, 756, *affd* 303 NY 946).

Here, there is no dispute that the snow and ice remaining on the walkway on which plaintiff fell constituted a dangerous condition and that defendant had actual notice of that dangerous condition. "The critical issue to be resolved is whether, under the prevailing conditions, [defendant] fulfilled its duty to take appropriate measures to keep the [walkway] safe . . . [I]t is a well-settled tort principle that appropriate measures are those which under the circumstances are reasonable . . . Ascertaining a standard of reasonableness must be undertaken with an awareness of the realities . . . caused by . . . weather" (*Pappo v State of New York*, 233 AD2d 379, 379-380 [internal quotation marks omitted]; *see Goldman v State of New York*, 158 AD2d 845, 845, *appeal dismissed* 76 NY2d 764; *see generally Basso v Miller*, 40 NY2d 233, 241-242). In determining whether defendant's actions were reasonable, the relevant inquiry is whether "it would be unreasonable to expect that the ice and hard-packed snow would have been completely eradicated" by defendant before plaintiff's accident (*Delveccio v State of New York*, 14 Misc 3d 1230[A], 2006 NY Slip Op 52569[U], * 3).

While plaintiff attempted to establish that there was no significant snowfall occurring on the morning of her accident, the majority ignores the fact that defendant presented proof demonstrating that the icy walkway resulted from the weather conditions that occurred close in time to the accident. Plaintiff presented testimony from a meteorologist, who relied heavily on reports from the National Oceanic Atmospheric Administration detailing the weather conditions at the airport, which was located six miles southwest of defendant's property. The meteorologist, however, admitted that the weather in other parts of Monroe County could be "significantly different" from the weather at the airport. Plaintiff's meteorologist had no specific records concerning the snowfall at defendant's property, and documentary exhibits established that, on the morning of plaintiff's accident, there was a band of "lake effect snow" in an area north of the airport that encompassed defendant's property. Moreover, there were several weather-related advisories issued that morning regarding the snow band and alerting travelers of "moderate to heavy snow," "snow-covered, slippery roads," and "hazardous" driving conditions. The majority states that "the snow band was focused north of Route 104 while the school is south of that roadway," but that ignores testimony and documentary exhibits establishing that the heaviest area of snowfall in that snow band "dropped below [Route 104]" into the area one mile south of Route 104, which encompassed defendant's property. We thus conclude that the jury could have discounted plaintiff's evidence concerning the weather conditions inasmuch as the meteorologist's testimony was inherently inconsistent and was, at times, directly contradicted by the documentary exhibits admitted in evidence at the trial and the testimony of other witnesses establishing that there was a significant snow band encompassing the area of defendant's property on the morning of plaintiff's fall.

We further conclude that defendant presented evidence demonstrating that it fulfilled its duty to take appropriate measures to keep the walkway safe. At the time of plaintiff's accident, defendant's employees were using a "proven snow-removal plan . . .

implemented immediately following the inclement weather" (*Goldman*, 158 AD2d at 846; *cf. McGowan v State of New York*, 79 AD3d 984, 986). The testimony at trial established that defendant had "a total of maybe four or five" employees working on maintaining the walkways the morning of plaintiff's accident and that at least two of those employees had been working on removing the snow and salting the walkways for over an hour before plaintiff's fall. Defendant's employees used a tractor and salt spreader but, even after "several trips going back and forth," ice remained on the walkways. Moreover, defendant's head custodian testified that it was not possible to shovel and scrape all of the walkways down to the bare surface and that, even though the area where plaintiff fell had been salted "quite a bit," it remained slippery due to the ice. Taking into consideration the circumstances with which defendant was presented, we conclude that defendant's evidence, at the very least, raised a question of fact whether defendant's "remedial measures were adequate" (*Diaz v West 197th St. Realty Corp.*, 269 AD2d 327, 327; *see Polgar v Syracuse Univ.*, 255 AD2d 780, 780-781).

Although plaintiff presented proof suggesting that defendant's efforts were inadequate, we cannot agree with the majority that the jury verdict resolving those issues of fact in favor of defendant is "palpably irrational or wrong" (*Dannick*, 191 AD2d at 964; *see Stern v Ofori-Okai*, 246 AD2d 807, 808). In our view, the majority "carr[ies] the rule of responsibility beyond all reasonable limits" (*Mead v Nassau Community Coll.*, 126 Misc 2d 823, 824; *see generally Williams*, 214 NY at 263-264).

Inasmuch as we conclude that the court properly denied plaintiff's motion to set aside the verdict, we must address plaintiff's remaining contention that reversal is required based on the court's charge to the jury concerning the applicable standard of care. In our view, plaintiff is precluded from challenging the court's charge. In its initial charge to the jury, the court instructed the jury regarding the standard of care applicable to municipalities. After plaintiff objected to the initial charge, the court admitted its error and gave the jury a curative instruction. The court first re-read the incorrect charge to the jury and then juxtaposed it to the correct charge, which the court then read in full. The court specifically informed the jury that the erroneous charge related to municipalities and that it was not applicable to defendant. Because plaintiff's attorney thereafter expressed his satisfaction with the curative instruction and neither moved for a mistrial nor objected to the curative instruction, plaintiff is "precluded from raising the effect of the curative instruction on appeal" (*Marek v DePoalo & Son Bldg. Masonry*, 240 AD2d 1007, 1009; *see Dennis v Capital Dist. Transp. Auth.*, 274 AD2d 802, 803; *see also MacNamara-Carroll, Inc. v Delaney*, 244 AD2d 817, 818-819, *lv dismissed in part and denied in part* 91 NY2d 1001; *but see Trump v Associated Transp., Inc.*, 275 App Div 982, 982). "While this Court is empowered to grant a new trial in the interest of justice where demonstrated errors in a jury instruction are fundamental . . . here, we find no evidence of error 'so significant that the jury was prevented from

fairly considering the issues at trial' " (*Pyptiuk v Kramer*, 295 AD2d 768, 771; *see Antokol & Coffin v Myers*, 30 AD3d 843, 847). The curative instruction was "given in such explicit terms as to preclude the inference that the jury might have been influenced by the [initial] error" (*Dennis*, 274 AD2d at 803).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

875

CA 11-02341

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

IRONWOOD, L.L.C.,
PLAINTIFF-RESPONDENT-APPELLANT,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

JGB PROPERTIES, LLC,
DEFENDANT-APPELLANT-RESPONDENT.

MICHAEL J. KAWA, SYRACUSE, FOR DEFENDANT-APPELLANT-RESPONDENT.

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

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered February 3, 2011. The order, inter alia, denied the claim of plaintiff Ironwood, L.L.C. for compensatory damages, granted the motion of plaintiff Ironwood, L.L.C. to amend the complaint to assert a claim for punitive damages, and determined that plaintiff Ironwood, L.L.C. is entitled to punitive damages.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiff's claim for compensatory damages and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following Memorandum: Ironwood, L.L.C. (plaintiff) is the successor in interest to an easement granting it a "permanent right of way for a railroad spur track" over property owned by defendant. The spur track connected plaintiff's property with the main railway line. After defendant removed the spur track over plaintiff's objections, plaintiff commenced this action seeking, inter alia, a declaratory judgment, injunctive relief and damages based upon defendant's unlawful interference with the easement. Plaintiff moved for a declaratory judgment and for partial summary judgment finding defendant liable for unlawful interference with plaintiff's use of the easement, and defendant cross-moved to dismiss the complaint. Supreme Court granted plaintiff's motion, declared that plaintiff possessed a permanent right of way for a spur track across defendant's property, enjoined defendant from further interference with plaintiff's use of the easement and ordered that a damages inquest be held. After the damages inquest, the court denied plaintiff's claim for compensatory damages, granted plaintiff's further motion to amend the complaint to

assert a punitive damages claim and determined that plaintiff was entitled to punitive damages. The court deferred its determination of the amount of the punitive damages award until after discovery and a hearing. Defendant appeals and plaintiff cross-appeals.

Addressing first plaintiff's cross appeal, we agree with plaintiff that the court erred in concluding that the diminution in rental value of its property caused by defendant's interference with the easement is the only permissible measure of compensatory damages for that interference and thus that the court erred in denying plaintiff's claim for compensatory damages. An easement is "an incorporeal right which is appurtenant to the ownership of the dominant estate," i.e., plaintiff's property, and "which constitutes a charge upon the servient estate", i.e., defendant's property (*Rahabi v Morrison*, 81 AD2d 434, 437-438). "An easement is more than a personal privilege to use another's land, it is an actual interest in that land" (*Sutera v Go Jokir, Inc.*, 86 F3d 298, 301; *see Rahabi*, 81 AD2d at 438). "In the case of an affirmative easement, the owner of the dominant tenement–the easement holder–acquires or is granted a right to use another person's land in a particular, though limited, way" (*Sutera*, 86 F3d at 302). Therefore, the owner of the servient estate may not "unreasonably interfer[e]" with the rights of the dominant estate owner to use and enjoy the easement (*Green v Mann*, 237 AD2d 566, 567-568; *see Tagle v Jakob*, 97 NY2d 165, 168; *Sutera*, 86 F3d at 302).

It is well settled that the owner of a servient estate may be required to remove obstructions to an easement (*see Pappenheim v Metropolitan El. Ry. Co.*, 128 NY 436, 444; *Green*, 237 AD2d at 568). Conversely, where, as here, the servient estate owner removes or destroys an improvement located within an easement, a court may require the servient estate owner to pay the cost of rebuilding the improvement and restoring the easement to its former condition (*see e.g. Levy v Morgan*, 31 AD3d 857, 858; *cf. Green*, 237 AD2d at 566). Consequently, the court should have awarded plaintiff compensatory damages consisting of the cost of replacing the spur track less what it would have cost plaintiff to restore the track to an operable condition had it not been removed inasmuch as plaintiff was obligated to maintain and repair the track (*see Sutera*, 86 F3d at 302).

Plaintiff's expert testified that it would cost the sum of $149,500 to replace the spur track, and defendant did not offer a competing estimate. The parties, however, offered differing evidence as to the cost of returning the spur track to an operable condition had it not been removed. We therefore modify the order by granting plaintiff's claim for compensatory damages, and we remit the matter to Supreme Court for the purpose of calculating those damages in accordance with the foregoing (*see Guiffrida v Storico Dev., LLC*, 60 AD3d 1286, 1288).

Turning to defendant's appeal, we note that defendant's contention that the court erred in granting plaintiff's motion to amend the complaint to assert a claim for punitive damages is not properly before us inasmuch as it is raised for the first time on

appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In any event, it is well settled that permission to amend pleadings should be "freely given" and that the decision whether to grant leave to amend is committed to the sound discretion of the trial court (CPLR 3025 [b]; *see Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959). We discern no abuse of discretion in this case (*see LaPorta v Wilmorite, Inc.*, 298 AD2d 920, 921).

Defendant further contends that the court erred in concluding that plaintiff is entitled to punitive damages because plaintiff failed to present any evidence that defendant acted with malice in removing the spur track. We reject that contention. "In order to recover punitive damages for trespass on real property, plaintiff[] ha[s] the burden of proving that [defendant] acted with actual malice involving an intentional wrongdoing, or that such conduct amounted to a wanton, willful or reckless disregard of plaintiff[']s] rights" (*Ligo v Gerould*, 244 AD2d 852, 853; *see West v Hogan*, 88 AD3d 1247, 1249-1250, *lv dismissed* 18 NY3d 915). Contrary to the contention of defendant, we conclude that the evidence establishes that defendant acted with actual malice when it removed the spur track and that its conduct rose to the level of a "wanton, willful or reckless disregard of plaintiff[']s] rights" relative to the easement (*Ligo*, 244 AD2d at 853).

Plaintiff's property manager testified that defendant's owner contacted him and asked if defendant could remove the spur track. The property manager told defendant's owner that defendant could not remove the spur track under any circumstances. Thereafter, plaintiff sent defendant a letter reiterating that it held a "permanent easement[]" in the spur track, that it had not "relinquished [its] rights" relative to the easement and that defendant did "not have the right to remove or obstruct" the easement. Plaintiff enclosed with the letter drawings that were filed in the county clerk's office as part of a right-of-way agreement and that clearly depicted the easement. Defendant's owner admitted that he received plaintiff's letter and that he knew of plaintiff's objections to the removal of the spur track. Further, the initial contractor defendant contacted concerning removal of the spur track refused to perform the work because the track serviced plaintiff and other adjoining property owners, and that contractor warned defendant that it should not remove the track. Defendant's owner then approached a friend about removing the spur track. That individual was likewise concerned about the legality of removing the spur track and was initially unwilling to perform the work. The friend ultimately agreed to remove the spur track, but only after defendant provided him with a hold harmless agreement. We thus conclude that the evidence supports the court's determination that plaintiff is entitled to punitive damages in an amount to be determined after a hearing (*see Western N.Y. Land Conservancy, Inc. v Cullen*, 66 AD3d 1461, 1463, *appeal dismissed* 13 NY3d 904, *lv denied* 14 NY3d 705, *rearg denied* 15 NY3d 746).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

879

KA 11-00358

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL L. SCHROCK, DEFENDANT-APPELLANT.

WAGNER & HART, LLP, OLEAN (JANINE C. FODOR OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL L. SCHROCK, DEFENDANT-APPELLANT PRO SE.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, 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 Cattaraugus County Court (Michael L. Nenno, J.), entered January 4, 2011. The order denied the CPL 440.10 motion of defendant.

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

Memorandum: Defendant appeals from an order denying his motion to vacate the judgment of conviction pursuant to CPL 440.10. The judgment had been entered following a jury trial at which defendant was found guilty of having committed numerous felonies, including attempted murder in the first degree and robbery in the first degree. In support of his CPL 440.10 motion, defendant contended that he is entitled to a new trial because he was improperly required to wear a stun belt at trial. Defendant further contended that he is entitled to a new trial because his trial attorney was ineffective for failing to object to the use of the stun belt and for failing "to adequately develop" his insanity defense. According to defendant, in pursuing that defense his trial attorney should have interviewed defendant's fellow inmate, who had provided the attorney with a written statement in which he claimed to have overheard various jail deputies talking about defendant's mental condition. County Court denied the motion following a hearing.

We agree with the court that defendant was not deprived of effective assistance of counsel. As the court properly determined, defense counsel was not ineffective in failing to object to the use of the stun belt inasmuch as the seminal case regarding the use of stun belts, *People v Buchanan* (13 NY3d 1), was not decided until

approximately two years after defendant's trial. We note that defendant wore the stun belt for only one day of trial, during the testimony of the People's rebuttal witness, and he never complained to anyone — including his attorney — about having to wear it. In addition, there is no indication in the record that the stun belt affected defendant's ability to communicate with his attorney. We also reject defendant's claim that defense counsel did not adequately develop his insanity defense by, e.g., failing to interview a fellow inmate, and thus was ineffective. Even assuming, arguendo, that the fellow inmate provided a written statement to defendant's attorney setting forth that he overheard jail deputies discussing defendant's mental condition, we conclude that the fellow inmate possessed only hearsay information and thus could not have been called as a witness at trial. The record also demonstrates that defendant's attorney called numerous witnesses at trial to support the insanity defense, including employees of the jail who observed defendant's behavior while incarcerated.

We now turn to defendant's contention that he was improperly required to wear the stun belt. As the court recognized, the use of the stun belt in this case was improper under *Buchanan* because such use was not approved by the court; in fact, the court was not aware that the Sheriff had outfitted defendant with the stun belt. Nevertheless, the court determined that, although the use of the stun belt was improper, the error was harmless in light of the "totality of the evidence." As we recently held in *People v Barnes* (96 AD3d 1579, 1579-1580), the improper use of a stun belt is not subject to harmless error analysis (*see People v Cruz*, 17 NY3d 941, 945 n).

Although there may be other reasons to justify the denial of defendant's motion, the only issues that we may consider on this appeal are those that "may have adversely affected the appellant" (CPL 470.15 [1]; *see People v Concepcion*, 17 NY3d 192, 194-195; *People v LaFontaine*, 92 NY2d 470, 473-474). Thus, our review is limited to the issues determined by the court in denying the motion, i.e., that defense counsel was not ineffective and that the error in requiring defendant to wear a stun belt is harmless, and for the reasons set forth herein we conclude that the court erred in determining that harmless error analysis is applicable. We therefore hold this case, reserve decision, and remit the matter to County Court to rule upon any other issues raised by the People in opposition to the motion.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

884

CAF 11-01230

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

IN THE MATTER OF REBECCA L. LANG-LOEB,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOHN F. O'NEILL, RESPONDENT-RESPONDENT.

IN THE MATTER OF JOHN F. O'NEILL,
PETITIONER-RESPONDENT,

V

REBECCA L. LANG-LOEB, RESPONDENT-APPELLANT.

RAYMOND W. BULSON, PORTVILLE, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

FERN S. ADELSTEIN, OLEAN, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

CAROLYN KELLOGG JONAS, ATTORNEY FOR THE CHILD, WELLSVILLE, FOR KATHRYN C.O.

Appeal from an order of the Family Court, Allegany County (Lynn L. Hartley, J.H.O.), entered April 1, 2011 in a proceeding pursuant to Family Court Act article 6. The order denied the petition of Rebecca L. Lang-Loeb for permission to relocate with the child to Alabama.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the provision that, if Rebecca L. Lang-Loeb relocates to Alabama, "the Court finds that it would be in the child's best interest that [John F. O'Neill] should be the primary custodian of the child" and as modified the order is affirmed without costs.

Memorandum: Petitioner-respondent mother brought a petition seeking permission to relocate with the parties' daughter to Alabama, where the man to whom she had recently been married resided. Respondent-petitioner father opposed the relocation petition and brought a petition seeking to modify the prior custody order by transferring primary physical custody of the child from the mother to him. Following a fact-finding hearing, Family Court denied both petitions and further ordered that, "should the [mother] relocate to Alabama the Court finds that it would be in the child's best interest

that the [father] should be the primary custodian of the child."

With respect to the relocation petition, we conclude that the court properly considered the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741) in determining that the mother failed to meet her burden of establishing by a preponderance of the evidence that the proposed relocation is in the child's best interests (*see Matter of Webb v Aaron*, 79 AD3d 1761, 1761-1762; *Matter of Murphy v Peace*, 72 AD3d 1626, 1626-1627). We note that the mother's primary reason for moving to Alabama was that she had obtained a job there that paid her approximately $40,000, but by the conclusion of the hearing she no longer had that job. Although the mother's attorney asserted in his written summation that the mother had other good job offers in Alabama, no evidence had been admitted at trial with respect to those jobs. In any event, as the court stated, the mother made no "attempts to obtain employment in New York State since she voluntarily closed her day care center." Indeed, the mother admitted that she did not send out a single resumé or complete any job applications in New York. Even assuming, arguendo, that the mother established a financial need to move to Alabama, we conclude that the other *Tropea* factors militated against granting her relocation petition.

We modify the order, however, by vacating the provision that primary physical custody of the child shall be transferred to the father in the event that the mother relocates to Alabama. That provision, "while possibly never taking effect, impermissibly purports to alter the parties' custodial arrangement automatically upon the happening of a specified future event without taking into account the child's best interests at that time" (*Matter of Brzozowski v Brzozowski*, 30 AD3d 517, 518; *see Matter of Carter v Kratzenberg*, 209 AD2d 990; *Rybicki v Rybicki*, 176 AD2d 867, 871).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

886

CA 11-02482

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

JOSEPHINE CLARE-HOLLO, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HANNES A. HOLLO, DECEASED, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

FINGER LAKES AMBULANCE EMS, INC., DEFENDANT-RESPONDENT, CITY OF GENEVA, DEFENDANT-RESPONDENT-APPELLANT, ET AL., DEFENDANT.

DAVID A. JOHNS, PULTNEYVILLE, FOR PLAINTIFF-APPELLANT-RESPONDENT.

MELVIN & MELVIN, PLLC, SYRACUSE (ELIZABETH GENUNG OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

ORLANDO L. BLANCO, TROY, MICHIGAN, OF THE MICHIGAN AND FLORIDA BARS, ADMITTED PRO HAC VICE, AND OSBORN, REED & BURKE, LLP, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered April 15, 2011 in a wrongful death action. The order struck paragraphs from plaintiff's supplemental bills of particulars.

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

Memorandum: In 1999 plaintiff's son (decedent) suffered a cardiac incident in his apartment in defendant City of Geneva (City). Plaintiff called the 911 service administered by the City, and the City's dispatcher transferred the call to a dispatcher of defendant Finger Lakes Ambulance EMS, Inc. (FLA), who ordered that an ambulance respond to the call. Because the ambulance initially responded to the wrong address, it did not arrive at decedent's apartment until approximately 15 minutes after plaintiff called. Decedent was taken to the hospital, where he subsequently died. Thereafter, plaintiff, individually and as administratrix of decedent's estate, commenced separate wrongful death actions against FLA and against the City and another defendant, arising from their handling of the 911 call and response thereto, and those actions were consolidated. Approximately 10 years after commencing the actions, and after considerable discovery, plaintiff filed supplemental bills of particulars for FLA and the City (hereafter, defendants). Defendants moved to vacate

their respective supplemental bills of particulars on the ground that they contained new theories of liability not previously alleged by plaintiff. Supreme Court granted the motions in part, striking certain paragraphs from each of plaintiff's supplemental bills of particulars. Plaintiff contends on appeal that the court erred in striking those paragraphs, and the City contends on its cross appeal that the court should have granted the full relief sought by the City by vacating the supplemental bill of particulars pertaining to the City in its entirety. We affirm.

With respect to plaintiff's supplemental bill of particulars pertaining to FLA, we agree with plaintiff that FLA, a private corporation, was not entitled to rely on General Municipal Law provisions concerning the notice of claim requirement in General Municipal Law §§ 50-e and 50-i as a basis for relief. Nevertheless, FLA properly established that several allegations in the supplemental bill of particulars should be stricken pursuant to CPLR 3043 (b). That statute has been interpreted to prohibit a party from using a supplemental bill of particulars to add a theory of liability not previously alleged in the complaint or original bill of particulars (*see Jurado v Kalache*, 93 AD3d 759, 760-761; *Jurkowski v Sheehan Mem. Hosp.*, 85 AD3d 1672, 1673-1674; *Dalrymple v Koka*, 295 AD2d 469, 469). The four paragraphs that the court struck from plaintiff's supplemental bill of particulars pertaining to FLA together alleged that FLA's employees acted negligently in their hiding or spoliation of evidence related to the 911 call and FLA's treatment of decedent. Although plaintiff's wrongful death complaint and initial bill of particulars against FLA asserted numerous theories of negligence, none of those theories related to FLA's handling or withholding of evidence. Thus, because the subject paragraphs in plaintiff's supplemental bill of particulars pertaining to FLA asserted new theories of liability in support of plaintiff's wrongful death claim that she had not previously asserted, we conclude that the court acted properly in granting FLA's motion with respect to those paragraphs (*see Jurado*, 93 AD3d at 760-761; *Dalrymple*, 295 AD2d at 469).

With respect to plaintiff's supplemental bill of particulars pertaining to the City, we reject plaintiff's contention that, because the City failed to challenge her notice of claim as deficient, the City may not now contend that allegations in her supplemental bill of particulars exceed the scope of the notice of claim. Because the basis for the City's instant motion was not that the notice of claim was deficient, but instead was that plaintiff was bound by the theories of negligence raised in the notice of claim and was not free to add new theories in her bills of particulars, plaintiff's contention has no bearing on the resolution of the City's motion. For the same reason, we view as irrelevant plaintiff's related contention that her notice of claim was factually sufficient to alert the City to the facts underlying her claim.

Turning to the merits, we conclude that the court properly struck 10 paragraphs of plaintiff's supplemental bill of particulars pertaining to the City. It is well settled that a plaintiff may not use a bill of particulars or supplemental bill of particulars to

assert new theories of liability against a municipal defendant if such theories were not raised in the plaintiff's notice of claim and the plaintiff is time-barred from serving a late notice of claim under General Municipal Law § 50-e (5) (*see Semprini v Village of Southampton*, 48 AD3d 543, 544; *Scott v City of New York*, 40 AD3d 408, 410; *Mahase v Manhattan & Bronx Surface Tr. Operating Auth.*, 3 AD3d 410, 411). Here, plaintiff's notice of claim alleged only that the City's employees may have been negligent, either through their actions or their use of address-identifying equipment and materials, in causing the initial response of the ambulance to the wrong address. The subject paragraphs in plaintiff's supplemental bill of particulars, by contrast, collectively alleged that the City's employees acted negligently in, inter alia, (1) "participating in a cover-up"; (2) failing to properly assess and report via dispatch decedent's medical condition; (3) failing to solicit help from other emergency responders; and (4) "sending [plaintiff] away from the phone to look for the ambulance." Because none of those theories of liability was contained in the notice of claim and a late notice of claim asserting such theories would in any event be time-barred, plaintiff was not entitled to raise them in her supplemental bill of particulars (*see Semprini*, 48 AD3d at 544; *Scott,* 40 AD3d at 410; *Mahase*, 3 AD3d at 411). Furthermore, inasmuch as plaintiff is seeking to assert new substantive theories of liability, she is unable to amend her notice of claim under General Municipal Law § 50-e (6) (*see Semprini*, 48 AD3d at 544; *Scott*, 40 AD3d at 410; *Mahase*, 3 AD3d at 411).

Finally, we reject the City's contention on its cross appeal that the court should have vacated plaintiff's supplemental bill of particulars against the City in its entirety, rather than merely striking certain paragraphs that asserted new theories of liability (*see e.g. DeJesus v New York City Hous. Auth.*, 46 AD3d 474, 475; *Lopez v New York City Hous. Auth.*, 16 AD3d 164, 164-165).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

889

CA 11-02061

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

JESSE LUCAS, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DR. ALAN WEINER, D.D.S., DEFENDANT-RESPONDENT.

FRANK S. FALZONE, BUFFALO, FOR PLAINTIFF-APPELLANT.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (DAVID M. STILLWELL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered July 1, 2011 in a dental malpractice action. 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 dental malpractice action seeking damages for injuries he sustained when defendant was extracting one of his molars. The jury returned a verdict in favor of defendant, finding that he was not negligent. Plaintiff failed to preserve for our review his contention that Supreme Court erred in denying his request to charge the doctrine of res ipsa loquitur inasmuch as he failed to object to the court's charge as given. In fact, when the court asked the parties' attorneys following the charge outside the presence of the jury whether there were any objections to the charge, plaintiff's attorney answered, "No, Your Honor." Although plaintiff asserts that, before the charge was given, his attorney objected to the court's refusal to charge that doctrine during an off-the-record charge conference, that assertion is belied by the record. According to the record before us, the court stated following the charge conference that "there were no exceptions to the Court's proposed charge," and plaintiff's attorney stated, "That's correct, Your Honor." We note that plaintiff's initial request that the court charge the doctrine of res ipsa loquitur does not preserve his present contention for our review; he must also have objected when the court thereafter did not give that charge (*see Kilburn v Acands, Inc.*, 187 AD2d 988, 988-989; *Jones v Brilar Enters.*, 184 AD2d 1077, 1078; *Byrd v Genesee Hosp.*, 110 AD2d 1051, 1052). In any event, we conclude that the court properly refused to charge the doctrine of res ipsa loquitur (*see generally Abrams v Excellent Bus Serv., Inc.*, 91 AD3d 681, 682-683).

Finally, plaintiff's remaining contention that the verdict is against the weight of the evidence is unpreserved for our review (*see Murdoch v Niagara Falls Bridge Commn.*, 81 AD3d 1456, 1457, *lv denied* 17 NY3d 702), and in any event that contention is without merit (*see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

894

CA 12-00491

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

SUE/PERIOR CONCRETE & PAVING, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SENECA GAMING CORPORATION, ET AL., DEFENDANTS,
KEVIN W. SENECA, ET AL., DEFENDANTS-APPELLANTS.

HARTER, SECREST & EMERY, LLP, BUFFALO (JOHN G. HORN OF COUNSEL), AND HOBBS STRAUS DEAN & WALKER, LLP, PORTLAND, OREGON (EDMUND C. GOODMAN, OF THE OREGON AND WASHINGTON BARS, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (GREGORY P. PHOTIADIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered November 21, 2011. The order, insofar as appealed from, denied in part defendants' motion to dismiss.

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

Memorandum: Plaintiff commenced this action against the Seneca Gaming Corporation (SGC), Seneca Niagara Falls Gaming Corporation (SNFGC), and 17 individual defendants, asserting causes of action for tortious interference with contract, tortious interference with prospective business advantage, "concerted action," and prima facie tort. SGC is a corporation formed by the Seneca Nation of Indians (SNI) to carry out the tribe's gambling operations, and SNFGC is a wholly-owned subsidiary of SGC that operates the Seneca Niagara Casino. All but one of the individual defendants are past and present officers and/or directors of SGC and SNFGC; the remaining individual defendant (Rodney Pierce) is a member of the Tribal Council of the SNI and an officer of nonparty Seneca Construction Management Company (SCMC). The gravamen of the complaint is that defendants, acting in concert, interfered with contracts between plaintiff and two SNI-related entities, including SCMC, by directing those entities not to pay plaintiff for work performed under the contracts, and then blacklisted plaintiff from doing any future work on SNI construction projects.

In lieu of answering the complaint, defendants moved to dismiss

the complaint on the ground of sovereign immunity. Supreme Court granted the motion with respect to SGC and SNFGC but denied the motion with respect to the individual defendants. We agree with the individual defendants on this appeal that they too are entitled to sovereign immunity because the complaint fails to allege with sufficient specificity that they acted outside the scope of their authority as officers and/or directors of the tribal corporate entities.

"It is well settled that Indian tribes possess common-law sovereign immunity from suit akin to that enjoyed by other sovereigns . . . Absent an explicit waiver of sovereign immunity, an Indian tribe cannot be sued in either state or federal court . . . , and waivers of immunity are to be strictly construed in favor of the [t]ribe" (*Hunt Constr. Group, Inc. v Oneida Indian Nation*, 53 AD3d 1048, 1049, *lv denied* 11 NY3d 709 [internal quotation marks omitted]; *see Santa Clara Pueblo v Martinez*, 436 US 49, 58-59; *Matter of Ransom v St. Regis Mohawk Educ. & Community Fund*, 86 NY2d 553, 558). Although tribal immunity does not necessarily extend to individual members of the tribe (*see Puyallup Tribe v Department of Game of Wash.*, 433 US 165, 171; *see also Narragansett Indian Tribe v Rhode Island*, 449 F3d 16, 42, *cert denied* 549 US 1053), it does as a rule "extend[] to individual tribal officials acting in their representative capacity and within the scope of their authority" (*Zeth v Johnson*, 309 AD2d 1247, 1248 [internal quotation marks omitted]). "[A] tribal official - even if sued in his 'individual capacity' - is only 'stripped' of tribal immunity when he acts 'manifestly or palpably beyond his authority' " (*Bassett v Mashantucket Pequot Museum & Research Ctr., Inc.*, 221 F Supp 2d 271, 280; *see generally Doe v Phillips*, 81 F3d 1204, 1209-1211).

Here, we conclude that the complaint fails to allege facts sufficient to support a finding that the individual defendants, in their dealings with plaintiff, acted outside the scope of their authority as officials of the SNI and its corporate entities (*see Smith v Oneida Empl. Servs.*, 2009 WL 890614, at *3 [ND NY]; *Frazier v Turning Stone Casino*, 254 F Supp 2d 295, 310, *reconsideration denied* 2005 WL 2033483 [ND NY]). Indeed, the complaint alleges that SGC has "no separate existence from the persons who carry out acts or engage in conduct under the name of this . . . entity," and that SNFGC "purports to be a wholly[-]owned subsidiary of SGC." All of the acts allegedly performed by the individual defendants are linked to their association with the corporate entities and, by extension, to the SNI itself. The complaint does not allege that any of the individual defendants personally profited or benefitted in any manner from their alleged acts of misconduct. Although the complaint alleges that the individual defendants engaged in improper and tortious conduct, it does not necessarily follow that in doing so they acted outside the scope of their tribal authority. To the extent that the complaint alleges that the individual defendants used their "power, influence, positions and political connections" to harm plaintiff, we conclude that such power and influence exists only by virtue of the individual

defendants' positions in, and actions on behalf of, SGC, SNFGC, and SCMC.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

895

CA 12-00611

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

DENNIS VERKEY, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

ROY F. HEBARD, JR. AND ROY W. HEBARD,
DEFENDANTS-APPELLANTS-RESPONDENTS.

HAGELIN KENT, LLC, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

WILLIAM K. MATTAR, P.C., WILLIAMSVILLE (APRIL J. ORLOWSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered July 26, 2011 in a personal injury action. The order denied the motion of defendants for summary judgment on the issue of serious injury, denied that part of plaintiff's cross motion seeking summary judgment on the issue of serious injury and granted that part of plaintiff's cross motion seeking summary judgment on the issue of negligence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiff's cross motion for partial summary judgment in its entirety and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when a vehicle owned by defendant Roy F. Hebard, Jr. and driven by defendant Roy W. Hebard collided with a vehicle driven by plaintiff. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of the three categories of Insurance Law § 5102 (d) alleged in the complaint, as amplified by plaintiff's bill of particulars, i.e., the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories of serious injury. Plaintiff cross-moved for partial summary judgment on liability, i.e., on the issues of negligence and serious injury (*see generally Ruzycki v Baker*, 301 AD2d 48, 51-52).

Addressing first the issue of negligence, we conclude that Supreme Court erred in granting that part of plaintiff's cross motion with respect to that issue. We therefore modify the order accordingly. Although plaintiff met his initial burden by establishing " 'that the sole proximate cause of the accident was

[defendant driver's] failure to yield the right of way' to plaintiff" (*Guadagno v Norward*, 43 AD3d 1432, 1433; *see Kelsey v Degan*, 266 AD2d 843, 843), defendants raised a triable issue of fact by presenting evidence that the collision was head-on and that defendant driver was stopped in his lane of travel at the time of the collision (*see Phillips v Bartholomew*, 20 AD3d 920, 921-922; *see generally S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341). Contrary to plaintiff's contention, the fact that defendant driver entered a plea of guilty to a Vehicle and Traffic Law offense is only some evidence of negligence and does not establish his negligence per se (*see Kelley v Kronenberg* [appeal No. 2], 2 AD3d 1406, 1407; *Canfield v Giles* [appeal No. 1], 182 AD2d 1075, 1075).

The court properly denied both defendants' motion and that part of plaintiff's cross motion for summary judgment on the issue of serious injury. We note at the outset that plaintiff's contention that his injury constitutes a permanent loss of use under Insurance Law § 5102 (d) is not properly before us inasmuch as it is raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

We conclude that there are issues of fact on the record before us with respect to the categories of permanent consequential limitation of use and significant limitation of use, based on the conflicting expert opinions submitted by the parties (*see Cooper v City of Rochester*, 16 AD3d 1117, 1118). Notably, we reject defendants' contention that the affirmed report of their retained physician established that plaintiff's injury was related to a preexisting condition and thus that, as a matter of law, it was not causally related to the instant accident (*see generally Spanos v Fanto*, 63 AD3d 1665, 1666). Here, although plaintiff had a preexisting degenerative disc disease as noted on a CT scan taken on the day of the accident and an MRI taken one month later, that condition was, by all accounts, asymptomatic at the time of the accident. It is well settled that the aggravation of an asymptomatic condition can constitute a serious injury (*see Austin v Rent A Ctr. E., Inc.*, 90 AD3d 1542, 1543; *Terwilliger v Knickerbocker*, 81 AD3d 1350, 1351). Moreover, the existence of an asymptomatic condition predating an accident merely indicates a plaintiff's susceptibility to injury; it does not constitute proof that a plaintiff did not sustain a serious injury in the subject accident (*see Feaster v Boulabat*, 77 AD3d 440, 440-441). We further conclude that both defendants and plaintiff failed to meet their initial burden on the 90/180-day category (*see Hedgecock v Pedro*, 93 AD3d 1143, 1143) and that, in any event, there is a triable issue of fact with respect to that category (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

896

CA 11-01725

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

JASON PALMER AND MANDY PALMER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (ERIC S. BERNHARDT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MAXWELL MURPHY, LLC, BUFFALO (ALAN D. VOOS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered May 9, 2011. The order denied that part of plaintiffs' motion seeking leave to renew and granted that part of plaintiffs' motion seeking partial summary judgment on liability pursuant to Labor Law § 240 (1).

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, plaintiffs' motion insofar as it seeks leave to renew is granted, that part of the underlying motion seeking summary judgment dismissing the Labor Law § 240 (1) claim against defendant is denied, that claim is reinstated and plaintiffs' motion insofar as it seeks partial summary judgment on that claim is denied.

Memorandum: In appeal Nos. 1 and 2, defendant, County of Erie (County), appeals from orders denying those parts of plaintiffs' respective motions for leave to renew as unnecessary and granting those parts of plaintiffs' respective motions for partial summary judgment on liability on the Labor Law § 240 (1) claims. We note at the outset that Supreme Court (Bannister, J.) erred in determining that plaintiffs' motions were unnecessary to the extent that they sought leave to renew. Supreme Court (Makowski, J.) previously had granted those parts of the motions of the County and another defendant for summary judgment dismissing the Labor Law § 240 (1) claims against the County, and plaintiffs neither opposed those parts of the motions nor took an appeal from the orders granting them. Thus, the dismissal of those claims became the law of the case (*see generally Town of Angelica v Smith*, 89 AD3d 1547, 1549-1550).

We conclude, however, that plaintiffs met their burden of

establishing their entitlement to leave to renew their opposition to the prior motions under CPLR 2221 (e) (2) based on a "change in the law that would change the prior determination." We further conclude that, upon renewal, plaintiffs established that summary judgment dismissing the claims under Labor Law § 240 (1) was not appropriate based on the change in the law but that plaintiffs failed to establish their entitlement to partial summary judgment on liability with respect to those claims. Thus, the court (Bannister, J.) erred in granting those parts of plaintiffs' motions seeking that relief because, in our view, there are issues of fact regarding the occurrence of the accident that preclude partial summary judgment on liability under section 240 (1) (*see Charney v LeChase Constr.*, 90 AD3d 1477, 1479).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

897

CA 11-01726

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

SHAWN PALMER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (ERIC S. BERNHARDT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered May 9, 2011. The order denied that part of plaintiff's motion seeking leave to renew and granted that part of plaintiff's motion seeking partial summary judgment on liability pursuant to Labor Law § 240 (1).

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, plaintiff's motion insofar as it seeks leave to renew is granted, that part of the underlying motion seeking summary judgment dismissing the Labor Law § 240 (1) claim against defendant is denied, that claim is reinstated and plaintiff's motion insofar as it seeks partial summary judgment on that claim is denied.

Same Memorandum as in *Palmer v County of Erie* ([appeal No. 1] ___ AD3d ___ [Oct. 5, 2012]).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

898

TP 12-00502

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

IN THE MATTER OF JOVAN FLUDD, PETITIONER,

V ORDER

DALE ARTUS, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, AND BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS & COMMUNITY SUPERVISION, RESPONDENTS.

JOVAN FLUDD, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [M. William Boller, A.J.], dated March 1, 2012) to review a determination of respondents. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

899

KA 10-00387

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE L. CASADO, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN 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 (Daniel J. Doyle, J.), rendered August 3, 2009. The judgment convicted defendant, upon a jury verdict, of attempted aggravated murder of a police officer, attempted aggravated assault upon a police officer and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted aggravated murder of a police officer (Penal Law §§ 110.00, 125.26 [1] [a] [i]; [b]) and attempted aggravated assault upon a police officer (§§ 110.00, 120.11). Defendant contends that his conviction of those two counts should be reversed and those counts should be dismissed as duplicitous because the evidence at trial establishes that there were two separate and distinct shooting incidents. We reject that contention. We note at the outset that defendant is correct that the two shooting incidents constitute distinct criminal acts as opposed to a single, continuing transaction (*see People v Boykins*, 85 AD3d 1554, 1555, *lv denied* 17 NY3d 814; *cf. People v Alonzo*, 16 NY3d 267, 270-271; *People v Kaid*, 43 AD3d 1077, 1079-1080). The first criminal act occurred when defendant fired a shot in the direction of an unmarked police car from the driveway of a residence, and the second criminal act occurred when defendant fired two shots at Officer Ryan Hickey while being pursued by him into the backyard of the residence. Nevertheless, the indictment was not rendered duplicitous on that ground because only the latter act is sufficient to constitute the crimes of attempted aggravated murder of a police officer and attempted aggravated assault upon a police officer as charged in counts one and two of the indictment (*cf. Boykins*, 85 AD3d at 1555).

Count one of the indictment, as amplified by the bill of particulars, alleges in relevant part that, "[o]n or about July 8, 2008, [at] approximately 11:15 PM, at or near 78 Evergreen Street, in the City of Rochester, . . . [defendant], *with intent to cause the death of another person, Officer Ryan Hickey, . . . attempted to cause the death of Officer Hickey by firing shots from a loaded handgun toward him*" (emphasis added). Count two of the indictment, as amplified by the bill of particulars, alleged in relevant part that, "[o]n or about July 8, 2008, [at] approximately 11:15 PM, at or near 78 Evergreen Street, in the City of Rochester, . . . [defendant], *with intent to cause serious physical injury to a person he knew or reasonably should have known to be a police officer engaged in the course of performing his official duties, Officer Ryan Hickey, . . . attempted to cause such injury by means of a deadly weapon*, to wit, a loaded handgun" (emphasis added). Thus, counts one and two required the People to prove that defendant intended to cause death and serious physical injury to Officer Hickey, respectively (*see* Penal Law §§ 120.11, 125.26 [1] [a] [i]). The evidence that defendant fired the first shot in the direction of the unmarked police vehicle, however, does not support the conclusion that defendant intended to kill or seriously injure any particular police officer (*see generally People v Ramos*, 19 NY3d 133, 135). Rather, each of the four officers in that vehicle testified that defendant fired a single shot at the vehicle or in the direction of the officers generally before fleeing. Indeed, the officer who had been driving the vehicle testified that, after he opened the door and put one foot out, "*we* were shot at" (emphasis added). Another officer testified that, while exiting the vehicle, he "observed the defendant raise a revolver and fire one shot at *us*" (emphasis added). Officer Hickey similarly testified that he saw defendant fire "one shot at *us*" (emphasis added). When asked where defendant was aiming, Officer Hickey replied "I can tell you the muzzle flash was pointing in *our direction*. I don't know exactly where he was aiming the gun" (emphasis added).

By contrast, the trial testimony was clear that, after defendant fled up the driveway and Officer Hickey began to pursue him, defendant fired two shots at Officer Hickey. Officer Hickey testified unequivocally that the two shots were directed at him: "He fired two shots *at me.* I could clearly see the muzzle flashes coming in my direction" (emphasis added). He explained: "I was chasing [defendant], and I could see the form of his body turn towards me, at which point he fired at me with the two shots." Officer Hickey's testimony to that effect was corroborated by other witnesses.

In light of the foregoing, we conclude that, while the evidence regarding the first shot fired by defendant may establish a mental state of depraved indifference, recklessness or an intent to kill a police officer, it does not establish that defendant specifically intended to kill or seriously injure Officer Hickey (*see People v Fernandez*, 88 NY2d 777, 780; *People v Cesario*, 157 AD2d 795, 796, *lv denied* 75 NY2d 917; *cf. People v Cabassa*, 79 NY2d 722, 728; *People v Hollenquest*, 309 AD2d 1159, 1159, *lv denied* 3 NY3d 707; *see generally* Penal Law § 15.05 [1], [3]). Thus, inasmuch as the evidence

establishes only a single act of attempted aggravated murder and attempted aggravated assault as against Officer Hickey, i.e., the two shots defendant fired directly at Officer Hickey, we conclude that counts one and two of the indictment were not rendered duplicitous by the trial testimony (*see generally* CPL 200.50 [3] - [7]; *People v Bowen*, 60 AD3d 1319, 1320, *lv denied* 12 NY3d 913).

Defendant further contends that Supreme Court improperly allowed a prosecution witness to testify concerning prior bad acts by defendant, i.e., that, prior to the shootings at issue, defendant possessed a gun inside the residence and was part of a group of men armed with guns who wanted to shoot at another house. With respect to the testimony concerning defendant's alleged prior gun possession, we conclude that such testimony was properly admitted as evidence of a motive for the shooting, i.e., to avoid capture in the presence of presumably illegal firearms and to complete the narrative of events by explaining why the police were summoned to the residence (*see People v Giuca*, 58 AD3d 750, 750, *lv denied* 12 NY3d 915; *People v Clarke*, 5 AD3d 807, 809-810, *lv denied* 2 NY3d 797; *see generally People v Alvino*, 71 NY2d 233, 241-242; *People v Burnell*, 89 AD3d 1118, 1120-1121, *lv denied* 18 NY3d 922). Contrary to the contention of defendant, the potential prejudice of such testimony did not outweigh its probative value (*see Burnell*, 89 AD3d at 1121). Notably, defendant admitted in his statement to the police, which was read into evidence, that he "kn[e]w there were at least three guns in the house" and that, earlier in the day, he "put a loaded black .380 inside on top of the couch." In addition, defendant testified that he fled when the police arrived because he thought that the police were executing a search warrant on the house and he knew that there were guns inside.

With respect to the witness's testimony concerning a group of armed men, we note that the witness testified that she told the police "that there were some guys out[,] they all had guns and they wanted to shoot at [her] friend's house." Contrary to defendant's contention, that testimony does not constitute prior bad act evidence. The witness testified that there were several other men in the house, and her statement does not specifically implicate defendant. Even assuming, arguendo, that her testimony constitutes *Molineux* evidence, we conclude that the testimony was admissible to establish motive and to complete the narrative of events (*see Giuca*, 58 AD3d at 750), and that the prejudicial effect of the statement did not outweigh its probative value (*see generally Alvino*, 71 NY2d at 242). We note in particular that, prior to the challenged testimony, the jury already heard testimony from a police officer elicited by defense counsel that there was a "beef between two possible gangs," that the two groups had exchanged gunfire earlier in the day and that tensions were high on the street. The witness who testified regarding the group of armed men also testified, without objection, that there was "conflict on and off" between two neighborhood groups and that "they were shooting at each other."

In any event, we conclude that any error in the admission of the testimony concerning the prior bad acts is harmless. The evidence of defendant's guilt is overwhelming (*see People v Finger*, 266 AD2d 561,

561, *affd* 95 NY2d 894; *Burnell*, 89 AD3d at 1121; *People v Thomas*, 26 AD3d 241, 242, *lv denied* 6 NY3d 898), and there is no significant probability that the jury would have acquitted defendant if the allegedly improper *Molineux* evidence had been excluded (*see People v Orbaker*, 302 AD2d 977, 978, *lv denied* 100 NY2d 541; *People v Robinson*, 202 AD2d 1044, 1045, *lv denied* 83 NY2d 1006; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Finally, defendant's contention that the court erred in failing to give a limiting instruction at the time the challenged testimony was admitted is unpreserved for our review inasmuch as he did not request a contemporaneous instruction (*see Finger*, 266 AD2d 561, 561; *see also Burnell*, 89 AD3d at 1121; *Thomas*, 26 AD3d at 242). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

901

KA 11-01261

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON L. HAYS, DEFENDANT-APPELLANT.

WALLACE VAN C. AUSER, III, FULTON, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Oswego County Court (Walter W. Hafner, Jr., J.), entered May 16, 2011. The order determined, inter alia, 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, inter alia, 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 denying his request for a downward departure to a level one risk. We reject that contention. Although the court may, in the exercise of its discretion, "depart from the presumptive risk level even if the Board [of Examiners of Sex Offenders] does not recommend such a departure" (*People v Johnson*, 11 NY3d 416, 421), a downward departure is warranted only "where 'there exists . . . [a] mitigating factor of a kind or to a degree, not otherwise adequately taken into account by the guidelines' " (*People v Hamelinck*, 23 AD3d 1060, 1060). Defendant must present "clear and convincing evidence of the existence of special circumstances to warrant a[] . . . downward departure" (*id.* [internal quotation marks omitted]; *see People v Vaughn*, 26 AD3d 776, 777). Contrary to defendant's contention, he has not established that his participation in a sex offender treatment program entitles him to a downward departure. Although "[a]n offender's *response* to [sex offender] treatment, *if exceptional*, can be the basis for a downward departure" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 17 [2006] [emphasis added]), here defendant failed to demonstrate by clear and convincing evidence that he had an *exceptional response* to sex offender treatment.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

903

KA 12-00604

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLARENCE M. JUSTICE, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (MICHAEL S. DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered September 29, 2010. The judgment convicted defendant, upon a jury verdict, of rape in the third degree (two counts) and criminal sexual act in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of rape in the third degree under Penal Law § 130.25 (2) and criminal sexual act in the third degree under Penal Law § 130.40 (2) and dismissing counts one and three of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts each of rape in the third degree (Penal Law § 130.25 [2], [3]) and criminal sexual act in the third degree (§ 130.40 [2], [3]). We reject defendant's contention that the evidence is legally insufficient to support the conviction with respect to the second and fourth counts of the indictment (*see generally People v Bleakley*, 69 NY2d 490, 495). Those counts charge defendant with rape in the third degree and criminal sexual act in the third degree for engaging in vaginal and anal intercourse with the victim without her consent, "where such lack of consent [wa]s by reason of some factor other than incapacity to consent" (§§ 130.25 [3]; 130.40 [3]). The testimony of the victim that defendant had anal and vaginal intercourse with her after she repeatedly told him no, and that "it couldn't happen," is sufficient to establish a prima facie case with respect to those counts (*see generally People v Carroll*, 95 NY2d 375, 383; *People v O'Donnell*, 138 AD2d 896, 896-897, *lv denied* 72 NY2d 864). In addition, the People introduced evidence that sperm was found in the underwear that the victim put on immediately after the sexual conduct and that the DNA in that sperm matched that of defendant. Furthermore, viewing the evidence in light of the elements

of those crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to those counts is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that the evidence is legally insufficient to support the conviction of counts one and three of the indictment, charging him with rape in the third degree and criminal sexual act in the third degree, respectively. In both of those counts, the indictment alleged that the victim was less than 17 years of age and that defendant was older than 21 years of age (*see* Penal Law §§ 130.25 [2]; 130.40 [2]). The only evidence submitted by the People concerning defendant's age, however, was the testimony of a police officer that he learned during the course of his investigation that defendant was born in November 1973 and thus that defendant was 35 years old at the time of the incident. We agree with defendant that Supreme Court erred in overruling his hearsay objection to that testimony. That "out-of-court statement[] [was] offered for the truth of the facts asserted [therein] and do[es] not fall within any recognized exception to the hearsay rule" (*People v Geddes*, 49 AD3d 1255, 1256, *lv denied* 10 NY3d 863; *see generally People v Settles*, 46 NY2d 154, 166-167). Indeed, the People failed to establish that the officer obtained the statement from defendant regarding his date of birth under circumstances demonstrating that the statement was against his penal interest or that the testimony was admissible pursuant to some other exception to the hearsay rule (*cf. People v Griffin*, 48 AD3d 1233, 1236, *lv denied* 10 NY3d 840). Thus, "there is no [admissible] evidence of defendant's age, and the circumstantial evidence relied upon by the People does not establish that defendant was at least 21 years old at the time of the crime" (*People v Castro*, 286 AD2d 989, 990, *lv denied* 97 NY2d 680). We therefore modify the judgment accordingly.

We reject defendant's further contention that the court erred in permitting an expert to testify regarding the child sexual abuse accommodation syndrome (CSAAS). "Defendant complains that the expert's testimony was not adequately constrained because certain of the hypothetical questions too closely mirrored the [victim]'s circumstances and therefore improperly bolstered or vouched for [her] credibility so as to prove that the charged crimes occurred. To the extent defendant now complains of specific questions, his argument is not preserved [for our review] because the [majority of those] questions were not objected to at trial" (*People v Spicola*, 16 NY3d 441, 465-466, *cert denied* ___ US ___, 132 S Ct 400). In any event, the Court of Appeals has " 'long held' evidence of psychological syndromes affecting certain crime victims[, including CSAAS,] to be admissible for the purpose of explaining behavior that might be puzzling to a jury" (*id.* at 465; *see People v Carroll*, 95 NY2d 375, 387). Additionally, contrary to defendant's contention, the court properly provided the jury with the standard Criminal Jury Instructions charge on expert testimony, rather than the expanded limiting instruction requested by defendant (*see People v Gregory*, 78 AD3d 1246, 1247-1248, *lv denied* 16 NY3d 831).

We also reject defendant's contention that the court abused its discretion in permitting the People to introduce evidence in their direct case that defendant engaged in other uncharged sexual conduct with the victim on the day of the incident and that he made veiled threats to her. That evidence was admissible to complete the narrative of the events charged in the indictment and to explain how the victim's fear of defendant may have led to her delay in reporting the incident (*see People v Shofkom*, 63 AD3d 1286, 1287, *lv denied* 13 NY3d 799, *appeal dismissed* 13 NY3d 933; *People v Workman*, 56 AD3d 1155, 1156-1157, *lv denied* 12 NY3d 789*; People v Higgins*, 12 AD3d 775, 777-778, *lv denied* 4 NY3d 764). Consequently, "the evidence in this case was not propensity evidence . . . ; it provided necessary background information on the nature of the relationship and placed the charged conduct in context" (*People v Dorm*, 12 NY3d 16, 19).

Defendant failed to preserve for our review his further contention that the court negated the presumption of innocence by instructing the jurors not to deliberate prior to the conclusion of the trial without also instructing the jury at that time that defendant is presumed innocent. Contrary to defendant's assertion, that contention does not raise a mode of proceedings error, and thus preservation is required. Notably, defendant's challenge is not to the instruction that the court gave, which was proper (*see generally People v Horney*, 112 AD2d 841, 843, *lv denied* 66 NY2d 615); rather, as stated above, his challenge is to the court's failure to provide a presumption of innocence instruction at that time in addition to providing that instruction as part of its final instructions. Defendant, however, failed to preserve that contention for our review "by a timely objection or request to charge" (*People v Bonaparte*, 78 NY2d 26, 31 n), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's contention, the court did not err in permitting a witness to testify that, two days after the incident, the victim reported that she had been the victim of a sexual attack. In defense counsel's opening statement and cross-examination of the victim, he raised the defense that the victim had fabricated the incident to "deflect[] attention from herself" and her drug use. Where, as here, "a 'witness'[s] testimony is assailed—either directly or inferentially—as a recent fabrication, the witness may be rehabilitated' with a prior consistent statement made at a time predating the motive to fabricate" (*People v Rosario*, 17 NY3d 501, 513, quoting *People v McDaniel*, 81 NY2d 10, 18). Here, defendant contended that the victim invented a story of rape after she was caught with drugs, but the witness testified that the victim reported the rape before that time.

The majority of defendant's contentions with respect to alleged instances of prosecutorial misconduct during the summation are not preserved for our review (*see* CPL 470.05 [2]). In any event, even assuming, arguendo, that some of the prosecutor's comments were not a fair response to defense counsel's summation or were not within the " 'broad bounds of rhetorical comment permissible in closing

argument' " (*People v Williams*, 28 AD3d 1059, 1061, *affd* 8 NY3d 854, quoting *People v Galloway*, 54 NY2d 396, 399), we conclude that "they were not so egregious as to deprive defendant of a fair trial" (*People v McEathron*, 86 AD3d 915, 916, *lv denied* 19 NY3d 975; *see People v Rivera*, 281 AD2d 927, 928, *lv denied* 96 NY2d 906; *People v Walker*, 234 AD2d 962, 963, *lv denied* 89 NY2d 1042).

We agree with defendant, however, that the "court erred in admitting testimony concerning defendant's decision not to meet with the police . . . and in allowing the prosecutor to comment on defendant's decision on summation" (*People v Kobza*, 66 AD3d 1387, 1389*, lv denied* 13 NY3d 939*; see generally People v De George*, 73 NY2d 614, 617-618). Nevertheless, we conclude that there is "no reasonable possibility that the error might have contributed to defendant's conviction and thus that the error is harmless beyond a reasonable doubt" (*Kobza*, 66 AD3d at 1389; *see generally People v Crimmins*, 36 NY2d 230, 237).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that none requires reversal or further modification of the judgment.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

904

KA 09-02106

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAN D. GONZALEZ, ALSO KNOWN AS ADAM GONZALES, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM G. PIXLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered September 18, 2008. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, and sexual abuse in the first degree (three 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 one count of rape in the first degree (Penal Law § 130.35 [3]) and three counts of sexual abuse in the first degree (§ 130.65 [3]), defendant contends that he was denied effective assistance of counsel. Specifically, defendant contends that defense counsel failed to demand discovery of recorded jailhouse telephone conversations between defendant and various witnesses that allegedly undercut defendant's alibi defense and thus failed to conduct a proper investigation (*see* CPL 240.20). We reject that contention. Even if defense counsel had sought discovery of those recordings, we conclude that the People would not have been obligated to disclose them, and a defendant is not denied effective assistance of counsel based on defense counsel's failure to seek relief to which defendant is not entitled (*see generally People v Taylor*, 97 AD3d 1139, 1141). CPL 240.20 (1) (g) requires the prosecutor, upon a demand to produce by a defendant, to disclose to the defendant and make available for inspection or copying "[a]ny tapes or other electronic recordings *which the prosecutor intends to introduce at trial*" (emphasis added). Here, the recordings were not offered in evidence; rather, they were used only for impeachment purposes or to refresh the recollection of defendant's witnesses (*see People v Muller*, 72 AD3d 1329, 1335-1336, *lv denied* 15 NY3d 776; *People v Farmer*, 198 AD2d 805, 807, *lv denied* 83 NY2d 804; *see generally* CPL 240.20 [1] [g]). We note in any event

that, once the recordings were used for that purpose, defense counsel appropriately suggested during defendant's direct examination and argued in summation that defendant's recorded conversations could be interpreted as attempts by defendant to refresh the memories of defense witnesses and to prepare them for trial rather than attempts to fabricate an alibi. Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

906

CA 12-00145

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

IN THE MATTER OF EDWARD P. DODGE AND
AMYLYNN M. DODGE, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

DAWN KRUL, TOWN OF WOLCOTT CLERK, DIANNA
BLANKLEY, TAX ASSESSOR, RED CREEK CENTRAL
SCHOOL DISTRICT AND WAYNE COUNTY TREASURER,
RESPONDENTS-RESPONDENTS.

EDWARD P. DODGE, PETITIONER-APPELLANT PRO SE.

AMYLYNN M. DODGE, PETITIONER-APPELLANT PRO SE.

NESBITT & WILLIAMS, NEWARK (ARTHUR B. WILLIAMS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated decision and order) of the Supreme Court, Wayne County (Dennis M. Kehoe, A.J.), dated April 19, 2011 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding challenging a determination made by a hearing officer following a small claims assessment review (SCAR) proceeding (*see* RPTL 730 [1]). Petitioners' property, a 1,166-square-foot residence on Blind Sodus Bay in the Town of Wolcott (Town), was initially assessed by the Town at $185,100, but the assessment was later reduced to $154,600 by the Board of Assessment Review. Still dissatisfied, petitioners sought a further reduction of their assessment in a SCAR proceeding. Following a SCAR hearing, the Hearing Officer reduced the assessment of petitioners' property to $140,000, i.e., the market value of the property as determined by petitioners' appraiser. Petitioners contended for the first time in this CPLR article 78 proceeding that their property should be assessed at $21,000. Supreme Court dismissed the petition, and we affirm.

Where the owner of residential property challenges a hearing officer's determination in a SCAR proceeding, " 'the court's role is limited to ascertaining whether the determination has a rational basis' " (*Matter of Sterben v Board of Assessment Review of Town of*

Amherst, County of Erie, State of N.Y., 41 AD3d 1214, 1215; *see Matter of Garth v Assessors of Town of Perinton*, 87 AD3d 1306, 1306-1307). Here, the Hearing Officer's determination to reduce the assessment of petitioners' property to $140,000 was supported by a rational basis inasmuch as that was the market value of the property as determined by petitioners' own appraiser.

Petitioners contend that the Town assigned their property an erroneous neighborhood classification and that the misclassification affected the assessment of their property. As a preliminary matter, we note that petitioners' contention was not properly raised at the SCAR proceeding, nor is it now properly before us. A SCAR proceeding is governed by RPTL 730 (1), which provides in relevant part that a property owner "claiming to be aggrieved by an assessment on real property *on the ground that such assessment is unequal or excessive* may file a petition for review" (emphasis added). A claim that property is misclassified, however, is not a claim that the assessment is unequal or excessive. Thus, petitioners were not entitled to raise misclassification as a ground for reducing the assessment of their property at the SCAR proceeding.

We conclude in any event that petitioners' contention lacks merit for several reasons. First, contrary to petitioners' contention, the Town did not classify their property as "deep water prime waterfront"; instead, the property was classified as "Blind Sodus Waterfront," as were all of the other properties in the general vicinity of petitioners' property. Second, unlike a zoning classification, the neighborhood classification did not affect the use of petitioners' property. It thus stands to reason that the neighborhood classification, even if erroneous, had no effect on the market value of petitioners' property. Moreover, we note that petitioners' appraiser, when he determined the subject property's market value, was aware that it was not located in a prime waterfront area. Petitioners' appraiser stated in his appraisal report that the "high variability of Blind Sodus water levels" results in "inconsistent access to Lake Ontario" and "impacts recreational use [and] view." Petitioners' appraiser further stated that, due to the marsh-like conditions in the bay, there are "severe weed issues and weed odor[s] at times in the summer." Despite those conditions, petitioners' appraiser determined the market value of the property to be $140,000, which is the same amount arrived at by the Hearing Officer.

We have reviewed petitioners' remaining contentions and conclude that they lack merit.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

907

CA 12-00603

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

CENTRAL CITY ROOFING CO., INC.,
PLAINTIFF-RESPONDENT,

V ORDER

ALTMAR-PARISH-WILLIAMSTOWN CENTRAL SCHOOL
DISTRICT AND BOARD OF EDUCATION OF
ALTMAR-PARISH-WILLIAMSTOWN CENTRAL SCHOOL
DISTRICT, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C., EAST SYRACUSE (CHARLES E. SYMONS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

D'ARRIGO & COTE, LIVERPOOL (ROBERT M. COTE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered June 30, 2011. The order granted the cross motions of plaintiff for leave to serve a late notice of claim and to amend the complaint, and denied as moot the motions of defendants Altmar-Parish-Williamstown Central School District and Board of Education of Altmar-Parish-Williamstown Central School District to dismiss the complaint.

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

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

909

CA 11-02226

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

SUZETTE R. CARLIN, ET AL., PLAINTIFFS,

V MEMORANDUM AND ORDER

RAJNIKANT M. PATEL, M.D., ET AL., DEFENDANTS.

ZAHID M. CHOHAN, M.D., THIRD-PARTY PLAINTIFF-RESPONDENT,

V

RAJNIKANT M. PATEL, M.D. AND MOHAMMAD SARWAR, M.D., THIRD-PARTY DEFENDANTS-APPELLANTS.

BROWN & TARANTINO, LLC, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-APPELLANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (J. MARK GRUBER OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered August 9, 2011 in a medical malpractice action. The order denied the motion of defendants-third-party defendants for summary judgment dismissing the third-party action.

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

Memorandum: Plaintiffs commenced this medical malpractice action (main action), and defendant-third-party plaintiff, Zahid M. Chohan, M.D., asserted cross claims for contribution against defendants-third-party defendants, Rajnikant M. Patel, M.D. and Mohammad Sarwar, M.D., that were converted into a third-party action after the main action was dismissed against Patel and Sarwar. The parties to the third-party action agreed to sever that action from the main action and to conduct the trial therein at a later date. At the conclusion of the trial in the main action, the jury returned a verdict finding Chohan liable to plaintiffs and awarding plaintiffs the sum of $2.4 million in damages. Following the verdict in the main action but before entry of the judgment, Chohan settled with plaintiffs. Thereafter, Patel and Sarwar moved for summary judgment dismissing the third-party action on the ground that Chohan is barred by General Obligations Law

§ 15-108 (c) from seeking contribution from them. We conclude that Supreme Court erred in denying the motion.

General Obligations Law § 15-108 (c) provides that "[a] tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person." Thus, as a general rule, a tortfeasor who settles with an injured party may not seek contribution from any other tortfeasor or potential tortfeasor (*see* § 15-108 [c]; *Gonzales v Armac Indus.*, 81 NY2d 1, 5). That rule, however, does not apply to postjudgment settlements (*see* § 15-108 [d] [3]*; Rock v Reed-Prentice Div. of Package Mach. Co.*, 39 NY2d 34, 41). General Obligations Law § 15-108 (d) (3) provides, in relevant part, that "[a] release . . . between a plaintiff or claimant and a person who is liable or claimed to be liable in tort shall be deemed a release . . . for the purposes of this section only if . . . such release . . . is provided *prior to entry of judgment*" (emphasis added). Thus, a tortfeasor who settles with an injured party after the entry of a judgment retains the right to seek contribution from other tortfeasors (*see Rock*, 39 NY2d at 41; *Makeun v State of New York*, 98 AD2d 583, 589; *see also State of New York v County of Sullivan*, 54 AD2d 29, 33-35 [Koreman, P.J., dissenting], *revd on dissenting op* 43 NY2d 815). Here, it is undisputed that Chohan settled with plaintiffs prior to the entry of the judgment against him, and thus he forfeited his right to seek contribution from Patel and Sarwar according to the plain language of General Obligations Law § 15-108 (*see Lettiere v Martin El. Co.*, 62 AD2d 810, 814, *affd* 48 NY2d 662; *Makeun*, 98 AD2d at 591; *see also Rock*, 39 NY2d at 41). We therefore reverse the order, grant the motion of Patel and Sarwar, and dismiss the third-party action (*see Lettiere*, 62 AD2d at 815).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

911

CA 12-00059

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF THE ARBITRATION BETWEEN
NICHOLAS GIANGUALANO, MARY ANN ALLAN,
RICHARD S. ALLAN, GARY L. ALLAN, KENNETH N.
ALLAN, JEFFREY R. ALLAN AND ELIZABETH E.
CHAIRES, PETITIONERS-RESPONDENTS,

AND MEMORANDUM AND ORDER

JAY B. BIRNBAUM AND ILENE L. FLAUM, AS
CO-TRUSTEES OF TRUST "B" UNDER THE LAST WILL
AND TESTAMENT OF BERNARD B. BIRNBAUM, DECEASED,
RESPONDENTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (KARL S. ESSLER OF COUNSEL), LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO, AND JOSEPH S. MATTINA, WILLIAMSVILLE, FOR RESPONDENTS-APPELLANTS.

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FREID AND KLAWON, WILLIAMSVILLE, AND ATTEA & ATTEA, NORTH BOSTON, FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered December 29, 2011 in a proceeding pursuant to CPLR article 75. The order, inter alia, granted the motion of petitioners to restore the case to Supreme Court's calendar.

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

Memorandum: In this proceeding to compel arbitration pursuant to CPLR article 75, respondents appeal from an order that, inter alia, granted petitioners' motion to restore the case to Supreme Court's calendar. Respondents contend that the court erred in granting the motion because this proceeding, which was commenced in 1993, had been abandoned by petitioners pursuant to CPLR 3404. We reject that contention. CPLR 3404 provides that "[a] case in the supreme court . . . marked 'off' or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned" (*Collins v Elbadawi*, 265 AD2d 850, 851). A case cannot be dismissed as "abandoned" under CPLR 3404, however, unless a note of issue has been filed (*see Lopez v Imperial Delivery Serv.*, 282 AD2d 190, 198, *lv dismissed* 96 NY2d 937), and here it is undisputed that a note of issue has not been filed. In any event, the case was never marked "off" or struck from the calendar, nor was it

unanswered on a clerk's calendar call.

We further reject respondents' contention that the court erred in granting the motion because petitioners failed to establish sufficient grounds for restoring the abandoned proceeding to the calendar. Inasmuch as the proceeding was not abandoned, petitioners were not required to move to restore the proceeding and thus were not required to establish grounds for restoring the case to the calendar (*see generally Collins*, 265 AD2d at 851).

Respondents contend that the court should have dismissed this proceeding due to the pendency of a similar proceeding in Surrogate's Court and that the court, by failing to dismiss the proceeding, opened the door to the granting of improper relief. Those contentions are not properly before us because respondents did not move for dismissal on the ground that another proceeding was pending in Surrogate's Court (*see* CPLR 3211 [a] [4]; 3211 [e]), and there is no indication that petitioners have asked for the relief to which respondents claim petitioners are not entitled (*see Murad v Russo*, 74 AD3d 1823, 1824, *lv dismissed* 16 NY3d 732).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

915

CA 11-01938

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

LYUDMILA V. BLYASHUK AND YEVEGNIY BLYASHUK,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

GURPREET DHALIWAL, M.D., DILARA SAMADI, M.D.,
BUFFALO MEDICAL GROUP, DEFENDANTS-APPELLANTS,
RALPH SPERRAZZA, M.D. AND CATHOLIC HEALTH
SYSTEM, DOING BUSINESS AS SISTERS HOSPITAL OF
BUFFALO, DEFENDANTS.
(APPEAL NO. 1.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ANGELO S. GAMBINO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LOTEMPIO & BROWN, P.C., BUFFALO (MICHAEL H. KOOSHOIAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 28, 2011 in a medical malpractice action. The order, among other things, denied that part of the motion of defendants Gurpreet Dhaliwal, M.D., Dilara Samadi, M.D. and Buffalo Medical Group to strike the errata sheet relating to the deposition testimony of plaintiff Yevegniy Blyashuk.

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

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for the alleged negligence of defendants in their care and treatment of plaintiff Lyudmila V. Blyashuk. In appeal No. 1, Gurpreet Dhaliwal, M.D., Dilara Samadi, M.D. and Buffalo Medical Group (defendants) appeal from an order that, inter alia, denied that part of their motion to strike the errata sheet relating to the deposition testimony of plaintiff Yevegniy Blyashuk, a Russian citizen who does not speak English. In appeal No. 2, defendants appeal from an order that, inter alia, granted that part of plaintiffs' motion to compel defendants to produce documents regarding all laparoscopic surgeries performed by Samadi while he was an employee and shareholder of Buffalo Medical Group, including, but not limited to, operative reports and billing records from 1997 through February 12, 2008, with the names and identifying information of the patients redacted.

With respect to appeal No. 1, we reject defendants' contention

that Supreme Court erred in denying that part of their motion to strike the errata sheet. At this juncture of the litigation, the court properly deferred the determination of the admissibility of the corrected testimony contained in the errata sheet until the time of trial or until raised in a summary judgment motion (*see generally Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 902).

We agree with defendants in appeal No. 2, however, that the court abused its discretion in granting that part of plaintiffs' motion to compel them to disclose all of the documents regarding the laparoscopic surgeries performed by Samadi, including the operative reports and billing records of nonparty patients (*see Grieco v Kaleida Health*, 79 AD3d 1764, 1766; *Brandes v North Shore Univ. Hosp.*, 1 AD3d 551, 552).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

916

CA 11-01939

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

LYUDMILA V. BLYASHUK AND YEVEGNIY BLYASHUK,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

GURPREET DHALIWAL, M.D., DILARA SAMADI, M.D.,
BUFFALO MEDICAL GROUP, DEFENDANTS-APPELLANTS,
RALPH SPERRAZZA, M.D. AND CATHOLIC HEALTH
SYSTEM, DOING BUSINESS AS SISTERS HOSPITAL OF
BUFFALO, DEFENDANTS.
(APPEAL NO. 2.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ANGELO S. GAMBINO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LOTEMPIO & BROWN, P.C., BUFFALO (MICHAEL H. KOOSHOIAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 20, 2011 in a medical malpractice action. The order, insofar as appealed from, granted that part of plaintiffs' motion to compel defendants Gurpreet Dhaliwal, M.D., Dilara Samadi, M.D. and Buffalo Medical Group to produce certain documents regarding laparoscopic surgeries performed by Dilara Samadi, M.D.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and that part of the motion seeking to compel defendants to produce all documents regarding all laparoscopic surgeries performed by defendant Dilara Samadi, M.D. while he was an employee and shareholder of defendant Buffalo Medical Group, including, but not limited to, operative reports and billing records from 1997 through February 12, 2008, with patient names and identifying information redacted, is denied.

Same Memorandum as in *Blyashuk v Dhaliwal* ([appeal No. 1] ___ AD3d ___ [Oct. 5, 2012]).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

917

CA 11-02065

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

THOMAS A. ELDRIDGE, DANIEL L. ELDRIDGE,
DAVID T. ELDRIDGE AND PETER A. ELDRIDGE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

VINCENT P. SHAW AND MARTHA M. SHAW,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

CARL J. DEPALMA, AUBURN, FOR PLAINTIFFS-APPELLANTS.

THE THURSTON LAW OFFICE, P.C., AUBURN (EARLE E. THURSTON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered January 28, 2011. The order, inter alia, granted the motion of defendants to enforce a stipulation of settlement and denied the cross motion of plaintiffs to vacate the stipulation of settlement.

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

Memorandum: Plaintiffs, who own property adjoining defendants' property, commenced this action seeking a determination establishing the location of the common boundary line between those properties. Before the scheduled trial date, the parties entered into an oral stipulation of settlement in open court (stipulation), wherein they agreed that a June 2005 survey map prepared by defendants' surveyor (defendants' survey) established the location of the boundary between their properties. The parties acknowledged that they had reviewed the defendants' survey, and defendants' attorney later prepared a written settlement agreement consistent with the stipulation. Plaintiffs, however, refused to sign the agreement on the ground that the defendants' survey inaccurately depicted the location of the boundary line. In appeal No. 1, plaintiffs appeal from an order that, inter alia, granted defendants' motion to enforce the stipulation and denied plaintiffs' cross motion to vacate the stipulation. In appeal No. 2, plaintiffs appeal from an order denying their motion to settle the record, wherein plaintiffs sought to include the pleadings. We affirm in both appeals.

With respect to appeal No. 1, we conclude that plaintiffs failed

to establish by clear and convincing evidence that a mutual mistake existed at the time the parties entered into the stipulation. "In order to vacate a stipulation of settlement on the ground of mutual mistake, the [movant must] demonstrate, by clear and convincing evidence . . . , that a mutual mistake existed at the time the stipulation was entered into, and that the mistake was so substantial that the stipulation failed to represent a true meeting of the parties' minds" (*Matter of Steger*, 81 AD3d 737, 738; *see Asset Mgt. & Capital Co., Inc. v Nugent*, 85 AD3d 947, 948; *Walker v Walker*, 67 AD3d 1373, 1374-1375). "[M]atters extrinsic to the [stipulation] may not be considered when the intent of the parties can be gleaned from the stipulation itself" (*Myles v Snorac, Inc.*, 298 AD2d 969, 969-970 [internal quotation marks omitted]).

Here, the intent of the parties can be gleaned from the stipulation, wherein they unambiguously agreed that the boundary line between their properties "would be established as the line designated in the [defendants'] survey." The fact that plaintiffs' surveyor found a second iron post on the western boundary of defendants' property approximately four months after the date on which the stipulation was entered does not establish that a mutual mistake existed at the time of the stipulation. The belief of plaintiffs and their surveyor that the defendants' survey may be inaccurate "[is] irrelevant in light of [their] express reference to the [defendants'] survey in the stipulation of settlement. In short, the time to dispute the adequacy of that survey has long since passed" (*French v Quinn*, 243 AD2d 792, 794, *lv dismissed* 91 NY2d 1002). To the extent that plaintiffs contend that the stipulation should be vacated on the ground of fraud, that contention was not advanced before the motion court and thus is unpreserved for our review.

We reject plaintiffs' further contention that the stipulation should be rescinded on the ground that defendants materially breached its terms and conditions by refusing to have their surveyor examine ancient markers allegedly discovered by plaintiffs' surveyor after the parties had entered into the stipulation. "Where, as here, a stipulation is entered into the record pursuant to CPLR 2104, 'courts should construe [the stipulation] as an independent contract subject to settled principles of contractual interpretation' " (*Edgewater Constr. Co., Inc. v 81 & 3 of Watertown, Inc.* [appeal No. 2], 24 AD3d 1229, 1230, quoting *McCoy v Feinman*, 99 NY2d 295, 302). "As a general rule, rescission of a contract is permitted for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual[ ] or technical breach, but . . . only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract" (*WILJEFF, LLC v United Realty Mgt. Corp.*, 82 AD3d 1616, 1617 [internal quotation marks omitted]).

Here, plaintiffs are essentially contending that defendants materially breached the stipulation by refusing to modify it after plaintiffs' surveyor allegedly found ancient markers that establish a location of the boundary different from that shown in the defendants' survey. That contention is untenable for the obvious reason that

defendants' refusal to modify the stipulation does not constitute a breach of the stipulation.

We also reject plaintiffs' contention that the stipulation should be rescinded on the ground that defendants materially breached its terms and conditions by spraying weed killer and creating an earth berm on plaintiffs' property. Even assuming, arguendo, that defendants engaged in those actions, we conclude that those alleged breaches would not provide a basis to rescind the stipulation because they are not "material and willful," nor are they "so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract," i.e., to establish the placement of the boundary line (*WILJEFF, LLC*, 82 AD3d at 1617; *see Links at N. Hills v Baker*, 226 AD2d 279, 279; *Babylon Assoc. v County of Suffolk*, 101 AD2d 207, 215).

In appeal No. 2, although we agree with plaintiffs that the pleadings should have been included in the record on appeal (*see* 22 NYCRR 1000.4 [a] [2]), dismissal of the appeal from the order in appeal No. 1 is not warranted. The absence of the pleadings does not "render[] meaningful appellate review impossible" inasmuch as this appeal concerns the enforceability of the stipulation, not the merits of plaintiffs' causes of action (*Mergl v Mergl*, 19 AD3d 1146, 1147).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

918

CA 12-00082

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

THOMAS A. ELDRIDGE, DANIEL L. ELDRIDGE,
DAVID T. ELDRIDGE AND PETER A. ELDRIDGE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

VINCENT P. SHAW AND MARTHA M. SHAW,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

CARL J. DEPALMA, AUBURN, FOR PLAINTIFFS-APPELLANTS.

THE THURSTON LAW OFFICE, P.C., AUBURN (EARLE E. THURSTON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered January 6, 2012. The order denied the motion of plaintiffs to include the pleadings in the record for an appeal from an order entered January 28, 2011.

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

Same Memorandum as in *Eldridge v Shaw* ([appeal No. 1] ___ AD3d ___ [Oct. 5, 2012]).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

920.1

CAF 12-00316

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

IN THE MATTER OF KERENSA CRUDELE, FORMERLY KNOWN AS KERENSA WELLS, PETITIONER-APPELLANT,

V ORDER

BRIAN WELLS, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY L. TURNER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

MARYBETH D. BARNET, ATTORNEY FOR THE CHILD, CANANDAIGUA, FOR HAYDEN W.

Appeal from an order of the Family Court, Ontario County (Stephen D. Aronson, A.J.), entered October 31, 2011 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking a modification of the custody provisions in the parties' judgment of divorce.

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

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

920.2

CAF 12-00317

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

IN THE MATTER OF KERENSA CRUDELE, FORMERLY
KNOWN AS KERENSA WELLS, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BRIAN WELLS, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY L. TURNER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

MARYBETH D. BARNET, ATTORNEY FOR THE CHILD, CANANDAIGUA, FOR HAYDEN W.

Appeal from an order of the Family Court, Ontario County (Stephen D. Aronson, A.J.), entered November 30, 2011 in a proceeding pursuant to Family Court Act article 6. The order granted the parties' respective motions for leave to reargue with respect to the prior custody order entered October 31, 2011 and, upon reargument, directed inter alia that the parties' child attend school in the Pittsford School District.

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

Memorandum: Petitioner mother commenced this Family Court Act article 6 proceeding seeking a modification of the custody provisions in the parties' judgment of divorce by awarding her sole custody of the parties' child. Respondent father also filed a petition seeking sole custody and later amended that petition to request an order directing the child to attend school in the Pittsford School District. The father thereafter withdrew that part of the amended petition seeking sole custody. By the order in appeal No. 1, Family Court dismissed the mother's petition (prior order) and, in its decision, stated that, had the father not withdrawn his amended petition, it would have determined that the child should attend Pittsford schools. By the order in appeal No. 2, the court granted the parties' respective motions for leave to reargue with respect to the prior order. Upon reargument, the court noted that the father did not intend to withdraw that part of the amended petition seeking a determination regarding where the child should attend school, and thus directed that the child attend Pittsford schools. We note at the

outset that the mother's appeal from the order in appeal No. 1 must be dismissed inasmuch as that order was, in effect, superseded by the order in appeal No. 2 (*see generally Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985).

We reject the mother's contention that she established a change in circumstances warranting an award of sole custody of the child to her. "It is well settled that [a] party seeking a change in an established custody arrangement must show a change in circumstances [that] reflects a real need for change to ensure the best interest[s] of the child" (*Matter of Moore v Moore*, 78 AD3d 1630, 1630, *lv denied* 16 NY3d 704 [internal quotation marks omitted]; *see Matter of Maher v Maher*, 1 AD3d 987, 988-989). Here, although the mother testified that the father was responsible for a complete breakdown in communication between them, she stipulated to the admission in evidence of the report of the court-appointed psychologist, wherein the psychologist opined that the child was doing well under the current custody arrangement and that the issues between the parties were not insurmountable.

We further reject the mother's contention that the court erred in determining that it was in the child's best interests to attend Pittsford schools. It is well established that a trial court's determination of a child's best interests shall be accorded great weight and "will not be disturbed if it has a sound and substantial basis in the record" (*Matter of Deborah E.C. v Shawn K.*, 63 AD3d 1724, 1725, *lv denied* 13 NY3d 710; *see generally Matter of Green v Bontzolakes*, 83 AD3d 1401, 1402, *lv denied* 17 NY3d 703). Although the court appears to have accorded significant weight to New York State Department of Education data on the merits of the Pittsford schools, the court also heard evidence from the parties and an expert witness that provided a sound and substantial basis for the court's determination that the child's best interests would be served by her attending Pittsford schools.

Finally, we have reviewed the mother's remaining contentions and conclude that they lack merit.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

923

KA 09-00393

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MCARTHUR DAVIS, 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 (William D. Walsh, J.), rendered January 6, 2009. The judgment convicted defendant, upon his plea of guilty, of murder in the first degree, murder in the second degree (two counts), and robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of one count each of murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]) and robbery in the first degree (§ 160.15 [1]), and two counts of murder in the second degree (§ 125.25 [1], [3]). Contrary to defendant's contention, the record establishes that his waiver of the right to appeal was knowingly, intelligently and voluntarily entered (*see People v Lopez*, 6 NY3d 248, 256; *People v Aguayo*, 37 AD3d 1081, 1081, *lv denied* 8 NY3d 981; *People v Peterson*, 35 AD3d 1195, 1196, *lv denied* 8 NY3d 926). Although defendant's contention that he was coerced into pleading guilty and thus that the plea was not voluntarily entered survives his waiver of the right to appeal, defendant did not move to withdraw the plea or to vacate the judgment of conviction and therefore failed to preserve that contention for our review (*see People v Harrison*, 4 AD3d 825, 826, *lv denied* 2 NY3d 740; *People v Williams*, 272 AD2d 986, 986). Defendant's plea of guilty forecloses his present challenge to County Court's evidentiary rulings (*see People v Hansen*, 95 NY2d 227, 230-231).

The further contention of defendant that he was denied effective assistance of counsel "does not survive his guilty plea or his waiver of the right to appeal because there was no showing that the plea bargaining process was infected by [the] allegedly ineffective

assistance or that defendant entered the plea because of his attorney[’s] allegedly poor performance” (*People v Dean*, 48 AD3d 1244, 1245, *lv denied* 10 NY3d 839 [internal quotation marks omitted]). In any event, it is well settled that, “[i]n the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel” (*People v Ford*, 86 NY2d 397, 404). We conclude on the record before us that defendant was afforded meaningful representation (*see generally id.*).

Contrary to defendant’s further contention, “there is no evidence in the record indicating an abuse of discretion by the court in denying the motion for substitution of counsel where[, as here, the] defendant failed to proffer specific allegations of a ‘seemingly serious request’ that would require the court to engage in a minimal inquiry” (*People v Porto*, 16 NY3d 93, 100; *see People v Sides*, 75 NY2d 822, 824). Finally, defendant challenges the severity of the sentence. However, his waiver of the right to appeal “ ‘ includes waiver of the right to invoke the Appellate Division’s interest-of-justice jurisdiction to reduce the sentence’ ” (*People v Smith*, 55 AD3d 1409, 1410, *lv denied* 11 NY3d 930, quoting *Lopez*, 6 NY3d at 255).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

924

KA 10-01381

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONNELL LLOYD, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN RUSSO-MCLAUGHLIN 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 (M. William Boller, A.J.), rendered June 24, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends that Supreme Court erred in refusing to suppress evidence seized during the search of his home because the search was unlawful. We reject that contention. The search was initiated and conducted by, inter alia, defendant's parole officer after defendant's GPS ankle bracelet stopped transmitting and defendant failed to observe his required curfew. We conclude that the parole officer's search of defendant's home for defendant, the bracelet, or the GPS transmitter was lawful because it was "rationally and reasonably related to the performance of his duty as a parole officer" (*People v Huntley*, 43 NY2d 175, 179; *see People v Johnson*, 94 AD3d 1529, 1531-1532, *lv denied* 19 NY3d 974; *People v Nappi*, 83 AD3d 1592, 1593-1594, *lv denied* 17 NY3d 820).

Defendant failed to preserve for our review his further contention that he was denied a fair trial by prosecutorial misconduct based on comments made by the prosecutor during his opening and closing statements (*see People v Figgins*, 72 AD3d 1599, 1600, *lv denied* 15 NY3d 893). In any event, we conclude that the two comments that the People do not dispute were improper, as well as the remaining comments to which defendant now objects, were not so egregious as to deny defendant a fair trial (*see People v Dizak*, 93 AD3d 1182, 1184,

lv denied 19 NY3d 972; *People v Jacobson*, 60 AD3d 1326, 1328, *lv denied* 12 NY3d 916).

We reject defendant's further contention that he was deprived of effective assistance of counsel. A review of the record as a whole, including the trial, demonstrates that defendant received meaningful representation (*see generally People v Schulz*, 4 NY3d 521, 530-531; *People v Baldi*, 54 NY2d 137, 147). In addition, although the People correctly concede that the court erred in permitting the prosecutor to introduce at trial a "wanted poster" that depicted defendant and others as the 10 most wanted suspects in the Buffalo area, we conclude that the error is harmless. The proof of defendant's guilt is overwhelming, and "there is no significant probability that defendant would have been acquitted if not for the error" (*People v Batjer*, 77 AD3d 1279, 1281, *lv denied* 17 NY3d 951). Defendant's neighbor testified that he saw defendant shoot the victim twice at close range, another witness heard the shots, the victim implicated defendant as the shooter, ballistics evidence linked the bullets that killed the victim with ammunition seized from defendant's bedroom, and defendant immediately fled the scene, demonstrating consciousness of guilt (*see generally People v Zuhlke*, 67 AD3d 1341, 1341, *lv denied* 14 NY3d 774). Furthermore, we note that the prosecutor did not mention the poster during his summation.

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

929

CA 12-00350

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

RJ TAYLOR GENERAL CONTRACTING, INC.,
PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

FAIRPORT CENTRAL SCHOOL DISTRICT,
DEFENDANT-APPELLANT-RESPONDENT.

LINDENFELD LAW FIRM, P.C., CAZENOVIA (HARRIS LINDENFELD OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

GATES & ADAMS, P.C., ROCHESTER (DANIEL P. ADAMS OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered May 20, 2011. The order denied the motion of plaintiff for partial summary judgment and denied the cross motion of defendant for summary judgment.

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

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

932

CA 12-00084

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

NATIONAL FUEL GAS DISTRIBUTION CORPORATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIE COUNTY WATER AUTHORITY, DEFENDANT-APPELLANT.

BENDER & BENDER, LLP, BUFFALO (THOMAS W. BENDER OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILDER & LINNEBALL, LLP, BUFFALO (LAURA A. LINNEBALL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), entered April 12, 2011. The judgment awarded money damages to plaintiff following a nonjury trial.

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

Memorandum: Plaintiff commenced this action seeking damages resulting from a break in defendant's water main, which caused water to infiltrate plaintiff's nearby gas line. Following a bifurcated nonjury trial on the issue of liability, Supreme Court concluded that defendant was negligent and that it was liable for plaintiff's damages caused by the leak. We affirm. We note at the outset that the interlocutory judgment from which defendant's appeal was taken was subsumed in the final judgment, from which no appeal was taken. Nevertheless, we exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the final judgment (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988; *see also* CPLR 5520 [c]).

Defendant's contention on appeal that its decision whether to replace the subject water main is entitled to governmental immunity is not properly before us. Defendant raised that contention in its pretrial motion for summary judgment dismissing the amended complaint, and defendant's appeal from the order denying that motion was dismissed by this Court based on defendant's failure to perfect the appeal in a timely manner. "[A] prior dismissal for want of prosecution acts as a bar to a subsequent appeal as to all questions that were presented on the earlier appeal" (*Bray v Cox*, 38 NY2d 350, 353; *see Dickerson v Woodbridge Constr. Group*, 274 AD2d 945, 945-946), and we decline to review defendant's contention in the exercise of our

discretion (*see Faricelli v TSS Seedman's*, 94 NY2d 772, 774).

Viewing the evidence in the light most favorable to sustain the judgment rendered following this nonjury trial (*see Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170), we conclude that there is a fair interpretation of the evidence supporting the court's determination that defendant was negligent (*see generally id.*). The evidence established that, within the approximately nine years preceding the break at issue, there had been four breaks in the water main in proximity to the subject break. Three of those prior breaks were the same type of break as the one that occurred here. In addition, plaintiff's expert testified that defendant should have replaced at least a portion of the water main after the previous breaks occurred and, contrary to defendant's contention, the court did not err in crediting the testimony of that expert (*see generally Cotton v Beames*, 74 AD3d 1620, 1621-1622). Thus, the court's determination that defendant had notice of a dangerous condition and that it failed to make reasonable efforts to inspect the water main and repair the dangerous condition is supported by a fair interpretation of the evidence (*see generally De Witt Props. v City of New York*, 44 NY2d 417, 424-425).

Contrary to the further contention of defendant, the court properly determined based on the evidence before it that defendant's negligence was the proximate cause of plaintiff's damages. Although two holes were discovered in plaintiff's gas line, plaintiff's leakage surveys indicated that the holes did not affect the functioning of the line, and defendant's distribution engineer testified that he was aware of prior incidents in which water from broken water mains had infiltrated nearby gas lines. The evidence thus supports the court's determination that " 'under all the circumstances the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the [defendant's] negligence' " (*Sheffer v Critoph*, 13 AD3d 1185, 1186-1187).

In light of our determination, we see no need to address defendant's remaining contentions.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

933

CA 12-00481

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

IN THE MATTER OF THE APPLICATION OF
STEVEN I. GOLDSTEIN, AS PRESIDENT AND
CHIEF EXECUTIVE OFFICER OF HIGHLAND
HOSPITAL, PETITIONER-APPELLANT,
FOR THE APPOINTMENT OF A GUARDIAN FOR MEMORANDUM AND ORDER
JEAN C., AN ALLEGED INCAPACITATED PERSON,
RESPONDENT-RESPONDENT.

SUSAN SEPANIAK, RESPONDENT.

DUTCHER & ZATKOWSKY, ROCHESTER (MILES P. ZATKOWSKY OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (William P. Polito, J.), entered May 13, 2011 in a proceeding pursuant to Mental Hygiene Law article 81. The order and judgment, insofar as appealed from, limited the authority of the appointed guardian to make end of life decisions.

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

Memorandum: Petitioner, a hospital administrator, commenced this proceeding pursuant to Mental Hygiene Law article 81 seeking a determination that respondent, Jean C., is an incapacitated person and seeking the appointment of a guardian for her person and property. Supreme Court granted the petition and appointed respondent's stepdaughter as guardian. The court included a provision in the order and judgment limiting the guardian's authority to make end of life decisions with respect to the withholding or withdrawal of artificial administration of nutrition or hydration. On appeal, petitioner contends that the limitation on the guardian's health care decision-making authority violated the Family Health Care Decisions Act (Public Health Law art 29-CC). Neither the guardian nor respondent appeal. We conclude that the appeal must be dismissed because petitioner is not aggrieved by the order and judgment (*see Gordon v LIN TV Corp.*, 89 AD3d 1459).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

938

CA 11-02092

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

DANIEL WILLIAMS AND EDWARD WILLIAMS,
PLAINTIFFS-APPELLANTS,

V OPINION AND ORDER

BEEMILLER, INC., DOING BUSINESS AS HI-POINT,
CHARLES BROWN, MKS SUPPLY, INC.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS,
AND THE UNITED STATES, RESPONDENT.
(APPEAL NO. 1.)

CONNORS & VILARDO, LLP, BUFFALO, AND BRADY CENTER TO PREVENT GUN VIOLENCE, WASHINGTON, D.C. (JONATHAN E. LOWY, OF THE WASHINGTON, D.C. BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

RENZULLI LAW FIRM, LLP, WHITE PLAINS (SCOTT C. ALLAN OF COUNSEL), FOR DEFENDANT-RESPONDENT BEEMILLER, INC., DOING BUSINESS AS HI-POINT.

SCOTT L. BRAUM & ASSOCIATES, LTD., DAYTON, OHIO (SCOTT L. BRAUM, OF THE OHIO BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND DAMON MOREY LLP, BUFFALO, FOR DEFENDANT-RESPONDENT CHARLES BROWN.

PISCIOTTI, MALSCH & BUCKLEY, P.C., WHITE PLAINS (JEFFREY M. MALSCH OF COUNSEL), FOR DEFENDANT-RESPONDENT MKS SUPPLY, INC.

WILLIAM J. HOCHUL, JR., UNITED STATES ATTORNEY, WASHINGTON, D.C. (BENJAMIN S. KINGSLEY OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered May 18, 2011. The order granted the motions of defendants Beemiller, Inc., doing business as Hi-Point, Charles Brown and MKS Supply, Inc. to dismiss the first amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motions are denied, and the first amended complaint is reinstated against defendants Beemiller, Inc., doing business as Hi-Point, Charles Brown and MKS Supply, Inc.

Opinion by PERADOTTO, J.: Plaintiffs commenced this action seeking damages for injuries sustained by Daniel Williams (plaintiff) in an August 2003 shooting in the City of Buffalo. Plaintiff, a high school student, was shot in the abdomen by defendant Cornell Caldwell,

who apparently misidentified plaintiff as a rival gang member. The gun used to shoot plaintiff was identified as a Hi-Point 9mm semi-automatic pistol manufactured by defendant Beemiller, Inc., doing business as Hi-Point (Beemiller), an Ohio corporation and a federally licensed firearms manufacturer. Beemiller sold the gun to defendant MKS Supply, Inc. (MKS), an Ohio corporation and a federally licensed wholesale distributor of firearms. MKS then sold the gun to defendant Charles Brown, a federal firearms licensee in Ohio. In October 2000, Brown sold 87 handguns, including the gun at issue, to defendants Kimberly Upshaw and James Nigel Bostic at a gun show in Ohio. Plaintiffs allege that Bostic, a Buffalo resident, was engaged in a trafficking scheme whereby he traveled to Ohio, a state with comparatively less stringent gun control laws than New York, and used "straw purchasers" to obtain large numbers of handguns. Bostic then supplied those guns, including the gun used to shoot plaintiff, to the criminal market in New York.

In the first amended complaint (hereafter, complaint), plaintiffs allege, inter alia, that Beemiller, MKS, and Brown (collectively, defendants) "negligently distributed and sold the Hi-Point handgun in a manner that caused it to be obtained by Caldwell, an illegal and malicious gun user and possessor, and then to be used to shoot [plaintiff]." According to plaintiffs, Beemiller and MKS intentionally supplied handguns to irresponsible dealers, including Brown, because they profited from sales to the criminal gun market. Brown, in turn, sold numerous handguns, including the subject gun, to Bostic and Upshaw, even though he knew or should have known that they "intended to sell these multiple guns on the criminal handgun market, to supply prohibited persons and criminals such as Caldwell with handguns." The complaint contains six causes of action. The first five causes of action allege that defendants (1) negligently distributed and sold the gun at issue to individuals they knew or should have known were in the business of illegally distributing handguns; (2) negligently entrusted the gun to individuals they knew or should have known would create an unreasonable risk of physical injury to others; (3) committed negligence per se by violating various federal and state gun laws; (4) created a public nuisance by distributing a large number of guns into the illegal gun market and selling them to that market; and (5) intentionally violated federal, state, and local legislative enactments. The sixth cause of action is derivative in nature.

In lieu of answering the complaint, defendants each moved to dismiss the complaint pursuant to the Protection of Lawful Commerce in Arms Act (PLCAA or Act) (15 USC §§ 7901-7903, as added by Pub L 109-92, 119 US Stat 2095). Plaintiffs opposed the motions, contending, inter alia, that the PLCAA was inapplicable or, in the alternative, that the statute was unconstitutional. In appeal No. 1, plaintiffs appeal from an order granting defendants' motions and dismissing the complaint against them. In appeal No. 2, plaintiffs appeal from an order denying their motion for leave to renew and reargue their opposition to defendants' motions to dismiss.

I

We conclude at the outset with respect to appeal No. 2 that the appeal from the order therein must be dismissed. In support of that part of the motion seeking leave to renew, plaintiffs failed to offer new facts that were unavailable at the time of their prior motion (*see Hill v Milan*, 89 AD3d 1458, 1458). Thus, plaintiffs' motion was actually only one seeking leave to reargue, and no appeal lies from an order denying a motion for leave to reargue (*see id.*; *Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

II

With respect to appeal No. 1, we agree with plaintiffs that Supreme Court erred in dismissing the complaint pursuant to the PLCAA. The PLCAA, which went into effect on October 26, 2005, generally shields manufacturers and sellers of firearms from liability for harm caused by the criminal or unlawful misuse of their non-defective products, i.e., products that functioned as designed and intended (*see* 15 USC §§ 7901 [b] [1]; 7903 [5] [A]; *Ileto v Glock, Inc.*, 565 F3d 1126, 1129, *cert denied* ___ US ___, 130 S Ct 3320). To that end, the Act prohibits the institution of a "qualified civil liability action" in any state or federal court (§ 7902 [a]), and mandates that any such action pending on the effective date of the PLCAA "shall be immediately dismissed" (§ 7902 [b]; *see Ileto*, 421 F Supp 2d 1274, 1284, *affd* 565 F3d 1126, *cert denied* ___ US ___, 130 S Ct 3320; *City of New York v Beretta U.S.A. Corp.*, 524 F3d 384, 389, *cert denied* ___ US ___, 129 S Ct 1579; *Estate of Charlot v Bushmaster Firearms, Inc.*, 628 F Supp 2d 174, 180). A "qualified civil liability action" is defined, in relevant part, as "a civil action . . . brought by any person against a manufacturer or seller of a qualified product . . . for damages . . . or other relief[] resulting from the criminal or unlawful misuse of a qualified product by the person or a third party" (§ 7903 [5] [A]). A "qualified product" includes "a firearm . . . shipped or transported in interstate or foreign commerce" (§ 7903 [4]).

Here, it is undisputed that this matter falls within the PLCAA's general definition of a "qualified civil liability action" (15 USC § 7903 [5] [A]). The present suit is a "civil action" brought by a "person" (plaintiffs) against a "manufacturer" (Beemiller) or "seller" (MKS/Brown) of a "qualified product" (the handgun) seeking "damages . . . or other relief" resulting from the "criminal . . . misuse of [the handgun] by . . . a third party" (Caldwell) (*id.*; *see Ileto*, 565 F3d at 1131-1132; *Ryan v Hughes-Ortiz*, 81 Mass App Ct 90, 98, 959 NE2d 1000, 1007). The question thus becomes whether any of the statute's six exceptions to the definition of "qualified civil liability action" apply to this action (*see* § 7903 [5] [A] [i] - [vi]; *Ileto*, 421 F Supp 2d at 1283-1284; *Ryan*, 81 Mass App Ct at 98, 959 NE2d at 1007).

Of particular relevance here, a "qualified civil liability action" does not include "an action in which a manufacturer or seller of a qualified product *knowingly violated a State or Federal statute applicable to the sale or marketing of the product*, and the violation

was a proximate cause of the harm for which relief is sought" (15 USC § 7903 [5] [A] [iii] [emphasis added]). That exception is often referred to as the " 'predicate exception,' because a plaintiff not only must present a cognizable claim, [but] he or she also must allege a knowing violation of a 'predicate statute,' " i.e., a state or federal statute applicable to the sale or marketing of firearms (*Ileto*, 565 F3d at 1132; *see District of Columbia v Beretta U.S.A. Corp.*, 940 A2d 163, 168, *cert denied* ___ US ___, 129 S Ct 1579; *Smith & Wesson Corp. v City of Gary*, 875 NE2d 422, 429-430 [Ind]). The PLCAA also contains an exception for claims against a seller of firearms for negligent entrustment or negligence per se (§ 7903 [5] [A] [ii]; *see Ileto*, 565 F3d at 1136 n 6).

It is well established that, "[w]hen reviewing 'a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory' " (*10 Ellicott Sq. Ct. Corp. v Violet Realty, Inc.*, 81 AD3d 1366, 1367, *lv denied* 17 NY3d 704, quoting *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414; *see Leon v Martinez*, 84 NY2d 83, 87-88). Applying that standard, we agree with plaintiffs that the court erred in dismissing the complaint inasmuch as they sufficiently alleged that defendants knowingly violated various federal and state statutes applicable to the sale or marketing of firearms within the meaning of the PLCAA's predicate exception (*see* 15 USC § 7903 [5] [A] [iii]; *City of New York v A-1 Jewelry & Pawn, Inc.*, 247 FRD 296, 351).

The complaint alleges, inter alia, that defendants "violated federal, state, and local statutes, regulations, and ordinances by engaging in illegal gun trafficking and illegally selling the Hi-Point handgun." With respect to Brown specifically, the complaint alleges that he "violated federal, state, and local statutes, regulations, and ordinances[] by selling firearms with a federal firearms license registered to his home address, by selling firearms with a federal firearms license solely at gun shows, and by selling firearms to Upshaw, who was purchasing firearms on Bostic's behalf, when Brown knew or had reasonable cause to believe that Bostic was ineligible to purchase a weapon." Initially, we reject defendants' contention that the complaint was properly dismissed because plaintiffs failed to identify the federal statutes that defendants allegedly violated. Defendants rely on cases involving the specific pleading requirements imposed in actions pursuant to General Municipal Law § 205-e (*see Mackay v Misrok*, 215 AD2d 734, 735; *Maisch v City of New York*, 181 AD2d 467, 469). Defendants, however, cite no cases applying that rule outside the General Municipal Law context and, indeed, in *Cole v O'Tooles of Utica* (222 AD2d 88, 91), we stated that the cases arising under the General Municipal Law "do not stand for the general proposition . . . that a plaintiff must always specify a statute in order to state a statutory cause of action." In any event, even assuming, arguendo, that the complaint lacks the requisite specificity, we note that defendants' remedy for that alleged defect

is to serve a demand for a bill of particulars, not to move for dismissal of the complaint (*see generally* CPLR 3041, 3043; *Sacks v Town of Thompson*, 33 AD2d 627, 628).

We conclude that, although the complaint does not specify the statutes allegedly violated, it sufficiently alleges facts supporting a finding that defendants knowingly violated federal gun laws. For example, the Gun Control Act of 1968 (18 USC § 921 *et seq.*) requires licensed firearms dealers to keep records containing information about the identity of individuals who purchase firearms (*see* § 923 [g]; *United States v Nelson*, 221 F3d 1206, 1209, *cert denied* 531 US 951). At a minimum, the records must contain "the name, age, and place of residence" of any person who purchases a firearm from a licensed dealer (§ 922 [b] [5]; *see Nelson*, 221 F3d at 1209). Further, "the information required [by 18 USC § 922] is information about the identity of the *actual buyer*, who supplies the money and intends to possess the firearm, as opposed to that individual's 'straw [purchaser]' or agent" (*Nelson*, 221 F3d at 1209 [emphasis added]). To that end, Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) Form 4473, which must be completed when a licensed dealer transfers a firearm to anyone other than another licensee (*see* 27 CFR § 478.124 [a]; *United States v Carney*, 387 F3d 436, 442 n 3), specifically asks the purchaser whether he or she is "the actual transferee/buyer of the firearm(s) listed on th[e] form" (www.atf.gov/forms/download/atf-f-4473-1.pdf; *see Nelson*, 221 F3d at 1208-1209). "A dealer violates the [Gun Control Act] if the dealer transfers a firearm based upon information in ATF Form 4473 that he [or she] knows or has reason to believe is false" (*Shawano Gun & Loan, LLC v Hughes*, 650 F3d 1070, 1073; *see* 18 USC § 922 [m]). Further, a licensed dealer may be criminally liable for aiding and abetting a gun purchaser's making of false statements or representations in the dealer's firearms transfer records (*see Carney*, 387 F3d at 441, 445-446; *see generally* § 2 [a]).

Here, plaintiffs allege that Upshaw engaged in illegal straw purchases on behalf of Bostic with the knowledge and assistance of Brown, a federally licensed firearms dealer. Specifically, plaintiffs allege that, on at least four different occasions, Brown sold guns to Bostic, a "convicted felon" who was prohibited from purchasing firearms (*see* 18 USC § 922 [d] [1]), via straw purchases to Upshaw. According to plaintiffs, Bostic selected and paid for the handguns while Upshaw filled out the required paperwork as the purchaser of record, circumstances that are suggestive of a prohibited straw purchase (*see Carney*, 387 F3d at 442; *Nelson*, 221 F3d at 1208). Brown allegedly sold at least 140 handguns to Bostic and/or Upshaw in this manner. In October 2000, Brown allegedly sold Bostic and/or Upshaw 87 handguns, including the gun used to shoot plaintiff, at a gun show in Ohio. According to plaintiffs, Brown knew or should have known that Upshaw and/or Bostic were purchasing the 87 handguns for trafficking in the criminal market rather than for their personal use because (1) they had purchased multiple guns on prior occasions; (2) they paid for the guns in cash; and (3) they selected Hi-Point 9mm handguns, which are "disproportionately used in crime" and have "no collector value or interest."

With respect to Beemiller and MKS, we conclude that the complaint sufficiently alleges that those entities were accomplices to Brown's statutory violations (*see generally Carney*, 387 F3d at 446-447). Plaintiffs allege that Beemiller and MKS supplied handguns to Brown even though they knew or should have known that he was distributing those guns to unlawful purchasers for trafficking into the criminal market. In support thereof, plaintiffs allege, inter alia, that from 1988 through 2000, ATF notified Beemiller and MKS that over 13,000 guns they sold had been used in crimes. Notably, MKS is allegedly the "sole marketer and distributor of Hi-Point firearms," and Brown, who is now the president of MKS, was a high-level officer during the relevant time period.

III

In light of our conclusion that this action falls within the PLCAA's predicate exception and therefore is not precluded by the Act (15 USC § 7903 [5] [A] [iii]; *see A-1 Jewelry & Pawn, Inc.*, 247 FRD at 351; *Smith & Wesson Corp.*, 875 NE2d at 434), we need not address plaintiffs' further contention that this action falls within the PLCAA's negligent entrustment or negligence per se exception (*see* § 7903 [5] [A] [ii]; *Smith & Wesson Corp.*, 875 NE2d at 434-435).

IV

We further agree with plaintiffs that the court erred in dismissing the action against Brown for lack of personal jurisdiction inasmuch as they are entitled to discovery on that issue. As the parties seeking to assert personal jurisdiction, plaintiffs bear the burden of proof on that issue (*see Castillo v Star Leasing Co.*, 69 AD3d 551, 551-552). "However, in opposing a motion to dismiss pursuant to CPLR 3211 (a) (8) on the ground that discovery on the issue of personal jurisdiction is necessary, plaintiffs need not make a prima facie showing of jurisdiction, but instead must only set forth[] a sufficient start, and show[ ] their position not to be frivolous" (*Lettieri v Cushing*, 80 AD3d 574, 575 [internal quotation marks omitted]; *see Peterson v Spartan Indus.*, 33 NY2d 463, 467; *Gold Bullion Intl. v General Mills*, 53 AD2d 1045, 1045). Thus, "plaintiff[s] need only demonstrate that facts *may exist* to exercise personal jurisdiction over the defendant[]" (*Tucker v Sanders*, 75 AD3d 1096, 1096 [emphasis added; internal quotation marks omitted]; *see Peterson*, 33 NY2d at 467).

CPLR 302 (a) (3) provides, in relevant part, that a court may exercise personal jurisdiction over a non-domiciliary who "commits a tortious act without the state causing injury to person or property within the state . . . if he [or she] . . . derives substantial revenue from goods used or consumed . . . in the state, or . . . expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." Here, there is no question that the complaint sufficiently alleges that Brown committed a tortious act outside New York that caused injury to a person inside New York (*see*

id.; *see generally Penguin Group [USA] Inc. v American Buddha*, 16 NY3d 295, 302). Specifically, plaintiffs allege that Brown unlawfully sold the subject gun in Ohio and that the gun was later used to shoot and injure plaintiff in New York.

We further conclude that the complaint sufficiently alleges that Brown expected or reasonably should have expected that his sale of guns to Bostic's trafficking ring would have consequences in New York (*see* CPLR 302 [a] [3] [ii]; *see generally LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 215; *Darienzo v Wise Shoe Stores*, 74 AD2d 342, 346). The complaint alleges that Brown sold at least 140 handguns, including the gun used to shoot plaintiff, to Bostic and/or his straw purchasers over a relatively short period of time. According to plaintiffs, Bostic operated a trafficking scheme whereby he traveled to Ohio and used straw purchasers to buy large quantities of handguns. Bostic then returned to New York, where he sold the guns to other illegal traffickers or users. It is alleged that Brown knew or should have known of this scheme, yet he continued to supply handguns to Bostic via illegal straw purchases.

With respect to whether Brown "derives substantial revenue from goods used or consumed . . . in [New York]" (CPLR 302 [a] [3] [i]) or "derives substantial revenue from interstate . . . commerce" (CPLR 302 [a] [3] [ii]), we agree with plaintiffs that they are entitled to jurisdictional discovery on that issue because they "established that facts 'may exist' to exercise personal jurisdiction over [Brown] . . ., and made a 'sufficient start' to warrant further disclosure on the issue of whether personal jurisdiction may be established over [Brown]" (*Lettieri*, 80 AD3d at 575). As noted above, plaintiffs allege that in 2000 Brown sold at least 140 handguns to Bostic, a New York resident. In an affidavit submitted in support of his motion to dismiss, Brown averred that he sold a total of 181 handguns to Bostic and/or Bostic's alleged "business partners" between May and October 2000. Brown further averred that, from 1996 until 2009, he sold "roughly 5,000 firearms." Thus, the 181 handguns Brown sold to the Bostic trafficking ring in 2000 alone constituted 3.6% of Brown's total sales for that 13-year period. Assuming that the 5,000 handguns Brown sold from 1996 to 2009 were evenly distributed throughout that 13-year period, we estimate that Brown's sale of 181 guns to Bostic and his associates in 2000 constituted roughly 47% of his sales that year. We thus conclude that plaintiffs sufficiently established that facts may exist to demonstrate that Brown derived "substantial revenue" from his sales to the Bostic trafficking ring (*see LaMarca*, 95 NY2d at 213-215; *Tonns v Spiegel's*, 90 AD2d 548, 549; *Darienzo*, 74 AD2d at 344-346).

The fact that Brown garnered significant revenue from gun sales to a New York resident, however, does not establish that he "derives substantial revenue from *goods used or consumed . . . in [New York]*" (CPLR 302 [a] [3] [i] [emphasis added]). Rather, plaintiffs must establish that Brown profited from guns "used or consumed" – i.e., possessed or discharged – in New York (*see Tonns*, 90 AD2d at 549). In our view, plaintiffs made the requisite "sufficient start" by alleging, inter alia, that (1) Bostic was a resident of New York, (2)

Bostic operated a gun trafficking ring in New York, and (3) Brown supplied over 140 guns to Bostic and his associates, including the gun used to shoot plaintiff in New York, within a period of months. In addition, plaintiffs cited an ATF report allegedly stating that the Hi-Point 9mm semi-automatic pistol, which is exclusively sold by MKS and/or Brown, "was the most popular pistol used in crimes in Buffalo in 2000." We thus conclude that plaintiffs are entitled to discovery to determine how many of the guns Brown sold to Bostic were trafficked into New York and whether that amount is sufficient to conclude that Brown derived substantial revenue from guns used or consumed in this state (*see City of New York v Bob Moates' Sport Shop, Inc.*, 253 FRD 237, 240; *see generally Peterson*, 33 NY2d at 467; *Lettieri*, 80 AD3d at 576).

We further agree with plaintiffs that jurisdictional discovery is necessary to determine the nature of Brown's relationship with MKS. Plaintiffs allege that MKS is a two-person company and that "MKS essentially is Mr. Brown." Indeed, Brown submitted an excerpt from a deposition in another case in which he testified that he owns 100% of the shares of MKS, and that he is the president of the company. Plaintiffs further allege that MKS "deals directly to over 35 New York dealers," that MKS sold at least 630 handguns traced to crime in New York, and that "[m]any of th[o]se handguns were sold to New York residents for use in New York." Notably, MKS does not dispute that it is subject to personal jurisdiction in New York. If MKS and Brown are indeed a single enterprise or share an agency relationship, then the admittedly interstate character of MKS may render Brown amenable to jurisdiction in New York (*see e.g. Darienzo*, 74 AD2d at 344-346; *see also Beatie & Osborn LLP v Patriot Scientific Corp.*, 431 F Supp 2d 367, 389).

Finally, there is no merit to Brown's contention, with which the court agreed, that plaintiffs are not entitled to discovery because their co-counsel had the opportunity to depose Brown in an unrelated case in 2005. Even assuming, arguendo, that information gleaned by plaintiffs' co-counsel during the course of unrelated litigation could be somehow imputed to plaintiffs, we note that Brown was not a named party in that case, and thus New York's jurisdiction over Brown was not at issue.

V

Accordingly, we conclude that the order in appeal No. 1 should be reversed, defendants' motions should be denied, and the complaint against defendants should be reinstated.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

939

CA 11-02093

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

DANIEL WILLIAMS AND EDWARD WILLIAMS,
PLAINTIFFS-APPELLANTS,

V OPINION AND ORDER

BEEMILLER, INC., DOING BUSINESS AS HI-POINT,
CHARLES BROWN, MKS SUPPLY, INC.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS,
AND THE UNITED STATES, RESPONDENT.
(APPEAL NO. 2.)

CONNORS & VILARDO, LLP, BUFFALO, AND BRADY CENTER TO PREVENT GUN VIOLENCE, WASHINGTON, D.C. (JONATHAN E. LOWY, OF THE WASHINGTON, D.C. BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

RENZULLI LAW FIRM, LLP, WHITE PLAINS (SCOTT C. ALLAN OF COUNSEL), FOR DEFENDANT-RESPONDENT BEEMILLER, INC., DOING BUSINESS AS HI-POINT.

SCOTT L. BRAUM & ASSOCIATES, LTD., DAYTON, OHIO (SCOTT L. BRAUM, OF THE OHIO BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND DAMON MOREY LLP, BUFFALO, FOR DEFENDANT-RESPONDENT CHARLES BROWN.

PISCIOTTI, MALSCH & BUCKLEY, P.C., WHITE PLAINS (JEFFREY M. MALSCH OF COUNSEL), FOR DEFENDANT-RESPONDENT MKS SUPPLY, INC.

WILLIAM J. HOCHUL, JR., UNITED STATES ATTORNEY, WASHINGTON, D.C. (BENJAMIN S. KINGSLEY OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered August 30, 2011. The order denied the motion of plaintiffs for leave to renew and reargue.

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

Same Opinion by PERADOTTO, J., as in *Williams v Beemiller, Inc.* ([appeal No. 1] ___ AD3d ___ [Oct. 5, 2012]).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

944

CA 11-02542

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

MOSTAFA ZOLFAGHARI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HUGHES NETWORK SYSTEMS, LLC, EXXON MOBIL CORPORATION AND RTE A SETAUKET REALTY, DEFENDANTS-RESPONDENTS.

EXXON MOBIL CORPORATION, THIRD-PARTY PLAINTIFF-APPELLANT,

V

ATLANTA NETWORK SYSTEMS, INC., THIRD-PARTY DEFENDANT-RESPONDENT.

KENNY & KENNY, PLLC, SYRACUSE (MICHAEL P. KENNY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MENDES & MOUNT, LLP, NEWARK, NEW JERSEY (WILLIAM T. WACHENFELD OF COUNSEL), FOR DEFENDANT-RESPONDENT EXXON MOBIL CORPORATION AND THIRD-PARTY PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR DEFENDANT-RESPONDENT HUGHES NETWORK SYSTEMS, LLC AND THIRD-PARTY DEFENDANT-RESPONDENT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (JENNIFER L. WANG OF COUNSEL), FOR DEFENDANT-RESPONDENT RTE A SETAUKET REALTY.

Appeals from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered August 18, 2011 in a personal injury action. The order and judgment denied plaintiff's motion for partial summary judgment, granted defendants' cross motions for summary judgment, dismissed the complaint, denied the motion of third-party plaintiff for summary judgment and granted the cross motion of third-party defendant for summary judgment dismissing the third-party complaint of Exxon Mobil Corporation.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he allegedly sustained

when he fell off a ladder while trying to remove a satellite dish attached to the outside wall of a gas station. The satellite dish was being removed because defendant Rte A Setauket Realty (Setauket) was in the process of changing from an Exxon station to a Gulf station, and the satellite dish was owned by defendant Exxon Mobil Corporation (Exxon). Exxon had contracted with defendant Hughes Network Systems, LLC (Hughes), which in turn contracted with Atlanta Network Systems, Inc. (Atlanta) to perform the removal services. Atlanta employed plaintiff to remove the dish from Setauket's station. Exxon commenced a third-party action against Atlanta contending, inter alia, that it was a third-party beneficiary of the indemnification agreement between Atlanta and Hughes. Supreme Court denied plaintiff's motion for partial summary judgment on liability under Labor Law §§ 240 (1) and 241 (6), granted the cross motion of Exxon and those parts of the cross motions of Setauket, as well as Atlanta and Hughes, for summary judgment dismissing the complaint in the main action, and granted Atlanta's cross motion for summary judgment dismissing the third-party complaint.

We note at the outset that plaintiff, as limited by his brief on appeal, contends only that the court erred in granting those parts of the cross motions for summary judgment dismissing the causes of action pursuant to Labor Law §§ 240 (1) and 241 (6). Plaintiff contends with respect to Labor Law § 240 (1) that he was engaged in the "alteration" of a building or structure within the meaning of that section. We reject that contention. To obtain the protections afforded by Labor Law § 240 (1), a worker must be engaged in "altering" a building or structure, i.e., "making a *significant* physical change to the configuration or composition of the building or structure" (*Joblon v Solow*, 91 NY2d 457, 465).

Here, plaintiff's task involved no more than manually unplugging a cord, loosening a small number of bolts by hand and with a wrench, cutting a wire with a hand tool, and lifting the dish apparatus from a bracket and face plate that remained attached to the building. That work did not require plaintiff to come in physical contact with the building itself, involved no power tools, no drilling of holes, and no feeding of wire through conduits. In short, plaintiff's work did not require that a significant physical change be made to the gas station building (*see Widawski v 217 Elizabeth St. Corp.*, 40 AD3d 483, 485; *Maes v 408 W. 39 LLC*, 24 AD3d 298, 299-300, *lv denied* 7 NY3d 716; *Anderson v Schwartz*, 24 AD3d 234, 234, *lv denied* 7 NY3d 707). Contrary to plaintiff's contention, the work involved in the removal or "de-installation" of a satellite dish system is not the same as that involved in the installation of such a system within the context of Labor Law § 240 (1) (*see e.g. Tassone v Mid-Valley Oil Co.*, 291 AD2d 623, 624, *lv denied* 100 NY2d 502; *Di Giulio v Migliore*, 258 AD2d 903, 903-904).

Plaintiff contends with respect to Labor Law § 241 (6) that his work constituted "demolition" within the meaning of that statute. Plaintiff's contention was raised for the first time in his reply papers, however, and it therefore was not properly before the court (*see New Yorkers for Constitutional Freedoms v New York State Senate*,

___ AD3d ___, ___ [July 6, 2012]; *Watts v Champion Home Bldrs. Co.*, 15 AD3d 850, 851). In any event, we conclude that plaintiff's contention is without merit.

Exxon contends on its appeal that the court erred in determining that Exxon was not covered by the indemnification agreement between Hughes and Atlanta and thus erred in granting that part of Atlanta's cross motion for summary judgment dismissing the third-party complaint with respect to contractual indemnification. We reject that contention. The agreement between Hughes and Atlanta expressly negated any intent to indemnify third-party beneficiaries, including Exxon (*see Mid-Valley Oil Co., Inc. v Hughes Network Sys., Inc.*, 54 AD3d 394, 396, *lv dismissed in part and denied in part* 12 NY3d 881; *see also Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786-787).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

945

CA 11-01736

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

LEE FANG, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HOME DEPOT USA, INC. AND SUPERIOR HEATING CO., LLC, DEFENDANTS-RESPONDENTS.

LEE FANG, PLAINTIFF-APPELLANT PRO SE.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KRISTIN L. NORFLEET OF COUNSEL), FOR DEFENDANT-RESPONDENT HOME DEPOT USA, INC.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (RALPH C. LORIGO OF COUNSEL), FOR DEFENDANT-RESPONDENT SUPERIOR HEATING CO., LLC.

Appeal from an order of the Erie County Court (Michael L. D'Amico, J.), dated May 11, 2011. The order affirmed an oral decision of the Tonawanda City Court (Mark E. Saltarelli, J.), which dismissed plaintiff's small claims action.

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

Memorandum: Plaintiff commenced this small claims action in City Court seeking damages for defendants' negligent installation and repair of an HVAC unit in plaintiff's house. After trial, City Court orally dismissed the claim from the bench. Plaintiff took an appeal to County Court despite the absence of an appealable paper, and that court issued an order affirming the "judgment" of City Court that dismissed plaintiff's claim. This appeal must be dismissed (*see* CPLR 5703 [b]; *Shapiro v Tony's Culver Atl., Inc.*, 90 AD3d 1501, 1502; *Kuhn v Kuhn*, 129 AD2d 967, 967). An appeal may be taken to this Court as of right "from an order of a county court . . . which determines an appeal from a judgment of a lower court" (CPLR 5703 [b]; *see Ellingsworth v City of Watertown*, 113 AD2d 1013, 1014; *see also Pigler v Adam, Meldrum & Anderson Co.*, 195 AD2d 1011, 1011). No appeal lies, however, from an oral decision (*see* UCCA 1702; *Kuhn*, 129 AD2d at 967). Indeed, we note that the Uniform City Court Act contemplates the entry of a judgment in a small claims action for purposes of review and enforcement (*see* UCCA 1805 [a]; *see generally* UCCA art 18), and the entry of a judgment or final order in City Court is a necessary predicate to the appellate jurisdiction of both County Court and this Court (*see* UCCA 1702; CPLR 5703 [b]). The entry of an appealable paper also is essential to the finality of such cases because such

entry limits the time within which an appeal may be taken in the first instance (*see* UCCA 1703; CPLR 5513 [a]). Thus, it is incumbent upon a court to ensure that a small claims action is terminated by the entry of a judgment or final order. Here, neither a judgment nor final order from City Court is contained in the record on appeal, and nothing in the record establishes that a judgment or final order was ever filed in City Court.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

953

CAF 11-01625

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

IN THE MATTER OF CHRIS SAWYER FEWELL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STACEY A. RATZEL, RESPONDENT-RESPONDENT.

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

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR RESPONDENT-RESPONDENT.

DAVID C. BRAUTIGAM, ATTORNEY FOR THE CHILD, HOUGHTON, FOR BRAEDAN R.

Appeal from an order of the Family Court, Allegany County (Lynn L. Hartley, J.H.O.), entered June 9, 2010 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking visitation.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Family Court, Allegany County, for a new hearing in accordance with the following Memorandum: Petitioner father, who is incarcerated based on his conviction of rape, appeals from an order that dismissed his petition seeking visitation with the parties' child. We agree with the father that, in dismissing the petition, Family Court failed to give due consideration to the presumption in favor of visitation, notwithstanding the father's incarceration, and failed to make an appropriate inquiry into the impact of the visitation on the welfare of the child. " 'It is generally presumed to be in a child's best interest[s] to have visitation with his or her noncustodial parent and the fact that a parent is incarcerated will not, by itself, render visitation inappropriate' " (*Matter of Lonobile v Betkowski*, 261 AD2d 829, 829). Here, respondent mother presented no evidence to overcome the presumption that visitation would be in the child's best interests, and the record is not sufficient to make a determination whether visitation would be detrimental to the child's welfare (*see Matter of Crowell v Livziey*, 20 AD3d 923, 923; *Matter of Buffin v Mosley*, 263 AD2d 962, 962; *Lonobile*, 261 AD2d at 829). We therefore reverse the order, reinstate the petition, and remit the matter to Family Court for a new hearing to determine whether visitation is in the child's best interests, at which the court shall consider the full range of

factors pertinent to that determination (*see Lonobile*, 261 AD2d at 829; *see generally Matter of Lazier v Gentes*, 259 AD2d 618, 619).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

954

CAF 11-01897

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

IN THE MATTER OF JASON L. HALL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NINA E. HAWTHORNE, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

COURTNEY S. RADICK, ATTORNEY FOR THE CHILD, OSWEGO, FOR DECEMBER R.H.

Appeal from an order of the Family Court, Oswego County (Bobette J. Morin, R.), entered August 25, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, enforced the Family Court order entered December 12, 2008.

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

Memorandum: Nina E. Hawthorne, the respondent in appeal No. 1 and the petitioner in appeal Nos. 2 and 3 (mother), appeals from three orders entered in proceedings brought pursuant to Family Court Act article 6. The orders granted the petition of Jason L. Hall, the petitioner in appeal No. 1 and the respondent in appeal Nos. 2 and 3 (father), to enforce a prior order of custody and visitation entered upon stipulation of the parties on December 12, 2008 (2008 custody and visitation order) and dismissed the mother's petitions for a modification of custody and visitation and for enforcement of an order of visitation.

The mother contends that reversal is required based on Family Court's refusal to allow her to present evidence that the father allegedly abused the child. We reject that contention. The court properly limited the proof to incidents that occurred after the 2008 custody and visitation order was entered (*see Matter of Risman v Linke*, 235 AD2d 861, 861-862; *see generally Matter of Tarrant v Ostrowski*, 96 AD3d 1580, 1581). Moreover, although "[i]t is well settled that there is an exception to the hearsay rule in custody cases involving allegations of abuse and neglect of a child . . . where . . . the statements are corroborated" (*Matter of Sutton v Sutton*, 74 AD3d 1838, 1840 [internal quotation marks omitted]; *see*

Matter of Mateo v Tuttle, 26 AD3d 731, 732), the mother failed to offer any evidence to corroborate the child's out-of-court statements and, therefore, the court's preclusion of those statements was proper.

Contrary to the mother's further contention, the court properly determined that enforcement of the 2008 custody and visitation order is in the child's best interests (*see generally Wiles v Wiles*, 171 AD2d 398, 399; *Sturm v Lyding*, 96 AD2d 731, 731). Finally, the court properly dismissed the mother's enforcement petition inasmuch as she "failed to establish that the father willfully violated a clear mandate of the prior order or that his conduct defeated, impaired, impeded, or prejudiced any right or remedy to which she was entitled" (*Matter of Oravec v Oravec*, 89 AD3d 1475, 1475 [internal quotation marks omitted]; *see Matter of Petkovsek v Snyder* [appeal No. 2], 251 AD2d 1085, 1085).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

955

CAF 11-01931

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

IN THE MATTER OF NINA E. HAWTHORNE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JASON L. HALL, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

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

COURTNEY S. RADICK, ATTORNEY FOR THE CHILD, OSWEGO, FOR DECEMBER R.H.

Appeal from an order of the Family Court, Oswego County (Bobette J. Morin, R.), entered August 25, 2011 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of custody and visitation.

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

Same Memorandum as in *Hall v Hawthorne* ([appeal No. 1] ___ AD3d ___ [Oct. 5, 2012]).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

956

CAF 11-01932

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

IN THE MATTER OF NINA E. HAWTHORNE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JASON L. HALL, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

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

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

COURTNEY S. RADICK, ATTORNEY FOR THE CHILD, OSWEGO, FOR DECEMBER R.H.

Appeal from an order of the Family Court, Oswego County (Bobette J. Morin, R.), entered August 25, 2011 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.

Same Memorandum as in *Hall v Hawthorne* ([appeal No. 1] ___ AD3d ___ [Oct. 5, 2012]).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

974

KA 11-00793

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAMAR T. ANDERSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered March 23, 2011. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [1]). Defendant failed to preserve for our review his contention that County Court failed to conduct a sufficient inquiry pursuant to *People v Outley* (80 NY2d 702) into his violation of the conditions of the plea agreement before imposing an enhanced sentence (*see generally People v Vaillant*, 77 AD3d 1389, 1389-1390; *People v Dietz*, 66 AD3d 1400, 1400, *lv denied* 13 NY3d 906). Further, inasmuch as defendant conceded that he had lost his sentence cap because of a violation of the conditions of his plea agreement, the court had no independent duty to conduct such an inquiry (*see People v Harris*, 197 AD2d 930, 930, *lv denied* 82 NY2d 850). To the extent that defendant's further contention that he was denied effective assistance of counsel survives his plea of guilty (*see People v Hawkins*, 94 AD3d 1439, 1440-1441, *lv denied* 19 NY3d 974), we reject that contention. We conclude on the record before us that defendant received meaningful representation (*see generally People v Ford*, 86 NY2d 397, 404). Contrary to defendant's additional contention, the sentence is not unduly harsh or severe.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

975

KA 10-01843

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID JACKSON, DEFENDANT-APPELLANT.

KEVIN J. BAUER, ALBANY, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered June 3, 2010. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of rape in the first degree (Penal Law § 130.35 [1]), defendant contends that his plea was not knowing, intelligent, and voluntary. Defendant failed to move to withdraw his plea or to vacate the judgment of conviction on that ground and thus has failed to preserve his contention for our review (*see People v Francis*, 53 AD3d 1112, 1113, *lv denied* 11 NY3d 736). This case does not fall within the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666). In any event, defendant's contention lacks merit (*see People v Moorer*, 63 AD3d 1590, 1591, *lv denied* 13 NY3d 837; *People v Jones*, 42 AD3d 968, 968). Defendant's further contention that he was denied effective assistance of counsel does not survive his plea of guilty inasmuch as "[t]here is no showing that the plea bargaining process was infected by any allegedly ineffective assistance or that defendant entered the plea because of his attorney[']s] allegedly poor performance" (*People v Burke*, 256 AD2d 1244, 1244, *lv denied* 93 NY2d 851; *see People v Barnes*, 32 AD3d 1250, 1251).

We agree with defendant that his waiver of the right to appeal is invalid and thus does not encompass his challenge to the severity of the period of postrelease supervision. "[I]t is not clear that 'the trial court engaged in a full and adequate colloquy, and [that] defendant expressly waived [his] right to appeal without limitation' " (*People v Maracle*, 19 NY3d 925, 928; *see generally People v Hidalgo*, 91 NY2d 733, 737), and defendant's waiver of the right to appeal also

is invalid "inasmuch as the record fails to establish that 'defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Balkum*, 71 AD3d 1594, 1595, *lv denied* 14 NY3d 885; *see People v Daniels*, 68 AD3d 1711, 1712, *lv denied* 14 NY3d 887; *People v Williams*, 59 AD3d 339, 340, *lv denied* 12 NY3d 861). Nevertheless, we reject defendant's challenge to the severity of the period of postrelease supervision.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

979

KA 11-00060

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARIA F. RAMIREZ, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered August 3, 2010. The judgment convicted defendant, upon a jury verdict, of falsifying business records in the first degree, criminal mischief in the fourth degree and petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of falsifying business records in the first degree (Penal Law § 175.10), criminal mischief in the fourth degree (§ 145.00), and petit larceny (§ 155.25). We reject defendant's contention that the evidence adduced at trial is legally insufficient to support the conviction of falsifying business records (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewed in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), the evidence established that defendant knowingly returned unpurchased merchandise at a Lord & Taylor store in exchange for store credit. Defendant then used the fraudulently obtained store credit to purchase several other items of merchandise before she left the store. Thus, the People established that defendant "cause[d] a false entry in the business records of an enterprise" (§ 175.05 [1]), i.e., that she returned merchandise that she had not in fact purchased, and that she thereby "inten[ded] . . . to aid or conceal [her] commission" of the crime of petit larceny (§ 175.10; *see People v Weaver*, 89 AD3d 1477, 1478; *People v Hopkins*, 28 AD3d 1244, 1244, *lv denied* 7 NY3d 790).

We reject defendant's further contention that the first count of the indictment, charging her with falsifying business records in the first degree, was rendered duplicitous by the evidence at trial and that it is unclear whether the jury reached a unanimous verdict concerning that count. The summations of the prosecutor and defense

counsel made it clear that defendant's return of merchandise she had not purchased, i.e., the "no receipt" transaction, was the sole cash register transaction that related to the count charging her with falsifying business records. Thus, there is an adequate basis in the record to connect that count of the indictment to a particular cash register transaction, and there is no danger that different jurors convicted defendant based on different cash register transactions involving defendant on the day in question (*see People v Mathis*, 8 AD3d 966, 967-968, *lv denied* 3 NY3d 709; *People v Drayton*, 198 AD2d 770, 770). Finally, defendant contends that prosecutorial misconduct on summation requires reversal. We reject that contention. "[A]ny improprieties [in the prosecutor's summation] were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Cox*, 21 AD3d 1361, 1364, *lv denied* 6 NY3d 753 [internal quotation marks omitted]).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

980

KA 10-02456

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL PYTLAK, 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 Erie County Court (Thomas P. Franczyk, J.), rendered October 19, 2010. The judgment convicted defendant, upon a jury verdict, of aggravated criminal contempt (three counts) and stalking in the fourth degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts of aggravated criminal contempt (Penal Law § 215.52 [3]) and two counts of stalking in the fourth degree (§ 120.45 [2]). We reject defendant's contention that County Court erred in admitting testimony concerning defendant's prior conduct toward the victim. That testimony was relevant to establish defendant's motive and intent in committing the crimes charged (*see People v Long*, 96 AD3d 1492, 1493; *People v Perez*, 67 AD3d 1324, 1325-1326, *lv denied* 13 NY3d 941; *People v Freece*, 46 AD3d 1428, 1428-1429, *lv denied* 10 NY3d 811); to establish that the victim had a reasonable fear of physical injury (*see* § 215.51 [b] [iii]; *People v Crump*, 77 AD3d 1335, 1336, *lv denied* 16 NY3d 857); and to establish that defendant's violation of the order of protection was neither innocent nor inadvertent (*see People v Perez*, 49 AD3d 903, 903, *lv denied* 10 NY3d 938; *see also People v Guiteau*, 267 AD2d 1094, *lv denied* 94 NY2d 920). Moreover, the court properly determined that the probative value of that testimony outweighed its potential for prejudice (*see People v Dizak*, 93 AD3d 1182, 1184, *lv denied* 19 NY3d 972; *People v Ditucci*, 81 AD3d 1249, 1250, *lv denied* 17 NY3d 794; *see generally People v Alvino*, 71 NY2d 233, 241-242).

Defendant's challenge to the legal sufficiency of the evidence with respect to the conviction of aggravated criminal contempt is not preserved for our review because he failed to renew his motion for a

trial order of dismissal after presenting proof (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, defendant's challenge lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495) and, viewing the evidence in light of the elements of the crime of aggravated criminal contempt as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence with respect to that crime (*see People v Curry*, 82 AD3d 1650, 1650-1651, *lv denied* 17 NY3d 805; *People v Van Duser* [appeal No. 2], 277 AD2d 1034, 1035, *lv denied* 96 NY2d 739; *see generally Bleakley*, 69 NY2d at 495). "[T]he jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Orta*, 12 AD3d 1147, 1147, *lv denied* 4 NY3d 801).

Finally, we reject defendant's contention that he was denied effective assistance of counsel. Because the evidence is legally sufficient to support defendant's conviction of aggravated criminal contempt, it cannot be said that defense counsel's failure to renew the motion for a trial order of dismissal constitutes ineffective assistance of counsel (*see People v Holt*, 93 AD3d 1304, 1305; *People v Washington*, 60 AD3d 1454, 1455, *lv denied* 12 NY3d 922; *see generally People v Baldi*, 54 NY2d 137, 147). Also, defendant has failed to "demonstrate the absence of strategic or other legitimate explanations" for defense counsel's failure to obtain the victim's mental health records (*People v Rivera*, 71 NY2d 705, 709; *see People v Castleberry*, 265 AD2d 921, 921-922, *lv denied* 94 NY2d 902). Based on the record before us, we conclude that defendant received meaningful representation (*see generally People v Benevento*, 91 NY2d 708, 712-713; *Baldi*, 54 NY2d at 147).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

981

CAF 11-01391

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

IN THE MATTER OF COMMISSIONER OF SOCIAL SERVICES, ON BEHALF OF PATRICIA FOSTER, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE TURNER, RESPONDENT-APPELLANT.

ELIZABETH A. SAMMONS, WILLIAMSON, FOR RESPONDENT-APPELLANT.

DANIEL M. WYNER, COUNTY ATTORNEY, LYONS (CECILY G. MOLAK OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Wayne County (John B. Nesbitt, J.), entered April 25, 2011 in a proceeding pursuant to Family Court Act article 4. The order, among other things, denied respondent's objections to an order issued by the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating that part suspending respondent's hunting and fishing licenses and as modified the order is affirmed without costs.

Memorandum: Respondent appeals from an order finding that he willfully violated a prior order of child support and, inter alia, suspending his hunting and fishing licenses until all arrears are paid in full. Contrary to respondent's contention, Family Court properly confirmed the finding of the Support Magistrate that respondent willfully violated the prior order of support (*see Matter of Hunt v Hunt*, 30 AD3d 1065, 1065; *Matter of Rothfuss v Thomas*, 6 AD3d 1145, 1146, *lv denied* 3 NY3d 603). There is a presumption that a respondent has sufficient means to support his or her spouse and minor children (*see* Family Ct Act § 437; *Matter of Powers v Powers*, 86 NY2d 63, 68-69), and evidence that respondent failed to pay support as ordered constitutes "prima facie evidence of a willful violation" (§ 454 [3] [a]). Here, petitioner introduced a calculation of the arrears owed by respondent (*see Matter of Moore v Blank*, 8 AD3d 1090, 1091, *lv denied* 3 NY3d 606), and thus the burden shifted to respondent to introduce "some competent, credible evidence of his inability to make the required payments" (*Powers*, 86 NY2d at 70). "Under the circumstances of this case and, contrary to [respondent's] contention, the evidence that he was receiving Social Security disability benefits did not, by itself, preclude the . . . [c]ourt from finding that he

was capable of working" (*Matter of Karagiannis v Karagiannis*, 73 AD3d 1064, 1066; *see also Matter of Bukovinsky v Bukovinsky*, 299 AD2d 786, 787-788, *lv dismissed* 100 NY2d 534). Furthermore, we reject the contention of respondent that he was deprived of meaningful representation (*see Matter of Leslie v Rodriguez*, 303 AD2d 1016, 1017; *Matter of Amanda L.*, 302 AD2d 1004, 1004; *see generally People v Benevento*, 91 NY2d 708, 712-713; *People v Baldi*, 54 NY2d 137, 147).

Respondent also contends that the court erred in failing to cap his unpaid child support arrears at $500 and that his hunting and fishing licenses should not have been suspended because he receives supplemental security income (*see* Family Ct Act §§ 413 [1] [g]; 458-c [c] [i]). Those contentions are raised for the first time on appeal and thus are not preserved for our review (*see Matter of Niagara County Dept. of Social Servs. v Hueber*, 89 AD3d 1433, 1433, *lv denied* 18 NY3d 805; *Matter of Erie County Dept. of Social Servs. v Shaw*, 81 AD3d 1328, 1329). Respondent failed to produce any evidence concerning his income during the time that the arrears accrued, and we decline to exercise our power to review his contention that his arrears should be capped. Nevertheless, we exercise our power to review his contention regarding his recreational licenses as a matter of discretion in the interest of justice. Family Court Act § 458-c (a) permits the court to order the suspension of the recreational licenses of respondents who have at least four months of arrears, but the statute further states that its provisions "shall not apply to . . . respondents who are receiving . . . supplemental security income" (§ 458-c [c] [i]). Petitioner does not dispute that respondent receives supplemental security income. Therefore, in light of the mandatory language in the statute, we modify the order by vacating that part suspending respondent's hunting and fishing licenses.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

982

CAF 12-00431

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

IN THE MATTER OF JOSEPH C.E.,
RESPONDENT-APPELLANT. MEMORANDUM AND ORDER

THOMAS ROOTE, PETITIONER-RESPONDENT.

JOHN M. LOCKHART, ATTORNEY FOR THE CHILD, GENESEO, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Livingston County (Dennis S. Cohen, J.), entered September 23, 2011 in a proceeding pursuant to Family Court Act article 7. The order, among other things, adjudged that respondent is a person in need of supervision.

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

Memorandum: Respondent appeals from an order adjudicating him a person in need of supervision and placing him on probation for a period of one year. At the outset, we note that, "[a]lthough the dispositional portion of the . . . order . . . has expired by its own terms, a review of [respondent's] adjudication as a person in need of supervision is not academic because of the possibility of collateral legal consequences resulting from the adjudication" (*Matter of Leslie H. v Carol M.D.*, 47 AD3d 716, 717; *see* Family Ct Act § 783).

Turning to the merits, we agree with respondent that Family Court erred in denying his motion to dismiss the petition. In a report attached to the petition, a representative of the Livingston County Probation Department (LCPD), the lead agency pursuant to Family Court Act § 735 (a), stated in a conclusory manner that diversion services for respondent and his family were provided prior to the filing of the petition. "Thus, the petition failed to demonstrate that the LCPD had 'exert[ed] what the statute refers to as documented diligent attempts to avoid the necessity of filing a petition' " (*Matter of Nicholas R.Y. [Joanne Y.]*, 91 AD3d 1321, 1322; *see* § 735 [b], [d]). "[T]he failure to comply with such substantive statutory requirements constitutes a nonwaivable jurisdictional defect requiring dismissal of the petition" (*Nicholas R.Y.*, 91 AD3d at 1322 [internal quotation marks omitted]).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

985

CA 12-00515

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

KAREN CASALE, AS PARENT AND NATURAL GUARDIAN
OF STEPHANIE CASALE, AN INFANT,
CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

LIVERPOOL CENTRAL SCHOOL DISTRICT,
RESPONDENT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR RESPONDENT-APPELLANT.

KUEHNER LAW FIRM, PLLC, SYRACUSE (BRIAN D. ROY OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered January 26, 2012. The order granted the application of claimant for leave to serve a late notice of claim.

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

Memorandum: Contrary to respondent's contention, Supreme Court did not abuse its discretion in granting claimant's application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5). Although a court may properly consider whether a claimant provided a reasonable excuse for failing to serve a timely notice of claim (*see Parton v Onondaga County*, 81 AD3d 1433, 1433-1434), a claimant's failure to tender a reasonable excuse "is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [respondent]" (*Matter of Hall v Madison-Oneida County Bd. of Coop. Educ. Servs.*, 66 AD3d 1434, 1435 [internal quotation marks omitted]; *see Hale v Webster Cent. School Dist.*, 12 AD3d 1052, 1053). Here, claimant "made a persuasive showing that [respondent] 'acquired actual knowledge of the essential facts constituting the claim' . . . [and respondent has] made no particularized or persuasive showing that the delay caused [it] substantial prejudice" (*Wetzel Servs. Corp. v Town of Amherst*, 207 AD2d 965, 965; *see* § 50-e [5]).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

989

CA 12-00545

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

JUDITH T. ARMSTRONG, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOAN MERRICK, DEFENDANT-RESPONDENT.

CARL J. COCHI, UTICA, FOR PLAINTIFF-APPELLANT.

GOZIGIAN, WASHBURN & CLINTON, COOPERSTOWN (EDWARD W.G. GOZIGIAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Norman I. Siegel, A.J.), dated November 21, 2011 in a personal injury action. The order, insofar as appealed from, granted the motion of defendant for leave to amend the answer.

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

Memorandum: Supreme Court erred in granting defendant's motion for leave to amend the answer to assert the defense of primary assumption of risk. Although leave to amend should be freely granted, it is properly denied where the proposed amendment is patently lacking in merit (*see Carro v Lyons Falls Pulp & Paper, Inc.*, 56 AD3d 1276, 1277; *Manufacturers & Traders Trust Co. v Reliance Ins. Co.*, 8 AD3d 1000, 1001; *Christiano v Chiarenza*, 1 AD3d 1039, 1040). Here, the complaint and plaintiff's factual submissions in opposition to the motion allege that plaintiff was injured when she was knocked over by defendant's dog while plaintiff was walking her own dog in a public space. "This is, in short, not a case in which the defendant solely by reason of having sponsored or otherwise supported some risk-laden but socially valuable voluntary activity has been called to account in damages," and thus the doctrine of primary assumption of risk is inapplicable to the facts and circumstances of this case (*Trupia v Lake George Cent. School Dist.*, 14 NY3d 392, 396). Defendant's proposed amendment therefore was patently without merit.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

994

CA 12-00621

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

ROSE MENDOLA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBIN DOUBRAVA AND KATHLEEN M. SIGLIN,
DEFENDANTS-RESPONDENTS.

FRIEDMAN & RANZENHOFER, P.C., AKRON (MICHAEL H. RANZENHOFER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN KENT LLC, BUFFALO (VICTOR M. WRIGHT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 17, 2011 in a personal injury action. The order granted the motion of defendants for summary judgment on the issue of serious injury 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 the vehicle in which she was a passenger was struck by a vehicle owned by defendant Kathleen M. Siglin and operated by defendant Robin Doubrava. We conclude that Supreme Court properly granted defendants' 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). Defendants met their initial burden of establishing that plaintiff did not sustain a serious injury under any of the categories alleged, i.e., the permanent consequential limitation of use, significant limitation of use and 90/180-day categories, and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

In support of their motion, defendants submitted the affirmed report of a neurologist who examined plaintiff and her medical records at the request of defendants. Defendants' expert concluded that the only objective medical findings with respect to any alleged injury related to a preexisting degenerative condition of the spine. "[W]ith persuasive evidence that plaintiff's alleged pain and injuries were related to a preexisting condition, plaintiff had the burden to come forward with evidence addressing defendant[s'] claimed lack of causation" and, here, plaintiff failed to meet that burden (*Carrasco v*

Mendez, 4 NY3d 566, 580; *see Briody v Melecio*, 91 AD3d 1328, 1329). Although plaintiff submitted the reports of three examining physicians, none of those physicians concluded that plaintiff's herniated discs or disc protrusions at C5-6 and/or C6-7 were caused by the accident. Indeed, the report of an examining neurologist submitted by plaintiff concluded that she had "pre-existing degenerative disc disease of the cervical spine (as evidenced on cervical spine MRI of 10/28/08 performed only three weeks after the motor vehicle accident)." Contrary to plaintiff's contention, there is nothing speculative or otherwise inappropriate relating to the interpretation and use of the MRI reports by defendants' expert in formulating his opinions (*see Carrasco*, 4 NY3d at 578-579).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

1000

KA 12-00229

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

DAVID F. MCNAMARA, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Cayuga County Court (Mark H. Fandrich, A.J.), entered November 21, 2011. The order granted the motion of defendant to dismiss the indictment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion is denied, the indictment is reinstated and the matter is remitted to Cayuga County Court for further proceedings on the indictment.

Memorandum: On this appeal by the People from an order granting defendant's motion to dismiss the indictment, we reject at the outset their contention that County Court lacked authority to grant defendant's motion because the court granted the motion upon a ground that was not timely asserted. According to the People, the only timely asserted ground for dismissal was that the People failed to inform defense counsel of charges other than the initial drug charges against defendant, but the court granted the motion on a different ground, i.e., that defendant's notice of appearance served as his request to testify before the grand jury with respect to the subsequent homicide charges against defendant and he was denied the right to testify. We note, however, that defendant's motion referenced the notice of appearance as the document that reserved defendant's right to testify before the grand jury, and in their opposing affidavit the People in fact addressed the ground on which the motion was granted, i.e., they contended that the notice of appearance was solely in connection with the initial drug charges and did not serve as defendant's request to testify regarding the homicide charges. Thus, it cannot be said that the court deprived the People of "the opportunity to address any alleged defects prior to dismissal of [the] indictment" (*People v Santmyer*, 255 AD2d 871, 872, *lv denied* 93 NY2d 902; *see* CPL 210.45 [2], [6]).

Nevertheless, we agree with the People on the merits that

defendant was not denied his statutory right to testify before the grand jury and thus that the court erred in granting his motion to dismiss the indictment on that ground (*see generally* CPL 190.50 [5] [a]; *People v Smith*, 18 AD3d 888, *lv denied* 5 NY3d 794). Defendant was not subject to an undisposed felony complaint in a local criminal court, and thus the District Attorney was not required to provide defendant with notice that the matter was going to be presented to a grand jury and to "accord the defendant a reasonable time to exercise his right to appear as witness therein" (CPL 190.50 [5] [a]; *see People v Woodard*, 197 AD2d 905; *People v Simmons*, 178 AD2d 972, 972, *lv denied* 79 NY2d 1007). Furthermore, defendant's notice of appearance applied only to the "then-entirely-separate [drug charges]" and not to the subsequent homicide charges at issue, and the People therefore were not obligated to consider the notification, which included the request to testify, as pertaining to the subsequent homicide charges (*People v Steed*, 253 AD2d 714, 715, *lv denied* 92 NY2d 1054). Thus, the notice of appearance did not trigger defendant's right to notification of the presentment of the homicide case.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

1016

CA 12-00233

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

IN THE MATTER OF GAMALIEL (TONY) DOMINGUEZ,
PETITIONER-RESPONDENT,

V ORDER

MONROE COUNTY SHERIFF PATRICK M. O'FLYNN,
CAPTAIN ANDREW FORSYTHE, LIEUTENANT JOHN
DIMARTINO AND DEPUTY PATRICIO ROJAS, JR.,
IN THEIR OFFICIAL CAPACITIES,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (BRIAN E. MARIANETTI OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered November 4, 2011 in a proceeding pursuant to CPLR article 78. The order, inter alia, vacated the termination of petitioner and ordered his reinstatement.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Laborers Intl. Union of N. Am., Local 210, AFL-CIO v Shevlin-Manning, Inc.*, 147 AD2d 977).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

1017

CA 12-00234

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

IN THE MATTER OF GAMALIEL (TONY) DOMINGUEZ,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MONROE COUNTY SHERIFF PATRICK M. O'FLYNN,
CAPTAIN ANDREW FORSYTHE, LIEUTENANT JOHN
DIMARTINO AND DEPUTY PATRICIO ROJAS, JR.,
IN THEIR OFFICIAL CAPACITIES,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (BRIAN E. MARIANETTI OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered November 16, 2011 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, vacated the termination of petitioner and ordered his reinstatement.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding to challenge his termination from employment as a deputy in the Monroe County Sheriff's Office based on his violation of three departmental rules and regulations. Following a hearing, Supreme Court granted those parts of the petition seeking to vacate the findings of guilt with respect to counts two and three and ordered that petitioner be reinstated with back pay. The court affirmed the finding of guilt with respect to count one, which alleged that petitioner engaged in conduct unbecoming a deputy sheriff in violation of section 4.1 of the Monroe County Sheriff's Office Rules and Regulations, and petitioner has not cross-appealed with respect to that charge. Petitioner previously signed a Last Chance Agreement (Agreement) when he pleaded guilty to prior charges of misconduct and, pursuant to the express terms of the Agreement, any violation of, inter alia, a rule or regulation "shall constitute just cause for his immediate termination." Thus, we need only determine whether the Agreement is

enforceable to warrant the penalty of termination.

We conclude that Supreme Court erred in determining that the Agreement was unenforceable on the ground that petitioner was placed in the "untenable position" of having to sign the Agreement or face termination. Courts in this state have repeatedly enforced such "last chance agreements" under the theory that a public employee may give up rights that the employee would otherwise have under the common law, statute or a collective bargaining agreement provided that the waiver is "freely, knowingly and openly arrived at, without taint of coercion or duress" (*Matter of Abramovich v Board of Educ. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown*, 46 NY2d 450, 455, *rearg denied* 46 NY2d 1076, *cert denied* 444 US 845). As the Second Department wrote in a similar context, "it is clear that by means of a settlement an employee who enjoys permanent status may, if voluntarily and knowingly done, waive statutory and contractual rights to a hearing before dismissal, where such waiver serves as the consideration for the curtailment of pending disciplinary proceedings" (*Whitehead v State of New York, Dept. of Mental Hygiene*, 71 AD2d 653, 654, *affd for reasons stated* 51 NY2d 781).

Here, although petitioner may eventually have been terminated if he did not sign the Agreement and instead had proceeded with a disciplinary hearing on the charges then pending against him, it does not necessarily follow that petitioner involuntarily signed the Agreement. Indeed, we cannot perceive how the Sheriff's decision to afford petitioner another chance to continue his employment with the understanding that he would be terminated if he engaged in any future misconduct — rather than proceeding with the scheduled disciplinary hearing — amounts to coercion or duress.

If petitioner found himself in the "untenable position" of having to sign the agreement or proceed with the hearing, he was in that position by virtue of his own misconduct and his extensive disciplinary history, which included seven prior suspensions. Several of the prior suspensions involved false statements made by petitioner to his superiors during their investigations of his misconduct. It is well settled that the "exercise or threatened exercise of a legal right [does] not amount to duress" (*C & H Engrs. v Klargester, Inc.*, 262 AD2d 984, 984; *see Marine Midland Bank v Hallman's Budget Rent-A-Car of Rochester*, 204 AD2d 1007, 1008), and there is no dispute that respondents had a legal right to seek termination of petitioner's employment based on the disciplinary charges that gave rise to the Agreement.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

1021

KA 12-00615

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KIERON ALLEN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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 (Michael L. Dwyer, J.), rendered August 3, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [3]) and, in appeal No. 2, he appeals from the resentence imposed on that conviction. With respect to appeal No. 1, defendant contends that County Court erred in summarily denying his pro se motion to withdraw his plea. We reject that contention. A court need only afford a defendant a "reasonable opportunity to present his contentions" on a motion to withdraw a guilty plea (*People v Tinsley*, 35 NY2d 926, 927; *see People v Buske*, 87 AD3d 1354, 1355, *lv denied* 18 NY3d 882), and the court did so here. The court properly denied the motion inasmuch as "defendant's assertions of innocence and coercion were conclusory and belied by defendant's statements during the plea colloquy" (*People v Wright*, 66 AD3d 1334, 1334, *lv denied* 13 NY3d 912). In addition, the record does not support defendant's contention that his motion to withdraw the plea should have been granted on the further ground that he received ineffective assistance of counsel (*see generally People v Ford*, 86 NY2d 397, 404; *People v Patterson*, 9 AD3d 899, 900). We reject defendant's contention that defense counsel took a position adverse to that of defendant in his pro se motion to withdraw the plea, and thus there was no reason for the court to assign new counsel (*see People v Strasser*, 83 AD3d 1411, 1411-1412; *People v McKoy*, 60 AD3d 1374, 1374-1375, *lv denied* 12 NY3d 856).

With respect to appeal No. 2, defendant failed to preserve for our review his contention that his resentence as a second felony offender constituted a greater sentence inasmuch as he did not object to the allegedly greater sentence, nor did he move to withdraw his guilty plea or to vacate the judgment of conviction on that ground (*see People v Sprague*, 82 AD3d 1649, 1649, *lv denied* 17 NY3d 801; *People v Coutts*, 277 AD2d 1029, 1029). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We agree with defendant, however, that the court erred in allowing him to proceed pro se during resentencing. "Before allowing a defendant to proceed pro se, the court must conduct a searching inquiry to ensure that the waiver of the right to appointed counsel is 'unequivocal, voluntary and intelligent' " (*People v LaValle*, 3 NY3d 88, 106, quoting *People v Smith*, 92 NY2d 516, 520). The court conducted no such inquiry in this case, and "[t]he sentencing court erred by permitting defendant to represent himself at his ultimate sentencing proceeding" (*People v Adams*, 52 AD3d 243, 243, *lv denied* 11 NY3d 829). We conclude that the tainted proceeding had an adverse impact on defendant, warranting reversal of the resentence and remittal of this matter for the court to ascertain that defendant has been afforded the right to counsel and for resentencing (*cf. People v Johnson*, 94 AD3d 1496, 1497; *see generally People v Wardlaw*, 6 NY3d 556, 559). We therefore reverse the resentence in appeal No. 2 and remit the matter to County Court for further proceedings in accordance with defendant's right to counsel and for resentencing.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

1022

KA 10-02120

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KIERON ALLEN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CHRISTOPHER JUDE PELLI, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Oneida County Court (Michael L. Dwyer, J.), rendered October 8, 2010. Defendant was resentenced upon his conviction of robbery in the first degree.

It is hereby ORDERED that the resentence so appealed from is unanimously reversed on the law and the matter is remitted to Oneida County Court for further proceedings in accordance with the same Memorandum as in *People v Allen* ([appeal No. 1] ___ AD3d ___ [Oct. 5, 2012]).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

1025

KA 09-00197

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN JONES, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered November 17, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [1] [b]), defendant contends that County Court erred in refusing to suppress tangible evidence seized from him by police officers as the fruit of an unlawful entry. We reject that contention. The evidence at the suppression hearing supports the court's conclusion that the police officers lawfully entered defendant's house to execute a bench warrant for defendant's brother. The evidence established that the officers reasonably believed that the brother, who resided at the same house, was present when they entered (*see* CPL 120.80 [4]; 530.70 [2]; *People v Paige*, 77 AD3d 1193, 1194, *affd* 16 NY3d 816). The record also supports the court's alternative conclusion that defendant's sister consented to the entry of the officers (*see People v Barnhill*, 34 AD3d 933, 934, *lv denied* 8 NY3d 843). We reject defendant's further contention that a police officer's removal of the blanket that was completely covering defendant, including his face, constituted an unlawful search not supported by probable cause. The officer's conduct in removing the blanket to ascertain defendant's identity and to keep defendant's hands in view was reasonable under the circumstances (*see People v Wheeler*, 2 NY3d 370, 373-374). Having removed the blanket, the officer was entitled to seize the handgun that was then in plain view (*see id.*), and to search a hooded sweatshirt located near defendant's feet (*see People v Smith*, 59 NY2d

454, 458).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

1027

KA 11-00807

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. KEITZ, DEFENDANT-APPELLANT.

PETER O. EINSET, GENEVA, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JASON A. MACBRIDE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered January 5, 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 guilty plea of assault in the second degree (Penal Law § 120.05 [7]). Defendant contends that he did not plead guilty or admit guilt and thus that he was not convicted of the charge brought against him. At the start of the plea proceeding, defendant agreed that he would plead guilty to assault in the second degree. He indicated that he was pleading guilty of his own free will and after having had sufficient time to discuss it with his attorney. When County Court asked defendant "[h]ow do you plead," defendant responded "[y]es." Thereafter, the court asked defendant specific questions about the charge, and defendant made various admissions. We conclude that the plea allocution as a whole establishes that "defendant understood the charges and made an intelligent decision to enter a plea" (*People v Goldstein*, 12 NY3d 295, 301).

To the extent that defendant's contention that he was denied effective assistance of counsel survives his guilty plea (*see People v Bethune*, 21 AD3d 1316, 1316, *lv denied* 6 NY3d 752), we conclude that it lacks merit. Defendant "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

1031

CAF 10-00645

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

IN THE MATTER OF KIMBERLY MARVIN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY L. KILMER, RESPONDENT-APPELLANT.

IN THE MATTER OF JEFFREY L. KILMER,
PETITIONER-APPELLANT,

V

KIMBERLY MARVIN, RESPONDENT-RESPONDENT.

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered March 16, 2010. The order, among other things, held Jeffery L. Kilmer in contempt of court.

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

Memorandum: Family Court properly found respondent-petitioner (father) in contempt of court based upon his willful violation of a prior order directing the return of the parties' son to the custody of petitioner-respondent (mother). "A careful review of the evidence, both direct and circumstantial, fully supports [the court's finding that the father willfully] violated a clear and unequivocal mandate of the court" (*Labanowski v Labanowski*, 4 AD3d 690, 694). The evidence establishes that the father was aware of the terms of the prior order and, in the court's words, "he put in motion the events which resulted in the child being removed from [the mother's] home and placed in [the father's] home" (*see Matter of Daniels v Guntert*, 256 AD2d 940, 942). We reject the father's further contention that the court erred in conducting a confidential interview with the parties' daughter (*see generally Matter of Lincoln v Lincoln*, 24 NY2d 270, 272) and, in any event, there is no indication that the court relied on that interview in rendering its decision herein (*see Matter of Bernelle P.*, 45 NY2d 937, 938).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

1033

CA 12-00537

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

BENJAMIN L. JOLLEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AGOSTINHA R. LANDO, DEFENDANT-APPELLANT.

WILLIAMSON, CLUNE & STEVENS, ITHACA (JOHN HANRAHAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

BENJAMIN L. JOLLEY, PLAINTIFF-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered October 11, 2011. The order, insofar as appealed from, denied defendant's motion to strike and cancel the notice of pendency.

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

Memorandum: Plaintiff husband commenced this action seeking equitable distribution of the parties' marital assets, which allegedly include 18 parcels of real property. In addition to filing a summons and complaint, plaintiff filed a notice of pendency as to the real property (*see* CPLR 6501). We agree with defendant wife that Supreme Court erred in denying her motion to cancel the notice of pendency. "A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property" (*id.*). In determining the merits of a motion to cancel a notice of pendency, a court is limited to examining the face of the pleadings (*see 5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 320-321). "A claim that real property is a marital asset subject to distribution does not, by itself, establish grounds for a [notice of pendency]" (*Sehgal v Sehgal*, 220 AD2d 201, 201; *see Fakiris v Fakiris*, 177 AD2d 540, 543), inasmuch as a claim for equitable distribution will not necessarily affect the title to, or possession, use, or enjoyment of, the subject real property (*see Arteaga v Martinez*, 79 AD3d 951, 952; *Fakiris*, 177 AD2d at 543; *Gross v Gross*, 114 AD2d 1002, 1003). The court erred in relying on, inter alia, *Caruso, Caruso & Branda, P.C. v Hirsch* (41 AD3d 407, 409) because the complaint in the underlying divorce action in that case asserted causes of action for fraudulent conveyance and constructive trust in addition to equitable distribution. Here, the complaint seeks only equitable distribution.

We reject plaintiff's contention that the relief demanded in the complaint "would, obviously, affect [defendant's] title to and/or her possession, use or enjoyment of the parcels identified in" the notice of pendency. At this juncture of the litigation it is unclear whether the court, in the event that it rules in favor of plaintiff, will order defendant to convey the properties to plaintiff or will instead order defendant to pay a money judgment to plaintiff. It thus cannot be said with certainty that defendant will be required to sell or mortgage the subject properties.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

1048

KA 11-01154

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUKE M. PERRAH, 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 April 26, 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 adjudicating him to be a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court erred in making an upward departure to a risk level two from the presumptive level one risk. We reject that contention. An upward departure from a presumptive risk level is warranted where " 'there exists an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines' " (*People v McCollum*, 41 AD3d 1187, 1188, *lv denied* 9 NY3d 807; *see People v Howe*, 49 AD3d 1302, 1302). "There must exist clear and convincing evidence of the existence of special circumstance[s] to warrant an upward or downward departure" (*People v Hamelinck*, 23 AD3d 1060, 1060 [internal quotation marks omitted]; *see People v Sawyer*, 78 AD3d 1517, 1518, *lv denied* 16 NY3d 704; *People v Gandy*, 35 AD3d 1163, 1164), and such evidence must be established by "[r]eliable hearsay," including case summaries, presentence reports, and grand jury testimony (*People v Mingo*, 12 NY3d 563, 572-573; *see People v Gardiner*, 92 AD3d 1228, 1229, *lv denied* 19 NY3d 801; *People v Alvarado*, 79 AD3d 1719, 1719, *lv denied* 16 NY3d 707).

Here, the court properly relied on the case summary, the presentence reports, and defendant's own testimony at the SORA hearing in determining that the upward departure was justified based upon two factors not reflected in the risk assessment instrument: (1) "defendant's denial or at least hedging about the prior sexual abuse"

- as evidenced by his denial of wrongdoing in his 2006 presentence report with respect to a conviction of endangering the welfare of a child, as well as his explanation of that crime in court; and (2) his "lack of candor about his own history of abuse," as evidenced by defendant's failure to disclose that abuse in connection with his first presentence report. Furthermore, as the People correctly contend, defendant's commission of the instant offense while engaged in sex offender counseling for the prior offense demonstrated that counseling and probation supervision did not curb his dangerous propensities, and that is another factor not reflected in the risk assessment instrument. The court's upward departure was thus amply supported by the record.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

1053

CAF 12-00602

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

IN THE MATTER OF MICHAEL H., JR.,
RESPONDENT-APPELLANT.
---------- MEMORANDUM AND ORDER
ERIE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

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

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (MICHAEL J. LISZEWSKI OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered October 27, 2011 in a proceeding pursuant to Family Court Act article 3. The order placed respondent on probation for a period of six months.

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

Memorandum: On appeal from an order that adjudicated him to be a juvenile delinquent and placed him on probation for a term of six months, respondent contends only that, by imposing a term of probation and issuing an order of protection, Family Court failed to adopt the "least restrictive available alternative" as required by Family Court Act § 352.2 (2) (a). Inasmuch as the term of probation and order of protection issued by the court have expired, this appeal is moot (*see Matter of Alex N.*, 255 AD2d 626, 627).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

1056

CAF 11-00898

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

IN THE MATTER OF CHRISTY BRAZIE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

FLORENCE ZENISEK, RESPONDENT-APPELLANT.

PAUL M. DEEP, UTICA, FOR RESPONDENT-APPELLANT.

EDWARD G. KAMINSKI, UTICA, FOR PETITIONER-RESPONDENT.

JOHN T. NASCI, ATTORNEY FOR THE CHILDREN, ROME, FOR CARI B., JERREMY B. AND MCKENNA B.

Appeal from an order of the Family Court, Oneida County (Brian M. Miga, J.H.O.), entered February 10, 2011 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

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

Memorandum: Respondent, the fiancé of petitioner's estranged husband, appeals from an order of protection entered in favor of petitioner and her children. Petitioner concedes that she failed to meet her burden of establishing by a preponderance of the evidence that respondent committed the family offense of reckless endangerment, and we agree with respondent that petitioner also failed to meet her burden of proof with respect to the remaining offenses, i.e., disorderly conduct, harassment in the second degree and aggravated harassment in the second degree (*see* Family Ct Act § 812 [1]; Penal Law §§ 240.20, 240.26, 240.30; *see also Matter of Marquardt v Marquardt*, 97 AD3d 1112, 1113-1114).

The offense of disorderly conduct was not established because there was no evidence that respondent intended "to cause *public* inconvenience, annoyance or alarm, or recklessly creat[ed] a risk thereof" (Penal Law § 240.20 [emphasis added]). The offenses of harassment in the second degree and aggravated harassment in the second degree were not established because the evidence failed to show that respondent — by arguing with her fiancé and making threats against him and petitioner — intended to harass, annoy, threaten or alarm petitioner, who was not present when the argument occurred.

Although petitioner later listened to a recording of the argument that had been left as a message on her telephone, there is no evidence that respondent knew that her fiancé had called petitioner during the argument and that her threats were being recorded on petitioner's telephone. We thus conclude that Family Court erred in failing to dismiss the petition (*see Marquardt*, 97 AD3d at 1113; *see generally Matter of Woodruff v Rogers*, 50 AD3d 1571, 1571-1572, *lv denied* 10 NY3d 717). Because we conclude that petitioner failed to establish that respondent committed a family offense, we need not reach respondent's remaining contention.

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

1061

CA 12-00594

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

IN THE MATTER OF FRANK A. SEDITA, III AND
ERIE COUNTY DISTRICT ATTORNEY'S OFFICE,
PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

MARK A. SACHA, RESPONDENT-RESPONDENT.

HODGSON RUSS LLP, BUFFALO (JOSHUA FEINSTEIN OF COUNSEL), FOR PETITIONERS-APPELLANTS.

CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD, LLP, ROCHESTER (MATTHEW J. FUSCO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark H. Dadd, A.J.), entered September 6, 2011. The order "denied" the petition.

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

Memorandum: Although petitioners appeal from an order that purportedly "denied" their petition, they concede in their brief that Supreme Court "effectively granted the relief requested in the Verified Petition" and seek only to have certain language stricken from the order. Where, as here, the appealing parties have by their own concession "obtained the full relief sought, [they have] no grounds for appeal . . . This is so even where [they] disagree[] with the particular findings, rationale or the opinion supporting the order . . . , or where [they] failed to prevail on all the issues that had been raised" (*Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545). "Merely because the order appealed from contains language or reasoning that a party deems adverse to its interests does not furnish a basis for standing to take an appeal" (*Cholowsky v Civiletti*, 69 AD3d 110, 116 [internal quotation marks omitted]). We therefore agree with respondent that this appeal must be dismissed (*see* CPLR 5511).

We note that we have not addressed petitioners' remaining contentions inasmuch as those contentions are raised for the first time in their reply brief and thus are not properly before this Court (*see generally Matter of State of New York v Zimmer* [appeal No. 4], 63

AD3d 1563, 1564; *Turner v Canale*, 15 AD3d 960, 961, *lv denied* 5 NY3d 702).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

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

1062

CA 12-00314

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

IN THE MATTER OF KEVIN GEE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION OF ROCHESTER CITY
SCHOOL DISTRICT, JEAN-CLAUDE BRIZARD,
SUPERINTENDENT, ROCHESTER CITY SCHOOL
DISTRICT, ROCHESTER CITY SCHOOL DISTRICT
AND DAWN JEFFORDS, RESPONDENTS-RESPONDENTS.

RICHARD E. CASAGRANDE, LATHAM (JAMES D. BILIK OF COUNSEL), FOR PETITIONER-APPELLANT.

CHARLES G. JOHNSON, ROCHESTER (MICHAEL E. DAVIS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered April 19, 2011 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Memorandum: We conclude that, by accepting employment as a school instructor and entering into a collective bargaining agreement as a result of his membership in the union representing him, petitioner waived any right to be credited for seniority in the tenure area of teacher (*see Matter of Dietz v Board of Educ. of Rochester City School Dist.*, ___ AD3d ___ [Sept. 28, 2012]; *Matter of Wiener v Board of Educ. of E. Ramapo Cent. School Dist.*, 90 AD2d 832, 833, *appeal dismissed* 58 NY2d 1115).

Entered: October 5, 2012

Frances E. Cafarell
Clerk of the Court

MOTION NO. (782/12) CA 11-02291. -- WINIFRED K. DAY, PLAINTIFF-RESPONDENT, V ONE BEACON INSURANCE, DEFENDANT-APPELLANT. -- Motion for reargument of the appeal is granted in part and, upon reargument, the memorandum and order entered June 29, 2012 (96 AD3d 1678) is amended by deleting the phrase “dismissing the amended complaint” from the second sentence of the order and the second sentence of the third paragraph of the memorandum, and by deleting the phrase “the amended complaint is dismissed” from the ordering paragraph and substituting in place thereof “the first and second causes of action of the amended complaint are dismissed”; and the motion insofar as it sought in the alternative leave to appeal to the Court of Appeals is denied. PRESENT: SCUDDER, P.J., SMITH, FAHEY, LINDLEY, AND MARTOCHE, JJ. (Filed Oct. 5, 2012.)