SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 6, 2009

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. ROBERT G. HURLBUTT

HON. SALVATORE R. MARTOCHE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JEROME C. GORSKI, ASSOCIATE JUSTICES

JoAnn M. Wahl, CLERK

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1330

CA 08-00835

PRESENT: SMITH, J.P., CENTRA, LUNN, FAHEY, AND GREEN, JJ.

IN THE MATTER OF LIGHTHOUSE POINTE PROPERTY ASSOCIATES LLC, PETITIONER-RESPONDENT,

V OPINION AND ORDER

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, ALEXANDER B. GRANNIS, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, AND DALE A. DESNOYERS, DIRECTOR, DIVISION OF ENVIRONMENTAL REMEDIATION, RESPONDENTS-APPELLANTS.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KAREN R. KAUFMANN OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PETITIONER-RESPONDENT.

DANIEL M. DELAUS, JR., COUNTY ATTORNEY, ROCHESTER (MICHAEL E. DAVIS OF COUNSEL), FOR MONROE COUNTY, AMICUS CURIAE.

FRANKLIN D'AURIZIO, ROCHESTER, FOR IRONDEQUOIT CHAMBER OF COMMERCE, AMICUS CURIAE.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered December 27, 2007 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

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

Opinion by FAHEY, J.: The issue before us on this appeal is whether Supreme Court erred in granting the petition in this CPLR article 78 proceeding and directing respondent New York State Department of Environmental Conservation (DEC) to accept petitioner into the Brownfield Cleanup Program (BCP), set forth in Environmental Conservation Law (ECL) article 27, title 14. We conclude that the court erred in determining that the DEC acted in an arbitrary and capricious manner in denying petitioner's applications for acceptance into the BCP. We therefore conclude that the judgment should be reversed and the petition dismissed.

Background

This appeal arises from petitioner's efforts to develop contiguous 22-acre and 25.4-acre parcels. The first of the parcels (Riverfront parcel) is located on the east side of the Genesee River in the Town of Irondequoit and the City of Rochester, close to the confluence of the Genesee River and Lake Ontario, while the second of the two parcels (Inland parcel) is located near the east side of the Genesee River (collectively, the site). Petitioner proposes to develop the site as a mixed-use neighborhood, including residential complexes, a marina, restaurants and a hotel. Petitioner estimates that the cost of the project will range between $150 million and $250 million.

The site presently is between 8 and 25 feet above mean lake level and has groundwater at approximately seven feet below surface level. The site is located across the Genesee River from the historic Charlotte lighthouse, which was once on the shore of Lake Ontario. According to one of petitioner's members, however, the lighthouse is now a "good distance" from the mouth of the Genesee River because the marshland in that area "filled in." Petitioner acknowledges that most of the site is located on a 100-year flood zone and encompasses what was historically a marsh area.

Much of the site was deemed wasteland during the early to mid-20th century. Most of the Inland parcel is located within the footprint of a City landfill that operated from at least 1956 to 1962 and that served as a depository for residential refuse, ash, slag, sewage sludge and construction debris. The site has fill material ranges of 4 to 26 feet in depth, and at least some of the ground at that location is unstable. A wastewater treatment plant was located on a portion of the Inland parcel for approximately 60 years. The plant ceased to operate in the early 1980s and was demolished in the late 1990s. Sewage sludge from that plant was disposed of on the part of the site that contained a landfill through roughly 1970. Today, the portions of the site that are not vacant are primarily used for boat storage and parking.

The Brownfield Cleanup Program Act

The Brownfield Cleanup Program Act was enacted in 2003 to encourage voluntary remediation of brownfield sites for reuse and redevelopment (*see* ECL 27-1403). A brownfield site, with certain exceptions not relevant herein, is defined as "any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant" (ECL 27-1405 [2]). The term contaminant is defined as "hazardous waste and/or petroleum" (ECL 27-1405 [7-a]).

Participation in the BCP is subject to DEC approval (*see* ECL 27-1407 [1]; 6 NYCRR 375-3.4 [c]). The ECL lists grounds that mandate exclusion from the program (*see* ECL 27-1407 [8]; *see also* 6 NYCRR 375-3.3), including the failure of "real property [to] meet the requirements of a brownfield site" (ECL 27-1407 [8] [a]).

The benefits of admission to the BCP are at least twofold: successful applicants are entitled to significant tax credits (*see* Tax Law §§ 21 - 23; 6 NYCRR 375-3.9 [e]) and, upon completion of remediation, they also are entitled to a release from liability to the State of New York "arising out of the presence of any contamination in, on or emanating from the brownfield site" (ECL 27-1421 [1]). The release from liability is critical to financing brownfield projects, inasmuch as lenders are understandably wary of becoming responsible for toxic land in the event of a debtor's default in payment.

Once accepted into the BCP, participants are required to enter into a site cleanup agreement with the DEC (*see* ECL 27-1409 [8]). As required by statute (*see* ECL 27-1415 [6] [a]), the DEC has developed soil cleanup objectives (SCOs) considering various uses of land and 85 specific contaminants (*see* 6 NYCRR 375-6.1, 375-6.8 [b]). The SCOs are "remedial action objectives" (ECL 27-1415 [6] [a]) and, according to the DEC, they are intended to act as benchmarks for sites within a remedial program, not as guidelines for admission. The applicable SCO category for the uses contemplated by the project in question is "[r]estricted-residential" (6 NYCRR 375-1.8 [g] [2] [ii]).

Procedural History

In November 2006 petitioner filed two applications for admission into the BCP, one for each of the parcels at the site. Those applications were supported by a remedial investigation report (RI Report) prepared for petitioner by its environmental consultant. In the RI Report, the environmental consultant identified numerous instances of "exceedances of soil and groundwater cleanup standards for a number of contaminants" and recommended various remedial measures to treat those "exceedances." The estimated cost of the remedial measures ranged from $4 million to $8 million and, by contrast, the assessed value of the site is approximately $1.3 million. The DEC denied petitioner's applications on the ground that "there is no reasonable basis to believe that contamination or the potential presence of contamination . . . is complicating the redevelopment or reuse of the property," and thus the site does not meet the definition of a "brownfield site" as defined in ECL 27-1405 (2).

Petitioner commenced this proceeding in July 2007, seeking to annul the determination of the DEC denying its BCP applications. Petitioner alleged with respect to the Riverfront parcel that the RI Report "shows exceedances of the restricted use residential SCOs . . . for numerous hazardous wastes, including benzo(a)anthracene, benzo(a)pyrene, benzo(b)flouranthene, lead and mercury." Petitioner further alleged that exceedances of recommended SCOs set forth in a DEC Technical and Administrative Guidance Memorandum were observed in surface samples for those hazardous wastes, as well as metals including nickel and zinc. In addition, according to the RI Report, exceedances of ambient water quality standards were observed at all groundwater monitoring wells on the Riverfront parcel. Sampling of the water at that site revealed the presence of approximately 18 metals.

With respect to the Inland parcel, petitioner alleged that testing revealed exceedances of restricted use residential SCOs for numerous hazardous wastes, as well as exceedances of ambient water quality standards at all groundwater monitoring wells. Arsenic and specified metals were found in those wells. Petitioner further alleged that soil vapor probes confirmed the presence of volatile organic compounds in excess of health risk standards, and high concentrations of explosive methane also were detected at the Inland parcel.

Respondents sought dismissal of the petition, relying largely on the affidavit of an environmental engineer employed by the DEC. In that affidavit, the DEC employee considered the prior use of the parcels and addressed each paragraph of the petition alleging contamination. He then found that "the exceedances [of SCOs] were relatively few and not in great magnitude" and that, viewed in its entirety, petitioner's data failed to "indicate the presence of contamination at the property in quantities or concentrations sufficient to require remediation." The DEC employee further concluded that "[t]he highest values in soil vapor were encountered in the vicinity . . . where there are no current structures," and that "[w]hether indoor air in a structure later constructed in that area would pose a potential health risk cannot be determined from these exceedances." The DEC employee further noted that, in any event, the soil vapor results yielded only screening values that are used to determine whether further actions are required, but they did not confirm the presence of a health risk. In sum, the DEC employee concluded that the exceedances revealed by both historical and current sampling data were few in number, were limited in magnitude, were widely dispersed throughout the property, and did not indicate the need for remedial action. In his view, the majority of the environmental costs associated with the project would arise from the disposal of municipal solid waste, rather than the disposal of hazardous waste, and the "extra engineering and design requirements generally make development of a former municipal landfill cost prohibitive."

In challenging the conclusions of the DEC employee, petitioner submitted, inter alia, the affidavit of a professional engineer stating that the DEC's determination was contrary to the data collected at the site. Petitioner also submitted the affidavit of an owner of the portion of the site stating that prior efforts to develop his property at the site were abandoned because of complications posed by the hazardous substances located there.

As previously noted, the court granted the petition and directed the DEC to accept petitioner into the BCP based in part on the court's conclusion that the DEC failed "to state the reasoning [it] employed in reaching" its decision that the SCO exceedances were minimal and thus would not complicate the project. The court concluded that, "[b]y failing to provide any rational basis for [its] determination that the development of [the parcels] would not, or could not, be complicated by the possible presence of even minimal levels of

contaminants, the DEC has failed to demonstrate that [its] actions were anything but arbitrary and capricious." This appeal ensued.

Discussion

"[I]n a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination" (*Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363; *see Matter of Bath Petroleum Stor. v New York State Dept. of Envtl. Conservation*, 298 AD2d 883, *lv denied* 99 NY2d 507). "[W]here . . . the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference" (*Flacke*, 69 NY2d at 363; *see Bath Petroleum Stor.*, 298 AD2d at 883). "[O]nce it has been determined that an agency's conclusion has a 'sound basis in reason' . . ., the judicial function is at an end" (*Paramount Communications v Gibraltar Cas. Co.*, 90 NY2d 507, 514, *rearg denied* 90 NY2d 1008; *see Matter of Smith v New York State Div. of Hous. & Community Renewal*, 27 AD3d 1063, 1064).

The recent decision of the Court of Appeals in *Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast* (9 NY3d 219, 232) reiterates the above-referenced rules:

> "It is not the province of the courts to second-guess thoughtful agency decisionmaking and, accordingly, an agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence. The . . . agency, after all, has the responsibility to comb through reports, analyses and other documents before making a determination; it is not for a reviewing court to duplicate these efforts. As we have repeatedly stated, '[w]hile judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to "weigh the desirability of any action or [to] choose among alternatives." ' "

Based on the well-established principles of the role of the courts in reviewing agency determinations, the issue before us is whether the DEC acted irrationally or in an arbitrary and capricious manner in determining that the redevelopment of the site would not be complicated by the presence or potential presence of contaminants there (*see* ECL 27-1405 [2]). It is beyond dispute that reasonable minds may differ in the interpretation and analysis of the data collected at the site, and it therefore cannot be said that the rejection by the DEC of petitioner's BCP applications was unsupported by the evidence, nor can it be said that the DEC acted in an arbitrary and capricious manner in rejecting those applications. The determination of the DEC was premised upon the results of a thoughtful analysis performed by an environmental engineer who considered and

based his opinion on the testing conducted on behalf of the DEC, as well as the data submitted by petitioner. Inasmuch as it is not the province of the courts to second-guess a reasoned agency determination or to invade the process by which such a conclusion is reached (*see e.g. Riverkeeper*, 9 NY3d at 232; *Paramount Communications*, 90 NY2d at 514; *Flacke*, 69 NY2d at 363), the petition should have been dismissed. The DEC's well-reasoned analysis of the BCP applications of petitioner, coupled with the mandate that we must not substitute our judgment for that of the DEC, compels the conclusion that the court erred in granting the petition and directing the DEC to accept petitioner into the BCP.

Conclusion

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

CENTRA and GREEN, JJ., concur with FAHEY, J.; LUNN, J., did not participate; SMITH, J.P., dissents and votes to affirm in the following Opinion: Because I conclude that respondent New York State Department of Environmental Conservation (DEC) misinterpreted the statutes applicable to the determination underlying the judgment in this proceeding, resulting in the arbitrary and capricious exclusion of petitioner's parcels from the Brownfield Cleanup Program ([BCP] ECL 27-1401 *et seq.*), I respectfully dissent and would affirm.

The parties correctly agree that the narrow issue presented on this appeal is whether the DEC acted arbitrarily and capriciously in concluding that petitioner's proposed redevelopment sites do not fall within the definition of a Brownfield site. " 'Brownfield site' or 'site' shall mean any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant" (ECL 27-1405 [2]). In its brief on appeal, the DEC concedes that "the sampling data accompanying the applications satisfy the statutory standard of 'the presence or potential presence of a contaminant,' " but the record establishes that the DEC denied petitioner's applications to participate in the BCP on the ground that redevelopment or reuse of the subject parcels will not be complicated thereby. In his letter denying petitioner's applications to include the subject parcels in the BCP, respondent Director of the DEC's Division of Environmental Remediation concluded that "it is likely that any [contaminants] are attributable to solid waste disposal," and thus that the parcels are not eligible for the BCP. In addition, the DEC engineer who recommended the denial of petitioner's applications concluded that the redevelopment of the property was complicated by its former use as a solid waste landfill, and that contaminants that arose from such use were not to be considered in an application for inclusion in the BCP. I note that it is the position of the DEC that we must defer to its determination that those contaminants do not complicate the development of the property, because that determination falls within its area of expertise. I disagree, and conclude that this case in fact presents a paradigm of sites that fall within the ambit of the BCP as defined by the statutes, and that the interpretation by the DEC of the BCP's enabling statutes to exclude

the subject parcels is unreasonable.

Initially, I of course agree with the majority that "[i]t is well settled that an agency's interpretation of the statutes it administers must be upheld absent demonstrated irrationality or unreasonableness" (*Matter of Buffalo Columbus Hosp. v Axelrod*, 165 AD2d 605, 607; *see Barrett v Lubin*, 188 AD2d 40, 44). However, it is equally well settled that, where "the question is one of pure legal interpretation of statutory terms, deference to the [the administrative agency] is not required" (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 419; *see Matter of Teachers Ins. & Annuity Assn. of Am. v City of New York*, 82 NY2d 35, 41-42; *Matter of Moran Towing & Transp. Co. v New York State Commn.*, 72 NY2d 166, 173). Inasmuch as the DEC's interpretation of the statutory scheme under which it determines which sites are eligible for participation in the BCP "is one of pure legal interpretation of statutory terms" and thus is not entitled to deference (*Toys "R" Us*, 89 NY2d at 419), I conclude that the DEC's interpretation is both unreasonable and arbitrary, and that petitioner's applications should have been granted.

The interpretation of the term "Brownfield site" is a matter of first impression at the appellate level. The language of the statute defining that term and the legislative intent in enacting the BCP, however, demonstrate that the DEC's interpretation of that term is unreasonably narrow. The Legislature's intent is clearly and unequivocally set forth in ECL 27-1403, entitled "Declaration of policy and findings of fact":

> "The legislature hereby finds that there are thousands of abandoned and likely contaminated properties that threaten the health and vitality of the communities they burden, and that these sites, known as brownfields, are also contributing to sprawl development and loss of open space. It is therefore declared that, to advance the policy of the state of New York to conserve, improve, and protect its natural resources and environment and control water, land, and air pollution in order to enhance the health, safety, and welfare of the people of the state and their overall economic and social well being, it is appropriate to adopt this act to encourage persons to voluntarily remediate brownfield sites for reuse and redevelopment by establishing within the department a statutory program to encourage cleanup and redevelopment of brownfield sites."

It is well settled that "the starting point in any case of [statutory] interpretation must always be the language itself, giving effect to the plain meaning thereof" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583; *see also* McKinney's Cons Laws of NY, Book 1, Statutes §§ 76, 94; *Matter of Malta Town Ctr. I, Ltd. v Town of Malta Bd. of Assessment Review*, 3 NY3d 563, 568; *Patrolmen's*

Benevolent Assn. of City of N.Y. v City of New York, 41 NY2d 205, 208). Here, the plain language of the statute defining the term "Brownfield site" encompasses "any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant" (ECL 27-1405 [2]). The Court of Appeals has stated that " 'the word "any" is as inclusive as any other word in the English language' " (*New Amsterdam Cas. Co. v Stecker*, 3 NY2d 1, 6). The use of additional broad language in ECL 27-1405 (2), including "may be complicated," when coupled with the highly inclusive "presence or potential presence of a contaminant" (*id.*), requires that we give an expansive reading to the legislation. Further, the use of "a contaminant" demonstrates the legislative intent that the presence of a single contaminant may be sufficient to complicate the redevelopment or reuse of real property. The Legislature could hardly have chosen broader language in either the statute defining the term "Brownfield site" or the statute entitled "Declaration of policy and findings of fact" to signify its intent to encompass a vast range of parcels that may be polluted.

Contrary to the majority's conclusion, this is not a case in which this Court must defer to the DEC's interpretation of the statute because it falls within the agency's area of expertise. I agree that the DEC has particular expertise with respect to cases that involve a mixture of law and science, but this is not such a case. Instead, the DEC has improperly interpreted the enabling statutes for the BCP, resulting in the arbitrary exclusion of parcels containing contaminants that arise from solid waste despite the absence of any statutory basis for such an exclusion. It is well settled that "[a]dministrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute" (*Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v Town of Fallsberg*, 78 NY2d 194, 204, *rearg denied* 78 NY2d 1008 [internal quotation marks omitted], quoting *Matter of McNulty v State Tax Commn.*, 70 NY2d 788, 791). By administratively redacting solid waste disposal sites from consideration for inclusion in the BCP, the DEC has improperly usurped the legislative function. Consequently, I conclude that Supreme Court properly granted the petition and directed the DEC to accept petitioner into the BCP.

On appeal, the DEC contends that its determination comports with the "Eligibility Guidance" (Guidance) that it has prepared for evaluating applications for the BCP. I note that the affidavit of the DEC engineer who recommended the denial of petitioner's applications does not discuss, or even mention, the Guidance. Furthermore, the Guidance lists four factors to be considered in determining whether a proposed site comes within the "Brownfield Definition" and thus is eligible for admission to the BCP, and there is no indication that any were considered by the DEC in making its determination. Additionally, there is no indication that the Guidance bears any of the imprimatur of law because the DEC has not promulgated it as a regulation, and it is not included in the BCP statutes. Finally, the Guidance is so vague that it can be used to justify the approval or denial of any application. For instance, the Guidance indicates that the DEC should

consider, inter alia, "whether the proposed site is idled, abandoned or underutilized; [or] whether the proposed site is unattractive for redevelopment or reuse due to the presence or reasonable perception of contamination" (Guidance, 2.2 [3] [A], [B]). I conclude that the subject parcels, a portion of which was formerly a municipal dump and sewage treatment plant that currently is vacant land or is used for boat storage and parking, unquestionably fits within that language, but the DEC uses the Guidance to reach a contrary result. The remaining items in the Guidance, concerning the use and values of the properties in the immediate vicinity and the estimated costs of remediation (*id.* at [C], [D]), were never discussed by the DEC personnel in making the determination at issue. Consequently, inasmuch as the Guidance could be used either to justify the approval or the denial of petitioner's applications, coupled with the DEC's failure to apply it in determining whether to include petitioners' parcels in the BCP, I conclude that the Guidance is irrelevant to the issue whether the denial of petitioner's application was arbitrary and capricious.

I further conclude that the DEC's failure to promulgate any viable regulation for evaluating applications for admission into the BCP is, of itself, arbitrary and capricious. The DEC has implemented no regulatory standards to enable a court to conduct any meaningful review of its determinations. The only existing standard for judicial review of the contamination of polluted properties is the DEC's "soil cleanup objectives," which set forth the goals for the maximum amounts of contaminants remaining after remediation (*see* 6 NYCRR 375-6.8). The DEC contends that those standards may not be used to ascertain whether a property is eligible for participation in the program, however, because they are goals for the completion of remediation, not the standards for determining whether a property is in fact contaminated. That contention flies in the face of the DEC's reliance upon those same standards in calculating the presence of contaminants on a property. More importantly, if we accept the DEC's contention, then there is no objective guideline for evaluating the presence and levels of contaminants on a property. Stated differently, if the "soil cleanup objectives" are not the standard for determining whether a property is contaminated, then there is no standard at all.

Turning to the specifics of this case, I conclude that the DEC's determination to deny these applications was unreasonable in light of the evidence presented, and was arbitrary and capricious in light of the lack of standards. The DEC admits, through the reviewing engineer's affidavit, that the samples taken from the subject parcels indicate that five volatile organic compounds, seven toxic metals, and six polyaromatic hydrocarbons were found on the sites in amounts exceeding the soil cleanup objectives. Indeed, the reviewing engineer acknowledged that the data submitted by petitioner establishes that those "exceedances" exist. In recommending that the applications be denied, however, the reviewing engineer concluded that any contaminants present on the site in amounts exceeding the soil cleanup objectives were "few in number, limited in magnitude, and widely dispersed throughout the property." As discussed above, the DEC has failed to provide any standard against which it measures the number,

magnitude or dispersal of the contaminants that were admittedly present, thus demonstrating the arbitrary nature of the reviewing engineer's conclusion. Furthermore, he discounted all of the exceedances in groundwater samples. He minimized the presence of lead in approximately one sixth of the soil samples that were at levels up to seven times greater than the soil cleanup objectives, and he simply failed to discuss the presence of the other six metals found in the soil. He admitted that five volatile organic compounds existed at levels exceeding the soil cleanup objectives and concluded that he could not determine the potential health risk from those exceedances, yet he recommended that the DEC conclude that those exceedances did not complicate the redevelopment of the parcels. Finally, the reviewing engineer refused even to consider the amounts of methane gas present on the property because "[m]ethane gas generated from putrescible solid waste is not considered hazardous waste for purposes of eligibility for the BCP," but he provided no statutory support for that conclusion.

I agree with petitioner that each of its parcels is a "Poster Child" of a prototypical Brownfield site, the remediation of which the Legislature intended to encourage by creating the BCP (*see Destiny USA Dev., LLC v New York State Dept. of Envtl. Conservation*, 19 Misc 3d 1144[A], 2008 NY Slip Op 51161[U], *4). In sum, I would affirm because I agree with the court that there is "no rational basis to conclude that the levels of contamination at this site were 'minimal' " (*see Matter of HLP Props. LLC v New York State Dept. of Envtl. Conservation*, 21 Misc 3d 658), particularly in light of the DEC's failure to provide any standard against which we may evaluate that conclusion.

Accordingly, I would affirm the judgment.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1359

CA 08-01079

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

WESTFIELD FAMILY PHYSICIANS, P.C., DRS. DONALD F. BRAUTIGAM, GARY E. EGGLESTON, MARK R. HAGEN, TIMOTHY A. GORMAN, TIMOTHY M. KITCHEN, KRISTOPHER N. HARTWIG, AND BRUCE A. BARKER, AND ROBERT BERKE, M.D., DOING BUSINESS AS FAMILY HEALTH SERVICES, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

HEALTHNOW NEW YORK, INC., DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (JEREMY A. COLBY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered December 17, 2007 in a breach of contract action. The order denied defendant's motion for summary judgment dismissing the complaints and amended complaint.

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

Memorandum: In February 1998 defendant entered into separate contracts with plaintiffs Westfield Family Physicians, P.C. (WFP) and Robert Berke, M.D., doing business as Family Health Services (FHS), pursuant to which those plaintiffs would be members of an incentive risk pool, i.e., "a joint risk sharing agreement" (hereafter, Group Agreement), and thus would share in the apportionment of budget surplus and deficits. The Group Agreement set forth a compensation schedule and, in 1999, defendant paid FHS and WFP their shares of the annual surplus, as calculated by defendant. FHS and WFP did not object to defendant's calculation of their shares, and they accepted the payment.

In 2000, while the Group Agreement was still in effect, WFP's physicians entered into individual Participating Physician Agreements (PPAs) that, inter alia, set forth compensation methods for payment and apportionment of the surplus and deficits that differed from those set forth in the Group Agreement. Later that same year, FHS terminated the Group Agreement. WFP and its individual plaintiff

physicians (collectively, WFP plaintiffs) commenced an action alleging that the terms of the PPAs governed over those of the Group Agreement and that defendants thus owed them a specified surplus for the calendar year 2001. The WFP plaintiffs, with the exception of plaintiff Bruce A. Barker, also commenced a second action seeking, in an amended complaint, a specified surplus for the calendar years 2003 through 2005. WFP and FHS commenced a separate action alleging that defendant owed both WFP and FHS a surplus in a specified amount for the calendar year 1999 based on the terms of the Group Agreement. The three actions thereafter were consolidated. We conclude that Supreme Court erred in denying defendant's motion for summary judgment dismissing "this action," i.e., the two complaints and the amended complaint.

We agree with defendant with respect to the WFP plaintiffs that the terms of the Group Agreement, not those of the PPAs, governed the apportionment of WFP's annual budget surplus for the years in question. It is well settled that, where parties have set forth their agreement in an unambiguous and complete document, that agreement should be enforced according to its terms (*see Uribe v Merchants Bank of N.Y.*, 91 NY2d 336, 341; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162). Thus, our "initial inquiry must center on whether the written contract, 'read as a whole to determine its purpose and intent' . . ., is reasonably susceptible to differing interpretations" with respect to whether the terms of the Group Agreement or those of the PPAs control (*Comprehensive Health Solutions v Trustco Bank, N.A.*, 277 AD2d 861, 863).

Here, the language of the Group Agreement unambiguously establishes that the Group Agreement, not the PPA, governs WFP's compensation, including division of any surplus. Indeed, pursuant to the terms of the Group Agreement, it was contemplated that the individual physicians would enter into PPAs with defendant, which would "remain in full effect except that compensation shall be pursuant to this [Group] Agreement." The Group Agreement further provided that, "[i]n the event of a conflict between the terms of this Agreement and the [PPAs], this Agreement shall control." Thus, although each PPA states that it supersedes prior agreements, we conclude that the PPAs do not override the clear and unambiguous language in the Group Agreement that it controls in the event of a conflict between the Group Agreement and the PPAs. Moreover, the PPAs were not entered into on behalf of WFP and thus there were no prior agreements between defendant and the individual plaintiff physicians who entered into the PPAs.

Having determined that the terms of the Group Agreement are controlling, we must next determine whether defendant complied with those terms in calculating each surplus for the years set forth in the complaint of the WFP plaintiffs and the amended complaint, i.e., 2001 and 2003 through 2005, and the year set forth in the complaint of WFP and FHS, i.e., 1999. We reject defendant's contention that the Group Agreement unambiguously provided that the annual surplus shares of WFP and FHS were limited to 50% of the surplus, capped at the amount of the withhold. The Group Agreement provides in relevant part that, "in

no event shall FHS[’s] and WFP’s share of any net deficit and surplus exceed the sum of amounts of the withhold,” but it subsequently provides that, “in the event of a surplus, the full withhold plus 50% of the surplus shall be paid to FHS and WFP.” We agree with the court that those provisions of the Group Agreement “cannot be interpreted in a way to avoid the inconsistencies and [that], although the specific provision controls when there is an inconsistency between a general provision and a specific provision . . . , here both provisions are specific” (*Contacare, Inc. v CIBA-Geigy Corp.*, 49 AD3d 1215, 1217, *lv denied* 10 NY3d 714), and thus that the Group Agreement is as a matter of law inconsistent with respect to the surplus apportionment provision.

“It is a basic principle of contract law that a written document is to be construed against the party who prepared it where there are . . . contradictory provisions” (*Gillette v Heinrich Motors*, 55 AD2d 841, 841, *affd* 44 NY2d 661; *see Rochester Home Equity v Guenette*, 6 AD3d 1119; *see also Jacobson v Sassower*, 66 NY2d 991, 993; *Brodsky v Levy*, 161 AD2d 1120, 1121-1122). Nevertheless, that principle is not applicable where, as here, the party seeking to apply it participated in negotiating the terms of the document (*see Coliseum Towers Assoc. v County of Nassau*, 2 AD3d 562, 565, *lv denied* 2 NY3d 707; *see also 67 Wall St. Co. v Franklin Natl. Bank*, 37 NY2d 245, 249). Thus, we are relegated to the intent of the parties to the Group Agreement, and the “best evidence of [their] intent . . . is their conduct after [it was] formed” (*Waverly Corp. v City of New York*, 48 AD3d 261, 265).

Here, we conclude that defendant established as a matter of law, based on the conduct of the parties to the Group Agreement after it was formed (*see id.*), that the parties intended that the Group Agreement cap the apportionment of the annual surplus, if any, at the amount of their withhold. As noted, plaintiffs did not object to their compensation when defendant capped the parties’ surplus in 1999 at the amount of the withhold. In addition, in support of its motion defendant submitted the deposition testimony and an affidavit of plaintiff Donald F. Brautigam, WFP’s president and chief executive officer, in which he confirmed that it was not until approximately the year 2000 that WFP concluded that the Group Agreement provided that WFP was entitled to receive 50% of the annual surplus, if any, without a cap.

In opposing the motion, plaintiffs failed to present any evidence establishing that WFP and FHS did not intend to agree to defendant’s cap of the surplus allotment in 1998, when they entered into the Group Agreement. Indeed, plaintiffs merely offered evidence of uncommunicated subjective intent, and subsequent interpretations of the Group Agreement, and plaintiffs therefore failed to raise an issue of fact to defeat the motion (*see Wells v Shearson Lehman/American Express*, 72 NY2d 11, 24, *rearg denied* 72 NY2d 953; *Sally v Sally*, 225 AD2d 816, 818).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1360

CA 08-00311

PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, PERADOTTO, AND PINE, JJ.

IN THE MATTER OF THOMAS ANDERSON, DAVID CAPONE, CHARLES G. COPELAND, JACK GRECO, TOM GRECO, BRIAN LYNCH, ROCHESTER AIR CENTER, LLC, JAMES SICKLES, LAWRENCE A. TORCELLO, AND UNION PROCESSING CORPORATION, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF CHILI PLANNING BOARD AND METALICO ROCHESTER, INC., RESPONDENTS-RESPONDENTS.

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

KEITH O'TOOLE, SPENCERPORT, FOR RESPONDENT-RESPONDENT TOWN OF CHILI PLANNING BOARD.

UNDERBERG & KESSLER LLP, ROCHESTER (RONALD G. HULL OF COUNSEL), AND WARD NORRIS HELLER & REIDY LLP, FOR RESPONDENT-RESPONDENT METALICO ROCHESTER, INC.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered October 18, 2007 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondent Town of Chili Planning Board to dismiss the petition.

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

Memorandum: Petitioners appeal from a judgment dismissing their petition pursuant to CPLR article 78 seeking to annul the determination of respondent Town of Chili Planning Board (Planning Board) granting the applications of respondent Metalico Rochester, Inc. (Metalico) with respect to, inter alia, the installation of a metal shredder on the site of its scrap metal processing facility. According to the petition, that facility is located in proximity to the Rochester International Airport, and the traffic pattern for a specified runway "will take aircraft using this runway directly over [the facility] at low altitude." The record of the public hearing before the Planning Board establishes that Metalico's representative advised the Planning Board that explosions can occur in the event that gasoline enters the shredder and is ignited by sparks created by the milling process. The representative further explained, however, that

water mist is sprayed into the shredder to "try to consume the oxygen and therefore limit the amount of explosions," and he stated that "[it] has worked out very, very successfully." Metalico provided an environmental assessment form (EAF), and the Town of Chili's Fire Marshal recommended, inter alia, that the Planning Board require Metalico to install a fire suppression system in the shredder and require that water mains provide service to the shredder and to hydrants on Metalico's property. The Fire Marshal concluded that, if his recommendations were accepted, "we will have an excellent operation at [Metalico] without nagging concerns." Thereafter, the Planning Board voted to table Metalico's application pending a Type I review pursuant to article 8 of the Environmental Conservation Law (State Environmental Quality Review Act [SEQRA]), for which it would be the lead agency.

During the course of the SEQRA review, Metalico advised the Planning Board that, because explosions require oxygen in order to occur, Metalico will inject a water and soap solution into the shredder. In addition, explosions are prevented because gasoline tanks are drained from vehicles before processing. Metalico advised the Planning Board that vehicles comprise only approximately 25% of the material processed at the facility. Also as part of the SEQRA review, the Monroe County Department of Planning and Development informed the Planning Board by letter that the application had been reviewed "for airport considerations and has been granted airport approval with conditions based on the fact that the new recycling plant equipment will not exceed a height of 49 feet." Petitioner Rochester Air Center, LLC, through its owner, advised the Planning Board by letter that it was concerned about the risk that periodic explosions would pose to air traffic using the specified runway that required aircraft to fly over the Metalico facility at a relatively low altitude. The Planning Board also received a letter from LaBella Associates, P.C. stating that the metal shredder posed numerous environmental and safety risks, including the risks of explosions and the ejection of material or shrapnel that could impact air traffic safety. Those two letters were not discussed at the public hearing.

The Planning Board hired FES Associates to conduct an environmental review, and in Part 2 of the EAF that FES Associates prepared noted that there were "small to moderate" potential environmental impacts, including the "risk of explosion or release of hazardous substances." The risk to aircraft was not specifically addressed in the EAF or at the public hearing. The Planning Board adopted the recommendation of FES Associates that the project would not have a significant impact on the environment and therefore issued a negative declaration (*see generally* ECL 8-0109 [8]).

It is well settled that "[a] court's authority to examine a SEQRA review . . . is limited to reviewing whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (*Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 688). Contrary to petitioners' contention, the Planning Board "identified the relevant areas of environmental concern, took a hard look at them,

and made a reasoned elaboration of the basis for its determination" (*id.* [internal quotation marks omitted]). We are cognizant that the Planning Board's determination did not address the precise concern raised by petitioners, i.e., that an explosion may affect air traffic. Nevertheless, viewing the determination of the Planning Board " 'in light of a rule of reason,' " we conclude that Supreme Court properly dismissed the petition (*id.*).

All concur except SMITH and PINE, JJ., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent because neither the Town of Chili's Fire Marshal nor the Monroe County Department of Planning and Development (Department) addressed the risk of explosions in the proposed automobile shredder resulting in fires, as well as the risk of flying projectiles from the shredder with respect to airplanes using runways near the proposed shredder. In his letter dated December 29, 2006 to respondent Town of Chili Planning Board (Planning Board), the Fire Marshal recommended that four conditions be met with respect to the proposed shredder: that a fire suppression system be installed in the shredder; that there be an adequate water supply; that the height of stacked material should not exceed 28 feet; and that the size of any material stacks should not exceed 90,000 square feet. The Department by letter dated January 26, 2007 set forth that "permit approval" for the shredder was granted by the airport "based on the fact that the new recycling plant equipment will not exceed a height of 49 feet." The Department further set forth that "the applicant will need to notify and coordinate the use of construction equipment such as cranes with a boom height over 100 feet" with the airport, and that "[w]ater must be used to control and manage dust from the operations on this site." Both communications preceded those received from petitioner Rochester Air Center, LLC and LaBella Associates, P.C. which raised concerns about the risk of explosions in the shredder resulting in fires and the risk of flying projectiles from the shredder with respect to airplanes using nearby runways. Those concerns are sufficiently serious that they should have been addressed explicitly before the applications of respondent Metalico Rochester, Inc. were granted. It is not enough that the Planning Board considered the views of the Fire Marshal and the Department, inasmuch as it appears that neither had considered the risk to airplanes using nearby runways. We therefore would reverse the judgment, deny the Planning Board's motion to dismiss the petition, grant the petition and annul the Planning Board's determination.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1369

KA 07-02140

PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, PERADOTTO, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RUDY E. ERB, DEFENDANT-APPELLANT.

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

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (TIMOTHY P. FITZGERALD OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Oneida County Court (Michael L. Dwyer, J.), entered August 8, 2007. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed in the interest of justice and on the law without costs and the matter is remitted to Oneida County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). Although the total risk factor score on the risk assessment instrument (RAI) prepared by the Board of Examiners of Sex Offenders (Board) resulted in the presumptive classification of defendant as a level one risk, County Court agreed with the Board's recommendation that an upward departure from defendant's presumptive risk level was warranted based on aggravating factors not taken into account by the RAI. Although defendant has not raised the issue, we conclude that his right to due process was violated based on the failure of the court to conduct a hearing before making its determination of defendant's risk level, as expressly required by Correction Law § 168-n (6). " '[T]he due process protections required for a risk level classification proceeding are not as extensive as those required in a plenary criminal or civil trial' " (*People v Brooks*, 308 AD2d 99, 105, *lv denied* 1 NY3d 502, quoting *Doe v Pataki*, 3 F Supp 2d 456, 470). Nevertheless, although defendant waived his right to appear in person and to submit materials, there is no indication in the record before us that he waived his right to a hearing (*see generally People v Costas*, 46 AD3d 475, *lv denied* 10 NY3d 716). Indeed, Correction Law § 168-n (6) requires that, "[i]f a sex offender, having been given notice . . . of the determination proceeding in accordance with this section, fails to appear at this proceeding, without sufficient

excuse, the court shall conduct the hearing" and make its determination. It does not provide that the failure to appear constitutes a waiver of the right to a hearing. We therefore reverse the order and remit the matter to County Court for a hearing and new risk level determination in compliance with Correction Law § 168-n.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1415

CA 08-01085

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

SAMUEL L. TABONE AND SALLY TABONE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

KEUN Y. LEE, M.D., BUFFALO OTOLARYNGOLOGY GROUP, P.C., AND KALEIDA HEALTH, DOING BUSINESS AS MILLARD FILLMORE GATES HOSPITAL,
DEFENDANTS-RESPONDENTS.

BROWN CHIARI LLP, LANCASTER (MICHAEL R. DRUMM OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

DAMON & MOREY LLP, BUFFALO (FRANK C. CALLOCCHIA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS KEUN Y. LEE, M.D. AND BUFFALO OTOLARYNGOLOGY GROUP, P.C.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ANGELO S. GAMBINO OF COUNSEL), FOR DEFENDANT-RESPONDENT KALEIDA HEALTH, DOING BUSINESS AS MILLARD FILLMORE GATES HOSPITAL.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered January 18, 2008 in a medical malpractice action. The order, insofar as appealed from, granted the motion of defendants Keun Y. Lee, M.D. and Buffalo Otolaryngology Group, P.C. and the cross motion of defendant Kaleida Health, doing business as Millard Fillmore Gates Hospital, and directed plaintiff Samuel L. Tabone to provide medical authorizations in compliance with the Health Insurance Portability and Accountability Act of 1996 with no date restrictions.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, plaintiff Samuel L. Tabone is directed to provide current time-restricted authorizations for the medical providers in question and, with respect to any such medical provider from whom he received treatment at a different time than that specified in the authorization, plaintiff Samuel L. Tabone is further directed to submit the records of such treatment to Supreme Court, and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following Memorandum: Plaintiffs commenced this medical malpractice action seeking damages based on the alleged failure of defendants Keun Y. Lee, M.D. and Buffalo Otolaryngology Group, P.C. (Lee defendants) and Kaleida Health, doing business as Millard Fillmore Gates Hospital (Kaleida), to diagnose Samuel L. Tabone (plaintiff) with throat cancer in the

course of their care and treatment of him. In response to the respective demands of the Lee defendants and Kaleida, plaintiff furnished them with medical authorizations in compliance with the Health Insurance Portability and Accountability Act of 1996 (42 USC § 1320d *et seq.*), but limited those authorizations either to specific dates or to retroactive periods ranging from 21 months to 6 years. According to plaintiffs' attorney, those limited authorizations were "intended to encompass all records . . . which do or may relate to the events underlying [the] action." The Lee defendants moved for an order compelling plaintiff, inter alia, to furnish authorizations that were "without date restrictions," and Kaleida cross-moved for, inter alia, that same relief. We conclude that Supreme Court abused its discretion in granting the motion and cross motion without first conducting an in camera review of the records of the medical providers in question that were outside the time periods specified in the authorizations to determine whether the records are material and related to any physical or mental condition placed in issue by plaintiffs.

"In bringing the action, plaintiff waived the physician/patient privilege only with respect to the physical and mental conditions affirmatively placed in controversy" (*Mayer v Cusyck*, 284 AD2d 937, 938). Here, all of plaintiffs' claims of injury and damages arise from the alleged undiagnosed cancer and its sequelae. Contrary to defendants' contentions, the allegations in the bill of particulars that plaintiff sustained, inter alia, mild cachexia and anorexia, loss of enjoyment of life, disability, disfigurement, fear of death, and extensive pain and suffering do not constitute such "broad allegations of injury" that they place plaintiff's entire medical history in controversy (*Geraci v National Fuel Gas Distrib. Corp.*, 255 AD2d 945, 946). Thus, as previously noted, the court abused its discretion in compelling plaintiff to provide authorizations with no date restrictions without first conducting an in camera review of the records of treatment outside the specified time periods (*see Mayer*, 284 AD2d at 937-938; *Carter v Fantauzzo*, 256 AD2d 1189, 1190; *cf. Geraci*, 255 AD2d at 946).

We therefore reverse the order insofar as appealed from, direct plaintiff to provide current time-restricted authorizations for the medical providers in question and, with respect to any such medical provider from whom plaintiff received treatment at a different time than that specified in the authorization, further direct plaintiff to submit the records of such treatment to the court, and we remit the matter to Supreme Court for an in camera review of those records to determine whether they are material and related to any physical or mental condition placed in issue by plaintiffs (*see Mayer*, 284 AD2d at 938).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1418

CA 08-00284

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, AND PINE, JJ.

DANA JUHASZ, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

STEPHEN JUHASZ, DEFENDANT-APPELLANT-RESPONDENT.

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

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an amended judgment of the Supreme Court, Erie County (John F. O'Donnell, J.), entered April 11, 2007 in a divorce action. The amended judgment, among other things, ordered defendant to pay maintenance and child support to plaintiff.

It is hereby ORDERED that the amended judgment so appealed from is unanimously modified on the law by providing that, upon the sale of the marital residence, defendant shall receive a credit of $216,000 and by vacating the amount awarded for child support and the directive that plaintiff designate defendant as beneficiary of life insurance for the benefit of the parties' children and as modified the amended judgment is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Defendant appeals and plaintiff cross-appeals from an amended judgment of divorce that, inter alia, directed defendant to pay maintenance and child support, as well as distributed marital property. The parties were married in 1990 and have three minor children. Supreme Court properly determined that a brokerage account with Julius Baer (JB account) was defendant's separate property inasmuch as it was funded entirely from defendant's premarital sale of stock in a family business (*see* Domestic Relations Law § 236 [B] [1] [d] [1]). The court erred, however, in failing to credit defendant for his contribution of separate property toward the purchase of the marital residence. It is well settled that a spouse is entitled to a credit for his or her contribution of separate property toward the purchase of the marital residence (*see Milnarik v Milnarik*, 23 AD3d 960, 962-963; *Gonzalez v Gonzalez*, 291 AD2d 373, 374; *Moses v Moses*, 231 AD2d 850), including any contributions that are directly traceable to separate property (*see Spilman-Conklin v Conklin*, 11 AD3d 798, 800; *Myers v Myers*, 255 AD2d 711, 716).

Before the marriage, defendant purchased a home for $240,000 with

funds that he derived from his sale of the stock. During the marriage, defendant contributed $200,000 from the JB account to purchase a vacation home for approximately $450,000, and he secured a mortgage for the balance. That mortgage was also paid with funds from the JB account. The parties subsequently sold both homes and purchased the marital residence for $216,000. We conclude that defendant is entitled to a credit of $216,000 for his contribution of separate property to purchase the marital residence, and we therefore modify the amended judgment accordingly. "While [defendant] did not provide a paper trail documenting the source of the money used to purchase the marital residence, nothing in either party's testimony suggests that any other possible source for the money exists" (*Zanger v Zanger*, 1 AD3d 865, 867). In view of our determination concerning defendant's entitlement to a credit for separate property with respect to the marital residence, we reject the contention of plaintiff on her cross appeal that she should have been awarded title to the marital residence as a matter of equity (*see generally* Domestic Relations Law § 236 [B] [5] [d]).

We also reject the contention of defendant that he was entitled to a credit for separate property that he contributed for renovations to the marital residence. Although the marital residence was appraised for $420,000 four months prior to the trial, defendant failed to establish that the separate property funds spent on renovations added value to the residence apart from the appreciation in value resulting from market forces over the period of ownership and, if so, the amount by which the value of the property was increased (*see generally Parkinson v Parkinson*, 295 AD2d 909).

Contrary to defendant's further contention, the court properly imputed income to defendant of $180,000 per year. Courts have "considerable discretion to attribute or [to] impute an annual income to a parent" (*Blaise v Blaise*, 241 AD2d 680, 682; *see* Domestic Relations Law § 240 [1-b] [b] [5] [iv]; *Winnert-Marzinek v Winnert*, 291 AD2d 921; *see also Kay v Kay*, 37 NY2d 632, 637), and the record establishes that defendant derived substantial income from his investments. We conclude, however, that the amount awarded for child support must be vacated because the court failed to articulate any basis for that portion of the award based on the parental income exceeding $80,000 (*see Matter of Cassano v Cassano*, 85 NY2d 649, 653-655; *Matter of Miller v Miller*, 55 AD3d 1267, 1268-1269; *Irene v Irene* [appeal No. 2], 41 AD3d 1179, 1181). We therefore further modify the amended judgment by vacating that amount, and we remit the matter to Supreme Court to determine defendant's child support obligation in compliance with the Child Support Standards Act (*see e.g. Irene*, 41 AD3d at 1181). Contrary to the contention of defendant, we conclude that the court properly ordered him to continue to pay for the private school education of the children (*see* § 240 [1-b] [c] [7]; *Fruchter v Fruchter*, 288 AD2d 942, 943).

We reject the further contention of plaintiff on her cross appeal that the court violated Domestic Relations Law § 248 by ordering that maintenance would terminate in the event that she resided with an

unrelated adult male for more than 30 days. That section, entitled "Modification of judgment or order in action for divorce or annulment," provides in relevant part that a husband may apply for *modification* of a judgment of divorce if the wife remarries or if she is "habitually living with another man and holding herself out as his wife, although not married to such man." Here, however, we are concerned with an initial award of maintenance and not an application to modify an existing judgment or order. Inasmuch as courts have the discretionary power to "fashion a fair and equitable maintenance award" (*Hartog v Hartog*, 85 NY2d 36, 52), we conclude under the circumstances of this case that the condition imposed by the court is not improper (*cf. Florio v Florio*, 25 AD3d 947, 950).

The further contention of plaintiff that she is entitled to arrears for maintenance and child support is not properly before us. In the amended judgment, the court specifically noted that these issues were unresolved and were still pending before the court. Thus, any ruling on those issues by this Court would be premature (*see generally* CPLR 5701 [a] [2]; *Cobb v Kittinger*, 168 AD2d 923).

As plaintiff contends and defendant correctly concedes, the court erred in directing plaintiff to "designate defendant as beneficiary [of life insurance] for the benefit of the children." We therefore further modify the amended judgment by vacating that directive.

Entered: February 6, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1419

CA 08-01064

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

ROBERT W. BLOOM, JR. AND CHARMAYNE R. BLOOM,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

RENE F. HENSEL, ESQ., DEFENDANT,
AND THOMAS D. CALANDRA, ESQ., DEFENDANT-RESPONDENT.

KEITH R. LORD, PHELPS, FOR PLAINTIFFS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (TARA J. SCIORTINO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered August 6, 2007 in a legal malpractice action. The order granted the motion of defendant Thomas D. Calandra, Esq. for summary judgment dismissing the complaint against him.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is denied and the complaint against defendant Thomas D. Calandra, Esq. is reinstated.

Memorandum: Plaintiffs commenced this legal malpractice action seeking damages allegedly arising from defendants' representation of them in a personal injury action. We conclude that Supreme Court erred in granting the motion of defendant Thomas D. Calandra, Esq. seeking summary judgment dismissing the complaint against him. We agree with Calandra that he met his initial burden on the motion by submitting evidence that he did not have an attorney-client relationship with plaintiffs, i.e., that he had no involvement in the personal injury action and he had no fee-sharing agreement with defendant Rene F. Hensel, Esq. with respect to that action (*see Rechberger v Scolaro, Shulman, Cohen, Fetter & Burstein, P.C.*, 45 AD3d 1453; *Volpe v Canfield*, 237 AD2d 282, 283, *lv denied* 90 NY2d 802). In opposition to the motion, however, plaintiffs raised a triable issue of fact whether they had an attorney-client relationship with Calandra at the time of the alleged malpractice (*see Tropp v Lumer*, 23 AD3d 550; *cf. Jane St. Co. v Rosenberg & Estis*, 192 AD2d 451, *lv denied* 82 NY2d 654).

"[A]n attorney-client relationship may exist in the absence of a retainer or fee" (*Gardner v Jacon*, 148 AD2d 794, 795) and, "[i]n determining the existence of an attorney-client relationship, a court must look to the actions of the parties to ascertain the existence of

such a relationship" (*Wei Cheng Chang v Pi*, 288 AD2d 378, 380, *lv denied* 99 NY2d 501; *see McLenithan v McLenithan*, 273 AD2d 757, 758-759). The unilateral beliefs of plaintiffs, without more, do not render them Calandra's clients (*see e.g. Volpe*, 237 AD2d at 283; *Jane St. Co.*, 192 AD2d 451). Here, plaintiffs submitted evidence that Calandra referred the personal injury action to Hensel and that plaintiffs met with Hensel in Calandra's office for the initial meeting and on another occasion as well. Plaintiffs also submitted evidence that Calandra's staff arranged for the initial meeting, that both defendants met with plaintiffs during that meeting, and that, at the conclusion of the meeting, Hensel stated that "they would call [Robert W. Bloom, Jr. (plaintiff)] . . . if they were going to take the case." In addition, plaintiffs submitted the affidavit of Hensel in which he stated that he had previously engaged in fee-sharing arrangements in several cases referred to him by Calandra and that there was an oral agreement to split the fee with respect to the instant personal injury action. Hensel also stated that Calandra inquired with respect to the progress of the underlying action several times, and plaintiff testified at his deposition that Hensel informed him of that fact. Several of the pleadings or proposed pleadings in the personal injury action list both defendants as plaintiffs' attorneys, and plaintiffs also submitted evidence establishing that Hensel sent Calandra copies of certain of his correspondence with plaintiffs. Viewed as a whole, we conclude that the evidence submitted in opposition to the motion raises a triable issue of fact whether there was an attorney-client relationship between plaintiffs and Calandra (*see Tropp*, 23 AD3d 550; *cf. Jane St. Co.*, 192 AD2d 451).

All concur except PERADOTTO, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent. In my view, Supreme Court properly granted the motion of defendant Thomas D. Calandra, Esq. seeking summary judgment dismissing the complaint against him. The facts on which the majority relies in concluding that a triable issue of fact exists with respect to the existence of an attorney-client relationship between plaintiffs and Calandra may support, at best, an inference that plaintiffs reasonably believed that they were being represented by Calandra. As the majority recognizes, however, an attorney-client relationship cannot be created solely by the unilateral belief of a plaintiff (*see Wei Cheng Chang v Pi*, 288 AD2d 378, 380, *lv denied* 99 NY2d 501). Moreover, there is no evidence in the record that Calandra explicitly undertook the performance of any specific task for plaintiffs (*see id.*; *cf. Tropp v Lumer*, 23 AD3d 550, 551). Absent such an undertaking, the inconsistent appearance of Calandra's name on draft pleadings in the underlying personal injury action is insufficient to raise a triable issue of fact, particularly because the only attorney signature to appear on any pleading was that of defendant Rene F. Hensel, Esq. (*see generally Wei Cheng Chang*, 288 AD2d at 380-381). Further, Hensel admitted at his deposition that the draft pleadings were his own work product, and he also stated in his opposition to Calandra's motion that Calandra had done nothing further to facilitate the prosecution of the personal injury action after referring the case to Hensel. Although Calandra was apparently copied on letters from Hensel to

plaintiffs concerning a separate workers' compensation claim, there is no evidence in the record that Calandra ever received those letters, and Robert W. Bloom, Jr. (plaintiff) admitted at his deposition that he never discussed those letters with Calandra. Significantly, Calandra was not copied on any correspondence between Hensel and plaintiffs concerning the personal injury action. Plaintiff also admitted at his deposition that he did not have a written retainer agreement with Calandra and that he had no further personal contact with Calandra after the initial meeting at Calandra's office.

Even assuming, arguendo, that Calandra could have assumed vicarious liability for Hensel's alleged negligence with respect to the personal injury action by an informal, oral fee-sharing agreement (*see generally Ford v Albany Med. Ctr.*, 283 AD2d 843, 845-846, *lv dismissed* 96 NY2d 937, *rearg denied* 97 NY2d 654), I conclude that the record does not support an inference that such an agreement existed. Hensel testified at his deposition that, although he had split fees and expenses with Calandra in the past, he did not share the fee in every case referred to him by Calandra, and he could not recall discussing a fee-sharing arrangement with Calandra concerning plaintiffs' personal injury action. I therefore would affirm the order.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1423

CA 08-00716

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

KEVIN LUTHRINGER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY LUTHRINGER, DEFENDANT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (SHAWN P. MARTIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered January 29, 2008 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell while replacing the roof on a single-family home owned by defendant, his brother. We agree with defendant that Supreme Court erred in denying his motion for summary judgment dismissing the complaint. With respect to the Labor Law cause of action, asserting the violation of Labor Law §§ 200, 240 (1) and § 241 (6), plaintiff contends that he was not a volunteer because he and his brother had a quid pro quo arrangement whereby they assisted each other. We reject that contention, inasmuch as plaintiff remained a volunteer despite the existence of an alleged "barter agreement" between the parties (*see Fuller v Spiez*, 53 AD3d 1093). It is well settled that the Labor Law does not afford protection to "[a] volunteer who offers his [or her] services gratuitously" (*Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971; *see* § 2 [5], [7]; *Schwab v Campbell*, 266 AD2d 840; *Yearke v Zarcone*, 57 AD2d 457, 460-461, *lv denied* 43 NY2d 643). Here, defendant established as a matter of law that plaintiff was not fulfilling any obligation to him and was not to be paid for his work (*see Stringer v Musacchia*, 46 AD3d 1274, 1277, *affd* 11 NY3d 212; *Fuller*, 53 AD3d at 1094), and plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We further conclude in any event that defendant is also exempt

from liability under Labor Law § 240 (1) and § 241 (6) as the owner of a one-family dwelling who contracted for but did not direct or control the work (*see generally Ennis v Hayes*, 152 AD2d 914, 915). "Whether an owner's conduct amounts to directing or controlling depends upon the degree of supervision exercised over the method and manner in which the work is performed" (*id.*; *see Gambee v Dunford*, 270 AD2d 809, 810). It is undisputed that defendant worked on the roof on the day of plaintiff's accident, and that defendant supplied materials for the work. Nevertheless, defendant submitted the deposition testimony of nonparty witnesses in which they stated that the family worked together to complete the project, but that no one at the work site supervised the project or the method and manner of the work. Defendant thus established as a matter of law that he did not supervise or control plaintiff's work, and plaintiff failed to raise an issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

Likewise, we conclude that the court erred in denying that part of defendant's motion with respect to the common-law negligence cause of action. As we previously determined, defendant established that he neither supervised nor controlled plaintiff's work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877), and we further conclude that defendant established as a matter of law that he neither created nor had actual or constructive notice of the alleged dangerous condition (*see Eddy v Tops Friendly Mkts.*, 91 AD2d 1203, *affd* 59 NY2d 692). Plaintiff failed to raise an issue of fact to defeat that part of defendant's motion (*see generally Zuckerman*, 49 NY2d at 562). Finally, inasmuch as defendant argued before the motion court that he is entitled to summary judgment dismissing the common-law negligence cause of action, we reject plaintiff's contention that defendant has advanced that argument for the first time on appeal (*cf. Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1466

CA 07-01831

PRESENT: HURLBUTT, J.P., SMITH, GREEN, PINE, AND GORSKI, JJ.

CLARK C.B., INDIVIDUALLY AND AS PARENT AND
NATURAL GUARDIAN OF MICHAEL B., AN INFANT,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NEIL FULLER, II, INDIVIDUALLY AND AS PARENT AND
NATURAL GUARDIAN OF NEIL FULLER, III,
DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

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

STANLEY LAW OFFICES, SYRACUSE (AMY P. CIOTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered August 20, 2007 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant Neil Fuller, II, individually and as parent and natural guardian of Neil Fuller, III, for summary judgment dismissing the amended complaint and cross claim against him and granted that part of the cross motion of plaintiff seeking to compel disclosure.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted, the amended complaint and cross claim against defendant Neil Fuller, II, individually and as parent and natural guardian of Neil Fuller, III, are dismissed and that part of the cross motion seeking to compel disclosure is dismissed.

Memorandum: Plaintiff, individually and on behalf of his son, commenced this action to recover damages for injuries sustained by his son when he was assaulted by the son of Neil Fuller, II (defendant). Supreme Court erred in denying the motion of defendant seeking summary judgment dismissing the amended complaint and cross claim against him. Defendant established his entitlement to summary judgment by submitting evidence that he had no knowledge of his son's alleged propensity to engage in violent or vicious conduct (*see Rivers v Murray*, 29 AD3d 884; *Decker v Chamberlain*, 234 AD2d 960, 961). Evidence that defendant was aware of a single altercation involving his son and a seventh grade classmate is insufficient to raise a triable issue of fact with respect to knowledge of a propensity to

engage in violent or vicious conduct (*see Davies v Incorporated Vil. of E. Rockaway*, 272 AD2d 503, 504; *Armour v England*, 210 AD2d 561). In view of our determination, that part of plaintiff's cross motion seeking to compel disclosure is dismissed as moot, and we therefore do not address defendant's contention with respect thereto.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1485

KA 07-02198

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAREN MAYNARD, DEFENDANT-APPELLANT.

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

SUSAN H. LINDENMUTH, DISTRICT ATTORNEY, PENN YAN (JASON L. COOK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered August 7, 2007. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the third degree and workers' compensation fraud.

It is hereby ORDERED that the judgment so appealed from is reversed on the law, the plea is vacated and the matter is remitted to Yates County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting her upon a plea of guilty of grand larceny in the third degree (Penal Law § 155.35) and workers' compensation fraud (Workers' Compensation Law § 114 [1]). The contention of defendant that her guilty plea was not knowingly, voluntarily and intelligently entered is not barred by her valid waiver of the right to appeal (*see People v Seaberg*, 74 NY2d 1, 10) and, although defendant failed to preserve that contention for our review by moving to withdraw her plea or to vacate the judgment of conviction (*see People v Davis*, 45 AD3d 1357, *lv denied* 9 NY3d 1005), we conclude that this case falls within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666). The record establishes that the statements of defendant during the plea colloquy "negate[d] an essential element" of the crimes to which she pleaded guilty, and County Court failed to make any further inquiry (*id.*).

In response to the court's question concerning the facts underlying those crimes, defendant admitted that she filed claim forms containing the false statement that she had not performed volunteer work or worked for wages, but she further stated that "I didn't read the one question all the way through and I thought they meant was I volunteering or working for wages or tips . . . And I wasn't." Defendant's statements during the plea colloquy thus negated the essential elements of criminal intent with respect to the larceny

count and intent to defraud with respect to the workers' compensation fraud count, thereby "triggering a duty on the part of [the court] to 'inquire further to ensure that defendant's guilty plea [was] knowing and voluntary' " (*People v Ramirez*, 42 AD3d 671, 672, quoting *Lopez*, 71 NY2d at 666; *see People v Bruce*, 291 AD2d 879; *see also People v Pergolizzi*, 281 AD2d 958; *People v Ocasio*, 265 AD2d 675, 676-677).

We therefore reverse the judgment of conviction, vacate the plea and remit the matter to County Court for further proceedings on the indictment.

All concur except SCUDDER, P.J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent because I cannot agree with the majority that defendant's statements during the plea colloquy negated the elements of intent to steal with respect to the larceny count and intent to defraud with respect to the workers' compensation fraud count. I thus cannot agree that those statements "cast[] significant doubt upon the defendant's guilt or otherwise call[ed] into question the voluntariness of the plea" so as to bring this case within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666).

Defendant was indicted for one count each of grand larceny in the third degree (Penal Law § 155.35) and workers' compensation fraud (Workers' Compensation Law § 114 [1]) relating to her theft of workers' compensation benefits between June 2005 and June 2006, accomplished by filing three false claimant disability statements. In those statements, defendant asserted that she did not work or perform any volunteer activities during the relevant periods of time. In fact, however, defendant was performing the equivalent of restaurant work on a volunteer basis for the American Legion.

During defendant's plea colloquy, defendant admitted that she filled out the three claimant disability statements, and that those three statements falsely represented her work and volunteer activity. Defendant further admitted that she was aware that the information set forth in the claimant disability statements was material to her right to receive workers' compensation benefits, and that she was not supposed to be working. When asked to specify the false information that she had included in the statements, defendant replied, "Well, on the statement I thought that it - - I didn't read the one question all the way through and I thought they meant was I volunteering or working for wages or tips." However, defendant went on to clarify that she knew that she was not supposed to be working at all, and that she knew the claimant disability statements were going to be returned to workers' compensation to ensure that she would continue to receive her benefits. She admitted that she signed the statements with the knowledge that they contained false representations, and she admitted that she knowingly sent those false statements to the workers' compensation agency to defraud the agency.

In my view, the totality of defendant's colloquy establishes that defendant knowingly and intentionally submitted false statements to the workers' compensation agency in order to ensure the continuation

of her benefits. The majority relies on defendant's quoted statement as proof that defendant did not have either an intent to steal or to defraud when she filed the false statements because of her claimed misinterpretation of what constituted volunteer activity. I conclude, however, that County Court's subsequent questions clarified that defendant knew that she was not supposed to be working "at all," that she signed the statements with the knowledge that they contained false information, and that she sent the statements to the workers' compensation agency in order to defraud the agency so that she would continue to receive her benefits. In my view, those admissions were sufficient to show the intent of defendant to steal the money she received by defrauding the agency, despite the fact that defendant did not use the word "intentionally" when entering her plea. The exception to the preservation requirement set forth in *Lopez* applies when the defendant's recitation of the facts "clearly casts significant doubt upon the defendant's guilt" (*id.*). Defendant's knowledge that the statements were false and that they would be used to determine the continued eligibility of defendant for workers' compensation benefits and defendant's actions in knowingly sending those false statements to the workers' compensation agency to defraud it in order to continue receiving benefits does not "clearly cast[] significant doubt" upon the guilt of defendant of either crime to which she pleaded guilty. I therefore would affirm the judgment of conviction.

Entered: February 6, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1489

CA 08-00507

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

BETSY ROSS REHABILITATION CENTER, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. BIRNBAUM, DAVID E. JONES AND
JUDITH A. JONES, DEFENDANTS-APPELLANTS.

MICHAEL J. BIRNBAUM, DAVID E. JONES AND
JUDITH A. JONES, THIRD-PARTY
PLAINTIFFS-APPELLANTS,

V

IRENE KAY, DONALD ALTMAN AND CAROL HALPERN,
THIRD-PARTY DEFENDANTS-RESPONDENTS.

THE DEIORIO LAW FIRM, LLP, RYE BROOK (ROBERT G. RAFFERTY OF COUNSEL),
FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

Appeal from a judgment of the Supreme Court, Oneida County (Robert F. Julian, J.), entered January 29, 2008 in a breach of contract action. The judgment, among other things, granted plaintiff's motion to vacate a supplemental judgment entered March 28, 2007.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the third, fourth and fifth decretal paragraphs and by awarding defendants damages in the amount of $159,485.49 and as modified the judgment is affirmed without costs, and

It is further ORDERED that judgment be entered in favor of defendants and against plaintiff in the amount of $159,485.49.

Memorandum: Plaintiff purchased a health care facility from defendants and, pursuant to the purchase agreement, plaintiff agreed to make a specified number of fixed monthly payments to defendants. Plaintiff thereafter commenced this action seeking, inter alia, reimbursement for retroactive Medicare and Medicaid assessments owed for a period of time in which plaintiff did not own the facility. Defendants were required to reimburse plaintiff for those assessments in accordance with the parties' purchase agreement, and when they refused to do so, plaintiff exercised its right of setoff in February

2001 by discontinuing all monthly payments to defendants. Following a nonjury trial, Supreme Court determined, inter alia, that plaintiff was entitled to exercise its right of setoff and issued a judgment in favor of plaintiff. Upon defendants' appeal from that March 2006 judgment, this Court concluded that, although plaintiff was entitled to exercise its right of setoff, "the court erred in failing to reduce the amount of the award by the amount owed by plaintiff under the [purchase agreement] from February 2001 to the date of entry of the judgment" (*Betsy Ross Rehabilitation Ctr., Inc. v Birnbaum*, 35 AD3d 1234, 1235). We remitted the matter to Supreme Court for further proceedings consistent with our decision. Upon remittal, the court initially executed defendants' proposed supplemental judgment after plaintiff failed to appear, but the court subsequently vacated that supplemental judgment and awarded plaintiff the sum of $55,110.44.

Contrary to defendants' contention, the court providently exercised its inherent authority to vacate its own judgment "for sufficient reason, in the furtherance of justice" (*Quinn v Guerra*, 26 AD3d 872, 873, *appeal dismissed* 7 NY3d 741 [internal quotation marks omitted]). We agree with defendants, however, that the court erred in calculating the amount of damages by awarding plaintiff a credit for the full amount of the March 2006 judgment, which in our prior decision we determined to be erroneous, against the amount owed by plaintiff to defendants under the purchase agreement as specified in our decision. In addition, the court erred by awarding plaintiff statutory interest on that amount from March 2006 to January 2008 despite the court's acknowledgment that plaintiff's right of setoff ended in September 2004. In the interest of judicial economy, we recalculate the amount of damages rather than remit the matter to Supreme Court for another recalculation, and we award defendants damages in the amount of $159,485.49. We therefore modify the judgment accordingly.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1513

CA 07-01431

PRESENT: MARTOCHE, J.P., SMITH, FAHEY, AND PINE, JJ.

IN THE MATTER OF JAMES E. PENNINGTON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JAMES WOYTASH, MD, DDS, ERIE COUNTY MEDICAL
EXAMINER, RESPONDENT-RESPONDENT.

JAMES E. PENNINGTON, PETITIONER-APPELLANT PRO SE.

CHERYL A. GREEN, COUNTY ATTORNEY, BUFFALO (JEANNINE PURTELL OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered May 15, 2007. The order denied the motion of petitioner to hold respondent in civil contempt.

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

Memorandum: Petitioner appeals from an order denying his motion to hold respondent in civil contempt for failing to comply with the terms of a February 2007 order requiring respondent to allow petitioner or his representative to inspect and to obtain copies of certain autopsy records, including X rays taken during the autopsy. The record establishes that petitioner, who was previously convicted of two counts of murder in the second degree (*People v Pennington*, 217 AD2d 919, *lv denied* 87 NY2d 906), intended to use the records in a motion pursuant to CPL article 440 challenging the conviction. We conclude that Supreme Court properly denied the motion to hold respondent in contempt.

In support of the instant motion, petitioner presented evidence establishing that, in 1992, respondent possessed X rays taken during the victim's autopsy and that, in 2007, respondent possessed an autopsy report dated April 10, 1992. Contrary to the contention of petitioner, however, he did not establish that respondent failed to comply with the terms of the prior discovery order. Addressing first the autopsy report, petitioner's representative admitted that, pursuant to the prior discovery order, respondent produced a report dated April 10, 1992 describing the cause and manner of death. Petitioner's contention with respect to the X rays is equally unavailing. "To sustain a civil contempt, a lawful judicial order [or judgment] expressing an unequivocal mandate must have been in effect

and disobeyed" (*McCain v Dinkins*, 84 NY2d 216, 226). In support of his motion to hold respondent in contempt, petitioner was required to establish with reasonable certainty that respondent failed to turn over X rays that were in his possession at the time of the prior discovery order (*see Matter of Hynes v Hartman*, 63 AD2d 1, 4, *appeal dismissed* 45 NY2d 838; *Matter of Hynes v Sloma*, 59 AD2d 1014, 1015-1016). We conclude, however, that petitioner failed to meet that burden. Indeed, the record establishes that respondent conducted three separate searches for the X rays but was unable to locate them. The contention of petitioner that a hearing should be conducted to enable him to present evidence establishing that the New York State Department of Health lost his own copies of the X rays but not respondent's copies is without merit. Such evidence would not enable petitioner to establish that respondent possessed the X rays on the date of the prior discovery order. Thus, contrary to the contention of petitioner, the court did not abuse its discretion in denying his motion without conducting a hearing, inasmuch as "there is no 'factual dispute as to [respondent's] conduct unresolvable from the papers on the motion' " (*Quantum Heating Servs. v Austern*, 100 AD2d 843, 844; *see Data-Track Account Servs. v Lee*, 291 AD2d 827, *lv dismissed* 98 NY2d 727, *rearg denied* 99 NY2d 532). Petitioner's contention that respondent allowed representatives of the District Attorney's Office to tamper with the autopsy file is unsupported by the record. " '[S]peculation, surmise, [or] deduction, cannot supplant the requisite proof' " (*Pereira v Pereira*, 35 NY2d 301, 309).

We have reviewed petitioner's remaining contentions and conclude that they are without merit.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1519

CA 08-00574

PRESENT: MARTOCHE, J.P., SMITH, GREEN, AND PINE, JJ.

IN THE MATTER OF THE APPLICATION OF NATHALIE RATEAU, MIREILLE RATEAU, AND MICHEL RATEAU, PETITIONERS-RESPONDENTS, FOR THE JUDICIAL DISSOLUTION OF DAPA COMMUNICATIONS, INC., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

KEENAN AND STONE, PLLC, HAMBURG (JOHN J. KEENAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

BLAIR & ROACH, LLP, TONAWANDA (LARRY KERMAN OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Cattaraugus County (Larry M. Himelein, A.J.), entered December 28, 2007 in a proceeding pursuant to BCL article 11. The judgment awarded petitioners the sum of $76,247.24 against respondent.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Cattaraugus County, for further proceedings in accordance with the following Memorandum: Respondent, DAPA Communications, Inc. (DAPACom), appeals from a judgment entered pursuant to Business Corporation Law § 1118, contending that Supreme Court erred in determining the fair value of petitioners' shares in DAPACom, a closely held corporation. Contrary to DAPACom's contentions, we conclude that the court properly valued DAPACom " 'as an operating business' " (*Matter of Pace Photographers [Rosen]*, 71 NY2d 737, 748; *see Matter of Friedman v Beway Realty Corp.*, 87 NY2d 161, 168; *Matter of Seagroatt Floral Co. [Riccardi]*, 78 NY2d 439, 445), and that the court properly used the net asset valuation method (*see e.g. Friedman*, 87 NY2d at 167; *Matter of Endicott Johnson Corp. v Bade*, 37 NY2d 585, 587-588; *Hall v King*, 265 AD2d 244). We further conclude that the court's valuation of DAPACom falls "within the range of testimony presented" and should not be disturbed (*Matter of Cortland MHP Assoc. [PetraliapBurnham]*, 267 AD2d 1013, 1013 [internal quotation marks omitted]; *see Matter of Ashford Mgt. Group*, 261 AD2d 863).

We agree with DAPACom, however, that the court erred in failing to apply a discount for the lack of marketability of petitioners' shares in DAPACom (*see Seagroatt Floral Co.*, 78 NY2d at 445-446; *Amodio v Amodio*, 70 NY2d 5, 7; *Hall*, 265 AD2d 244; *cf. Matter of Whalen v Whalen's Moving & Stor. Co.*, 234 AD2d 552, 554; *Matter of Quill v Cathedral Corp.*, 215 AD2d 960, 963, *lv dismissed* 86 NY2d 838).

We therefore reverse the judgment and remit the matter to Supreme Court to determine the fair value of petitioners' shares following application of a discount for lack of marketability.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1523

TP 08-01413

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

IN THE MATTER OF NEW YORK STATE DIVISION OF HUMAN RIGHTS, PETITIONER,

V MEMORANDUM AND ORDER

VILLAGE PLAZA FAMILY RESTAURANT, INC., CHRIS VOTIS, AS AIDER AND ABETTOR, AND CHRIS VOTIS, ALSO KNOWN AS CHRIS VOTSIS, INDIVIDUALLY, RESPONDENTS.

CAROLINE J. DOWNEY, BRONX (MARILYN BALCACER OF COUNSEL), FOR PETITIONER.

UNDERBERG & KESSLER LLP, ROCHESTER (PAUL F. KENEALLY OF COUNSEL), FOR RESPONDENT CHRIS VOTIS, AS AIDER AND ABETTOR, AND CHRIS VOTIS, ALSO KNOWN AS CHRIS VOTSIS, INDIVIDUALLY.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [William P. Polito, J.], entered January 25, 2008) to enforce a determination of petitioner.

It is hereby ORDERED that said petition is unanimously granted without costs and respondents are directed to pay complainant the sum of $7,350.75 for back pay, with interest at the rate of 9% per annum, commencing July 7, 2002, and the sum of $65,000 for mental anguish and humiliation, with interest at the rate of 9% per annum, commencing November 14, 2006.

Memorandum: Petitioner commenced this proceeding seeking to enforce its determination awarding complainant, an employee of respondent Village Plaza Family Restaurant, Inc. (Restaurant), damages based on sexual harassment.

We note at the outset that Supreme Court erred in transferring the proceeding to this Court pursuant to Executive Law § 298 inasmuch as the determination was made following a hearing pursuant to Executive Law § 297 (4) (b) (*see Matter of New York State Div. of Human Rights v Atlantic City Sub Shop*, 27 AD3d 853). Nevertheless, we address the merits of the issues raised by petitioner in the interest of judicial economy (*see generally Matter of Moulden v Coughlin*, 210 AD2d 997).

In reviewing an administrative determination, this Court "may not substitute its judgment for that of . . . the administrative board or agency" (*State Div. of Human Rights v Rochester Prods. Div. of Gen. Motors Corp.*, 112 AD2d 785, 785; *see generally* § 298; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179). Here, petitioner's determination is supported by the requisite substantial evidence, and we therefore grant the petition. We agree with petitioner that the record supports its determination that complainant was subjected to a hostile work environment based on evidence that she was forced to submit to a constant barrage of inappropriate and demeaning comments, unwanted physical contact, and vulgar sexual gestures during her term of employment (*see generally* Executive Law § 296 [1] [a]). We further conclude that there is substantial evidence in the record to support petitioner's determination that the Restaurant is liable for the hostile work environment created by respondent employee of the Restaurant (*see Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 54-55, *lv denied* 89 NY2d 809).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

1526

CAF 07-02724

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

IN THE MATTER OF CARL A. GUTZMER,
PETITIONER-APPELLANT,

V ORDER

MYRIAM L. SANTINI, RESPONDENT-RESPONDENT.

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

OAK ORCHARD LEGAL SERVICES A DIVISION OF NEIGHBORHOOD LEGAL SERVICES, INC., BATAVIA (JOHN M. ZONITCH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

DEREK R. BROWNLEE, LAW GUARDIAN, BATAVIA, FOR CAILYN G.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered July 24, 2007 in a proceeding pursuant to Family Court Act article 6. The order, among other things, dismissed the petitions seeking to modify an order of custody.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

1531

CA 08-00297

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

EVOLUTION IMPRESSIONS, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES D. LEWANDOWSKI, DAVID HICKEY, GREGORY MAREK, GIORGIO BRACAGLIA, AND 1 SOURCE PARTNERS, INC., DEFENDANTS-APPELLANTS.

THE ODORISI LAW FIRM, EAST ROCHESTER (TERRENCE C. BROWN-STEINER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (DONALD W. O'BRIEN, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered February 28, 2007. The order, insofar as appealed from, denied that part of the motion of defendants seeking to vacate a default order and judgment in its entirety.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, that part of the motion seeking to vacate the default order and judgment in its entirety is granted, and the order and judgment entered August 4, 2006 is vacated in its entirety.

Memorandum: Defendants appeal from an order denying in part their motion seeking, inter alia, to vacate a default order and judgment entered against them following their failure to oppose plaintiff's motion for summary judgment on the complaint. It is well settled that, in order to establish their entitlement to vacatur of the default order and judgment, defendants were required to establish "both a reasonable excuse for the default and the existence of a meritorious defense" (*Wilcox v U-Haul Co.*, 256 AD2d 973, 973; *see generally* CPLR 5015 [a] [1]). "[A]lthough the decision whether to vacate a default judgment rests within the sound discretion of the trial court, it is equally true that a disposition on the merits is favored" (*Wilcox*, 256 AD2d at 974 [internal quotation marks omitted]).

We agree with defendants that they established a reasonable excuse for their default. Defendants established that the default resulted from confusion over the substitution of counsel (*see generally Lovisa Constr. Co. v Facilities Dev. Corp.*, 148 AD2d 913, 914) and that, at the time of the default, they had a reasonable

belief that their legal interests were being adequately protected by counsel (*see Clark v Sherwood*, 117 AD2d 973; *cf. Roussodimou v Zafiriadis*, 238 AD2d 568, 569). We further conclude that defendants met their burden of establishing a meritorious defense by demonstrating "that there is support in fact for [their] . . . defenses" (*Bilodeau-Redeye v Preferred Mut. Ins. Co.*, 38 AD3d 1277, 1277 [internal quotation marks omitted]), i.e., that there are issues of fact that preclude summary judgment in favor of plaintiff (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Furthermore, there are unresolved issues between the parties that require further litigation even if we were to deny the relief sought by defendants, and we conclude under the circumstances of this case that both fairness and judicial economy warrant the resolution of this case on the merits (*see Estate of Witzigman v Drew*, 48 AD3d 1172, 1173; *see generally Alliance Prop. Mgt. & Dev. v Andrews Ave. Equities*, 70 NY2d 831, 832-833).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

1532

CA 08-00746

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

DARTNELL ENTERPRISES, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HEWLETT-PACKARD COMPANY (INDIVIDUALLY, AND AS SUCCESSOR-IN-INTEREST TO COMPAQ COMPUTER CORPORATION), DEFENDANT-RESPONDENT.

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (WILLIAM G. BAUER OF COUNSEL), MORGAN LEWIS & BOCKIUS LLP, PHILADELPHIA, PENNSYLVANIA, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered December 11, 2007. The order, insofar as appealed from, granted in part defendant's motion to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking dismissal of the first cause of action in its entirety and reinstating that cause of action in its entirety and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a corporation with its principal place of business in New York, commenced this action alleging, inter alia, that defendant violated Massachusetts General Laws ch 93A, §§ 2 and 11, which prohibit intentionally deceptive conduct in commercial dealings. Plaintiff appeals from an order that granted in part defendant's motion seeking to dismiss the complaint. We agree with plaintiff that Supreme Court erred in granting that part of defendant's motion seeking dismissal of the first cause of action as time-barred to the extent that it alleges the violation of those Massachusetts statutes with respect to acts that occurred prior to March 10, 2002. We therefore modify the order by denying that part of defendant's motion in its entirety and reinstating that cause of action in its entirety.

Plaintiff and defendant's predecessor in interest, Digital Equipment Corporation (DEC), entered into an agreement in March 1998 (settlement agreement) in an effort to resolve disputes between them in connection with their contractual relationship, pursuant to which plaintiff distributed and resold computer equipment. The settlement

agreement provided that it would be construed in accordance with the laws of the Commonwealth of Massachusetts. In 2001 plaintiff and DEC's successor in interest, Compaq Computer Corporation (Compaq), entered into an arbitration agreement providing that they would "arbitrate all claims or disputes associated with or arising out of the performance of the [settlement agreement]." The arbitration agreement provided that, "for the purposes of this arbitration only, [plaintiff] agrees not to assert . . . any claims based on allegations of bad faith." Following arbitration of disputes arising from the settlement agreement and its ancillary documents, the arbitration award was confirmed in federal district court. Plaintiff thereafter commenced this action asserting various causes of action relating to the bad faith of Compaq in connection with their contractual relationship and defendant, as successor in interest to Compaq, moved to dismiss the complaint. With respect to the second through fourth causes of action, we affirm the order on appeal for the reasons stated in the decision at Supreme Court.

We conclude with respect to the first cause of action, however, that the court erred in dismissing as time-barred that cause of action to the extent that it concerns acts that occurred prior to March 10, 2002. According to the complaint in this action, plaintiff was unaware of defendant's alleged deceptive practices and bad faith dealings in connection with the settlement agreement until those acts were disclosed by defendant's representatives during the arbitration hearing in August 2002. Pursuant to Massachusetts law, the four-year statute of limitations applicable to a cause of action under chapter 93A is tolled until such time as the plaintiff knew or should have known of the deceptive acts or practices (*see International Mobiles Corp. v Corroon & Black/Fairfield & Ellis*, 29 Mass App Ct 215, 220-221, 560 NE2d 122, 125-126). Plaintiff commenced the action on March 10, 2006, more than four years after the alleged acts occurred and, in support of that part of its motion to dismiss the first cause of action as time-barred, defendant contended that it submitted documentary evidence pursuant to CPLR 3211 (a) (1) establishing its entitlement to that relief. "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction . . . Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 87-88). Here, defendant submitted only the complaint in this action, the amended complaint in the federal action, correspondence with the federal district court, and the order of that court confirming the arbitration award. We therefore conclude, based on the allegations of plaintiff in the complaint in this action, that defendant failed to submit documentary evidence conclusively establishing that the statute of limitations had not been tolled with respect to the first cause of action concerning acts committed before March 10, 2002.

Entered: February 6, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1534

CA 07-02361

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

FELICE SCALA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VENERA SCALA, DEFENDANT-RESPONDENT.

THE ODORISI LAW FIRM, EAST ROCHESTER (TERRENCE C. BROWN-STEINER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (JENNIFER L. FAZIO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (John M. Owens, J.), entered August 14, 2007 in a divorce action. The judgment, among other things, awarded nondurational maintenance to defendant.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by providing that maintenance shall terminate 12 years from the date of the judgment and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff appeals from a judgment of divorce that confirmed the report of the Matrimonial Referee (Referee) appointed to hear and report and, inter alia, ordered plaintiff husband to pay maintenance to defendant wife. Plaintiff contends that the Referee erred in precluding him from testifying concerning the nature of his alleged physical injuries based on his willful failure to furnish requested medical authorizations. We reject that contention. Rather, we conclude under the facts and circumstances of this case that the Referee neither abused nor improvidently exercised his discretion in precluding that testimony (*see generally Optic Plus Enters., Ltd. v Bausch & Lomb Inc.*, 37 AD3d 1185, 1186-1187).

Plaintiff further contends that Supreme Court erred in confirming the Referee's report both to the extent that the Referee found that the closure by plaintiff of his masonry business constituted a wasteful dissipation of assets and to the extent that the Referee valued the business. With respect to wasteful dissipation, this Court has previously stated that the failure to recoup value from an unprofitable business operated during the marriage constitutes wasteful dissipation of that asset (*see Baker v Baker* [appeal No. 2], 199 AD2d 967, 968). Thus, it necessarily is a wasteful dissipation of assets to fail to recoup the value of a profitable business, such as

plaintiff's masonry business. We also reject the contention with respect to the valuation of the masonry business. " 'The determination of a fact-finder as to the value of a business, if it is within the range of the testimony presented, will not be disturbed on appeal where valuation of the business rested primarily on the credibility of expert witnesses and their valuation techniques' " (*Johnson v Johnson*, 277 AD2d 923, 926, *lv dismissed* 96 NY2d 792). Here, the Referee, whose report was adopted by the court, credited the conclusion of defendant's expert with respect to the value of the business, and plaintiff "presented no expert testimony that would support a different valuation" (*Schiffmacher v Schiffmacher*, 21 AD3d 1386, 1387).

We agree with plaintiff, however, that the court erred in awarding nondurational maintenance to defendant. " 'As a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court' " (*Frost v Frost*, 49 AD3d 1150, 1150-1151). Nevertheless, this Court's authority in determining issues of maintenance is as broad as that of the trial court, and we conclude that the award of nondurational maintenance in this case is excessive (*see Reed v Reed*, 55 AD3d 1249). Based on the statutory factors, including the parties' respective ages and financial circumstances, we conclude that defendant is entitled to maintenance for 12 years from the date of the judgment (*see* Domestic Relations Law § 236 [B] [6] [a]; *see generally Reed*, 55 AD3d 1249; *Fruchter v Fruchter*, 288 AD2d 942, 944-945). We therefore modify the judgment accordingly.

Entered: February 6, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1535

CA 08-00833

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

FRANCIS TRUPO AND ANITA TRUPO,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

PREFERRED MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT-RESPONDENT.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, WHITE PLAINS (MICHAEL J. CASE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered January 7, 2008 in a breach of contract action. The order denied defendant's motion for summary judgment and granted in part and denied in part plaintiffs' cross motion for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking a determination that defendant is obligated to provide coverage for damage to their home and personal property pursuant to the terms of the insurance policy issued by defendant to them. Plaintiffs' home was allegedly damaged when approximately 75 gallons of a chemical mixture were released into the atmosphere from a nearby plant operated by the former Diaz Chemical Corporation. Supreme Court denied defendant's motion for summary judgment dismissing the complaint and granted in part plaintiffs' cross motion for summary judgment, determining that the insurance policy in question covers damages caused by or arising from the explosion. The court denied that part of plaintiffs' cross motion for damages in the amount of approximately $144,000, and instead ordered that a hearing on damages would be conducted. We affirm.

The policy issued by defendant provided coverage for "direct physical loss" caused by certain perils, including explosion. We agree with plaintiffs that the incident at the chemical plant constitutes an explosion under the policy and that the alleged contamination of their home was caused by that explosion. We further agree with plaintiffs that the exclusion relied upon by defendant,

entitled "Wear and Tear," does not apply to this case. Pursuant to that exclusion, defendant would "not pay for loss which results from wear and tear, marring, deterioration, inherent vice, latent defect, mechanical breakdown, rust, wet or dry rot, corrosion, mold, *contamination* or smog" (emphasis added). We reject defendant's contention that, because the damage to plaintiffs' home arises out of pollution or contamination, the exclusion for "Wear and Tear" applies. Rather, we conclude that the exclusion in question is ambiguous and thus should be construed in favor of plaintiffs, the insureds (*see generally White v Continental Cas. Co.*, 9 NY3d 264, 267; *Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383). The title "Wear and Tear" would lead an average person to believe that the exclusion for "contamination" therein included only contamination that occurred over time, rather than a sudden occurrence such as the incident here. We have considered defendant's remaining contentions and conclude that they are without merit.

Contrary to the contention of plaintiffs on their cross appeal, the court properly denied that part of their cross motion for summary judgment on damages inasmuch as there are triable issues of fact with respect thereto (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

All concur except SCUDDER, P.J., and PINE, J., who dissent in part and vote to modify in accordance with the following Memorandum: We respectfully dissent in part. Although we agree with the majority that the incident at the chemical plant constituted an explosion under the insurance policy issued by defendant to plaintiffs and that the alleged contamination of plaintiffs' home was caused by that explosion, we disagree with the majority that the policy exclusion relied upon by defendant does not apply to preclude plaintiffs' recovery under the policy. That exclusion is entitled "Wear and Tear," and it provides that defendant will "not pay for loss which results from wear and tear, marring, deterioration, inherent vice, latent defect, mechanical breakdown, rust, wet or dry rot, corrosion, mold, *contamination* or smog" (emphasis added). We cannot agree with the majority that the exclusion in question is ambiguous. Plaintiffs suffered a loss from contamination, and the policy specifically excludes loss resulting from contamination. "[U]nambiguous provisions of an insurance contract must be given their plain and ordinary meaning" (*White v Continental Cas. Co.*, 9 NY3d 264, 267; *see Kula v State Farm Fire & Cas. Co.*, 212 AD2d 16, 19, *lv dismissed in part and denied in part* 87 NY2d 953).

The majority focuses on the title of the paragraph containing the exclusion in question and concludes that it would lead an average person to believe that the exclusion for contamination was only for contamination that occurred over time. We disagree. Rather, we apply the principle of statutory construction that titles are given little weight. "The title of a statute may be resorted to . . . only in case of ambiguity in meaning, and it may not alter or limit the effect of unambiguous language in the body of the statute itself" (McKinney's Cons Laws of NY, Book 1, Statutes § 123 [a]). Inasmuch as the

language in the exclusion in question is unambiguous and does not limit the exclusion to contamination that occurs over time, we decline to add such limiting language. We therefore would modify the order by granting defendant's motion for summary judgment and dismissing the complaint and by denying plaintiffs' cross motion for summary judgment in its entirety and vacating the determination in favor of plaintiffs with respect to coverage under the insurance policy.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1546

KA 06-00067

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, PERADOTTO, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAREEM RAMSEY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON 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 February 24, 2004. 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 modified on the law by directing that the sentence imposed on count two of the indictment shall run concurrently with the sentence imposed on count one of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [former (2)]). Contrary to the contention of defendant, County Court properly denied his request to charge manslaughter in the first degree (§ 125.20 [1], [2]) as a lesser included offense of murder in the second degree. With respect to Penal Law § 125.20 (1), there is no reasonable view of the evidence that defendant intended to cause serious physical injury to another person but not to kill him or her (*see* CPL 300.50 [1]; *People v Miller*, 6 NY3d 295, 302; *People v Cabassa*, 79 NY2d 722, 728-729, *cert denied* 506 US 1011; *People v Glover*, 57 NY2d 61, 63-64). Defendant testified that he shot the victim at close range four times, causing the victim to sustain fatal injuries to, inter alia, his heart and lungs (*see People v Tyler*, 43 AD3d 633, 634, *lv denied* 9 NY3d 1010; *see generally People v Payne*, 3 NY3d 266, 272, *rearg denied* 3 NY3d 767). Moreover, there was no evidence of a struggle for the weapon (*cf. People v DeCapua*, 37 AD3d 1189, 1190, *lv denied* 8 NY3d 983), nor was there evidence that the victim possessed a gun at the time of the shooting (*cf. People v Tabb*, 180 AD2d 770).

We further conclude that defendant failed to establish that he was entitled to a charge of manslaughter in the first degree under Penal Law § 125.20 (2) based on his defense of extreme emotional disturbance. To establish that defense, "a defendant must demonstrate, first, that he or she acted under the influence of an extreme emotional disturbance and, second, that there was a reasonable explanation or excuse for that disturbance" (*People v Roche*, 98 NY2d 70, 75-76; *see People v Harris*, 95 NY2d 316, 319; *People v Casassa*, 49 NY2d 668, 675, *cert denied* 449 US 842). The first element "is generally associated with a loss of self-control" (*Harris*, 95 NY2d at 319) and, here, the record establishes that defendant did not lose self-control at the time of the crime (*see People v McGrady*, 45 AD3d 1395, *lv denied* 10 NY3d 813). Defendant testified that he shot the victim both because he became angry and because he feared for his own safety. Defendant also testified that he was calm immediately prior to the shooting, and that he was nervous and scared after the shooting. We thus conclude that there is "no reasonable view of the evidence to support a finding that the defendant's conduct actually 'was influenced by an extreme emotional disturbance at the time the alleged crime was committed' " (*People v Murden*, 190 AD2d 822, 822, *lv denied* 81 NY2d 1017).

Defendant failed to preserve for our review his contention that he was denied his right to present a defense based on the court's evidentiary rulings (*see People v Angelo*, 88 NY2d 217, 222). In any event, that contention lacks merit. We agree with defendant that the court erred in precluding him from testifying concerning threats made by the victim to defendant's girlfriend (*see People v Miller*, 39 NY2d 543, 548-549; *People v Henderson*, 162 AD2d 1038; *People v Dixon*, 138 AD2d 929), and that the court further erred in permitting the prosecutor to cross-examine defendant's girlfriend beyond the scope of her limited direct examination (*see generally People v Maerling*, 64 NY2d 134, 141-142; *People v Sanders*, 2 AD3d 1420). Nevertheless, we conclude that any error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242). Indeed, we note that the precluded testimony was essentially cumulative of other evidence presented at trial (*see People v Diallo*, 297 AD2d 247, 248; *People v Starostin*, 265 AD2d 267, 268, *lv denied* 94 NY2d 885; *People v Bruner*, 222 AD2d 738, 739, *lv denied* 88 NY2d 981; *see generally People v Dolan*, 51 AD3d 1337, 1341), and that defendant was provided " 'a meaningful opportunity to present a complete defense' " (*Crane v Kentucky*, 476 US 683, 690; *see People v Douglas*, 29 AD3d 47, 50, *lv denied* 6 NY3d 847). Although defendant failed to preserve for our review his further contention that the court erred in directing that the sentence imposed for criminal possession of a weapon in the second degree shall run consecutively to the sentence imposed for murder in the second degree, the People correctly concede that those consecutive sentences are illegal and thus that preservation is not required (*see People v Fuentes*, 52 AD3d 1297, 1300-1301, *lv denied* 11 NY3d 736). We agree with defendant that the sentences must run concurrently (*see* Penal Law § 70.25 [2]; *People v Hamilton*, 4 NY3d 654, 657-658; *People v Boyer*, 31 AD3d 1136, 1139, *lv denied* 7 NY3d 865; *People v Rudolph*, 16 AD3d 1151, 1152-1153, *lv*

denied 5 NY3d 809), and we therefore modify the judgment accordingly.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1554

CA 08-01067

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, PERADOTTO, AND GREEN, JJ.

LEONARD ROSPIERSKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JEAN G. HAAR, D.D.S., M.D., AND BUFFALO MEDICAL GROUP, P.C., DEFENDANTS-RESPONDENTS.

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

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (DANIEL T. ROACH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered August 2, 2007 in a medical malpractice action. The judgment, upon a jury verdict, dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries sustained as the result of the alleged malpractice of Jean G. Haar, D.D.S., M.D. (defendant). At trial, plaintiff's expert testified that defendant deviated from medically acceptable treatment standards in failing to refer plaintiff for radiation therapy after defendant performed surgery to remove a cancerous tumor. The jury returned a verdict finding that defendant was not negligent. We agree with plaintiff that reversal is required based on the fact that Supreme Court improperly gave an error in judgment charge (*see* PJI 2:150). "That charge is appropriate only in a narrow category of medical malpractice cases in which there is evidence that defendant physician considered and chose among several medically acceptable treatment alternatives" (*Martin v Lattimore Rd. Surgicenter*, 281 AD2d 866, 866; *see Spadaccini v Dolan*, 63 AD2d 110, 120), and this case does not fall within that narrow category.

As noted, in accordance with plaintiff's theory of liability at trial, plaintiff's expert testified that defendant failed to adhere to medically acceptable treatment standards because he failed to refer plaintiff for radiation therapy. Neither defendant nor his expert testified that radiation therapy was a medically acceptable treatment alternative for plaintiff. Rather, they testified that, given plaintiff's condition, radiation therapy would not have been

appropriate. Thus, there was no evidence that defendant "made a choice between or among medically acceptable alternatives" (*Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 140; *see Nestorowich v Ricotta*, 97 NY2d 393, 400), and an error in judgment charge therefore was inappropriate. Instead, the evidence simply raised the issue whether the standard of care of a reasonably prudent physician required defendant to refer plaintiff for radiation, given plaintiff's condition (*see Nestorowich*, 97 NY2d at 400). Because the court's error in giving the charge in question cannot be deemed harmless (*see Anderson*, 44 AD3d at 141-142; *cf. Nestorowich*, 97 NY2d at 401), plaintiff is entitled to a new trial.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1563

KA 08-00676

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRYL BLACK, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANKLIN R. PRATCHER, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered January 24, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and unlawful possession of marihuana.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and unlawful possession of marihuana (§ 221.05), defendant contends that Supreme Court erred in refusing to suppress physical evidence seized as a result of the allegedly illegal stop of his vehicle. We reject that contention.

At the suppression hearing, two police officers testified that they observed a vehicle stopped on the side of the road at 11:30 P.M. and that the occupants of the vehicle, defendant and his codefendant (*People v Rogers*, ___ AD3d ___ [Feb. 6, 2009]), appeared to be having a “heated argument” with a man on the street. After the vehicle pulled into a nearby driveway, the officers questioned the man on the street concerning the argument, and he responded that the occupants of the vehicle owed him some money. The officers pulled their patrol vehicle in front of the house next to the driveway where the vehicle had stopped and approached the vehicle to question the occupants with respect to their exchange with the man on the street. According to the officers, the patrol vehicle was not blocking the driveway, and the overhead lights were not activated. As the officers approached the vehicle, they smelled the odor of marihuana and, upon questioning by the officers, defendant admitted to them that he had “smoked weed earlier” in the evening. Upon searching the occupants and the

vehicle, the officers recovered two guns and marihuana.

The suppression hearing testimony of the man on the street, who was employed by defendant, was contrary to that of the officers. He testified that the patrol vehicle was blocking the driveway and that its overhead lights were activated. He further testified, however, that he did not know whether the vehicle occupied by defendant and his codefendant was in motion when the lights on the patrol vehicle were activated.

Although defendant contends on appeal that the officers stopped his vehicle, we conclude that the court was entitled to credit the testimony of the officers at the suppression hearing that the vehicle was parked when they approached it and that they did not park their patrol vehicle in such a manner as to block the driveway in which the vehicle was parked (*see generally People v Prochilo*, 41 NY2d 759, 761; *People v Alexander*, 51 AD3d 1380, 1382, *lv denied* 11 NY3d 733). We further conclude that the officers possessed an objective, credible reason to approach the vehicle (*see People v Ocasio*, 85 NY2d 982, 984; *People v Robinson*, 309 AD3d 1228, *lv denied* 1 NY3d 579) and that, once the officers smelled marihuana, they had probable cause to search the vehicle and its occupants for drugs (*see People v Chestnut*, 43 AD3d 260, 261-262, *affd* 36 NY2d 971; *People v Badger*, 52 AD3d 231, *lv denied* 10 NY3d 955; *People v Felli*, 27 AD3d 318, 319, *lv denied* 6 NY3d 894).

Entered: February 6, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1564

KA 08-01159

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SPENCER ROGERS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ALAN S. HOFFMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered January 24, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts) and unlawful possession of marihuana (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed, and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 460.50 (5) (*see People v Black*, ___ AD3d ___ [Feb. 6, 2009]).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1566

KA 03-02013

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSIE J. COOPER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

PHILLIP R. HURWITZ, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered September 15, 2003. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree and criminal possession of a weapon in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reversing that part convicting defendant of criminal possession of a weapon in the third degree and dismissing the second count of the indictment and as modified the judgment is affirmed.

Same Memorandum as in *People v Cooper* ([appeal No. 2] ___ AD3d ___ [Feb. 6, 2009]).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1567

KA 03-02014

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSIE J. COOPER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

PHILLIP R. HURWITZ, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered September 15, 2003. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following a jury trial of criminal possession of a weapon in the third degree (Penal Law § 265.02 [former (4)]) and criminal possession of a weapon in the fourth degree (§ 265.01 [1]) and, in appeal No. 2, he appeals from a judgment convicting him, following the same jury trial, of murder in the second degree (§ 125.25 [1] [intentional murder]). We note at the outset that defendant failed to move for a trial order of dismissal with respect to the intentional murder count and thus failed to preserve for our review his challenge to the alleged insufficiency of the evidence with respect to that count (*see People v Gray*, 86 NY2d 10, 19). In any event, that challenge is without merit. Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621), we conclude that "there is [a] valid line of reasoning and permissible inferences [that] could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (*People v Bleakley*, 69 NY2d 490, 495), i.e., that defendant, acting either as an accomplice or as a principal, intended to kill the victim and either killed him or aided a codefendant in doing so. Contrary to defendant's further contention, for those same reasons the evidence is legally sufficient to establish that, on the day of the murder, defendant possessed the .32 caliber gun that inflicted the fatal wound and thus was guilty of criminal possession of a weapon in the fourth degree. Viewing the evidence in light of the elements of the murder count as charged to the jury (*see People v*

Danielson, 9 NY3d 342, 349), we reject defendant's further contention that the verdict with respect to that count is against the weight of the evidence, particularly in light of the fact that the trial testimony presented issues of credibility for the jury to resolve (*see generally Bleakley*, 69 NY2d at 495).

Contrary to the further contention of defendant, he was not denied effective assistance of counsel based on defense counsel's failure to move for a trial order of dismissal with respect to the murder count. Because we conclude that the evidence is legally sufficient to support the conviction of that count, defendant has failed to show that the motion, if made, would have been successful (*see People v Wright*, 41 AD3d 1221, *lv denied* 9 NY3d 928; *People v Phelps*, 4 AD3d 863, *lv denied* 2 NY3d 804).

As the People correctly concede, however, the evidence is legally insufficient to support the conviction of criminal possession of a weapon in the third degree with respect to the .38 caliber gun. Although defendant failed to preserve his contention for our review (*see Gray*, 86 NY2d at 19), we exercise our power to review his contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). There is no evidence that the .38 caliber gun was operable and, although the People were not required to prove that defendant was aware of the gun's operability, they were required to prove under Penal Law § 265.02 (former [4]) that it was in fact operable (*People v Ansare*, 96 AD2d 96, 97-98, *lv denied* 61 NY2d 672). We therefore modify the judgment in appeal No. 1 accordingly.

We reject the further contention of defendant that County Court erred in refusing to suppress the statements that he made to the police. We note at the outset that defendant improperly relies on evidence presented at trial in support of his contention with respect to the court's pretrial suppression ruling (*see People v Pruitt*, 6 AD3d 1233, *lv denied* 3 NY3d 646). The record establishes that defendant's statements made to the police at the hospital were spontaneous and were not the result of police interrogation (*see People v Bryant*, 59 NY2d 786, *rearg dismissed* 65 NY2d 638; *People v Wearen*, 19 AD3d 1133, 1134, *lv denied* 5 NY3d 834). The subsequent statements made by defendant to the police at the Public Safety Building were made after he had waived his *Miranda* rights and the court thus properly refused to suppress them (*see People v Davis*, 27 AD3d 1138, 1139, *lv denied* 6 NY3d 847). Contrary to the further contention of defendant, the waiver of his *Miranda* rights was not rendered invalid by virtue of the fact that approximately 13 hours had elapsed before he made his statements. " '[W]here a person in police custody has been issued *Miranda* warnings and voluntarily and intelligently waives those rights, it is not necessary to repeat the warnings prior to subsequent questioning within a reasonable time thereafter, so long as the custody has remained continuous' " (*People v Plume*, 306 AD2d 916, 917, *lv denied* 100 NY2d 644; *see People v Rosado*, 26 AD3d 891, 892, *lv denied* 6 NY3d 838). Here, defendant does not contend that the custody was not continuous, and we conclude under the circumstances of this case that the police subsequently questioned

defendant within a reasonable period of time, inasmuch as the police were simultaneously questioning the codefendants, defendant was allowed to speak with one of the codefendants, he was provided with cigarettes and food and was allowed to use the bathroom, and he was permitted to telephone his mother (*see People v Lowin*, 36 AD3d 1153, 1154-1155, *lv denied* 9 NY3d 847, 878; *People v Petronio*, 34 AD3d 602, 604, *lv denied* 8 NY3d 948; *see also Rosado*, 26 AD3d at 892). The sentence is not unduly harsh or severe. We have examined defendant's remaining contention and conclude that it is lacking in merit.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1573

KA 07-01566

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER M. SHAPARD, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 16, 2007. 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 modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for resentencing in accordance with the following Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05 [7]). We agree with defendant that his waiver of the presentence report should not have been given effect pursuant to CPL 390.20 (4) (a). Such a waiver is not authorized where, as here, "an indeterminate or determinate sentence of imprisonment is to be imposed" (*id.*). Defendant pleaded guilty to a class D felony and agreed that he was properly classified as a persistent violent felony offender. Supreme Court therefore was required to impose a term of imprisonment upon that conviction (Penal Law § 70.08 [3] [c]; § 120.05 [7]), and thus was also required to order a presentence report prior to imposing the bargained-for sentence (*see generally People v Selikoff*, 35 NY2d 227, 238, *cert denied* 419 US 1122; Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 390.20). We therefore modify the judgment by vacating the sentence, and we remit the matter to Supreme Court for resentencing in compliance with CPL 390.20 (1).

In light of our decision, we do not reach defendant's remaining contentions.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1584

TP 08-01313

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, AND GORSKI, JJ.

IN THE MATTER OF ELIZABETH L. WINKLER,
PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS, THE
FITNESS INSTITUTE AND PILATES STUDIO, RICHARD
WILLIAMSON AND JULIE WILLIAMSON, RESPONDENTS.

LAW OFFICE OF LINDY KORN, BUFFALO (LINDY KORN OF COUNSEL), FOR PETITIONER.

LAW OFFICE OF DAVID GERALD JAY, BUFFALO (DAVID GERALD JAY OF COUNSEL), FOR RESPONDENTS THE FITNESS INSTITUTE AND PILATES STUDIO, RICHARD WILLIAMSON AND JULIE WILLIAMSON.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court for the Fourth Judicial Department by order of the Supreme Court, Erie County [Kevin M. Dillon, J.], entered June 12, 2008) to annul a determination of respondent New York State Division of Human Rights. The determination dismissed petitioner's complaint alleging, inter alia, that petitioner was subjected to a hostile work environment.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs and the matter is remitted to respondent New York State Division of Human Rights for further proceedings in accordance with the following Memorandum: In this proceeding pursuant to Executive Law § 298, petitioner seeks to annul the determination dismissing her complaint following a public hearing. In her complaint, petitioner alleged, inter alia, that she was subjected to a hostile work environment by respondents The Fitness Institute and Pilates Studio, Richard Williamson and Julie Williamson. We conclude that the determination of the Commissioner of respondent New York State Division of Human Rights (Division) that petitioner "neglected to take advantage of [her employer's] reasonable complaint procedures" is not supported by substantial evidence. An employer may assert as an affirmative defense that it "exercised reasonable care to prevent and correct promptly discriminatory conduct committed by its supervisory personnel, such as by promulgating an antidiscrimination policy with complaint procedure, and that the [employee] unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312 n 10; *see Faragher v City of Boca*

Raton, 524 US 775, 807-808). The Commissioner erred in applying that affirmative defense in this case, however, because the individuals who allegedly harassed petitioner were "indisputably within that class of an employer organization's officials who may be treated as the organization's proxy" (*Faragher*, 524 US at 789; *see Randall v Tod-Nik Audiology*, 270 AD2d 38, 38-39). Furthermore, the antidiscrimination policy of petitioner's employer did not provide a mechanism through which employees could bypass a harassing supervisor when making a complaint (*see Faragher*, 524 US at 808). We thus conclude that petitioner's failure to register a complaint was not unreasonable (*see Randall*, 270 AD2d 38; *see generally Faragher*, 524 US at 806-810).

In her order, the Commissioner "[did] not adopt the conclusion [of the administrative law judge] that the behavior about which [petitioner] complain[ed was] insufficient as a matter of law to constitute a hostile work environment." We are unable to discern on the record before us whether, but for her erroneous reliance on the affirmative defense, the Commissioner would have found in favor of petitioner. We therefore annul the determination and remit the matter to the Division for a new determination with findings of fact addressing whether petitioner established that she was subjected to a hostile work environment (*see generally Matter of Draman v Lamar Adv. of Penn*, 273 AD2d 808; *Mohawk Finishing Prods. v New York State Div. of Human Rights*, 70 AD2d 1016, *appeal dismissed* 48 NY2d 1027, *lv denied* 49 NY2d 702).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1601

CA 08-00800

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, AND GORSKI, JJ.

MIAN RAFI, TERESA RAFI, DOING BUSINESS AS MIAN RAFI'S INTERNATIONAL CUISINE, AND SHAHAB INC., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RUTGERS CASUALTY INSURANCE COMPANY, DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, BUFFALO (STEPHEN A. SHARKEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

J. MICHAEL SHANE, ALLEGANY, FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Cattaraugus County (Larry M. Himelein, A.J.), entered February 1, 2008 in a breach of contract action. The judgment, upon a jury verdict, awarded plaintiffs damages.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and a new trial is granted.

Memorandum: Defendant appeals from a judgment rendered in favor of plaintiffs, following a jury trial, based on the refusal by defendant to pay plaintiffs' claim for losses under an insurance policy issued by defendant to plaintiffs. We agree with defendant that Supreme Court committed reversible error in charging the jury that defendant was required to prove that the alleged misrepresentations made by plaintiffs on their insurance application were intentional in order to prevail on its affirmative defense, seeking to void the insurance policy. Rather, although misrepresentations made by an insured must be material, they may be innocently or unintentionally made (*see Curanovic v New York Cent. Mut. Fire Ins. Co.*, 307 AD2d 435, 436-437; *see generally* Insurance Law § 3105 [a], [b]), in which event the insurance policy is void ab initio (*see Precision Auto Accessories, Inc. v Utica First Ins. Co.*, 52 AD3d 1198, 1201, *lv denied* 11 NY3d 709; *see also Taradena v Nationwide Mut. Ins. Co.*, 239 AD2d 876, 877). Thus, the court should have charged the jury that, in order to prevail on its affirmative defense, defendant was required to submit "proof concerning its underwriting practices with respect to applicants with similar circumstances" in order to meet its burden of establishing that it would not have issued the same policy had the correct information been

included in the application (*Campese v National Grange Mut. Ins. Co.*, 259 AD2d 957, 958; *see Precision Auto Accessories, Inc.*, 52 AD3d at 1200; *Curanovic*, 307 AD2d at 437; *see also* § 3105 [c]). We cannot conclude that the error in the court's charge is harmless, and we therefore reverse the judgment and grant a new trial (*see Wilson v Nationwide Mut. Ins. Co.*, 168 AD2d 912, *lv dismissed* 77 NY2d 940).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1606

KA 06-02121

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAMAR BROWN, DEFENDANT-APPELLANT.

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

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered May 30, 2006. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of criminal possession of a controlled substance in the second degree.

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

Memorandum: Supreme Court properly denied defendant's motion pursuant to CPL 440.10 seeking to vacate the judgment convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]), as charged in a superior court information (SCI). Defendant had waived indictment of a count of criminal possession of a controlled substance in the first degree (§ 220.21 [1]) and instead pleaded guilty to the charge contained in the SCI. Defendant did not appeal from the judgment of conviction but moved to vacate it pursuant to CPL 440.10 on the grounds that the court lacked jurisdiction over the SCI and that he was denied effective assistance of counsel because defense counsel permitted him to plead guilty despite the court's lack of jurisdiction over the SCI. Although defendant is correct that the court lacked jurisdiction to permit him to waive indictment and "consent to be prosecuted by [SCI]" inasmuch as he was charged in the indictment with a class A felony (CPL 195.10 [1] [b]), we nevertheless conclude that he is barred from raising that error by way of a motion to vacate the judgment pursuant to CPL 440.10. Where, as here, "sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review" of the defendant's contentions, the court must deny a motion to vacate the judgment (CPL 440.10 [2] [c]; *see People v*

Cuadrado, 9 NY3d 362, 364-365).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1615

CA 08-01166

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

ERIK CRANDALL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WRIGHT WISNER DISTRIBUTING CORP., ET AL.,
DEFENDANTS,
CLAUDE G. WRIGHT AND CLAUDE H. WRIGHT, DOING
BUSINESS AS WRIGHT REAL ESTATE PARTNERSHIP,
AND WRIGHT REAL ESTATE, L.L.C.,
DEFENDANTS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (GARY H. ABELSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CROUCHER, JONES AND JOHNS, CANANDAIGUA (DAVID A. JOHNS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered September 7, 2007 in a personal injury action. The order, inter alia, denied the motion of defendant Wright Real Estate, L.L.C. to vacate a default judgment and extend its time to answer.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, the judgment entered August 9, 2006 is vacated, defendant Wright Real Estate, L.L.C. is granted 20 days from service of the order of this Court with notice of entry to serve and file an answer, and the cross motion is dismissed.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he allegedly sustained while working at a construction site. Defendant Wright Real Estate, L.L.C. (LLC) failed to answer the complaint, and Supreme Court (Egan, J.) granted plaintiff's motion seeking a default judgment against the LLC. We agree with the LLC and defendants Claude G. Wright and Claude H. Wright, doing business as Wright Real Estate Partnership (Partnership), that Supreme Court (Barry, J.) erred in denying the motion of the LLC to vacate the default judgment and extend the LLC's time to answer. "A defendant seeking to vacate a default under [CPLR 5015 (a)] must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action" (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141). Here, after the Partnership, as owner, entered into the

contracts for the construction project, the Partnership converted into the LLC pursuant to Limited Liability Company Law § 1006. The LLC submitted evidence that the insurance carrier for the Partnership retained counsel to defend the Partnership but not the LLC, and that the insurance carrier and counsel were unaware of the conversion and the carrier's duty to defend the LLC prior to the entry of the default judgment. We conclude that the LLC thus demonstrated a reasonable excuse for the LLC's default (*see Dodge v Commander*, 18 AD3d 943, 945; *Hayes v Maher & Son*, 303 AD2d 1018) and, in addition, that the LLC has a meritorious defense to the action. "Given the brief overall delay, the promptness with which [the LLC] moved to vacate the judgment, the lack of any intention on [the LLC's] part to abandon the action, plaintiff's failure to demonstrate any prejudice attributable to the delay, and the preference for resolving disputes on the merits, we conclude that [the LLC's] default in appearing must be excused" (*Mayville v Wal-Mart Stores*, 273 AD2d 944, 945). In view of our decision, we do not address the alternative contention that the answer served by the Partnership should be deemed to have been served by the LLC. Finally, in view of our decision, plaintiff's cross motion for an inquest on damages must be dismissed as moot (*see Estate of Witzigman v Drew*, 48 AD3d 1172).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1618

CA 08-01388

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

PATRICIA KNIERY, INDIVIDUALLY AND AS
ADMINISTRATRIX OF THE ESTATE OF MICHAEL KNIERY,
DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COTTRELL, INC., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

GOLDBERG SEGALLA LLP, BUFFALO (JOHN J. JABLONSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN P. FEROLETO, ATTORNEYS AT LAW, BUFFALO (JOHN P. FEROLETO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered February 8, 2008. The order, insofar as appealed from, denied the motion of defendant Cottrell, Inc. to dismiss the complaint against it.

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

Memorandum: In June 2005, plaintiff's decedent sustained injuries that resulted in his death when he fell from a trailer manufactured by Cottrell, Inc. (defendant) in 1994 and owned by decedent's employer. Defendant is incorporated in Georgia, decedent was a New York resident, and the accident occurred in Ohio. The trailer was sold by defendant to the first purchaser on April 15, 1994. Defendant made a pre-answer motion to dismiss the complaint against it as time-barred, contending that Ohio's 10-year statute of repose for actions based on products liability claims controls (*see* Ohio Rev Code Ann § 2305.10 [C] [1]). Supreme Court erred in denying the motion. The statute upon which defendant relies is indeed a statute of repose rather than a mere statute of limitations and thus is substantive in nature (*see generally Tanges v Heidelberg*, 93 NY2d 48, 54-58). New York choice of law principles therefore govern the outcome of the motion (*see id.* at 53). "In the context of tort law, New York utilizes interest analysis to determine which of [the] competing jurisdictions has the greater interest in having its law applied in the litigation" (*Padula v Lilarn Props. Corp.*, 84 NY2d 519, 521). " '[T]he law of the jurisdiction having the greatest interest in the litigation will be applied and . . . the [only] facts or

contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict' . . . Under this formulation, the significant contacts are, almost exclusively, the parties' domiciles and the locus of the tort" (*Schultz v Boy Scouts of Am.*, 65 NY2d 189, 197). Here, there is no question that there is diversity with respect to the domiciles of the parties and that, because the locus of the tort is Ohio, the interest of Ohio in enforcing its own law is more significant than that of New York (*see id.* at 198).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1619

CA 08-01163

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

CHARLES SOULIER AND BARBARA SOULIER,
PLAINTIFFS-RESPONDENTS,

V ORDER

RADIATOR SPECIALTY COMPANY, ET AL., DEFENDANTS,
AND SAFETY-KLEEN SYSTEMS, INC.,
DEFENDANT-APPELLANT.

PETRONE & PETRONE, P.C., SYRACUSE (DAVID H. WALSH, IV, OF COUNSEL), AND JONES CARR MCGOLDRICK, L.L.P., DALLAS, TEXAS, FOR DEFENDANT-APPELLANT.

MCMAHON, KUBLICK & SMITH, P.C., SYRACUSE, SHRADER & ASSOCIATES, LLP, HOUSTON, TEXAS (ROSS D. STOMEL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, J.), entered February 6, 2008. The order, insofar as appealed from, directed defendant Safety-Kleen Systems, Inc. to provide discovery responses to plaintiffs.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on December 23, 2008,

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1620

CA 07-01737

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

KEITH LONG, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

CELLINO & BARNES, P.C., THE BARNES FIRM, P.C., STEPHEN E. BARNES, ESQ., RICHARD J. BARNES, ESQ., ROSS M. CELLINO, JR., ESQ., DEFENDANTS-RESPONDENTS-APPELLANTS, ET AL., DEFENDANTS.

COLLINS & MAXWELL, L.L.P., BUFFALO (ALAN D. VOOS OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (GABRIELLE MARDANY HOPE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 30, 2007 in a legal malpractice action. The order, inter alia, granted in part and denied in part the cross motion of defendants Cellino & Barnes, P.C., The Barnes Firm, P.C., Stephen E. Barnes, Esq., Richard J. Barnes, Esq., and Ross M. Cellino, Jr., Esq. for summary judgment dismissing the complaint against them.

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

Memorandum: Plaintiff commenced this legal malpractice action seeking damages resulting from, inter alia, the alleged negligence of defendants-respondents (defendants) in their representation of plaintiff in the underlying Labor Law and common-law negligence action. Defendants commenced the underlying action seeking damages for injuries sustained by plaintiff, an ironworker, when he fell approximately 20 feet to the ground from the mezzanine deck of a warehouse. Defendants failed, however, to commence the action against the correct general contractor and owner of the construction project within the statute of limitations, and they admit that such failure constituted negligence.

Contrary to plaintiff's contention, Supreme Court properly granted those parts of the first cross motion of defendants seeking summary judgment dismissing the breach of contract and fraud causes of action against them as duplicative of the malpractice cause of action. The breach of contract cause of action arises from the same facts and

alleges the same damages as the malpractice cause of action (*see InKine Pharm. Co. v Coleman*, 305 AD2d 151, 152). With respect to the fraud cause of action, defendants met their initial burden by establishing that plaintiff failed to allege fraud "premised upon one or more affirmative, intentional misrepresentations——that is, something more egregious than mere 'concealment or failure to disclose [defendants'] own malpractice' . . . ——which have caused additional damages, separate and distinct from those generated by the alleged malpractice" (*White of Lake George v Bell*, 251 AD2d 777, 778, *appeal dismissed* 92 NY2d 947; *see Tasseff v Nussbaumer & Clarke*, 298 AD2d 877, 878). Plaintiff failed to raise a triable issue of fact in opposition to those parts of the first cross motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We further conclude that the court properly granted that part of defendants' second cross motion seeking summary judgment dismissing the claim for punitive damages. Plaintiff failed to "allege conduct that was directed to the general public or that evinced the requisite 'high degree of moral turpitude' or 'wanton dishonesty' to support a claim for punitive damages" (*Williams v Coppola*, 23 AD3d 1012, 1013, *lv dismissed* 7 NY3d 741, quoting *Walker v Sheldon*, 10 NY2d 401, 405). The court also properly exercised its discretion in granting that part of the second cross motion for a protective order precluding plaintiff from deposing defendants. Defendants admitted their negligence, and plaintiff failed to establish that the additional evidence he sought was relevant and necessary to the issues to be determined at trial (*see generally Wolin v St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 304 AD2d 348).

Contrary to the contention of defendants on their cross appeal, the court properly denied that part of the first cross motion seeking summary judgment dismissing the malpractice cause of action. Defendants' own submissions raise triable issues of fact whether plaintiff would have succeeded in the underlying action absent defendants' negligence (*see generally Phillips v Moran & Kufta, P.C.*, 53 AD3d 1044).

Entered: February 6, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1621.1

KA 08-00498

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CORY T., DEFENDANT-APPELLANT.

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

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment and an adjudication the Erie County Court (Michael L. D'Amico, J.), rendered August 8, 2006. Defendant was convicted upon his plea of guilty of reckless endangerment in the first degree and attempted robbery in the third degree, and defendant was adjudicated a youthful offender upon his plea of guilty of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the conviction on counts three and four of the superior court information is deemed vacated and replaced by a youthful offender finding, and the sentences of imprisonment of 1a to 4 years imposed on counts three and four of the superior court information are directed to run concurrently with the sentence imposed on count one of the superior court information, and the adjudication on count one of the superior court information is modified on the law by directing that the sentence imposed on count one of the superior court information shall run concurrently with the sentences imposed on counts three and four of the superior court information and as modified the adjudication is affirmed, and the matter is remitted to Erie County Court for further proceedings on count two of the superior court information in accordance with the following Memorandum: Defendant appeals from a youthful offender adjudication based upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [3]) and from a judgment convicting him upon his plea of guilty of reckless endangerment in the first degree (§ 120.25) and attempted robbery in the third degree (§§ 110.00, 160.05). As the People correctly concede, the sentence imposed pursuant to the plea agreement is illegal. "Where an eligible youth is convicted of two or more crimes set forth in separate counts of an accusatory instrument . . ., the court must not find him [or her] a youthful offender with respect to any such conviction . . . unless it finds him [or her] a youthful offender with respect to all such convictions" (CPL 720.20 [2]; *People*

v Christopher T., 48 AD3d 1131, 1132; *People v Huther*, 78 AD2d 1011). Here, defendant was convicted of "two or more crimes set forth in separate counts" of the superior court information (SCI) (CPL 720.20 [2]). Thus, upon adjudicating him a youthful offender with respect to robbery in the first degree under count one of the SCI, County Court was required to adjudicate defendant a youthful offender with respect to the remaining counts. Furthermore, having adjudicated defendant a youthful offender, the court "was without authority to impose consecutive sentences in excess of four years" (*People v Ralph W.C.*, 21 AD3d 904, 905; *see* Penal Law § 60.02 [2]; § 70.00 [2] [e]). We therefore reverse the judgment and modify the adjudication accordingly.

We note in addition that the court failed to sentence defendant with respect to count two of the SCI, charging him with criminal possession of stolen property in the fifth degree (Penal Law § 165.40), despite the fact that during the plea colloquy defendant admitted each element of that crime. We further note, however, that both the written waiver of indictment and the presentence report contain notations striking that count. It is thus unclear whether the court mistakenly failed to sentence defendant with respect to criminal possession of stolen property in the fifth degree, or whether that count was dismissed following the entry of defendant's guilty plea. We therefore remit the matter to County Court for further proceedings on count two of the SCI consistent with our decision.

Entered: February 6, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1621

CA 08-01073

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

IN THE MATTER OF THE FORECLOSURE OF TAX LIENS BY PROCEEDING IN REM PURSUANT TO ARTICLE 11 OF THE REAL PROPERTY TAX LAW BY COUNTY OF ONTARIO, PETITIONER-RESPONDENT. MEMORANDUM AND ORDER

BRUCE EDWIN MIDDLEBROOK, RESPONDENT-APPELLANT.

MUEHE AND NEWTON, LLP, CANANDAIGUA (DAVID J. WHITCOMB OF COUNSEL), FOR RESPONDENT-APPELLANT.

JASON S. DIPONZIO, P.C., ROCHESTER (JASON S. DIPONZIO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, A.J.), entered May 2, 2008. The order denied the motion of respondent to vacate a default judgment of foreclosure.

It is hereby ORDERED that the order so appealed from is unanimously reversed in the exercise of discretion without costs, the motion is granted and the judgment entered February 29, 2008 is vacated.

Memorandum: Respondent appeals from an order denying his motion to vacate a judgment of foreclosure entered upon his default. According to respondent, the judgment was entered based on his failure to pay the sum of approximately $24 in interest on overdue property taxes (*see generally* RPTL 1110 [1], [2]). We note at the outset that Supreme Court erred in determining that it lacked the inherent authority to vacate the default judgment "for sufficient reason and in the interests of substantial justice" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68), and we conclude under the circumstances of this case that the court improvidently exercised its discretion in denying respondent's motion (*see generally Shouse v Lyons*, 4 AD3d 821, 823). The record establishes that respondent in fact paid his property taxes by the deadline provided by petitioner in order to avoid losing his property. Even assuming, arguendo, that respondent received notice that he owed interest on those delinquent property taxes in the amount of approximately $24, we conclude that the entry of a default judgment based on the failure to pay that minor amount of interest would result in a disproportionately harsh result. We thus conclude "that this is an appropriate case in which to exercise our broad equity power to vacate [the] default judgment" (*European Am. Bank v Harper*, 163 AD2d 458, 460; *see generally Alliance Prop. Mgt. & Dev. v Andrews Ave.*

Equities, 70 NY2d 831, 832).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1629

KA 08-00198

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

ALBERT SCERBO, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

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

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered November 27, 2007. The order, insofar as appealed from, granted those parts of the omnibus motion of defendant seeking dismissal of counts 9 through 12, 27, and 28 of the indictment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion seeking dismissal of counts 11 and 12 of the indictment and reinstating those counts of the indictment and as modified the order is affirmed, and the matter is remitted to Onondaga County Court for further proceedings on counts 11 and 12 of the indictment.

Memorandum: In appeal No. 1, the People appeal from an order insofar as it granted those parts of defendant's omnibus motion seeking dismissal of counts 9 through 12, 27, and 28 of the indictment. In appeal No. 2, the People appeal from an order insofar as it denied their motion to reopen the CPL 330.40 hearing and granted the motion of defendant pursuant to CPL 330.30 to set aside the verdict as the product of improper influence and for a new trial.

With respect to appeal No. 1, we note at the outset that we reject the contention of defendant that the appeal should be dismissed on the ground that CPL 450.20 (1) is limited to interlocutory appeals, and the People here proceeded to trial before perfecting their appeal from the pretrial order. Pursuant to the express terms of CPL 450.20 (1), the People may take an appeal from an "order dismissing an accusatory instrument or a count thereof," but there is no provision specifying that subdivision (1) is limited to interlocutory appeals. In the event, however, that the People take an appeal from an "order reducing a count or counts of an indictment" (CPL 450.20 [1-a]), the "effectiveness of the order" is stayed (CPL 210.20 [6] [c]). The Legislature included the stay provision in fairness to the People when

it amended CPL 210.20, "[r]ecognizing . . . the possibility that a defendant might be tempted to exercise the statutory right to plead guilty to the reduced indictment before the People had a fair chance to respond" (*People v Jackson*, 87 NY2d 782, 787). The Legislature, however, apparently did not share those same concerns for cases in which a court dismisses a count or counts of an indictment pursuant to CPL 450.20 (1) other than one charging murder in the first degree, inasmuch as the Legislature failed to include a stay provision for such dismissal in CPL 210.20 (6) (c) (*see People v Moquin*, 77 NY2d 449, 455-456, *rearg denied* 78 NY2d 952).

Turning to the merits of the order in appeal No. 1, we conclude that County Court properly granted those parts of defendant's omnibus motion seeking dismissal of counts 9 and 27, charging course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [a]), and counts 10 and 28, charging endangering the welfare of a child (§ 260.10 [1]), based on the legal insufficiency of the evidence. In determining whether to dismiss counts of an indictment based on the legal insufficiency of the evidence before the grand jury, the court must determine "whether the evidence, viewed in the light most favorable to the People, if unexplained and uncontradicted, would be sufficient to warrant conviction by a trial jury" (*People v Manini*, 79 NY2d 561, 568-569). The grand jury "must have before it evidence legally sufficient to establish a prima facie case, including all the elements of the crime, and reasonable cause to believe that the accused committed the offense to be charged" (*People v Jensen*, 86 NY2d 248, 251-252).

Here, Jane Doe #5 and Jane Doe #14 each testified that defendant, their music teacher, touched them on their inner thighs and stomachs, over their clothing, when they sat on his lap while watching a video in class. Sexual conduct includes sexual contact (*see* Penal Law § 130.00 [10]), which is defined as "any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party" (§ 130.00 [3]). There was no testimony that would support an inference that defendant touched those victims for the purpose of gratifying his sexual desire to support the counts of course of sexual conduct against a child in the second degree (*see* § 130.80 [1] [a]; *cf. People v Gray*, 201 AD2d 961, 962, *lv denied* 83 NY2d 1003). Indeed, any such conclusion by the grand jury would necessarily be based on "impermissible speculation" (*People v Jackson*, 65 NY2d 265, 272). The counts of endangering the welfare of a child likewise were properly dismissed inasmuch as they were based on the same testimony (*see* § 260.10 [1]; *People v Guerra*, 178 AD2d 434, 435).

The court erred, however, in granting those parts of defendant's omnibus motion seeking dismissal of counts 11 and 12 based on defects in the grand jury proceeding, and we therefore modify the order in appeal No. 1 accordingly. Dismissal on that ground is "limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the Grand Jury" (*People v Huston*, 88 NY2d 400, 409). "Typically, the

submission of some inadmissible evidence will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment" (*id.*). Here, although some of the grand jury testimony of a teacher's assistant was improper, we conclude that the remaining evidence, particularly that of Jane Doe #6, was sufficient to sustain counts 11 and 12 of the indictment.

With respect to appeal No. 2, we reject the contention of the People that the court erred in setting aside the verdict and granting a new trial. It is well settled that "a jury verdict may not be impeached by proof of the tenor of [the jury's] deliberations, but it may be upon a showing of improper influence" (*People v Brown*, 48 NY2d 388, 393). Improper influence includes jury conduct that tends to place the jury in possession of evidence not introduced at trial (*see People v Arnold*, 96 NY2d 358, 364-365; *Brown*, 48 NY2d at 393). In determining whether a jury has been subjected to improper influence, the court must examine the facts "to determine the nature of the material placed before the jury and the likelihood that prejudice would be engendered" (*Brown*, 48 NY2d at 394). "Overall, a reversible error can materialize from (1) jurors conducting personal specialized assessments not within the common ken of juror experience and knowledge (2) concerning a material issue in the case, and (3) communicating that expert opinion to the rest of the jury panel with the force of private, untested truth as though it were evidence" (*People v Maragh*, 94 NY2d 569, 574; *see generally Arnold*, 96 NY2d at 367).

Here, the court properly instructed the jurors that they should use their common sense, knowledge, and experience in evaluating the evidence but that, if a juror possessed special expertise related to a material issue in the case, the juror could not rely on that special expertise "to inject into your deliberations either a fact that is not in evidence or inferable from the evidence, or an opinion that could not be drawn from the evidence by a person without that special expertise." Despite that instruction, the evidence at the post-trial hearing on defendant's CPL 330.30 motion established that two jurors, both of whom were educators, informed the other jurors that teachers are trained or informed never to touch students. That information is not within the common understanding of the average juror, and the issue whether it was appropriate for defendant to allow his female students to sit on his lap during class was a material issue in the case. Indeed, the record establishes that at least one juror was swayed by the opinions of the two jurors in voting to convict defendant. As the court concluded in granting defendant's motion, once a juror was "convinced that defendant knowingly violated some professional ethic by allowing students to sit on his lap, [the juror] was then able to make the next logical step of concluding that he did so only for the purpose of committing the crimes under consideration." Reversal was required under the circumstances of this case because the "jurors [were] exposed to prejudicial, extra-record facts" (*Arnold*, 96 NY2d at 364).

Entered: February 6, 2009 JoAnn M. Wahl
Clerk of the Court

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

1630

KA 08-00199

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

ALBERT SCERBO, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered November 27, 2007. The order, insofar as appealed from, denied the motion of the People to reopen the CPL 330.40 hearing and granted the motion of defendant to set aside the verdict and for a new trial.

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

Same Memorandum as in *People v Scerbo* ([appeal No. 1] ___ AD3d ___ [Feb. 6, 2009]).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1631

KA 08-01305

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH WALLACE, DEFENDANT-APPELLANT.

LOUIS ROSADO, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Timothy J. Drury, J.), rendered August 3, 1994. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the fourth degree and unauthorized use of a vehicle 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 a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), defendant contends that County Court erred in admitting in evidence a recording of a rap song along with a copy of its lyrics. We reject defendant's contention, and we conclude that the rap song was admissible as evidence of defendant's consciousness of guilt. Although "evidence of consciousness of guilt . . . has limited probative value . . ., its probative weight is highly dependent upon the facts of each particular case" (*People v Cintron*, 95 NY2d 329, 332-333). Here, the evidence presented at trial established that defendant played a cassette tape of his favorite rap song, entitled "How I Could Just Kill a Man," two or three times over the course of two five-minute car rides shortly after the homicide. The lyrics of the song describe a murder occurring under similar circumstances as those present in the instant case. We agree with defendant insofar as he contends that owning a cassette tape of rap music in general, or of any rap song in particular, is not relevant to the murder charge (*see generally United States v McCrea*, 583 F2d 1083, 1086). The rap song here, however, was not admitted in evidence merely for the purpose of establishing that defendant generally enjoyed rap music. Instead, the People sought to shed light on the circumstances under which defendant listened to the song, and thus the rap song was properly admitted as evidence of defendant's consciousness of guilt (*see generally Cintron*, 95 NY2d at 332). Moreover, although the lyrics to rap music can at

times be violent and inflammatory and thus may be prejudicial to defendants, the court here alleviated any such prejudice by giving an adequate limiting instruction, which the jury is presumed to have followed (*see generally People v Curtis*, 286 AD2d 900, 901, *lv denied* 97 NY2d 728).

Defendant did not make a specific objection to the prosecutor's cross-examination of him concerning his drug sale activities, and he made no objection with respect to the cross-examination of him concerning his acting experience. Defendant thus failed to preserve for our review his contentions that he was denied a fair trial by the cross-examination on those subjects (*see* CPL 470.05 [2]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). With respect to the further contention of defendant that he was denied a fair trial by prosecutorial misconduct on summation, we note that defendant moved for a mistrial on that ground. The court denied defendant's motion and instead gave a curative instruction. In view of the fact that defendant failed to seek further relief or to object after that curative instruction was given, the curative instruction "must be deemed to have corrected the alleged errors to defendant's satisfaction" (*People v Dunham*, 261 AD2d 909, 909, *lv denied* 93 NY2d 1017). In any event, we note that the prosecutor's comments on summation were a fair response to defense counsel's summation (*see People v Halm*, 81 NY2d 819, 821; *People v West*, 4 AD3d 791).

Entered: February 6, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1632

KA 04-00585

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS MARTINEZ, DEFENDANT-APPELLANT.

SHIRLEY A. GORMAN, BROCKPORT, FOR DEFENDANT-APPELLANT.

LUIS MARTINEZ, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered December 23, 2003. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (two counts) and criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him, following a jury trial, of two counts of robbery in the first degree (Penal Law § 160.15 [2], [4]) and one count of criminal possession of a weapon in the third degree (§ 265.02 [former (3)]), defendant contends that he was denied his right to be present at a pretrial scheduling conference. We reject that contention. That conference did not involve "factual matters about which defendant might have peculiar knowledge that would be useful in advancing the defendant's or countering the People's position" (*People v Spotford*, 85 NY2d 593, 596), and the contention of defendant that his presence would have affected the outcome of the trial is merely speculative (*see People v Roman*, 88 NY2d 18, 26, *rearg denied* 88 NY2d 920).

We also reject the contention of defendant that the police lacked probable cause to arrest him. The record of the suppression hearing establishes that a police officer observed defendant emerge from the area immediately behind the store that had just been robbed, and that defendant matched the description of one of the suspects. The officer testified that defendant fled from the area when he saw the officer. It is well settled that "a defendant's flight in response to an approach by the police, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, may

give rise to reasonable suspicion, the necessary predicate for police pursuit" (*People v Sierra*, 83 NY2d 928, 929; *see People v Davis*, 48 AD3d 1120, 1121-1122, *lv denied* 10 NY3d 957; *People v Nesmith*, 289 AD2d 1049, *lv denied* 97 NY2d 758). The officer thus was entitled to pursue defendant (*see People v Martinez*, 39 AD3d 1159, 1160, *lv denied* 9 NY3d 867), and he had probable cause to arrest defendant based on defendant's spontaneous statement that the police did not need to look for the guns used in the robbery because "they were plastic, [and] we broke them up" (*see generally People v Bigelow*, 66 NY2d 417, 423). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

We reject the contention of defendant in his main and pro se supplemental briefs that he was denied effective assistance of counsel. To the extent that defendant contends that defense counsel was ineffective for failing to move to suppress certain evidence, defendant "failed to show that a pretrial motion to suppress [that] evidence, if made, would have been successful" (*People v Matthews*, 27 AD3d 1115, 1116). To the extent that defendant contends that defense counsel was ineffective for failing to conduct proper cross-examinations of witnesses, to question potential jurors in a sufficient manner and to request a specific jury instruction, defendant failed " 'to demonstrate the absence of strategic or other legitimate explanations' for [those] alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712, quoting *People v Rivera*, 71 NY2d 705, 709) and, absent such a showing, it is presumed that defense counsel acted competently (*see People v Wells*, 187 AD2d 745, *lv denied* 81 NY2d 894; *see generally People v Flores*, 84 NY2d 184, 187).

The remaining contentions of defendant in his main and pro se supplemental briefs are not preserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: February 6, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1633

CAF 08-01257

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, AND PERADOTTO, JJ.

IN THE MATTER OF JOSHUA M.,
RESPONDENT-APPELLANT.

MONROE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

ARDETH L. HOUDE, LAW GUARDIAN, ROCHESTER, FOR RESPONDENT-APPELLANT.

DANIEL M. DELAUS, JR., COUNTY ATTORNEY, ROCHESTER (KIM KOSKI TAYLOR OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered February 8, 2008 in a proceeding pursuant to Family Court Act article 3. The order, among other things, placed respondent on probation for a period of 24 months.

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

Memorandum: On appeal from an order that revoked his existing probation based on the finding that he violated the conditions of probation and placed him on a new two-year period of probation, respondent contends that Family Court erred in directing the presentment agency to file a violation petition. The record does not support that contention. The petition, which was verified and subscribed by the presentment agency in accordance with Family Court Act § 360.2 (2), merely recites that it is "being filed at the request of" the court, and it does not recite that the court "directed" the presentment agency to file the petition. Indeed, we agree with petitioner that respondent "did not present proof that it was the Family Court Judge alone" that prompted the filing of the petition (*see* § 360.2 [1]). Also contrary to the contention of respondent, the court properly found that he violated the conditions of probation. The record establishes that the presentment agency "met its burden of establishing by a preponderance of the evidence that respondent violated the conditions of [his] probation" (*Matter of Carliesha C.*, 17 AD3d 1057, 1057; *see Matter of Devon AA.*, 7 AD3d 845, 846). Finally, we reject the contention of respondent that the court lacked the authority to remand him to detention after completion of the fact-finding hearing, pending a continuance of the violation proceeding (*see* Family Ct Act § 360.3 [6]), and we conclude, based upon the severity of the offense committed by respondent as well as his willful violation of his existing conditions of probation, that the court did not abuse its discretion in imposing a new two-year period of

probation (*see Matter of Richard W.*, 13 AD3d 1063, 1064).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1640

CA 08-00743

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, AND PERADOTTO, JJ.

IN THE MATTER OF JANET ARNOLD, JEFFREY BLOCK, JEROME JOHNSON, SANDRA MCMASTER, DENNIS MULLEN, BRUCE MUNGER AND LUIS RODRIGUEZ, PETITIONERS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION, ALAN ANTOS, STEVEN BAJAK, AMANDA GENERAL, SEAN JABLONSKI, MATTHEW WHITE, RESPONDENTS-RESPONDENTS-APPELLANTS, AND COUNTY OF ERIE, RESPONDENT-RESPONDENT.

NANCY E. HOFFMAN, ALBANY (PAUL S. BAMBERGER OF COUNSEL), FOR PETITIONERS-APPELLANTS-RESPONDENTS.

COLUCCI & GALLAHER, P.C., BUFFALO (PAUL G. JOYCE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS-APPELLANTS.

CHERYL A. GREEN, COUNTY ATTORNEY, BUFFALO (JEANNINE M. PURTELL OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered July 19, 2007 in a proceeding pursuant to CPLR article 78, and cross appeal by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from the order and judgment. The order and judgment, insofar as appealed from, granted the cross motion of respondent County of Erie and dismissed the petition against it and, insofar as cross-appealed from, denied the motion of respondents Erie County Medical Center Corporation, Alan Antos, Steven Bajak, Amanda General, Sean Jablonski, and Matthew White to dismiss the petition against them.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the cross motion, reinstating the petition against respondent County of Erie, and granting that respondent 20 days from service of the order of this Court with notice of entry to serve and file an answer and as modified the order and judgment is affirmed without costs.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination that created the position of Senior Technical Assistant and abolished the

position of Computer Operator for respondent Erie County Medical Center Corporation (ECMCC), thereby terminating petitioners from that position of employment. Petitioners appeal from an order and judgment insofar as it granted the cross motion of respondent County of Erie (County) to dismiss the petition against it, and ECMCC and the individual respondents (collectively, ECMCC respondents) cross-appeal from the order and judgment insofar as it denied their motion to dismiss the petition against them.

Addressing first the County's cross motion, we agree with petitioners that Supreme Court erred in granting it. We therefore modify the order and judgment accordingly. Contrary to the contention of the County, the proceeding against it was not time-barred. A CPLR article 78 proceeding "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner" (CPLR 217 [1]). "An agency determination is final . . . when the petitioner is aggrieved by the determination[, i.e., when] . . . the agency has issued an unambiguously final decision that puts the petitioner on notice that all administrative appeals have been exhausted" (*Matter of Carter v State of N.Y., Exec. Dept., Div. of Parole*, 95 NY2d 267, 270; *see Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194-195; *Matter of Edmead v McGuire*, 67 NY2d 714, 716). Thus, in determining the issue of timeliness, we must first identify the administrative action or determination to be reviewed, and we must then determine when petitioners were first aggrieved thereby (*see Matter of Properties of N.Y., Inc. v Planning Bd. of Town of Stuyvesant*, 35 AD3d 941, 942-943; *Matter of Dziedzic v Gallivan*, 28 AD3d 1087, 1088).

Here, the relevant administrative determination for statute of limitations purposes is the County's determination that the Computer Operator position was not comparable to the newly-created Senior Technical Assistant position. In the context of its cross motion, the County failed to meet its burden of establishing that it provided petitioners with notice of its determination more than four months prior to petitioners' commencement of this proceeding (*see Matter of Vadell v City of New York Health & Hosps. Corp.*, 233 AD2d 224, 225). Although the County had the final authority to classify employment positions with ECMCC, it sought advice from the New York State Department of Civil Service Testing Services Division (Testing Services Division) to review the classifications of Computer Operator and Senior Technical Assistant in order to determine whether the Computer Operators were entitled to automatic certification in the new title of Senior Technical Assistant. Although petitioners were notified by the Testing Services Division on October 31, 2006 and November 14, 2006 that the position of Computer Operator was not comparable to that of a Senior Technical Assistant, they never received any oral or written communication from the County concerning its determination. Thus, the County's determination was not final for statute of limitations purposes until petitioners were laid off from their positions, on November 22, 2006 (*see generally Matter of Heron v City of Binghamton*, 307 AD2d 524, 524-525, *lv denied* 100 NY2d 515; *Matter of Wininger v Williamson*, 46 AD2d 689, *lv denied* 36 NY2d 648).

Petitioners timely commenced this proceeding less than four months later, on March 21, 2007. We have considered the remaining contentions of the County and conclude that they are without merit.

Contrary to the contention of the ECMCC respondents on their cross appeal, the court properly denied their motion to dismiss the petition against them. We reject the contention of those respondents that the petition against them was time-barred. The relevant determination for statute of limitations purposes with respect to the ECMCC respondents is the determination of ECMCC to create the new position of Senior Technical Assistant and to terminate petitioners from their positions as Computer Operators. Although petitioners were aware that ECMCC created the new position before November 22, 2006, they were not aware that they were being terminated from their employment until that day, and the petition was therefore timely.

Contrary to the further contention of the ECMCC respondents, there are triable issues of fact with respect to whether ECMCC acted in bad faith in terminating petitioners, thus precluding dismissal of the petition against them. "It is well established that a public employer may abolish civil service positions for the purposes of economy or efficiency" (*Matter of Hritz-Seifts v Town of Poughkeepsie*, 22 AD3d 493), but it may not act in bad faith in doing so (*see Matter of Johnson v Board of Educ. of City of Jamestown*, 155 AD2d 896), nor may it abolish positions " 'as a subterfuge to avoid the statutory protection afforded civil servants before they are discharged' " (*Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO v Rockland County Bd. of Coop. Educ. Servs.*, 39 AD3d 641, 642; *see Matter of Hartman v Erie 1 BOCES Bd. of Educ.*, 204 AD2d 1037). " 'Bad faith may be demonstrated by evidence that a newly hired person performed substantially the same duties as the discharged employee' " (*Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO*, 39 AD3d at 642).

A petitioner challenging the abolition of his or her position must establish that the employer in question acted in bad faith (*see Matter of Aldazabal v Carey*, 44 NY2d 787; *Hritz-Seifts*, 22 AD3d 493; *Johnson*, 155 AD2d at 897). Here, however, the ECMCC respondents moved to dismiss the petition against them and they therefore had the initial burden of establishing that ECMCC abolished the position of Computer Operator for the purposes of economy or efficiency and acted in good faith in doing so. In support of their motion, the ECMCC respondents submitted evidence establishing that ECMCC abolished the position to increase efficiency and that the new position required more experience and skills than the abolished position. In addition, individuals employed in the new position required the ability to handle a higher percentage of problems that may arise. In opposition to the motion, however, petitioners raised a triable issue of fact by submitting affidavits in which they stated that Computer Operators performed the same duties as Senior Technical Assistants, that they were qualified for the new position, and that they were laid off solely because of their ongoing conflict with management (*see Hartman*, 204 AD2d 1037; *Matter of Terrible v County of Rockland*, 81 AD2d 837;

see also Matter of Archer v Town of Wheatfield, 300 AD2d 1108).

We have considered the remaining contentions of the ECMCC respondents and conclude that they are without merit.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1641

CA 08-01110

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, AND PERADOTTO, JJ.

CYNTHIA J. MATTHEWS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KEVIN T. SMALLRIDGE AND KSPM VENDING,
DEFENDANTS-RESPONDENTS.

ALEXANDER & CATALANO, LLC, SYRACUSE (FRANCES P. MANCE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF LAURIE G. OGDEN, ROCHESTER (DAVID F. BOWEN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered December 11, 2007 in a personal injury action. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when the vehicle she was driving collided at an intersection with a vehicle owned by defendant KSPM Vending and operated by Kevin T. Smallridge (Smallridge vehicle). Plaintiff was traveling eastbound as she attempted to make a left turn, whereupon her vehicle was struck by the westbound Smallridge vehicle. The sole issue on appeal is whether Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint. We conclude that the court erred, inasmuch as defendants failed to meet their initial burden of establishing their entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Indeed, defendants raised a triable issue of fact concerning the negligence of Smallridge, and thus the vicarious liability of KSPM Vending, by submitting plaintiff's deposition testimony in support of their motion. Plaintiff testified therein that Smallridge pulled out from behind a large westbound vehicle that was waiting to turn left and that he then proceeded into the intersection where plaintiff was already located. Thus, defendants raised an issue of fact whether Smallridge "failed to use reasonable care when proceeding into the intersection" (*Halbina v Brege*, 41 AD3d 1218, 1219; *see Fleming v Graham*, 34 AD3d 525, 526, *revd on other grounds* 10 NY3d 296; *Boston v Dunham*, 274 AD2d 708, 710; *Teller v*

Anzano, 263 AD2d 647, 647-648).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1642

CA 08-01428

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, AND PERADOTTO, JJ.

HOME INSULATION & SUPPLY, INC.,
PLAINTIFF-APPELLANT,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

GERALD A. BUCHHEIT, JR., DEFENDANT-RESPONDENT.

JOHN J. LAVIN, P.C., BUFFALO (JOHN J. LAVIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF ROBERT G. WALSH, P.C., BLASDELL (ROBERT G. WALSH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order the Supreme Court, Erie County (John A. Michalek, J.), entered October 3, 2007. The order, insofar as appealed from, found in favor of defendant and against plaintiff Home Insulation & Supply, Inc. after a nonjury trial.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and judgment is granted in favor of plaintiff Home Insulation & Supply, Inc. and against defendant on the first cause of action, and

It is further ORDERED that judgment be entered in favor of plaintiff Home Insulation & Supply, Inc. and against defendant in the amount of $6,442, with interest at the rate of 9% per annum, commencing September 12, 2003, plus costs and disbursements.

Memorandum: Home Insulation & Supply, Inc. (plaintiff) commenced this action seeking damages in the amount of $6,442 based on the alleged failure by defendant to pay plaintiff for the installation of certain insulation at his residence. We conclude that Supreme Court erred in finding after a nonjury trial that plaintiff failed to establish the existence of a written agreement between plaintiff and defendant for the disputed insulation services and thus that plaintiff was not entitled to recover damages from defendant. Viewing the evidence in the light most favorable to defendant (*see Matter of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170), we conclude that there is no fair interpretation of the evidence supporting the court's determination that plaintiff was not entitled to recover from defendant. Upon our review of the record, we conclude that plaintiff established entitlement to judgment based on the theory of quantum meruit (*see Capital Heat, Inc. v Buchheit*, 46 AD3d 1419,

1420). We further conclude that there is no fair interpretation of the evidence supporting the implicit conclusion of the court that defendant hired a general contractor to perform the renovation work on his residence and that plaintiff should have sought payment from the general contractor instead of seeking payment directly from defendant (*see id.* at 1421). We therefore grant judgment in favor of plaintiff and against defendant on the quantum meruit cause of action. Under the circumstances of this case, we conclude that plaintiff is entitled to a discretionary award of preverdict interest at the rate of 9% per annum, commencing September 12, 2003, the date on which plaintiff certified that its work at the project was complete, plus costs and disbursements (*see generally* CPLR 5001 [a], [b]; *cf. Bank of New York v Spiro*, 267 AD2d 339).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1643

KA 08-01441

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, AND PERADOTTO, JJ.

IN THE MATTER OF THE SECOND REPORT OF
THE SENECA COUNTY SPECIAL GRAND JURY OF
JANUARY 2007.
---------- MEMORANDUM AND ORDER
FIRST NAMED PUBLIC OFFICIAL, APPELLANT;

R. MICHAEL TANTILLO, SPECIAL DISTRICT
ATTORNEY OF SENECA COUNTY, RESPONDENT.

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

R. MICHAEL TANTILLO, SPECIAL DISTRICT ATTORNEY OF SENECA COUNTY, CANANDAIGUA, RESPONDENT PRO SE.

Appeal from an order of the Seneca County Court (Dennis F. Bender, J.), dated February 15, 2008. The order accepted Report Number 2 of the January 2007 Seneca County Special Grand Jury and directed the filing of the report as a public record.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the report is sealed.

Memorandum: We agree with appellant, a public official of Seneca County, that County Court erred in directing that a grand jury report be filed as a public record. It is "incumbent upon the prosecutor to instruct the Grand Jury regarding the duties and responsibilities of the public servant who is the target of the probe" (*Morgenthau v Cuttita*, 233 AD2d 111, 113, *lv denied* 89 NY2d 1042; *see Matter of Grand Jury of Onondaga County* [appeal No. 1], 101 AD2d 1023). Here, we agree with appellant that the special prosecutor's instructions concerning appellant's duties were vague and inadequate. "Without a [clear and adequate charge] as to . . . [appellant's] duties, it was not only impossible for the Grand Jury to determine that [appellant] was guilty of misconduct, nonfeasance or neglect, but impermissible as well, for it allowed the Grand Jury to simply substitute its judgment for that of [appellant]" (*Matter of June 1982 Grand Jury of Supreme Ct. of Rensselaer County*, 98 AD2d 284, 285; *see Matter of Reports of Grand Jury of County of Montgomery Impaneled on Apr. 30, 1979*, 100 AD2d 692). Indeed, we agree with appellant that the conclusions of the grand jury with respect to the alleged violation of those duties were in fact contradictory to the special prosecutor's instructions

concerning appellant’s duties.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1647

KA 06-00771

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTIAN TABB, DEFENDANT-APPELLANT.

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

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (RAYMOND C. HERMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered March 22, 2006. The judgment convicted defendant, upon a jury verdict, of assault on a peace officer, police officer, fireman or emergency medical services professional and 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 a jury verdict, inter alia, of assault on a peace officer, police officer, fireman or emergency medical services professional (Penal Law § 120.08). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The jury was entitled to credit the testimony of the People's witnesses and to reject defendant's justification defense (*see generally People v Inguaggiato*, 267 AD2d 248, *lv denied* 94 NY2d 921; *People v Green*, 240 AD2d 513, *lv denied* 90 NY2d 940). Defendant failed to preserve for our review his contention that the evidence of serious physical injury is legally insufficient to support the conviction of assault under Penal Law § 120.08 (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678), and we conclude that the sentence is not unduly harsh or severe. Defendant failed to preserve his remaining contentions for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1648

KA 99-02082

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVE STROMAN, DEFENDANT-APPELLANT.

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

STEVE STROMAN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Cayuga County Court (Peter E. Corning, J.), rendered July 9, 1998. The judgment convicted defendant, upon a jury verdict, of rape in the second degree (19 counts), sodomy in the second degree (19 counts), incest in the third degree (60 counts), rape in the third degree (37 counts), sodomy in the third degree (37 counts) and endangering the welfare of a child (21 counts).

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

Memorandum: We previously granted defendant's motion for a writ of error coram nobis on the ground that appellate counsel failed to raise an issue on direct appeal that may have merit, i.e., that defendant's trial counsel was ineffective (*People v Stroman*, 38 AD3d 1369). Defendant now appeals de novo from the judgment convicting him after a jury trial of multiple counts of, inter alia, rape in the second degree (Penal Law § 130.30 [1]), sodomy in the second degree (former § 130.45 [1]), incest in the third degree (§ 255.25) and endangering the welfare of a child (§ 260.10 [1]).

Contrary to the contention of defendant, County Court properly denied his motion to dismiss the indictment for lack of specificity (*see People v Miller*, 197 AD2d 925, 926, *lv denied* 83 NY2d 807; *see generally People v Morris*, 61 NY2d 290, 295). We further conclude that the indictment was neither duplicitous on its face (*see generally People v Keindl*, 68 NY2d 410, 419-421, *rearg denied* 69 NY2d 823), nor was it rendered duplicitous based on the testimony of the victim on cross-examination (*see People v Coveney*, 134 Misc 2d 894, 899-900; *cf. People v Jones*, 165 AD2d 103, 108-109, *lv denied* 77 NY2d 962). In addition, the conviction is supported by legally sufficient evidence

(*see generally People v Bleakley*, 69 NY2d 490, 495) and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that he was denied a fair trial by prosecutorial misconduct, but he failed to preserve for our review most of the alleged instances of prosecutorial misconduct (*see* CPL 470.05 [2]; *People v Diaz*, 52 AD3d 1230, *lv denied* 11 NY3d 831). In any event, we conclude that "[a]ny improprieties 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]). We further conclude that the court did not abuse its discretion in limiting the cross-examination of the victim with respect to matters bearing only on her credibility (*see generally People v Duffy*, 36 NY2d 258, 262-263, *mot to amend remittitur granted* 36 NY2d 857, *cert denied* 423 US 861; *People v McCullough*, 278 AD2d 915, 917, *lv denied* 96 NY2d 803).

Finally, we conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

We have examined the remaining contention of defendant in his pro se supplemental brief and conclude that it does not warrant reversal.

Entered: February 6, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1653

KAH 07-02186

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DENNIS WURTHMANN, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

KEVIN J. BAUER, BUFFALO, FOR PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered July 12, 2007. The judgment converted the proceeding for a writ of habeas corpus to a proceeding pursuant to CPLR article 78 and dismissed the petition.

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

Memorandum: Supreme Court erred in converting this proceeding seeking a writ of habeas corpus to a proceeding pursuant to CPLR article 78, and we therefore modify the judgment accordingly (*see People ex rel. Smith v Mantello*, 167 AD2d 912). We further conclude on the merits, however, that the court properly dismissed the petition. Petitioner previously appealed from a judgment convicting him of murder in the second degree (Penal Law § 125.25 [2]) and criminal possession of a weapon in the third degree (§ 265.02 [former (1)]), and this Court modified the judgment by vacating the sentence and remitted the matter for resentencing (*People v Wurthmann*, 26 AD3d 830, 831, *lv denied* 7 NY3d 765). The certificate of conviction issued following petitioner's resentencing and the minutes of the resentencing proceeding establish that County Court properly corrected its previous errors in accordance with the express terms of our prior decision by modifying the sentence only to the extent that it was illegal and by otherwise allowing the valid terms of the sentence previously imposed to stand (*see generally People v Carpenter*, 19 AD3d 730, 731, *lv denied* 5 NY3d 804).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1658

CA 08-01419

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

CATARACT SPORTS & ENTERTAINMENT GROUP, LLC,
ET AL., PLAINTIFFS,

V MEMORANDUM AND ORDER

ESSEX INSURANCE COMPANY, DEFENDANT-RESPONDENT,
FRANK STRANGIO, MERRIE CAROLE STRANGIO,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

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

HURWITZ & FINE, P.C., BUFFALO (STEVEN E. PEIPER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered September 14, 2007 in a declaratory judgment action. The judgment, insofar as appealed from, dismissed the complaint, granted the motion of defendant Essex Insurance Company for summary judgment declaring that it is not obligated to defend or indemnify plaintiffs in the underlying personal injury action, and denied the cross motion of defendants Frank Strangio and Merrie Carole Strangio for summary judgment.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the complaint is reinstated, the motion is denied, the declaration is vacated, the cross motion is granted, and judgment is granted as follows:

> It is ADJUDGED and DECLARED that defendant Essex Insurance Company is obligated to defend and indemnify plaintiffs in the underlying personal injury action.

Memorandum: Plaintiffs commenced this action seeking, inter alia, judgment declaring that defendant Essex Insurance Company (Essex) has a duty to defend and indemnify them in the underlying personal injury action brought by defendants Frank Strangio and his wife, Merrie Carole Strangio. In the underlying action, the Strangios seek damages for injuries sustained by Frank Strangio during a flag football game when he allegedly stepped into a rut in the artificial turf on premises owned and operated by plaintiffs. Supreme Court erred in granting the motion of Essex seeking summary judgment

declaring that it is not obligated to defend or indemnify plaintiffs in the underlying action and in denying the Strangios' cross motion seeking a declaration to the contrary. We note at the outset that the Strangios ordinarily would lack standing to seek such relief against Essex based on their failure to satisfy the requirements of Insurance Law § 3420 by obtaining a judgment against Essex, the tortfeasors' insured, in the underlying action (*see 3405 Putnam Realty Corp. v Insurance Corp. of N.Y.*, 36 AD3d 565, *lv denied* 8 NY3d 813). Here, however, plaintiffs named them as party defendants, thereby allowing them to contest the issue of coverage in this action (*see id.*).

On the merits, we conclude that the commercial general liability policy issued by Essex to plaintiffs provides coverage for the accident. "Where an insurance policy is clear and unambiguous, it must be enforced as written" (*Woods v General Acc. Ins.*, 292 AD2d 802, 802). The policy in effect at the time of the accident, as modified by Endorsement M/E 217 (4/99), unambiguously provides liability coverage for bodily injury arising out of the "ownership, maintenance or use of the premises" *or* arising out of the "project shown in the Schedule," i.e., the golf driving range. Because the policy identifies the insured premises in the disjunctive, each must be separately considered and either would support coverage (*see generally Propis v Fireman's Fund Ins. Co.*, 112 AD2d 734, 737-738, *affd* 66 NY2d 828; *Coutu v Exchange Ins. Co.*, 174 AD2d 241, 243). Because the injury in the underlying action allegedly arose out of the "ownership, maintenance or use of the premises," the Strangios are entitled to judgment declaring that Essex is obligated to defend and indemnify plaintiffs in the underlying action.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1659

CA 08-01183

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

IN THE MATTER OF LAIDLAW ENERGY AND ENVIRONMENTAL, INC., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF ELLICOTTVILLE, TOWN OF ELLICOTTVILLE PLANNING BOARD, MARGARET SIGNORE, IN HER CAPACITY AS CHAIR OF TOWN OF ELLICOTTVILLE PLANNING BOARD, JOHN ZERFAS, IN HIS CAPACITY AS CO-CHAIR OF TOWN OF ELLICOTTVILLE PLANNING BOARD, MICHAEL GUERCIO, SHARI BARRERA, DOC DAYTON, GARY MATHE AND ARTHUR CHUBB, IN THEIR RESPECTIVE CAPACITIES AS MEMBERS OF TOWN OF ELLICOTTVILLE PLANNING BOARD, RESPONDENTS-RESPONDENTS.

HISCOCK & BARCLAY, LLP, SYRACUSE (ANDREW J. LEJA OF COUNSEL), FOR PETITIONER-APPELLANT.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered March 18, 2008 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of respondent Town of Ellicottville Planning Board (Board) denying its application for, inter alia, site plan approval for a cogeneration plant. Petitioner owns 16.5 acres of land in respondent Town of Ellicottville in an area zoned for "Light Industrial/Service Commercial" use. The previous owner of the property had operated a lumber drying kiln and cogeneration electrical power plant, powered by natural gas. Petitioner applied to the Board for, inter alia, site plan approval for a new cogeneration plant using wood chips as a fuel source (plant). The Board named itself as lead agency for a review pursuant to article 8 of the Environmental Conservation Law (State Environmental Quality Review Act) and issued a positive declaration, requiring the preparation of a draft environmental impact statement (DEIS).

Petitioner subsequently submitted a DEIS and a revised DEIS to the Board, and a public hearing was held. The Board requested additional information from petitioner, and petitioner submitted a draft final environmental impact statement (FEIS) and a revised FEIS. The Board then issued the FEIS, held another public hearing on petitioner's applications, and subsequently denied site plan approval for the plant. In its Statement of Findings and Decision, the Board indicated that there was no area of greater concern than the air emissions from the proposed cogeneration plant, and that the "serious increases in harmful emissions" from the plant would result in an "unacceptable adverse impact."

Contrary to the contentions of petitioner, the Board's determination is not "arbitrary, capricious or unsupported by substantial evidence" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417; *see Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 688), and the record establishes that the Board took the requisite hard look at the evidence and made a reasoned elaboration of the basis for its determination (*see generally Matter of WEOK Broadcasting Corp. v Planning Bd. of Town of Lloyd*, 79 NY2d 373, 383). We thus conclude that Supreme Court properly dismissed the petition.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1660

CA 08-00072

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

RICHARD N. GROTH AND ROSALIE J. GROTH,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

BJ'S WHOLESALE CLUB, INC., DEFENDANT-APPELLANT,
PAUL V. MASSEY, INDIVIDUALLY, AND PAUL V.
MASSEY, DOING BUSINESS AS GRASSHOPPER LANDSCAPING,
DEFENDANT-RESPONDENT.

MACKENZIE HUGHES LLP, SYRACUSE (NEIL J. SMITH OF COUNSEL), FOR DEFENDANT-APPELLANT.

RUSSELL, RUSSELL & GRASSO, PLLC, CENTRAL SQUARE (DAVID S. GRASSO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

IACONO, CAMBS, GOERGEN AND MANSON, LIVERPOOL, SASSANI & SCHENCK, P.C. (MITCHELL P. LENCZEWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered December 11, 2007 in a personal injury action. The order, among other things, denied that part of the motion of defendant BJ's Wholesale Club, Inc. for summary judgment dismissing the complaint against it.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Richard N. Groth (plaintiff) when he slipped and fell in a parking lot owned by defendant BJ's Wholesale Club, Inc. (BJ's). Supreme Court properly denied that part of the motion of BJ's for summary judgment dismissing the complaint against it. BJ's failed to meet its "initial burden of establishing that it did not create the dangerous condition that caused plaintiff to fall and did not have actual or constructive notice thereof" (*Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857, 857; *see Kimpland v Camillus Mall Assoc., L.P.*, 37 AD3d 1128). In any event, even assuming, arguendo, that BJ's met its initial burden, we conclude that plaintiffs raised a triable issue of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We reject the contention of BJ's that the court erred in granting that part of the cross motion of defendant Paul V. Massey,

individually and doing business as Grasshopper Landscaping, for summary judgment dismissing the complaint against him. Pursuant to his snow removal contract with BJ's, Massey was obligated to plow after at least two inches of snow had accumulated. He established in support of the cross motion that he plowed snow in the parking lot two days before the accident and salted one day before the accident. He further established that, on the day of the accident, the snow accumulation was less than two inches and that BJ's did not request that he apply salt or plow that day. "[B]y merely plowing the snow, as required by the contract, [the] actions [of Massey] could not be said 'to have created or exacerbated a dangerous condition' " (*Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 361, quoting *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 142). We have considered BJ's remaining contentions and conclude that they are lacking in merit.

Entered: February 6, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1661

CA 08-00606

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

PATRICK L. DALEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, DEFENDANT-APPELLANT.

CHERYL A. GREEN, COUNTY ATTORNEY, BUFFALO (KRISTIN KLEIN WHEATON OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHIACCHIA & FLEMING, LLP, HAMBURG (CHRISTEN ARCHER PIERROT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered December 19, 2007 in an action for, inter alia, breach of contract. The order denied the motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiff, an employee of defendant, commenced this action seeking damages for, inter alia, breach of contract based on the alleged violation by defendant of its Employee Suggestion Program (Program). The Program provided monetary awards to employees who submitted cost-saving suggestions that were implemented by defendant. Contrary to the contention of defendant, Supreme Court properly denied its motion seeking to dismiss the complaint for, inter alia, failure to state a cause of action (*see* CPLR 3211 [a] [7]). In determining whether a complaint fails to state a cause of action, a court is required to "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88; *see Morone v Morone*, 50 NY2d 481, 484). "It is well[ ]established that the processing of a suggestion pursuant to an employee suggestion plan creates a contractual relationship between the employee and the employer under the rules of the plan" (*Didley v General Motors Corp.*, 837 F Supp 535, 539; *see deCiutiis v Nynex Corp.*, 1996 WL 512150, *3 [SD NY 1996]; *see also Milich v Schenley Indus.*, 54 AD2d 659, *affd* 42 NY2d 952; *Streeter v Eastman Kodak Co.*, 251 AD2d 1064). Thus, the court properly determined that plaintiff stated a cause of action for breach of contract (*see Furia v Furia*, 116 AD2d 694, 695).

Defendant also contended in support of its motion that this

action is time-barred because it is properly a proceeding under CPLR article 78 and thus is barred by the four-month statute of limitations. We reject that contention. "The proper vehicle for seeking damages arising from an alleged breach of contract by a . . . governmental body is an action for breach of contract, not a proceeding pursuant to CPLR article 78" (*Kerlikowske v City of Buffalo*, 305 AD2d 997, 997; *see Matter of Steve's Star Serv. v County of Rockland*, 278 AD2d 498, 499-500; *Matter of Barrier Motor Fuels v Boardman*, 256 AD2d 405, 405-406).

We have considered defendant's remaining contention and conclude that it is without merit.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1666

KA 07-01385

PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, PERADOTTO, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWIN GIMENEZ, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

EDWIN GIMENEZ, DEFENDANT-APPELLANT PRO SE.

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered December 6, 2006. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). Contrary to the contention of defendant, his waiver of the right to appeal was knowingly, intelligently and voluntarily entered (*see People v Lopez*, 6 NY3d 248, 256; *People v Gilbert*, 17 AD3d 1164, *lv denied* 5 NY3d 762). That valid waiver encompasses defendant's challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737). Although the further contention of defendant that his plea was not knowingly, voluntarily, and intelligently entered survives his waiver of the right to appeal, defendant failed to preserve that contention for our review inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Carmody*, 53 AD3d 1048, *lv denied* 11 NY3d 830; *People v Adams*, 26 AD3d 597, *lv denied* 7 NY3d 751; *People v Beekman*, 280 AD2d 784, *lv denied* 96 NY2d 780). In any event, defendant's contention lacks merit (*see generally People v Garcia*, 92 NY2d 869, 870). Any challenge by defendant to the voluntariness of the plea based on alleged coercion is belied by defendant's responses to County Court's questions during the plea colloquy (*see People v Nichols*, 21 AD3d 1273, 1274, *lv denied* 6 NY3d 757). The contention of defendant in his main and pro se supplemental briefs that he was denied effective assistance of counsel survives his guilty plea and waiver of the right to appeal to the extent that he contends that the plea was

infected by the alleged ineffective assistance (*see Nichols*, 21 AD3d at 1274; *cf. People v Burke*, 256 AD2d 1244, *lv denied* 93 NY2d 851). We nevertheless reject that contention (*see generally People v Ford*, 86 NY2d 397, 404; *People v Baldi*, 54 NY2d 137, 147). We have considered the remaining contentions of defendant in his pro se supplemental brief and conclude that they are without merit.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1674

KAH 07-02096

PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, PERADOTTO, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
GEORGE WARD, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

MICHAEL G. CONROY, WATERLOO, FOR PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered September 19, 2007. The judgment denied the petition for a writ of habeas corpus.

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

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus on the ground that the indictment charging him with various crimes was jurisdictionally defective because the underlying facts were not set forth with the requisite specificity. Supreme Court properly denied the petition. The issues raised therein could have been raised either on direct appeal or by way of a motion pursuant to CPL 440.10, and thus habeas corpus relief does not lie (*see e.g. People ex rel. Carpenter v Corcoran*, 46 AD3d 1468, *lv denied* 10 NY3d 706; *People ex rel. Elkady v Conway*, 41 AD3d 1176, *lv denied* 9 NY3d 809; *People ex rel. Lyons v Conway*, 32 AD3d 1324, *lv denied* 8 NY3d 802).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

1676

CAF 07-00708

PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, PERADOTTO, AND PINE, JJ.

IN THE MATTER OF EDWIN GARCIA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NORA BARIE, RESPONDENT-RESPONDENT.

EDWIN GARCIA, PETITIONER-APPELLANT PRO SE.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered December 4, 2006 in a proceeding pursuant to Family Court Act article 4. The order, insofar as appealed from, dismissed that part of the petition seeking to modify a child support order.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, that part of the petition seeking to modify an order of child support is reinstated, and the matter is remitted to Family Court, Cattaraugus County, for a hearing on that part of the petition in accordance with the following Memorandum: Petitioner appeals pro se from an order dismissing his petition seeking, inter alia, to modify his child support order for failure to state a cause of action. Pursuant to Family Court Act § 451, Family Court must conduct a hearing on a petition to modify a support order where the petition is "supported by affidavit and other evidentiary material sufficient to establish a prima facie case for the relief requested." Here, petitioner established a prima facie case for the relief requested with respect to child support by submitting evidentiary material establishing that his daughter had abandoned him. His submissions in support of the petition established that his repeated attempts at communication with his daughter had been refused and that she had expressed a clear wish to "have nothing to do with [him]" (*see Matter of Chamberlin v Chamberlin*, 240 AD2d 908, 909). At the "hearing" conducted by the court in this proceeding, the court did not permit petitioner to testify or otherwise to present any other sworn testimony, and thus the hearing to which petitioner was entitled was " 'inherently flawed' " (*Matter of Ademovic v Reid*, 1 AD3d 899, 899). The court's "cursory handling of this matter . . . [did] not provide a substitute for the 'meaningful hearing' to which petitioner [was] entitled" (*id.* at 900). We therefore reverse the order insofar as appealed from, reinstate that part of the petition seeking to modify a support order, and remit the matter to Family Court for a hearing on that part of the petition in compliance with

Family Court Act § 451.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

1677

CAF 08-00991

PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, PERADOTTO, AND PINE, JJ.

IN THE MATTER OF JAMES M. SAUNDERS, JR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DONNA M. AIELLO, RESPONDENT-RESPONDENT.

WILLIAM L. KOSLOSKY, LAW GUARDIAN, APPELLANT.

WILLIAM L. KOSLOSKY, LAW GUARDIAN, UTICA, APPELLANT PRO SE.

LINDA M.H. DILLON, COUNTY ATTORNEY, UTICA (RAYMOND F. BARA OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered August 15, 2007 in a proceeding pursuant to Family Court Act article 4. The order granted the petition and suspended the child support obligation of 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: The Law Guardian appeals from an order suspending the child support obligation of petitioner father, who alleged in his petition that his two children, ages 14 and 17, have abandoned him. In granting the petition seeking that relief, Family Court determined that the children have refused to visit their father or to have any substantial contact with him, and the court further determined that respondent mother was indifferent with respect to the visitation of the children with their father. It is well established that a " 'child of employable age, who actively abandons the noncustodial parent by refusing all contact and visitation, without cause, may be deemed to have forfeited his or her right to support' " (*Matter of Chestara v Chestara*, 47 AD3d 1046, 1047). Here, only one of the two children is of employable age (*see Matter of Gottesman v Schiff*, 239 AD2d 500; *Matter of Ryan v Schmidt*, 221 AD2d 449, 450), and thus the court erred as a matter of law in determining that the actions of the younger child constituted abandonment of her father (*see Gottesman*, 239 AD2d 500).

We conclude with respect to the older child that the evidence fails to support the court's determination that she abandoned her father. The children, who reside in Florida, last visited their

father in the summer of 2005. The father and the children had an argument on the final night of the visit, and the children stayed with a family friend who transported them to the airport the next day. The father testified at the hearing on the petition that he left one or two messages for the children on the answering machine at their home and that he called or sent text messages to them on their individual cellular telephones. The father further testified that the children failed to return his calls or to respond to his text messages. We conclude that the failure of the older child to contact her father "merely indicates that there was a reluctance on [her] part to contact him . . . A child's reluctance to see a parent is not abandonment, relieving the parent of any support obligation . . ., and a few telephone calls cannot be construed as a serious attempt to maintain a relationship with a child" (*Radin v Radin*, 209 AD2d 396; *cf. Matter of Chamberlin v Chamberlin*, 240 AD2d 908, 909-910; *see generally Matter of Kinney v Simonds*, 276 AD2d 882, 883-884).

We further conclude that the court erred in determining that the failure of the mother to encourage visitation warranted the suspension of the father's child support obligation. "Where the custodial parent's actions do not rise to the level of 'deliberate frustration' of the noncustodial parent's visitation rights, suspension or termination of support payments is not warranted" (*Hiross v Hiross*, 224 AD2d 662, 663).

Entered: February 6, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1680

CA 07-01353

PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, PERADOTTO, AND PINE, JJ.

IN THE MATTER OF JOSEPH GRAY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

JOSEPH GRAY, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered April 12, 2007 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to expunge the determination that he violated two inmate rules. We conclude that Supreme Court properly dismissed the petition. We agree with petitioner that there was a violation of 7 NYCRR 251-4.2 based on the failure of his two employee assistants to interview requested witnesses and to collect requested documentary evidence (*see Matter of Burgess v Selsky*, 50 AD3d 1347; *see also Matter of Velasco v Selsky*, 211 AD2d 953, 954). Nevertheless, we conclude that "[t]he Hearing Officer remedied any alleged defect in the prehearing assistance by ensuring that petitioner was offered all [relevant] documentation which he requested, ensured that petitioner's many objections were addressed, [and] exercised considerable patience in allowing petitioner to develop the record" (*Matter of Amaker v Selsky*, 43 AD3d 547, 547, *lv denied* 9 NY3d 814; *see Matter of Parkinson v Selsky*, 49 AD3d 985, 986; *cf. Velasco*, 211 AD2d 953).

We reject the further contention of petitioner that he was denied the right to call two witnesses, in violation of 7 NYCRR 253.5. The testimony of an inmate concerning petitioner's mental health status was properly excluded because the Hearing Officer previously had conducted a confidential interview with an employee from the Office of Mental Health, and thus any additional testimony concerning petitioner's mental health status would have been redundant (*see*

Matter of Allah v Leclaire, 51 AD3d 1173). In addition, the testimony of one of petitioner's employee assistants was properly excluded because it "would have been irrelevant to the charges against petitioner" (*Matter of Daum v Goord*, 274 AD2d 715, 716).

Contrary to the contention of petitioner, he was not entitled to copies of various documents pursuant to 7 NYCRR 1010.5. The Hearing Officer permitted petitioner to review the documents during the course of the hearing, and we thus cannot conclude that petitioner was denied "his right to disclosure" (*Matter of Sharpe v Coombe*, 237 AD2d 980, 981). Also contrary to petitioner's contentions, the results of the drug tests were admissible (*cf. Matter of Sanchez v Hoke*, 116 AD2d 965, 966), and the misbehavior report was sufficiently specific pursuant to 7 NYCRR 251-3.1 (*see Matter of Dingle v Goord*, 244 AD2d 938).

Although petitioner is correct that there are gaps in the hearing transcript, we conclude that those gaps " 'do not preclude meaningful review of petitioner's contentions, and petitioner has not demonstrated that he was prejudiced thereby' " (*Matter of Redmond v Goord*, 6 AD3d 1207, 1208; *see Matter of Grigger v Goord*, 288 AD2d 892, *lv denied* 97 NY2d 610). We also reject petitioner's contention that the hearing was not timely commenced pursuant to 7 NYCRR 253.6 (a), which requires that "the hearing may not be held until 24 hours after the assistant's initial meeting with the inmate." Although petitioner met with one of the two employee assistants less than 24 hours prior to commencement of the hearing, we conclude that the regulation was not violated inasmuch as he met with the other employee assistant eight days prior to commencement of the hearing (*see generally Matter of Govan v Goord*, 22 AD3d 928). Finally, petitioner's remaining contention is based on materials outside the record on appeal and thus is not properly before us (*see generally Matter of Prudential Prop. & Cas. Ins. Co. v Ambeau*, 19 AD3d 999, 1000).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1681

CA 08-01118

PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, PERADOTTO, AND PINE, JJ.

ARDA MAKARCHUK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EDWARD MAKARCHUK, DEFENDANT-RESPONDENT.

MARK WOLBER, UTICA, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Robert F. Julian, J.), entered January 31, 2008. The order, insofar as appealed from, granted that part of defendant's motion seeking to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action in 2006 seeking to enforce defendant's obligation to pay carrying costs on the marital residence pursuant to a separation agreement (agreement) executed by the parties in 1970. The carrying costs consisted of taxes, insurance and most of the maintenance costs. The agreement further provided that it would "survive any decree of divorce . . . [and would] not merge in[] nor be superseded by any divorce decree or judgment." A decree of divorce was entered in 1971 and, although the decree expressly incorporated the agreement, it did not contain a nonmerger clause. In 1975 Supreme Court (John R. Tenney, J.) modified the decree by ordering that defendant was no longer responsible for paying the carrying costs on the marital residence. We agree with plaintiff that Supreme Court (Robert F. Julian, J.) erred in granting that part of defendant's motion seeking to dismiss the complaint.

It is well settled that "[a] separation agreement that is incorporated into but not merged with a divorce decree is an independent contract binding on the parties unless impeached or challenged for some cause recognized by law" (*Merl v Merl*, 67 NY2d 359, 362). Furthermore, such an agreement cannot be modified by a change to the divorce decree "absent a clear expression by the parties of such an intent" (*Kleila v Kleila*, 50 NY2d 277, 283). Here, the parties expressed no such intent. It is of no consequence that the decree did not contain a nonmerger clause inasmuch as the parties'

intent to incorporate and not merge the agreement in the decree is clear from the language of those instruments (*see Rainbow v Swisher*, 72 NY2d 106, 109-110; *Merrick v Merrick*, 181 AD2d 503). We thus conclude that plaintiff retained the right to enforce the agreement notwithstanding the 1975 order modifying the decree. Contrary to the contention of defendant, he failed to establish as a matter of law that plaintiff either is judicially estopped from enforcing the agreement (*see generally Prudential Home Mtge. Co. v Neildan Constr. Corp.*, 209 AD2d 394, 395), or is equitably estopped from doing so (*see generally Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 81-82).

Contrary to the further contention of defendant, this action is not time-barred. Plaintiff is seeking to enforce a continuing obligation under a contract, and she therefore may seek damages for those breaches that have occurred within the six years prior to the commencement of the action (*see* CPLR 213 [2]; *see generally Tauber v Lebow*, 65 NY2d 596, 598; *Matter of Volpe v Volpe*, 16 AD3d 1176, 1178).

We agree with plaintiff that the court further erred in determining that dismissal of the complaint was warranted based on the theory of laches inasmuch as laches is inapplicable in actions at law (*see Hilgendorff v Hilgendorff*, 241 AD2d 481). Finally, the court also erred in determining that plaintiff waived her right to enforce the agreement (*see generally Comvest Consulting v W.R.S.B. Dev. Co.*, 266 AD2d 890), and that there was a novation between the parties (*see generally Flaum v Birnbaum*, 120 AD2d 183, 192).

Entered: February 6, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1683

CA 08-00167

PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, PERADOTTO, AND PINE, JJ.

CHERI ANN DRECHSEL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE M. NARBY, M.D., DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (KATHLEEN M. SWEET OF COUNSEL), FOR DEFENDANT-APPELLANT.

STAMM, REYNOLDS & STAMM, WILLIAMSVILLE (BRADLEY J. STAMM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered October 3, 2007 in a medical malpractice action. The amended order, insofar as appealed from, granted those parts of plaintiff's motion seeking to revoke speaking authorizations and to preclude ex parte interviews and seeking the admission of certain hospital records and denied defendant's cross motion.

It is hereby ORDERED that said appeal from the amended order insofar as it concerned the admissibility of evidence at trial is unanimously dismissed and the amended order is modified on the law by denying those parts of the motion seeking to revoke speaking authorizations and to preclude ex parte interviews and as modified the amended order is affirmed without costs.

Memorandum: Defendant appeals from an amended order insofar as it granted those parts of plaintiff's motion seeking to revoke all speaking authorizations previously provided to defendant, to preclude defendant and his attorneys from engaging in ex parte interviews with plaintiff's treating physicians, and to determine that certain hospital records are self-authenticating and admissible at trial. Defendant also appeals from the amended order insofar as it denied that part of defendant's cross motion seeking to direct plaintiff and her attorney to discontinue "their campaign to discourage" plaintiff's consulting neurologist from testifying at trial, and conditionally denied that part of defendant's cross motion seeking to preclude plaintiff's primary care physician from testifying at trial.

At the time it determined the motion and cross motion, the court properly granted those parts of plaintiff's motion seeking to revoke the speaking authorizations previously provided to defendant and to preclude ex parte interviews between defendant and his attorneys and

plaintiff's treating physicians based on the decision of this Court in *Kish v Graham* (40 AD3d 118, 114). The decision of this Court in *Kish*, however, subsequently was reversed by the Court of Appeals following the issuance of the court's decision and during the pendency of the appeal (*Kish*, 9 NY3d 393). Thus, those parts of plaintiff's motion seeking to revoke the speaking authorizations previously provided to defendant and to preclude defendant from engaging in ex parte interviews with plaintiff's treating physicians must be denied, and we modify the amended order accordingly.

The appeal by defendant with respect to that part of his cross motion seeking to preclude plaintiff's primary care physician from testifying at trial and with respect to that part of plaintiff's motion seeking to admit certain hospital records in evidence at trial must be dismissed. Those parts of the amended order address only pretrial rulings concerning " 'the admissibility of evidence, [and thus] constitute[], at best, an advisory opinion which is neither appealable as of right nor by permission' " (*George C. Miller Brick Co., Inc. v Stark Ceramics*, 2 AD3d 1341, 1342-1343; *see Mayes v Zawolik*, 55 AD3d 1386).

We have considered defendant's remaining contention and conclude that it is lacking in merit.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1686.2

CA 08-01105

PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, PERADOTTO, AND PINE, JJ.

RAYMOND S. SWAN, JR. AND DORIS J. SWAN,
PLAINTIFFS-RESPONDENTS,

V ORDER

ANDREW J. INGERSOLL, ET AL., DEFENDANTS,
CRICKET COMMUNICATIONS, INC., LEAP WIRELESS
INTERNATIONAL, INC. AND PBS CONSULTANTS CORP.,
DEFENDANTS-APPELLANTS.

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (JOHN WALLACE OF COUNSEL), FOR DEFENDANTS-APPELLANTS CRICKET COMMUNICATIONS, INC. AND LEAP WIRELESS INTERNATIONAL, INC.

HURWITZ & FINE, P.C., BUFFALO (V. CHRISTOPHER POTENZA OF COUNSEL), FOR DEFENDANT-APPELLANT PBS CONSULTANTS CORP.

CONNORS & VILARDO, LLP, BUFFALO (AMY C. MARTOCHE AND TERRENCE M. CONNORS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

BOUVIER PARTNERSHIP, LLP, BUFFALO (JOSHUA P. RUBIN OF COUNSEL), FOR DEFENDANT ANDREW J. INGERSOLL.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (DAVID G. BROCK OF COUNSEL), FOR DEFENDANTS NOCO EXPRESS AND NOCO ENERGY CORP.

Appeals from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered March 20, 2008 in a personal injury action. The order denied the motions of defendants Cricket Communications, Inc., Leap Wireless International, Inc. and PBS Consultants Corp. for summary judgment dismissing the amended complaint and cross claims against them.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for plaintiffs and defendant PBS Consultants Corp. on December 11, 2008, and upon reading the stipulation of discontinuance of action signed by the attorneys for plaintiffs and defendants Andrew J. Ingersoll, Noco Express, Noco Energy Corp., Cricket Communications, Inc. and Leap Wireless International, Inc. on January 2, 2009 and filed in the Erie County Clerk’s Office on January 5, 2009,

It is hereby ORDERED that said appeals are unanimously dismissed

without costs upon stipulations.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

1686

CA 08-01406

PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, AND PINE, JJ.

TIMOTHY TRALA, PLAINTIFF,

V MEMORANDUM AND ORDER

HUSSEIN AFIF, DEFENDANT.

HUSSEIN AFIF, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

ROBERT PAWLIK, THIRD-PARTY
DEFENDANT-APPELLANT.

LAW OFFICE OF EPSTEIN & HARTFORD, WILLIAMSVILLE (ERIC C. HITZEL OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MELISSA A. FOTI OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph G. Makowski, J.), entered February 8, 2008 in a personal injury action. The order denied the motion of third-party defendant for summary judgment dismissing the third-party complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he slipped and fell on snow and ice on the driveway of property owned by defendant-third-party plaintiff (defendant). At the time of the accident, defendant had hired third-party defendant to remove snow from the driveway, but there was no written contract for those services. Defendant commenced the third-party action seeking contribution and indemnification on the grounds that third-party defendant was negligent and had breached the alleged snow removal contract. We conclude that Supreme Court erred in denying the motion of third-party defendant for summary judgment dismissing the third-party complaint inasmuch as he met his burden of establishing his entitlement to judgment as a matter of law, and defendant failed to raise a triable issue of fact in opposition to the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

To the extent that the third-party complaint, as amplified by the bill of particulars, asserts a claim for contribution, we conclude that third-party defendant met his burden of establishing that he did not owe defendant a duty of care independent of the alleged contract (*see Zemotel v Jeld-Wen, Inc.*, 50 AD3d 1586, 1587). Contrary to the further contention of defendant, his retention of responsibility and control over the premises precludes his recovery on the common-law indemnification cause of action (*see id.*). Finally, with respect to the cause of action for contractual indemnification, we conclude that there is no basis upon which to impose liability against third-party defendant inasmuch as he established that at the time of the accident there was no snow removal contract containing an indemnification provision (*see Zemotel*, 50 AD3d at 1587; *see also Miller v Mott's Inc.*, 5 AD3d 1019, 1020).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1694

CA 08-01376

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

PAULETTE TRENCA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT CULETON, NOREEN CULETON, FURDI'S, DOING BUSINESS AS PATRICK FURLONG, SR., INC., AND WD MALONE TRUCKING AND EXCAVATING, INC., DEFENDANTS-RESPONDENTS.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (JOHN D. CONNERS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (MATTHEW J. LARKIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ROBERT CULETON AND NOREEN CULETON.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, ALBANY (DOUGLAS R. KEMP OF COUNSEL), FOR DEFENDANT-RESPONDENT FURDI'S, DOING BUSINESS AS PATRICK FURLONG, SR., INC.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DANIEL P. FLETCHER OF COUNSEL), FOR DEFENDANT-RESPONDENT WD MALONE TRUCKING AND EXCAVATING, INC.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered December 19, 2007 in a personal injury action. The order granted defendants' motions and cross motion for summary judgment dismissing the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motions and cross motion are denied, and the amended complaint is reinstated.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she fell into a trench on neighboring property. Defendant Robert Culeton contracted with defendant Furdi's, doing business as Patrick Furlong Sr., Inc. (Furdi's), for the construction by Furdi's of a modular home on a vacant lot owned by Culeton. Furdi's in turn hired defendant WD Malone Trucking and Excavating, Inc. (Malone) to excavate and backfill the foundation. At the time of plaintiff's accident, the foundation walls had been erected but the excavation had not been backfilled, thus leaving a trench around the foundation. Plaintiff walked her dog to her backyard on the night of the accident and passed by the excavation. According to the testimony of plaintiff at her deposition, she

recalled walking back along the side of her house, and she next recalled waking up several hours later, at the bottom of the trench.

We agree with plaintiff that Supreme Court erred in granting defendants' respective motions and cross motion for summary judgment dismissing the amended complaint. Culeton, as the owner of the property, had a duty to keep his premises in a reasonably safe condition (*see Basso v Miller*, 40 NY2d 233, 241; *Smilinich v Mays*, 262 AD2d 1049), and he failed to meet his initial burden of establishing that he did not have actual or constructive notice of the alleged dangerous condition (*see Wesolek v Jumping Cow Enters., Inc.*, 51 AD3d 1376, 1378). With respect to Furdi's and Malone, they failed to meet their initial burden, respectively, of establishing that they did not create the allegedly dangerous condition (*see Altamirano v Door Automation Corp.*, 48 AD3d 308; *see generally Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141-142; *Miller v Pike Co., Inc.*, 52 AD3d 1240).

Contrary to defendants' contentions, the fact that plaintiff does not recall how she fell into the trench is not dispositive. Plaintiff alleges that her injuries were caused by defendants' negligence in failing to place a barricade around the open trench (*see generally Walters v Castle Vil. Owners Corp.*, 166 AD2d 316), and defendants made no showing that they were not negligent under the common law in failing to provide such protection. Plaintiff also alleges that defendants' violation of 12 NYCRR 23-1.33 (a) (1) and 23-4.2 (h) provides some evidence of negligence (*see generally Conte v Large Scale Dev. Corp.*, 10 NY2d 20, 29; *De Vivo v Dartwood Realty Co.*, 33 AD2d 1022), and defendants failed to establish as a matter of law that those regulations are not applicable to the facts of this case.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1696

CA 08-01099

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

CONCEPCION VIRELLA, III, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALLSTATE HOME CARE OF BUFFALO, INC., ALFONSO REID, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT. (APPEAL NO. 1.)

SUGARMAN LAW FIRM, LLP, BUFFALO (KELLY J. PHILIPS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered September 13, 2007 in a personal injury action. The order denied the motion of defendants Allstate Home Care of Buffalo, Inc. and Alfonso Reid for summary judgment dismissing the complaint against them.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained in two motor vehicle accidents. The first accident occurred in January 2003 (January accident), when the vehicle operated by plaintiff collided with a vehicle owned and operated by defendant Neal E. Dunning. The second accident occurred in April 2003 (April accident), when the vehicle operated by plaintiff collided with a vehicle owned by defendant Allstate Home Care of Buffalo, Inc. and operated by defendant Alfonso Reid (collectively, Allstate defendants). According to plaintiff, he sustained a serious injury within the meaning of Insurance Law § 5102 (d) in each of those accidents under the permanent consequential limitation of use, significant limitation of use and 90/180 categories, as well as a serious injury in the January accident under the permanent loss of use category.

We conclude with respect to the order in appeal No. 1 that Supreme Court properly denied the motion of the Allstate defendants seeking summary judgment dismissing the complaint against them on the ground that plaintiff did not sustain a serious injury in the April accident. Even assuming, arguendo, that the Allstate defendants met

their initial burden on the motion, we conclude that plaintiff raised triable issues of fact whether he sustained a serious injury in the April accident under the permanent consequential limitation of use, significant limitation of use and 90/180 categories (*see generally Zeigler v Ramadhan*, 5 AD3d 1080, 1081; *Parkhill v Cleary*, 305 AD2d 1088, 1089-1090). In opposition to the motion, plaintiff submitted the affirmation of his treating orthopedic surgeon who concluded upon reviewing the results of an MRI and other diagnostic tests and upon conducting his own objective tests that plaintiff had, inter alia, quantified limited lumbar range of motion and severe aggravation of herniated discs at levels L4-5 and L5-S1 that were causally related to the April accident (*see Parkhill*, 305 AD2d at 1089). Plaintiff also submitted the affidavit of a chiropractor who, after administering several objective tests that yielded positive results, concluded that plaintiff suffered from, inter alia, bilateral L5 radiculopathy and limited range of lumbar motion as a result of the April accident (*see id.*). Plaintiff further averred in opposition to the motion that he was physically unable to work or to perform his usual daily activities for at least three months after the April accident (*see Zeigler*, 5 AD3d at 1081; *Parkhill*, 305 AD2d at 1089-1090).

With respect to the order in appeal No. 2, the Allstate defendants contend that the court erred in granting that part of the motion of Dunning seeking summary judgment dismissing the complaint against him on the ground that plaintiff did not sustain a serious injury in the January accident. As noted by Dunning in his amended motion papers, plaintiff discontinued his action against Dunning "on the merits [and] with prejudice" by a stipulation that postdated the original motion in question, thereby rendering moot that part of the motion. We therefore modify the order in appeal No. 2 accordingly.

We further conclude, however, that the court properly granted that part of Dunning's motion seeking summary judgment dismissing the cross claim of the Allstate defendants. The stipulation discontinuing plaintiff's action against Dunning was not a release within the meaning of the General Obligations Law and thus did not extinguish the cross claim of the Allstate defendants (*see* General Obligations Law § 15-108 [d] [1]; *see generally* CPLR 3019 [b], [d]; Siegel, NY Prac § 227, at 375 [4th ed]). We conclude that Dunning met his initial burden on that part of the motion with respect to the cross claim by submitting evidence establishing that plaintiff did not sustain a serious injury in the January accident under any of the categories alleged in the complaint, as amplified by the bill of particulars (*see generally Wiegand v Schunck*, 294 AD2d 839, 839-840). The medical evidence submitted by the Allstate defendants in opposition to Dunning's motion was limited to the issue whether plaintiff sustained a serious injury in the April accident, and we thus conclude that the Allstate defendants failed to raise a triable issue of fact sufficient to defeat that part of Dunning's motion with respect to the cross

claim (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: February 6, 2009 JoAnn M. Wahl
Clerk of the Court

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

1697

CA 08-01100

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

CONCEPCION VIRELLA, III, PLAINTIFF,

V MEMORANDUM AND ORDER

ALLSTATE HOME CARE OF BUFFALO, INC., ALFONSO REID, DEFENDANTS-APPELLANTS, AND NEAL E. DUNNING, DEFENDANT-RESPONDENT. (APPEAL NO. 2.)

SUGARMAN LAW FIRM, LLP, BUFFALO (KELLY J. PHILIPS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HAGELIN KENT LLC, BUFFALO (VICTOR M. WRIGHT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered March 25, 2008 in a personal injury action. The order granted the motion of defendant Neal E. Dunning for summary judgment dismissing the complaint and cross claim against him.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by dismissing that part of the motion seeking summary judgment dismissing the complaint against defendant Neal E. Dunning and as modified the order is affirmed without costs.

Same Memorandum as in *Virella v Allstate Home Care of Buffalo, Inc.* ([appeal No. 1.] ___ AD3d ___ [Feb. 6, 2009]).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

1698

CA 08-00093

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

VIRGINIA FASANO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

J.C. PENNEY CORPORATION, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FELDMAN, KIEFFER & HERMAN, LLP, BUFFALO (MICHELE K. SNYDER OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered October 23, 2007 in a personal injury action. The order denied defendant's motion to dismiss the 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 action is dismissed.

Memorandum: Defendant appeals from an order denying its motion to dismiss the action based on the failure of plaintiff to comply with defendant's demand for service of a complaint pursuant to CPLR 3012 (b). We agree with defendant that Supreme Court erred in denying the motion. "To avoid dismissal for failure to timely serve a complaint after a demand for the complaint has been made pursuant to CPLR 3012 (b), a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint and a meritorious cause of action" (*Kordasiewicz v BCC Prods., Inc.*, 26 AD3d 853, 854). Here, plaintiff failed to provide any excuse for the delay (*see Moreno v Shell Oil Co.*, 67 AD2d 905), and she failed to demonstrate that she has a meritorious cause of action (*see Kordasiewicz*, 26 AD3d at 855). Thus, "it was error, as a matter of law, not to grant the motion to dismiss without condition" (*Kel Mgt. Corp. v Rogers & Wells*, 64 NY2d 904, 905; *see Stolowitz v Mount Sinai Hosp.*, 60 NY2d 685).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

1699

CA 08-00094

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

VIRGINIA FASANO, PLAINTIFF-RESPONDENT,

V ORDER

J.C. PENNEY CORPORATION, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FELDMAN, KIEFFER & HERMAN, LLP, BUFFALO (MICHELE K. SNYDER OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered October 23, 2007 in a personal injury action. The order, insofar as appealed from, denied those parts of defendant's motion for leave to reargue and for a stay of the action pending appeal.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984) and insofar as it denied a stay pending appeal is dismissed without costs as moot (*see Mercer v Pal Energy Corp.*, 280 AD2d 896, 897).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1708

OP 08-01586

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

IN THE MATTER OF JUDITH E. DUDLEY, RONALD P. IOCONO, TRUSTEE UNDER THE RONALD P. IOCONO REVOCABLE TRUST AND J. LYNN IOCONO REVOCABLE TRUST, RAYMOND C. MESSNER AND DONALD R. REPPERT, PETITIONERS,

V MEMORANDUM AND ORDER

TOWN BOARD OF TOWN OF PRATTSBURGH AND WINDFARM PRATTSBURGH, LLC, RESPONDENTS.

THE BROCKLEBANK FIRM, CANANDAIGUA (DEREK G. BROCKLEBANK OF COUNSEL), FOR PETITIONERS.

JOHN F. LEYDEN, TOWN ATTORNEY, WAYLAND, FOR RESPONDENT TOWN BOARD OF TOWN OF PRATTSBURGH.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (KEVIN M. BERNSTEIN OF COUNSEL), FOR RESPONDENT WINDFARM PRATTSBURGH, LLC.

Proceeding pursuant to EDPL 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul a determination of respondent Town Board of Town of Prattsburgh to condemn a portion of petitioners' property in order to create certain easements.

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

Memorandum: Petitioners commenced this proceeding pursuant to EDPL 207 seeking to annul the determination of respondent Town Board of Town of Prattsburgh (Town Board) to condemn a portion of petitioners' property in order to create easements to enable respondent Windfarm Prattsburgh, LLC, to place underground electricity lines for a wind farm project. We confirm the determination. According to petitioners, the Town Supervisor, who cast the deciding vote on both the resolution commencing the condemnation proceedings and the resolution approving the condemnation, had an impermissible conflict of interest that required his recusal from the proceedings. Our scope of review in this proceeding pursuant to EDPL 207 (C) is, however, "limited to whether the proceeding was in conformity with constitutional requirements, whether the proposed acquisition is within the statutory jurisdiction or authority of the condemnor, whether the condemnor's determination

and findings were made in accordance with the procedures set forth in EDPL article 2 and ECL article 8, and whether a proposed [public] use, benefit or purpose will be served by the proposed acquisition" (*Matter of Pfohl v Village of Sylvan Beach*, 26 AD3d 820, 820). Here, petitioners did not allege that the Town Supervisor's alleged conflict of interest resulted in the deprivation of their constitutional rights, nor did they otherwise raise any of the factors set forth in EDPL 207 (C) to warrant the annulment of the determination. We thus conclude that the proper procedural vehicle by which petitioners should raise their contentions is a proceeding pursuant to CPLR article 78 (*see* CPLR 7803 [3]; *see generally Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 547).

In any event, we conclude that petitioners failed to meet their burden of establishing that the Town Board's determination was "without foundation and baseless" (*Matter of Butler v Onondaga County Legislature*, 39 AD3d 1271; *Pfhol*, 26 AD3d 820; *Matter of Faith Temple Church v Town of Brighton*, 17 AD3d 1072, 1073; *see generally Matter of Waldo's, Inc. v Village of Johnson City*, 74 NY2d 718, 720-721). Contrary to the contention of petitioners, a town board's findings that condemnation for the purpose of creating easements would, inter alia, "create jobs, provide infrastructure, and possibly stimulate new private sector economic development" constitute an adequate basis for the town board's determination that the condemnation would serve a public use or benefit (*Sunrise Props. v Jamestown Urban Renewal Agency*, 206 AD2d 913, *lv denied* 84 NY2d 809; *see also Vitucci v New York City School Constr. Auth.*, 289 AD2d 479, 481, *lv denied* 98 NY2d 609; *see generally Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 425). Finally, we have reviewed petitioners' remaining contention and conclude that it is without merit.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1711

CAF 08-00599

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

IN THE MATTER OF SARAH B. THOMPSON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS A. THOMPSON, RESPONDENT-APPELLANT.

ONTARIO COUNTY, RESPONDENT.

CONVERSE & MORELL, LLP, PALMYRA (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT-APPELLANT.

JOHN W. PARK, COUNTY ATTORNEY, CANANDAIGUA (WENDY R. WELCH OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, J.), entered February 15, 2008 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, revoked the suspension of the jail sentence of respondent Marcus A. Thompson.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Ontario County, for a hearing on the petition in accordance with the following Memorandum: Petitioner commenced this proceeding alleging that respondent-appellant (respondent) had violated a May 2007 order requiring him to pay child support in the amount of $28 per month. In addition, the order suspended a six-month jail sentence imposed based on respondent's prior willful failure to pay support. Respondent now appeals from an order revoking the suspension of the jail sentence and remanding him to the Ontario County jail. Although Family Court had the discretion to revoke the suspension of the jail sentence, the court erred in doing so without first affording respondent "an 'opportunity to be heard and to present witnesses' . . . on the issue whether good cause existed to revoke the suspension of the sentence" (*Ontario County Dept. of Social Servs. v Hinckley*, 226 AD2d 1126, quoting Family Ct Act § 433 [a]; *see Matter of Wolski v Carlson*, 309 AD2d 759). No specific form of a hearing is required, but at a minimum the hearing must " 'consist of an adducement of proof coupled with an opportunity to rebut it' " (*Ontario County Dept. of Social Servs.*, 226 AD2d 1126). "[I]t is well settled that neither a colloquy between a respondent and Family Court nor between a respondent's counsel and the court is sufficient to constitute the required hearing" (*Matter of Commissioner*

of Chenango County Dept. of Social Servs. v Bondanza, 288 AD2d 773, 773-774; *see Matter of Delaware County Dept. of Social Servs. v Manon*, 119 AD2d 940). Contrary to the contention of respondent Ontario County, respondent did not waive his right to a hearing pursuant to Family Court Act § 433. Waiver of the right to be heard in a meaningful manner must be " 'unequivocal, voluntary and intelligent' " (*Matter of Jung*, 11 NY3d 365), and the request for an adjournment by respondent's attorney cannot be considered a waiver of respondent's right to a hearing. We therefore reverse the order and remit the matter to Family Court for a hearing on the petition in compliance with Family Court Act § 433 before a different judge.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1

KAH 08-00495

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ANTHONY JACKSON, PETITIONER-APPELLANT,

V ORDER

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

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

ANTHONY JACKSON, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered November 29, 2007 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

2

KA 07-01725

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ORLANDO BUTCHER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered July 9, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

3

KA 08-00137

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RICHARD DION MOORE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered November 28, 2007. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

4

KA 07-02430

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DOLLY MAE CLAPP, DEFENDANT-APPELLANT.

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

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered October 31, 2007. The judgment convicted defendant, upon her plea of guilty, of manslaughter in the first degree.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

6

KA 07-00846

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARLA OUCHIE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered December 12, 2006. The judgment convicted defendant, upon her plea of guilty, of criminal contempt in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by providing that the order of protection shall expire on August 9, 2009 and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of criminal contempt in the second degree (Penal Law § 215.50 [3]), defendant contends that Supreme Court erred in directing that the order of protection remain in effect until three years from the date of sentencing. Although that contention survives the waiver by defendant of her right to appeal (*see People v Cambridge*, 55 AD3d 1381; *see also People v Fomby*, 42 AD3d 894, 896), she failed to preserve it for our review (*see People v Nieves*, 2 NY3d 310, 315-317). We nevertheless exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see People v Chattley*, 49 AD3d 1307, *lv denied* 10 NY3d 933; *People v Goins*, 45 AD3d 1371), and we modify the judgment by providing that the order of protection shall expire on August 9, 2009, three years from the date of defendant's conviction (*see Cambridge*, 55 AD3d 1381; *Chattley*, 49 AD3d 1307).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 05-01491

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENYATTA L. RAPLEY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered March 21, 2005. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [2]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of two counts of robbery in the first degree (§ 160.15 [4]). Even assuming, arguendo, that the waiver by defendant of the right to appeal was not voluntarily, knowingly, and intelligently entered and thus that his contentions in each appeal with respect to County Court's suppression rulings are properly before us, we conclude that those contentions lack merit. Contrary to defendant's contentions, the identification procedure was not unduly suggestive (*see People v Dunlap*, 9 AD3d 434, 435-436, *lv denied* 3 NY3d 739), and the People met their burden at the *Huntley* hearing of establishing that defendant's written statements were not the product of "improper police conduct" (*People v Rosado*, 222 AD2d 617, 618, *lv denied* 88 NY2d 853). Defendant " 'presented no bona fide factual predicate' in support of his conclusory speculation that his statement[s were] coerced" (*People v Fisher*, 19 AD3d 1034, 1034, *lv denied* 5 NY3d 805, quoting *People v Witherspoon*, 66 NY2d 973, 974). Finally, we conclude that the sentence imposed in each appeal is not unduly harsh or severe.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

8

KA 05-01492

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENYATTA L. RAPLEY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered March 21, 2005. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (two counts).

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

Same Memorandum as in *People v Rapley* ([appeal No. 1] ___ AD3d ___ [Feb. 6, 2009]).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

10

KA 06-03779

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID PETERS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (GERALD T. BARTH 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 October 23, 2006. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [3]). Contrary to the contention of defendant, the record of the plea colloquy establishes that his waiver of the right to appeal was voluntary, knowing and intelligent (*see People v Branch*, 49 AD3d 1206, *lv denied* 10 NY3d 932). "The further contention of defendant that his plea was not voluntarily, knowingly, and intelligently entered is actually a challenge to the factual sufficiency of the plea allocution . . ., and that challenge is encompassed by the valid waiver of the right to appeal" (*People v Wilson*, 38 AD3d 1348, *lv denied* 9 NY3d 927; *see Branch*, 49 AD3d 1206). In any event, defendant failed to preserve that challenge for our review (*see People v Lopez*, 71 NY2d 662, 665), and this case does not fall within the narrow exception to the preservation requirement (*see id.* at 666).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 07-01627

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RODNEY ADAMS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL C. WALSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (RAYMOND C. HERMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Timothy J. Drury, J.), rendered March 1, 2006. The judgment convicted defendant, after a jury trial, of sodomy in the first degree (two counts), endangering the welfare of a child (five counts) and sexual abuse in the second 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, inter alia, two counts of sodomy in the first degree (Penal Law former § 130.50 [3]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "The testimony of the victim was not so inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Black*, 38 AD3d 1283, 1285, *lv denied* 8 NY3d 982; *see generally People v Calabria*, 3 NY3d 80, 82), and we see no reason to disturb the jury's resolution of credibility issues (*see generally Bleakley*, 69 NY2d at 495). Defendant failed to preserve for our review his contention that the indictment lacked the requisite specificity with respect to the dates of the alleged crimes (*see generally People v Soto*, 44 NY2d 683). In any event, that contention lacks merit inasmuch as the time frames set forth in the indictment, i.e., June 1, 2003 through September 30, 2003 and September 1, 2003 through November 25, 2003, were " 'sufficiently specific' in view of the nature of the offense and the age of the victim" (*People v Dickens*, 48 AD3d 1034, 1035, *lv denied* 10 NY3d 958). We thus conclude that defense counsel's failure to move to dismiss the indictment for lack of specificity did not constitute ineffective assistance of counsel (*see People v Caban*, 5 NY3d 143, 152).

Contrary to the further contention of defendant, he also was not denied the right to effective assistance of counsel based on defense counsel's elicitation of allegedly damaging testimony in cross-examining the victim's pediatrician or by defense counsel's failure to object to testimony concerning the emotional state of the victim. Those contentions involve "simple disagreement[s] with strategies, tactics or the scope of possible cross-examination, weighed long after the trial," and thus are insufficient to establish ineffective assistance of counsel (*People v Flores*, 84 NY2d 184, 187; *see generally People v Baldi*, 54 NY2d 137, 147). The sentence is not unduly harsh or severe. Finally, we note that the certificate of conviction incorrectly reflects that defendant was convicted of two counts of criminal sexual act in the first degree (Penal Law § 130.50 [3]), and it must therefore be amended to reflect that he was convicted of two counts of sodomy in the first degree (former § 130.50 [3]) (*see generally People v Saxton*, 32 AD3d 1286).

Entered: February 6, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CAF 08-00720

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

IN THE MATTER OF ANTHONY E. AND TAMMY E.

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

SHARON E., RESPONDENT-APPELLANT,
ET AL., RESPONDENT.

ABBIE GOLDBAS, UTICA, FOR RESPONDENT-APPELLANT.

JACQUELYN M. ASNOE, HERKIMER, FOR PETITIONER-RESPONDENT.

JOHN G. KOSLOSKY, LAW GUARDIAN, UTICA, FOR ANTHONY E. AND TAMMY E.

Appeal from an order of the Family Court, Herkimer County (Henry A. LaRaia, J.), entered February 29, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order, insofar as appealed from, terminated the parental rights of respondent Sharon E. with respect to Anthony E. and Tammy E. upon a finding that she permanently neglected them.

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

Memorandum: Respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the children at issue in this proceeding upon a finding that she permanently neglected them. Contrary to the contention of the mother, Family Court did not abuse its discretion in refusing to enter a suspended judgment with respect to her daughter Tammy E. (*see Matter of Ty'Keith R.*, 45 AD3d 1397, *lv denied* 10 NY3d 701; *Matter of Susan C.*, 1 AD3d 991; *Matter of Jason J.*, 283 AD2d 982). The record establishes that the mother has no meaningful relationship with that child and that the child in fact expressed a "clear preference not to be reunited with [the] mother." Thus, the court properly determined that termination of the parental rights of the mother was in the best interests of that child (*Matter of Dabari S.*, 29 AD3d 593, 594, *lv denied* 7 NY3d 706; *see Matter of Lenny R.*, 22 AD3d 240, *lv denied* 6 NY3d 708; *Jason J.*, 283 AD2d 982).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

16

CA 08-01630

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

VIVIAN STERN, DOING BUSINESS AS THE JEWELER,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THE CHARTER OAK FIRE INSURANCE COMPANY,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

CARL E. WORBOYS, SYRACUSE, FOR PLAINTIFF-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered May 6, 2008 in a breach of contract action. The order, inter alia, denied that part of the motion of plaintiff for leave to renew her opposition to the motion of defendant The Charter Oak Fire Insurance Company to dismiss plaintiff's claim for consequential damages.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion of plaintiff for leave to renew her opposition to the motion of defendant The Charter Oak Fire Insurance Company and, upon renewal, denying the motion of that defendant and reinstating the claim for consequential damages and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action alleging that defendants breached the terms of the insurance policy issued to her by failing, inter alia, to pay certain claims for losses arising from an armed robbery at plaintiff's jewelry store. On a prior appeal, we affirmed an order that, inter alia, granted the motion of defendant The Charter Oak Fire Insurance Company (Charter Oak) to dismiss plaintiff's claim for consequential damages (*Stern v Charter Oak Fire Ins. Co.*, 38 AD3d 1288). We cited, inter alia, *Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.* (37 AD3d 1184) in concluding that "[t]he insurance policy at issue expressly excludes coverage for the consequential damages claimed by plaintiff" (*Stern*, 38 AD3d 1288).

Following our decision in the prior appeal, the Court of Appeals reversed the order in *Bi-Economy Mkt., Inc.*, concluding under circumstances similar to those present in this case that a contractual exclusion for consequential losses in the insurance policy issued to

the plaintiff business did not bar its claim for consequential damages caused by the defendant insurer's alleged breach of the terms of the policy (*Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 194-196; *see Panasia Estates, Inc. v Hudson Ins. Co.*, 10 NY3d 200, 203).

While the instant action remained pending, plaintiff moved, inter alia, for leave to renew her opposition to Charter Oak's motion to dismiss her claim for consequential damages, based upon the decisions of the Court of Appeals in *Bi-Economy Mkt., Inc.* and *Panasia Estates, Inc*. Supreme Court erred in denying that part of plaintiff's motion for leave to renew with respect to consequential damages based upon the doctrine of law of the case and instead should have granted leave to renew and, upon renewal, denied Charter Oak's motion. "[A] court of original jurisdiction may entertain a motion to renew or [to] vacate a prior order or judgment even after an appellate court has rendered a decision on that order or judgment" (*Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 377). Furthermore, we conclude that, because "the analysis employed by this [C]ourt in the prior appeal no longer reflects the current state of the law, the doctrine of law of the case should not be invoked to preclude reconsideration of" Charter Oak's motion to dismiss plaintiff's claim for compensatory damages (*Szajna v Rand*, 131 AD2d 840, 840; *see Foley v Roche*, 86 AD2d 887, *lv denied* 56 NY2d 507). We therefore modify the order accordingly.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 08-00820

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

THE LINKS AT BLACK CREEK, LLC,
PLAINTIFF-APPELLANT,

V ORDER

BALLANTYNE DEVELOPMENT, LLC, ET AL.,
DEFENDANTS,
AND REXFORD-ALBANY MUNICIPAL SUPPLY
COMPANY, INC., DEFENDANT-RESPONDENT.

PHILLIPS LYTLE LLP, ROCHESTER (STEVEN E. LAPRADE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COUCH DALE PC, LATHAM (KIMBERLEE J. DALE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered June 29, 2007. The order denied in part plaintiff's motion for summary judgment.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on December 17, 2008,

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

18

CA 08-01547

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

IN THE MATTER OF ELDERWOOD HEALTH CARE CENTER AT LINWOOD, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ANTONIA C. NOVELLO, M.D., COMMISSIONER OF HEALTH, STATE OF NEW YORK, RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered October 15, 2007 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination of the Administrative Law Judge (ALJ) that respondent properly reclassified the salary and benefit costs of nurse aide trainees as skilled nursing facility costs (*see* 10 NYCRR 455.37), rather than as nursing administration costs (*see* 10 NYCRR 455.13), as reported by petitioner. We conclude that Supreme Court erred in granting the petition. Resolution of the issue whether the salary and benefit costs of nurse aide trainees are properly reclassified as skilled nursing costs as opposed to nursing administration costs depends on the interpretation of the regulations of New York State's Department of Health (agency), and it is well settled that "the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549; *see Matter of IG Second Generation Partners L.P. v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 10 NY3d 474, 481; *Matter of 427 W. 51st St. Owners Corp. v Division of Hous. & Community Renewal*, 3 NY3d 337, 342). Here, it was neither irrational nor unreasonable for the agency to determine that the salary and benefit costs of nurse aide trainees

were part of the expenses associated with “providing skilled nursing care to patients” (10 NYCRR 455.37), rather than the expenses associated with “the overall administration and supervision of all nursing services” (10 NYCRR 455.13). We thus conclude that the ALJ properly deferred to the agency’s interpretation of the regulations in question.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 08-01174

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

MARLENE MORRIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER J. SCHEPP AND SUSAN R. SCHEPP,
DEFENDANTS-APPELLANTS.

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

WOODS OVIATT GILMAN LLP, ROCHESTER (JAMES W. KILEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered January 2, 2008 in a personal injury action. The order denied defendants' motion for summary judgment.

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

Memorandum: Supreme Court properly denied defendants' motion to dismiss the claim for punitive damages. We note at the outset that the court properly treated the motion as one for summary judgment pursuant to CPLR 3211 (c), and we conclude that defendants failed to meet their initial burden on the motion inasmuch as they failed to establish their entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Defendants' remaining contention is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

21

CA 08-01715

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

CRYSTAL M. GONYOU AND SCOTT A. GONYOU,
PLAINTIFFS-RESPONDENTS,

V ORDER

ROBERTA D. MCLAUGHLIN, ET AL., DEFENDANTS,
AND JUSTIN M. SANMARTIN, DEFENDANT-APPELLANT.

CRAMER, SMITH & LEACH, P.C., SYRACUSE (RALPH S. ALEXANDER OF COUNSEL), FOR DEFENDANT-APPELLANT.

RIVETTE & RIVETTE, P.C., SYRACUSE (RYAN L. ABEL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered October 19, 2007 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant Justin M. Sanmartin for summary judgment dismissing the complaint against him.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

22

CA 08-01003

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

JEREMY M. MCPHEE, PLAINTIFF-RESPONDENT,

V ORDER

JOHN D. BRUSH, INC., DOING BUSINESS AS SENTRY GROUP, SUED HEREIN AS SENTRY GROUP, LLC, DOING BUSINESS AS SENTRY SAFE, DEFENDANT.

JOHN D. BRUSH, INC., DOING BUSINESS AS SENTRY GROUP, SUED HEREIN AS SENTRY GROUP, LLC, DOING BUSINESS AS SENTRY SAFE, THIRD-PARTY PLAINTIFF,

V

ELMER W. DAVIS ROOFING COMPANY, THIRD-PARTY DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, ROCHESTER (MELANIE S. WOLK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

VALERIO & KUFTA, P.C., ROCHESTER (MARK J. VALERIO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered January 8, 2008 in a personal injury action. The order, inter alia, granted the motion of plaintiff for partial summary judgment on liability pursuant to Labor Law § 240 (1).

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

23

KAH 08-01196

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
KEITH MAGUIRE, PETITIONER-APPELLANT,

V ORDER

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

KEITH MAGUIRE, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered May 8, 2008. The judgment denied the petition for a writ of habeas corpus.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 07-01827

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WAYNE R. HINKSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered February 13, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that his waiver of the right to appeal was invalid. We reject that contention. The record "establish[es] that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256; *cf. People v Cain*, 29 AD3d 1157; *People v Popson*, 28 AD3d 870), and that he knowingly, intelligently and voluntarily waived the right to appeal (*see People v Seaberg*, 74 NY2d 1, 11). Defendant's challenge to the factual sufficiency of the plea allocution is encompassed by that valid waiver of the right to appeal (*see People v Spivey*, 9 AD3d 886, *lv denied* 3 NY3d 712) and, in any event, defendant failed to preserve that challenge for our review (*see People v Lopez*, 71 NY2d 662, 665; *People v Owes*, 34 AD3d 1320, 1321).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

25

KA 06-01033

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS FARROW, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (GERALD T. BARTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MATTHEW H. JAMES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered May 3, 2005. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20), defendant contends that his waiver of the right to appeal was invalid because County Court failed even to address his waiver of the right to appeal during the plea colloquy. We agree. It is well established that "a knowing and voluntary waiver cannot be inferred from a silent record" (*People v Callahan*, 80 NY2d 273, 283; *see generally People v Lopez*, 6 NY3d 248, 256). The only reference to the waiver of the right to appeal is set forth in the printed waiver of indictment, which was signed by defendant and defense counsel. The waiver of indictment provides in relevant part as follows: "I further understand that I have the right to appeal from any judgment of conviction or from any sentence under this Superior Court Information. Upon discussion of this aspect of my case with my attorney, and with a full understanding of the significance of this waiver, I hereby voluntarily waive my right to appeal as well as my right to have the court explain on the record, my right to appeal and the significance of my waiver of appeal."

The identical issue was before this Court in *People v Adams* (57 AD3d 1385, ___), wherein we determined that the purported waiver of the right to appeal was invalid because the court "failed to engage[] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (internal quotation marks omitted). The same determination is compelled in this

case. It cannot be gainsaid that it is the responsibility of the court to ensure that "a defendant's understanding of the terms and conditions of a plea agreement is evident on the face of the record" (*Lopez*, 6 NY3d at 256; *see Callahan*, 80 NY2d at 283). Defendant's purported waiver cannot relieve the court of its responsibility.

We note in any event that a valid waiver of the right to appeal would not encompass defendant's challenge to the severity of the sentence in this case inasmuch as the court failed to advise defendant of the sentencing possibilities (*see People v Mingo*, 38 AD3d 1270, 1271; *see generally People v Lococo*, 92 NY2d 825, 827). Nevertheless, we reject defendant's challenge to the severity of the sentence. "Defendant was sentenced in accordance with the plea bargain and should be bound by its terms" (*People v McGovern*, 265 AD2d 881, *lv denied* 94 NY2d 882).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

27

KA 07-02668

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ISAAC JACKSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered June 15, 2007. 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 (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

28

KA 08-00008

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ROBERT L. HUNT, DEFENDANT-APPELLANT.

DOUGLAS P. BATES, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHARLES M. THOMAS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered August 16, 2007. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

29

KA 07-01247

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN R. LANZARA, DEFENDANT-APPELLANT.

DENNIS A. GERMAIN, WATERTOWN, FOR DEFENDANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (SASHA SAMBERG-CHAMPION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (Charles C. Merrell, J.), rendered January 12, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]), defendant contends that County Court erred in imposing a fine without conducting a hearing to determine his ability to pay. That contention is encompassed by defendant's valid waiver of the right to appeal (*see generally People v Hidalgo*, 91 NY2d 733, 737; *People v Horton*, 256 AD2d 1105, *lv denied* 93 NY2d 972). In any event, "appellate challenges to the procedures utilized in determining and imposing sentence are forfeited if they are not raised in a timely manner before the trial court" (*People v Callahan*, 80 NY2d 273, 281), and here defendant forfeited that challenge by failing to raise it before the sentencing court.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

32

KA 05-02601

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HOMER BROWN, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered October 5, 2005. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree and grand larceny in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the third degree (Penal Law § 160.05) and grand larceny in the fourth degree (§ 155.30 [5]), defendant contends that his plea was not voluntarily entered and that County Court abused its discretion in denying his motion to withdraw the plea without conducting a hearing (*see* CPL 220.60 [3]). We reject those contentions. "Trial judges are vested with discretion in deciding plea withdrawal motions because they are best able to determine whether a plea is entered voluntarily, knowingly and intelligently" (*People v Alexander*, 97 NY2d 482, 485). Here, defendant's allegations of duress and coercion are belied by the statements of defendant during the plea colloquy, wherein he knowingly and voluntarily admitted that he committed the crimes to which he was pleading guilty (*see People v Nimmons*, 27 AD3d 1186, *lv denied* 6 NY3d 851; *People v Dale*, 235 AD2d 565, 566).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

40

CA 08-01596

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

CASSANDRA WILLIAMS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CLINTON CENTRAL SCHOOL DISTRICT,
DEFENDANT-RESPONDENT.

WILLIAM M. BORRILL, NEW HARTFORD, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered November 9, 2007 in a personal injury action. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff, a senior in high school, commenced this action seeking damages for injuries she sustained when she fell while performing a stunt during cheerleading practice at school. We conclude that Supreme Court properly granted defendant's motion seeking summary judgment dismissing the complaint. Defendant met its initial burden by establishing as a matter of law that the action is barred based on the primary assumption of risk by plaintiff. Although defendant was "under a duty to exercise ordinary reasonable care to protect student athletes involved in extracurricular sports from unreasonably increased risks" (*Driever v Spackenkill Union Free School Dist.*, 20 AD3d 384, 384; *see Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 658), the risks that are known and fully comprehended, open and obvious, inherent in the activity, and reasonably foreseeable are assumed by the student athlete (*see Turcotte v Fell*, 68 NY2d 432, 439; *Lamey v Foley*, 188 AD2d 157, 164). Here, defendant established that "[t]he risk posed [to] plaintiff by performing her cheerleading routine on a bare wood gym floor, as opposed to a matted surface, was obvious" (*Traficenti v Moore Catholic High School*, 282 AD2d 216), and thus that "plaintiff assumed the risks of the sport in which she voluntarily engaged" (*Fisher v Syosset Cent. School Dist.*, 264 AD2d 438, 439, *lv denied* 94 NY2d 759). Plaintiff's submissions in opposition to the motion "consisted only of speculative and conclusory opinions to support the conclusion that the defendant[] had unreasonably increased the risks to the plaintiff by failing to

provide mats" (*DiGiose v Bellmore-Merrick Cent. High School Dist.*, 50 AD3d 623, 624). Plaintiff's submissions therefore were insufficient to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

42

CA 07-02498

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

IN THE MATTER OF ROSE SPERDUTI,
PETITIONER-APPELLANT,

V ORDER

NEW YORK STATE EXECUTIVE DEPARTMENT DIVISION
OF PAROLE, RESPONDENT-RESPONDENT.

CHIACCHIA & FLEMING, LLP, HAMBURG (CHRISTEN ARCHER PIERROT OF COUNSEL), FOR PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered October 2, 2007 in a proceeding pursuant to CPLR article 78. The judgment granted respondent's motion to dismiss the petition.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

43

CA 08-01444

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

DENNIS LEBARON, DOING BUSINESS AS AAA DRAIN CLEANING, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

ERIE INSURANCE COMPANY AND MICHAEL E. PIONTKOWSKI, DEFENDANTS-RESPONDENTS-APPELLANTS.

LAW OFFICE OF JACOB P. WELCH, CORNING (JACOB P. WELCH OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (MARCO CERCONE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered December 13, 2007. The order, inter alia, granted those parts of the motion of defendants seeking dismissal of the negligence and slander causes of action and the punitive damages claim.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

44

CA 08-01291

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

RENEE S. SANTIAGO AND JOSE SANTIAGO,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

WENDY A. SPINUZZA, DEFENDANT,
AND CITY OF DUNKIRK, DEFENDANT-RESPONDENT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL F. CHELUS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered May 29, 2008. The order, insofar as appealed from, granted that part of the motion of defendant City of Dunkirk seeking to compel plaintiff Renee S. Santiago to comply with further discovery demands.

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 further discovery is denied.

Memorandum: Plaintiffs appeal from an order insofar as it granted that part of the motion of the City of Dunkirk (defendant) seeking to compel plaintiff Renee S. Santiago to comply with further discovery demands, including a vocational rehabilitation examination. We reverse the order insofar as appealed from. "It is well established that, absent special, unusual or extraordinary circumstances spelled out factually, the motion court lacks discretion to permit further discovery after the note of issue and statement of readiness have been filed" (*Sanly v Nowak*, 49 AD3d 1340, 1341 [internal quotation marks omitted]; *see* 22 NYCRR 202.21 [d]; *Gould v Marone*, 197 AD2d 862; *Laudico v Sears, Roebuck & Co.*, 125 AD2d 960, 961). Here, the discovery demand in question was made approximately 16½ months after the note of issue was filed, and defendant failed to establish that any special, unusual, or extraordinary circumstances had developed during that time (*see Lopez v Barrett T.B. Inc.*, 38 AD3d 1308, 1310; *Fuzak v Donohue*, 23 AD3d 1022).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

47

TP 08-01530

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

IN THE MATTER OF THOMAS BRYANT, PETITIONER,

V ORDER

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

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered July 17, 2008) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

48

TP 08-01457

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

IN THE MATTER OF WAHEEM ALLAH, PETITIONER,

V ORDER

TIM HODSON, COUNSELOR, LT. GIANNO, HEARING OFFICER, J. LAMANNA, APPEAL REVIEW OFFICER, AND JOHN LEMPKE, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENTS.

WAHEEM ALLAH, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered July 2, 2008) to review a determination. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

49

KA 07-01825

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WAYNE R. HINKSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered February 14, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree (three counts) and menacing in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of three counts of criminal possession of a weapon in the third degree (Penal Law § 265.02 [former (4)]) and one count of menacing in the third degree (§ 120.15). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve for our review his challenge to the factual sufficiency of the plea allocution with respect to the menacing count (*see People v Lopez*, 71 NY2d 662, 665; *People v Dorrah*, 50 AD3d 1619, *lv denied* 11 NY3d 736). In any event, that challenge is without merit. Defendant admitted during the plea colloquy that he formed his hand into the shape of a gun and pushed it into the victim's abdomen with the intent to place the victim in fear of physical injury (*see* § 120.15; *Matter of Pedro H.*, 308 AD2d 374). "Defendant admitted each of the elements of [menacing in the third degree], and [his] factual allocution therefore was legally sufficient" (*People v Gibbs*, 31 AD3d 1186, *lv denied* 7 NY3d 867). Even assuming, arguendo, that defendant's recitation of the facts underlying the menacing count called into question the voluntariness of the plea, we conclude that County Court conducted the requisite further inquiry to ensure that defendant's plea was knowing and voluntary (*see Lopez*, 71 NY2d at 666; *People v Brow*, 255 AD2d 904, 905).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

50

KA 07-01947

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WILLIAM JAMES, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JESSICA BIRKAHN HOUSEL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Stephen K. Lindley, A.J.), rendered July 5, 2005. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree (two counts).

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

51

KA 07-02661

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

HASHIM KERNAHAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered October 19, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the second degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on January 6, 2009 and by the attorneys for the parties on January 9 and 12, 2009,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

52

KA 07-02662

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

HASHIM KERNAHAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered October 19, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted failure to register.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on January 6, 2009 and by the attorneys for the parties on January 9 and 12, 2009,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

55

KA 06-03548

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERRI L. BUNNELL, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (KEVIN T. FINNELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered October 23, 2006. The judgment convicted defendant, upon her plea of guilty, of attempted falsifying business records in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the amount of restitution ordered and as modified the judgment is affirmed, and the matter is remitted to Genesee County Court for a new hearing in accordance with the following Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of attempted falsifying business records in the first degree (Penal Law §§ 110.00, 175.10). A restitution hearing was conducted by County Court's court attorney, after which the court attorney prepared a preliminary fact-finding report. The court affirmed the report and ordered defendant to pay $8,883.99 in restitution, plus a 5% surcharge. We conclude that the court erred in delegating its responsibility to conduct the restitution hearing to its court attorney. We reach this issue sua sponte, as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Braswell*, 49 AD3d 1190, 1191, *lv denied* 10 NY3d 860). Penal Law § 60.27 (2) provides that, upon the defendant's request, "the court must conduct a hearing" with respect to the amount of restitution in accordance with the procedures set forth in CPL 400.30. CPL 400.30 does not contain a provision permitting the court to delegate its responsibility to conduct the hearing to its court attorney or to any other factfinder. We therefore modify the judgment by vacating the amount of restitution ordered, and we remit the matter to County Court for a new hearing to determine the amount of restitution in compliance

with Penal Law § 60.27.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

56

KA 07-02197

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMIEN DANIELS, DEFENDANT-APPELLANT.

THOMAS E. ANDRUSCHAT, EAST AURORA, FOR DEFENDANT-APPELLANT.

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (JAMIE C. GALLAGHER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered September 19, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted 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 attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]). The challenge by defendant to the factual sufficiency of the plea allocution is encompassed by his valid waiver of the right to appeal (*see People v Thomas*, 56 AD3d 1240). The contention of defendant that his plea was not knowingly, intelligently and voluntarily entered because he failed to recite the elements of the crime is actually an additional challenge to the factual sufficiency of the plea allocution, and that challenge also does not survive his valid waiver of the right to appeal (*see People v Ramos*, 56 AD3d 1180). In any event, defendant failed to preserve those challenges for our review by failing to move to withdraw the plea or to vacate the judgment of conviction (*see People v Lopez*, 71 NY2d 662, 665; *People v Bailey*, 49 AD3d 1258, 1259, *lv denied* 10 NY3d 932).

To the extent that the further contention of defendant that he was denied effective assistance of counsel survives his plea and valid waiver of the right to appeal (*see People v Santos*, 37 AD3d 1141, *lv denied* 8 NY3d 950), we conclude that his contention lacks merit (*see generally People v Ford*, 86 NY2d 397, 404). Prior to entering his plea, defendant acknowledged that he had discussed the plea with defense counsel, that he was satisfied with defense counsel's representation, and that no one had influenced his decision to enter

the plea.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

57

KA 07-01499

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN A. MCNAUGHTON, DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperazza, J.), rendered June 12, 2007. The judgment convicted defendant, upon a jury verdict of, inter alia, rape in the first 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, inter alia, two counts of rape in the first degree (Penal Law § 130.35 [1]) and one count each of attempted rape in the first degree (§§ 110.00, 130.35 [1]), and criminal sexual act in the first degree (§ 130.50 [1]). We reject defendant's contention that the evidence is legally insufficient to support the conviction with respect to those crimes requiring the element of forcible compulsion. The victim testified at trial that she told defendant to stop "[p]robably like at least four, five times" and that she repeatedly tried to push defendant away. In addition, a nurse who examined the victim shortly after the incident testified that she found that the area between the victim's genitals and rectum was "totally bruised . . . [and] looked like a pulp." We thus conclude "that the jury could reasonably infer that the sexual contact was perpetrated by forcible compulsion" (*People v Bailey*, 252 AD2d 815, 817, *lv denied* 92 NY2d 922; *see People v Bones*, 309 AD2d 1238, *lv denied* 1 NY3d 568).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The jury was entitled to credit the testimony of the victim (*see People v Thomas*, 53 AD3d 1099, 1100-1101, *lv denied* 11 NY3d 795), and we accord great

deference to the jury's "opportunity to view the witnesses, hear the testimony and observe demeanor" (*Bleakley*, 69 NY2d at 495). Finally, the sentence is not unduly harsh or severe.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

58

KA 07-01927

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC D. CARR, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered May 21, 2007. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). Contrary to defendant's contention, the evidence is legally sufficient to establish the element of intent with respect to the attempted murder count (*see generally People v Bleakley*, 69 NY2d 490, 495). The surveillance video from a store establishes that defendant and the codefendant, his father, chased the victim through the store and that defendant shot the victim. The video further establishes that, after the victim ran from the store, defendant reloaded his gun and he, the codefendant and another man left the store. A security guard at a nearby apartment complex testified that the injured victim was lying on the ground when defendant again shot the victim. Viewing the evidence in light of the elements of the crime of attempted murder as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to that crime is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). The contention of defendant that his actions were justified because he was attempting to defend the codefendant is belied by the record.

Defendant failed to object to Supreme Court's charge on the defense of justification and therefore failed to preserve for our

review his contention that the court erred in failing to instruct the jury with respect to attempted murder that a person may be justified in using deadly physical force in defense of a third person (*see People v Bolling*, 49 AD3d 1330, 1332; *see generally People v Robinson*, 88 NY2d 1001). In any event, the alleged error is harmless. The evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted had it not been for the alleged error (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Defendant further contends that the court abused its discretion in denying his request for a missing witness charge with respect to three individuals who were present in the store before defendant arrived there. Defendant requested the charge after the People rested, although the witness list provided to defendant before the commencement of the trial did not indicate that the People intended to call those individuals as witnesses. We therefore conclude that the court properly determined that defendant's request for the missing witness charge was not made "as soon as practicable" (*People v Gonzalez*, 68 NY2d 424, 428). In any event, we conclude that the court did not abuse its discretion in further determining that the People met their burden of establishing that the testimony of those individuals would be cumulative to the testimony of the victim, the codefendant and the surveillance video (*see People v Sweney*, 55 AD3d 1350; *see generally Gonzalez*, 68 NY2d at 427-428).

Defendant failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct on summation (*see People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849). In any event, although we agree with defendant that certain remarks by the prosecutor were improper inasmuch as they "played on the sympathies and fears of the jury," we nevertheless conclude that the misconduct was not so egregious as to deprive defendant of a fair trial (*People v Ortiz-Castro*, 12 AD3d 1071, *lv denied* 4 NY3d 766). Finally, the sentence is not unduly harsh or severe.

Entered: February 6, 2009 JoAnn M. Wahl
Clerk of the Court

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

59

CAF 07-02449

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

IN THE MATTER OF DANIEL W. GRACE,
PETITIONER-RESPONDENT,

V ORDER

ELEANOR B. GRACE, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

LISA M. KROEMER, LAW GUARDIAN, BATAVIA, FOR MATTHEW G. AND ERIKA G.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered October 17, 2007. The order, among other things, adjudged that respondent willfully violated an order of visitation.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

60

CAF 07-02450

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

IN THE MATTER OF ELEANOR B. GRACE,
PETITIONER-APPELLANT,

V ORDER

DANIEL W. GRACE, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

LISA M. KROEMER, LAW GUARDIAN, BATAVIA, FOR MATTHEW G. AND ERIKA G.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered October 17, 2007 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 (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

61

CAF 07-01094

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

IN THE MATTER OF MADISON C. AND RILEY C.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LORNA C., RESPONDENT,
AND PAUL C., RESPONDENT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

LAURA A. WAGNER, LOCKPORT, FOR PETITIONER-RESPONDENT.

CYNTHIA A. FALK, LAW GUARDIAN, NIAGARA FALLS, FOR MADISON C. AND RILEY C.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered April 23, 2007 in a proceeding pursuant to Family Court Act article 10. The order determined that Riley C. is an abused child and that Madison C. is a neglected child.

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

Memorandum: Paul C. (respondent), the live-in boyfriend of respondent mother, appeals from an order adjudicating the mother's daughter Riley to be an abused child and the mother's daughter Madison to be derivatively neglected. Respondent contends that Family Court erred in determining that petitioner established by a preponderance of the evidence that Riley was an abused child inasmuch as the petition alleged, inter alia, that Riley was a severely abused child, and such a determination must be based upon clear and convincing evidence (*see* Family Ct Act § 1051 [e]). Respondent is correct with respect to the standard of review to be applied in determining whether a child is severely abused. Nevertheless, we note that the court properly considered in the alternative whether petitioner established by a preponderance of the evidence that Riley was an abused child rather than a severely abused child (*see generally Matter of Julia BB.*, 42 AD3d 208, 218-219, *lv denied* 9 NY3d 815).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

65

CA 08-00494

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

KATHLEEN M. SWEENEY, PLAINTIFF-APPELLANT,
ET AL., PLAINTIFF,

V ORDER

JOAN M. LINDE, ROBERT LINDE,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (KRISTIN A. TISCI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, BUFFALO (BRIAN G. MANKA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered June 14, 2007 in a personal injury action. The order denied the motion of plaintiff Kathleen M. Sweeney to set aside a jury verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1]).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

66

CA 08-00496

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

KATHLEEN M. SWEENEY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOAN M. LINDE AND ROBERT LINDE,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (KRISTIN A. TISCI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, BUFFALO (BRIAN G. MANKA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered October 31, 2008 in a personal injury action. The judgment dismissed the complaint upon a jury verdict of no cause of action.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Kathleen M. Sweeney (plaintiff) when she tripped and fell on a retaining wall owned by Joan M. Linde and Robert Linde (defendants). Plaintiff contends that Supreme Court erred in denying her motion to set aside the verdict as against the weight of the evidence because there is no reasonable view of the evidence that would permit the jury to conclude that defendants were negligent but that such negligence was not a proximate cause of plaintiff's injuries. We reject that contention. "A jury finding that a party was negligent but that such negligence was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" (*Skowronski v Mordino*, 4 AD3d 782, 783), and that is not the case here. We conclude that "the evidence on the issue of causation did not so preponderate in favor of plaintiff that the jury's finding of no proximate cause could not have been reached on any fair interpretation of the evidence" (*Waild v Boulos* [appeal No. 2], 2 AD3d 1284, 1286, *lv denied* 2 NY3d 703; *see Lolik v Big V Supermarkets*, 86 NY2d 744, 746).

Contrary to the further contention of plaintiff, the court

properly denied her request for a jury instruction on the emergency doctrine. A party is entitled to such an instruction only if "the evidence supports a finding that the party . . . was confronted by 'a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration' " (*Caristo v Sanzone*, 96 NY2d 172, 175, quoting *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327, *rearg denied* 77 NY2d 990) and, here, the evidence does not support such a finding. Finally, plaintiff's contention that the verdict should have been set aside based on jury confusion is without merit (*see Mendez v Rochester Gen. Hosp.*, 31 AD3d 1160, 1161, *lv denied* 7 NY3d 713; *Mateo v 83 Post Ave. Assoc.*, 12 AD3d 205, 206; *see also Nath v Brown*, 48 AD3d 1166, 1167).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

70

CA 08-01056

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

WILLETTE HARRIS, PLAINTIFF,

V ORDER

EILEEN JACKSON, ET AL., DEFENDANTS.

IN THE MATTER OF CELLINO & BARNES, P.C.,
PETITIONER-RESPONDENT,

V

CHARLES L. DAVIS, RESPONDENT-APPELLANT.

CHARLES L. DAVIS, BUFFALO, RESPONDENT-APPELLANT PRO SE.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), PETITIONER-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered March 3, 2008. The order granted attorneys' fees to petitioner.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

71

CA 07-01836

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

IN THE MATTER OF DANIEL JONES,
PETITIONER-APPELLANT,

V ORDER

CITY OF BUFFALO, RESPONDENT-RESPONDENT.

DANIEL JONES, PETITIONER-APPELLANT PRO SE.

ALISA A. LUKASIEWICZ, CORPORATION COUNSEL, BUFFALO (CARMEN J. GENTILE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), entered August 10, 2007 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

72

TP 08-01529

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF STEPHEN GAGNE, PETITIONER,

V ORDER

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

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered July 17, 2008) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

73

KA 08-00158

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RAYMOND M. IVEYS, III, DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered December 19, 2006. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Lococo*, 92 NY2d 825, 827).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

75

KA 07-02562

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAMAR MCCALL, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered November 30, 2007. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree and assault in the first degree.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

78

KA 08-00637

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD L. MORGAN, DEFENDANT-APPELLANT.

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

EDWARD M. SHARKEY, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered February 4, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the second 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 his plea of guilty, of two counts of criminal contempt in the second degree (Penal Law § 215.50 [3]). Contrary to the contention of defendant, he knowingly, intelligently and voluntarily waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256; *People v Seaberg*, 74 NY2d 1, 11). That valid waiver of the right to appeal encompasses defendant's challenge to the factual sufficiency of the plea allocution (*see People v Spikes*, 28 AD3d 1101, 1102, *lv denied* 7 NY3d 818; *People v Bland*, 27 AD3d 1052, *lv denied* 6 NY3d 892; *People v White*, 24 AD3d 1220, *lv denied* 6 NY3d 820), as well as defendant's challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 256; *People v Hidalgo*, 91 NY2d 733, 737). Although the contention of defendant with respect to the voluntariness of his plea survives his valid waiver of the right to appeal (*see Seaberg*, 74 NY2d at 11), defendant failed to preserve that contention for our review (*see People v Collins*, 45 AD3d 1472, *lv denied* 10 NY3d 861; *People v DeJesus*, 248 AD2d 1023, *lv denied* 92 NY2d 878), and this case does not fall within the narrow exception to the preservation doctrine (*see People v Lopez*, 71 NY2d 662, 666; *People v Sharp*, 56 AD3d 1230).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

80

KAH 07-02532

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
FRANKLIN JOEL THOMAS HAMPTON, JR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT DENNISON, CHAIRMAN, NEW YORK STATE
DIVISION OF PAROLE, RESPONDENT-RESPONDENT.

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered October 11, 2007 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: This appeal by petitioner from a judgment dismissing his petition seeking a writ of habeas corpus has been rendered moot by his release to parole supervision (*see People ex rel. Limmer v McKinney*, 23 AD3d 806). Contrary to petitioner's contention, the exception to the mootness doctrine does not apply here (*see id.*; *People ex rel. Alexander v Walsh*, 303 AD2d 1015, *lv denied* 100 NY2d 505; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

82

KA 03-01746

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMARIUS CARTER, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO 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 March 5, 2003. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree, assault in the first degree, criminal use of a firearm in the first degree, attempted robbery 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: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant contends that his waiver of the right to appeal was invalid. We reject that contention. The record of the plea colloquy demonstrates that defendant understood the terms of the plea agreement and that he knowingly, intelligently, and voluntarily waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256; *People v Quishana M.*, 50 AD3d 1513, *lv denied* 10 NY3d 938). The waiver by defendant of his right to appeal encompasses his challenge to County Court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833). Although the contention of defendant that the plea was not knowingly, voluntarily, and intelligently entered survives his valid waiver of the right to appeal, defendant failed to preserve that contention for our review (*see People v Vandeviver*, 56 AD3d 1118). 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 inasmuch as "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 Leonard*, 37 AD3d 1148, 1149, *lv denied* 8 NY3d 947). Finally, the bargained-for

sentence is not unduly harsh or severe.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

83

CAF 08-00595

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF MARIA F. AND EDUARDO F.

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

JAMES F., RESPONDENT-APPELLANT.

ANDREW M. DUNN, ONEIDA, FOR RESPONDENT-APPELLANT.

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

JOHN S. WILK, LAW GUARDIAN, UTICA, FOR MARIA F. AND EDUARDO F.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered January 16, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: Family Court properly granted the petition seeking termination of respondent father's parental rights on the ground of permanent neglect. The father admitted that he permanently neglected the children, and the evidence at the dispositional hearing supports the court's determination that the best interests of the children would be served by terminating his parental rights and freeing the children for adoption (*see generally Matter of Darlene L.*, 38 AD3d 552, 554). The contentions of the father and the Law Guardian concerning events that occurred subsequent to the dispositional hearing are not properly before us (*see Matter of Saafir M.*, 17 AD3d 1100).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

85

CAF 07-01606

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF BRITTANY K., MELISSA K.,
AND JUSTIN L.

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

GEORGETTA K., NOW KNOWN AS GEORGETTA R.,
RESPONDENT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR RESPONDENT-APPELLANT.

JACQUELYN M. ASNOE, HERKIMER, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Herkimer County (Henry A. LaRaia, J.), entered June 26, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order adjudged that the subject children are permanently neglected and terminated respondent's parental rights.

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

Memorandum: Family Court properly adjudicated respondent mother's three children to be permanently neglected and terminated the mother's parental rights with respect to them. Petitioner presented evidence establishing that it provided "services and other assistance aimed at ameliorating or resolving the problems preventing [the children's] return to [the mother's] care" (*Matter of Kayte M.*, 201 AD2d 835, 835, *lv denied* 83 NY2d 757). Thus, petitioner met its burden of proving "by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between [the mother] and the child[ren]" (*Matter of Ja-Nathan F.*, 309 AD2d 1152; *see* Social Services Law § 384-b [7] [a]). Petitioner "is not charged with a guarantee that the [mother] succeed in overcoming . . . her predicaments" (*Matter of Sheila G.*, 61 NY2d 368, 385) and, "[a]lthough [the mother] participated in [some of] the services offered by petitioner, [s]he failed to address successfully the problems that led to the removal of the child[ren] and continued to prevent [their] safe return" (*Ja-Nathan F.*, 309 AD2d at 1152).

The mother failed to preserve for our review her contention that the court erred in admitting evidence at the fact-finding hearing with respect to events preceding the removal of the children and predating the instant petition by more than one year (*see generally Matter of*

William C., 9 AD3d 897, 898). In any event, that evidence was "relevant and instructive" for the limited purpose of ascertaining the conditions that led to the removal of the children in the first instance (*Matter of Nathaniel T.*, 67 NY2d 838, 841). We reject the contention of the mother that her attorney's failure to object to the admission of that evidence constitutes ineffective assistance of counsel (*see generally Matter of Cody T.B.*, 27 AD3d 1166).

The mother also failed to preserve for our review her contention that the Law Guardian should have apprised the court of the children's wishes at the dispositional hearing (*see Matter of Alyshia M.R.*, 53 AD3d 1060, 1061, *lv denied* 11 NY3d 707). In any event, the record establishes that the Law Guardian had previously apprised the court of the children's wishes at the fact-finding hearing, and her failure to do so again at the dispositional hearing "did not prevent the court from considering the child[ren]'s best interests" (*id.*). Thus, any error must be deemed harmless.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

86

CAF 08-00612

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF WALTER K. TELFER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NICOLE L. PICKARD, RESPONDENT-RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (GERALD T. BARTH OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Onondaga County (George M. Raus, Jr., R.), entered October 12, 2007 in proceedings pursuant to, inter alia, Family Court Act article 6. The order dismissed the petitions.

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

Memorandum: Petitioner father filed two petitions, one seeking to modify a prior order and the other alleging that respondent mother had violated that prior order. We conclude that Family Court properly dismissed the petitions. The prior order required the mother to mail to the father, who is incarcerated, a photograph of the parties' child every other month, along with a letter describing the photograph and any important events in the child's life that had occurred since the prior letter was sent. The petitions were filed 1½ months following entry of the prior order. The father alleged in one petition that the mother had failed to mail the father a photograph of the child, and he sought modification of the prior order by instead requiring a third party to bring the child to visit him. The father alleged in the other petition that the mother had violated the prior order by failing to send him any pictures of the child or any correspondence concerning the child. We conclude with respect to the modification petition that the father " 'fail[ed] to allege a sufficient change in circumstances requiring modification in the best interest[s] of the child[]' " (*Matter of Reczko v Reczko*, 278 AD2d 876, 876), and we conclude with respect to the violation petition that, at the time the petitions were filed, there was no evidence of the mother's willful violation of the prior order.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

87

TP 08-01579

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF GEORGE LUNDY,
PETITIONER,

V MEMORANDUM AND ORDER

CITY OF OSWEGO AND RANDOLPH BATEMAN,
MAYOR, CITY OF OSWEGO, RESPONDENTS.

D. JEFFREY GOSCH, SYRACUSE, FOR PETITIONER.

ROEMER WALLENS & MINEAUX LLP, ALBANY (ELAYNE G. GOLD 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, Oswego County [Norman W. Seiter, Jr., J.], entered October 26, 2007) to review a determination of respondent Randolph Bateman, Mayor, City of Oswego. The determination terminated petitioner's employment with respondent City of Oswego.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination terminating his employment as Chief of Police for respondent City of Oswego following a hearing pursuant to Civil Service Law § 75. We conclude that the determination is supported by the requisite substantial evidence, i.e., "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180; *see* CPLR 7803 [4]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231), and we therefore may not substitute our judgment for that of respondent Mayor (*see generally Matter of Barhite v Village of Medina*, 23 AD3d 1114, 1115). We further conclude that the penalty of termination does not constitute an abuse of discretion as a matter of law, i.e., it is not " 'so disproportionate to the offense as to be shocking to one's sense of fairness' " (*Matter of Kelly v Safir*, 96 NY2d 32, 38; *Matter of Smeraldo v Rater*, 55 AD3d 1298, 1299). " 'A police force is a quasi-military organization demanding strict discipline' " (*Matter of Panek v Bennett*, 38 AD3d 1251, 1252) and, "[i]n matters concerning police discipline, 'great leeway' must be

accorded to . . . determinations concerning the appropriate punishment" (*Kelly*, 96 NY2d at 38).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

88

CA 08-00529

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

TARTAN TEXTILE SERVICES, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ST. JOSEPH'S HOSPITAL HEALTH CENTER,
DEFENDANT-RESPONDENT.

KERNAN AND KERNAN, P.C., UTICA (JAMES P. GODEMANN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (ROBERT W. CONNOLLY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered December 4, 2007 in an action for, inter alia, breach of contract. The order, insofar as appealed from, granted defendant's amended motion insofar as it sought preclusion of expert testimony and certain documentation at trial.

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

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, breach of a contract pursuant to which it was to provide defendant with laundry services. Discovery continued after plaintiff filed the note of issue in October 2003, but plaintiff did not provide any expert disclosure. On May 1, 2006, plaintiff provided 32 pages of financial documentation to support its calculation of damages. On May 12, 2006, three days before the trial was scheduled to begin, Supreme Court returned the action to the general docket and gave the parties one year in which to restore the case to the calendar. Plaintiff's attorney restored the case to the calendar on May 10, 2007 but had not provided expert disclosure or additional financial documentation. The court then directed plaintiff to provide expert witness disclosure by June 29, 2007. When plaintiff had not done so by July 9, 2007, defendant moved, inter alia, to preclude plaintiff from presenting any expert testimony at trial. In its opposing papers, plaintiff served defendant with two expert witness disclosures, and the court granted plaintiff's request for an adjournment of defendant's motion to September 12, 2007. On August 15, 2007, plaintiff served defendant with approximately 1,700 pages of financial documentation. Defendant then filed an amended motion seeking additional relief, including preclusion of any financial documentation disclosed after the note of

issue was filed, which was in effect all financial documentation. The court granted defendant's amended motion to the extent that it sought preclusion of expert testimony and all financial documentation at trial.

Under the circumstances of this case, we conclude that the court did not abuse or improvidently exercise its discretion in fashioning an appropriate sanction for plaintiff's repeated failures to provide requested discovery (*see* CPLR 3126; *see Optic Plus Enters., Ltd. v Bausch & Lomb Inc.*, 37 AD3d 1185, 1186-1187; *Kimmel v State of New York*, 267 AD2d 1079, 1080-1081).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

89

CA 08-01663

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

VINCENT D. IOCOVOZZI, PLAINTIFF-APPELLANT,

V ORDER

GETNICK LIVINGSTON ATKINSON GIGLIOTTI & PRIORE, LLP, AND THOMAS L. ATKINSON, ESQ., DEFENDANTS-RESPONDENTS.

ANDREW LAVOOTT BLUESTONE, NEW YORK CITY, FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (PAUL G. FERRARA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, A.J.), entered November 30, 2008 in a legal malpractice action. The order, inter alia, granted the motion of defendants to compel certain nonparty depositions.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

90

CA 08-01391

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

IRENE MOSKAL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

UTICA COLLEGE, PRESIDENT TODD HUTTON, ROBERT GRANT, R. BARRY WHITE, AND DOES 1-50, DEFENDANTS-APPELLANTS.

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

SKANADORE REISDORPH LAW OFFICES, HUNTINGTON BEACH (DEBORAH S. REISDORPH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered August 22, 2007. The order denied the motion of defendants to dismiss the complaint and granted the cross motion of plaintiff for leave to amend the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for employment discrimination (*see* Executive Law § 296) and violations of the Family Medical Leave Act of 1993 (29 USC § 2601 *et seq.*) by, inter alia, her employer, defendant Utica College, and the individual defendants, three of her coemployees. Supreme Court denied defendants' motion to dismiss the complaint and granted plaintiff's cross motion seeking leave to amend the complaint. We note at the outset that defendants contend on appeal only that the court erred in denying that part of their motion seeking dismissal of the first cause of action against the individual defendants, and thus they have abandoned any issues with respect to the propriety of the remainder of the order (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

The court properly denied that part of the motion seeking dismissal of the first cause of action against the individual defendants pursuant to CPLR 3211 (a) (7). Contrary to defendants' contention, plaintiff stated a cause of action against the individual defendants under Executive Law § 296 (6) for aiding and abetting the alleged discriminatory conduct (*see Mitchell v TAM Equities, Inc.*, 27 AD3d 703, 707; *Murphy v ERA United Realty*, 251 AD2d 469, 472; *see also Nesathurai v University at Buffalo, State Univ. of N.Y.*, 23 AD3d 1070,

1072; *D'Amico v Commodities Exch.*, 235 AD2d 313, 315).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

91

CA 08-01578

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF UTICA CITY SCHOOL DISTRICT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CRAIG S. FEHLHABER, RESPONDENT-APPELLANT.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (THOMAS J. FRANTA OF COUNSEL), FOR RESPONDENT-APPELLANT.

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C., EAST SYRACUSE (DAVID W. LARRISON OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered December 12, 2007. The order, among other things, denied respondent's motion for issuance of a subpoena duces tecum pursuant to CPLR 2307.

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

Memorandum: Petitioner commenced a disciplinary proceeding pursuant to Civil Service Law § 75 seeking to terminate respondent's employment as its Superintendent of Buildings and Grounds. Respondent thereafter moved in Supreme Court for an order issuing a subpoena duces tecum pursuant to CPLR 2307 seeking e-mails sent or received by the Superintendent of petitioner, Utica City School District, and a certain member of petitioner's Board of Education (Board of Education) relating to public matters and a list of the e-mail addresses used by members of the Board of Education, including privately maintained e-mail addresses "where public business is believed or known to be conducted." We conclude that the court properly denied the motion.

Contrary to respondent's contention, the information sought was overly broad, in contravention of CPLR 3120, and respondent failed to establish the requisite " 'factual predicate' [that] would make it reasonably likely that documentary information will bear relevant and exculpatory evidence" (*Matter of Constantine v Leto*, 157 AD2d 376, 378, *affd* 77 NY2d 975). Furthermore, we conclude that the motion was nothing more than a fishing expedition and an attempt to circumvent the fact that there is no right to discovery in a proceeding pursuant to Civil Service Law § 75 (*see generally Matter of Miller v Schwartz*, 72 NY2d 869, 870, *rearg denied* 72 NY2d 953).

We further conclude, however, that the court erred in awarding petitioner costs because the court failed to set forth in a written decision "the conduct on which the award . . . is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded . . . to be appropriate" (22 NYCRR 130-1.2).

We therefore modify the order accordingly.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

95

KA 08-00245

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID C. PETTIGREW, SR., DEFENDANT-APPELLANT.

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

DAVID C. PETTIGREW, SR., DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Niagara County Court (Peter L. Broderick, Sr., J.), rendered December 19, 2007. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree and criminal contempt 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 [2]) and criminal contempt in the first degree (§ 215.51 [b] [vi]). Contrary to the contention of defendant, his waiver of the right to appeal was voluntarily, knowingly, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256; *People v Lococo*, 92 NY2d 825, 827). The challenge by defendant to the severity of the sentence is encompassed by his valid waiver of the right to appeal (*see Lopez*, 6 NY3d at 256; *People v Hidalgo*, 91 NY2d 733, 737). The contention of defendant in his pro se supplemental brief concerning alleged prosecutorial vindictiveness is based upon matters outside the record and thus must be raised by way of a motion pursuant to CPL article 440 (*see People v Hoeft*, 42 AD3d 968, 969-970, *lv denied* 9 NY3d 962). The further contention of defendant in his pro se supplemental brief 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]). We have reviewed the remaining contentions of defendant in his pro se supplemental brief and conclude that none

requires reversal or modification of the judgment.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

96

KA 02-02514

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSE M. SANTIAGO, DEFENDANT-APPELLANT.

CHRISTOPHER J. LARAGY, ROCHESTER, FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered August 27, 2002. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

97

KA 06-03803

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DEQUAN WILLIAMS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered July 19, 2005. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

98

KA 04-02819

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PETER R. MCNALLY, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LORETTA S. COURTNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), rendered November 8, 2004. The judgment convicted defendant, upon his plea of guilty, of felony driving while intoxicated.

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 felony driving while intoxicated (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (i)]). Supreme Court did not abuse its discretion in denying the pro se motion of defendant to withdraw his plea (*see generally People v Alexander*, 97 NY2d 482, 485-486). The "protestations [of defendant] as to his . . . confusion and innocence ring hollow" in light of his admissions during the plea colloquy and his statement that he understood that he was giving up certain rights, including the right to a jury trial, by pleading guilty (*id.* at 486).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

99

KA 07-00627

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WALTER TELFER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (GERALD T. BARTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MATTHEW H. JAMES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered January 31, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]). To the extent that defendant contends that his plea was not knowingly, voluntarily or intelligently entered because he failed to recite the underlying facts of the crime to which he pleaded guilty, that contention is actually a challenge to the factual sufficiency of the plea allocution (*see People v Bailey*, 49 AD3d 1258, 1259, *lv denied* 10 NY3d 932). Defendant failed to preserve that contention for our review by failing to move to withdraw his plea or to vacate the judgment of conviction (*see People v Lopez*, 71 NY2d 662, 665). In any event, that contention lacks merit inasmuch as there is no requirement that a defendant recite the underlying facts of the crime to which he or she is pleading guilty (*see People v Martin*, 55 AD3d 1304; *Bailey*, 49 AD3d at 1259). By pleading guilty, defendant forfeited his further contention that he was denied his statutory right to a speedy trial pursuant to CPL 30.30 (*see People v O'Brien*, 56 NY2d 1009, 1010; *People v Trapp*, 48 AD3d 1086, *lv denied* 10 NY3d 871). Finally, although defendant contends that his plea was not knowingly, voluntarily or intelligently entered inasmuch as defense counsel "guaranteed that he would be able to appeal his case including the CPL 30.30 motion," that alleged statement of defense counsel "was not placed on the record at the time of the plea, [and thus] it is not entitled to judicial recognition" (*People v Ramos*, 63 NY2d 640, 643;

see People v Pickett, 49 AD3d 1207, 1208, *lv denied* 10 NY3d 963).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

100

KA 07-00757

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MATTHEW K. REASIN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered December 19, 2006. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

101

KA 05-00310

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARNELL MOSLEY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

CHARNELL MOSLEY, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered December 22, 2004. The judgment convicted defendant, upon a nonjury verdict, of robbery in the third degree (three counts), assault in the second degree, unauthorized use of a vehicle in the first degree and petit larceny (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of, inter alia, three counts of robbery in the third degree (Penal Law § 160.05) and one count of assault in the second degree (§ 120.05 [2]). Contrary to defendant's contention, the evidence is legally sufficient to support the conviction of counts one and three of the indictment, which concern the robberies of two banks. "The applicable statutes do not require the use or display of a weapon nor actual injury or contact with a victim [for a person to be guilty of robbery] . . . All that is necessary is that there be a threatened use of force . . ., which may be implicit from the defendant's conduct or gleaned from a view of the totality of the circumstances" (*People v Rychel*, 284 AD2d 662, 663; *see* § 160.00; *People v Woods*, 41 NY2d 279, 282-283). Here, the People presented evidence from which defendant's threatened use of force could be implied, i.e., the testimony of the bank employees to whom defendant handed a note upon arriving at the respective banks.

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

was conflicting testimony with respect to the count charging assault in the second degree and thus "an acquittal [on that count] would not have been unreasonable" (*People v Danielson*, 9 NY3d 342, 348), we conclude that, "[b]ased on the weight of the credible evidence, the court . . . was justified in finding the defendant guilty beyond a reasonable doubt" (*id.*; *see People v Romero*, 7 NY3d 633, 642-643). " 'Great deference is to be accorded to the fact-finder's resolution of credibility issues based upon its superior vantage point and its opportunity to view witnesses, observe demeanor and hear the testimony' " (*People v Gritzke*, 292 AD2d 805, 805-806, *lv denied* 98 NY2d 697), and we perceive no basis to disturb the court's credibility determinations (*see People v Reddick*, 43 AD3d 1334, 1335-1336, *lv denied* 10 NY3d 815).

We reject the contention of defendant in his main and pro se supplemental briefs that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). Defendant has failed " 'to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712). The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they are lacking in merit.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

102

KA 07-00892

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHARNELL MOSLEY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

CHARNELL MOSLEY, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN 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 Monroe County Court (Richard A. Keenan, J.), entered April 5, 2007. The order denied the motion of defendant pursuant to CPL 440.10 to vacate the judgment convicting him of, inter alia, robbery in the third degree (three counts).

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

103

KA 06-03543

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRONE CANNON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MATTHEW H. JAMES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered May 20, 2005. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [4]). By failing to move to withdraw his plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that his plea was not knowing, voluntary and intelligent (*see People v Vandeviver*, 56 AD3d 1118). In any event, that contention is belied by the record. The further contention of defendant with respect to his purported waiver of the right to appeal is also without merit inasmuch as the record establishes that defendant did not waive his right to appeal. Finally, the sentence is not unduly harsh or severe.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

106

KA 07-00814

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN D. GAGNER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered March 28, 2007. The judgment convicted defendant, upon a jury verdict, of possessing a sexual performance by a child, harassment in the second degree, criminal contempt in the second degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him of, inter alia, possessing a sexual performance by a child (Penal Law § 263.16). We agree with defendant that County Court erred in considering evidence that was not presented at the suppression hearing when making its findings of fact in connection with its suppression ruling (*see People v Washington*, 291 AD2d 780, 781, *lv denied* 98 NY2d 682). We conclude, however, that the court sufficiently cured the error by basing its suppression ruling solely on the evidence presented at the suppression hearing (*see generally People v Dixon*, 305 AD2d 1020). We reject the further contention of defendant that his wife did not freely consent to the search of their home by the police (*see People v Santiago*, 41 AD3d 1172, 1173-1174, *lv denied* 9 NY3d 964). The court's determination that she did in fact provide her consent is entitled to great deference (*see People v Kozikowski*, 23 AD3d 990, *lv denied* 6 NY3d 755), and we perceive no reason to disturb that determination.

We agree with defendant that the court erred in instructing the jury that it could consider a variance in the proof at trial with respect to the time of the offense as opposed to that set forth in the indictment (*see* 1 CJI[NY] 8.01, at 376). The indictment charged defendant with possessing a sexual performance by a child on October 24, 2005, while the proof at trial established that one of the three photographs in question was moved on or deleted from defendant's

computer on March 13, 2005. That jury instruction was intended for cases involving "relatively minor variances" of time, not the discrepancy of more than seven months present in this case (*People v Bigda*, 184 AD2d 993, 994; *cf. People v Jones*, 37 AD3d 1111, *lv denied* 8 NY3d 986; *People v Davis*, 15 AD3d 920, 921, *lv denied* 4 NY3d 885, 5 NY3d 787). We conclude, however, that the court's error in giving that instruction is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Contrary to defendant's further contention, the order of protection was properly admitted in evidence under the public document or official entry exception to the hearsay rule (*see People v Casey*, 95 NY2d 354, 361-362). Defendant's remaining contentions are not preserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

107

CA 08-01842

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

JOSEPH P. MAXON, PLAINTIFF-APPELLANT,

V ORDER

WOODS OVIATT GILMAN LLP AND ANTHONY COTRONEO,
DEFENDANTS-RESPONDENTS.

REMINGTON, GIFFORD, WILLIAMS & COLICCHIO, LLP, ROCHESTER (ROBERT B. KOEGEL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (DONALD W. O'BRIEN, JR., OF COUNSEL), DEFENDANT-RESPONDENT PRO SE, AND FOR ANTHONY COTRONEO, DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered May 30, 2008 in a legal malpractice action. The order granted the motion of defendants for summary judgment dismissing the complaint and denied the cross motion of plaintiff 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: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

108

CA 08-01697

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

PHILIP J. LOREE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JAMES G. BARNES, MARY C. BARNES AND
FRED C. JOHNSON & SON, INC.,
DEFENDANTS-RESPONDENTS.

PHILIP J. LOREE, NORTH HORNELL, PLAINTIFF-APPELLANT PRO SE.

Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered June 6, 2008 in an action pursuant to RPAPL 871. The order denied plaintiff's motion for summary judgment and dismissed the amended complaint without prejudice.

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

Memorandum: Plaintiff commenced this action pursuant to RPAPL 871 seeking an injunction requiring James G. Barnes and Mary C. Barnes (defendants) to remove asphalt that encroaches on the northern boundary of property owned by plaintiff in fee with his wife as tenants by the entirety. Plaintiff further contends that the asphalt also encroaches on property that is owned by the Village of North Hornell but is the frontage of plaintiff's property and abuts the street. We note at the outset that we agree with plaintiff that, as the owner of the abutting property, he has an easement by operation of law to that frontage "subject to interference by no one except the representatives of the public" (*Donahue v Keystone Gas Co.*, 181 NY 313, 320). Defendants raised three affirmative defenses in their answer, two with respect to the alleged failure to join necessary parties and the third with respect to adverse possession.

We conclude that Supreme Court properly sua sponte dismissed the amended complaint without prejudice based on defendants' first affirmative defense, i.e., the failure of plaintiff to include his wife as a necessary party, inasmuch as her right with respect to the fee interest itself and her interest with respect to the easement may be inequitably affected by this action (*see* CPLR 1001 [a]; *Hitchcock v Boyack*, 256 AD2d 842, 844; *cf. Weichert v O'Neill*, 245 AD2d 1121, 1122; *see generally Hitchcock v Abbott*, 9 AD3d 563, 566). We note, however, that the court erred in further determining that the Village of North Hornell is also a necessary party, as alleged in defendants' second affirmative defense. Here, only defendants' affirmative

defense with respect to adverse possession may affect a right of the municipality and where, as here, property is held for public purposes, "no interest will pass by adverse possession" (*City of Tonawanda v Ellicott Cr. Homeowners Assn.*, 86 AD2d 118, 125, *appeal dismissed* 58 NY2d 824).

Despite our conclusion that the court properly dismissed the amended complaint without prejudice based on plaintiff's failure to name a necessary party, we further note in the interest of judicial economy that the court erred in determining that defendants raised an issue of fact with respect to their affirmative defense of adverse possession over a 34-inch area at the base of their driveway that extended over the frontage of plaintiff's property sufficient to defeat plaintiff's motion seeking summary judgment on the amended complaint. Even assuming, arguendo, that there is a valid claim of adverse possession for that type of easement, we conclude that plaintiff established that the encroachment on that easement did not exist prior to June 2006. Thus, in opposition to the motion defendants raised an issue of fact only with respect to the period from December 2002 to June 2006, not the 10-year period required for a claim of adverse possession (*see Comrie, Inc. v Holmes*, 40 AD3d 1346, 1347, *lv denied* 9 NY3d 815).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

109

CA 08-01658

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

DALE LAKE AND KAREN LAKE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DOING BUSINESS AS MILLARD
FILLMORE GATES HOSPITAL, ET AL., DEFENDANTS,
RAM PRAKASH SHARMA, M.D., AND LISA
HASTINGS, C.R.N.A., DEFENDANTS-APPELLANTS.

DAMON & MOREY LLP, BUFFALO (BRIAN A. BIRENBACH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

STAMM, REYNOLDS & STAMM, WILLIAMSVILLE (MELISSA A. BREWSTER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 23, 2007 in a medical malpractice action. The order denied the motion of defendants Ram Prakash Sharma, M.D. and Lisa Hastings, C.R.N.A. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the complaint against defendants Ram Prakash Sharma, M.D. and Lisa Hastings, C.R.N.A. is dismissed.

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for back injuries allegedly sustained by Dale Lake (plaintiff) when he was moved and/or positioned in connection with a surgical procedure performed on his left thumb. Supreme Court erred in denying the motion of Ram Prakash Sharma, M.D., the anesthesiologist, and Lisa Hastings, C.R.N.A., the anesthesia nurse (collectively, defendants), seeking summary judgment dismissing the complaint against them. Defendants met their initial burden by submitting the affidavit of an expert establishing that they did not deviate from accepted medial practice in their care and treatment of plaintiff (*see Darling v Scott*, 46 AD3d 1363, 1364). Plaintiffs failed to raise a triable issue of fact by submitting the affidavit of an expert that contained only "[g]eneral allegations of medical malpractice, [which were] merely conclusory in nature and unsupported by competent evidence tending to establish the essential elements of [medical malpractice]" (*Mendez v City of New York*, 295 AD2d 487, 488; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325). We further conclude that the record does not support plaintiffs' allegation that the

alleged injuries to plaintiff could not occur in the absence of negligence and thus, contrary to plaintiffs' contention, the doctrine of res ipsa loquitur does not apply to defeat defendants' motion (*see Hoffman v Pelletier*, 6 AD3d 889, 891; *Sapienza v County of Erie*, 270 AD2d 907, 907-908).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

110

CA 08-01066

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

STEPHEN E. WEBSTER, PLAINTIFF-APPELLANT,

V ORDER

TOTAL IDENTITY CORPORATION, ET AL., DEFENDANTS,
PHILIP MISTRETTA, LESLIE W. KERNAN, JR., AND
LACY KATZEN LLP (FORMERLY KNOWN AS LACY, KATZEN,
RYEN & MITTLEMAN, LLP), DEFENDANTS-RESPONDENTS.

EVANS & FOX LLP, ROCHESTER (JARED P. HIRT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (WILLIAM G. BAUER OF COUNSEL), FOR DEFENDANT-RESPONDENT PHILIP MISTRETTA.

HISCOCK & BARCLAY, LLP, ROCHESTER (TARA J. SCIORTINO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS LESLIE W. KERNAN, JR., AND LACY KATZEN LLP (FORMERLY KNOWN AS LACY, KATZEN, RYEN & MITTLEMAN, LLP).

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered December 7, 2007. The order, among other things, granted the motions of defendants Philip Mistretta, Leslie W. Kernan, Jr., and Lacy Katzen LLP (formerly known as Lacy, Katzen, Ryen & Mittleman, LLP) 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: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

111

TP 08-01711

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

IN THE MATTER OF JOHN LEGGIO, PETITIONER,

V MEMORANDUM AND ORDER

DANIEL D. HOGAN, AS CHAIRMAN, AND MICHAEL J. HOBLOCK, JR., AND JOHN B. SIMONI, AS MEMBERS OF NEW YORK STATE RACING & WAGERING BOARD, DIVISION OF HARNESS RACING, AND NEW YORK STATE RACING & WAGERING BOARD, RESPONDENTS.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Kevin M. Dillon, J.], entered August 7, 2008) to annul a determination of respondents. The determination, inter alia, revoked petitioner's license to participate in pari-mutuel harness racing as an owner and trainer.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination that he violated 9 NYCRR 4120.13 (a) by permitting one of his horses to race with a total carbon dioxide level (TCO2) in excess of 37 millimoles per liter, according to TCO2 blood sample testing. Contrary to petitioner's contention, the determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182). Also contrary to petitioner's contention, the penalty of revocation of petitioner's license is not "so disproportionate to the offense as to be shocking to one's sense of fairness" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 237; *see Matter of Patistas v New York State Racing & Wagering Bd.*, 1 AD3d 1003, *lv denied* 1 NY3d 508; *see generally Matter of Kelly v Safir*, 96

NY2d 32, 38-40, *rearg denied* 96 NY2d 854).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

113

CA 08-01223

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

JESSIE M. DUNBAR, PLAINTIFF-RESPONDENT,

V ORDER

WILLIAM G. ORTON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JAMES F. GAUL, SYRACUSE, FOR DEFENDANT-APPELLANT.

COULTER, VENTRE & MCCARTHY, LLP, LIVERPOOL (J. MARK MCCARTHY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, A.J.), entered September 5, 2007 in a personal injury action. The order, inter alia, denied the motion of defendant for summary judgment.

Now, upon the stipulation of discontinuance of action signed by the attorneys for the parties on October 14, 2008, and filed in the Oswego County Clerk's Office on October 20, 2008,

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

114

CA 08-01224

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

TIMOTHY C. RICHMOND, PLAINTIFF-RESPONDENT,

V ORDER

WILLIAM G. ORTON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, A.J.), entered September 7, 2007 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant for summary judgment dismissing the complaint.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

115

CA 08-01847

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

JESSIE M. DUNBAR, PLAINTIFF,

V ORDER

WILLIAM G. ORTON, DEFENDANT.

WILLIAM G. ORTON, THIRD-PARTY
PLAINTIFF-APPELLANT,

V

TIMOTHY C. RICHMOND, THIRD-PARTY
DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, A.J.), entered September 7, 2007 in a personal injury action. The order denied the motion of defendant-third-party plaintiff for summary judgment dismissing the third-party complaint.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

116

CA 08-00992

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

IN THE MATTER OF THE APPLICATION OF KURT W. WATSON, PETITIONER-RESPONDENT, FOR THE DISSOLUTION OF WATSON LANDSCAPING, INC., RESPONDENT-APPELLANT. ORDER

WATSON LANDSCAPING, INC., PLAINTIFF,

V

KURT W. WATSON, DEFENDANT.

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

SONNEBORN, SPRING & O'SULLIVAN, P.C., SYRACUSE (JAMES L. SONNEBORN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered July 2, 2007. The order, among other things, held respondent in contempt.

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: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

117

CA 08-01401

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ.

LISA HINCKLEY, INDIVIDUALLY, AND AS WIFE OF JOHN HINCKLEY, DECEASED, AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN HINCKLEY, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CSX TRANSPORTATION, INC., DEFENDANT-RESPONDENT, ET AL., DEFENDANT.

KANTOR & GODWIN, PLLC, WILLIAMSVILLE (STEVEN L. KANTOR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (J. CHRISTINE CHIRIBOGA OF COUNSEL), AND MAYER BROWN LLP, WASHINGTON, D.C., FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered April 16, 2008 in a wrongful death action. The order granted the motion of defendant CSX Transportation, Inc. for summary judgment dismissing the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the first and second causes of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for the wrongful death of decedent, an employee of CSX Transportation, Inc. (defendant). We agree with plaintiff that Supreme Court erred in granting the motion of defendant for summary judgment dismissing the complaint against it in its entirety. As plaintiff correctly contends, there is a triable issue of fact whether defendant provided decedent with a safe place to work in accordance with the Federal Employers' Liability Act ([FELA] 45 USC § 51 *et seq.*). We have previously recognized that "there is a more lenient standard for determining negligence and causation in a FELA action" (*McCabe v CSX Transp., Inc.*, 27 AD3d 1150, 1151, quoting *Pilarski v Consolidated Rail Corp.*, 269 AD2d 821, 821 [internal quotation marks omitted]). In such an action, summary judgment in favor of the defendant is inappropriate if there is any possibility that the defendant's " 'negligence played any part, even the slightest,' " in the employee's death or injuries (*Syverson v Consolidated Rail Corp.*, 19 F3d 824, 828, quoting *Gallick v Baltimore & Ohio R. Co.*, 372 US 108,

120-121). Here, the court erred in granting those parts of defendant's motion seeking summary judgment dismissing the first and second causes of action, alleging the violation of FELA and common-law negligence, and we therefore modify the order accordingly. Defendant failed to establish that its alleged negligence played no part in decedent's death (*see Pilarski*, 269 AD2d at 822; *see generally Zuckerman v City of New* York, 49 NY2d 557, 562), and "FELA expressly provides that 'the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee' (45 USC § 53)" (*Sneddon v CSX Transp.*, 46 AD3d 1345, 1346). We further conclude, however, that the court properly granted that part of defendant's motion seeking summary judgment dismissing the third cause of action, for loss of consortium, inasmuch as "[t]here is no recovery for loss of consortium in a wrongful death action" (*Kaplan v Sparks*, 192 AD2d 1119, 1120; *see Liff v Schildkrout*, 49 NY2d 622, 634).

Entered: February 6, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

118

TP 08-01798

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

IN THE MATTER OF ENRIQUE TANTAO, PETITIONER,

V ORDER

JAMES L. BERBARY, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY, AND DONALD SELSKY, DIRECTOR, SPECIAL HOUSING/INMATE DISCIPLINARY PROGRAMS, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENTS.

ENRIQUE TANTAO, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO 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 Erie County Court [Michael L. D'Amico, J.], entered May 1, 2008) to review a determination of respondent James L. Berbary, Superintendent, Collins Correctional Facility. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

119

TP 08-01730

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

IN THE MATTER OF ROBERT RODRIGUEZ, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, AND MELVIN HOLLINS, SUPERINTENDENT, ONEIDA CORRECTIONAL FACILITY, RESPONDENTS.

FRANK POLICELLI, UTICA, FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK K. WALSH 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, Oneida County [John W. Grow, J.], entered August 6, 2008) 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: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

120

KA 08-00119

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOY SHORT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL C. WALSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered November 29, 2006. The judgment convicted defendant, upon her plea of guilty, of identity theft in the first degree.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

121

KA 08-00246

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DANIEL E. O'BRIEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered January 8, 2008. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

123

KA 03-02272

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANSISCO CARABALLO, DEFENDANT-APPELLANT.

RICHARD W. YOUNGMAN, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered July 25, 2003. The judgment convicted defendant, upon his plea of guilty, of burglary 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 burglary in the first degree (Penal Law § 140.30 [1]). Contrary to the contention of defendant, his waiver of the right to appeal was valid. "Defendant's responses to County Court's questions unequivocally established that defendant understood the proceedings and was voluntarily waiving the right to appeal" (*People v Gilbert*, 17 AD3d 1164, 1164, *lv denied* 5 NY3d 762; *see People v Griner*, 50 AD3d 1557, *lv denied* 11 NY3d 737; *People v Williams*, 39 AD3d 1200, *lv denied* 9 NY3d 853). The valid waiver by defendant of his right to appeal encompasses his contention that the court erred in refusing to suppress identification testimony (*see People v Kemp*, 94 NY2d 831, 833; *People v Brown*, 41 AD3d 1234, *lv denied* 9 NY3d 873).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

124

KA 06-03044

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CONSTANTINE JACKSON, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 6, 2006. Defendant was resentenced to an indeterminate term of imprisonment of 15 years to life upon his conviction of murder in the second degree.

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

Memorandum: Defendant was convicted upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [2]), and he appeals from the resentence on that conviction. During the plea colloquy, Supreme Court expressed its intent to order that defendant's sentence run consecutively to a prior undischarged sentence. Defendant stated that he understood the court's intention, and he then entered his plea of guilty. During sentencing, however, the court failed to state on the record that the sentence was to run consecutively to the prior sentence. The court granted the People's motion to correct the error after the People discovered that the sentences were running concurrently, and the court resentenced defendant to an indeterminate term of 15 years to life, to run consecutively to the prior sentence. We affirm.

A court has the inherent power to correct its mistake in sentencing a defendant where the mistake is clear from the record and the correction fully comports with the expectations of the parties at the time of sentencing (*see People v Richardson*, 100 NY2d 847, 850-851; *Matter of Campbell v Pesce*, 60 NY2d 165, 169). Here, the record establishes that the court unequivocally expressed its intent to order that the sentence run consecutively to the prior sentence during the plea colloquy, and there is no indication that the failure to do so was anything other than a mere oversight. Because the corrected sentence conforms to the parties' expectations, the correction was proper (*see People v Wright*, 56 NY2d 613, 615; *People v Minaya*, 54

NY2d 360, 364-365, *cert denied* 455 US 1024; *see also People v Fountaine*, 8 AD3d 1107, *lv denied* 3 NY3d 706). We thus reject the further contention of defendant that the court abused its discretion in denying his postjudgment motion to withdraw the plea on the ground that he expected that the sentence would run concurrently with the prior sentence at the time he entered his plea (*cf. People v Bobo*, 41 AD3d 129, *lv denied* 9 NY3d 873; *People v Ford*, 143 AD2d 522). Indeed, on the record before us, there is no "evidence of innocence, fraud, or mistake in inducing the plea" (*People v Pane*, 292 AD2d 850, 850, *lv denied* 98 NY2d 653).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

125

KA 05-02437

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THERESA D. HAMILTON, DEFENDANT-APPELLANT.

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

THERESA D. HAMILTON, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered September 30, 2005. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a forged instrument in the second degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of three counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25). The contention of defendant that she was denied effective assistance of counsel does not survive her guilty plea because "[t]here is no showing that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [her] attorney['s] allegedly poor performance" (*People v Robinson*, 39 AD3d 1266, 1267, *lv denied* 9 NY3d 869 [internal quotation marks omitted]; *see People v Burke*, 256 AD2d 1244, *lv denied* 93 NY2d 851). In any event, that contention concerns matters outside the record and thus must be raised by way of a motion pursuant to CPL article 440 (*see People v Williams*, 48 AD3d 1108, 1109, *lv denied* 10 NY3d 872; *People v Jackson*, 4 AD3d 773, *lv denied* 2 NY3d 801). Finally, the sentence is not unduly harsh or severe.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

126

KA 07-02660

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD TAYLOR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered September 6, 2007. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). Contrary to the contention of defendant, County Court did not abuse its discretion in denying his motion to withdraw his plea. " '[R]efusal to permit withdrawal does not constitute an abuse of . . . discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea' . . . [and, h]ere, defendant failed to present evidence to warrant withdrawal of the plea" (*People v Pillich*, 48 AD3d 1061, *lv denied* 11 NY3d 793). Defendant acknowledged during the plea allocution that his sentence was to run consecutively to any sentence he received on charges pending against him in other jurisdictions. After defendant entered his plea, the People moved to adjourn sentencing until defendant was sentenced on charges pending in another county. Defendant, however, then moved to withdraw his plea on the ground that he had entered a guilty plea because there were no other convictions at that time and thus "nothing to [which the sentence could] be consecutive . . . ." By denying the motion and adjourning sentencing for a reasonable amount of time (*see generally People v Drake*, 61 NY2d 359, 364-366), we conclude that the court properly recognized that, "[h]aving obtained the benefit of [the plea] bargain, defendant should be bound by its terms" (*People v Zelke*, 203 AD2d 909, *lv denied* 83 NY2d 973).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

127

KA 07-01151

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTWON SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered May 8, 2007. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

128

KA 06-03797

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA KAPP, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY 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 October 23, 2006. The judgment convicted defendant, upon his plea of guilty, of burglary 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 burglary in the first degree (Penal Law § 140.30 [2]). Contrary to the contentions of defendant, we conclude that his waiver of the right to appeal is valid (*see People v Lopez*, 6 NY3d 248, 256), and that it is not void as against public policy (*see People v Carmody*, 53 AD3d 1048, *lv denied* 11 NY3d 830; *see generally People v Muniz*, 91 NY2d 570, 573-575; *People v Callahan*, 80 NY2d 273, 280; *People v Seaberg*, 74 NY2d 1, 7-10). The further contention of defendant that he was denied effective assistance of counsel survives his guilty plea and valid waiver of the right to appeal only insofar as he contends " 'that his plea was infected by the allegedly ineffective assistance and that he entered the plea because of his attorney's poor performance' " (*People v Neal*, 56 AD3d 1211; *see People v Dean*, 48 AD3d 1244, 1245, *lv denied* 10 NY3d 839; *see also People v Petgen*, 55 NY2d 529, 534-535, *rearg denied* 57 NY2d 674). That contention, however, is belied by the statements of defendant during the plea colloquy that he was satisfied with the representation provided by defense counsel (*see People v Farley*, 34 AD3d 1229, *lv denied* 8 NY3d 880; *People v Dean*, 302 AD2d 951; *People v Forshey*, 294 AD2d 868, *lv denied* 98 NY2d 675). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

129

KA 06-01046

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KIM M. WILSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered November 1, 2005. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). "By failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that he raised [a] possible . . . intoxication defense[] during his plea colloquy and thus that [Supreme] Court erred in failing to conduct a sufficient inquiry to ensure that the plea was knowingly, voluntarily and intelligently entered" (*People v Davis*, 37 AD3d 1179, 1179, *lv denied* 8 NY3d 983; *see People v Lopez*, 71 NY2d 662, 665). This is not one of those rare cases "where the defendant's recitation of the facts underlying the crime pleaded to clearly cast significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea" such that preservation is not required (*Lopez*, 71 NY2d at 666; *see People v Wimes*, 49 AD3d 1286, 1287, *lv denied* 11 NY3d 743). The sentence is not unduly harsh or severe.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

130

CAF 08-00458

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

IN THE MATTER OF SHAHIDA M. AND SHAHID M., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TIFFANY W., RESPONDENT-APPELLANT.

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

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

WILLIAM D. BRODERICK, JR., LAW GUARDIAN, ELMA, FOR SHAHIDA M. AND SHAHID M., JR.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered January 18, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights on the ground of mental illness pursuant to Social Services Law § 384-b (4) (c). We conclude that Family Court's determination that the mother "is presently and for the foreseeable future unable by reason of mental illness to provide proper and adequate care for [the] children [in question] is supported by clear and convincing evidence" (*Matter of Steven M.*, 37 AD3d 1072; *see* § 384-b [4] [c]). The court was entitled to credit the testimony of a psychologist that, based on the mental illness of the mother, any child in her care would be placed at significant risk of neglect for the foreseeable future. That testimony was based upon the results of standardized testing, interviews with the mother and petitioner's caseworkers, the psychologist's observation of the mother's interaction with the children and a review of records relevant to both the mother and the children (*see Matter of Anthony M.*, 56 AD3d 1124).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

131

CAF 07-01913

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

IN THE MATTER OF TIMOTHY FOSTER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BARBARA BARTLETT, ROSE L. FOSTER AND
CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES,
RESPONDENTS-RESPONDENTS.

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

TIMOTHY PATRICK MURPHY, WILLIAMSVILLE, FOR RESPONDENT-RESPONDENT ROSE L. FOSTER.

NATHANIEL L. BARONE, II, JAMESTOWN, FOR RESPONDENT-RESPONDENT BARBARA BARTLETT.

WENDY S. SISSON, LAW GUARDIAN, GENESEO, FOR JEREMIAH F.

Appeal from an order of the Family Court, Cattaraugus County (Paul B. Kelly, J.H.O.), entered September 6, 2007 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, dismissed the cross petition for child custody.

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

Memorandum: Petitioner father appeals from an order of disposition that, inter alia, dismissed his cross petition for custody of the child in question and continued temporary custody with the maternal grandmother. We note at the outset that the Law Guardian's contention that the order of disposition is not appealable as of right is without merit (*see* Besharov, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 1112, at 345-346). We reject the Law Guardian's further contention that, because the father consented to the terms of the order of disposition, the appeal is moot. The father in fact consented only to that part of a subsequent order concerning his visitation rights (*see Matter of Deuel v Dalton*, 33 AD3d 1158, 1159).

The record does not support the contention of the father that he did not consent to the referral of the matter to a Judicial Hearing Officer and thus Family Court did not have jurisdiction to determine

the matter. Although the father did not personally sign the consent form, the record establishes that his attorney did so, "and thus the requirements of CPLR 4317 (a) were satisfied" (*Matter of Adam R.*, 43 AD3d 1425, 1426, *lv denied* 9 NY3d 816). We reject the Law Guardian's contention that the court was required to determine whether extraordinary circumstances existed to deny the father custody and to continue custody with the maternal grandmother inasmuch as the court granted the maternal grandmother only temporary custody (*cf. Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981). Contrary to the father's contention, however, we conclude that the court properly determined that it was in the best interests of the child to continue the temporary custody arrangement (*see generally Friederwitzer v Friederwitzer*, 55 NY2d 89, 94-95). At the time of the hearing, the father had not yet completed the terms and conditions relating to a prior finding of neglect, and he had not been involved with the child's mental health treatment or schooling for the preceding year. Further, there was testimony presented at the hearing indicating that the father was likely to interfere with the child's relationship with respondent mother in the event that he was awarded custody. Thus, we conclude that the court's determination has a sound and substantial basis in the record, and we see no reason to disturb it (*see generally Matter of Jennifer L.B. v Jared R.B.*, 32 AD3d 1174, 1175).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

133

TP 08-01531

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

IN THE MATTER OF DARRELL JOHNSON, PETITIONER,

V MEMORANDUM AND ORDER

GEORGE ALEXANDER, CHAIRMAN, NEW YORK STATE DIVISION OF PAROLE, RESPONDENT.

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ANDREW B. AYERS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered July 17, 2008) to annul a determination. The determination revoked petitioner's release to parole supervision.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of the Administrative Law Judge (ALJ) revoking his release to parole supervision based upon his violation of the conditions of parole. "[A] determination to revoke parole will be confirmed if the procedural requirements were followed and there is evidence [that], if credited, would support such determination" (*Matter of Layne v New York State Bd. of Parole*, 256 AD2d 990, 992, *lv dismissed* 93 NY2d 886, *rearg denied* 93 NY2d 1000). Here, we conclude that the testimony of the witnesses at the parole revocation hearing, including petitioner's counselor in the high impact incarceration program, provides substantial evidence to support the ALJ's determination (*see Matter of Solano v Mazzuca*, 38 AD3d 789, 790; *Matter of Prodromidis v McCoy*, 292 AD2d 769; *see also People ex rel. Fryer v Beaver*, 292 AD2d 876). The testimony of petitioner that he did not threaten the parole officer merely presented a credibility issue that the ALJ was entitled to resolve against petitioner (*see Matter of Williams v New York State Div. of Parole*, 23 AD3d 800; *Matter of Ciccarelli v New York State Div. of Parole*, 11 AD3d 843, 844).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

134

TP 08-01582

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

IN THE MATTER OF STEPHEN EBLING, PETITIONER,

V MEMORANDUM AND ORDER

TOWN OF EDEN, RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN M. LICHTENTHAL OF COUNSEL), FOR PETITIONER.

WILLIAM J. TRASK, SR., BLASDELL, FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Kevin M. Dillon, J.], entered July 18, 2008) to annul a determination of respondent. The determination terminated petitioner's employment.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination terminating him from employment following a hearing pursuant to Civil Service Law § 75. We reject petitioner's contention that the determination is not supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-182). Rather, we conclude that the evidence presented at the hearing included "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*id.* at 180). Contrary to the further contention of petitioner, he was not denied his right to a fair hearing by the admission of hearsay evidence (*see generally Matter of Gray v Adduci*, 73 NY2d 741, 742; *Matter of Gates of Goodness & Mercy v Johnson*, 49 AD3d 1295).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

135

CA 08-01743

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

DIANE MARTIN-GRANDE, PLAINTIFF-RESPONDENT,

V ORDER

PAUL J. GRANDE, DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (LAURA W. SMALLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

MULDOON & GETZ, ROCHESTER (GARY MULDOON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered November 5, 2007 in a divorce action. The judgment, inter alia, equitably distributed the marital property of the parties.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

138

CA 08-01587

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

OLIPHANT FINANCIAL CORPORATION, PLAINTIFF-RESPONDENT,

V ORDER

JAMES T. ANGELO, DEFENDANT-APPELLANT.

GREGORY L. DOLAN, HONEOYE, FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered May 30, 2007 in an action for breach of contract. The order granted the motion of plaintiff for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Murphy v Niagara Frontier Transp. Auth.*, 207 AD2d 1038; *see also* CPLR 5513 [a]).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

143

KA 07-02091

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN WHITLOCK, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered August 3, 2007. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [2]). We agree with defendant that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence under the circumstance of this case (*see generally People v Lopez*, 6 NY3d 248, 256), inasmuch as "defendant may have erroneously believed that the right to appeal is automatically extinguished upon entry of a guilty plea" (*People v Moyett*, 7 NY3d 892, 893). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

144

KA 07-02328

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CLAYTON E. HERRING, DEFENDANT-APPELLANT.

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

CLAYTON E. HERRING, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Niagara County Court (Angelo J. Morinello, J.), rendered August 17, 2007. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

145

KA 07-02487

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN EDWARDS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered November 20, 2007. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree and course of sexual conduct against a child 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 rape in the first degree (Penal Law § 130.35 [1]) and course of sexual conduct against a child in the first degree (§ 130.75 [1] [b]). We agree with defendant that his waiver of the right to appeal was invalid because it is unclear on the record before us whether he "may have erroneously believed that the right to appeal is automatically extinguished upon entry of a guilty plea" (*People v Moyett*, 7 NY3d 892, 893). Although the waiver thus does not encompass defendant's challenge to the severity of the sentence (*see generally People v Lopez*, 6 NY3d 248, 256), we reject that challenge. "Defendant was sentenced in accordance with the plea bargain and should be bound by its terms" (*People v McGovern*, 265 AD2d 881, *lv denied* 94 NY2d 882; *see People v Lake*, 45 AD3d 1409, *lv denied* 10 NY3d 767). Finally, defendant failed to preserve for our review his contention that County Court failed to take into account the jail time credit to which he is entitled in determining the duration of the order of protection (*see People v Nieves*, 2 NY3d 310, 315-317), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

146

KA 05-00426

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRAVIOUS J. SMITH, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered August 23, 2004. The judgment convicted defendant, upon a jury verdict, of 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 criminal possession of a weapon in the second degree (Penal Law § 265.03 [former (2)]), defendant contends that the verdict is against the weight of the evidence. 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 conclude that defendant's contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495). We accord great deference to the jury's resolution of credibility issues (*see People v Catlin*, 41 AD3d 1199, 1200, *lv denied* 9 NY3d 873), and here "[t]he jury was entitled to credit the testimony of the witness[] who indicated that [she] observed defendant in possession of a loaded weapon and believed, under the circumstances, that defendant intended to use the weapon against another" (*People v Hunter*, 46 AD3d 1417, 1417, *lv denied* 10 NY3d 812). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

147

KA 08-00161

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTWON R. WILSON, DEFENDANT-APPELLANT.

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

MICHAEL J. VIOLANTE, PUBLIC DEFENDER, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Peter L. Broderick, Sr., J.), rendered August 21, 2007. 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 (*see People v Lococo*, 92 NY2d 825, 827).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

149

KA 08-00485

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ALICIA TYGER, DEFENDANT-APPELLANT.

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

EDWARD M. SHARKEY, DISTRICT ATTORNEY, LITTLE VALLEY (JOHN C. LUZIER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered January 14, 2008. The judgment convicted defendant, upon her plea of guilty, of unauthorized use of a vehicle in the third degree.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

150

KA 07-00719

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND F. NEWTON, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered March 8, 2007. The judgment convicted defendant, upon a jury verdict, of assault in the second degree, reckless endangerment in the second degree, and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]), reckless endangerment in the second degree (§ 120.20), and criminal possession of a weapon in the third degree (§ 265.02 [1]). We reject the contention of defendant that he was denied a fair trial by the prosecutor's comments during summation with respect to his postarrest silence. Defendant waived his *Miranda* rights and chose to speak to the police about the charges, and the prosecutor thus was entitled to impeach his credibility at trial with respect to omissions from his statements to the police (*see generally People v Savage*, 50 NY2d 673, 678-682, *cert denied* 449 US 1016; *People v Thomas*, 287 AD2d 326, *lv denied* 97 NY2d 688; *People v Mosby*, 239 AD2d 938, *lv denied* 90 NY2d 942). Contrary to defendant's further contention, County Court properly refused to suppress physical evidence based on its determination that the officers had probable cause to arrest defendant pursuant to the fellow officer rule (*see People v Massey*, 49 AD3d 462, *lv denied* 10 NY3d 866; *People v Whitehead*, 23 AD3d 695, 696, *lv denied* 6 NY3d 840; *see generally People v Ketcham*, 93 NY2d 416, 419-420). Finally, the court properly denied as untimely the CPL 330.30 motion of defendant seeking, inter alia, to renew his pretrial request for the suppression of physical evidence (*see* CPL 710.40 [4]; *People v Taylor*, 36 AD3d 562, 562-563, *lv denied* 8 NY3d 991). In any event, there was no basis for the court to reconsider its suppression ruling because any discrepancy between the testimony at trial and the

suppression hearing was insignificant and "could not have affected the court's suppression ruling" (*Taylor*, 36 AD3d at 563).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

151

KA 05-02578

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GUILLERMO TORRES, III, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JESSICA BIRKAHN HOUSEL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered October 13, 2005. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree and assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Supreme Court, Monroe County, for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]). We agree with defendant that reversal and vacatur of the plea is required inasmuch as Supreme Court sentenced him to a period of postrelease supervision but failed to advise him thereof at the time of the plea (*see People v Louree*, 8 NY3d 541, 545-546; *People v Catu*, 4 NY3d 242, 245; *People v Trisvan*, 53 AD3d 1057). In light of our determination, we need not address defendant's remaining contention.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

152

KA 07-01083

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM MOORE, DEFENDANT-APPELLANT.

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

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (DOUGLAS A. GOERSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Timothy J. Drury, J.), rendered June 14, 2006. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to the contention of defendant, we conclude that his waiver of the right to appeal is valid. "Upon our review of the plea allocution, we are satisfied that 'defendant's waiver of the right to appeal reflects a knowing and voluntary choice' " (*People v Hoeft*, 42 AD3d 968, 969, *lv denied* 9 NY3d 962, quoting *People v Callahan*, 80 NY2d 273, 280). Although the contention of defendant that his plea was not knowingly and intelligently entered survives his waiver of the right to appeal, that contention is not preserved for our review inasmuch as defendant failed to move to withdraw his plea or to vacate the judgment of conviction (*see People v Smith*, 48 AD3d 1171, *lv denied* 10 NY3d 964). This case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666). There is no support in the record for defendant's further contention that County Court was unaware that it had the discretion to impose a shorter period of postrelease supervision (*cf. People v Stanley*, 309 AD2d 1254, 1255). Finally, the challenge by defendant to the severity of the sentence is encompassed by his valid waiver of the right to appeal (*see People v Lopez*, 6 NY3d 248, 256).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

155

CA 08-01631

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

JACK A. CARDINELL, PLAINTIFF-APPELLANT,

V ORDER

CHERUNDOLO, BOTTAR & LEONE, P.C., AND
EDWARD S. LEONE, DEFENDANTS-RESPONDENTS.

DONOHUE, SABO, VARLEY & HUTTNER, LLP, ALBANY (BRUCE S. HUTTNER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROCHE, CORRIGAN, MCCOY & BUSH, PLLC, ALBANY (SCOTT W. BUSH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered January 10, 2008 in a legal malpractice action. The order denied the motion of plaintiff for partial summary judgment, granted the cross motion of defendants for summary judgment and dismissed the complaint.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

156

CA 08-01088

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

GORDON S. BLACK, PLAINTIFF-RESPONDENT,

V ORDER

LONNY H. DOLIN, DEFENDANT-APPELLANT.

INCLIMA LAW FIRM, ROCHESTER (CHARLES P. INCLIMA OF COUNSEL), FOR DEFENDANT-APPELLANT.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (RICHARD GLEN CURTIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered July 25, 2007 in a divorce action. The order clarified the equitable distribution of the parties' marital assets.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

157

CA 08-01546

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

RONALD J. RAUX, JR. AND MELISSA RAUX,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF UTICA, DEFENDANT-RESPONDENT.

GEORGE FARBER ANEY, HERKIMER, FOR PLAINTIFFS-APPELLANTS.

LINDA SULLIVAN FATATA, CORPORATION COUNSEL, UTICA (ARMOND J. FESTINE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered October 22, 2007 in a personal injury action. The order granted defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by plaintiff Ronald J. Raux, Jr. when he stepped into an unmarked hole on a golf course operated and maintained by defendant. The hole, which was about 18 to 24 inches deep, was located 2 to 3 feet from the fringe of the green on the 12th hole of the golf course and was camouflaged by the 2½-inch rough. We conclude that Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint. Defendant met its initial burden on the motion by establishing that it did not create the allegedly dangerous condition and did not have actual or constructive notice of it (*see Wesolek v Jumping Cow Enters., Inc.*, 51 AD3d 1376, 1377; *see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838). Plaintiffs' speculation with respect to the source of the hole is insufficient to raise a triable issue of fact to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562; *Rachlin v Volvo Cars of N. Am.*, 289 AD2d 981, 982). Contrary to the contention of plaintiffs, they failed to defeat the motion by their submission of a hearsay statement made by a person who allegedly overheard a golf course employee comment that the hole in question was "a drainage hole that [the course] had dug." Although hearsay evidence may be considered in opposition to a motion for summary judgment, it is by itself insufficient to defeat such a motion (*see Gier v CGF Health Sys.*, 307 AD2d 729, 730; *Arnold v New York City Hous. Auth.*, 296 AD2d 355, 356), and here the sole basis for

plaintiffs' opposition to the motion, other than speculation, was that hearsay statement.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

158

CA 07-02244

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

WINDSONG LANE FARMS, PLAINTIFF-RESPONDENT,

V ORDER

TELMARK, LLC, WELLS FARGO FINANCIAL LEASING, INC., AND RONALD POPE, DEFENDANTS-APPELLANTS.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (JULIAN B. MODESTI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HISCOCK & BARCLAY, LLP, SYRACUSE (GABRIEL M. NUGENT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (Joseph D. McGuire, J.), entered September 26, 2007 in an action for breach of contract and negligence. The order denied defendants' motion for summary judgment.

Now, upon reading and filing the stipulation to withdraw appeal signed by the attorneys for the parties on December 2 and 8, 2008,

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

160

CA 08-01841

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

EDWIN CONKLIN, PLAINTIFF-RESPONDENT,

V ORDER

MICHAEL BONGIOVANNI AND MARGARET BONGIOVANNI,
DEFENDANTS-APPELLANTS.

LAW OFFICES OF MICHAEL M. EMMINGER, SYRACUSE (MATTHEW J. ROE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ADORANTE, TURNER & ASSOCIATES, CAMILLUS (ANTHONY P. ADORANTE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, J.), entered November 29, 2007 in a personal injury action. The order denied the motion of defendants for summary judgment.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

162.1

TP 08-01484

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

IN THE MATTER OF PAUL HANSON, PETITIONER,

V ORDER

A. LABRIOLA, DEPUTY SUPERINTENDENT FOR SECURITY, ORLEANS CORRECTIONAL FACILITY, RESPONDENT.

LAW OFFICE OF TOM TERRIZZI, ITHACA (TOM TERRIZZI OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Orleans County [James H. Dillon, J.], entered July 11, 2008) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

163

KA 05-02671

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHRISTOPHER C. HOLLINS, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JESSICA BIRKAHN HOUSEL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered September 28, 2005. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

164

KA 08-00687

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEBORAH K. SCHENA, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (KEVIN T. FINNELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered January 3, 2008. The judgment convicted defendant, upon her plea of guilty, of driving while intoxicated, a class E felony.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of driving while intoxicated as a felony (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (i)]). We note that the certificate of conviction incorrectly recites that a fine of $1,500 was imposed on the conviction, and it must therefore be amended to reflect that the fine imposed was $1,050 (*see generally People v Saxton*, 32 AD3d 1286). We reject defendant's contention that the fine imposed is unduly harsh or severe.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

165

KA 07-02563

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY M. DOZIER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered August 8, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). We reject the challenge by defendant to the validity of his waiver of the right to appeal. Supreme Court was not required to engage in a particular litany to ensure that defendant's waiver of the right to appeal was voluntary, knowing and intelligent (*see People v Callahan*, 80 NY2d 273, 283; *People v Pointer*, 43 AD3d 1413, *lv denied* 9 NY3d 1037), and thus the waiver of the right to appeal was not rendered invalid based on the court's failure to require defendant to articulate the waiver in his own words (*see People v Ludlow*, 42 AD3d 941). The valid waiver by defendant of the right to appeal includes the waiver of his right to invoke our "interest-of-justice jurisdiction to reduce the sentence" (*People v Lopez*, 6 NY3d 248, 255).

Although the further contention of defendant that his plea was coerced and thus was not voluntary survives his valid waiver of the right to appeal (*see People v Adams*, 57 AD3d 1385; *People v Thomas*, 56 AD3d 1240), defendant did not move to withdraw the plea or to vacate the judgment of conviction and thus failed to preserve his contention for our review (*see People v Russell*, 55 AD3d 1314; *People v Elardo*, 52 AD3d 1272, *lv denied* 11 NY3d 787, 788). In any event, that contention lacks merit. The court's statement informing defendant of the sentence that he could receive in the event that he went forward

with a suppression hearing and trial did not constitute a threat to impose a greater sentence unless defendant pleaded guilty to the crime charged (*see People v Min*, 249 AD2d 130, 131-132; *cf. People v Beverly*, 139 AD2d 971). Rather, the court's statement was a proper explanation of defendant's sentence exposure in the event that defendant chose not to plead guilty (*see People v Pagan*, 297 AD2d 582, *lv denied* 99 NY2d 562). Furthermore, "[t]he fact that [the court] would not extend the [sentencing] offer once the suppression hearing began does not support the inference that the plea was coerced" (*People v Santalucia*, 19 AD3d 806, 807, *lv denied* 5 NY3d 856).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

166

KA 06-02819

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BOBBY M. COWARD, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (GERALD T. BARTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered July 10, 2006. The judgment convicted defendant, upon his plea of guilty, of attempted murder 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 murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant challenges the sufficiency of factual allegations in the indictment on the ground that they failed to state a crime. Even assuming, arguendo, that defendant's challenge is jurisdictional in nature and thus is properly before us, i.e., that it is "a nonwaivable jurisdictional prerequisite to a criminal prosecution" (*People v Mitchell*, 10 NY3d 819, 820; *see People v Iannone*, 45 NY2d 589, 600-601), we conclude that the count to which defendant pleaded guilty provided him "with fair notice of the nature of the charge[] against him and the time and place of the conduct, so as to enable him to prepare an adequate defense" (*People v Watt*, 192 AD2d 65, 67-68, *affd* 84 NY2d 948; *see Iannone*, 45 NY2d at 594).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

167

KA 07-02684

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FREDERICK K. ROYCE, DEFENDANT-APPELLANT.

DEL ATWELL, EAST HAMPTON, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered September 24, 2007. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

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 felony driving while intoxicated (Vehicle and Traffic Law § 1192 [2]; § 1193 [1] [c] [former (i)]). To the extent that it appears that defendant is challenging the validity of his waiver of the right to appeal, we reject that challenge (*see generally People v Lopez*, 6 NY3d 248, 256). The valid waiver by defendant of the right to appeal encompasses his challenge to the severity of the sentence (*see id.*). Further, insofar as the contention of defendant that he was denied effective assistance of counsel survives his guilty plea and his waiver of the right to appeal, we conclude that defendant failed to preserve his contention for our review because he did not move to withdraw his plea or to vacate the judgment of conviction on that ground (*see People v Fairman*, 38 AD3d 1346, *lv denied* 9 NY3d 865). In any event, we conclude that defendant's contention lacks merit (*see generally People v Ford*, 86 NY2d 397, 404).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

170

KA 07-02648

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT W. ELLSWORTH, DEFENDANT-APPELLANT.

GOODELL & GOODELL, JAMESTOWN (R. THOMAS RANKIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (TRACEY A. BRUNECZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered June 25, 2007. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [a]). We conclude on the record before us that, contrary to the contention of defendant, his plea was knowing, voluntary, and intelligent (*see generally People v Harris*, 61 NY2d 9, 16-19).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

173

KA 07-02185

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH K. MALLABER, DEFENDANT-APPELLANT.

STEPHEN BIRD, ROCHESTER, FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH (PATRICIO JIMENEZ OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Steuben County Court (Marianne Furfure, J.), entered September 12, 2007. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Following a SORA hearing, defendant was presumptively classified as a level two risk based on a total risk factor score of 85. County Court then determined, however, that an upward departure to a level three risk was warranted based on the testimony of defendant's mental health therapist, who diagnosed defendant as having several psychological disorders.

We reject defendant's contention that the court's upward departure to a level three risk is not supported by clear and convincing evidence because the mental health therapist testified that the psychological disorders of defendant could affect his ability to control his sexual impulses, but he did not testify that they would in fact do so. The mental health therapist testified that defendant suffered from a sexual disorder, not otherwise specified, that the disorder of pedophilia had not been ruled out, that the sexual disorder was at least partially the reason for the maladaptive behavior of defendant, and that his psychological abnormalities could affect his ability to control his sexual impulses. We thus conclude on the record before us that, based on the totality of that testimony, defendant's psychological abnormalities are causally related to any risk of reoffense, and thus that there is clear and convincing evidence of special circumstances to support the court's upward departure from defendant's presumptive risk level (*see generally*

People v Burgos, 39 AD3d 520, 521; *People v Perkins*, 35 AD3d 1167; *People v Zehner*, 24 AD3d 826, 827).

In view of our decision, it is unnecessary to address defendant's remaining contention.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

174

CAF 07-01578

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

IN THE MATTER OF ARLENE K. CUNNINGHAM,
PETITIONER-RESPONDENT,

V ORDER

LOUIS J. JACKSON, II, RESPONDENT-APPELLANT,
DEBRA K. BEACH, RESPONDENT-RESPONDENT,
ET AL., RESPONDENT.

ANN LEONARD ANDERSON, SPRING BROOK, FOR RESPONDENT-APPELLANT.

RICHARD L. SOTIR, JR., LAW GUARDIAN, JAMESTOWN, FOR MARCEL J.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered July 9, 2007 in a proceeding pursuant to Family Court Act article 6. The order modified a prior order of custody and visitation.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

176

CAF 08-00692

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

IN THE MATTER OF MARIANNE LOWERY,
PETITIONER-RESPONDENT,

V ORDER

ONI COLE, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered March 14, 2008. The order, among other things, adjudged that respondent willfully failed to obey an order of support.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

177

CAF 07-01801

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

IN THE MATTER OF JASON A. CHABOT,
PETITIONER-APPELLANT,

V ORDER

LISA A. CHABOT, RESPONDENT-RESPONDENT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (NEAL J. MAHONEY OF COUNSEL), FOR PETITIONER-APPELLANT.

WENDY S. SISSON, LAW GUARDIAN, GENESEO, FOR AISHIALYN C.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered August 22, 2007 in a proceeding pursuant to Family Court Act article 6. The order, among other things, dismissed the petition.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

180

CA 07-02704

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

JAMES LUPPINO, SUCCESSOR ADMINISTRATOR OF THE ESTATE OF MARIA V. LUPPINO, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM E. O'BRIEN, M.D., ET AL., DEFENDANTS, AND CATHOLIC HEALTH SYSTEM, DOING BUSINESS AS KENMORE MERCY HOSPITAL, DEFENDANT-APPELLANT. (APPEAL NO. 1.)

DAMON & MOREY LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered April 19, 2007. The order, among other things, denied that part of the cross motion of defendant Catholic Health System, doing business as Kenmore Mercy Hospital, for a protective order.

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

Memorandum: In appeal No. 1, defendant Catholic Health System, doing business as Kenmore Mercy Hospital (KMH), appeals from an order that, inter alia, granted that part of plaintiff's motion to compel the production of four documents referenced in the contract between KMH and Elder Medical Services, P.C. (contract) and denied that part of KMH's cross motion for an order of protection with respect to those documents. In appeal No. 2, KMH appeals from an order denying its motion for, inter alia, leave to renew that part of its cross motion and its opposition to that part of plaintiff's motion with respect to the four documents referenced in the contract. We conclude with respect to the order in appeal No. 1 that Supreme Court did not abuse its discretion by compelling KMH to produce the four documents referenced in the contract. Those documents were within the scope of plaintiff's discovery requests and detailed the policy and procedures concerning the treatment of patients at KMH, and thus they are relevant to the allegations of medical malpractice in plaintiff's complaint (*see Kern v City of Rochester*, 261 AD2d 904, 905).

We conclude with respect to the order in appeal No. 2 that the court properly denied that part of the motion for leave to renew. The affidavit of KMH's Vice President of Compliance and Administrative Services submitted in support thereof failed to present new facts and, in any event, KMH failed to establish a reasonable justification for its failure to present that affidavit in support of its cross motion or in opposition to plaintiff's motion (*see Blazynski v A. Gareleck & Sons, Inc.*, 48 AD3d 1168, 1170, *lv dismissed in part and denied in part* 11 NY3d 825; *Robinson v Consolidated Rail Corp.*, 8 AD3d 1080).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

181

CA 08-00776

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

JAMES LUPPINO, SUCCESSOR ADMINISTRATOR OF THE ESTATE OF MARIA V. LUPPINO, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM E. O'BRIEN, M.D., ET AL., DEFENDANTS, AND CATHOLIC HEALTH SYSTEM, DOING BUSINESS AS KENMORE MERCY HOSPITAL, DEFENDANT-APPELLANT. (APPEAL NO. 2.)

DAMON & MOREY LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered March 27, 2008. The order denied the motion of defendant Catholic Health System, doing business as Kenmore Mercy Hospital, for, inter alia, leave to renew.

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

Same Memorandum as in *Luppino v O'Brien* ([appeal No. 1] ___ AD3d ___ [Feb. 6, 2009]).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

183

CA 08-01627

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

TAMMY IGLESIAS, AS MOTHER AND NATURAL GUARDIAN
OF TYLER MITSCHANG, AND TAMMY IGLESIAS,
INDIVIDUALLY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ANNE BROWN, VINCENT BROWN, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

WATSON, BENNETT, COLLIGAN, JOHNSON & SCHECHTER, LLP, BUFFALO (MELISSA A. DAY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROSENTHAL, SIEGEL & MUENKEL, LLP, BUFFALO (PETER M. KOOSHOIAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered May 15, 2008 in a personal injury action. The order, insofar as appealed from, denied the motion of defendants Anne Brown and Vincent Brown seeking to bifurcate the trial.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries sustained by her son when a dog bit him. At the time of the incident, plaintiff's son was at premises owned by Anne Brown and Vincent Brown (defendants) and leased to the two remaining defendants, who owned the dog. Contrary to defendants' contention, we conclude that Supreme Court properly denied their motion seeking to bifurcate the trial. Generally, issues of liability and damages in a negligence action are distinct and severable and should be tried separately. An exception to that general rule arises, however, where the injuries sustained "have 'an important bearing' on the issue of liability" (*Tate v Stevens*, 275 AD2d 1039, 1040, quoting *Parmar v Skinner*, 154 AD2d 444, 445), and that exception is applicable here. Contrary to defendants' contention, "the nature, extent and gravity of the injuries sustained [by plaintiff's son] has an important bearing on the issue of liability insofar as it [is] relevant to the jury's assessment of the dog's propensities" (*Lynch v Nacewicz*, 126 AD2d 708, 709; *see also Hernandez v Carter & Parr Mobile*, 224 AD2d 586, 587).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

184

CA 08-01595

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

IN THE MATTER OF THE ARBITRATION BETWEEN
TOWN OF CHEEKTOWAGA, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

CHEEKTOWAGA POLICE CLUB, INC.,
RESPONDENT-RESPONDENT.

PHILLIPS LYTLE LLP, BUFFALO (JAMES D. DONATHEN OF COUNSEL), FOR PETITIONER-APPELLANT.

ANTHONY J. DEMARIE, WILLIAMSVILLE, FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 30, 2008 in a proceeding pursuant to CPLR article 75. The order and judgment denied the petition for a permanent stay of arbitration.

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

Memorandum: Petitioner appeals from an order and judgment denying its petition for a permanent stay of arbitration pursuant to CPLR 7503 (b). We affirm. Respondent, the representative for Cheektowaga police officers below the rank of lieutenant, filed a demand for arbitration concerning petitioner's decision to promote one officer to the rank of lieutenant instead of a second officer, based on the second officer's residence outside the Town of Cheektowaga. Because neither party challenges the propriety of arbitrating such a dispute, the only issue before us is whether respondent's claim falls within the scope of the parties' collective bargaining agreement (CBA), and we conclude that it does inasmuch as it is reasonably related to the subject matter of the CBA (*see Matter of City of Watertown v Watertown Firefighters, Local 191*, 6 AD3d 1095; *Matter of Odessa-Montour Cent. School Dist. [Odessa-Montour Teachers Assn.]*, 271 AD2d 931, 932). "Where, as here, there is a broad arbitration clause and a 'reasonable relationship' between the subject matter of the dispute and the general subject matter of the parties' [CBA], the court 'should rule the matter arbitrable, and the arbitrator will then make a more exacting interpretation of the precise scope of the substantive provisions of the [CBA], and whether the subject matter of the dispute fits within them' " (*Matter of Van Scoy [Holder]*, 265 AD2d 806, 807-808, quoting *Matter of Board of Educ. of Watertown City*

School Dist. [Watertown Educ. Assn.], 93 NY2d 132, 143).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

185

TP 08-00759

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF DAVID RHODES, PETITIONER,

V ORDER

JOHN B. LEMPKE, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENT.

DAVID RHODES, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered April 4, 2008) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated an inmate rule.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

186

KA 06-02853

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JACOB A. GARDNER, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Monroe County Court (John R. Schwartz, A.J.), rendered July 18, 2006. Defendant was resentenced to a determinate term of incarceration of 12 years and a five-year period of postrelease supervision upon his conviction of attempted kidnapping in the second degree.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

187

KA 07-02424

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEAN D. CLIFFORD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Niagara County (Sara S. Sperrazza, J.), rendered August 15, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree (Penal Law §§ 110.00, 265.02 [7]). Defendant knowingly and voluntarily waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256), and that valid waiver encompasses his challenge to the severity of the sentence (*see id.*). Moreover, defendant failed to move to withdraw the plea or to vacate the judgment of conviction and thus has failed to preserve for our review his challenge to the voluntariness of his plea (*see People v Collins*, 45 AD3d 1472, *lv denied* 10 NY3d 861; *People v DeJesus*, 248 AD2d 1023, *lv denied* 92 NY2d 878). In any event, we conclude that defendant's challenges are without merit.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

188

KA 06-03549

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT MOTHERSELL, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (GERALD T. BARTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROBERT MOTHERSELL, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered October 27, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: On appeal from a judgment convicting him, upon his guilty plea, of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]), defendant contends that County Court erred in refusing to suppress a plastic bag containing crack cocaine recovered from his person by a police officer pursuant to a search warrant. We reject defendant's contention that the search warrant was insufficiently specific because it permitted the search of "any and all person(s) present" at the apartment designated in the warrant. "[S]earch warrants that direct a search of a particular place . . . 'may also direct a search of any person present thereat or therein' . . ., as long as the search warrant application establishes probable cause for the search" (*People v Ming*, 35 AD3d 962, 965, *lv denied* 8 NY3d 883). Contrary to defendant's further contention, the warrant application established probable cause to believe that the apartment was being used for the sale of controlled substances and "that anyone present was involved in the ongoing illegal activity" (*People v Neish*, 232 AD2d 744, 746, *lv denied* 89 NY2d 927; *see People v Williams*, 284 AD2d 564, 565, *lv denied* 96 NY2d 909).

The evidence at the suppression hearing supports the court's determination that the officers were justified in conducting a strip search of defendant (*see Williams*, 284 AD2d at 565). In addition,

"[d]espite defendant's attempts to characterize this search as a body cavity search, the record fails to support this argument; the bag was visibly sticking out from between [defendant's] buttocks, [and was] not inserted into a body cavity such as defendant's rectum" (*People v Walker*, 27 AD3d 899, 901, *lv denied* 7 NY3d 764). Finally, the contention of defendant that he was denied effective assistance of counsel is not reviewable on direct appeal to the extent that it concerns matters outside the record on appeal (*see People v Joyner*, 19 AD3d 1129). Defendant's contention concerning the alleged denial of effective assistance of counsel does not otherwise survive the guilty plea because "[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, *lv denied* 93 NY2d 851).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

189

KA 07-02655

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JONATHAN MCENNIS, DEFENDANT-APPELLANT.

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

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered November 28, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

193

KA 07-00774

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MILTON LEE, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (ESTHER COHEN LEE OF COUNSEL), FOR DEFENDANT-APPELLANT.

MILTON LEE, DEFENDANT-APPELLANT PRO SE.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Oneida County (Barry M. Donalty, A.J.), entered March 7, 2007. The order denied the motion of defendant pursuant to CPL article 440 to vacate the judgment convicting him of murder in the second degree.

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

Memorandum: Defendant appeals from an order denying his motion pursuant to CPL 440.10 (1) (h) seeking to vacate the judgment convicting him of depraved indifference murder (Penal Law § 125.25 [2]). Defendant contended in his motion papers that, by virtue of changes in the law effectuated by *People v Suarez* (6 NY3d 202), the evidence adduced at trial was legally insufficient to support his conviction. Supreme Court erred in denying the motion pursuant to CPL 440.10 (2) (a) as having been "previously determined on the merits," inasmuch as that contention was not raised, much less decided on the merits, upon defendant's direct appeal from the judgment of conviction (*People v Lee*, 6 AD3d 1235, *lv denied* 3 NY3d 740). Nevertheless, we conclude that the motion was properly denied because the Court of Appeals has determined that "the existing law should not be applied on collateral review to defendants whose convictions became final prior to our new interpretation of the law of depraved indifference murder," and defendant's conviction became final prior to the decision of the Court of Appeals in *Suarez* (*People v Jean-Baptiste*, 11 NY3d 539, ___). In both his main and pro se supplemental briefs, defendant contends for the first time that the dispositive changes in the law were effectuated not by *Suarez*, but by *People v Payne* (3 NY3d 266, *rearg*

denied 3 NY3d 767), and that *Payne* was decided before his conviction was final. Even assuming, arguendo, that defendant's contention is properly before us, we conclude that defendant is not entitled to relief pursuant to CPL 440.10 inasmuch as sufficient facts appear in the record to have permitted review of defendant's challenge to the legal sufficiency of the evidence, but defendant unjustifiably failed to raise that challenge on his direct appeal (*see generally* CPL 440.10 [2] [c]; *People v Jossiah*, 2 AD3d 877, *lv denied* 2 NY3d 742).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

200

CAF 08-00535

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF HENRY V. SCHULTZ,
PETITIONER-APPELLANT,

V ORDER

STEPHANIE LYNESS, RESPONDENT-RESPONDENT.

ANDREW M. DUNN, ONEIDA, FOR PETITIONER-APPELLANT.

KRISTEN T. SHAHEEN, LAW GUARDIAN, NEW HARTFORD, FOR ADAM M.S.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered January 8, 2008 in a proceeding pursuant to Family Court Act article 6. The order dismissed the amended petition.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

201

CAF 07-01072

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF KASEEM J. AND ROKIEM J.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, ORDER
PETITIONER-RESPONDENT;

JAMAL J., RESPONDENT-APPELLANT.

TYSON BLUE, MACEDON, FOR RESPONDENT-APPELLANT.

DANIEL M. DELAUS, JR., COUNTY ATTORNEY, ROCHESTER (PAUL N. HUMPHREY OF COUNSEL), FOR PETITIONER-RESPONDENT.

FAUNA M. PAPPALARDO, LAW GUARDIAN, FAIRPORT, FOR KASEEM J. AND ROKIEM J.

Appeal from an order of the Family Court, Monroe County (Gail A. Donofrio, J.), entered April 27, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

202

CA 08-01460

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF THE APPLICATION OF
JAMES R. GOUGH, PETITIONER-RESPONDENT,
FOR THE APPOINTMENT OF A GUARDIAN FOR
JEAN G.S., AN ALLEGED INCAPACITATED PERSON, RESPONDENT.

DIBBLE & MILLER, P.C., APPELLANT.

MEMORANDUM AND ORDER

DIBBLE & MILLER, P.C., ROCHESTER (G. MICHAEL MILLER OF COUNSEL), APPELLANT PRO SE.

WOODS OVIATT GILMAN LLP, ROCHESTER (CHRISTIAN N. VALENTINO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered April 30, 2008 in a proceeding pursuant to Mental Hygiene Law article 81. The order denied the order to show cause of Dibble & Miller, P.C.

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

Memorandum: Petitioner commenced this proceeding seeking the appointment of a guardian for his mother, an alleged incapacitated person (AIP). Appellant, a nonparty law firm, appeals from an order denying its order to show cause seeking, inter alia, to vacate that part of a prior order requiring appellant to refund $22,401.55 to the AIP's trust account. We note at the outset that, contrary to petitioner's contention, the order is appealable as of right. Even assuming, arguendo, that appellant moved by order to show cause for leave to reargue that part of the prior motion requiring it to reimburse the AIP's trust account, we note that Supreme Court in fact granted leave to reargue and, upon reargument, adhered to its prior decision, thus rendering the order appealable as of right (*see* CPLR 5701 [a] [2] [viii]; *Grasso v Schenectady County Pub. Lib.*, 30 AD3d 814, 816 n 1; *Marine Midland Bank v Fisher*, 85 AD2d 905).

We reject appellant's contention that the court erred in denying the order to show cause. A movant seeking to vacate a prior order pursuant to CPLR 5015 (a) must establish one of the statutory grounds, which include excusable default, newly discovered evidence, and fraud, misrepresentation, or other misconduct by an adverse party. It is the movant's burden "to show that the prior order[] should be set aside by submission of sufficient evidence supporting the grant of such relief"

(*Matter of Commissioner of Social Servs. of Ulster County v Powell*, 39 AD3d 946, 948, *lv dismissed* 9 NY3d 975, *rearg denied* 10 NY3d 737) and, here, appellant failed to meet that burden.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

206

CA 08-01755

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

KATHLEEN RUGGIO AND ROBERT RUGGIO, SR.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

PCCB, INC., DOING BUSINESS AS PORT CITY
CAFÉ & BAKERY, DEFENDANT,
LAURIE O'BRIEN AND WILLIAM O'BRIEN,
INDIVIDUALLY, DEFENDANTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, OSWEGO (DOUGLAS M. MCRAE OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

S. ROBERT WILLIAMS, PLLC, SYRACUSE (MICHELLE A. ELLSWORTH OF COUNSEL),
FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, A.J.), entered November 20, 2007 in a personal injury action. The order denied the motion of defendants Laurie O'Brien and William O'Brien for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by plaintiff Kathleen Ruggio when she bit into a foreign object in a sandwich purchased from a restaurant owned by defendant PCCB, Inc., doing business as Port City Café & Bakery (PCCB). Laurie O'Brien and William O'Brien (collectively, defendants) are shareholders of PCCB. Before discovery, defendants moved for summary judgment dismissing the amended complaint against them. Supreme Court properly denied the motion without prejudice. We agree with plaintiffs that discovery may uncover "facts essential to justify opposition" to the motion (CPLR 3212 [f]; *see Wright v Shapiro*, 16 AD3d 1042, 1043).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

210

KA 07-00151

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CENTRA, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KIMBERLY K. BROOKS, DEFENDANT-APPELLANT.

STEPHEN BIRD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered September 11, 2006. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [1]). Defendant failed to preserve for our review her contention that County Court erred in imposing an enhanced sentence based upon her failure to appear for sentencing (*see People v Perkins*, 291 AD2d 925, *lv denied* 98 NY2d 654; *People v Perry*, 252 AD2d 990, *lv denied* 92 NY2d 929), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

211

KA 06-02286

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CENTRA, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILFREDO BRITO, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (GERALD T. BARTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MATTHEW H. JAMES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered January 11, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the seventh 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 two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [2]) and one count of criminal possession of a controlled substance in the seventh degree (§ 220.03), defendant contends that his arrest was not based upon probable cause inasmuch as the People failed to satisfy the *Aguilar-Spinelli* test with respect to the citizen informant who provided the relevant information to the police. We reject that contention. "[T]he information provided by an identified citizen accusing another individual of the commission of a specific crime is sufficient to provide the police with probable cause to arrest" (*People v Williams*, 301 AD2d 543, *lv denied* 100 NY2d 589; *see People v Bingham*, 263 AD2d 611, 612, *lv denied* 93 NY2d 1014). The reliability and veracity of an identified citizen is presumed, particularly in light of "the criminal sanctions attendant upon falsely reporting . . . information to the authorities" (*People v Chipp*, 75 NY2d 327, 340, *cert denied* 498 US 833). Furthermore, the statement by the identified citizen informant that was against the informant's "own penal interest constituted reliable information for the purposes of supplying probable cause" (*People v Riggins*, 161 AD2d 813, 814, *lv denied* 76 NY2d 851, 863). We accord great deference to the determination of County Court crediting the testimony of the police officer concerning the information provided by the citizen informant (*see generally*

People v Prochillo, 41 NY2d 759, 761).

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

212

KA 07-01644

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CENTRA, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN L. ALLPORT, DEFENDANT-APPELLANT.

TULLY RINCKEY P.L.L.C., ALBANY (MATHEW B. TULLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered May 14, 2007. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of two counts of sexual abuse in the first degree (Penal Law § 130.65 [3]), defendant contends that his plea was coerced by defense counsel and thus was involuntary. Although that contention survives the waiver by defendant of the right to appeal, he failed to move to withdraw the plea or to vacate the judgment of conviction and thus failed to preserve that contention for our review (*see People v Aguayo*, 37 AD3d 1081, *lv denied* 8 NY3d 981; *People v DeJesus*, 248 AD2d 1023, *lv denied* 92 NY2d 878). The further contention of defendant that he was denied effective assistance of counsel survives his plea and waiver of the right to appeal inasmuch as he contends that the plea was coerced by defense counsel (*see People v Peterson*, 56 AD3d 1230), but that contention is belied by defendant's statements during the plea colloquy (*see People v Farley*, 34 AD3d 1229, *lv denied* 8 NY3d 880; *see also People v Nichols*, 21 AD3d 1273, 1274, *lv denied* 6 NY3d 757). Contrary to the contention of defendant, his waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

213

KA 06-02298

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CENTRA, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK BOYD, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (ESTHER COHEN LEE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered January 9, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, robbery in the first degree (four counts), criminal possession of a weapon in the second degree, and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of four counts of robbery in the first degree (Penal Law § 160.15 [1], [2], [3], [4]) and one count each of murder in the second degree (§ 125.25 [3]), criminal possession of a weapon in the second degree (§ 265.03 [former (2)]), and criminal possession of a weapon in the third degree (§ 265.02 [former (4)]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "The question of whether the defendant was acting under duress is primarily one of credibility, which is to be determined by the jury . . .[, and t]he jury's determination should be accorded great weight on appeal and should not be disturbed unless clearly unsupported by the record" (*People v Torres*, 158 AD2d 730, 731, *lv denied* 76 NY2d 744). Contrary to defendant's contention, County Court did not abuse its discretion in submitting to the jury the noninclusory concurrent counts of robbery in the first degree under Penal Law § 160.15 (2) and (4) (*see People v Davis*, 165 AD2d 610, 612, *lv denied* 78 NY2d 1010; *see also People v Kulakov*, 278 AD2d 519, 520-521, *lv denied* 96 NY2d 785, 9 NY3d 866).

Defendant failed to preserve for our review his contention that

the court erred in instructing the jurors on the statutory presumption set forth in section 265.15 (4) with respect to defendant's intent to commit the crime of criminal possession of a weapon in the second degree (*see People v Pulley*, 302 AD2d 899, *lv denied* 100 NY2d 565). 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]). By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant also failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction of criminal possession of a weapon in the third degree (*see People v Lane*, 7 NY3d 888, 889; *People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). Finally, the sentence is not unduly harsh or severe.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

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

214

KA 08-00018

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CENTRA, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS J. BELILE, DEFENDANT-APPELLANT.

RONALD C. VALENTINE, PUBLIC DEFENDER, LYONS (DAVID M. PARKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (JACQUELINE MCCORMICK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered October 18, 2005. The judgment convicted defendant, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the first degree, driving while intoxicated, a class E felony, and attempted forgery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, attempted forgery in the second degree (Penal Law §§ 110.00, 170.10 [3]). Defendant failed to preserve for our review his contention that County Court erred in enhancing the sentence without affording him the opportunity to withdraw his plea (*see People v VanDeViver*, 56 AD3d 1118), 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]; *cf. People v Waggoner*, 53 AD3d 1143, 1144; *People v Fomby*, 42 AD3d 894, 895). The sentence is not unduly harsh or severe.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

215

KA 07-00825

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CENTRA, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW MOORE, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered June 29, 2005. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the second degree (Penal Law § 160.10 [1]). Contrary to defendant's contention, County Court was not obligated to address the issue of youthful offender treatment at sentencing. The record establishes that defendant agreed to an enhanced sentence that did not include youthful offender treatment, in full satisfaction of new charges arising between the time of his plea and sentencing (*see People v Hopper*, 39 AD3d 1030, 1031; *see also People v Wise*, 29 AD3d 1216, *lv denied* 7 NY3d 852; *People v Sharlow*, 12 AD3d 724, 726, *lv denied* 4 NY3d 748). The enhanced sentence is not unduly harsh or severe.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

218

KA 06-01497

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CENTRA, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAUQERE FLAGG, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MATTHEW H. JAMES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered April 6, 2006. The judgment convicted defendant, upon a jury verdict, of assault 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 as a juvenile offender upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]). 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 conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, [we] must give '[g]reat deference . . . [to the] fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor' " (*People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831, quoting *Bleakley*, 69 NY2d at 495). It was for the jury to determine whether to credit the victim's testimony, and we see no reason to disturb the jury's credibility determination (*see id.*). The sentence is not unduly harsh or severe. We note, however, that the certificate of conviction incorrectly reflects that defendant was sentenced to an indeterminate term of incarceration of 3½ to 10 years, and it must therefore be amended to reflect that he was sentenced to an indeterminate term of incarceration of 3a to 10 years (*see generally People v Saxton*, 32 AD3d 1286).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

219

KA 06-01620

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CENTRA, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICKY FLEMMING, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Oneida County (Barry M. Donalty, A.J.), rendered May 19, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the third degree (Penal Law § 265.02 [former (4)]). Contrary to defendant's contention, Supreme Court properly refused to suppress evidence, including a handgun, seized by a police officer from defendant's person. After the vehicle in which defendant was a passenger was lawfully stopped for a traffic violation, defendant refused to move his hands in accordance with the officer's instructions to do so, thereby threatening the safety of the officer. The officer, who had been told by a fellow officer that defendant had previously carried a handgun, also observed a bulge in defendant's waistband. "Considering the totality of the circumstances . . ., there was an ample measure of reasonable suspicion necessary to justify" the officer's limited frisk for weapons (*People v Benjamin*, 51 NY2d 267, 271; *see People v Robinson*, 278 AD2d 808, 809, *lv denied* 96 NY2d 787; *see generally People v Prochilo*, 41 NY2d 759, 761-762). Contrary to defendant's further contention, "the five-year period of postrelease supervision is mandatory based on defendant's status as a second felony offender" (*People v McQuiller*, 19 AD3d 1043, 1045, *lv denied* 5 NY3d 808; *see People v Ware*, 28 AD3d 1124, 1125, *lv denied* 7 NY3d 852), and thus the sentence is not illegal.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

222

CA 08-01363

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CENTRA, AND PERADOTTO, JJ.

HELGA POREDA AND SIEGFRIED POREDA,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

AIMEE KROFSSIK, DEFENDANT-APPELLANT,
SEWKUMAR SOOKANAND AND GEMINI TRAFFIC
SALES, INC., DEFENDANTS-RESPONDENTS.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (MARK M. CAMPANELLA OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF JACOB P. WELCH, CORNING (JACOB P. WELCH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (MARK T. WHITFORD, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Yates County (W. Patrick Falvey, A.J.), entered June 19, 2008 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant Aimee Krofssik for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by plaintiff Helga Poreda in a motor vehicle accident. We reject the contention of Aimee Krofssik (defendant) that Supreme Court erred in denying her motion seeking summary judgment dismissing the complaint against her. According to plaintiffs, defendant was negligent, inter alia, by "walking out onto Route 54" after her vehicle slid partly off that road. Defendant met her initial burden on the motion by submitting her deposition testimony in which she stated that she did not enter the roadway (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In opposition to the motion, however, plaintiffs submitted a prior statement of defendant that was inconsistent with that deposition testimony. Where the "version of the accident [set forth by a witness] is inconsistent with either his [or her] own previous account or that of another witness, a triable question of fact [sufficient to defeat the motion] may be presented" (*Rodriguez v New York City Hous. Auth.*, 194 AD2d 460, 462; *see 6243 Jericho Realty Corp. v AutoZone, Inc.*, 27 AD3d 447, 449; *Krampen v Foster*, 242 AD2d 913, 915), and we conclude on the record

before us that plaintiffs raised a triable question of fact.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

226

CA 08-01645

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CENTRA, AND PERADOTTO, JJ.

COR ROUTE 5 COMPANY, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALFRED SARACENE, DEFENDANT-RESPONDENT.

MANNION & COPANI, SYRACUSE (RYAN L. ABEL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MELVIN & MELVIN, PLLC, SYRACUSE (WILLIAM J. LEBERMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered October 24, 2007. The order, among other things, denied plaintiff's motion for summary judgment in lieu of complaint.

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

Memorandum: Supreme Court properly denied plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213 seeking to recover the amount due on a promissory note executed by defendant. Although plaintiff met its initial burden by submitting the note and evidence of defendant's default (*see LaMar v Vasile* [appeal No. 4], 49 AD3d 1218; *Di Marco v Bombard Car Co., Inc.*, 11 AD3d 960), defendant raised a triable issue of fact with respect to his defense of contract modification (*see generally Rose v Spa Realty Assoc.*, 42 NY2d 338, 343; *Ford Motor Credit Co. v Sawdey*, 286 AD2d 972, 973).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

228

CA 07-02495

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CENTRA, AND PERADOTTO, JJ.

IN THE MATTER OF KENNETH FRIEDHABER,
PETITIONER,
ELIZABETH WAGNER, MARK MOORE, NADJA LASKA,
CYNTHIA A. BLAIR, AND KENNETH J. BLAIR,
PETITIONERS-APPELLANTS,

V ORDER

TOWN BOARD OF TOWN OF SHELDON, ZONING BOARD
OF APPEALS OF TOWN OF SHELDON AND SHELDON
ENERGY, LLC, RESPONDENTS-RESPONDENTS.

LAW OFFICE OF ARTHUR J. GIACALONE, EAST AURORA (ARTHUR J. GIACALONE OF COUNSEL), FOR PETITIONERS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), AND DIFILIPPO & FLAHERTY, EAST AURORA, FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Wyoming County (John M. Curran, J.), entered October 24, 2007 in a proceeding pursuant to CPLR article 78. The judgment, among other things, dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court (*Friedhaber v Town Bd. of Town of Sheldon*, 16 Misc 3d 1140[A], 2007 NY Slip Op 51772[U]).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

230

TP 08-01592

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

IN THE MATTER OF YUSEFF PARRIS, PETITIONER,

V ORDER

GLENN S. GOORD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT.

YUSEFF PARRIS, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Robert F. Julian, J.], entered December 18, 2007) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

231

KA 08-00628

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LOMA J. BURSHTYNSKY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered December 18, 2007. The judgment convicted defendant, upon her plea of guilty, of driving while intoxicated as a class E felony.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

232

KA 08-00373

PRESENT: MARTOCHE, J.P., FAHEY, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DEMAR GREEN, DEFENDANT-APPELLANT.

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

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered January 15, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

233

KA 07-00952

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ROCKY DECAPUA, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a sentence of the Monroe County Court (Richard A. Keenan, J.), rendered March 2, 2007. Defendant was sentenced upon his conviction of manslaughter in the first degree.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

236

KA 08-01597

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW J. WHEELER, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Joseph D. Valentino, J.), entered November 14, 2007. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). We reject the contention of defendant that Supreme Court violated his due process rights when it determined, sua sponte, that a departure from the presumptive risk level based upon the risk assessment instrument was warranted. The court adjourned the SORA hearing after advising defendant that it was considering an upward departure, thus protecting his due process rights by affording him notice and a meaningful opportunity to respond (*see generally People v Warren*, 42 AD3d 593, 594, *lv denied* 9 NY3d 810; *People v Jordan*, 31 AD3d 1196, *lv denied* 7 NY3d 714). Contrary to defendant's further contention, the statements in the presentence report constitute "reliable hearsay" (§ 168-n [3]). Those statements, moreover, provide clear and convincing evidence that an upward departure from the presumptive risk level is warranted based upon "an aggravating . . . factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [risk assessment] guidelines" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006]; *see People v Gandy*, 35 AD3d 1163; *People v Goodwin*, 35 AD3d 1285).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

237

KA 08-00686

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

THERESA PIERCE, DEFENDANT-APPELLANT.

DENNIS CLAUS, LIVERPOOL, FOR DEFENDANT-APPELLANT.

EDWARD M. SHARKEY, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cattaraugus County Court (Larry M. Himelein, J.), entered November 19, 2007. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

238

KA 05-01036

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY FOSTER, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered March 29, 2005. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant's contention, Supreme Court properly refused to suppress evidence obtained as the result of eavesdropping warrants. The information submitted by the police in support of the eavesdropping warrant applications, "tested in a practical and commonsense fashion in the context of the objectives of the investigation" (*People v Hafner*, 152 AD2d 961, 962), contained a sufficient "showing that normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried" (CPL 700.15 [4]). One objective of the eavesdropping warrants was to ascertain defendant's location, and the police officer's supporting affidavit set forth in detail the resistance of defendant's known associates in cooperating with the police (*see People v Palmeri*, 272 AD2d 968, 969, *lv denied* 95 NY2d 967; *Hafner*, 152 AD2d at 962), as well as the ineffectiveness of the surveillance methods previously employed (*see Hafner*, 152 AD2d at 962; *People v Quezada*, 145 AD2d 950; *People v Baris*, 116 AD2d 174, 187, *lv denied* 67 NY2d 1050). We also reject the contention of defendant that he was denied a fair trial by prosecutorial misconduct on summation. The prosecutor's comments during summation, viewed in light of defense counsel's summation, were "within the bounds of fair response to the defense counsel's attack on the credibility of the [prosecution] witnesses" (*People v Farrell*, 228 AD2d 693, 694, *lv denied* 88 NY2d

984; *see People v Melendez*, 11 AD3d 983, 984, *lv denied* 4 NY3d 888). In any event, those comments did not amount to a " 'deliberate and pervasive pattern of prosecutorial misconduct' " (*People v Dombrowski*, 163 AD2d 873, 875).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

239

KA 06-01216

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW GARDNER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (ROBERT P. RICKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MATTHEW H. JAMES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered March 10, 2006. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the second degree, sexual abuse in the third degree and endangering the welfare of a child.

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, criminal sexual act in the second degree (Penal Law § 130.45 [1]). We reject the contention of defendant that he was denied effective assistance of counsel based on defense counsel's failure to cross-examine the victim with respect to a prior inconsistent statement she made (*see People v Rodriguez*, 48 AD3d 312, *lv denied* 10 NY3d 939), and we conclude on the record before us that defendant received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). To the extent that defendant's contention is based on matters outside the record on appeal, it must be raised by way of a motion pursuant to CPL article 440 (*see People v Keith*, 23 AD3d 1133, 1134-1135, *lv denied* 6 NY3d 815).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

240

KA 07-01767

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAELJON H. LORD, DEFENDANT-APPELLANT.

CARR SAGLIMBEN LLP, OLEAN (JAY D. CARR OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered October 10, 2006. The judgment convicted defendant, upon a jury verdict, of rape in the second degree, criminal sexual act in the second degree, endangering the welfare of a child, and unlawfully dealing with a child in the first degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, rape in the second degree (Penal Law § 130.30 [1]), and endangering the welfare of a child (§ 260.10 [1]), defendant contends that County Court abused its discretion in failing, sua sponte, to order a competency evaluation before trial (*see* CPL 730.30 [1]; *People v Tortorici*, 92 NY2d 757, 765-766, *cert denied* 528 US 834; *People v Morgan*, 87 NY2d 878, 879-880). We reject that contention, inasmuch as the record is devoid of any indication that the court had "a 'reasonable ground for believing that [the] defendant [was] in such state of idiocy, imbecility or insanity that he [was] incapable of understanding the charge, indictment or proceedings or of making his defense' " (*Tortorici*, 92 NY2d at 765; *see People v Corney*, 303 AD2d 1006, *lv denied* 1 NY3d 570). We also reject the contention of defendant that the court deprived him of his right to a fair trial by admitting in evidence references to uncharged crimes. The references to those uncharged crimes were properly admitted in evidence to support the count charging endangering the welfare of a child (*see People v Keindl*, 68 NY2d 410, 421-422, *rearg denied* 69 NY2d 823; *People v Lemanski*, 217 AD2d 962). Defendant failed to preserve for our review his contention with respect to the alleged inaccuracy of information relied upon by the court in sentencing him (*see People v Leeson*, 299 AD2d 919, 920, *lv denied* 99 NY2d 560; *People v Washington*, 291 AD2d 780, *lv denied* 98 NY2d 682), 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, the sentence is not unduly harsh or severe.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

241

CAF 07-02573

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

IN THE MATTER OF LYSA L. MCLEOD,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JAMAR A. MCLEOD, RESPONDENT-RESPONDENT.

IN THE MATTER OF JAMAR A MCLEOD,
PETITIONER-RESPONDENT,

V

LYSA L. MCLEOD, RESPONDENT-APPELLANT.

SUSAN GRAY JONES, CANANDAIGUA, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

MARYBETH D. BARNET, CANANDAIGUA, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

M. KATHLEEN CURRAN, LAW GUARDIAN, CANANDAIGUA, FOR QUINTYN M. AND RYLAN M.

Appeal from an amended order of the Family Court, Ontario County (Stephen D. Aronson, J.), entered November 26, 2007 in a proceeding pursuant to Family Court Act articles 6 and 8. The amended order, inter alia, granted sole custody of the parties' children to respondent-petitioner, Jamar A. McLeod.

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

Memorandum: Family Court properly granted respondent-petitioner father's petition seeking sole custody of the parties' children. The court's determination following a hearing that the best interests of the children would be served by an award of sole custody to the father is entitled to great deference (*see Eschbach v Eschbach*, 56 NY2d 167, 173). We will not disturb that determination inasmuch as the record establishes that it is the product of "careful weighing of the appropriate factors" (*Matter of Pinkerton v Pensyl*, 305 AD2d 1113, 1114), and it has a sound and substantial basis in the record (*see Betro v Carbone*, 5 AD3d 1110; *Matter of Thayer v Ennis*, 292 AD23d 824).

We reject the contention of petitioner-respondent mother and the Law Guardian that the court erred in reconsidering its order to sequester witnesses at the hearing and, upon reconsideration, determining that it would admit the testimony of the children's paternal grandmother, who was present during testimony of other witnesses. The decision whether to sequester witnesses was within the court's discretion in the first instance (*see McLean v Ryan*, 157 AD2d 928, 931), and the court retained jurisdiction to reconsider its sequestration order during the course of the hearing (*see Lidge v Niagara Falls Mem. Med. Ctr.* [appeal No. 2], 17 AD3d 1033, 1034).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

246

CAF 08-00290

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

IN THE MATTER OF SAMANTHA K.

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

KENNETH K., RESPONDENT-APPELLANT.

ANDREW M. DUNN, ONEIDA, FOR RESPONDENT-APPELLANT.

DENISE J. MORGAN, UTICA, FOR PETITIONER-RESPONDENT.

KAREN STANISLAUS-FUNG, LAW GUARDIAN, CLINTON, FOR SAMANTHA K.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered November 23, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred respondent's guardianship and custody rights to petitioner.

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

Memorandum: On appeal from an order terminating his parental rights on the ground of permanent neglect and freeing his child for adoption, respondent father contends that petitioner failed to establish by clear and convincing evidence that it exercised diligent efforts to encourage and strengthen the parent-child relationship (*see* Social Services Law § 384-b [7] [a]). Contrary to the father's contention, however, petitioner was relieved of that obligation based on the father's failure "on more than one occasion while incarcerated to cooperate with an authorized agency in its efforts to assist such parent to plan for the future of the child" (§ 384-b [7] [e] [ii]; *see Matter of Eric L.*, 51 AD3d 1400, 1403, *lv denied* 10 NY3d 716). Further, we conclude that Family Court properly determined that the child was permanently neglected based on the father's failure to plan for the child's future (*see* § 384-b [7] [a]). Even where an incarcerated parent makes an effort to develop a feasible plan for the future of his or her child, a finding of permanent neglect is appropriate where, as here, no alternative to foster care for the duration of the parent's incarceration is provided (*see Matter of Paige M.J.*, 256 AD2d 1150, *lv dismissed* 93 NY2d 904; *Matter of C. Children*, 253 AD2d 554; *see also Matter of Star Leslie W.*, 63 NY2d 136, 142-143). We conclude that the court properly determined that termination of the father's parental rights based upon a finding of

permanent neglect, while allowing the father to retain visitation rights, was in the child's best interests (*see generally Matter of Bert M.*, 50 AD3d 1509, 1511, *lv denied* 11 NY3d 704).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 07-01936

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

LEROY SIMMONS, JR., CLAIMANT-RESPONDENT,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF COUNSEL), FOR DEFENDANT-APPELLANT.

CROUCHER, JONES AND JOHNS, CANANDAIGUA (DAVID A. JOHNS OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (Philip J. Patti, J.), entered August 20, 2007. The order denied the pre-answer motion of defendant to dismiss the claim and granted the cross motion of claimant for leave to amend the claim.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at the Court of Claims (*Simmons v State of New York*, 17 Misc 3d 394).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

251

CA 08-02156

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

RICHARD BARON AND MARCIA BARON,
PLAINTIFFS-RESPONDENTS,

V ORDER

KLEWIN BUILDING COMPANY, INC.,
DEFENDANT-APPELLANT.

DAMON & MOREY LLP, BUFFALO (VINCENT G. SACCOMANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered August 12, 2008 in a personal injury action. The order, insofar as appealed from, denied in part defendant's motion for summary judgment and granted the motion of plaintiffs for leave to amend their bill of particulars.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on January 7, 2009,

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

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

252

KA 08-01262

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN ROBINSON, DEFENDANT-APPELLANT.

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

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered February 6, 2008. The judgment revoked defendant's sentence of probation and imposed consecutive terms of incarceration.

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

Memorandum: Defendant appeals from a judgment that revoked his sentence of probation and imposed consecutive terms of incarceration. The contention of defendant with respect to the original judgment from which no appeal was taken, i.e., that the superior court information was jurisdictionally defective, therefore is not properly before us on this appeal from the subsequent judgment revoking the sentence of probation (*see generally People v Coble*, 17 AD3d 1165, *lv denied* 5 NY3d 787). That contention is, in any event, without merit (*see People v Rossi*, 5 NY2d 396, 400-401; *People v Tighe*, 2 AD3d 1364, 1365, *lv denied* 2 NY3d 747). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court

MOTION NO. (388/00) KA 99-05191. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANDRE GARFIELD, DEFENDANT-APPELLANT. -- Motion for reargument or, in the alternative, leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, GREEN, AND PINE, JJ. (Filed Feb. 6, 2009.)

MOTION NO. (28/05) KA 03-01922. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LEON A. WEEKS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., HURLBUTT, SMITH, CENTRA, AND GREEN, JJ. (Filed Feb. 6, 2009.)

MOTION NO. (1655/05) KA 03-02629. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAVON M. GRIFFIN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis granted. Memorandum: Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal that would have resulted in reversal, specifically, whether defendant received an illegal sentence because of noncompliance with the statutory mandates of CPL 400.21. Upon our review of the trial court proceedings, we conclude that the issue may have merit. Therefore, the order of December 22, 2005 is vacated and this Court will consider the appeal de novo (*see People v LeFrois*, 151 AD2d 1046 [1989]). Defendant is directed to file and serve his records and briefs with this Court on or before June 5, 2009. PRESENT: SCUDDER, P.J., HURLBUTT, SMITH, AND GORSKI, JJ. (Filed Feb. 6, 2009.)

MOTION NO. (629/07) KA 05-02514. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RYAN J. LAWS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PERADOTTO, AND PINE, JJ. (Filed Feb. 6, 2009.)

MOTION NO. (1031/07) KA 04-01029. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALFRED MILLER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, GREEN, AND PINE, JJ. (Filed Feb. 6, 2009.)

MOTION NO. (333/08) KA 06-01520. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KEYONTAY C. RICKS, DEFENDANT-APPELLANT. -- Motion for leave to appeal denied. PRESENT: MARTOCHE, J.P., FAHEY, PERADOTTO, AND PINE, JJ. (Filed Feb. 6, 2009.)

MOTION NO. (473/08) KA 05-01523. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARK L. EMMONS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND PINE, JJ. (Filed Feb. 6, 2009.)

MOTION NO. (632/08) KA 05-00854. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HECTOR FUENTES, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: HURLBUTT, J.P., MARTOCHE, PERADOTTO, PINE, AND GORSKI, JJ. (Filed Feb. 6, 2009.)

MOTION NO. (1096/08) KA 05-01406. -- THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V CHRISTOPHER L. POOLE, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: SMITH, J.P., FAHEY, PERADOTTO, AND PINE, JJ. (Filed Feb. 6, 2009.)

MOTION NO. (1120/08) CA 06-03448. -- SAM PILATO AND SON, INC. AND SAM PILATO, PLAINTIFFS-RESPONDENTS, V LEO D. STAROWITZ, SR., ET AL., DEFENDANTS, AND FRANK STAROWITZ, DEFENDANT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, AND SMITH, JJ. (Filed Feb. 6, 2009.)

MOTION NO. (1125/08) CA 07-02393. -- SUSAN M. DOYLE, PLAINTIFF-RESPONDENT-APPELLANT, V CITY OF BUFFALO, BUFFALO POLICE DEPARTMENT AND JOHN SANDERS, DEFENDANTS-APPELLANTS-RESPONDENTS. (APPEAL NO. 3.) -- Motion for reargument or, in the alternative, leave to appeal to the Court of Appeals denied; the cross motion for reargument is granted and, upon reargument, the memorandum and order entered November 14, 2008 is amended by deleting "$36,000" from the penultimate sentence of the second paragraph of the memorandum and substituting "$32,000." PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, AND SMITH, JJ. (Filed Feb. 6, 2009.)

MOTION NOS. (1153-1155.1/08) CA 07-01601. -- PETER E. BISSELL AND SHERRY BISSELL, PLAINTIFFS-RESPONDENTS, V TOWN OF AMHERST, DEFENDANT-APPELLANT. TOWN OF AMHERST, THIRD-PARTY PLAINTIFF, V MCGONIGLE & HILGER ROOFING COMPANY, THIRD-PARTY DEFENDANT-APPELLANT. (APPEAL NO. 1.) CA 07-01660. -- PETER E. BISSELL AND SHERRY BISSELL, PLAINTIFFS-RESPONDENTS, V TOWN OF AMHERST, DEFENDANT-APPELLANT. TOWN OF AMHERST, THIRD-PARTY

PLAINTIFF-RESPONDENT, V MCGONIGLE & HILGER ROOFING COMPANY, THIRD-PARTY DEFENDANT-APPELLANT. (APPEAL NO. 2.) CA 07-02225. -- PETER E. BISSELL, ET AL., PLAINTIFFS, V TOWN OF AMHERST, DEFENDANT. TOWN OF AMHERST, THIRD-PARTY PLAINTIFF-RESPONDENT, V MCGONIGLE & HILGER ROOFING COMPANY, THIRD-PARTY DEFENDANT-APPELLANT. (APPEAL NO. 3.) CA 08-01113. -- PETER E. BISSELL, ET AL., PLAINTIFFS, V TOWN OF AMHERST, DEFENDANT. TOWN OF AMHERST, THIRD-PARTY PLAINTIFF-RESPONDENT, V MCGONIGLE & HILGER ROOFING COMPANY, THIRD-PARTY DEFENDANT-APPELLANT. (APPEAL NO. 4.) -- Motions for reargument or, in the alternative, leave to appeal to the Court of Appeals denied. PRESENT: HURLBUTT, J.P., SMITH, CENTRA, GREEN, AND PINE, JJ. (Filed Feb. 6, 2009.)

MOTION NO. (1207/08) KA 08-00449. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KEMAR TURNER, DEFENDANT-APPELLANT. -- Motion for reargument and leave to appeal to the Court of Appeals denied. PRESENT: HURLBUTT, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Feb. 6, 2009.)

MOTION NO. (1218/08) CA 07-02601. -- JOAN HASTINGS-DOVE AND JOHN A. DOVE, PLAINTIFFS-RESPONDENTS, V BRIAN W. HACKFORD AND JENNIFER A. TURNER, DEFENDANTS-APPELLANTS. (ACTION NO. 1.) JENNIFER A. TURNER, PLAINTIFF-APPELLANT, V BRIAN W. HACKFORD, DEFENDANT-RESPONDENT. (ACTION NO. 2.) -- Motions for reargument denied. PRESENT: HURLBUTT, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Feb. 6, 2009.)

MOTION NO. (1275/08) KA 07-01918. –– THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V WILLIAM LIGGINS, DEFENDANT-APPELLANT. -- Motion to amend the memorandum and order of this Court denied. PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, AND GREEN, JJ. (Filed Feb. 6, 2009.)

MOTION NO. (1292/08) CA 08-00978. -- FIRST PRESBYTERIAN CHURCH OF OAKFIELD, PLAINTIFF-APPELLANT, V PRESBYTERY OF GENESEE VALLEY OF THE PRESBYTERIAN CHURCH (USA) ("PC (USA)"), DEFENDANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, AND GREEN, JJ. (Filed Feb. 6, 2009.)

MOTION NO. (1331/08) CA 08-00950. -- IN THE MATTER OF EDWARD W. GUZDEK, JR., AS PRESIDENT OF AMHERST POLICE CLUB, INC., DAVID SCHNEIDER AND JENNIFER KOEPEL, PETITIONERS-RESPONDENTS, V SATISH MOHAN, SUPERVISOR, TOWN OF AMHERST, RESPONDENT-APPELLANT, TOWN OF AMHERST, RESPONDENT-RESPONDENT, ET AL., RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, AND GREEN, JJ. (Filed Feb. 6, 2009.)

MOTION NO. (1366/08) KA 06-01295. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LARRY COMFORT, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, PERADOTTO, AND PINE, JJ. (Filed Feb. 6, 2009.)

MOTION NOS. (1402-1403/08) CA 07-02514. -- PATRICK DANIEU AND EILEEN DANIEU, PLAINTIFFS-APPELLANTS, V 109 SOUTH UNION ST., LLC AND FLAUM MANAGEMENT COMPANY, INC., DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) CA

08-00723. -- PATRICK DANIEU AND EILEEN DANIEU, PLAINTIFFS-APPELLANTS, V 109 SOUTH UNION ST., LLC AND FLAUM MANAGEMENT COMPANY, INC., DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.) -- Motion for reargument or, in the alternative, leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, AND GORSKI, JJ. (Filed Feb. 6, 2009.)

MOTION NO. (1429/08) KA 04-00694. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLOVERIOUS THOMAS, JR., DEFENDANT-APPELLANT. -- Motion for reargument granted and, upon reargument, the memorandum and order entered November 14, 2008 is amended by deleting the second and third sentences of the memorandum and substituting the following sentences: "The sole contention of defendant on appeal is that the judgment revoking his probation was based on an illegal search. We reject defendant's contention (*see generally People v Thomas,* 30 AD3d 1197, 1198, *lv denied* 9 NY3d 869)." PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Feb. 6, 2009.)

MOTION NO. (1453/08) KA 05-02233. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KAREEM THOMAS, DEFENDANT-APPELLANT. -- Motion for reconsideration denied. PRESENT: HURLBUTT, J.P., SMITH, GREEN, PINE, AND GORSKI, JJ. (Filed Feb. 6, 2009.)

MOTION NO. (1478/08) KA 07-00937. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARTIN L. OAKES, DEFENDANT-APPELLANT. -- Motion for writ of

error coram nobis denied. PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Feb. 6, 2009.)

KA 06-00133. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BRANDON CROSBY, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Monroe County Court, Stephen K. Lindley, A.J. - Attempted Robbery, 1st Degree). PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Feb. 6, 2009.)

KA 06-00773. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIE ELLINGTON, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Monroe County, David D. Egan, J. - Attempted Grand Larceny, 3rd Degree). PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Feb. 6, 2009.)

KA 07-02199. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BOB J. GAY, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Yates County Court, W. Patrick Falvey, J. - Sodomy, 2nd Degree). PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Feb. 6, 2009.)

KA 07-02200. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BOB J. GAY, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Yates County Court, W. Patrick Falvey, J. - Criminal Sexual Act, 2nd Degree). PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Feb. 6, 2009.)

KA 07-02256. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAVID H. LADD, DEFENDANT-APPELLANT. -- Appeal dismissed as abandoned. Counsel's motion to be relieved of assignment granted. (Appeal from Judgment of Monroe County Court, Frank P. Geraci, Jr., J. - Felony Driving While Intoxicated). PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Feb. 6, 2009.)

KA 07-01230. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V GREENE B. MULLEN, ALSO KNOWN AS BARRY MULLENS, DEFENDANT-APPELLANT. -- Order unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Order of Erie County Court, Michael L. D'Amico, J. - 2005 Drug Law Reform Act). PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Feb. 6, 2009.)

KA 06-01048. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DALE PETERSON, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's

motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Monroe County Court, Stephen K. Lindley, A.J. - Burglary, 3rd Degree). PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Feb. 6, 2009.)

KA 07-00450. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RODGER B. SAGE, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Monroe County Court, Frank P. Geraci, Jr., J. - Burglary, 3rd Degree). PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Feb. 6, 2009.)