SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 5, 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

PATRICIA L. MORGAN, CLERK

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

385

CA 08-01126

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

TAG MECHANICAL SYSTEMS, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

V.I.P. STRUCTURES, INC.,
DEFENDANT-APPELLANT.

SHEATS & ASSOCIATES, P.C., BREWERTON (EDWARD J. SHEATS, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DONALD S. DIBENEDETTO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered January 10, 2008 in a breach of contract action. The order and judgment granted plaintiff's motion for, inter alia, summary judgment and denied defendant's cross motion for leave to serve an amended answer.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motion and by granting that part of the cross motion for leave to serve an amended answer to include the proposed affirmative defenses and counterclaims based on commercial bribery with respect to the contracts for projects in Tahlequah, Oklahoma; Hazard, Kentucky; and Skaneateles, New York upon condition that defendant shall serve an amended answer within 30 days of service of the order of this Court with notice of entry and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, defendant's alleged breach of contract, based upon a series of contracts pursuant to which plaintiff was to perform certain construction services for defendant. The complaint concerns four contracts, relating to projects in Tahlequah, Oklahoma; Hazard, Kentucky; Skaneateles, New York; and Syracuse, New York. Plaintiff moved for summary judgment on the complaint, seeking damages in the total amount owed pursuant to the four contracts, and plaintiff sought dismissal of defendant's affirmative defenses and counterclaims. Defendant cross-moved for leave to serve an amended answer to include additional affirmative defenses and counterclaims based on fraud and commercial bribery with respect to the Tahlequah, Hazard and Skaneateles contracts, as well as with respect to an alleged fifth contract between the parties concerning construction services rendered

by plaintiff at a project in Gas City, Indiana. We conclude that Supreme Court erred in granting plaintiff's motion and in denying that part of defendant's cross motion for leave to serve an amended answer to include the proposed affirmative defenses and counterclaims based on commercial bribery with respect to the Tahlequah, Hazard and Skaneateles projects. We therefore modify the order and judgment accordingly.

Addressing first defendant's cross motion, we note the well established principle that, " '[g]enerally, leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a [pleading] is committed to the sound discretion of the court' " (*Carro v Lyons Falls Pulp & Paper, Inc.*, 56 AD3d 1276, 1277; *see* CPLR 3025 [b]; *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959). In our view, the court properly denied that part of the cross motion seeking leave to serve an amended answer to include an affirmative defense and counterclaim based on fraud. The proposed amended answer contains no allegation of reasonable reliance upon a representation of plaintiff. Such an allegation is a necessary element of fraud (*see Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 19 AD3d 1056, 1058, *affd* 7 NY3d 152), and thus the failure to plead reliance renders defendant's proposed affirmative defense and counterclaim patently without merit (*see e.g. Gelmac Quality Feeds, Inc. v Ronning*, 23 AD3d 1019; *Dos v Scelsa & Villacara*, 200 AD2d 705, 707, *lv denied* 84 NY2d 840; *cf.* CPLR 3016 [b]; *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492). We further conclude, however, that the court erred in denying that part of defendant's cross motion seeking leave to serve an amended answer to include affirmative defenses and counterclaims based on commercial bribery. Here, defendant "sufficiently pleaded all the elements of [commercial bribery], i.e., that [plaintiff] conferred a benefit upon [defendant's] employee, without [defendant's] consent and with the intent to influence the employee's conduct" (*Niagara Mohawk Power Corp. v Freed*, 265 AD2d 938, 939).

The court properly denied that part of defendant's cross motion seeking leave to serve an amended answer to include a counterclaim based on commercial bribery with respect to the Gas City contract. That contract was not at issue in the complaint, and the proposed counterclaim seeks affirmative relief unrelated to any matters addressed during the course of discovery (*see generally United States Fid. & Guar. Co. v Delmar Dev. Partners, LLC*, 22 AD3d 1017, 1019-1020). Indeed, to permit that amendment well after the close of discovery would result in obvious prejudice to plaintiff (*see generally* CPLR 3025 [b]; *Edenwald Contr. Co.*, 60 NY2d at 959).

Turning next to plaintiff's motion, we conclude that the court erred in granting those parts of the motion with respect to the Tahlequah, Hazard and Skaneateles contracts. Even assuming, arguendo, that plaintiff met its initial burden with respect to those parts of the motion (*see generally Carltun on Bay Kosher Caterers v Makani*, 295 AD2d 464; *Furia v Furia*, 116 AD2d 694, 695), we conclude on the record

before us that there is an issue of fact whether plaintiff used bribery to induce an employee of defendant to enter into those contracts on defendant's behalf (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The bribery, if proven, would prevent plaintiff from obtaining any recovery with respect to those three contracts (*cf. United States Fid. & Guar. Co.*, 22 AD3d at 1019-1020).

Finally, we conclude that the court erred in granting that part of plaintiff's motion with respect to the Syracuse contract. Plaintiff failed to submit that contract in support of its motion and, even assuming, arguendo, that plaintiff met its initial burden with respect to the Syracuse contract, we conclude that defendant raised a triable issue of fact by submitting evidence that it was not a party to the Syracuse contract (*see generally Zuckerman*, 49 NY2d at 562).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

408

CA 08-01175

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

INNOVATIVE TRANSMISSION & ENGINE COMPANY, LLC,
AND D.R. WATSON HOLDINGS, LLC,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

RICHARD S. MASSARO, JR., RICHARD S. MASSARO, SR.,
JAMES RAIA, A.P. BERSOHN AND CO., LLC, CPAS,
RAIA, BREDEFELD & ASSOCIATES, P.C.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

BLAIR & ROACH, LLP, TONAWANDA (LARRY KERMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HARRIS BEACH PLLC, BUFFALO (ANDREW O. MILLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS RICHARD S. MASSARO, JR. AND RICHARD S. MASSARO, SR.

HARTER, SECREST & EMERY LLP, BUFFALO (JOHN G. HORN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS JAMES RAIA, A.P. BERSOHN AND CO., LLC, CPAS, AND RAIA, BREDEFELD & ASSOCIATES, P.C.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, J.), entered January 18, 2008. The order, among other things, granted the motion of defendants James Raia, A.P. Bersohn and Co., LLC, CPAs, and Raia, Bredefeld & Associates, P.C. seeking to preclude certain evidence at trial and requesting that judicial notice be taken.

It is hereby ORDERED that said appeal from the order insofar as it concerned the cross motion and that part of the motion requesting that judicial notice be taken is unanimously dismissed and the order is otherwise modified on the law by denying that part of the motion seeking to preclude certain evidence and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action to recover damages for, inter alia, conversion of corporate assets of plaintiff Innovative Transmission & Engine Company, LLC (ITEC). Plaintiffs appeal from an order that, inter alia, granted what was in effect a motion in limine (hereafter, motion in limine) of defendants James Raia, A.P. Bersohn and Co., LLC, CPAs, and Raia, Bredefeld & Associates, P.C. (collectively, Raia defendants) seeking, inter alia,

to preclude plaintiffs from offering evidence that ITEC owned the assets in question. We note at the outset that we dismiss the appeal from the order insofar as it concerned plaintiffs' cross motion in limine seeking to preclude defendants from offering evidence that ITEC's owner and principal has a criminal conviction and that part of the motion in limine of the Raia defendants requesting that judicial notice be taken of that conviction. Generally, an order "ruling [on a motion in limine], even when made 'in advance of trial on motion papers constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission' " (*Winograd v Price*, 21 AD3d 956; *see Citlak v Nassau County Med. Ctr.*, 37 AD3d 640). "Inasmuch as [those parts of] the order herein 'merely adjudicate[d] the admissibility of evidence and do[ ] not affect a substantial right, no appeal lies as of right from [those parts of] the order' " (*Shahram v St. Elizabeth School*, 21 AD3d 1377, 1378).

That part of the order granting the Raia defendants' motion in limine to the extent that it sought to preclude plaintiffs from submitting evidence that ITEC owned the assets in question in this litigation is appealable, however, because "an order which limits the scope of issues to be tried is appealable" (*Parker v Mobil Oil Corp.*, 16 AD3d 648, 650, *affd* 7 NY3d 434, *rearg denied* 8 NY3d 828; *see Scalp & Blade v Advest, Inc.*, 309 AD2d 219, 223-225; *Rondout Elec. v Dover Union Free School Dist*., 304 AD2d 808, 810-811). In their motion in limine, the Raia defendants contended that plaintiffs are collaterally estopped from establishing ITEC's ownership of the corporate assets that were allegedly converted, because the jury verdict in the criminal case of ITEC's owner and principal in United States District Court conclusively established that ITEC did not own those assets. We agree with plaintiffs that Supreme Court erred in granting that part of the motion, and we therefore modify the order accordingly.

A party will be collaterally estopped from relitigating an issue only if the issue was necessarily determined in the prior litigation and the party had "a full and fair opportunity to contest the decision now said to be controlling" (*Buechel v Bain*, 97 NY2d 295, 304, *cert denied* 535 US 1096; *see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455). The Court of Appeals has held that, "in appropriate situations, an issue decided in a criminal proceeding may be given preclusive effect in a subsequent civil action" (*D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664; *see City of New York v College Point Sports Assn., Inc.*, 61 AD3d 33, 41). In the event that the issue was not "necessarily determined in the criminal proceeding," the doctrine of collateral estoppel does not apply (*Allstate Ins. Co. v Zuk*, 78 NY2d 41, 46; *see Hughes v Farrey*, 30 AD3d 244, 248, *lv dismissed* 8 NY3d 841). Here, the Raia defendants failed to establish that the issue of the ownership of ITEC's corporate assets was necessarily decided in the prior criminal trial. The owner and principal of ITEC was convicted following a jury trial of, inter alia, defrauding a federally insured bank by transferring assets of one of his other corporations, World Auto Parts, Incorporated (WAP), to ITEC to strip a bank of its security interests in those assets. The issue before the jury in the criminal trial was whether the assets were removed from

WAP and transferred. Thus, the jury was not required to determine whether ITEC owned or legally possessed the assets, rendering the doctrine of collateral estoppel inapplicable in this case.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

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CA 08-01227
PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

HBE CORPORATION AND CORNERSTONE COMMUNITY
FEDERAL CREDIT UNION, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SIRIUS AMERICA INSURANCE COMPANY,
DEFENDANT-APPELLANT.

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

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (PATRICK A. DUDLEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered February 13, 2008 in a declaratory judgment action. The judgment granted plaintiffs' motion for summary judgment with respect to the violation of Insurance Law § 3420 (d), declaring, inter alia, that defendant must defend and indemnify plaintiffs in the underlying personal injury action.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied and the declarations are vacated.

Memorandum: Plaintiffs, HBE Corporation (HBE) and Cornerstone Community Federal Credit Union (Cornerstone), commenced this action alleging, inter alia, that defendant violated Insurance Law § 3420 (d) by failing to provide timely written notice to plaintiffs that it would neither defend nor indemnify its insured, Thomas Johnson, Inc. (TJI), the third-party defendant in the underlying third-party action. The underlying main action was commenced by TJI's employee and his wife against HBE and Cornerstone (*Orlikowski v Cornerstone Community Fed. Credit Union*, 55 AD3d 1245, *lv dismissed* 11 NY3d 915). On a prior appeal we held, inter alia, that TJI was foreclosed from challenging the amount of the judgment in the main action inasmuch as HBE and Cornerstone were granted contractual indemnification in their third-party action against TJI based on TJI's default (*id.* at 1248-1249).

We conclude that Supreme Court erred in granting plaintiffs' motion for summary judgment with respect to the violation of Insurance Law § 3420 (d), declaring that defendant's disclaimer letter was

invalid and that defendant must defend and indemnify plaintiffs in the underlying main action. We agree with defendant that the motion should have been denied because defendant established as a matter of law that it provided plaintiffs with the requisite written notice of disclaimer pursuant to Insurance Law § 3420 (d) (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Notice of disclaimer under Insurance Law § 3420 (d) is required "when a claim falls within the coverage terms of the insurance policy but is denied based on a policy exclusion" (*Arida v Essex Ins. Co.*, 299 AD2d 902, 903; *see Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648-649). Here, the disclaimer of coverage to plaintiffs and TJI was based upon a policy exclusion, i.e., that plaintiffs and TJI failed to notify defendant of the claim "as soon as practicable." Thus, defendant was required to comply with section 3420 (d) by providing both plaintiffs and TJI with written notice of its disclaimer. Here, the record establishes that the underlying accident occurred in October 2002, that defendant received notice of the accident on February 25, 2004, and that defendant sent a disclaimer letter to TJI on March 5, 2004 and to plaintiffs' attorney on March 10, 2004. According to plaintiffs, the disclaimer letter to their attorney dated March 10, 2004 did not provide the requisite notice with respect to plaintiffs' third-party action against TJI because it stated only that defendant would not defend or indemnify plaintiffs "in this matter," which referred only to the underlying main action. We reject plaintiffs' contention. As noted, the letters sent to TJI and plaintiffs' attorney stated that there was no coverage based on the failure to give defendant notice "as soon as practicable."

Finally, we decline the request of defendant on appeal that, despite its failure to cross-move for a declaration that it has no duty to defend or indemnify plaintiffs, we should nevertheless search the record and grant it that relief (*see* CPLR 3212 [b]). Defendant failed to "tender . . . evidentiary proof in admissible form" with respect to plaintiffs' failure to provide timely notice of the occurrence to defendant (*Zuckerman*, 49 NY2d at 562), and defendant thus failed to establish its entitlement to such a declaration.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

411

CA 08-01637

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

IN THE MATTER OF CUSTOM TOPSOIL, INC. AND 1070 SENECA STREET, INC., PETITIONERS/PLAINTIFFS-RESPONDENTS,

V ORDER

CITY OF BUFFALO AND RICHARD M. TOBE, COMMISSIONER, CITY OF BUFFALO DEPARTMENT OF ECONOMIC DEVELOPMENT, PERMIT AND INSPECTION SERVICES, RESPONDENTS/DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

ALISA A. LUKASIEWICZ, CORPORATION COUNSEL, BUFFALO (BRENDAN R. MEHAFFY OF COUNSEL), FOR RESPONDENTS/DEFENDANTS-APPELLANTS.

HARTER, SECREST & EMERY LLP, BUFFALO (CRAIG A. SLATER OF COUNSEL), FOR PETITIONERS/PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 11, 2008 in a proceeding pursuant to CPLR article 78. The order denied the motion of respondents/defendants to dismiss the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

412

CA 08-01638

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

IN THE MATTER OF CUSTOM TOPSOIL, INC. AND 1070 SENECA STREET, INC., PETITIONERS/PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO AND RICHARD M. TOBE, COMMISSIONER, CITY OF BUFFALO DEPARTMENT OF ECONOMIC DEVELOPMENT, PERMIT AND INSPECTION SERVICES, RESPONDENTS/DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

ALISA A. LUKASIEWICZ, CORPORATION COUNSEL, BUFFALO (BRENDAN R. MEHAFFY OF COUNSEL), FOR RESPONDENTS/DEFENDANTS-APPELLANTS.

HARTER, SECREST & EMERY LLP, BUFFALO (CRAIG A. SLATER OF COUNSEL), FOR PETITIONERS/PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered May 6, 2008 in a proceeding pursuant to CPLR article 78. The order, among other things, denied the motion of respondents/defendants to dismiss the petition.

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

Memorandum: Petitioners/plaintiffs (petitioners) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul a “Stop All Work Order” issued by respondents/defendants (respondents) in May 2007. Respondents previously issued a letter in August 2006 determining that the amended use permit for the operation of a portable concrete mixing plant on property owned by petitioner 1070 Seneca Street, Inc. and leased by petitioner Custom Topsoil, Inc. had expired. We note at the outset that a declaratory judgment action is not an appropriate procedural vehicle for challenging respondents’ determination. Petitioners do not challenge the constitutionality of any statutes or regulations, and thus the hybrid proceeding and action is properly only a CPLR article 78 proceeding (*see generally Matter of Noslen Corp. v Ontario County Bd. of Supervisors*, 295 AD2d 924, 925; *Matter of Sutherland v Glennon*, 221 AD2d 893, 893-894). We further note that, although no appeal lies as of right from a nonfinal order in a CPLR article 78 proceeding (*see* CPLR 5701 [b] [1]), we nevertheless treat the notice

of appeal as an application for permission to appeal and grant respondents such permission (*see Matter of Engelbert v Warshefski*, 289 AD2d 972).

We agree with respondents that Supreme Court erred in denying their motion to dismiss the petition as time-barred, pursuant to the four-month statute of limitations applicable to CPLR article 78 proceedings. The August 2006 letter gave petitioners sufficient notice of respondents' final determination that the amended use permit in question had expired (*see Matter of Essex County v Zagata*, 91 NY2d 447, 453-454; *New York Coalition for Quality Assisted Living, Inc. v Novello*, 53 AD3d 914, 915-916, *lv denied* 11 NY3d 715), and petitioners failed to commence this proceeding within four months of their receipt of that letter (*see* CPLR 217 [1]). The subsequent May 2007 order did not renew or revive the statute of limitations period because respondents did not " 'conduct[] a fresh and complete examination of the matter based on newly presented evidence' " (*Matter of Finger Lakes Racing Assn., Inc. v State of N.Y. Racing & Wagering Bd.*, 34 AD3d 895, 897, *lv denied* 8 NY3d 810; *see also Matter of Green Harbour Homeowners' Assn. v Town of Lake George Planning Bd.*, 1 AD3d 744, 746).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

413

CA 08-01639

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

IN THE MATTER OF CUSTOM TOPSOIL, INC. AND 1070 SENECA STREET, INC., PETITIONERS/PLAINTIFFS-RESPONDENTS,

V ORDER

CITY OF BUFFALO AND RICHARD M. TOBE, COMMISSIONER, CITY OF BUFFALO DEPARTMENT OF ECONOMIC DEVELOPMENT, PERMIT AND INSPECTION SERVICES, RESPONDENTS/DEFENDANTS-APPELLANTS. (APPEAL NO. 3.)

ALISA A. LUKASIEWICZ, CORPORATION COUNSEL, BUFFALO (BRENDAN R. MEHAFFY OF COUNSEL), FOR RESPONDENTS/DEFENDANTS-APPELLANTS.

HARTER, SECREST & EMERY LLP, BUFFALO (CRAIG A. SLATER OF COUNSEL), FOR PETITIONERS/PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered May 12, 2008 in a proceeding pursuant to CPLR article 78. The order, among other things, granted the motion of petitioners/plaintiffs for leave to renew.

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: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

435

CA 08-01418

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, PERADOTTO, AND GORSKI, JJ.

FIRST BAPTIST CHURCH OF OLEAN, ALSO KNOWN AS
FIRST BAPTIST CHURCH, PLAINTIFF-RESPONDENT,

V ORDER AND MEMORANDUM

JOHN S. GREY, JENNIFER L. GREY,
DEFENDANTS-RESPONDENTS,
AMERICAN STATES INSURANCE COMPANY,
DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

MURA & STORM, PLLC, BUFFALO (ROY A. MURA OF COUNSEL), FOR DEFENDANT-APPELLANT.

WAGNER & HART, OLEAN (JANINE C. FODOR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

FRANCIS M. LETRO, ESQ., BUFFALO (RONALD J. WRIGHT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Larry M. Himelein, A.J.), entered October 16, 2007 in a declaratory judgment action. The order, insofar as appealed from, denied the motion of defendant American States Insurance Company for summary judgment.

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

All concur except HURLBUTT, J.P., and PERADOTTO, J., who dissent and vote to reverse the order insofar as appealed from in accordance with the following Memorandum: We respectfully dissent. In our view, Supreme Court erred in denying the motion of defendant American States Insurance Company (American States) for summary judgment seeking a declaration that it is not obligated to defend or indemnify plaintiff, First Baptist Church of Olean, also known as First Baptist Church (Church), in the underlying personal injury action commenced by John S. Grey, a defendant herein, against the Church.

Grey was injured on November 30, 2000 while performing construction work on the side of a barn structure owned by the Church when he fell 20 feet to the ground from the extension ladder on which he was standing. Grey was at that time employed by Grey Builders Co., Inc. (Grey Builders), which had been hired by the Church to perform

construction work on the structure. A Church employee assisted Grey, who was transported by ambulance to the hospital. It is undisputed that, within a day of the accident, a Church trustee was informed of the accident and that Grey was transported by ambulance to the hospital, and learned that Grey had fractured his wrist. It is also undisputed that the Church completed an accident report.

On October 8, 2003, Grey and his wife commenced the underlying action against the Church and, that same month, the Church provided notice of the accident and lawsuit to American States, its insurance carrier. By letter dated November 4, 2003, American States disclaimed coverage based on the failure of the Church to comply with the policy provision requiring the Church to provide prompt notice of "an 'occurrence' that may result in a claim." The Church thereafter commenced this action seeking a declaration that American States is obligated to defend and indemnify it in the underlying action. The court denied the ensuing motion of American States for summary judgment declaring that it is not obligated to defend or indemnify the Church, as well as the cross motion of the Church for summary judgment seeking a declaration to the contrary. The court determined that there were triable issues of fact whether the Church had a reasonable good-faith belief that it was not liable or that a claim would not be made against it.

It is well settled that the prompt notice requirement "operates as a condition precedent to coverage" (*White v City of New York*, 81 NY2d 955, 957) and that, "[a]bsent a valid excuse, a failure to satisfy the notice requirement vitiates the policy" (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440). Thus, based on the policy language, the issue before us is whether the Church had a reasonable good-faith belief that the occurrence would not result in a claim (*see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743; *Dryden Mut. Ins. Co. v Greaser*, 269 AD2d 792). In determining whether such a belief was reasonable, a court should consider, inter alia, "whether the insured [made] an adequate inquiry into the injured party's condition to determine its seriousness . . ., and whether the insured [made] a 'deliberate determination' in evaluating potential liability" (*Philadelphia Indem. Ins. Co. v Genesee Val. Improvement Corp.*, 41 AD3d 44, 46-47).

Here, the record establishes that the Church, within a day of the accident, was aware that Grey had fallen 20 feet from a ladder to the ground, had been transported by ambulance to a hospital, and had fractured his wrist. Although in our view "[s]uch information would cause a reasonable and prudent person to investigate the circumstances, ascertain the facts, and evaluate his [or her] potential liability" (*Security Mut. Ins. Co. of N.Y.*, 31 NY2d at 442), the Church performed no such investigation and instead determined that the accident was a "minor incident" that would be covered by Grey Builders' insurance company. We thus conclude that the Church "failed to exercise reasonable care and diligence in ascertaining the facts about the alleged accident and in evaluating [its] potential liability. Thus, the otherwise unreasonable delay of [almost three

years] in giving notice may not be excused or explained on the basis of ‘lack of knowledge’ or a ‘belief of nonliability’ ” (*id.*; *see Haas Tobacco Co. v American Fid. Co.*, 226 NY 343, 347; *Philadelphia Indem. Ins. Co.*, 41 AD3d at 47). Had the Church performed a reasonable investigation, it would have learned that there was a possibility of liability and thus that a claim might be brought (*see Steinberg v Hermitage Ins. Co.*, 26 AD3d 426, 427-428; *Zadrima v PSM Ins. Cos.*, 208 AD2d 529, 530, *lv denied* 85 NY2d 807).

Although the owner of Grey Builders submitted an affidavit in opposition to the motion of American States in which he asserted that he had informed the Church that it was not responsible for the injury and that Grey Builders would take care of the worker’s injuries, that affidavit is insufficient to raise a triable issue of fact that would preclude summary judgment. Even if the injured worker himself had informed the Church that he was not going to bring a lawsuit against it, the Church would not be excused for its almost three-year delay in providing notice to American States. “[T]he fact that the injured party voiced the intent not to sue anyone will not excuse the insured’s delay when the facts and circumstances surrounding the happening of the injury are such that a reasonable person could envision liability” (*Vradenburg v Prudential Prop. & Cas. Ins. Co.*, 212 AD2d 913, 914; *see E.B. Gen. Contr. v Nationwide Ins. Co.*, 189 AD2d 796; *Platsky v Government Empls. Ins. Co.*, 181 AD2d 764, 765). Because the Church would not be entitled to rely on the assurances of the worker himself, we conclude that it likewise would not be entitled to rely on the assurances given by the owner of Grey Builders. In any event, there is no evidence in the record that the Church in fact relied on the owner’s assurances.

We therefore would reverse the order insofar as appealed from, grant the motion of American States for summary judgment and grant judgment in its favor declaring that American States is not obligated to defend or indemnify the Church in the underlying personal injury action.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

478

CA 08-02152

PRESENT: HURLBUTT, J.P., MARTOCHE, CARNI, GREEN, AND PINE, JJ.

CATHERINE BARNES AND SCOTT BARNES,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DEAN E. FIX, DAVID S. BRODERICK, AS
ADMINISTRATOR OF THE ESTATE OF HARRISON W.
CALEB, JR., DECEASED, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

LAW OFFICES OF DANIEL R. ARCHILLA, BUFFALO (THOMAS D. SEAMAN OF COUNSEL), FOR DEFENDANT-APPELLANT DEAN E. FIX.

BROWN & KELLY, LLP, BUFFALO (H. WARD HAMLIN, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT DAVID S. BRODERICK, AS ADMINISTRATOR OF THE ESTATE OF HARRISON W. CALEB, JR., DECEASED.

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

Appeals from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered December 24, 2007 in a personal injury action. The order denied the motions of Dean E. Fix and Harrison W. Caleb, Jr. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of Harrison W. Caleb, Jr. and dismissing the complaint against defendant David S. Broderick, as administrator of the estate of Harrison W. Caleb, Jr., deceased, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Catherine Barnes (plaintiff) when the vehicle she was driving was struck by a vehicle driven by Harrison W. Caleb, Jr. and then again by a vehicle driven by defendant Dean E. Fix. After the vehicle driven by Caleb struck plaintiff’s vehicle, Caleb moved his vehicle to the side of the road, and plaintiff’s vehicle was then struck by the vehicle driven by Fix while plaintiff stood outside of her vehicle waiting for the police. Plaintiff attempted to re-enter the driver’s side of her stopped vehicle in order to avoid Fix’s vehicle as it slid out of control but was unable to do so, and her legs were injured when the driver’s side door of her vehicle was struck by Fix’s vehicle.

We conclude that Supreme Court erred in denying the motion of Caleb for summary judgment dismissing the complaint against him with respect to the first and second accident, and we therefore modify the order accordingly. We note that Caleb died after taking this appeal, and that David S. Broderick has been substituted as administrator of his estate. Caleb met his initial burden by submitting the deposition testimony of plaintiff and the report of a physician who examined plaintiff at Fix's request, both establishing that plaintiff did not sustain any injury in the first accident (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562; Prince, Richardson on Evidence § 8-202 [Farrell 11th ed]). Neither plaintiffs nor Fix raised a triable issue of fact in opposition to that part of Caleb's motion with respect to the first accident and, indeed, plaintiff conceded that she did not sustain a serious injury as a result of the first accident.

Additionally, we conclude that Caleb was entitled to summary judgment dismissing plaintiff's complaint to the extent it sought to recover damages from Caleb for injuries resulting from the second accident involving Fix. Caleb's negligence, if any, "did nothing more than to furnish the condition or give rise to the occasion by which the injury was made possible and which was brought about by the intervention of a new, independent and efficient cause" (*Gralton v Oliver*, 277 AD 449, 452, *affd* 302 NY 864). Accordingly, Caleb's motion for summary judgment dismissing the complaint insofar as asserted against him for injuries arising out of the second accident also should have been granted (*see Agurto v Dela*, 44 AD3d 362).

The court also properly denied the motion of Fix for summary judgment dismissing the complaint against him. Although Fix met his initial burden on the motion, plaintiffs raised triable issues of fact, i.e., whether Fix encountered a " 'sudden emergency' " and whether he acted reasonably in light of all of the circumstances, including the icy road conditions (*Lauricella v McKinney*, 284 AD2d 939; *see Sossin v Lewis*, 9 AD3d 849, 850-851, *amended on rearg* 11 AD3d 1045).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

482

CA 08-02157

PRESENT: HURLBUTT, J.P., MARTOCHE, CARNI, GREEN, AND PINE, JJ.

ROBERT STIVERS AND DONNA STIVERS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JEFFREY L. BROWNELL, DEFENDANT-RESPONDENT.

DAVIDSON FINK LLP, ROCHESTER (PAUL D. KELLY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

VANHORN & NABINGER, GENEVA (SCHUYLER T. VANHORN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered January 4, 2008. The order denied the motion of plaintiffs for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion for partial summary judgment on liability on the claim for breach of contract based on unlawful eviction and by providing that the claim for punitive damages is dismissed and as modified the order is affirmed without costs.

Memorandum: Plaintiffs and defendant executed a lease for a restaurant for a two-year period to end on April 30, 2005 and, in March 2005, defendant padlocked the doors of the restaurant, thus preventing plaintiffs from entering it. Plaintiffs commenced this action seeking, inter alia, damages for the allegedly wrongful eviction and seeking the return of a $25,000 “inventory deposit.” Defendant asserted numerous counterclaims in his answer seeking, inter alia, compensation for damage to the property. Plaintiffs moved for summary judgment on the complaint as well as dismissal of the counterclaims. Supreme Court denied the motion and, in its bench decision, dismissed the claim for punitive damages sought by plaintiffs in their motion. We note that, although the order does not address the issue of punitive damages, the decision is controlling in the event that “there is a conflict between an order and a decision” (*Innovative Transmission & Engine Co., LLC v Massaro*, 37 AD3d 1199, 1201). We therefore modify the order accordingly.

We conclude that Supreme Court erred in denying that part of plaintiffs’ motion for partial summary judgment on liability on the claim for breach of contract based on defendant’s unlawful eviction.

Pursuant to the terms of the lease, defendant had the right to re-enter the premises and to terminate the lease “without further demand or notice of any kind” in the event of a default by plaintiffs. Although defendant contends that he evicted plaintiffs on the ground that they were in default for failing to pay rent and for damaging the property, the lease requires in relevant part that plaintiffs first be given written notice of their alleged default and the opportunity to cure the default 30 days before defendant is entitled to terminate the lease. In support of their motion, plaintiffs submitted the deposition testimony of defendant in which he admitted that he did not give them any written notice before entering the premises and padlocking the doors, and defendant submitted no evidence establishing that he had a valid basis to re-enter the restaurant and padlock the doors before the expiration of the term of the lease. We therefore conclude that plaintiffs established their entitlement to partial summary judgment on liability as a matter of law with respect to their claim for breach of contract based on unlawful eviction (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562), and further modify the order accordingly.

Contrary to the further contention of plaintiffs, however, they failed to establish as a matter of law that defendant breached the terms of the lease based on his failure to return the $25,000 “inventory deposit.” We thus conclude that the court properly denied that part of plaintiffs’ motion seeking reimbursement of the $25,000 deposit. Pursuant to the terms of the lease, plaintiffs were required to pay defendant “the sum of $25,000.00 for inventory and supplies, i.e.[,] glasses, silverware, napkins, etc.” upon entering into the lease. The lease further provided that, in the event that plaintiffs did not purchase the premises at the end of the term of the lease, defendant “shall repurchase said inventory” for $25,000. We conclude on the record before us that there is an issue of fact whether “said inventory” was on the premises, for defendant to repurchase (*see generally id.*). According to the deposition testimony of defendant, many items were missing when he repossessed the property, and defendant also submitted evidence that the missing items included the glasses and silverware that were mentioned in the lease.

We further conclude that the court properly denied that part of plaintiffs’ motion seeking dismissal of defendant’s counterclaims. Although plaintiffs correctly contend that “ ‘a party to a contract cannot rely on the failure of another to perform when he [or she] has frustrated or prevented the performance’ ” (*Hidden Meadows Dev. Co. v Parmelee’s Forest Prods.*, 289 AD2d 642, 644; *see Kooleraire Serv. & Installation Corp. v Board of Educ. of City of N.Y.*, 28 NY2d 101, 106), plaintiffs submitted evidence raising an issue of fact whether they could have performed under the terms of the contract. The submissions of both plaintiffs and defendant include evidence that the damage to the property may have been too extensive for repairs to have been completed before the lease expired.

Finally, in view of the issues of fact on the record before us, we conclude that the court properly denied that part of plaintiffs’ motion seeking an award of attorneys’ fees under the terms of the

lease. The determination whether plaintiffs are entitled to an award of attorneys' fees should await the outcome of a trial (*see Meysar Realty Corp. v Anndon Rest. Corp.*, 277 AD2d 99).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

498

CA 08-01936

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

BRIAN PETERS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THE KISSLING INTERESTS, INC.,
DEFENDANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (TIMOTHY J. PERRY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (V. CHRISTOPHER POTENZA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered December 12, 2007 in a personal injury action. The order, insofar as appealed from, denied that part of plaintiff's motion for partial summary judgment on liability on the Labor Law § 240 (1) cause of action and granted that part of defendant's cross motion for summary judgment dismissing that cause of action.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, that part of the cross motion for summary judgment dismissing the Labor Law § 240 (1) cause of action is denied, that cause of action is reinstated, and that part of the motion for partial summary judgment on liability on the Labor Law § 240 (1) cause of action is granted.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while he was standing on a window sill that was six inches wide and several feet above the floor and was attempting to remove the window trim with a pry bar. A piece of loose trim on which plaintiff was pulling unexpectedly broke free from the window, and he began to fall backward off the window sill. When plaintiff grabbed the window sash to prevent himself from falling, the window shattered and a piece of falling glass struck his wrist. We agree with plaintiff that Supreme Court erred in granting that part of defendant's cross motion for summary judgment dismissing the Labor Law § 240 (1) cause of action and instead should have granted that part of plaintiff's motion for partial summary judgment on liability on the Labor Law § 240 (1) cause of action. A worker is protected by Labor Law § 240 (1) when he or she is subject to an elevation-related risk, and the failure to provide any safety devices to protect the worker from such a risk is a proximate cause of his or her injuries (*see Striegel v Hillcrest Hgts. Dev. Corp.*, 100 NY2d 974, 978). "The

application of section 240 (1) does not hinge on whether the worker actually hit the ground" (*id.*). Rather, that section equally applies where the force of gravity requires the worker to act to prevent himself or herself from falling from an elevated worksite (*see Ray v Niagara Mohawk Power Corp.*, 256 AD2d 1070, 1071-1072; *see also Ienco v RFD Second Ave., LLC*, 41 AD3d 537, 538-539; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174-175; *cf. Milligan v Allied Bldrs., Inc.*, 34 AD3d 1268). Here, plaintiff met his burden of establishing that the lack of an appropriate safety device to protect him "*from harm directly flowing from the application of the force of gravity*" was the proximate cause of his injuries as a matter of law and thus that he was protected by Labor Law § 240 (1) (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501; *see Striegel*, 100 NY2d at 978). 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).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

519
KA 06-03542
PRESENT: SCUDDER, P.J., PERADOTTO, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT R. MACDONALD, 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 July 19, 2006. The judgment convicted defendant, upon a jury verdict, of rape in the first degree (three counts) and conspiracy in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of three counts of rape in the first degree (Penal Law § 130.35 [1]) and one count of conspiracy in the fourth degree (§ 105.10 [1]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We reject the contention of defendant that he was denied a fair trial by County Court's denial of his motion to subpoena the psychiatric records of an accomplice who testified against him in order to ascertain the medications being taken by the accomplice. Inasmuch as defendant was afforded the opportunity to cross-examine the accomplice concerning any medications taken by him and failed to do so, we cannot conclude that defendant was deprived of his right to a fair trial by the court's denial of his motion.

Contrary to defendant's further contention, the court did not abuse its discretion by admitting in evidence expert testimony concerning rape trauma syndrome. Such testimony "may be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand" (*People v Carroll*, 95 NY2d 375, 387; *see also People v Hryckewicz*, 221 AD2d 990, *lv denied* 88 NY2d 849). We further conclude that the court properly refused to dismiss the indictment on the ground of improper geographical jurisdiction,

inasmuch as the People established by a preponderance of the evidence that defendant and his accomplices conspired to commit rape in Onondaga County (*see* CPL 20.40 [1] [b]; *People v Moore*, 46 NY2d 1, 6; *People v DeGraw*, 140 AD2d 984). Furthermore, the People established that the rapes occurred in a vehicle during the course of a trip between counties, and thus the offenses “may be prosecuted in any county through which such vehicle passed in the course of such trip” (CPL 20.40 [4] [g]; *see People v Curtis*, 286 AD2d 901, *lv denied* 97 NY2d 728).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

526

CA 08-01969

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

MAYER'S CIDER MILL, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PREFERRED MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT,
AND JAMES LANSDOWNE, DEFENDANT-RESPONDENT.

COHEN & LOMBARDO, P.C., BUFFALO (FRANK T. HOUSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ANDREW J. RYAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 19, 2008 in a declaratory judgment action. The judgment, among other things, granted plaintiff's motion for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking a declaration that defendant Preferred Mutual Insurance Company (Preferred Mutual) must defend and indemnify plaintiff in the underlying personal injury action commenced against it by defendant James Lansdowne. We agree with plaintiff that Supreme Court properly granted its motion for summary judgment seeking that declaration. Lansdowne was injured in October 1999, at the age of 12, when he placed his hand inside machinery used to process apple cider, but he did not commence the underlying action until March 2007. Lansdowne is the son of one of plaintiff's employees and the younger brother of another of plaintiff's employees. Preferred Mutual never disclaimed coverage, but an individual who served as plaintiff's secretary and treasurer signed a "Non-Waiver Agreement" on October 18, 1999 pursuant to which Preferred Mutual indicated that it would investigate the claim and reserved its right to disclaim coverage. In his underlying amended complaint, Lansdowne asserted, inter alia, that he was a 12-year-old independent contractor who was paid an hourly sum by plaintiff, and plaintiff asserted as an affirmative defense in its answer that Lansdowne was "not its employee or independent contractor." By letter dated May 31, 2007, Preferred Mutual advised plaintiff that its investigation into the matter was continuing, noted that the policy did not apply to employees, and continued to reserve

its right to deny coverage.

We agree with the court that Preferred Mutual failed to provide the requisite written notice of disclaimer to plaintiff "as soon as [was] reasonably possible" (Insurance Law § 3420 [d] [2]; *cf. Zappone v Home Ins. Co.*, 55 NY2d 131, 136-137). The "timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for . . . denial of coverage, and the insurer has the burden of justifying the delay" (*Wood v Nationwide Mut. Ins. Co.*, 45 AD3d 1285, 1286 [internal quotation marks omitted]). It is incumbent upon the insurance company to conduct its own prompt investigation (*see id.* at 1286-1287), and "the burden is on the insurer to demonstrate that its delay [in disclaiming coverage] was reasonably related to its completion of a thorough and diligent investigation" (*Tully Constr. Co., Inc. v TIG Ins. Co.*, 43 AD3d 1150, 1152-1153).

Preferred Mutual contends that its investigation into Lansdowne's employment status remains ongoing and that its delay in disclaiming coverage is justified because plaintiff initially reported the claim "for informational purposes only." The record establishes, however, that Preferred Mutual had plaintiff execute the non-waiver agreement in October 1999, and the general liability loss notice completed by Preferred Mutual's agent did not state that the claim was reported for informational purposes only. The record further establishes that Preferred Mutual received notice that Lansdowne had retained counsel with respect to the subject accident no later than May 22, 2000 and that in March 2001 its representative was present during an inspection of the machine that caused Lansdowne's injury. There is no indication in the record that Preferred Mutual thereafter conducted any further investigation and, indeed, it took no action until Lansdowne commenced the underlying personal injury action against plaintiff in March 2007. Thus, although Preferred Mutual had prompt notice of the claim and contradictory information regarding Landsdowne's employment status immediately after the accident, it failed to conduct a timely investigation into the claim and has offered no reasonable explanation for its failure to do so. Any disclaimer by Preferred Mutual therefore is now untimely as a matter of law (*see Wood*, 45 AD3d at 1287).

Finally, we reject the contention of Preferred Mutual that the manufacturer and distributor of the machine in question are necessary parties to this action, pursuant to CPLR 1001 (a). The issue whether Preferred Mutual must defend and indemnify plaintiff has no bearing on any claim by Lansdowne against the manufacturer or the distributor, and they thus are not affected, "inequitably" or otherwise, by this action (*id.*).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

533
CA 08-00696
PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GREEN, AND GORSKI, JJ.

IN THE MATTER OF DAVID M. SMITH AND KRISTINE L. SMITH, CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

CAMBARERI & CAMBARERI, LLP, SYRACUSE (DOM CAMBARERI OF COUNSEL), FOR CLAIMANTS-APPELLANTS.

BURKE, SCOLAMIERO, MORTATI & HURD, LLP, ALBANY (GERALD D. D'AMELIA, JR., OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Court of Claims (Norman I. Siegel, J.), entered March 14, 2008. The order denied claimants' application seeking permission to file a late claim.

It is hereby ORDERED that the order so appealed from is unanimously reversed in the exercise of discretion without costs and the application is granted upon condition that claimants shall file the proposed claim within 20 days of the date of entry of the order of this Court.

Memorandum: David M. Smith (claimant) was injured on May 22, 2007 when he fell from a ladder while working as a sheet metal journeyman on a renovation and construction project at the Central New York Psychiatric Center. On September 17, 2007, claimants filed an application pursuant to Court of Claims Act § 10 (6) seeking permission to file a late claim against respondent. "Court of Claims Act § 10 (6) permits a court, in its discretion, upon consideration of certain enumerated factors, to allow a claimant to file a late claim . . . No one factor is deemed controlling, nor is the presence or absence of any one factor dispositive" (*Broncati v State of New York*, 288 AD2d 172, 173). Upon our consideration of the statutory factors, we conclude that the Court of Claims improvidently exercised its discretion in denying claimants' application (*see Matter of Hughes v State of New York*, 25 AD3d 800; *Jomarron v State of New York*, 23 AD3d 527).

Although claimants failed to provide an acceptable excuse for their failure to file a timely claim, the delay was minimal (*see Hughes*, 25 AD3d 800; *Matter of Morales v State of New York*, 292 AD2d 455). We agree with the court that workers' compensation benefits are

a partial alternative remedy available to claimants (*see Garguiolo v New York State Thruway Auth.*, 145 AD2d 915). As the court properly determined, however, claimants have sufficiently "establish[ed] the appearance of merit of the claim" (*Hughes*, 25 AD3d at 800; *see Matter of Lockwood v State of New York*, 267 AD2d 832), and we conclude that the remaining factors, i.e., whether respondent had notice of the essential facts constituting the claim, whether respondent had an opportunity to investigate the claim, and whether the failure to file a timely claim resulted in substantial prejudice to respondent, also weigh in claimants' favor (*see* Court of Claims Act § 10 [6]). In support of their application, claimants alleged that respondent had inspectors on the job site, that claimant's employer prepared an accident report and took photographs of the ladder and accident site, and that the employer was contractually obligated to procure insurance for respondent's benefit and to defend and indemnify respondent for claims arising from the renovation and construction project.

In opposition to the application, respondent submitted only the affirmation of an attorney with no personal knowledge of the facts (*see Matter of Powell v State of New York*, 187 AD2d 848). Respondent failed to establish that any effort was made to determine whether it had notice of the accident or an opportunity to investigate, nor did respondent substantiate its conclusory allegations that it would be substantially prejudiced as the result of claimants' delay (*see id.*; *Matter of Donaldson v State of New York*, 167 AD2d 805, 806). "Surely, [respondent] itself was in a far better position than claimant[s] to locate and identify the names of its employees who were present at the accident sit[e]," and to determine whether it received any accident report, photographs or other information from claimant's employer (*Calzada v State of New York*, 121 AD2d 988, 990; *see also Donaldson*, 167 AD2d at 806).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

534

CA 08-01705

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

IN THE MATTER OF DAVID M. SMITH AND KRISTINE L. SMITH, CLAIMANTS-APPELLANTS,

V ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

CAMBARERI & CAMBARERI, LLP, SYRACUSE (DOM CAMBARERI OF COUNSEL), FOR CLAIMANTS-APPELLANTS.

BURKE, SCOLAMIERO, MORTATI & HURD, LLP, ALBANY (GERALD D. D'AMELIA, JR., OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Court of Claims (Norman I. Siegel, J.), entered July 15, 2008. The order denied claimants' motion for leave to renew and reargue.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Ortiz v New York City Hous. Auth.*, 191 AD2d 177).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

545
CAF 08-02503
PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

IN THE MATTER OF MAUREEN M. MURPHY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN B. WOODS, RESPONDENT-APPELLANT.

MITCHELL LAW OFFICE, OSWEGO (RICHARD C. MITCHELL, JR., OF COUNSEL), FOR RESPONDENT-APPELLANT.

FRANKLIN A. JOSEF, FAYETTEVILLE, FOR PETITIONER-RESPONDENT.

SUSAN BASILE JANOWSKI, LAW GUARDIAN, LIVERPOOL, FOR EMMA R.W.

Appeal from an order of the Family Court, Onondaga County (George M. Raus, Jr., R.), entered February 25, 2008 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, modified the visitation provisions of a prior order.

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, Onondaga County, for a new hearing on the petition and cross petition in accordance with the following Memorandum: Respondent father appeals from an order that, inter alia, granted the relief sought by petitioner mother and modified the visitation provisions of a prior order entered upon the stipulation of the parties. We agree with the father that Family Court erred in permitting a “licensed mental health counselor,” who examined the parties’ child and was called as a witness by the mother, to offer an opinion that was based in part upon his interviews with collateral sources who did not testify at trial. There are two exceptions to the general rule requiring that opinion evidence be based on facts in the record or on facts personally known to the witness: if the opinion is based upon out-of-court material “of a kind accepted in the profession as reliable in forming a professional opinion or if it comes from a witness subject to full cross-examination on the trial” (*Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 726 [internal quotation marks omitted]). Neither exception applies in this case. At the fact-finding hearing, the expert testified that material portions of his opinion were based not only upon his interviews with the parties, but also were based on his interviews with collateral sources. On the record before us, we are unable to determine the extent to which the expert relied on those collateral source interviews in forming his opinion (*cf. Matter of Mohammad v Mohammad*, 23 AD3d 476, 476-477).

Furthermore, the collateral sources did not testify at trial, and there was no evidence establishing their reliability (*see generally Hambsch*, 63 NY2d at 725-726). We cannot conclude that the admission of the expert's opinion is harmless error because, without the admission of that opinion or the testimony of the collateral sources, there is insufficient evidence in the record to support the court's determination. We therefore reverse the order and remit the matter to Family Court for a new hearing on the petition and cross petition before a different adjudicator.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

547
CAF 07-02245
PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

IN THE MATTER OF RONNIE P.

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

YVONNE P., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

SUSAN M. SUSSMAN, NIAGARA FALLS, FOR PETITIONER-RESPONDENT.

TIMOTHY D. HASELEY, LAW GUARDIAN, LOCKPORT, FOR RONNIE P.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered September 24, 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.

Memorandum: These consolidated appeals arise from a proceeding in which petitioner sought to terminate the parental rights of respondent mother with respect to her son and daughter. Although the mother filed notices of appeal with respect to the orders at issue in appeal Nos. 1 and 2 terminating her parental rights, she has failed to address any issues concerning those orders in her brief on appeal and thus any such issues are deemed abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984). In appeal No. 3, the mother appeals, as limited by her brief, from that part of the order denying her request for post-termination visitation with her son. The appeal from the order in appeal No. 3 is moot, however, because the mother's son attained the age of 18 years during the pendency of the appeal (*see Matter of Dawn M.L. v Gary A.M.*, 31 AD3d 1222).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

548

CAF 07-02246

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

IN THE MATTER OF EMILY W.

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

YVONNE P., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

SUSAN M. SUSSMAN, NIAGARA FALLS, FOR PETITIONER-RESPONDENT.

TIMOTHY D. HASELEY, LAW GUARDIAN, LOCKPORT, FOR EMILY W.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered September 24, 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.

Same Memorandum as in *Matter of Ronnie P.* ([appeal No. 1] ___ AD3d ___ [June 5, 2009]).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

549

CAF 07-02468

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

IN THE MATTER OF RONNIE P. AND EMILY W.

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

YVONNE P., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

SUSAN M. SUSSMAN, NIAGARA FALLS, FOR PETITIONER-RESPONDENT.

TIMOTHY D. HASELEY, LAW GUARDIAN, LOCKPORT, FOR RONNIE P. AND EMILY W.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered October 15, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order, insofar as appealed from, denied respondent's request for post-termination visitation between respondent and Ronnie P.

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

Same Memorandum as in *Matter of Ronnie P.* ([appeal No. 1] ___ AD3d ___ [June 5, 2009]).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

555

CA 07-00219

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

JOANNE LOVALL, AS EXECUTOR OF THE ESTATE OF
ANDREW R. BASCH, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GRAVES BROS., INC. AND GRAVES BROS. HOME
IMPROVEMENT CO., DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

HISCOCK & BARCLAY, LLP, ROCHESTER (PAUL SANDERS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FITZSIMMONS, NUNN, FITZSIMMONS & PLUKAS, LLP, ROCHESTER (JASON ABBOTT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered January 5, 2007 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 modified on the law by granting the motion in part and dismissing the common-law negligence cause of action and the Labor Law §§ 200 and 241 (6) claims except insofar as the latter claim is based upon the alleged violation of 12 NYCRR 23-1.21 and as modified the order is affirmed without costs.

Memorandum: Andrew R. Basch (decedent) commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell from an extension ladder. Basch had placed that ladder on a pitched driveway to work on the front of a garage, and the ladder "kicked out." We note that decedent died after these appeals were taken and that plaintiff has been substituted as executor of his estate. In appeal No. 1, defendants contend that Supreme Court erred in denying their motion for summary judgment dismissing the complaint and, in appeal No. 2, plaintiff contends that the court erred in denying decedent's motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) claim.

With respect to appeal No. 1, we conclude that the court properly denied that part of defendants' motion for summary judgment dismissing the Labor Law § 240 (1) claim. To be held liable pursuant to section 240 (1), "the owner or contractor must breach the statutory duty . . . to provide a worker with adequate safety devices, and [that] breach must proximately cause the

worker's injuries" (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554; *see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39). Where, however, the "actions [of the worker are] the sole proximate cause of his or her injuries . . .[,] liability under Labor Law § 240 (1) [does] not attach" (*Weininger v Hagedorn & Co.*, 91 NY2d 958, 960, *rearg denied* 92 NY2d 875; *see Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 290). Thus, "if adequate safety devices are available at the job site, but the worker either does not use or misuses them," then the owner or contractor will not be held liable pursuant to section 240 (1) (*Robinson*, 6 NY3d at 554; *see Gallagher v New York Post*, 55 AD3d 488, 490).

Here, defendants established in support of their motion that the stepladders and planks necessary to erect the scaffolding for decedent to access the garage were available to him. Defendants submitted the deposition testimony of decedent's supervisor in which he testified that he instructed decedent to use the scaffolding rather than the extension ladder because of the pitched driveway and that the scaffolding would have been secure because it would be placed closer to the garage, where the ground was level. In addition, however, defendants submitted the deposition testimony of decedent stating that he was never told to use the scaffolding rather than the extension ladder. Thus, by their own submissions, defendants raised a triable issue of fact whether decedent knew that he should have used the scaffolding to access the garage but chose not to do so, and they therefore failed to establish their entitlement to judgment as a matter of law (*cf. Cahill*, 4 NY3d at 40).

The court also properly denied that part of defendants' motion for summary judgment dismissing the Labor Law § 241 (6) claim insofar as it is based upon the alleged violation of 12 NYCRR 23-1.21. Defendants failed to meet their initial burden inasmuch as they failed to establish that the regulation is not applicable to the facts of the case, that they did not violate it, or that the alleged violation was not a proximate cause of decedent's injuries (*see Whalen v ExxonMobil Oil Corp.*, 50 AD3d 1553, 1554). We conclude, however, that the Labor Law § 241 (6) claim with respect to the remaining Industrial Code sections set forth in the bill of particulars has been abandoned, and thus the Labor Law § 241 (6) claim should be dismissed except insofar as it is based upon the alleged violation of 12 NYCRR 23-1.21 (*see Roosa v Cornell Real Prop. Servicing, Inc.*, 38 AD3d 1352, 1354; *Smith v Le Frois Dev., LLC*, 28 AD3d 1133, 1134; *Ciesinski v Town of Aurora*, 202 AD2d 984). We therefore modify the order in appeal No. 1 accordingly.

The court also erred in denying those parts of defendants' motion with respect to the Labor Law § 200 claim and common-law negligence cause of action, and we therefore further modify the order in appeal No. 1 accordingly. "Defendants established that they exercised no control over the manner or method of

[decedent's] work," and decedent failed to raise a triable issue in opposition to the motion (*Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1428; *see Brunette v Time Warner Entertainment Co., L.P.*, 32 AD3d 1170; *see generally Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877-878).

With respect to the order in appeal No. 2, we conclude that the court properly denied decedent's motion seeking partial summary judgment on liability with respect to the Labor Law § 240 (1) claim. Decedent failed to meet his initial burden of establishing that his actions were not the sole proximate cause of the accident inasmuch as he submitted the deposition testimony of his employer indicating that he was instructed to use the scaffolding (*see Gallagher*, 55 AD3d at 490; *cf. Baker v Essex Homes of W. N.Y., Inc.*, 55 AD3d 1332).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

556

CA 07-01515

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

JOANNE LOVALL, AS EXECUTOR OF THE ESTATE OF
ANDREW R. BASCH, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GRAVES BROS., INC. AND GRAVES BROS. HOME
IMPROVEMENT CO., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

FITZSIMMONS, NUNN, FITZSIMMONS & PLUKAS, LLP, ROCHESTER (JASON ABBOTT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, ROCHESTER (PAUL SANDERS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered May 18, 2007 in a personal injury action. The order denied the motion of Andrew R. Basch for partial summary judgment.

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

Same Memorandum as in *Lovall v Graves Bros., Inc.* ([appeal No. 1] ___ AD3d ___ [June 5, 2009]).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

558

CA 08-01565

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

MICHAEL J. SCARBOROUGH, JR., AS ADMINISTRATOR OF THE ESTATE OF MICHAEL J. SCARBOROUGH, SR., DECEASED, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

NAPOLI, KAISER & BERN, LLP, JEFFREY R. GUZMAN, STEVEN KRENTSEL, DEFENDANTS-APPELLANTS-RESPONDENTS, RANDOLPH D. JANIS, MELINDA RUTH ALEXIS AND WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, AS TEMPORARY ADMINISTRATOR OF THE ESTATE OF BRADLEY C. ABBOTT, DECEASED, DEFENDANTS-RESPONDENTS.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, NEW YORK CITY (RICHARD E. LERNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS AND DEFENDANTS-RESPONDENTS.

POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered February 15, 2008 in a legal malpractice action. The order, among other things, granted in part plaintiff's cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in its entirety and reinstating the amended complaint against defendants Randolph D. Janis, Melinda Ruth Alexis and Wilson, Elser, Moskowitz, Edelman & Dicker LLP, as temporary administrator of the estate of Bradley C. Abbott, deceased, and by denying the cross motion in its entirety and as modified the order is affirmed without costs.

Memorandum: Following the death of his father, plaintiff retained defendants, a law firm, two partners and three associates, to prosecute a medical malpractice action against various doctors, hospitals and clinics (collectively, underlying medical defendants). It is undisputed that there is only one medical defendant whose negligence potentially could support the underlying medical malpractice action (underlying medical defendant). The medical malpractice action was dismissed against the underlying medical defendants after defendants failed to file a timely note of issue.

Following the dismissal of that action, defendants asked plaintiff to sign a stipulation of discontinuance with respect to the underlying action, which in fact had already been dismissed. According to plaintiff, he was informed that he could not prevail in his underlying action but was never informed that the action already had been dismissed as a result of defendants' failure to file a timely note of issue. Subsequently, a member of defendants' firm telephoned plaintiff and told him the actual basis for the dismissal of the underlying action.

Plaintiff thereafter commenced this action asserting causes of action for legal malpractice and for treble damages pursuant to Judiciary Law § 487. Defendants moved for summary judgment dismissing the amended complaint in its entirety on the ground that no acts or omissions by the underlying medical defendants were the proximate cause of the death of plaintiff's father, an essential element of a cause of action for legal malpractice. Alternatively, defendants sought summary judgment dismissing the amended complaint against Randolph D. Janis, Melinda Ruth Alexis and Bradley C. Abbott (collectively, associate defendants) on the ground that they were associates rather than partners of defendant law firm and thus were not legally responsible for any legal malpractice. Plaintiff cross-moved for partial summary judgment on liability on the legal malpractice cause of action. We note that one of the associate defendants died after the action was commenced, and a temporary administrator was substituted as a defendant to represent his estate. Supreme Court granted the alternative relief sought by defendants by granting that part of the motion for summary judgment dismissing the amended complaint against the two remaining associate defendants and the temporary administrator of the estate of the deceased associate defendant. The court granted plaintiff's cross motion for partial summary judgment on liability on the legal malpractice cause of action against the remaining defendants. We conclude that the court erred in granting the alternative relief sought by defendants and in granting plaintiff's cross motion with respect to defendant law firm and the two partners, and we therefore modify the order accordingly.

Contrary to the contention of defendants, the court erred in granting the alternative relief sought in their motion. Partnership Law § 26 (c) (i) provides that "each partner, employee or agent of . . . a registered limited liability partnership" may be individually liable for, inter alia, his or her negligent or wrongful act. Defendants failed to meet their initial burden of establishing as a matter of law that the associate defendants committed no negligent or wrongful act for which they could be individually liable. We thus reinstate the amended complaint against the two remaining associate defendants and the temporary administrator of the estate of the deceased associate.

Contrary to the further contention of defendants, the court properly determined that none of the defendants is entitled to summary judgment dismissing the Judiciary Law § 487 cause of action. That statute provides in relevant part that an attorney who is "guilty of deceit or collusion, or consents to any deceit or collusion, with

intent to deceive the court or any party . . . [i]s guilty of a misdemeanor, and . . . he [or she] forfeits to the party injured treble damages, to be recovered in a civil action." "A violation of Judiciary Law § 487 may be established 'either by the defendant's alleged deceit *or* by an alleged chronic, extreme pattern of legal delinquency by the defendant' " (*Izko Sportswear Co., Inc. v Flaum*, 25 AD3d 534, 537; *see Amalfitano v Rosenberg*, 12 NY3d 8; *Schindler v Issler & Schrage*, 262 AD2d 226, *lv dismissed* 94 NY2d 791, *rearg denied* 94 NY2d 859). Here, the documents submitted by defendants in support of their motion establish that some of the attorneys at defendant law firm engaged in intentional deceit, and thus by their own submissions defendants defeated their entitlement to summary judgment dismissing that cause of action.

Finally, we conclude that neither plaintiff nor any defendant is entitled to summary judgment with respect to the merits of the legal malpractice cause of action. Inasmuch as there are competing expert affidavits "raising an issue of fact . . . whether plaintiff would have been successful in the underlying medical malpractice action," neither plaintiff nor defendants are entitled to summary judgment (*Gotay v Breitbart*, 58 AD3d 25, 30; *see Leadbeater v Peters, Berger, Koshel & Goldberg, P.C.*, 40 AD3d 713, 713-714). Contrary to the contention of plaintiff, he did not establish his entitlement to judgment as a matter of law on the theory that defendants' negligence caused him to lose a viable settlement opportunity. Although plaintiff submitted evidence that the attorney for the underlying medical defendant was considering a settlement with plaintiff, there is no evidence in the record of an offer of settlement by the underlying medical defendant, and thus plaintiff's contention is based on mere speculation (*see e.g. Bauza v Livington*, 40 AD3d 791, 793; *Masterson v Clark*, 243 AD2d 411, 412; *cf. Silva v Worby, Groner, Edelman, LLP*, 54 AD3d 634).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

559

KA 06-01796

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM DURAND, DEFENDANT-APPELLANT.

EGERT AND TRAKINSKI, NEW YORK CITY (LEONARD EGERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS, FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered May 16, 2006. The appeal was held by this Court by order entered December 21, 2007, decision was reserved and the matter was remitted to Wayne County Court for further proceedings (46 AD3d 1336). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Wayne County Court for resentencing.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of three counts of criminal trespass in the third degree (Penal Law § 140.10 [a]) arising from his unlawful entry into a henhouse at the Wegmans Egg Farm. Defendant was acquitted of, inter alia, three counts of burglary in the third degree (§ 140.20). We previously held this case, reserved decision and remitted the matter to County Court on the ground that the court should have conducted a *Gomberg* hearing "with respect to the contention of defendant that he was denied effective assistance of counsel at the pretrial stage of the criminal proceeding prior to denying his motion seeking to dismiss the indictment on that ground" (*People v Durand*, 46 AD3d 1336, 1336-1337). Defendant's former defense counsel (defense counsel) represented defendant and his codefendants prior to defendant's arraignment on the indictment. According to defendant, defense counsel obtained favorable plea bargains for the codefendants but conducted no plea negotiations on defendant's behalf and in fact advised defendant to testify before the grand jury, where he gave incriminating testimony that was used against him at trial.

Contrary to the contention of defendant in his supplemental brief, we conclude that the court properly determined upon remittal

that there was no actual conflict with respect to the joint representation of defendant and the codefendants prior to their arraignments on the indictment, i.e., that their defenses did not " 'run afoul of each other,' " and thus that dismissal of the indictment on that ground was not required (*People v Gomberg*, 38 NY2d 307, 312). The record of the *Gomberg* hearing establishes that defense counsel in fact attempted to obtain a favorable plea bargain for defendant as well as his codefendants prior to the presentation of the matter to the grand jury and that the District Attorney declined to make defendant a plea offer at that time. The record of the hearing further establishes that the codefendants obtained different attorneys after their arraignments on the indictment and that they obtained their respective plea bargains while represented by those attorneys. Defense counsel testified at the hearing that the court had raised the issue of a potential conflict of interest at defendant's arraignment on the indictment and that, in order to maintain a harmonious relationship with the court, defense counsel agreed that each codefendant should have separate counsel.

We further conclude that the court properly determined that any potential conflict of interest did not affect the conduct of the defense (*see People v Harris*, 99 NY2d 202, 210). The record of the hearing establishes that defense counsel advised defendant that his grand jury testimony may negate the element of intent on the burglary counts inasmuch as defendant would testify that his intent when entering the henhouse was to document the conditions and not to remove birds. Defense counsel also testified that he believed that defendant's grand jury testimony would benefit the codefendants as well. We note that the District Attorney testified at the hearing that, at the time he presented the matter to the grand jury, he believed that the element of intent with respect to the burglary charges might have been negated by defendant's grand jury testimony. Defense counsel further testified that he had advised defendant and the codefendants prior to the grand jury proceeding that he did not believe that there was a conflict of interest based upon his joint representation of them, but that they were each entitled to their own attorney. He also testified that defendant was adamant that he and his codefendants "were in this together" and that he did not want separate counsel. Indeed, defendant testified at the hearing that he chose to testify before the grand jury because he was the most eloquent of the three defendants and that he understood the strategy of advising the grand jury that his intent and that of the codefendants when entering the henhouse was humanitarian, not criminal. He further testified that he knew that his testimony could be used against him at trial. We thus conclude that the court properly denied defendant's motion to dismiss the indictment based on the alleged ineffective assistance of counsel.

Finally, we agree with the contention of defendant in his main brief that the court erred in considering the counts of burglary in the third degree and petit larceny, of which defendant was acquitted, when imposing the sentences on the criminal trespass counts (*see People v Reeder*, 298 AD2d 468, *lv denied* 99 NY2d 538; *see also People v Rogers*, 56 AD3d 1173, 1174). Although defendant failed to preserve

that contention for our review (*see People v Brown*, 38 AD3d 676, 677, *lv denied* 9 NY3d 840), we nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing. We have reviewed the remaining contentions of defendant in his main brief with respect to the sentence and conclude that they are without merit.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

572

CA 08-02276

PRESENT: HURLBUTT, J.P., PERADOTTO, CARNI, GREEN, AND PINE, JJ.

IN THE MATTER OF CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, ERIE UNIT OF LOCAL 815, JOAN A. BENDER, AND THE CLASS OF ALL SIMILARLY SITUATED AND AFFECTED MEMBERS OF CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, ERIE UNIT OF LOCAL 815, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, JOEL GIAMBRA, COUNTY EXECUTIVE, RESPONDENTS-APPELLANTS,
ET AL., RESPONDENTS.

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

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (DIANE M. ROBERTS OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered January 24, 2008 in a proceeding pursuant to CPLR article 75. The order, inter alia, granted the petition.

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

Memorandum: Petitioners commenced this CPLR article 75 proceeding seeking to compel respondents to proceed to arbitration with respect to their grievance. According to petitioners, respondents improperly prohibited employees of respondent County of Erie (County) who were laid off from various departments from being recalled or “bumped” into equivalent open positions at respondent Erie County Medical Center Corporation (ECMCC), a public benefit corporation (*see* Public Authorities Law § 3628 *et seq.*). ECMCC and respondent Chief Executive Officer of ECMCC moved to dismiss the petition, and the remaining respondents sought that relief in their answer. Petitioner Civil Service Employees Association, Inc. is the bargaining unit for both County and ECMCC employees. The County and respondent County Executive (collectively, respondents) contend that Supreme Court erred in granting the petition and directing them to schedule arbitration because the grievance is not arbitrable. Specifically, respondents contend that, although County and ECMCC

employees are contained within the same bargaining unit, there are separate layoff units for them for purposes of recall and "bumping." We agree, and we therefore reverse.

In determining the arbitrability of a grievance, the court must determine, inter alia, whether " 'there is any statutory, constitutional or public policy prohibition against arbitration of the grievance' " (*Matter of County of Chautauqua v Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO, County of Chautauqua Unit 6300, Chautauqua County Local 807*, 8 NY3d 513, 519).

Here, we conclude that there is a statutory prohibition against arbitration of the grievance. Pursuant to Rule 24 of the Erie County Rules for the Classified Civil Service (County Rules), enacted pursuant to Civil Service Law § 20 (1), "Layoff Unit shall mean each department of the County. Each town, each village, each school district, each special district and each authority are separate layoff units. Authorities shall be deemed to be separate civil divisions." Pursuant to Public Authorities Law § 2 (1) and (2) (a), a "public benefit corporation" such as ECMCC that was created under that or any other New York State law is included under the definitions for both a " 'state authority' " and a " 'local authority.' " Because ECMCC is an "authority" within the meaning of both the Public Authorities Law and the County Rules, it constitutes a separate layoff unit within the County. "[A]n arbitral award that would permit interdepartmental bumping into a ***different*** layoff unit would run afoul of . . . Civil Service Law [§ 80 (6)]" (*County of Chautauqua*, 8 NY3d at 522), and we thus conclude that there is a "statutory . . . prohibition against arbitration of the grievance" (*id.* at 519).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

584
KA 08-00221
PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDISON DAVISON, DEFENDANT-APPELLANT.

MULDOON & GETZ, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (KRISTYNA S. MILLS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered September 22, 2006. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (two counts), bribing a witness, petit larceny (two counts), criminal possession of stolen property in the fifth degree (two counts), criminal possession of a weapon in the fourth degree and menacing in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of bribing a witness and dismissing count four of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of robbery in the first degree (Penal Law § 160.15 [3]) and one count of bribing a witness (§ 215.00 [a]). The People correctly concede that the part of the judgment convicting defendant of bribing a witness must be reversed because that count of the indictment had been dismissed before commencement of the trial and was mistakenly submitted to the jury (*see People v Romero*, 309 AD2d 953, *lv denied* 1 NY3d 579; *People v Smiley*, 303 AD2d 425, 426, *lv denied* 100 NY2d 542). We therefore modify the judgment accordingly. Defendant failed to preserve for our review his further contention that he was prejudiced by the introduction of evidence concerning the mistakenly submitted count (*see Smiley*, 303 AD2d at 426; *People v Castellano*, 284 AD2d 406, *lv denied* 97 NY2d 680) and, in any event, that contention lacks merit. "[T]he paramount consideration in assessing potential spillover error is whether there is a 'reasonable possibility' that the jury's decision to convict on the [mistakenly submitted] count[] influenced its guilty verdict on the remaining counts in a 'meaningful way' " (*People v Doshi*, 93 NY2d 499, 505), and that cannot be said here (*see*

generally People v Williams, 292 AD2d 474). Contrary to the further contentions of defendant, he was not denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147), and the sentence is not unduly harsh or severe.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

587

CAF 08-00802

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

IN THE MATTER OF LA'DERRICK W. AND QUENTIN W.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

ASHLEY W., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

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

CARACCIOLI & NELSON, PLLC, WATERTOWN (KATHRYN G. WOLFE OF COUNSEL), FOR PETITIONER-RESPONDENT.

LISA A. PROVEN, LAW GUARDIAN, WATERTOWN, FOR LA'DERRICK W. AND QUENTIN W.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered April 3, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

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, Jefferson County, for further proceedings in accordance with the following Memorandum: Respondent mother appeals from a default order terminating her parental rights upon a finding that she had permanently neglected her children. We agree with the mother that Family Court abused its discretion in granting the motion of the mother's attorney to withdraw as counsel for the mother without notice to her. "An attorney of record may withdraw as counsel only upon notice to his or her client" (*Matter of Hohenforst v DeMagistris*, 44 AD3d 1114, 1116; *see* CPLR 321 [b] [2]; Family Ct Act § 165 [b]; *Matter of Davontae D.*, ___ AD3d ___ [May 1, 2009]; *Matter of Michael W.*, 239 AD2d 865). "Because the purported withdrawal of counsel in this case was ineffective, the order entered by Family Court was improperly entered as a default order and appeal therefrom is not precluded" (*Matter of Tierra C.*, 227 AD2d 994, 995; *see Matter of Kwasi S.*, 221 AD2d 1029). We therefore reverse the order and remit the matter to Family Court for reassignment of counsel and a new hearing on the petition (*see Davontae D.*, ___ AD3d ___; *Michael W.*, 239 AD2d at 866). In light of our conclusion that a new hearing on the petition is necessary, we do not address the mother's remaining

contentions.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

588

CAF 08-00925

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

IN THE MATTER OF JALEEL F. AND SIERRA S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ERNEST F., RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

DAVID C. SCHOPP, LAW GUARDIAN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR JALEEL F. AND SIERRA S.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered March 27, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order, insofar as appealed from, determined that respondent is a notice father pursuant to Social Services Law § 384-c.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the determination that respondent is a notice father pursuant to Social Services Law § 384-c is vacated, and the matter is remitted to Family Court, Erie County, for a new hearing in accordance with the following Memorandum: Petitioner commenced this proceeding pursuant to Social Services Law § 384-b to free the subject children for adoption following the death of their mother. Respondent is the biological father of one of the two children, and he appeals from an order that vacated a default order "as to [respondent] as it pertains to [the] Termination of Parental Rights Petition . . . but still stands on Notice father standing." Social Services Law § 384-c, inter alia, limits the rights of certain fathers of children born out of wedlock to notice of a dispositional hearing pursuant to Social Services Law § 384-b and an opportunity to present evidence concerning the best interests of the child at such a hearing (§ 384-c [1], [2] [a]; [3]). Respondent contends that Family Court erred in failing to afford him an opportunity to present evidence that he was not a notice father pursuant to section 384-c, but was instead a "consent father" pursuant to Domestic Relations Law § 111 (1) (d), in which event his consent to the adoption of his son was required.

We conclude that respondent was denied his right to due process based on the failure to inform him of the date of the dispositional hearing on the termination of parental rights petition. Even

assuming, arguendo, that respondent was properly determined to be a notice father, we conclude that he nevertheless had the right to "notice of the proceeding and an opportunity to be heard concerning the [child's] best interests" (*Matter of Alyssa M.*, 55 AD3d 505, 506). The record establishes that respondent appeared at each court date of which he had notice, either in person or by counsel, thus manifesting his intention to exercise his rights even if those rights were limited to those of a notice father (*cf. Matter of Desmond K.*, 59 AD3d 240). The record, however, contains no indication that respondent was informed of the date on which the dispositional hearing on the termination of parental rights petition was to be conducted. We conclude that the failure to afford respondent an opportunity to be heard on the issue of his son's best interests at that hearing in accordance with his right as a notice father, at which hearing he also would have been afforded the opportunity to submit evidence that he was a consent father, amounts to a denial of due process (*see Matter of Samantha L.J.*, 155 AD2d 980; *see generally Matter of Roy Anthony A.*, 59 AD2d 662). We therefore reverse the order insofar as appealed from, vacate the determination that respondent is a notice father, and remit the matter to Family Court for a new hearing consistent with our decision (*see Samantha L.J.*, 155 AD2d 980).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

590

CA 08-02297

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

WILLIAM R. CONGDON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BRITA M. EVERETT AND WILLIAM R. EVERETT,
DEFENDANTS-APPELLANTS.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (DAVID S. WHITTEMORE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Larry M. Himelein, A.J.), entered January 22, 2008. The order, inter alia, denied that part of defendants' motion to dismiss the claim seeking to enforce an alleged oral agreement.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the claim seeking to enforce an alleged oral agreement and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to enforce an alleged oral agreement to sell real property and seeking money damages for unjust enrichment. Supreme Court erred in denying that part of defendants' motion to dismiss the claim seeking to enforce the alleged oral agreement inasmuch as that claim is barred by the statute of frauds (*see* General Obligations Law § 5-703 [1], [2]), and we therefore modify the order accordingly. There are no writings in the record on appeal that "spell out the terms of the alleged agreement" (*Anostario v Vicinanzo*, 59 NY2d 662, 663; *see Abbey v Henriquez*, 36 AD3d 724). We further agree with defendants that the doctrine of part performance does not apply to defeat the affirmative defense of the statute of frauds (*see* § 5-703 [4]; CPLR 3211 [a] [5]). Plaintiff resided on defendants' property with defendants' daughter from 1998 through at least 2006, when plaintiff initiated a divorce action. According to plaintiff, he made both monthly payments to defendants and improvements to the property. We conclude, however, that plaintiff's actions in making monthly payments, in helping to build a barn on the property, and in building an addition to the mobile home were not "unequivocally referable" to an agreement to purchase the property to warrant invoking the doctrine of part performance (*Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d

229, 235; *see Anostario*, 59 NY2d at 664).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

596

CA 08-02424

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

STANDARD FIRE INSURANCE COMPANY, AS SUBROGEE OF PETER O. ALLEN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NEW HORIZONS YACHT HARBOR, INC., DEFENDANT-APPELLANT.

HISCOCK & BARCLAY, LLP, ROCHESTER (PAUL SANDERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF MICHAEL M. EMMINGER, SYRACUSE (JOSEPH R. PACHECO, II, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered January 30, 2008. The order, insofar as appealed from, denied defendant's motion for summary judgment.

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

Memorandum: Plaintiff, as subrogee of an individual who housed his boat at defendant's marina (hereafter, boat owner), commenced this action seeking to recover the amount paid by plaintiff to the boat owner, its insured, for property damage sustained by him after the roof of a storage building at the marina collapsed and damaged his boat. We conclude that Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint.

In support of its motion, defendant relied on an exculpatory clause in the contract between the boat owner and defendant pursuant to which defendant "accept[ed] no liability for damage . . . or any other losses related to the boat . . . arising from any cause including but not limited to . . . weather, etc." As a general rule, issues of proximate cause are for the trier of fact (*see generally Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784; *Prystajko v Western N.Y. Pub. Broadcasting Assn.*, 57 AD3d 1401, 1403; *Wechter v Kelner*, 40 AD3d 747, *lv denied* 9 NY3d 806). We conclude on the record before us that a trier of fact could find that the building collapsed based on defendant's failure to clear snow from the roof of that structure, rather than from the rapid accumulation of snow. We further conclude that defendant failed to establish that there was a storm in progress and thus that it is relieved of liability on that ground as a matter of law. Indeed, the record

establishes that the snow had stopped approximately 20 hours before the accident. " 'Once there is a period of inactivity after cessation of the storm, it becomes a question of fact as to whether the delay in commencing the cleanup was reasonable' " (*Boarman v Siegel, Kelleher & Kahn*, 41 AD3d 1247, 1248; *see Williams v Geneva B. Scruggs Community Health Care Ctr.*, 255 AD2d 982).

Defendant also contended in support of its motion that it is not subject to liability because it lacked constructive notice of the dangerous condition created by the accumulation of snow on the roof of the building (*see Bellassai v Roberts Wesleyan Coll.*, 59 AD3d 1125; *Wesolek v Jumping Cow Enters., Inc.*, 51 AD3d 1376, 1377). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [a defendant] to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837). Here, the record establishes that, although defendant did not staff the marina during winter months, defendant has admitted that the snow accumulation contributed to the accident, and evidence offered by defendant in support of its motion established that between seven and eight feet of snow had fallen in the month preceding the accident and that there was an 18-inch accumulation of snow that blanketed the area the day before the accident. That evidence, coupled with evidence that an identical building on defendant's premises collapsed approximately 12 hours before the accident, raises a triable issue of fact whether defendant had constructive notice of the dangerous condition (*see generally id.* at 837-838).

Finally, in view of the various issues of fact identified herein, we decline plaintiff's request to search the record and to grant plaintiff summary judgment pursuant to CPLR 3212 (b).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

597

CA 08-02501

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

IN THE MATTER OF TOWN OF GENEVA, BY AND ON BEHALF OF TOWN BOARD, TOWN OF GENEVA, AND ON BEHALF OF TOWN OF GENEVA SEWER DISTRICT NO. 1, PETITIONER/PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF GENEVA, STUART EINSTEIN, MAYOR, CITY OF GENEVA, AND TARA J. CLARK, CITY OF GENEVA COMPTROLLER, RESPONDENTS/DEFENDANTS-RESPONDENTS.

THE WOLFORD LAW FIRM LLP, ROCHESTER (ELIZABETH A. WOLFORD OF COUNSEL), FOR PETITIONER/PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (H. TODD BULLARD OF COUNSEL), FOR RESPONDENTS/DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered August 8, 2008 in a CPLR article 78 proceeding and plenary action. The judgment, inter alia, dismissed the petition/complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition/complaint is reinstated, and respondents/defendants are granted 20 days from service of the order of this Court with notice of entry to serve and file an answer.

Memorandum: Although respondents/defendants (respondents) moved to dismiss this hybrid CPLR article 78 proceeding and plenary action against them under various paragraphs of CPLR 3211 (a) and under CPLR 7804 (f), Supreme Court in its decision nevertheless addressed the burdens of petitioner/plaintiff (petitioner) and granted respondents' motion to dismiss based on the evidence submitted by respondents in support of their motion. We agree with petitioner that the court erred in converting respondents' motion to dismiss to one for summary judgment. The court did not provide "adequate notice to the parties" that it was doing so (CPLR 3211 [c]), nor did respondents and petitioner otherwise receive " 'adequate notice' by expressly seeking summary judgment or submitting facts and arguments clearly indicating that they were 'deliberately charting a summary judgment course' " (*Mihlovan v Grozavu*, 72 NY2d 506, 508; *see Carcone v D'Angelo Ins. Agency*, 302 AD2d 963; *Pitts v City of Buffalo*, 298 AD2d 1003, 1004-

1005).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

598.1

CA 08-01661

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

DEBORAH GDANIEC, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF JOSEPH F. GDANIEC, DECEASED, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

JOSEPH CORIGLIANO, D.O., AND BUFFALO MEDICAL GROUP, P.C., DEFENDANTS-RESPONDENTS-APPELLANTS.

CANTOR, LUKASIK, DOLCE & PANEPINTO, P.C., BUFFALO (EDWARD L. SMITH, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

CONNORS & VILARDO, LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Joseph G. Makowski, J.), entered October 2, 2007 in a medical malpractice action. The order, among other things, granted defendants' motion to set aside the jury verdict and granted a new trial.

Now, upon the stipulation of discontinuance of action signed by the attorneys for the parties on April 29, 2009 and filed in the Erie County Clerk's Office on May 21, 2009,

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

598

CA 08-01899

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

U.S. BANK NATIONAL ASSOCIATION AS CUSTODIAN OF TAX LIENS OWNED BY ERIE TAX CERTIFICATE CORPORATION, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TRACY PATTERSON, DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

STEVEN BEDFORD AND MARY JO BEDFORD, RESPONDENTS.

TRONOLONE & SURGALLA, P.C., BUFFALO (JOHN B. SURGALLA OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Erie County Court (Sheila A. DiTullio, J.), entered April 30, 2008 in a foreclosure action. The order denied the motion of defendant Tracy Patterson, seeking, inter alia, to vacate a default judgment of foreclosure and sale.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted in part, and the judgment entered June 21, 2007 is vacated in its entirety.

Memorandum: We conclude that Supreme Court abused its discretion in denying that part of the motion of Tracy Patterson (defendant) seeking to vacate a default judgment of foreclosure and sale of property jointly owned by defendant and his ex-wife, defendant Vicki Lynn Patterson. We agree with defendant that service pursuant to CPLR 308 (5) on the ex-wife at the subject property along with court-ordered service by publication pursuant to CPLR 316 was insufficient to establish that the court had personal jurisdiction over him. The service upon his ex-wife, with whom he no longer resided, was not "reasonably calculated, under all the circumstances, to apprise" him of the foreclosure action (*Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 314; *see Raschel v Rish*, 69 NY2d 694, 696-697; *cf. Johnson v County of Erie*, 309 AD2d 1278). Furthermore, "[s]ervice by publication in a . . . foreclosure action is permissible where the [defendant] is evading service," and here there was no evidence that defendant was evading service (*Contimortgage Corp. v Isler*, 48 AD3d 732, 734). Indeed, we note that the record contains evidence

establishing that plaintiff had access to defendant's telephone number at the time its attorney alleged in plaintiff's motion for, inter alia, expedient service that no such number could be located, and that its collections company was in fact in telephone contact with defendant just prior to plaintiff's motion.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

608

CA 08-01700

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

VILLAGE OF ILION, VILLAGE OF HERKIMER, VILLAGE OF FRANKFORT, AND TOWN OF FRANKFORT, AS MUNICIPAL CORPORATIONS AND ON BEHALF OF THEIR CONSTITUENT TAXPAYERS, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

COUNTY OF HERKIMER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE HERKIMER COUNTY SELF-INSURANCE PLAN, VILLAGE OF DOLGEVILLE, VILLAGE OF MIDDLEVILLE, VILLAGE OF MOHAWK, VILLAGE OF WEST WINFIELD, TOWN OF COLUMBIA, TOWN OF DANUBE, TOWN OF GERMAN FLATS, TOWN OF HERKIMER, TOWN OF LITCHFIELD, TOWN OF LITTLE FALLS, TOWN OF MANHEIM, TOWN OF NEWPORT, TOWN OF STARK, TOWN OF WARREN, TOWN OF WINFIELD, AND CITY OF LITTLE FALLS, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

GLEASON DUNN WALSH & O'SHEA, ALBANY (THOMAS F. GLEASON OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON (ALBERT J. MILLUS, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT COUNTY OF HERKIMER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE HERKIMER COUNTY SELF-INSURANCE PLAN.

ROSSI AND MURNANE, NEW YORK MILLS (VINCENT J. ROSSI, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS TOWN OF DANUBE, TOWN OF GERMAN FLATS, TOWN OF HERKIMER, TOWN OF LITTLE FALLS, TOWN OF MANHEIM, TOWN OF NEWPORT, TOWN OF STARK, AND TOWN OF WARREN.

Appeal from an order of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered March 31, 2008. The order, inter alia, granted the motion of defendant County of Herkimer, individually and as administrator of the Herkimer County Self-Insurance Plan, for summary judgment and dismissed the amended complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part the motion of plaintiffs and placing venue in Oneida County and by denying in part the motion of defendant County of Herkimer, individually and as administrator of the Herkimer County Self-Insurance Plan, and reinstating the third cause of action, the fourth cause of action

insofar as that cause of action alleges that the costs and withdrawal payments of the Herkimer County Self-Insurance Plan were not allocated by rational or actuarially sound methodology, and the ninth cause of action against that defendant and as modified the order is affirmed without costs.

Memorandum: Plaintiffs are municipalities and former members of the Herkimer County Self-Insurance Plan (Plan), which was created in 1956 pursuant to article 5 of the Workers' Compensation Law. As the Plan's assessments increased, plaintiffs each attempted to withdraw from the Plan effective January 1, 2005, but defendant County of Herkimer (County) determined that their notices of withdrawal were conditional and thus ineffective. Plaintiffs were instead assessed their respective shares of the Plan costs for the year 2005, but they refused to pay those shares or to participate in the "Abandonment Plan," which was adopted by the County to effectuate the Plan's termination. Plaintiffs commenced this action against the County and its third-party Plan administrators (collectively, defendants), and also named the municipal defendants as necessary parties inasmuch as they may be inequitably affected by the judgment. The amended complaint asserts 10 causes of action, including causes of action asserting that both the Plan and the Abandonment Plan violate the New York Constitution and the Workers' Compensation Law. Plaintiffs also alleged that defendants had mismanaged the Plan, and sought an accounting of its funds. Plaintiffs have refused to make any payments toward their continuing liabilities under the Plan for the years 2006 and 2007.

In appeal No. 1, plaintiffs contend that Supreme Court erred in granting the motion of the County for summary judgment dismissing the amended complaint, and they request that this Court search the record and grant summary judgment in their favor. Plaintiffs further contend in appeal No. 1 that the court erred in denying their motion for a change of venue and for recusal. In appeal No. 2, plaintiffs contend that the court erred in granting the motion of the County for summary judgment on its amended and supplemental counterclaims concerning plaintiffs' liability under the plan and seeking an inquest on damages.

With respect to appeal No. 1, we decline the request of plaintiffs to search the record and grant them summary judgment inasmuch as we conclude that their submissions are insufficient to establish their entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The future liability accrued by the Plan is derived from the estimated remaining balance of the future costs of existing workers' compensation claims, and that balance does not constitute "debt" within the meaning of the New York Constitution, article VIII, § 2 (*see generally Wein v Levitt*, 42 NY2d 300, 304-305; *Levy v McClellan*, 196 NY 178, 200). Further, plaintiffs' remedy for the failure of the County to provide annual reports pursuant to Workers' Compensation Law § 72 was first to request the reports and, in the event that the requests were denied and plaintiffs exhausted their administrative remedies without success (*see generally Matter of Di Pietro v State Ins. Fund*, 206 AD2d 211,

213-214), to commence a CPLR article 78 proceeding to compel production of the reports (*see* CPLR 7801; *Matter of Priest v Mareane*, 45 AD3d 1474, 1475, *lv denied* 10 NY3d 704).

We agree with plaintiffs, however, that the court erred in granting that part of the motion of the County in appeal No. 1 for summary judgment dismissing the third cause of action, which alleges that the Plan and the Abandonment Plan improperly covered employees of certain nonmunicipal members. We therefore modify the order accordingly. The County failed to meet its initial burden inasmuch as it did not establish that the employees of the Mohawk Valley Ambulance Corps were volunteer ambulance workers, within the scope of Workers' Compensation Law § 63 (3) and Volunteer Ambulance Workers' Benefit Law §§ 3, 5, and 30. Thus, the burden never shifted to plaintiffs with respect to that cause of action (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). We further conclude that the court erred in granting those parts of the motion of the County for summary judgment dismissing the fourth cause of action insofar as it alleges that the costs and withdrawal payments of the Plan were not allocated by rational or actuarially sound methodology, and the ninth cause of action against the County, for an accounting, both of which bear on issues that are relevant to the upcoming inquest on damages. We therefore further modify the order accordingly. There are material issues of fact concerning the alleged mismanagement and the allocation of costs to be determined at the inquest on damages, thus precluding summary judgment dismissing the fourth cause of action in its entirety and the ninth cause of action against the County (*see generally Zuckerman*, 49 NY2d at 562).

Inasmuch as the County now agrees with plaintiffs that there should be a change of venue, that part of plaintiffs' motion seeking that relief is granted. We therefore further modify the order accordingly. Although we need not reach the further contention of plaintiffs with respect to recusal in light of our determination concerning venue, we note that we conclude that the Justice did not abuse his discretion in denying that part of their motion for recusal (*see* Judiciary Law §§ 14, 15; *Matter of Albany County Dept. of Social Servs. v Rossi*, ___ AD3d ___ [May 7, 2009]).

Finally, we conclude with respect to appeal No. 2 that the County met its burden of establishing its entitlement to judgment as a matter of law with respect to its motion for summary judgment on its amended and supplemental counterclaims and for an inquest on damages, and plaintiffs failed to raise a triable issue of fact to defeat the motion (*see generally Zuckerman*, 49 NY2d at 562).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

609

CA 08-02120

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

VILLAGE OF ILION, VILLAGE OF HERKIMER, VILLAGE OF FRANKFORT, AND TOWN OF FRANKFORT, AS MUNICIPAL CORPORATIONS AND ON BEHALF OF THEIR CONSTITUENT TAXPAYERS, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

COUNTY OF HERKIMER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE HERKIMER COUNTY SELF-INSURANCE PLAN, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS.
(APPEAL NO. 2.)

GLEASON DUNN WALSH & O'SHEA, ALBANY (THOMAS F. GLEASON OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON (ALBERT J. MILLUS, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered August 27, 2008. The order, inter alia, granted the motion of defendant County of Herkimer, individually and as administrator of the Herkimer County Self-Insurance Plan, for summary judgment on its amended and supplemental counterclaims.

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

Same Memorandum as in *Village of Ilion v County of Herkimer* ([appeal No. 1] ___ AD3d ___ [June 5, 2009]).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

612

CA 08-01913

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

IN THE MATTER OF LOCKPORT SMART GROWTH, INC., DOROTHY STOCKTON, THOMAS WALKER, JOSEPH P. STUART, JR., JAMES EMMERT, JOAN A. GRIGG, AND JOANNE WOODSIDE, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF LOCKPORT, TOWN OF LOCKPORT PLANNING BOARD, RICHARD FORSEY, ROBERT BALCERZAK, MORRIS WINGARD, DAVID KINYON, WALTER THORMAN, RODNEY CONRAD, WILLIAM FEW, AND ROBERT LANGDON, IN THEIR CAPACITIES AS MEMBERS OF TOWN OF LOCKPORT PLANNING BOARD, WAL-MART STORES, INC., WAL-MART REAL ESTATE BUSINESS TRUST, AND LOCKPORT L.L.C., RESPONDENTS-RESPONDENTS.
(PROCEEDING NO. 1.)

IN THE MATTER OF LOCKPORT SMART GROWTH, INC., JOAN A. GRIGG, AND JAMES EMMERT, PETITIONERS-APPELLANTS,

V

TOWN OF LOCKPORT ZONING BOARD OF APPEALS, EUGENE NENNIS, IN HIS OFFICIAL CAPACITY AS TOWN OF LOCKPORT BUILDING INSPECTOR, WAL-MART STORES, INC., LOCKPORT L.L.C., AND WAL-MART REAL ESTATE BUSINESS TRUST, RESPONDENTS-RESPONDENTS.
(PROCEEDING NO. 2.)

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), AND OTTAVIANO & SANSONE, LLP, LOCKPORT, FOR PETITIONERS-APPELLANTS.

SEAMAN, JONES, HOGAN & BROOKS, LLP, LOCKPORT (MORGAN L. JONES, JR., OF COUNSEL), FOR RESPONDENTS-RESPONDENTS TOWN OF LOCKPORT, TOWN OF LOCKPORT PLANNING BOARD, RICHARD FORSEY, ROBERT BALCERZAK, MORRIS WINGARD, DAVID KINYON, WALTER THORMAN, RODNEY CONRAD, WILLIAM FEW, AND ROBERT LANGDON, IN THEIR CAPACITIES AS MEMBERS OF TOWN OF LOCKPORT PLANNING BOARD, TOWN OF LOCKPORT ZONING BOARD OF APPEALS, AND EUGENE NENNIS, IN HIS OFFICIAL CAPACITY AS TOWN OF LOCKPORT BUILDING INSPECTOR.

HARTER SECREST & EMERY LLP, BUFFALO (MARC A. ROMANOWSKI OF COUNSEL), FOR RESPONDENTS-RESPONDENTS WAL-MART STORES, INC. AND WAL-MART REAL ESTATE BUSINESS TRUST.

HOPKINS & SORGI PLLC, WILLIAMSVILLE (SEAN W. HOPKINS OF COUNSEL), FOR RESPONDENT-RESPONDENT LOCKPORT L.L.C.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered May 16, 2008 in consolidated proceedings pursuant to CPLR article 78. The judgment dismissed the petitions.

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

Memorandum: In these consolidated proceedings pursuant to CPLR article 78, petitioners seek, inter alia, to annul the determinations of respondent Town of Lockport Planning Board (Planning Board) and respondent Town of Lockport Zoning Board of Appeals (ZBA) granting certain variances to allow the construction of a Super Wal-Mart. In addition, petitioners contend that respondents Wal-Mart Stores, Inc. and Wal-Mart Real Estate Business Trust (collectively, Wal-Mart respondents) did not obtain necessary waivers and variances with respect to several applicable zoning ordinances. We conclude that Supreme Court properly dismissed the petitions.

We note at the outset that our interpretation of section 200-70 of the Code of the Town of Lockport (Town Code), entitled “Special Uses,” differs from that of petitioners. That section merely provides that “[a]ny of the following uses may be permitted upon obtaining a special use permit, provided such use complies with all applicable dimensional and other requirements of this chapter . . . .” In other words, a use complies with all applicable dimensional and other requirements once any required variances are obtained and, “[i]ndeed, Town Law § 274-b (3) expressly provides for the issuance of a special use permit in conjunction with an area variance” (*Matter of Real Holding Corp. v Lehigh*, 304 AD2d 583, 584, *affd* 2 NY3d 297). We likewise conclude that the Wal-Mart respondents were not required to obtain a variance with respect to Town Code § 200-94 (B), which mandates a maximum lot coverage within the Commercial Corridor Overlay District (CCOD) of 75%, or with respect to Town Code § 200-94 (H), which regulates fencing and explicitly provides that “[t]he Planning Board may vary fence location, height and construction to accommodate an aesthetically pleasing buffer zone.” Petitioners contend that the waivers from the CCOD requirements granted by the Planning Board for “extreme difficulties” are invalid. We reject that contention. Section 200-93 (C) of the Town Code provides that the Planning Board, in its discretion, may grant waivers from respondent Town of Lockport’s site development standards if a developer can establish that “extreme difficulties” would be encountered with strict conformance. Initially, we conclude that, taking into account the purpose of the CCOD regulations and restrictions, the extreme difficulties standard is “ ‘capable of a reasonable application and [is] sufficient to limit and define the [Planning B]oard’s discretionary powers’ ” (*Morgan v Town of W. Bloomfield*, 295 AD2d 902, 903). Thus, section 200-93 (C) does not impermissibly delegate

legislative power (*see generally Matter of Levine v Whalen*, 39 NY2d 510, 516). We further conclude that the Wal-Mart respondents properly sought waivers from dimensional requirements under Town Law § 274-a (5), and were not required instead to seek variances pursuant to Town Law § 274-a (3) (*see Real Holding Corp.*, 2 NY3d at 302). Similarly, we conclude that section 274-a (5) does not preempt local law, and that the "extreme difficulties" standard employed here does not conflict with that section. In addition, we conclude that the Planning Board's finding that the Wal-Mart respondents encountered "extreme difficulties" was not arbitrary and capricious. We agree with the court that the Planning Board took a "rational, measured approach to the reality of the project," and that the record contained sufficient detail to determine whether the Planning Board's determination had a rational basis (*cf. Matter of Fleck v Town of Colden*, 16 AD3d 1052, 1053).

We further note that Town Code § 200-94 (J) (2), concerning parking lot locations, expressly allows for a deviation from its requirements if a developer demonstrates a "practical difficulty." In our view, the record demonstrates that the Wal-Mart respondents in fact demonstrated that they would face a practical difficulty in the event that strict compliance with section 200-94 (J) (2) was required. Petitioners' contention that the Wal-Mart respondents were required to obtain a variance for section 200-94 (M) (5), concerning landscaping, is belied by the record inasmuch as the project includes the construction of a three-foot berm and the project's landscaping plan makes clear that, other than the entranceway, the project's western boundary does not abut Transit Road. Also, although the project includes a concrete wall, no variance from section 200-94 (M) (5) (b) was required because the wall will be treated, painted, and maintained by the Wal-Mart respondents.

Finally, we conclude that the ZBA did not improperly treat the project site as a single lot, rather than two separate lots, in granting the required variances. The variances were necessary because strict compliance with the Town Code's area requirements was impractical based on the proximity of the project to existing retail and commercial businesses (*see Matter of Cohalan v Schermerhorn*, 77 Misc 2d 23, 25, citing *Matter of Levy v Board of Stds. & Appeals*, 267 NY 347), and the ZBA's determination granting the variances did not "invade the zoning province of the legislative body" (*Matter of Giuntini v Aronow*, 92 AD2d 548). Moreover, although the ZBA determined that "the parcels should be considered together as one site," it nevertheless "individually addressed" the variances required for each parcel.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

614

CA 08-01829

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

PAUL THOMAS ZULAWSKI, JR., PLAINTIFF-APPELLANT,

V ORDER

RICHARD TAYLOR, PATRICIA HARTNER, DONALD G. POWELL, ESQ., ZDARSKY, SAWICKI & AGOSTINELLI, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT. (APPEAL NO. 1.)

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (THOMAS CUNNINGHAM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (RALPH C. LORIGO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS RICHARD TAYLOR AND PATRICIA HARTNER.

CONNORS & VILARDO, LLP, BUFFALO (RANDALL D. WHITE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS DONALD G. POWELL, ESQ. AND ZDARSKY, SAWICKI & AGOSTINELLI.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered June 4, 2008 in an action for, inter alia, breach of contract. The order granted the motion of defendants Richard Taylor and Patricia Hartner to strike plaintiff's demand for a jury trial.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Trocom Constr. Corp. v Consolidated Edison Co. of N.Y., Inc.*, 7 AD3d 434, 437-438; *see also* CPLR 5501 [a] [1]).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

615

CA 08-01929

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

PAUL THOMAS ZULAWSKI, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD TAYLOR, PATRICIA HARTNER, DONALD G. POWELL, ESQ., ZDARSKY, SAWICKI & AGOSTINELLI, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT. (APPEAL NO. 2.)

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (THOMAS CUNNINGHAM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (RALPH C. LORIGO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS RICHARD TAYLOR AND PATRICIA HARTNER.

CONNORS & VILARDO, LLP, BUFFALO (RANDALL D. WHITE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS DONALD G. POWELL, ESQ. AND ZDARSKY, SAWICKI & AGOSTINELLI.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered July 28, 2008 in an action for, inter alia, breach of contract. The order and judgment granted the motion of defendants Richard Taylor and Patricia Hartner and the motion of defendants Donald G. Powell, Esq. and Zdarsky, Sawicki & Agostinelli for summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying in part the motion of defendants Richard Taylor and Patricia Hartner and reinstating the second and seventh causes of action and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, damages for his allegedly wrongful “expulsion” from defendant Thomas Design Gallery, LLC (TDG), of which he was a member, pursuant to the company’s Operating Agreement. The agreement provides in relevant part that “[a] member may be expelled and his Membership interest in [TDG] forfeited . . . for . . . engaging, or attempting to engage in a transaction, which utilizes or contemplates the use of the products and services provided by [TDG] in the ordinary course of business for one’s personal benefit or for the benefit of another entity.” We

agree with plaintiff that Supreme Court erred in granting that part of the motion of defendants Richard Taylor and Patricia Hartner for summary judgment dismissing the second cause of action, alleging that Taylor breached TDG's Operating Agreement, and we therefore modify the order and judgment accordingly. That part of the motion was supported only by the " 'conclusory, unsubstantiated assertions' " of Taylor, which are insufficient to establish entitlement to the relief sought by those defendants with respect to that cause of action (*Towner Living Trust v Lottermoser*, 56 AD3d 1275, 1277).

We further conclude that the court erred in granting that part of the motion of Taylor and Hartner for summary judgment dismissing the seventh cause of action against Hartner, for slander, and we therefore further modify the order and judgment accordingly. "Whether a statement constitutes pure opinion or an actionable factual assertion is a question of law for the court in the first instance and must be answered on the basis of what the reasonable listener would understand the statement to mean" (*Rossi v Attanasio*, 48 AD3d 1025, 1027). Here, Hartner allegedly commented to vendors in plaintiff's industry that plaintiff "scam[med]" people to avoid payment of his business debts. Although those comments were mixed statements of opinion and fact, the vendors could reasonably infer, in light of Hartner's working relationship with plaintiff, that such statements were "based upon certain facts known to [Hartner] that are undisclosed to the [vendors] and are detrimental to [plaintiff]" (*id.*). We conclude that Taylor and Hartner failed to meet their initial burden of "establish[ing] a defense of justification or privilege sufficient[] to warrant judgment as a matter of law" with respect to that cause of action (*Russo v Padovano*, 84 AD2d 925, 926).

We reject plaintiff's contention, however, that the court erred in granting the motion of defendants Donald G. Powell, Esq. and Zdarsky, Sawicki & Agostinelli for summary judgment dismissing the complaint against them. Those defendants met their initial burden of establishing that any alleged legal malpractice on their part was not a proximate cause of plaintiff's damages (*see Barbara King Family Trust v Voluto Ventures LLC*, 46 AD3d 423, 424), and plaintiff failed to raise a triable issue of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We have reviewed plaintiff's remaining contentions and conclude that they are without merit.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

619

KA 07-02191

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE FRANCISCO, DEFENDANT-APPELLANT.

JONES & MORRIS, VICTOR (MICHAEL A. JONES, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered September 26, 2007. The judgment convicted defendant, after a nonjury trial, of criminal possession of marihuana in the third degree, felony driving while intoxicated (two counts) and aggravated unlicensed operation of a motor vehicle in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of criminal possession of marihuana in the third degree, granting that part of the motion seeking to suppress tangible property and dismissing count one of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of, inter alia, criminal possession of marihuana in the third degree (Penal Law § 221.20). We agree with defendant that County Court erred in denying that part of his omnibus motion seeking to suppress tangible property, i.e., the marihuana found by the police in the trunk of his vehicle during an alleged inventory search, inasmuch as the People failed to establish that the search was valid (*see People v Johnson*, 1 NY3d 252, 255-256). Indeed, they failed to establish the existence of any departmental policy concerning inventory searches or that the officer properly conducted the search in compliance with established procedures (*see id.* at 256). The People also failed to establish that the officer “fill[ed] out the hallmark of an inventory search: a meaningful inventory list” (*id.*; *see generally People v Galak*, 80 NY2d 715, 720). We therefore modify the judgment accordingly.

Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we

further conclude that the verdict with respect to the remaining counts is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, the sentence is not unduly harsh or severe.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

626

CA 08-02452

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

CAROL R. JOHNSTON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DANIEL S. JOHNSTON, DEFENDANT-RESPONDENT.

BERKOWITZ & PACE, ORCHARD PARK (PETER P. VASILION OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JOHN P. PIERI, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered February 28, 2008 in a divorce action. The judgment, among other things, directed plaintiff to pay defendant child support.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by providing that defendant's pro rata share of the child support obligation is 71% and plaintiff's pro rata share of the child support obligation is 29% and that plaintiff shall pay to defendant the amount of $111.54 per week for child support and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff appeals from a judgment of divorce that, inter alia, directed her to pay to defendant the sum of $146.15 per week in child support, directed defendant to pay to plaintiff the sum of $1,850 per month in maintenance for a period of five years and the sum of $1,650 per month in maintenance for a period of one year thereafter, and denied plaintiff's request for counsel fees.

Contrary to plaintiff's contention, we conclude that Supreme Court properly determined that defendant was the custodial parent with respect to the issue of child support. Pursuant to the express terms of the parties' stipulation, defendant was the primary residential parent, and plaintiff made no showing that the stipulation was unenforceable, i.e., that it was " 'tainted by mistake, fraud, duress, overreaching or unconscionability' " (*Cheruvu v Cheruvu*, 59 AD3d 876, 878; *see generally Canarelli v Canarelli*, 58 AD3d 658). We agree with plaintiff, however, that the court erred in including the amount of maintenance awarded to her in determining her income for the purpose of calculating the amount of child support that she was required to pay to defendant (*see Simon v Simon*, 55 AD3d 477; *Frost v Frost*, 49 AD3d 1150, 1152), and we further conclude that the court erred in failing to deduct the FICA tax payments from the salaries earned by

both parties (*see* Domestic Relations Law § 240 [1-b] [b] [5] [vii] [H]; *Beece v Beece*, 289 AD2d 352; *Frankel v Frankel*, 287 AD2d 686). We therefore modify the judgment by providing that defendant's pro rata share of the child support obligation is 71% and plaintiff's pro rata share of the child support obligation is 29% and that plaintiff shall pay to defendant the amount of $111.54 per week for child support.

We reject the further contention of plaintiff that the court abused its discretion in awarding her the sum of only $1,850 per month in maintenance for a five-year period. Indeed, we conclude that the court properly took into consideration the statutory maintenance factors, including the parties' standard of living during the marriage (*see* Domestic Relations Law § 236 [b] [6] [a]; *Hartog v Hartog*, 85 NY2d 36, 50-51). Finally, we reject the contention of plaintiff that the court abused its discretion in denying her request for counsel fees. "[F]or a party to be entitled to an award of counsel fees, there must be sufficient documentation to establish the value of the services performed" (*Reynolds v Reynolds*, 300 AD2d 645, 646), and plaintiff failed to provide such documentation.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

627

CA 08-00795

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

SENECA PIPE & PAVING CO., INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SOUTH SENECA CENTRAL SCHOOL DISTRICT,
JAVEN CONSTRUCTION COMPANY,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

LAW OFFICE OF JOSEPH A. CAMARDO, AUBURN (KEVIN M. COX OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MATTHEW R. FLETCHER, CAYUGA, FOR DEFENDANT-RESPONDENT SOUTH SENECA CENTRAL SCHOOL DISTRICT.

HARRIS BEACH PLLC, PITTSFORD (LAURA W. SMALLEY OF COUNSEL), FOR DEFENDANT-RESPONDENT JAVEN CONSTRUCTION COMPANY.

Appeal from an order of the Supreme Court, Seneca County (David Michael Barry, J.), entered August 24, 2007. The order, insofar as appealed from, granted those parts of the cross motions of defendants South Seneca Central School District and Javen Construction Company for summary judgment dismissing the second amended complaint against them and denied those parts of plaintiff's cross motion for summary judgment with respect to those defendants.

Now, upon reading and filing the stipulation of settlement and discontinuance signed by the attorneys for plaintiff and defendant South Seneca Central School District on February 23, 2009,

It is hereby ORDERED that said appeal with respect to defendant South Seneca Central School District is unanimously dismissed upon stipulation and the order is otherwise affirmed without costs.

Memorandum: These consolidated appeals arise from a construction project on property owned by defendant South Seneca Central School District (School District), pursuant to which plaintiff was awarded the site work prime contract and defendant Javen Construction Co., Inc., incorrectly sued as Javen Construction Company in appeal No. 1 (Javen), was awarded the general trades prime contract. Plaintiff commenced the action at issue in appeal No. 1 seeking damages for work performed pursuant to an alleged verbal agreement with one of Javen's

subcontractors. In its second amended complaint, plaintiff asserted, inter alia, that Javen was unjustly enriched, and Supreme Court, inter alia, granted that part of the cross motion of Javen for summary judgment dismissing the second amended complaint against it and denied that part of plaintiff's cross motion for summary judgment with respect to Javen. We affirm the order in appeal No. 1 for reasons stated in the decision at Supreme Court.

Plaintiff commenced the action at issue in appeal No. 3 alleging, inter alia, that it performed certain work under protest because the work was not encompassed by its site work prime contract. The complaint in appeal No. 3 alleges against Javen that it was unjustly enriched because it received payment for certain work pursuant to its prime contract for general trades work, but that work was in fact performed by plaintiff pursuant to its prime contract for site work. Contrary to the contention of plaintiff in appeal No. 3, it is not entitled to recover from Javen for unjust enrichment under these circumstances because "a nonsignatory to a contract cannot be held liable where there is an express contract covering the same subject matter" (*Feigen v Advance Capital Mgt. Corp*., 150 AD2d 281, 283, *lv dismissed in part and denied in part* 74 NY2d 874; *see Bellino Schwartz Padob Adv. v Solaris Mktg. Group*, 222 AD2d 313). Inasmuch as the "services were performed at the behest of [an entity] other than th[is] defendant, the plaintiff must look to that [entity, i.e., the School District] for recovery" (*Kagan v K-Tel Entertainment*, 172 AD2d 375, 376; *see Heller v Kurz*, 228 AD2d 263, 264). We thus conclude that the court properly granted the cross motion of Javen for summary judgment dismissing the complaint in appeal No. 3 against it (*see generally IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 141-142).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

628

CA 08-00796

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

SENECA PIPE & PAVING CO., INC.,
PLAINTIFF-APPELLANT,

V ORDER

SOUTH SENECA CENTRAL SCHOOL DISTRICT,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

LAW OFFICE OF JOSEPH A. CAMARDO, AUBURN (KEVIN M. COX OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MATTHEW R. FLETCHER, CAYUGA, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (David Michael Barry, J.), entered August 23, 2007. The order granted defendant's cross motion for summary judgment.

Now, upon reading and filing the stipulation of settlement and discontinuance signed by the attorneys for the parties on February 23, 2009,

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

629

CA 08-00798

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

SENECA PIPE & PAVING CO., INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHRISTA CONSTRUCTION CO., INC.,
ET AL., DEFENDANTS,
AND JAVEN CONSTRUCTION CO., INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

LAW OFFICE OF JOSEPH A. CAMARDO, AUBURN (KEVIN M. COX OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (LAURA W. SMALLEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (David Michael Barry, J.), entered August 24, 2007. The order, among other things, granted the cross motion of defendant Javen Construction Co., Inc. for summary judgment dismissing the complaint against it.

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

Same Memorandum as in *Seneca Pipe & Paving Co., Inc. v South Seneca Cent. School Dist*. ([appeal No. 1] ___ AD3d ___ [June 5, 2009]).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

630
CA 08-02453
PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND PINE, JJ.

LARRY C. HOLLY AND SANDRA HOLLY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

COUNTY OF CHAUTAUQUA AND E.E. AUSTIN &
SON, INC., DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (RYAN K. CUMMINGS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeals from an order of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered April 30, 2008 in a personal injury action. The order granted the motion of plaintiffs for partial summary judgment on the issue of liability under Labor Law § 240 (1) and denied the cross motions of defendants for summary judgment dismissing the common-law negligence cause of action and the Labor Law §§ 200 and 241 (6) claims.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the cross motions in part and dismissing the common-law negligence cause of action and the Labor Law §§ 200 and 241 (6) claims insofar as the latter claim is premised upon the alleged violations of the regulations set forth in the bills of particulars and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action to recover damages for injuries sustained by Larry C. Holly (plaintiff) while he was erecting a wall composed of concrete blocks at the Chautaqua County Jail. As he lifted a 40-pound block over his head and attempted to place that block on the top row of the wall, plaintiff lost his balance and either fell or jumped to the concrete floor from the scaffold on which he was working. The scaffold was approximately six feet from the floor and did not have a restraint bar. We conclude that Supreme Court properly granted plaintiffs' motion for partial summary judgment on the issue of liability under Labor Law § 240 (1). "Plaintiff[s] met [their] initial burden of establishing that [plaintiff] was not furnished with appropriate safety devices within the meaning of the statute and that the absence of any such devices was a proximate cause of his injuries" (*Howe v Syracuse Univ.*, 306 AD2d 891, 892; *see Capasso v Kleen All of Am., Inc.*, 43 AD3d 1346,

1346-1347; *LoVerde v 8 Prince St. Assoc., LLC*, 35 AD3d 1224, 1225; *see generally Felker v Corning Inc.*, 90 NY2d 219, 224). The absence of guardrails violates section 240 (1) under the facts of this case (*see Bland v Manocherian*, 66 NY2d 452, 461 n 3; *Cartella v Margaret Woodbury Strong Museum*, 135 AD2d 1089). Defendants contend that there is an issue of fact whether plaintiff's actions were the sole proximate cause of the accident and thus that the court erred in granting plaintiffs' motion. That contention is premised solely upon a notation in plaintiff's hospital records indicating that plaintiff jumped from the scaffold. Even assuming, arguendo, that the hospital records are admissible (*see Passino v DeRosa*, 199 AD2d 1017, 1017-1018; *cf. Gier v CGF Health Sys.*, 307 AD2d 729, 730), we conclude that defendants' contention lacks merit (*see Howe*, 306 AD2d at 892; *Sherman v Eugene I. Piotrowski Bldrs.*, 229 AD2d 959, 959-960).

We further conclude, however, that the court erred in denying those parts of the respective cross motions of defendants for summary judgment dismissing the common-law negligence cause of action and the Labor Law § 200 claim, and we therefore modify the order accordingly. Defendants met their burden in support of those parts of their cross motions with respect to the common-law negligence cause of action and the section 200 claim by establishing that they did not control the methods or manner in which plaintiff performed his work and had only general supervisory authority at the work site or the authority to stop work for safety reasons (*see Barends v Louis P. Ciminelli Constr. Co., Inc.*, 46 AD3d 1412, 1413; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 309). In opposition, plaintiffs failed to raise a triable issue of fact sufficient to defeat those parts of the cross motions (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We also agree with defendants that the court erred in denying that part of their respective cross motions seeking dismissal of the Labor Law § 241 (6) claim insofar as it is premised upon the alleged violations of the regulations set forth in plaintiffs' bills of particulars, and we therefore further modify the order accordingly. "It is well settled that an [Occupational Safety and Health Administration (OSHA)] regulation generally cannot provide a basis for liability under Labor Law § 241 (6)" (*Millard v City of Ogdensburg*, 274 AD2d 953, 954; *see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 n; *Williams v White Haven Mem. Park*, 227 AD2d 923, 924), and defendants thus were entitled to summary judgment dismissing the Labor Law § 241 (6) claim insofar as it is premised upon the alleged violation of OSHA regulations. With respect to the alleged violations of the Industrial Code, the moving parties must demonstrate that they did not violate the regulations upon which the section 241 (6) claim is based, that the regulations are not applicable to the facts of the case, or that the alleged violation was not a proximate cause of the accident (*see Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 2 AD3d 1345, 1348-1349). "12 NYCRR 23-5.1 (f) does not support the [section] 241 (6) [claim] because it sets forth a general rather than a specific safety standard" (*Sopha v Combustion Eng'g*, 261 AD2d 911, 912). Even assuming, arguendo, that 12 NYCRR 23-5.1 (h) sets forth a specific safety standard, we conclude that it is not applicable to the facts of

this case because plaintiff's accident was unrelated to the erection or removal of a scaffold (*see generally Lavore v Kir Munsey Park 020, LLC*, 40 AD3d 711, 713, *lv denied* 10 NY3d 701). Finally, plaintiffs' reliance upon 12 NYCRR 23-1.15, 12 NYCRR 23-5.1 (j) and 12 NYCRR 23-5.4 is misplaced, inasmuch as there were no safety railings on the scaffold in question (*see Partridge v Waterloo Cent. School Dist.*, 12 AD3d 1054, 1055-1056).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

631

CA 08-02477

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

CYNTHIA M. LAURIA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DOWNEY-GOODLEIN ELEVATOR CORP. AND LAM ASSOCIATES, DEFENDANTS-APPELLANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY M. WILKENS OF COUNSEL), FOR DEFENDANT-APPELLANT DOWNEY-GOODLEIN ELEVATOR CORP.

GOERGEN AND MANSON, WILLIAMSVILLE (JOSEPH G. GOERGEN, II, OF COUNSEL), FOR DEFENDANT-APPELLANT LAM ASSOCIATES.

BRENNA, BRENNA & BOYCE, PLLC, ROCHESTER (SHELDON W. BOYCE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered July 22, 2008 in a personal injury action. The order granted plaintiff's motion to set aside the jury verdict with respect to proximate cause and directed a verdict in favor of plaintiff and against defendants on proximate cause.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the verdict with respect to proximate cause is reinstated.

Memorandum: Plaintiff, Cynthia M. Lauria, commenced this action seeking damages for injuries she sustained when the elevator in which she was riding stopped abruptly. The elevator was located in a building owned by defendant LAM Associates (LAM), and LAM contracted with defendant Downey-Goodlein Elevator Corp. (Downey-Goodlein) to service and repair the elevator. Following a jury trial on liability, the jury found that Downey-Goodlein was negligent but that its negligence was not a proximate cause of the accident. Plaintiff thereafter moved to set aside the verdict in favor of defendants with respect to proximate cause and for judgment notwithstanding the verdict or, alternatively, for a new trial on the issue of proximate cause. We conclude that Supreme Court erred in granting what it characterized as "[p]laintiff's motion . . . for a directed verdict on proximate cause." We agree with defendants that plaintiff is not entitled to judgment notwithstanding the verdict or, indeed, a directed verdict, inasmuch as she "failed to establish that 'there [was] no rational process by which the [jury] could base a finding in favor of [Downey-Goodlein,] the nonmoving party' " (*Leonard v Thompson*

& Johnson Equip. Co., Inc. [appeal No. 2], 60 AD3d 1302, 1303, quoting *Szczerbiak v Pilat*, 90 NY2d 553, 556). Nor can it be said that plaintiff is entitled to a new trial on the issue of proximate cause.

"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' " (*Cona v Dwyer*, 292 AD2d 562, 563; *see Skowronski v Mordino*, 4 AD3d 782, 783), and that is not the case here. In any event, "[w]here . . . 'an apparently inconsistent or illogical verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view' " (*Mascia v Olivia*, 299 AD2d 883, 883; *see Lemberger v City of New York*, 211 AD2d 622, 623).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

632

CA 08-00766

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

IN THE MATTER OF THE STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V ORDER

RICHARD W. ZIMMER, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (JANINE E. FRANK OF COUNSEL), FOR RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JULIE S. MERESON OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (James C. Tormey, J.), entered February 7, 2008 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, granted in part petitioner's motion to unseal certain records.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

633
CA 08-00767
PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND PINE, JJ.

IN THE MATTER OF THE STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD W. ZIMMER, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (JANINE E. FRANK OF COUNSEL), FOR RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JULIE S. MERESON OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (James C. Tormey, J.), entered March 13, 2008 in a proceeding pursuant to Mental Hygiene Law article 10. The order, insofar as appealed from, granted petitioner's motion to change the venue of the trial from the county where respondent is located to the county where the underlying offenses occurred.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied, and the first and third ordering paragraphs are vacated.

Memorandum: In this Mental Hygiene Law article 10 proceeding, respondent appeals from an order that granted petitioner's motion to change the venue of the trial from Oneida County, where respondent is located, to Broome County, where the underlying sex offenses occurred. We agree with respondent that Supreme Court erred in granting the motion. Pursuant to Mental Hygiene Law § 10.08 (e), "the court may change the venue of the trial . . . for good cause, which may include considerations relating to the convenience of the parties or witnesses or the condition of the respondent." Petitioner supported its motion with an attorney's affirmation containing general allegations concerning the convenience of petitioner's unidentified witnesses and setting forth in a conclusory manner that respondent had the greatest ties to Broome County. In light of the lack of specificity in petitioner's motion papers, we conclude that petitioner failed to establish good cause for the change of venue (*see id.*).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

634

CA 08-00768

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

IN THE MATTER OF THE STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V ORDER

RICHARD W. ZIMMER, RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (JANINE E. FRANK OF COUNSEL), FOR RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JULIE S. MERESON OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (James C. Tormey, J.), entered March 24, 2008 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, denied respondent's motion for a protective order with respect to certain records.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

635
CA 08-00769
PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND PINE, JJ.

IN THE MATTER OF THE STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD W. ZIMMER, RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (JANINE E. FRANK OF COUNSEL), FOR RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JULIE S. MERESON OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (James C. Tormey, J.), entered April 9, 2008 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, directed that certain records be unsealed and made available to petitioner.

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

Memorandum: In this Mental Hygiene Law article 10 proceeding, respondent contends that Supreme Court erred in directing that certain records that previously were sealed pursuant to CPL 160.50 (1) be unsealed and made available to petitioner for use in this proceeding. We affirm. Mental Hygiene Law § 10.08 (c) provides that, "[n]otwithstanding any other provision of law," petitioner is authorized to request, and state agencies are authorized to provide, "any and all records and reports related to the respondent's commission or alleged commission of a sex offense . . . or other information relevant to" the article 10 proceeding. The statute further provides that "[o]therwise confidential materials obtained for purposes of proceedings pursuant to [article 10] shall not be further disseminated or otherwise used except for such purposes" (§ 10.08 [c]). Respondent contends that the provisions of section 10.08 do not supersede the sealing provisions of CPL 160.50 (1). We reject that contention. Where, as here, the language of a statute is unambiguous, " 'the courts may not resort to rules of construction to broaden the scope and application of a statute[]' " (*Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 107; *see Desiderio v Ochs*, 100 NY2d 159, 169; *Kash v Jewish Home & Infirmary of Rochester, N.Y., Inc.*, 61 AD3d 146). The phrase "[n]otwithstanding any other provision of law" contained in Mental Hygiene Law § 10.08 (c) "clearly supersedes *any* inconsistent

provisions of state law" (*Matter of Melendez v Wing*, 8 NY3d 598, 609; *see Land v County of Ulster*, 84 NY2d 613, 617; *Williams v White*, 40 AD3d 110, 111-112), and thus must be deemed to include CPL 160.50.

We further conclude that petitioner established that the records in question may contain information concerning the alleged commission of a sex offense and are otherwise relevant to the Mental Hygiene Law article 10 proceeding (*see* § 10.08 [c]). Contrary to the contention of respondent, the constitutional issues he raises involve the admissibility or use of those records at a subsequent article 10 trial, and the court reserved decision on the issue of the admissibility of the sealed records at trial. Thus, our review of that issue would be premature (*see Matter of Parrinello*, 213 AD2d 1006, 1008). Finally, respondent contends that the court erred in ordering that the records be unsealed and made available to petitioner because section 10.08 (c) is permissive rather than mandatory. That contention is not properly before us inasmuch as it is raised for the first time in respondent's reply brief (*see generally Turner v Canale*, 15 AD3d 960, *lv denied* 5 NY3d 702).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

636
CAF 08-01583
PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND PINE, JJ.

IN THE MATTER OF MAURICE PERRY, JR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JAMIE L. KORMAN, RESPONDENT-APPELLANT.

SUSAN B. MARRIS, LAW GUARDIAN, APPELLANT.

SUSAN B. MARRIS, LAW GUARDIAN, MANLIUS, APPELLANT PRO SE.

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

RICHARD P. FERRIS, UTICA, FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Oneida County (Brian M. Miga, J.H.O.), entered August 8, 2008 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, transferred primary physical custody of the parties' child to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously reversed in the exercise of discretion without costs, the petition is denied, and the matter is remitted to Family Court, Oneida County, for further proceedings in accordance with the memorandum, and

It is further ORDERED that all proceedings to enforce the order of this Court are stayed pending the conclusion of the school year.

Memorandum: Respondent mother appeals from an order transferring physical custody of the parties' nine-year-old daughter to petitioner father. The parties have had joint custody of the child with primary physical custody with the mother since August 2000 pursuant to an order entered upon the consent of the parties. " 'It is well established that alteration of an established custody arrangement will be ordered only upon a showing of a change in circumstances which reflects a real need for change to ensure the best interests of the child' " (*Matter of Amy L.M. v Kevin M.M.*, 31 AD3d 1224, 1225). Here, it is undisputed that the mother had moved six times between the years 2000 and 2007, as a result of which the child had attended three schools over a period of five years. Family Court therefore properly determined that a sufficient change of circumstances existed to warrant a review of the custody arrangement. We nevertheless conclude that the court improvidently exercised its discretion in determining that the best interests of the child warranted a transfer of primary

physical custody to the father (*see Matter of Kristi L.T. v Andrew R.V.,* 48 AD3d 1202, 1204, *lv denied* 10 NY3d 716).

As we set forth in *Matter of Maher v Maher* (1 AD3d 987, 988-989), " '[a] change of custody should be made only if the totality of the circumstances warrants a change that is in the best interests of the child' . . . 'Among the factors to be considered are the quality of the home environment and the parental guidance the custodial parent provides for the child' . . . ." The evidence presented at the hearing on the petition established that the mother had moved with her three children into her parents' home because the trailer park in which she lived had been sold. The child's grandmother cared for the child and the mother's other children while the mother worked. The mother intended to live with the father of her other children and had been looking for housing that would permit the child to continue to attend the same school in which the child was enrolled at the time of the hearing. Although the father testified that he filed the petition seeking a change of primary physical custody because the mother moved with the child into her parents' home, he could not identify any negative impact on the child as a result of the move. We conclude that the evidence establishes that the mother has provided proper guidance for the child (*see id.* at 989).

We further conclude that, although both parties are able to provide for the child's emotional and intellectual development (*see id.*), the evidence established that the child has a learning disability, that the mother has participated in the child's individualized education program, and that the father has not attended the meetings with respect to that program. The evidence further established that, although the father was opposed to the school's recommendation that the child repeat first grade, he failed to articulate the basis for his opposition. In addition, despite the evidence that the child has a loving relationship with both parties, we note that the father refused to permit her to visit his home for a period of several weeks because of her "attitude." Both parties are able to provide for the financial needs of the child and, although both parents are fit to care for the child, the child has always lived with the mother (*see id.*). We further note that the order necessitated the separation of the child from her two half-sisters, to whom she was very attached (*see generally Matter of Brown v Marr*, 23 AD3d 1029, 1030; *Fox v Fox,* 177 AD2d 209, 210), but that she also has a half-brother at the father's home.

Thus, based on the evidence presented at the hearing, we cannot agree with the court that the best interests of the child warrant a change in her primary physical custody. Therefore, in the exercise of our discretion, we reverse the order, deny the petition, and remit the matter to Family Court to fashion an appropriate visitation schedule for the father. Finally, in order to allow the child to complete the school year, we stay all proceedings to enforce our order pending the conclusion of the school year.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

637

CA 08-02298

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

AMY J. HALLQUIST, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHAUTAUQUA COUNTY, EDWIN J. MINER, INDIVIDUALLY AND AS COMMISSIONER OF CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES, CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES, CAROL DANKERT, INDIVIDUALLY AND AS AN EMPLOYEE OR AGENT OF CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES, DR. FREDERICK VERDONIK, AS AN EMPLOYEE AND/OR AGENT OF CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES, DR. ISRAR ABBASI, INDIVIDUALLY, OR IN THE ALTERNATIVE, AS A "JOHN DOE" AND/OR AGENT OF CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES, AND JOHN DOE AND/OR JANE DOE, INTENDED TO BE SOCIAL SERVICES DEPARTMENT EMPLOYEES OR AGENTS WHO SLANDERED PLAINTIFF, DEFENDANTS-RESPONDENTS.

GOODELL & GOODELL, JAMESTOWN (R. THOMAS RANKIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA, LLP, BUFFALO (JULIE PASQUARIELLO APTER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Chautauqua County (John T. Ward, A.J.), entered April 28, 2008. The order and judgment, among other things, granted defendants' cross motion for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiff commenced this action to recover damages for, inter alia, defamation and prima facie tort. We conclude that Supreme Court properly denied plaintiff's motion for leave to serve a second amended complaint and granted defendants' cross motion for summary judgment dismissing the amended complaint. We note at the outset that we need not consider plaintiff's contention that an order of the United States District Court concerning this matter is binding on Supreme Court, inasmuch as Supreme Court did not in fact rely upon that order; rather, it independently determined the merits of the issues raised herein. We further note that defendants contend as an

alternative ground for affirmance that Supreme Court was required to dismiss this matter based on the prior federal determination (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546). In light of our determination that the court properly granted defendants' cross motion on the merits, we see no reason to address that contention. Indeed, we affirm the order and judgment for reasons stated in the decision at Supreme Court but write only to correct the court's mischaracterization of a prior order issued by this Court in this matter. The court erroneously stated that we previously affirmed an order granting plaintiff custody of the child. In fact, we affirmed an order appointing plaintiff as the guardian of the child (*Matter of Amy H. v Chautauqua County Dept. of Social Servs.,* 13 AD3d 1048), but we reversed a separate order granting plaintiff custody of the child, and we remitted the matter to Supreme Court for a hearing to determine the child's best interests (*Matter of Amy H. v Chautauqua County Dept. of Social Servs.*, 13 AD3d 1050).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

647

CA 08-01855

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, PINE, AND GORSKI, JJ.

IN THE MATTER OF DESTINY USA DEVELOPMENT, LLC
AND PYRAMID COMPANY OF ONONDAGA,
PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

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

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

GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE (WILLIAM J. GILBERTI, JR., OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered June 10, 2008 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 modified on the law by vacating that part of the third decretal paragraph declaring null and void the “guidance” and “guide factors” issued pursuant to ECL 3-0301 (2) (z) and by vacating the fourth decretal paragraph and as modified the judgment is affirmed without costs.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul that part of the determination of respondent New York State Department of Environmental Conservation (DEC) denying the application of petitioner Destiny USA Development, LLC (Destiny) for inclusion of certain parcels of property in the Brownfield Cleanup Program ([BCP]; *see generally* ECL art 27, tit 14). The DEC and its Commissioner appeal from a judgment that, inter alia, annulled the determination of the DEC, “declared” that its promulgated “guidance” and “guide factors” were null and void and that its refusal to include the parcels in the BCP violated the equal protection clauses of the state and federal constitutions, and ordered the DEC to include the “entire project site of DestiNY USA, including all of the ‘Carousel Parcels’ and all of the ‘Oil City Parcels’ in the BCP” (*Destiny USA Dev., LLC v New York State Dept. of*

Envtl. Conservation, 19 Misc 3d 1144[A], 2008 NY Slip Op 51161[U], *28). We note at the outset that, because this is properly a CPLR article 78 proceeding, Supreme Court erred in making a declaration (*see generally Matter of Barker Cent. School Dist. v Niagara County Indus. Dev. Agency*, ___ AD3d ___ [May 1, 2009]).

Contrary to the contention of respondents (hereafter, DEC), the court properly granted the petition. Destiny applied to have 17 parcels located in a formerly industrial area of the Syracuse waterfront admitted into the BCP as a part of its development of an international resort and tourism destination known as DestiNY USA (hereafter, Project). The DEC admitted only six of those parcels into the BCP. Two of the rejected parcels are occupied by the already existent Carousel Center (Carousel parcels), which Destiny intends to redevelop as part of the Project. Located on a third rejected parcel, known as the Clark Containment Cell (Clark parcel), is an engineered containment structure containing hazardous waste soils. The remaining eight rejected parcels are in that part of Syracuse referred to as "Oil City," by virtue of the former petroleum bulk storage and industrial use of that parcel. Oil City has an established history of contamination.

We note at the outset the well-established principle that, "where . . . 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 v Onondaga Landfill Sys.*, 69 NY2d 355, 363; *see Matter of Lighthouse Pointe Prop. Assoc. LLC v New York State Dept. of Envtl. Conservation*, 61 AD3d 88, 93). "Where, however, the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight" (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459). Indeed, agency determinations that conflict with the clear wording of a statute are entitled to little or no weight (*see Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 103; *Kurcsics*, 49 NY2d at 459).

The DEC acknowledged that there was contamination at each of the rejected parcels, but it nevertheless determined that those parcels failed to meet the definition of a brownfield site and thus were ineligible for participation in the BCP. The term 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' " (*Lighthouse Pointe Prop. Assoc. LLC*, 61 AD3d at 90, quoting ECL 27-1405 [2]). The record establishes that the determination of the DEC with respect to those parcels was based upon its own interpretation of the relevant BCP statutes as well as the application of its own internal "guidance" and "guide factors," rather than on a factual determination within the expertise of the DEC. We thus conclude that the determination of the DEC with respect to those parcels is not entitled to our deference (*see Flacke*, 69 NY2d at 363; *Kurcsics*, 49 NY2d at 459; *cf. Lighthouse*

Pointe Prop. Assoc. LLC, 61 AD3d at 93-94).

Contrary to the further contention of the DEC, the court properly determined that its refusal to include in the BCP the portion of the Carousel parcels outside of the existing mall structure was arbitrary and capricious. "[A]n agency, by law, is not allowed to 'legislate' by adding 'guidance requirements' not expressly authorized by statute" (*Matter of HLP Props., LLC v New York State Dept. of Envtl. Conservation*, 21 Misc 3d 658, 669; *see Matter of Medical Socy. of State of N.Y. v Serio*, 100 NY2d 854, 866). As noted, the term brownfield site is defined in ECL 27-1405 (2) as "any real property, the *redevelopment or reuse* of which *may be complicated* by the presence or potential presence of a contaminant" (emphasis added). The DEC did not address in its determination any of the specified complications to redevelopment that Destiny asserted would result from contaminants in the subject parcels. Instead, the DEC relied upon its self-promulgated "guidance" and "guide factors" that require, inter alia, consideration of whether a parcel is "idled, abandoned or underutilized" and a comparison of the estimated remediation cost "to the anticipated value of the proposed site as redeveloped or reused." Those factors effectively limit inclusion in the BCP to parcels of real property that, but for BCP participation, would remain undeveloped. We conclude that the application of such a categorical limitation without a fact-specific analysis contravenes the broadly worded definition of brownfield site set forth in ECL 27-1405 (2), which requires that redevelopment only potentially be "complicated" by the presence of contamination (*see HLP Props., LLC*, 21 Misc 3d at 668-670). Similarly, the DEC's reliance on the comparative cost of remediation to the total project cost was unwarranted, inasmuch as the Legislature has addressed that issue in Tax Law sections that are applied after the completion of remediation, not before acceptance into the BCP (*see* Tax Law §§ 21 - 23; *HLP Props., LLC*, 21 Misc 3d at 671). Thus, the categorical application by the DEC of its "guidance" and "guide factors" as a precondition to admission into the BCP both conflicts with the intent of the Legislature and constitutes an impermissible attempt to legislate (*see HLP Props., LLC*, 21 Misc 3d at 668-670; *see also Matter of East Riv. Realty Co., LLC v New York State Dept. of Envtl. Conservation*, 22 Misc 3d 404, 422; *see generally Matter of Trump-Equitable Fifth Ave. Co. v Gliedman*, 57 NY2d 588, 594).

Although we conclude that the categorical application by the DEC of certain "guidance" and "guide factors" as preconditions to admission into the BCP has rendered its determination arbitrary and capricious, we nevertheless agree with the DEC that the court erred in "declaring" those factors null and void. "[B]y their own terms [the 'guidance' and 'guide factors'] are explanatory and advisory, to be followed 'under appropriate conditions' " (*Matter of Sheehan v Ambach*, 136 AD2d 25, 29, *lv denied* 72 NY2d 804), and thus they are appropriate inasmuch as they facially "do not represent 'a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers' " (*id.* at 29, quoting *Matter of Roman Catholic*

Diocese of Albany v New York State Dept. of Health, 66 NY2d 948, 951). We therefore modify the judgment accordingly.

We reject the DEC's contention that the issue of the inclusion of the Carousel parcels in the BCP is moot inasmuch as Destiny has commenced redevelopment and remediation with respect to those parcels. A 2005 Stipulation Agreement between the DEC and Destiny (Stipulation) not only ensures that any remediation activities undertaken by Destiny are in compliance with the BCP standards, but it also expressly provides that "[n]either entering into the Stipulation *nor implementation of any work* pursuant to the Stipulation will adversely affect DestiNY's (or an affiliate's) eligibility or the eligibility of the Site as a brownfield site pursuant to the BCP" (*cf. 377 Greenwich LLC v New York State Dept. of Envtl. Conservation*, 14 Misc 3d 417, 425-426; *see generally* ECL 27-1409).

Contrary to the DEC's further contention, the eight parcels located in the "Oil City" area of the project site were not subject to statutory exclusions. We note that the DEC set forth in its determination that those parcels were ineligible for BCP participation because they were "subject to . . . on-going state or federal enforcement action related to the contamination which is at or emanating from the site subject to the present application" (ECL 27-1405 [2] [e]), and that the DEC has since abandoned any reliance on paragraph (e) of that statutory subdivision.

In opposition to the petition, however, the DEC also relied upon a different paragraph of that statutory subdivision, i.e., ECL 27-1405 (2) (d), in support of its contention that the eight parcels located in the "Oil City" area of the project site are subject to statutory exclusions. We conclude that the DEC's reliance thereon is misplaced. Pursuant to paragraph (d) of ECL 27-1405 (2), property "subject to an order for cleanup pursuant to article twelve of the navigation law or pursuant to title ten of article seventeen of this chapter [are excluded from the definition of a brownfield site,] except such property shall not be deemed ineligible if it is subject to a stipulation agreement." Here, the record establishes that the DEC had previously entered into what were denominated Orders on Consent with several petroleum companies with respect to the eight Oil City parcels, and the DEC conceded at oral argument before Supreme Court that two of those parcels were no longer subject to the Orders on Consent. Even assuming, arguendo, that the Orders on Consent with respect to the remaining six parcels were "order[s] for cleanup" within the meaning of ECL 27-1405 (2) (d), we conclude that those parcels were included in the Stipulation, which by its own terms is a "stipulation agreement within the meaning of" ECL 27-1405 (2) (d). Thus, the Orders on Consent were superseded by the Stipulation. Further, in the cover letter to the Stipulation, the DEC expressly stated that the Stipulation would "govern the remediation of the Site during its term" and would not "adversely affect DestiNY's (or an affiliate's) eligibility or the eligibility of the Site as a brownfield site pursuant to the BCP."

We further reject the DEC's contention that the Clark parcel was "subject to . . . on-going state or federal environmental enforcement action related to the contamination," and thus that it was properly excluded under ECL 27-1405 (2) (e). The Clark parcel was subject to voluntary remediation agreements in the form of two "Agreements and Determinations" between the DEC and Destiny's predecessor in interest. Contrary to the DEC's contention, those voluntary agreements are not "enforcement actions" within the meaning of the BCP but, rather, they serve to obviate the need for the DEC to achieve remediation goals through litigation. Indeed, the two agreements expressly reserve to the DEC the right to commence an action if necessary.

We agree with the DEC, however, that the court erred in "declaring" that its determination was null and void on constitutional grounds inasmuch as we agree with the court that the DEC's determination was arbitrary and capricious, apart from any constitutional issues. "It is fundamental that a court should not decide a constitutional issue except where it is unavoidable, and should not decide a case on constitutional grounds where the decision may be based on alternative, nonconstitutional grounds" (*Ajay Glass & Mirror Co. v County of Erie*, 155 AD2d 988, 988-989; *see Rescue Army v Municipal Court of City of Los Angeles*, 331 US 549, 569; *see also Matter of Vogel v Blackwell*, 225 AD2d 1091, 1092). We therefore further modify the judgment accordingly.

Finally, we reject the contention of the DEC that the court erred in directing it to grant the application in its entirety. A judgment in a CPLR article 78 proceeding may "annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent" (CPLR 7806), and the record here was sufficiently developed for the court to direct the DEC as it did (*see Matter of Pantelidis v New York City Bd. of Stds. & Appeals*, 10 NY3d 846).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

649

CA 08-01944

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, PINE, AND GORSKI, JJ.

JOHN W. STAATS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WEGMANS FOOD MARKETS, INC.,
DEFENDANT-RESPONDENT.

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

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered April 3, 2008 in a personal injury action. The order, following a collateral source hearing, granted defendant a collateral source offset against all of plaintiff's damages for future medical expenses.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reducing the award of damages for future medical expenses by the amount of $41,379.39 and as modified the order is affirmed without costs.

Memorandum: Plaintiff sustained injuries upon falling from a height, and a jury awarded him damages that included $662,069 for future medical expenses over a period of 36 years, which is approximately $1,532.57 per month. Plaintiff contends on appeal that Supreme Court, following a collateral source hearing, erred in granting defendant a collateral source offset against all of his damages for future medical expenses upon determining that it was reasonably certain that those expenses would be paid by Canadian national health insurance. We conclude that the court properly determined that defendant was entitled to an offset against plaintiff's damages attributable to the 27-month period between the jury award and April 2007 inasmuch as plaintiff admitted that he was in fact reimbursed in full for his medical expenses during that period of time (*see Kastick v U-Haul Co. of W. Mich.*, 292 AD2d 797, 798-799). We conclude, however, that the court erred in granting defendant a further offset beyond that 27-month period, and we therefore modify the order accordingly. We agree with plaintiff that defendant failed to meet its burden of establishing "with reasonable certainty," i.e., by clear and convincing evidence, that plaintiff would remain entitled to the continued receipt of benefits from a collateral source (CPLR

4545 [c]; *see Kihl v Pfeffer*, 47 AD3d 154, 163-164; *Kastick*, 292 AD2d at 798-799; *Caruso v Russel P. LeFrois Bldrs.*, 217 AD2d 256, 258-259). Plaintiff, the sole witness at the collateral source hearing, testified that he was no longer a resident of Canada and thus was not entitled to Canadian health care benefits, and he further testified that he did not intend to return to his status as a Canadian resident. Even assuming, arguendo, that plaintiff was not a credible witness, we note that defendant failed to present any evidence from which the court could have determined that plaintiff was reasonably certain to remain entitled to Canadian health care benefits for the duration of the period in which damages for future medical expenses were awarded (*see Kihl*, 47 AD3d at 165-167; *Ruby v Budget Rent A Car Corp.*, 23 AD3d 257, *lv denied* 6 NY3d 712; *see generally Young v Tops Mkts.* [appeal No. 4], 283 AD2d 923, 926).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

651

CA 07-02219

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, PINE, AND GORSKI, JJ.

EUGENE MARGERUM, ANTHONY HYNES, JOSEPH FAHEY, TIMOTHY HAZELET, PETER KERTZIE, PETER LOTOCKI, SCOTT SKINNER, THOMAS REDDINGTON, TIMOTHY CASSEL, MATTHEW S. OSINSKI, MARK ABAD, BRAD ARNONE, AND DAVID DENZ, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, CITY OF BUFFALO DEPARTMENT OF FIRE, AND LEONARD MATARESE, INDIVIDUALLY AND AS COMMISSIONER OF HUMAN RESOURCES FOR CITY OF BUFFALO, DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (JOSEPH S. BROWN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered September 10, 2007. The order, inter alia, granted the cross motion of plaintiffs for partial summary judgment on liability.

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

Memorandum: Plaintiffs, 13 firefighters employed by defendant City of Buffalo Department of Fire (Fire Department), commenced this action alleging that defendants discriminated against them by allowing promotional eligibility lists created pursuant to the Civil Service Law to expire solely on the ground that plaintiffs, who were next in line for promotion, were Caucasian. Plaintiffs asserted causes of action based on the Human Rights Law (Executive Law art 15), the New York Constitution and the Civil Service Law. Before answering the complaint, defendants moved to dismiss it or, alternatively, to stay the action, and plaintiffs cross-moved for partial summary judgment on liability. We agree with defendants that Supreme Court erred in granting plaintiffs' cross motion but further conclude that the court properly denied defendants' motion. We therefore modify the order accordingly.

This action is one of a number of actions concerning the

promotion of firefighters in the Fire Department, and it is helpful to review those prior actions in order to place this action in context. In 1980 the United States Court of Appeals for the Second Circuit determined, inter alia, that the defendant City of Buffalo (City) and the defendant Fire Department had discriminated against African-Americans, Hispanics and women (*United States v City of Buffalo*, 633 F2d 643, *modfg* 457 F Supp 612). The "Final Decree and Order" dated November 23, 1979 that was issued by the District Court in that action prohibited the City and the Fire Department from engaging in any act or practice with respect to, inter alia, hiring or promotion "which has the purpose or effect of discriminating against any employee or future employee . . . because of such individual's race" (*United States v City of Buffalo*, 721 F Supp 463, 464 n 1, *affd* 993 F2d 1533).

Following civil service examinations in 1998 and 2002, eligibility lists for various supervisory positions within the Fire Department were created. Based on the statistical disparities placing minorities at a disadvantage, Men of Color Helping All Society, Inc. (MOCHA), an organization of African-American firefighters employed by the Fire Department, commenced two actions in federal court alleging that the respective civil service examinations for the position of lieutenant were discriminatory with respect to African-Americans. "MOCHA I" challenged the 1998 examination, and "MOCHA II" challenged the 2002 examination.

In 2005 defendant Leonard Matarese, Commissioner of Human Resources for the City, allowed the eligibility lists for all supervisory positions within the Fire Department generated from the 2002 examinations to expire without granting a third one-year extension. Because all of the lists were generated from examinations developed at the same time and in the same manner as the examination for the position of lieutenant, Matarese believed that all of the lists were suspect. Plaintiffs are those nonminority candidates who were "next in line" for promotion on the expired lists, some of whom had been recommended for promotion before the lists were allowed to expire. In 2006 the Buffalo Professional Firefighters Association, Inc., Local 282, IAFF, AFL-CIO (Union) and all of the plaintiffs in this action, with the exception of Peter Kertzie, commenced two CPLR article 78 proceedings. In those proceedings, which were consolidated for appeal, the petitioners contended that the determination to allow the lists to expire was arbitrary and capricious and made in bad faith (*Matter of Hynes v City of Buffalo*, 52 AD3d 1216). The petitioners further contended that the respondents should be compelled to make permanent various promotions that had been recommended before the lists were allowed to expire. Also in 2006, the Union filed grievances against the City, contending that the City violated the collective bargaining agreement when it failed to make a particular provisional appointment and other recommended promotions permanent.

Supreme Court, in December 2006, denied those parts of the petitions that challenged the determination to allow the lists to expire and the failure to make certain proposed appointments permanent. In January 2007, the arbitrator denied the Union's grievances, finding that the City did not violate the collective

bargaining agreement in failing to make provisional appointments permanent or in failing to fill vacancies before the expiration of promotional "eligible lists."

In February 2007, while the appeals from the judgments in the consolidated CPLR article 78 proceedings were pending, plaintiffs commenced this action, contending that the determination to allow the eligibility lists to expire amounted to racial discrimination against plaintiffs. In July 2008, this Court affirmed in part the CPLR article 78 judgments on the ground that the determination "to permit the eligibility lists at issue to expire was not arbitrary, nor was it made in bad faith" (*Hynes*, 52 AD3d at 1217). On March 9, 2009, the District Court for the Western District of New York (John T. Curtin, J.) issued an order in MOCHA I concluding after a trial that, despite the disparate impact of the 1998 lieutenant examination, that examination "was developed . . . in a manner that is significantly correlated with important elements of work behavior which are relevant to the position . . . [and thus that] the City ha[d] met its burden of demonstrating that the Exam [was] job-related for the position and consistent with business necessity" (*M.O.C.H.A. Socy., Inc. v City of Buffalo*, 2009 WL 604898 *18). Because the MOCHA I plaintiffs failed to establish "that other tests or devices were available for selection," the District Court dismissed the second amended complaint "to the extent it seeks relief under Title VII [of the Civil Rights Act of 1964] based on the City of Buffalo's use of the results of the 1998 Lieutenant's Exam to promote Buffalo firefighters to the rank of lieutenant" (*id.*).

On this appeal from the order that, inter alia, granted plaintiffs' cross motion for partial summary judgment on liability on the complaint, defendants contend that plaintiffs' reverse discrimination allegations do not state a cause of action and that, even assuming, arguendo, that a strict scrutiny standard applies, we should conclude that defendants' conduct meets that standard and dismiss the complaint.

We agree with plaintiffs that the proper standard by which to measure defendants' conduct is that of strict scrutiny. The United States Supreme Court has repeatedly written that "all 'governmental action based on race - a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited - should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed' " (*Grutter v Bollinger*, 539 US 306, 326, *reh denied* 539 US 982, quoting *Adarand Constructors, Inc. v Peña*, 515 US 200, 227). The Supreme Court has also held that " '[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination' " (*Adarand Constructors, Inc.*, 515 US at 218, quoting *Regents of Univ. of Cal. v Bakke*, 438 US 265, 291). In short, "[a]lthough all governmental uses of race are subject to strict scrutiny, not all are invalidated by it" (*Grutter*, 539 US at 326-327). Under the strict scrutiny standard, governmental actions based on race are constitutional "only if they are narrowly tailored to further

compelling governmental interests" (*id.* at 326). "When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied" (*id*. at 327).

On this record there can be no dispute that the determination to allow the eligibility lists to expire was made because those next in line for promotion were Caucasian and, in view of the ongoing discrimination actions in federal court, defendants wanted to avoid the further appointment of Caucasians. Thus, the governmental action being challenged was based on racial distinctions and should be subjected to the " 'most exacting judicial examination' " (*Adarand Constructors, Inc.*, 515 US at 218).

In contending that the strict scrutiny standard does not apply, defendants rely on *Hayden v County of Nassau* (180 F3d 42). We conclude that their reliance on *Hayden* is misplaced. In that case, the plaintiffs were challenging the police department's act in designing race-neutral entrance examinations, and the Second Circuit concluded that "race-neutral efforts to address and rectify the racially disproportionate effects of an entrance examination do not discriminate against non-minorities" (*id.* at 54). In this case, defendants' actions were not race-neutral. Rather, defendants' determination to allow the lists to expire was made " 'because of' " the race of those individuals who were next in line for promotion (*id.* at 51).

Defendants also rely on a second decision of the Second Circuit, that of *Ricci v DeStefano* (554 F Supp 2d 142, *affd for the reasons stated* 530 F3d 87, *reh en banc denied* 530 F3d 88, *cert granted* ___ US ___, 129 S Ct 894), to support their contention that the strict scrutiny standard does not apply. In our view, the implications of *Ricci* are not clear. In that case, the New Haven Civil Service Board refused to certify the results of two promotional examinations upon learning of the disparate impact that those examinations had on minorities (*Ricci*, 554 F Supp 2d at 145-146). Although the District Court recognized that the refusal to certify the results of the examinations was a race-conscious decision, the court concluded that the remedy was race-neutral (*id.* at 158). The court determined that there was no "facial classification based on race" (*id.* at 161), and it dismissed the complaint. Although the Second Circuit affirmed for the reasons stated, it then denied a rehearing en banc by only a majority of seven to six (530 F3d 88). The six dissenting judges voted to grant a rehearing to address, inter alia, an "important question[] of first impression in [the Second] Circuit[:] . . . May a municipal employer disregard the results of a qualifying examination, which was carefully constructed to ensure race-neutrality, on the ground that the results of that examination yielded too many qualified applicants of one race and not enough of another?" (*Ricci*, 530 F3d 88, 93-94 [Cabranes, J., dissenting]). In distinguishing *Hayden*, Judge Cabranes in his dissent noted that "[n]eutral administration and scoring - even against the backdrop of race conscious *design* of an

employment examination . . . is one thing. But neutral administration and scoring that is followed by race-based treatment of examination results is surely something else entirely" (*id.* at 98).

Although the underlying facts of *Ricci* are similar to the facts of this case, we ultimately conclude that *Ricci* is distinguishable from this case and thus that defendants mistakenly rely upon it. In *Ricci* the examination results were discarded before any appointments were made and without any consideration of those who would have been next in line for promotion. In this case, however, the examination results were certified, eligibility lists were created and promotions were made for three years before the determination was made to allow the promotional eligibility lists to expire. In other words, the determination in this case was in fact made based on the race of those next in line for promotion.

We conclude, however, that plaintiffs were not entitled to partial summary judgment on liability. First, plaintiffs failed to establish the absence of a compelling interest. Indeed, "a sufficiently serious claim of discrimination" may constitute a compelling interest to engage in race-conscious remedial action (*Bushey v New York State Civ. Serv. Commn.*, 733 F2d 220, 228, *cert denied* 469 US 1117, *reh denied* 470 US 1024). Second, plaintiffs submitted no evidence to establish that defendants' actions were not narrowly tailored to meet the allegedly compelling interest. Thus "the record is insufficient to determine whether [defendants'] plan trammeled the interests of the nonminority [plaintiffs] . . . [and] a full exploration of this disputed issue" is warranted (*Bushey*, 733 F2d at 229). For that same reason, the court properly denied defendants' motion to dismiss the complaint. We reject defendants' contention that plaintiffs failed to state a cause of action, thus warranting dismissal of the complaint. "[I]n determining whether to dismiss a complaint for failure to state a cause of action, the court must accept all of the allegations in the complaint as true . . . The 'sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail' " (*Meyer v Stout*, 45 AD3d 1445, 1446, quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275). The facts alleged in the complaint, when accepted as true, state a viable cause of action.

We also reject the contention of defendants that plaintiffs were required to file a notice of claim before commencing this action and thus that the complaint should be dismissed based on plaintiffs' failure to do so (*see Picciano v Nassau County Civ. Serv. Commn.*, 290 AD2d 164, 170; *Sebastian v New York City Health & Hosps. Corp.*, 221 AD2d 294; *cf. Grasso v Schenectady County Pub. Library*, 30 AD3d 814, 816-817; *Mendell v Salamanca Hous. Auth.*, 12 AD3d 1023). Contrary to defendants' further contention, plaintiffs' action is not barred by the doctrines of res judicata or collateral estoppel. In the prior CPLR article 78 proceedings plaintiffs could not have sought the relief they seek in this action (*see generally Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 348-349), nor were the issues raised

in this action either raised or necessarily decided in the prior proceedings (*see generally Buechel v Bain*, 97 NY2d 295, 303-304, *cert denied* 535 US 1096).

Based on our determination with respect to plaintiffs' cross motion, we see no need to address defendants' remaining contention concerning the relief being sought by plaintiffs.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

652

CA 08-01996

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, PINE, AND GORSKI, JJ.

MARGARET J. BARBATO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BRENT D. BOWDEN, DEFENDANT-APPELLANT.

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

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered December 7, 2007 in an action for, inter alia, negligence. The order, insofar as appealed from, denied the motion of defendant to dismiss the first, second, fifth, and eighth causes of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion to dismiss the first, second, and fifth causes of action and dismissing those causes of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages arising from defendant's alleged "concerted campaign to harass, sexually harass, and intimidate her." According to plaintiff, the alleged conduct occurred at the elementary school where she was employed as a teacher and defendant was employed as the principal. Although defendant moved to dismiss the complaint, he now raises a new ground in support of his motion with respect to the first and second causes of action, for negligence, contending that they are barred by the exclusive remedy provisions of the Workers' Compensation Law. Although that contention is therefore not preserved for our review (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985), we nevertheless address it inasmuch as " 'the issue [raised therein] is one of law appearing on the face of the record that [plaintiff] could not have countered if it had been raised in the court of first instance' " (*Hoke v Hoke*, 27 AD3d 1055, 1055). We agree with defendant that those causes of action are indeed barred, inasmuch as "workers' compensation is intended to be the exclusive remedy for work-related injuries" (*Burlew v American Mut. Ins. Co.*, 63 NY2d 412, 416; *see* Workers' Compensation Law § 29 [6]; *Monteiro v State of New York*, 27 AD3d 1133). We therefore modify the order accordingly.

We further agree with defendant that Supreme Court erred in denying that part of his motion to dismiss the fifth cause of action, alleging a violation of the Human Rights Law (Executive Law art 15), and we therefore further modify the order accordingly. Pursuant to Executive Law § 296 (1) (a), “an employer” is prohibited from discriminating against any individual on the ground of gender “in terms, conditions or privileges of employment.” In a case involving a school district, a plaintiff alleging the violation of the Human Rights Law is required to file a notice of claim against the school district pursuant to Education Law § 3813 (2). Thus, even assuming, arguendo, that defendant is liable under that statute as an employer because he had the “power to do more than carry out personnel decisions made by others” and was acting within the scope of his employment (*Patrowich v Chemical Bank*, 63 NY2d 541, 542; *see also Layaou v Xerox Corp.*, 298 AD2d 921, 922), we conclude that the fifth cause of action must be dismissed on the ground that plaintiff failed to file the requisite notice of claim against the Central Square Central School District.

We reject plaintiff’s contention that defendant is bound by an alleged stipulation made by his former attorney that the sexual comments were not within the scope of defendant’s employment. That stipulation does not appear in the record and thus does not bind defendant. “[T]here [can be] no open court settlement agreement within the meaning of CPLR 2104 where the purported agreement was never transcribed or entered into any court record” (*Matter of Janis*, 210 AD2d 101, 101). We further agree with defendant that he cannot be held liable for aiding and abetting a violation of the Human Rights Law “[w]here[, as here,] no violation of the Human Rights Law by another party has been established” (*Strauss v New York State Dept. of Educ.*, 26 AD3d 67, 73; *see* Executive Law § 296 [6]).

Finally, we reject the contention of defendant that the court erred in denying that part of his motion to dismiss the claim for a violation of 42 USC § 1983 based on, inter alia, a hostile work environment (*see generally DiPalma v Phelan*, 81 NY2d 754, 756).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

659
KA 07-01788
PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, PERADOTTO, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRENCE X. JONES, DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

TERRENCE X. JONES, 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 May 23, 2007. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the fourth degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]) and resisting arrest (§ 205.30). We reject the contention of defendant that County Court erred in refusing to suppress the cocaine found on his person following the arrest. Great deference is to be accorded “the determination of the suppression court with its peculiar advantages of having seen and heard the witnesses” (*People v Prochilo*, 41 NY2d 759, 761), and we see no reason to disturb the court’s determination. The evidence presented at the suppression hearing established that the police lawfully stopped the vehicle driven by defendant inasmuch as they had reasonable suspicion to believe that he had just participated in a drug transaction (*see People v Spencer*, 84 NY2d 749, 753, *cert denied* 516 US 905; *People v White*, 27 AD3d 1181). The subsequent arrest of defendant and the frisk of his person were valid based on the existence of an outstanding warrant for his arrest (*see People v Troiano*, 35 NY2d 476, 478; *People v Boone*, 269 AD2d 459, *lv denied* 95 NY2d 850, 961; *see also People v Ebron*, 275 AD2d 490, 491, *lv denied* 95 NY2d 934).

Defendant’s challenge to the legality of the warrant is not preserved for our review (*see generally People v Gonzalez*, 55 NY2d

887), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant also failed to preserve for our review the contention in his pro se supplemental brief that the absence of any description of defendant in the radio communication between the police dispatcher and the detective who stopped defendant's vehicle rendered his arrest illegal (*see generally Gonzalez*, 55 NY2d 887), and we likewise 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]). To the extent that defendant contends in his pro se supplemental brief that defense counsel was ineffective in failing to preserve that contention for our review, we reject that contention (*see generally People v Caban*, 5 NY3d 143, 152; *People v Baldi*, 54 NY2d 137, 147).

We further conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Also contrary to defendant's contention, the sentence is not unduly harsh or severe.

The further contention of defendant in his pro se supplemental brief that he was denied a fair trial by prosecutorial misconduct on summation is not preserved for our review (*see* CPL 470.05 [2]). In any event, we conclude that the challenged comments fall "within the latitude afforded to attorneys in advocating their cause" (*People v Halm*, 81 NY2d 819, 821). Finally, the remaining contentions of defendant in his pro se supplemental brief involve matters outside the record on appeal and thus are properly raised by way of a motion pursuant to CPL article 440 (*see generally People v Carlisle*, 50 AD3d 1451, *lv denied* 10 NY3d 957).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

663

CA 08-01856

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, PERADOTTO, AND GREEN, JJ.

BRANDY B., INDIVIDUALLY AND AS MOTHER AND
NATURAL GUARDIAN OF BRENNA B., AN INFANT,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EDEN CENTRAL SCHOOL DISTRICT, EDEN CENTRAL
SCHOOL DISTRICT BOARD OF EDUCATION, ERIE
COUNTY CHILD AND FAMILY SERVICES,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

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

GOLDBERG SEGALLA, LLP, BUFFALO (JULIE PASQUARIELLO APTER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS EDEN CENTRAL SCHOOL DISTRICT AND EDEN CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION.

DAMON & MOREY LLP, BUFFALO (DANIELLE M. CARDAMONE OF COUNSEL), FOR DEFENDANT-RESPONDENT ERIE COUNTY CHILD AND FAMILY SERVICES.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered May 6, 2008 in a personal injury action. The order granted the motions of defendants Eden Central School District, Eden Central School District Board of Education and Erie County Child and Family Services for summary judgment dismissing the amended 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 sustained by her daughter when she was sexually assaulted on a school bus. According to plaintiff, the foster child of third-party defendants foster parents (foster parents) committed the assault. In appeal No. 1, Supreme Court properly granted the respective motions of defendants-third-party plaintiffs and defendant Erie County Child and Family Services for summary judgment dismissing the amended complaint against them on the ground that they had no prior knowledge of the assailant’s sexual tendencies. With respect to the moving defendants, the court properly concluded that they established as a matter of law that they did not have sufficiently specific knowledge or notice of

the dangerous conduct. Thus, the principle concerning liability for "foreseeable injuries proximately related to the absence of adequate supervision" is inapplicable here (*Mirand v City of New York*, 84 NY2d 44, 49). Indeed, the records in the possession of those defendants failed to indicate any relevant dangerous conduct at all, and the assailant had not been disciplined for any conduct of any kind during the year in which he was in the school district.

We also affirm the order in appeal No. 2 granting the motion (improperly denominated cross motion) of the foster parents for summary judgment dismissing the third-party complaint against them, for reasons stated in the letter decision of Supreme Court dated May 6, 2008.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

671

CA 08-01924

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, PERADOTTO, AND GREEN, JJ.

BRANDY B., INDIVIDUALLY AND AS MOTHER AND
NATURAL GUARDIAN OF BRENNA B., AN INFANT,
PLAINTIFF,

V MEMORANDUM AND ORDER

EDEN CENTRAL SCHOOL DISTRICT, ET AL., DEFENDANTS.

EDEN CENTRAL SCHOOL DISTRICT AND EDEN CENTRAL
SCHOOL DISTRICT BOARD OF EDUCATION, THIRD-PARTY
PLAINTIFFS-APPELLANTS,

V

JOHN ZAJAC AND KAREN ZAJAC, AS FOSTER PARENTS AND
GUARDIANS TO ROBERT FELVUS, AN INFANT,
THIRD-PARTY DEFENDANTS-RESPONDENTS,
ET AL., THIRD-PARTY DEFENDANT.
(APPEAL NO. 2.)

GOLDBERG SEGALLA, LLP, BUFFALO (JULIE PASQUARIELLO APTER OF COUNSEL),
FOR THIRD-PARTY PLAINTIFFS-APPELLANTS.

LAW OFFICE OF EPSTEIN & HARTFORD, WILLIAMSVILLE (JENNIFER V.
SCHIFFMACHER OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered June 6, 2008 in a personal injury action. The order granted the motion of third-party defendants John Zajac and Karen Zajac, as foster parents and guardians to Robert Felvus, an infant, for summary judgment dismissing the third-party complaint against them.

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

Same Memorandum as in *Brandy B. v Eden Cent. School Dist.* ([appeal No. 1] ___ AD3d ___ [June 5, 2009]).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

673
CAF 08-00088
PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, PERADOTTO, AND GREEN, JJ.

IN THE MATTER OF CHERYL R. OWENS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

WADE K. GARNER, RESPONDENT-APPELLANT.

SHEILA SULLIVAN DICKINSON, BUFFALO, FOR RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-RESPONDENT.

MINDY L. MARRANCA, LAW GUARDIAN, BUFFALO, FOR RENEE C.G.

Appeal from an order of the Family Court, Erie County (Marjorie C. Mix, J.H.O.), entered December 12, 2007 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner sole custody of the parties' children.

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

Memorandum: Respondent father appeals from an order modifying a prior order pursuant to which he had sole custody of the parties' children, with visitation to petitioner mother, by awarding the mother sole custody of the children, with visitation to the father. Although we agree with the father that Family Court erred in granting temporary custody of the children to the mother without conducting a full evidentiary hearing (*see Matter of Smith v Brown*, 272 AD2d 993), we conclude that the error is harmless because the Judicial Hearing Officer (JHO) " 'subsequently conducted the requisite evidentiary hearing' " (*Matter of Darryl B.W. v Sharon M.W.*, 49 AD3d 1246, 1247).

Contrary to the father's further contention, there is a sound and substantial basis in the record to support the JHO's determination following the hearing (*see generally id.*; *Matter of Jennifer L.B. v Jared R.B.*, 32 AD3d 1174; *Matter of Carl G. v Oneida County Dept. of Social Servs.*, 24 AD3d 1274, 1275; *Matter of Green v Mitchell*, 266 AD2d 884). " 'It is well established that alteration of an established custody [and visitation] arrangement will be ordered only upon a showing of a change in circumstances which reflects a real need for change to ensure the best interest[s] of the child[ren]' " (*Matter of Amy L.M. v Kevin M.M.*, 31 AD3d 1224, 1225; *see Matter of Connie L.C. v Edward C.B.*, 45 AD3d 1374). Here, the mother established that the father interfered with the mother's visitation with the children

under the prior order, that the children's grades declined while the children were in the father's care, that the father failed to seek proper and necessary medical and dental treatment for the children, and that he had used a belt to "whip" the children on at least one occasion. That evidence, as well as the evidence that the children were thriving in the mother's care and preferred to reside with the mother, supports the JHO's determination that an award of sole custody to the mother is in the best interests of the children (*see generally Matter of Maher v Maher*, 1 AD3d 987, 989; *Fox v Fox*, 177 AD2d 209, 210).

We reject the contention of the father that he was denied a fair hearing. Contrary to his contention, his request that the JHO recuse herself did not constitute a withdrawal of his consent to have the matter handled by the JHO. Also, contrary to the contention of the father, the record fails to establish that the JHO was biased against him. Although the JHO elicited substantial testimony from the father during the mother's cross-examination of him, he did not object to the JHO's questioning, and the questions sought only clarification or further explanation of testimony from both parties (*cf. Matter of Yadiel Roque C.*, 17 AD3d 1168, 1169).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

680

TP 08-02557

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

IN THE MATTER OF MARK PAUL, PETITIONER,

V ORDER

LUCIEN J. LECLAIRE, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES, RESPONDENT.

MARK PAUL, PETITIONER PRO SE.

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, Oneida County [Samuel D. Hester, J.], dated August 14, 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: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

681

KA 08-00837

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SHAUN JOHNSON, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered March 8, 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 Hidalgo*, 91 NY2d 733, 737).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

682

KA 06-01933

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NACHE AFRIKA, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), rendered May 12, 2006. Defendant was resentenced upon his conviction of robbery in the first degree and sodomy in the first degree.

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

Memorandum: Defendant was convicted upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]) and sodomy in the first degree (former § 130.50 [1]), and he appeals from the resentence on that conviction. The sole contention of defendant is that Supreme Court erred in resentencing him as a second violent felony offender because the People failed to refile a second violent felony offender statement pursuant to CPL 400.15 (2) at the time of his resentencing. Defendant failed to preserve that contention for our review inasmuch as, upon resentencing, he challenged only the constitutionality of the predicate violent felony conviction (*see generally People v Beu*, 24 AD3d 1257, *lv denied* 6 NY3d 809). In any event, defendant's contention lacks merit. Even assuming, arguendo, that defendant is correct in contending that the People were required to refile the second violent felony offender statement at resentencing and that they failed to do so, we conclude that there was substantial compliance with CPL 400.15 (2) (*see generally People v Mateo*, 53 AD3d 1111, *lv denied* 11 NY3d 791). It is undisputed that the People filed the requisite statement at defendant's original sentencing and that defendant admitted his status as a second violent felony offender at that time (*see generally id.*).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

683

KA 08-01879

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARL STEWART, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Erie County Court (Michael F. Pietruszka, J.), entered September 4, 2008. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk under the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court erred in refusing to deduct 10 points assessed by the Board of Examiners of Sex Offenders for forcible compulsion because it is not an element of the crimes of which he was convicted. We reject that contention (*see People v Feeney*, 58 AD3d 614; *People v LaRock*, 45 AD3d 1121, 1122-1123). We conclude, based on the case summary and the presentence report, that the assessment of points under that risk factor is supported by clear and convincing evidence (*see People v Richards*, 50 AD3d 1329, *lv denied* 10 NY3d 715; *LaRock*, 45 AD3d at 1123). In any event, the presumptive classification of defendant as a level two risk would not change even in the event that those points were deducted, and the court properly rejected the contention of defendant that a downward departure was warranted based either upon his age (*see People v Mothersell*, 26 AD3d 620, 621), or his postrelease conduct (*see People v Hamelinck*, 23 AD3d 1060).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

684

KA 08-00335

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH G. MCCLAM, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Ontario County Court (William F. Kocher, J.), entered January 25, 2008. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court's determination with respect to the risk factor for drug or alcohol abuse is not supported by the requisite clear and convincing evidence (*see* § 168-n [3]). We reject that contention. An assessment of 15 points is warranted under that risk factor where "an offender has a substance abuse history or was abusing drugs and or alcohol at the time of the offense" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 15 [2006]), and here the record establishes that defendant had a history of drug and alcohol abuse, including several prior convictions for possession of marihuana. In addition, the present offense involved the purchase of alcohol for a minor and consumption of alcohol with that minor. As the People correctly concede, the court erred in assessing 15 points rather than 5 points under the risk factor for the number and nature of prior crimes and 10 points under the risk factor for the recency of prior felonies or sex crimes. After reducing the total risk factor score by the 20 points improperly assessed under those factors, however, we conclude that "defendant nevertheless is presumptively classified as a level [two] risk, and there are no mitigating circumstances to warrant a downward departure from the presumptive risk level" (*People v*

Harris, 46 AD3d 1445, 1446, *lv denied* 10 NY3d 707).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

686

KA 07-02640

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEXTER MASTOWSKI, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Ontario County Court (Craig J. Doran, J.), entered January 28, 2008. The order denied the motion of defendant pursuant to CPL 440.10 seeking to vacate the judgment convicting him of assault in the first degree.

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

Memorandum: On appeal from an order denying his motion pursuant to CPL 440.10 seeking to vacate the judgment convicting him of assault in the first degree (Penal Law § 120.10 [3] [depraved indifference]), defendant contends that the changes in the law concerning depraved indifference effectuated by *People v Feingold* (7 NY3d 288) render his conviction void for failure to prove every element of the charge. Even assuming, arguendo, that defendant is entitled on collateral review to the application of the objective standard of depraved indifference set forth in *Feingold*, we would nonetheless conclude that the evidence is legally sufficient to support the conviction (*see People v Jean-Baptiste*, 11 NY3d 539, 542; *People v Jeffries*, 56 AD3d 1166, 1167, *lv denied* 12 NY3d 759; *People v Bowman*, 48 AD3d 178, 183-186, *lv denied* 10 NY3d 808). The further contention of defendant in support of his motion, i.e., that he did not receive effective assistance of counsel, is equally unavailing. The alleged instances of ineffective assistance either were or could have been raised on direct appeal (*see* CPL 440.10 [2] [a], [c]; *People v Vigliotti*, 24 AD3d 1216, 1216-1217). We have considered defendant's remaining contention and conclude that it is without merit.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

687

KA 06-02494

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT C. MOORER, 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 (Elma A. Bellini, A.J.), rendered October 26, 2005. The judgment convicted defendant, upon his plea of guilty, of 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 criminal contempt in the first degree (Penal Law § 215.51 [b] [v]). We agree with defendant that his waiver of the right to appeal is invalid inasmuch as the record does not "establish that [he] understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256; *see People v Moyett*, 7 NY3d 892, 893). Nevertheless, 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 (*see People v Lopez*, 71 NY2d 662, 665). We further reject the contention of defendant that his recitation of the facts underlying the crime cast "significant doubt upon [his] guilt or otherwise call[ed] into question the voluntariness of the plea" (*id.* at 666). In any event, the record establishes that Supreme Court made a further inquiry to ensure that defendant's plea was knowing and voluntary (*see id.*; *People v Hinkson*, 59 AD3d 941). Finally, defendant's bargained-for sentence is not unduly harsh or severe.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

688

KAH 08-00147

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
FRANK HARRIS, PETITIONER-APPELLANT,

V ORDER

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

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (ROBERT P. BAHR OF COUNSEL), FOR PETITIONER-APPELLANT.

FRANK HARRIS, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered October 9, 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 (*see People ex rel. Lewis v Graham*, 57 AD3d 1508, *lv denied* 12 NY3d 705).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

689

KAH 07-02238

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ERVIN MITCHELL, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DAVID UNGER, SUPERINTENDENT, ORLEANS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

TULLY RINCKEY PLLC, ALBANY (KILEY D. SCOTT OF COUNSEL), FOR PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK K. WALSH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered September 28, 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. Hampton v Dennison*, 59 AD3d 951), and the exception to the mootness doctrine does not apply herein (*see id.*).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

691

CAF 08-00551

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

IN THE MATTER OF ANTHONY E. AND TAMMY E.

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

SHARON E., RESPONDENT,
AND THOMAS E., SR., RESPONDENT-APPELLANT.

PETER J. DIGIORGIO, JR., 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 Thomas E., Sr. with respect to Anthony E. and Tammy E. upon a finding that he permanently neglected them.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

692

CAF 08-01830

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

IN THE MATTER OF SARAH A.

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

WAYNE A., RESPONDENT-APPELLANT.

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

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

DAVID C. SCHOPP, LAW GUARDIAN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR SARAH A.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered August 19, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order denied the motion of respondent to vacate a default order terminating his parental rights.

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

Memorandum: Respondent father appeals from an order denying his second motion to vacate a default order terminating his parental rights with respect to his child based upon findings that he abandoned and permanently neglected her. On a prior appeal from the order denying the father's first motion to vacate the default order, we reversed the order, granted the motion, vacated the default order of fact-finding and disposition, and remitted the matter to Family Court for a hearing on the petition (*Matter of Sarah A.*, 60 AD3d 1293). Inasmuch as the father has already obtained the full relief he now seeks, the appeal is moot (*see generally T.D. v New York State Off. of Mental Health*, 91 NY2d 860, 862).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

693

CA 08-01874

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

KATHLEEN GALLAGHER AND JOHN GALLAGHER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JAMES CORASANTI, M.D., DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

THE PAGAN LAW FIRM, P.C., NEW YORK CITY (TANIA M. PAGAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BROWN & TARANTINO, LLC, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John P. Lane, J.), entered March 28, 2008 in a medical malpractice action. The judgment, among other things, dismissed the complaint upon a jury verdict.

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

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries sustained by Kathleen Gallagher (plaintiff) when her spleen was damaged during a colonoscopy performed by James Corasanti, M.D. (defendant). Following a trial, the jury returned a verdict in favor of defendant. Contrary to the contention of plaintiffs, the Judicial Hearing Officer (JHO) properly denied that part of their post-trial motion to set aside the verdict as against the weight of the evidence and for a new trial. " '[T]he preponderance of the evidence in favor of plaintiff[s] is not so great that the verdict could not have been reached upon any fair interpretation of the evidence, nor is the verdict . . . palpably wrong or irrational' " (*Kubala v Suddaby*, 32 AD3d 1227; *see Mussari v Davidson*, 93 AD2d 996). The JHO also properly denied that part of plaintiffs' motion for a directed verdict on the cause of action for lack of informed consent inasmuch as plaintiffs failed to establish that there is no rational process by which the jury could have found in favor of defendant (*see Dooley v Skodnek*, 138 AD2d 102, 104). Plaintiffs' contention that the JHO erred in charging the jury with respect to evidence of habit is not preserved for our review (*see Klotz v Warick*, 53 AD3d 976, 978-979, *lv denied* 11 NY3d 712) and, in any event, we conclude that any error in giving that charge is

harmless (*see Thomas v Samuels*, 60 AD3d 1187).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

694

CA 08-00921

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

DARLTON CLARKE AND PATRICIA SHAW,
PLAINTIFFS-RESPONDENTS,

V ORDER

CITY OF SYRACUSE AND CITY OF SYRACUSE FIRE
DEPARTMENT, DEFENDANTS-APPELLANTS.

RORY A. MCMAHON, CORPORATION COUNSEL, SYRACUSE (JENNIFER E. SAVION OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered March 27, 2008 in a personal injury action. The order, insofar as appealed from, denied the motion of defendants for summary judgment dismissing the complaint.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

696.1

CA 08-02508

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

CARMEN BRITT AND CARMEN BRITT, AS EXECUTOR
OF THE ESTATE OF LULA BAITY, DECEASED,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

BUFFALO MUNICIPAL HOUSING AUTHORITY, ELAINE
GARBE, SUPERVISOR, BUFFALO MUNICIPAL HOUSING
AUTHORITY, BISILOLA F. JACKSON, ADMINISTRATOR
OF THE ESTATE OF JERELENE ELIZABETH GIWA,
GRACE MANOR HEALTH CARE FACILITY, INC.,
DAVID J. GENTNER, MARY STEPHAN, KATHY RANDALL,
TIFFANY MATTHEWS, PHILLIP J. RADOS, M.D.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

GLENN E. MURRAY, BUFFALO, FOR PLAINTIFFS-APPELLANTS.

COLUCCI & GALLAHER, P.C., BUFFALO (JOHN J. MARCHESE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BUFFALO MUNICIPAL HOUSING AUTHORITY, ELAINE GARBE, SUPERVISOR, BUFFALO MUNICIPAL HOUSING AUTHORITY, AND BISILOLA F. JACKSON, ADMINISTRATOR OF THE ESTATE OF JERELENE ELIZABETH GIWA.

FELDMAN, KIEFFER & HERMAN, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS GRACE MANOR HEALTH CARE FACILITY, INC., DAVID J. GENTNER, MARY STEPHAN, KATHY RANDALL, AND TIFFANY MATTHEWS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 11, 2008. The order, inter alia, granted a stay of the action pending resolution of a related federal action.

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

Memorandum: Supreme Court providently exercised its discretion in granting the alternative relief sought by defendants in their respective CPLR 3211 (a) (4) motions, i.e., to stay the action pending the outcome of a related federal action (*see* CPLR 2201; *see generally Asher v Abbott Labs*., 307 AD2d 211). A stay may be warranted based on "due consideration of issues of comity, orderly procedure, and judicial economy" where there is substantial identity of the issues, relief sought, and parties in the state and federal actions (*id.* at 211; *see Finger Lakes Racing Assn. v New York Racing Assn.*, 28 AD3d

1208, 1209), and that is the case here. Plaintiffs' contention that the case should be assigned to a different justice based on the court's alleged bias is raised for the first time on appeal and thus is not preserved for our review (*see William Kaufman Org. v Graham & James*, 269 AD2d 171, 174; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In any event, that contention is without merit (*see generally William Kaufman Org.*, 269 AD2d at 174).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

696

CA 08-02662

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

CARMEN BRITT, PLAINTIFF,
AND CARMEN BRITT, AS EXECUTOR OF THE ESTATE
OF LULA BAITY, DECEASED,
PLAINTIFF-APPELLANT,

V ORDER

JILL STADELMEYER, CERTIFIED SOCIAL WORKER,
CRISIS SERVICES EMERGENCY OUTREACH SERVICES,
MICHAEL DUDKOWSKI, RURAL/METRO AMBULANCE DRIVER,
AND CHRISTY LINDNER, RURAL/METRO AMBULANCE
DRIVER, DEFENDANTS-RESPONDENTS.

GLENN E. MURRAY, BUFFALO, FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (MARY QUINN WYDYSH OF COUNSEL), FOR DEFENDANT-RESPONDENT JILL STADELMEYER, CERTIFIED SOCIAL WORKER, CRISIS SERVICES EMERGENCY OUTREACH SERVICES.

CONNORS & VILARDO, LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS MICHAEL DUDKOWSKI, RURAL/METRO AMBULANCE DRIVER, AND CHRISTY LINDNER, RURAL/METRO AMBULANCE DRIVER.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered August 12, 2008 in a personal injury action. The order granted the motions of defendants to dismiss the complaint.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

700

TP 08-02396

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

IN THE MATTER OF SHAWN COLEMAN, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, AND JOHN BURGE, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENTS.

SHAWN COLEMAN, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered November 12, 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: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

701

KA 08-00129

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

COLIN MOAR, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered January 9, 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: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

702

KA 08-00847

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JASON SEYLER, 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 (William J. Watson, A.J.), rendered March 19, 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: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

703

KA 07-01904

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TIFFANY J. HASKELL, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

NATHANIEL L. BARONE, II, JAMESTOWN, 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 August 6, 2007. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

704

KA 07-02169

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TIFFANY J. HASKELL, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

NATHANIEL L. BARONE, II, JAMESTOWN, 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 August 6, 2007. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

705

KA 08-00484

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SUSAN BARTON, 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 November 28, 2007. The judgment convicted defendant, upon a jury verdict, of falsifying business records in the first degree, assault in the third degree and endangering the welfare of an incompetent or physically disabled person.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

706

KA 07-02657

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WALTER MILLER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RAYMOND C. HERMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered December 10, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

708

KA 06-02790

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL D. SEELER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM CLAUSS 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 Supreme Court, Monroe County (Francis A. Affronti, J.), rendered April 11, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts) and robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of murder in the second degree (Penal Law § 125.25 [1], [3]) and one count of robbery in the first degree (§ 160.15 [1]). Contrary to the contention of defendant, Supreme Court properly denied his request to charge manslaughter in the first degree (§ 125.20 [1]) and manslaughter in the second degree (§ 125.15 [1]) as lesser included offenses of murder in the second degree. The evidence established that defendant shot the victim twice in the back of the head at close range, and there is thus no reasonable view of the evidence that defendant intended to cause serious physical injury to the victim but not to kill him (*see* § 125.20 [1]; *People v Ramsey*, 59 AD3d 1046; *People v Tyler*, 43 AD3d 633, 634, *lv denied* 9 NY3d 1010; *People v Wheeler*, 257 AD2d 673, *lv denied* 93 NY2d 930; *see generally People v Miller*, 6 NY3d 295, 302; *People v Glover*, 57 NY2d 61, 63). There is also no reasonable view of the evidence that defendant engaged in reckless rather than intentional conduct (*see* § 125.15 [1]; *People v Ware*, 303 AD2d 173, *lv denied* 100 NY2d 543).

We reject the further contention of defendant that he was denied a fair trial by prosecutorial misconduct during summation. The comments by the prosecutor concerning the prosecution witnesses were fair comment in response to defense counsel's summation (*see People v Halm*, 81 NY2d 819, 821; *People v Pepe*, 259 AD2d 949, 950, *lv denied* 93

NY2d 1024). We agree with defendant that the comment by the prosecutor that defendant's testimony was a "fabrication" was improper (*see People v Fiori*, 262 AD2d 1081; *People v Bonilla*, 170 AD2d 945, *lv denied* 77 NY2d 904). That single instance of misconduct, however, did not deprive defendant of a fair trial (*see generally People v Moore*, 41 AD3d 1149, 1151-1152, *lv denied* 9 NY3d 879, 992; *People v Wilson*, 34 AD3d 1276, *lv denied* 8 NY3d 886; *People v Walker*, 234 AD2d 962, 963, *lv denied* 89 NY2d 1042). Finally, 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).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

709

KA 06-01061

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL EDWARD PRINDLE, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM CLAUSS 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 Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered November 30, 2005. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, attempted grand larceny in the fourth degree and petit larceny.

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, murder in the second degree (Penal Law § 125.25 [2] [depraved indifference murder]), defendant contends that the evidence is legally insufficient to establish the depraved indifference element of that crime. We reject that contention. Pursuant to Penal Law § 125.25 (2), a person is guilty of depraved indifference murder when, "[u]nder circumstances evincing a depraved indifference to human life, he [or she] recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person . . . ." Here, the evidence presented at trial established that, while attempting to escape from the police, defendant drove a van at a high rate of speed on city streets on a weekend afternoon, often traveling in the opposing lane of traffic. We thus conclude that the evidence establishes that defendant acted with depraved indifference, i.e., "a wanton indifference to human life or depravity of mind" (*People v Gomez*, 65 NY2d 9, 11; *see People v Gonzalez*, 288 AD2d 321, *lv denied* 97 NY2d 754; *People v Williams*, 184 AD2d 437, *lv denied* 80 NY2d 935). Defendant's further contention that the evidence before the grand jury was legally insufficient with respect to the depraved indifference murder count "is not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence" (CPL 210.30 [6]; *see People v Lee*, 56 AD3d 1250, 1251).

We conclude that Supreme Court did not abuse its discretion in refusing to allow a defense witness to testify that a third person, rather than defendant, was culpable. Such testimony is generally admissible, but "before such testimony can be received there must be such proof of connection with it, such a train of facts or circumstances as tend clearly to point out [someone] besides the [defendant] as the guilty party" (*Greenfield v People*, 85 NY 75, 89; *see People v Schulz*, 4 NY3d 521, 529; *see generally People v Primo*, 96 NY2d 351, 356-357). "Remote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose" (*Greenfield*, 85 NY at 89; *see Schulz*, 4 NY3d at 529). Here, the testimony of the defense witness that the third party in question might have driven a getaway car and hit a police car in a separate incident was irrelevant and, indeed, was likely to cause " 'undue prejudice . . . and confusion' " with respect to the evidence presented to the jury (*Schulz*, 4 NY3d at 528).

Defendant further contends that the court erred in refusing to suppress an identification of defendant from a photo array because the unduly suggestive nature of two prior photo array identifications tainted the identification in question. We reject that contention. "Any taint resulting from the [two prior photo array] identification[s] . . . was sufficiently attenuated by the passage of [six months] between" the prior photo array identifications and the identification in question (*People v Davis*, 294 AD2d 872, 873; *see People v Wallace*, 270 AD2d 823, *lv denied* 95 NY2d 806; *People v Lee*, 207 AD2d 953, *lv denied* 85 NY2d 864).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

712

CA 08-02512

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

CHERYL A. HAYEK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE M. HAYEK, DEFENDANT-APPELLANT.

WATSON, BENNETT, COLLIGAN, JOHNSON & SCHECHTER, L.L.P., BUFFALO (KRISTIN L. ARCURI OF COUNSEL), FOR DEFENDANT-APPELLANT.

GLEICHENHAUS, MARCHESE & WEISHAAR, P.C., BUFFALO (CHARLES J. MARCHESE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered February 25, 2008. The order modified defendant's child support obligation.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second through sixth ordering paragraphs and by providing that the modification of child support shall be retroactive to October 4, 2006 and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Plaintiff, the former wife of defendant, filed an order to show cause on October 4, 2006 seeking, inter alia, modification of defendant's child support obligation, and defendant contends on appeal that Supreme Court erred in directing him to pay increased child support retroactive to the year 2002. We agree with defendant that the court erred in directing that the child support modification be retroactive to a date prior to the filing of the instant order to show cause. Pursuant to Domestic Relations Law § 236 (B) (7) (a), a modification of child support shall "be effective as of the date of the application therefor" (*see* § 240 [1] [j]). Thus, the court should have directed that the modification of child support be retroactive to October 4, 2006, the date on which plaintiff filed the order to show cause seeking that relief (*see Bailey v Bailey*, 48 AD3d 1123, 1124-1125; *Kelly v Kelly*, 19 AD3d 1104, 1107, *appeal dismissed* 5 NY3d 847, 6 NY3d 803). We therefore modify the order accordingly, and we remit the matter to Supreme Court to recalculate support arrears for the period from October 4, 2006 through November 2, 2007.

We have considered defendant's further contentions and conclude that they are without merit. Finally, we note that plaintiff's cross appeal was deemed abandoned and dismissed based on plaintiff's failure to perfect it in a timely manner (*see* 22 NYCRR 1000.12 [b]). We

therefore have not considered plaintiff’s requests for affirmative relief.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

713

CA 09-00128

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

IN THE MATTER OF BRUCE PIERCE AND
REBECCA PIERCE, PETITIONERS-RESPONDENTS,

V ORDER

PAUL BESAW AND KAREN TOBIN,
RESPONDENTS-APPELLANTS.

LEGAL SERVICES OF CENTRAL NEW YORK, INC., SYRACUSE (ERIC TOHTZ OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

LEDDEN LAW OFFICE, BALDWINSVILLE (TERESA C. HUEGEL OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Oswego County Court (John J. Elliott, A.J.), dated April 7, 2008 in a proceeding pursuant to RPAPL article 7. The order affirmed a judgment of the Town Court of the Town of Hannibal (Eugene Hafner, J.), entered July 18, 2006 in favor of petitioners.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

719

CA 09-00099

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

DENIS J. KENNELTY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KATHLEEN W. KENNELTY, DEFENDANT-RESPONDENT.

LAW OFFICES OF MARC JONAS, UTICA (MARC JONAS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GETNICK LIVINGSTON ATKINSON GIGLIOTTI & PRIORE, LLP, UTICA (JANET M. RICHMOND OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered April 17, 2008 in a divorce action. The order denied the motion of plaintiff for leave to file an amended qualified domestic relations order.

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

Memorandum: Supreme Court properly denied plaintiff's motion for leave to file an amended qualified domestic relations order (QDRO). The parties stipulated to the entry of a QDRO that would fix the value of the parties' respective shares in a TIAA-CREF account as of a certain date. Plaintiff's attorney indicated at the time of the stipulation that defendant could withdraw her share of the funds or leave it in the account until a later date and that, "if she . . . elects to leave it in there and it increases, those are her gains, and if it decreases, those are her losses." We conclude that, pursuant to the terms of the stipulation, defendant was entitled to the passive gains on her share of the account between the date of the valuation of the account and the date on which her share was transferred to a separate account. The record establishes that the court properly construed the " 'stipulation made in open court in accordance with the intent of the parties and the purpose of the stipulation as illustrated in the record as a whole' " (*Cuda v Cuda*, 19 AD3d 1114, 1114; *see Elwell v Elwell*, 34 AD3d 1337).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

720

CA 08-02114

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

ROGER A. COSMO AND PEARL COSMO,
PLAINTIFFS-APPELLANTS,

V ORDER

TOWN OF EVANS AND DENNIS M. FELDMAN,
DEFENDANTS-RESPONDENTS.

DAVID G. JAY, BUFFALO (KEVIN J. BAUER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LIPPMAN O'CONNOR, BUFFALO (CHRISTOPHER M. DUGGAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered May 16, 2008 in a personal injury action. The order granted defendants' motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Herod v Mele*, ___ AD3d ___ [May 1, 2009]).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

724
KA 06-01419
PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, FAHEY, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY R. PATTISON, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU 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 April 12, 2006. The appeal was held by this Court by order entered March 14, 2008, decision was reserved and the matter was remitted to Chautauqua County Court for further proceedings (49 AD3d 1157, *amended on rearg* 50 AD3d 1630). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the motion is granted and the indictment is dismissed without prejudice to the People to re-present any appropriate charges under counts one, three, four, five and six of the indictment to another grand jury.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of murder in the first degree (Penal Law § 125.27 [1] [a] [vi], [viii]; [b]) and one count each of murder in the second degree (§ 125.25 [1]) and conspiracy in the second degree (§ 105.15). We previously held the case, reserved decision and remitted the matter to County Court for a reconstruction hearing to determine whether the People complied with CPL 190.50 (5) (b) (*People v Pattison*, 49 AD3d 1157, *amended on rearg* 50 AD3d 1630; *see generally People v Jordan*, 153 AD2d 263, 266-267, *lv denied* 75 NY2d 967). Contrary to defendant's contention, a reconstruction hearing is proper where, as here, "an error of law is committed by the hearing court which directly causes the People to fail to offer potentially critical evidence," and the People should therefore be afforded the opportunity to present such evidence (*People v Havelka*, 45 NY2d 636, 643; *see generally People v Malinsky*, 15 NY2d 86, 95-96). We agree with defendant, however, that the court erred in determining following the reconstruction hearing that the People had complied with CPL 190.50 (5) (b). We conclude that the People failed to establish by a preponderance of the evidence that defendant was afforded actual

notice that was “reasonably calculated to apprise [him] of the [g]rand [j]ury proceeding so as to permit him to exercise his right to testify” (*Jordan*, 153 AD2d at 266-267; *see generally People v Terry*, 225 AD2d 1058, *lv denied* 88 NY2d 886). We therefore reverse the judgment, grant defendant’s motion to dismiss the indictment and dismiss the indictment without prejudice to the People to re-present any appropriate charges under counts one, three, four, five and six of the indictment to another grand jury (*see generally People v Massard*, 139 AD2d 927; *Matter of Borrello v Balbach*, 112 AD2d 1051, 1052-1053).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

725
KA 08-00020
PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JUSTIN CHAD SMITH, DEFENDANT-APPELLANT.

E. ROBERT FUSSELL, P.C., LEROY (E. ROBERT FUSSELL 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 November 8, 2007. The judgment convicted defendant, upon his plea of guilty, of unauthorized use of a vehicle in the second degree and aggravated unlicensed operation of a motor vehicle in the third degree.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

726

KA 07-02423

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RICHARD C. ALEXANDER, DEFENDANT-APPELLANT.

ROBERT L. GOSPER, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered September 10, 2007. The judgment convicted defendant, upon his plea of guilty, of felony driving while intoxicated (two counts) and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

727

KA 04-02864

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

IBN J. WOOD, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., 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 (Joseph D. Valentino, J.), rendered June 10, 2004. The judgment convicted defendant, upon his plea of guilty, of attempted burglary 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: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

728

KA 08-01148

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RAND A. THOMAS, ALSO KNOWN AS RAND THOMAS,
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 April 11, 2008. The judgment convicted defendant, upon his plea of guilty, of felony driving while intoxicated (two counts).

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

729

KA 07-02179

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON L. SCOTT, DEFENDANT-APPELLANT.

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

JASON L. SCOTT, DEFENDANT-APPELLANT PRO SE.

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 13, 2005. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree, robbery in the second degree (two counts) and assault 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*, robbery in the first degree (Penal Law § 160.15 [3]), defendant contends that his waiver of the right to appeal was not knowingly, intelligently and voluntarily entered. We reject that contention. "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 generally People v Lopez*, 6 NY3d 248, 256). The valid waiver by defendant of his right to appeal encompasses his challenges to the court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833; *People v Williams*, 39 AD3d 1200, *lv denied* 9 NY3d 853), as well as the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737).

To the extent that the contention of defendant in his pro se supplemental brief that he was denied effective assistance of counsel is not forfeited by the plea and survives the waiver of the right to appeal (*see People v Fifield*, 24 AD3d 1221, 1222, *lv denied* 6 NY3d 775), we conclude that it is without merit. Defendant "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404; *see People v Brown*, 305 AD2d 1068, 1069, *lv denied* 100 NY2d 579).

The record belies the further contention of defendant in his pro se supplemental brief that the court failed to inform him during the plea colloquy that his sentence would include a five-year period of postrelease supervision, and we thus reject defendant's contention that reversal is warranted on that ground (*see generally People v Louree*, 8 NY3d 541, 545).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

730

KA 08-00901

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DANIEL P. WILDER, DEFENDANT-APPELLANT.

DENNIS A. GERMAIN, WATERTOWN, FOR DEFENDANT-APPELLANT.

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (Charles C. Merrell, J.), rendered October 26, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

732

KA 08-01030

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVON GRANDIN, 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 March 14, 2008. 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.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of two counts of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [2] [b]), defendant contends that he was denied effective assistance of counsel based on his attorney's failure to request a mental competency examination pursuant to CPL article 730. That contention does not survive either the plea of guilty or the waiver by defendant of the right to appeal because he failed to demonstrate 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 Robinson*, 39 AD3d 1266, 1267, *lv denied* 9 NY3d 869 [internal quotation marks omitted]). Moreover, by failing to move to withdraw his plea of guilty or to vacate the judgment of conviction on that ground, defendant failed to preserve that contention for our review (*see People v Hall*, 50 AD3d 1467, 1468-1469, *lv denied* 11 NY3d 789). We reject the further contention of defendant that County Court abused its discretion in failing sua sponte to order a mental competency examination (*see People v Jermain*, 56 AD3d 1165, *lv denied* 11 NY3d 926). Defendant's challenge to the severity of the sentence is encompassed by the waiver of the right to appeal (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

733

KA 08-01153

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER D. BREWER, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Ontario County Court (William F. Kocher, J.), entered April 28, 2008. 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 modified in the exercise of discretion by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: We agree with defendant that County Court improvidently exercised its discretion in determining that he is a level three risk under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). We therefore substitute our own discretion "even in the absence of an abuse [of discretion]" (*Matter of Von Bulow*, 63 NY2d 221, 224), and we modify the order by determining that defendant is a level two risk. Although the record establishes that defendant was presumptively a level three risk pursuant to the risk assessment instrument, we conclude that there is clear and convincing evidence of special circumstances to warrant a downward departure from the presumptive risk level (*see People v Weatherley*, 41 AD3d 1238; *see also People v Smith*, 30 AD3d 1070). Defendant was 20 years old when he engaged in the underlying offense, i.e., sexual activity with a 16-year-old female who admitted that she willingly engaged in the sexual activity. There was no allegation or evidence of forcible compulsion. The record further establishes that this was defendant's first and only sex offense and that defendant was enrolled in sex offender counseling at the time of the SORA hearing. We thus conclude under the circumstances of this case that defendant is not at a high risk of reoffending (*see* § 168-*l* [6] [c]; *cf*. *People*

v Heichel, 20 AD3d 934).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

735

KA 08-01437

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RANDALL L. SCHROEDER, DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (AARON D. CARR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered June 19, 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: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

736
KA 08-01588
PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OTIS L. SIMMONS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered July 10, 2008. The order denied the motion of defendant pursuant to CPL 440.30 (1-a) for DNA testing.

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

Memorandum: County Court properly denied defendant's postjudgment motion pursuant to CPL 440.30 (1-a) for DNA testing. We note that defendant has abandoned any request for DNA testing on blood found in the basement where the alleged rape occurred inasmuch as his contention in his brief on appeal is limited to DNA testing of pubic hair (*see generally People v Jansen*, 145 AD2d 870, 871, *lv denied* 73 NY2d 923). We conclude that, even if the mitochondrial DNA testing sought by defendant had been performed on the pubic hair, there is no reasonable probability that the verdict would have been more favorable to defendant (*see generally People v Pitts*, 4 NY3d 303, 310, *rearg denied* 5 NY3d 783).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

738

CA 08-02578

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

IN THE MATTER OF THE APPLICATION OF
FAXTON-ST. LUKE'S HEALTHCARE, INC.,
PETITIONER-RESPONDENT,

PURSUANT TO ARTICLE 81 OF THE MENTAL HYGIENE LAW FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND PROPERTY OF CAESAR A., AN ALLEGED INCAPACITATED PERSON.

ORDER

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
RESPONDENT-APPELLANT.

CHESTER W. JASKOLKA, UTICA, FOR RESPONDENT-APPELLANT.

GETNICK LIVINGSTON ATKINSON GIGLIOTTI & PRIORE, LLP, UTICA (JANET M. RICHMOND OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Bernadette T. Romano, J.), entered September 23, 2008 in a proceeding pursuant to article 81 of the Mental Hygiene Law. The order and judgment, among other things, appointed respondent as the guardian of the person and property of Caesar A., an alleged incapacitated person.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

739

CA 08-02607

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

ROBIN ADAIR, ET AL., PLAINTIFFS-RESPONDENTS,

V ORDER

MUNICIPAL UTILITY COMMISSION OF THE VILLAGE OF BATH, DOING BUSINESS AS BATH ELECTRIC, GAS AND WATER SYSTEMS, AND VILLAGE OF BATH, DEFENDANTS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (EDWARD A. TREVVETT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered May 5, 2008 in a breach of contract action. The order denied defendants' motion to dismiss the complaint.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

740

CA 08-01490

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

NEAL TOOLEY AND KENDRA TOOLEY,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

FERN R. CORP, DEFENDANT-RESPONDENT.

ALDERMAN AND ALDERMAN, SYRACUSE (RALPH G. DEMASI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Jefferson County (Joseph D. McGuire, J.), entered June 27, 2008. The order, insofar as appealed from, granted those parts of defendant's motion for summary judgment dismissing the second and third causes of action.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, those parts of the motion for summary judgment dismissing the second and third causes of action are denied and those causes of action are reinstated.

Memorandum: Plaintiffs commenced this action seeking, inter alia, to impose a constructive trust on the proceeds of the lease and subsequent sale of a gravel quarry on a portion of property owned by defendant and on defendant's remaining interest in that property. As limited by their brief on appeal, plaintiffs contend that Supreme Court erred in granting those parts of defendant's motion for summary judgment dismissing the second and third causes of action based on the doctrine of unclean hands. Those causes of action were asserted by Neal Tooley (plaintiff). We agree with plaintiffs that the court erred in granting those parts of defendant's motion. Although plaintiff's admitted purpose for the transfer of the land to defendant was to avoid the potential creditors of either plaintiff Hazel Tooley, the original owner of the land, or plaintiff himself, defendant failed to meet her burden on those parts of the motion inasmuch as she failed to establish that either Hazel Tooley or plaintiff had any actual creditor at the time of the transfer (*see Trager v Vigliotti*, 42 AD2d 912, *affd* 35 NY2d 865; *Guggenheim v Lieber*, 42 AD2d 778; *cf. Muscarella v Muscarella*, 93 AD2d 993, 994; *see also* Debtor and Creditor Law § 270). We therefore reverse the order insofar as appealed from, deny those parts of the motion for summary judgment dismissing the second and third causes of action and reinstate those

causes of action.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

748

TP 08-02625

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

IN THE MATTER OF JAMES HILL, 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 (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 December 22, 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 said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

749

TP 09-00067

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

IN THE MATTER OF JAMES J. DUNN, PETITIONER,

V ORDER

GREGORY J. KADIEN, SUPERINTENDENT, GOWANDA CORRECTIONAL FACILITY, AND BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENTS.

JAMES J. DUNN, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Christopher J. Burns, J.], entered January 9, 2009) 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: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

750

KA 07-01938

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WILLIAM RENTAS, 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 Onondaga County Court (William D. Walsh, J.), rendered May 22, 2007. 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 (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

751

KA 08-00153

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SAMUEL E. PAIGE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN RUSSO-MCLAUGHLIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered January 11, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted assault 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 (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

752

KA 08-00649

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL C. ROMANO, DEFENDANT-APPELLANT.

ROBERT L. GOSPER, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (KATHLEEN H. VALONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered November 20, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal solicitation in the second degree.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

753

KA 06-02570

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE L. GONZALEZ, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN 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 January 31, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]). Contrary to the contention of defendant, Supreme Court properly refused to suppress the evidence seized from him during a traffic stop. We reject the contention of defendant that the People failed to establish the existence and reliability of the confidential informant and the basis of the informant's knowledge at the *Darden* hearing (*see generally People v Johnson*, 66 NY2d 398, 402-403). The court properly made available to defendant its "Summary Report" with respect to the existence of the informant and the communications made by the informant to the police (*see People v Allen*, 298 AD2d 856, *lv denied* 99 NY2d 579). That report established that "the information provided by the [informant] carried sufficient indicia of reliability to permit the officer to reasonably credit it" (*People v Bashian*, 190 AD2d 681, 682, *lv denied* 81 NY2d 836), and it established the basis of the informant's knowledge (*see generally Johnson*, 66 NY2d at 402).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

756

KA 08-00630

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT COLLINS, JR., DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered February 7, 2007. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree (two counts), assault in the third degree (two counts), menacing in the second degree, endangering the welfare of a child and tampering with a witness 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, inter alia, of two counts of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we 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 that defendant threatened her with a hacksaw and a steak knife and to reject the theory of the defense that those allegations were untrue and manufactured by the victim's father (*see generally People v Kelly*, 34 AD3d 1341, *lv denied* 8 NY3d 847). Defendant failed to preserve for our review his contention that Supreme Court did not follow the requisite three-step analysis when he raised a *Batson* challenge (*see People v Robinson*, 1 AD3d 985, *lv denied* 1 NY3d 633, 2 NY3d 805), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's further contention that the court erred in determining that the prosecutor's explanation for exercising the peremptory challenge with respect to the prospective juror in question was race-neutral and not pretextual (*see People v Lawrence*, 23 AD3d 1039, *lv denied* 6 NY3d 835). Finally, the sentence

is not unduly harsh or severe.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

758
CAF 08-00589
PRESENT: SMITH, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

IN THE MATTER OF DAWN R. FRANCISCO WALTERS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

REX R. FRANCISCO, RESPONDENT-RESPONDENT.

TULLY RINCKEY, PLLC, ALBANY (MATHEW B. TULLY OF COUNSEL), FOR PETITIONER-APPELLANT.

ROY D. BIELEWICZ, FILLMORE, FOR RESPONDENT-RESPONDENT.

CAROLYN KELLOGG JONAS, LAW GUARDIAN, WELLSVILLE, FOR KRISTOPHER F.

Appeal from an order of the Family Court, Allegany County (Lynn L. Hartley, J.H.O.), entered December 19, 2007 in a proceeding pursuant to Family Court Act article 6. The order granted respondent's motion and dismissed the amended petition seeking, inter alia, to modify a prior order of custody and visitation.

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

Memorandum: Petitioner mother appeals from an order granting the motion of respondent father to dismiss the amended petition seeking, inter alia, to modify a prior order of custody and visitation. We note at the outset that, in contending that Family Court erred in determining that she failed to establish a change in circumstances sufficient to warrant modification of the prior order, the mother relies solely upon the father's alleged interference with her telephone contact with the child. The mother has not raised any issues with respect to the remaining instances of changed circumstances alleged in the amended petition and thus is deemed to have abandoned any such issues (*see Matter of Jenks v Valentine*, 19 AD3d 1158; *Matter of Joseph*, 286 AD2d 995; *Ciesinski v Town of Aurora*, 202 AD2d 984).

Where, as here, "a respondent moves to dismiss a modification proceeding at the conclusion of the petitioner's proof, the court must accept as true the petitioner's proof and afford the petitioner every favorable inference that reasonably could be drawn therefrom" (*Matter of Le Blanc v Morrison*, 288 AD2d 768, 770; *see* CPLR 4401; Family Ct Act § 165 [a]). We conclude that the court properly determined that the mother failed to establish a change in circumstances sufficient to

warrant modification of the prior order (*cf. Le Blanc*, 288 AD2d at 770; *Matter of Markey v Bederian*, 274 AD2d 816, 817-818).

Contrary to the further contention of the mother, the court did not abuse its discretion in refusing to conduct a *Lincoln* hearing. In determining whether such a hearing is warranted, the court must determine whether the in camera testimony of the child "will on the whole benefit the child by obtaining for the Judge significant pieces of information he [or she] needs to make the soundest possible decision" (*Matter of Lincoln v Lincoln*, 24 NY2d 270, 272) and, here, the court properly determined that a *Lincoln* hearing was not warranted (*see Matter of Charles M.O. v Heather S.O.*, 52 AD3d 1279).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

759
CAF 08-01044
PRESENT: SMITH, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

IN THE MATTER OF TONJALEAH H.

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

RAYMOND D., RESPONDENT-APPELLANT.

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

DAVID C. SCHOPP, LAW GUARDIAN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR TONJALEAH H.

Appeal from an order of the Family Court, Erie County (James H. Dillon, J.), entered March 19, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

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

Memorandum: Respondent father contends that Family Court abused its discretion in terminating his parental rights with respect to his child rather than issuing a suspended judgment. We reject that contention. Petitioner established at the dispositional hearing that the child had no meaningful bond with the father (*see Matter of Lenny R.*, 22 AD3d 240, *lv denied* 6 NY3d 708; *Matter of Jason J.*, 283 AD2d 982), and that the father could not provide structure for his child, who has special needs. Petitioner also established that the father failed to attend a court-ordered domestic violence program (*see Matter of Melissa DD.*, 45 AD3d 1219, 1220-1221, *lv denied* 10 NY3d 701), and that he continued to use crack cocaine. We thus conclude that the court properly determined that a suspended judgment would not be in the best interests of the child (*see Matter of Donovan W.*, 56 AD3d 1279, *lv denied* 11 NY3d 716; *Matter of Ty'Keith R.*, 45 AD3d 1397, *lv denied* 10 NY3d 701). The father further contends that the court did not have an adequate opportunity to consider the wishes of the child because the court did not conduct an in camera interview with the child, and the Law Guardian did not meet with her to ascertain her wishes (*see Matter of Alyshia M.R.*, 53 AD3d 1060, 1061, *lv denied* 11 NY3d 707). The father failed to preserve that contention for our review and, in any event, that contention is without merit. In view of the child's young age and the evidence before the court, an in

camera interview with the child would not have assisted the court in any meaningful way (*cf. Matter of Cassandra JJ.*, 284 AD2d 619, 621). In addition, the Law Guardian indicated that staff from his office had met with the child and determined that she had no interest in additional contact with the father. We have considered the father's remaining contention and conclude that it is without merit.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

764

CA 08-01995

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

ROY JONES, PLAINTIFF-APPELLANT,

V ORDER

RENE PETTIES-JONES, DEFENDANT-RESPONDENT.

RANDY S. MARGULIS, WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

PALMER, MURPHY & TRIPI, BUFFALO (DEANNE M. TRIPI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), entered December 6, 2007 in a divorce action. The judgment, insofar as appealed from, directed plaintiff to pay to defendant child support in the amount of $400 per week.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

766

CA 08-02172

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

RAMONA COLEMAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JACQUELINE V. LORUSSO, INDIVIDUALLY AND IN HER REPRESENTATIVE CAPACITY, DOING BUSINESS AS JVL MANAGEMENT & CO., AND THEIR AGENTS, SERVANTS, AND EMPLOYEES, DEFENDANTS-RESPONDENTS.

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

COHEN & LOMBARDO, P.C., BUFFALO (JONATHAN D. COX OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered July 10, 2008 in a personal injury action. The order granted the motion of defendants seeking summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell on an icy sidewalk outside an apartment building owned and managed by defendants, where plaintiff resided. Supreme Court properly granted defendants' motion seeking summary judgment dismissing the complaint. The sole contention of plaintiff on appeal is that defendants had constructive notice of the allegedly dangerous condition. We reject that contention. Defendants met their initial burden with respect to constructive notice (*see Wilson v Walgreen Drug Store*, 42 AD3d 899, 900; *Boddie v New Plan Realty Trust*, 304 AD2d 693, 694), and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiff testified at her deposition that she fell on ice but that she did not observe any ice on the sidewalk before she fell. In addition, plaintiff was unable to describe the amount or thickness of the ice on which she fell. Neither that deposition testimony nor the meteorological data submitted by plaintiff in opposition to the motion is sufficient "to raise an issue of fact whether the ice existed for a sufficient period of time to permit discovery and corrective action by defendants" (*Wilson*, 42 AD3d at 900; *see Boddie*, 304 AD2d at 694; *Murphy v 136 N.*

Blvd. Assoc., 304 AD2d 540).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

767

CA 08-01640

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

SHAWN M. BRADY AND RENEE BRADY,
PLAINTIFFS-APPELLANTS,

V ORDER

FAMILY DOLLAR STORES OF NEW YORK, INC. AND
LOCKPORT PLAZA ASSOCIATES, LLC,
DEFENDANTS-RESPONDENTS.

COLLINS & MAXWELL, L.L.P., BUFFALO (ALAN D. VOOS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (JOSEPH L. MOONEY OF COUNSEL), FOR DEFENDANT-RESPONDENT FAMILY DOLLAR STORES OF NEW YORK, INC.

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR DEFENDANT-RESPONDENT LOCKPORT PLAZA ASSOCIATES, LLC.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered May 9, 2008 in a personal injury action. The order granted the motions 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: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

768

TP 08-01893

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

IN THE MATTER OF ORLANDO RIOS, PETITIONER,

V ORDER

NORMAN BEZIO, DIRECTOR, SPECIAL HOUSING
UNIT, MIDSTATE CORRECTIONAL FACILITY,
RESPONDENT.

ORLANDO RIOS, PETITIONER PRO SE.

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, Oneida County [John W. Grow, J.], entered August 26, 2008) 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: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

770

TP 08-02681

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

IN THE MATTER MATTER OF KWAMELL SMITH,
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 (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 December 22, 2008) 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: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

771

TP 09-00065

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

IN THE MATTER OF MARY POPE, PETITIONER,

V ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT AND ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

TRONOLONE & SURGALLA, P.C., BUFFALO (JOHN B. SURGALLA OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF COUNSEL), FOR RESPONDENTS NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES AND NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR RESPONDENT ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Joseph G. Makowski, J.], entered June 5, 2008) to review a determination of the Commissioner of respondent New York State Office of Children and Family Services. The determination, after a hearing, denied the application of petitioner to amend an indicated report of child maltreatment to an unfounded report and to seal the amended report.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

772

TP 08-02626

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

IN THE MATTER OF DANIEL WILLIAMS, 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 (FRANK BRADY 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 December 22, 2008) 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: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

773

KA 08-00243

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL HERNANDEZ, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN C. RUSSO-MCLAUGHLIN 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 Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered January 9, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree and burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]) and burglary in the third degree (§ 140.20). As the People correctly concede, defendant's waiver of the right to appeal was not knowing and voluntary inasmuch as Supreme Court failed to explain that the waiver of the right to appeal is separate and distinct from the other rights that are forfeited by the plea (*see People v Lopez*, 6 NY3d 248, 256). Although defendant's jurisdictional challenge to the superior court information (SCI) survives the plea and, indeed, would have survived a valid waiver of the right to appeal (*see People v Heinig*, 21 AD3d 1297, *lv denied* 6 NY3d 813), we nevertheless reject that challenge. According to defendant, the SCI is jurisdictionally defective because he was not held for the action of a grand jury by the local criminal court as required by CPL 195.10 (1) (a). The record establishes that defendant was arraigned by the local criminal court and that the matter was adjourned for further proceedings. There is no indication in the record that a preliminary hearing was held, but the record does establish that Supreme Court was satisfied with the waiver of the indictment and executed an order to that effect. We thus "may presume that the matter was properly before that court" (*People v Chad S.*, 237 AD2d 986, *lv denied* 90 NY2d 856; *see People v Hurd*, 12 AD3d 1198, 1199, *lv denied* 4 NY3d 764). Finally, the sentence is not unduly

harsh or severe.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

774
KA 08-00148
PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARIO BANKSTON, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RAYMOND C. HERMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered January 16, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree and robbery 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 one count of robbery in the first degree (Penal Law § 160.15 [4]) and two counts of robbery in the second degree (§ 160.10 [1], [2] [b]). Contrary to the contention of defendant, the record of the suppression hearing supports County Court's determination that the police had probable cause to arrest him (*see People v Brito*, 59 AD3d 1000; *see generally People v Prochilo*, 41 NY2d 759, 761). Defendant failed to preserve for our review his contentions that the court limited his right to present a defense (*see generally People v Angelo*, 88 NY2d 217, 222; *People v Roman*, 60 AD3d 1416), and that he was denied a fair trial by prosecutorial misconduct during summation (*see People v Romero*, 7 NY3d 911; *People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849). 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]).

Contrary to defendant's further contention, the court did not abuse its discretion in consolidating the indictments. "[T]he decision to consolidate separate indictments under CPL 200.20 (subd 4) is committed to the sound discretion of the Trial Judge in light of the circumstances of the individual case, and the decision is reviewable on appeal . . . only to the extent that there has been an abuse of that discretion as a matter of law" (*People v Lane*, 56 NY2d 1, 8; *see* CPL 200.20 [5]; *People v Brown*, 254 AD2d 781, 782, *lv*

denied 92 NY2d 1029). Here, the offenses in the indictments were joinable under CPL 200.20 (2) (c), and defendant failed to make the requisite showing of good cause why the indictments should be tried separately, pursuant to CPL 200.20 (3). Defendant did not "establish that there was substantially more proof against him on one set of charges and that it was likely that the jury would be unable to consider separately the proof as it related to each offense" (*People v Rogers*, 245 AD2d 1041, 1041; *see* CPL 200.20 [3] [a]), nor did he establish "that he had 'both important testimony to give concerning one [offense] and a genuine need to refrain from testifying on the other' " (*Rogers*, 245 AD2d at 1041, quoting CPL 200.20 [3] [b]; *see Lane*, 56 NY2d at 5).

Further, 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 with respect to robbery in the first degree is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The testimony of the prosecution witnesses was not " 'so unworthy of belief as to be incredible as a matter of law' " (*People v Woods*, 26 AD3d 818, 819, *lv denied* 7 NY3d 756, 765), and we see no reason to disturb the jury's resolution of credibility issues (*see generally Bleakley*, 69 NY2d at 495). Finally, we reject defendant's contentions that the indictment was defective (*see People ex rel. Shaffer v Kuhlmann*, 173 AD2d 1034, 1035, *lv denied* 78 NY2d 856; *see generally People v McMillan*, 231 AD2d 841, *lv denied* 89 NY2d 987, *cert denied* 522 US 830), and that the sentence is unduly harsh or severe.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

775

KA 07-02013

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACK ANDERSON, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Stephen R. Sirkin, J.), rendered November 29, 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: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). We reject defendant's challenge to the factual sufficiency of the plea allocution. Defendant was indicted on charges of, inter alia, murder in the second degree (§ 125.25 [1], [2]), and " '[a] bargained guilty plea to a lesser crime makes unnecessary a factual basis for the particular crime confessed' " (*People v Turner*, 16 AD3d 1150, *lv denied* 5 NY3d 770, quoting *People v Clairborne*, 29 NY2d 950, 951). We reject the further contention of defendant that County Court abused its discretion in denying his motion to withdraw his plea. "In the absence of some evidence of innocence, fraud, or mistake in the inducement of the plea, the decision whether to permit a defendant to withdraw a plea of guilty rests solely within the court's discretion" (*People v Canales*, 48 AD3d 1105, 1105-1106, *lv denied* 10 NY3d 860; *see* CPL 220.60 [3]). The record establishes that defendant discussed the plea with defense counsel and that he understood the consequences of his plea and was not threatened or coerced into entering the plea. Finally, defendant's bargained-for sentence is not unduly harsh or severe.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

778

CAF 09-00242

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

IN THE MATTER OF JESSICA C.,
RESPONDENT-APPELLANT.

ROCHESTER CITY SCHOOL DISTRICT,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

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

Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered October 10, 2008 in a proceeding pursuant to Family Court Act article 7. The order, among other things, adjudged that respondent is a person in need of supervision.

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

Memorandum: Respondent appeals from an order adjudicating her a person in need of supervision based upon her admitted truancy and placing her in the custody of the Commissioner of the Monroe County Department of Social Services for a period of 12 months at a residential facility. The record supports Family Court's determination that continuation of respondent in her home would be contrary to her best interests, that reasonable efforts aimed at preventing or eliminating the need for placement away from her home were ineffectual, and that her best interests would be served by placement at a residential facility (*see* Family Ct Act § 754 [2] [a] [i]; *see generally Matter of Samantha T.*, 296 AD2d 869; *Matter of April FF.*, 195 AD2d 860).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

779
CAF 08-01634
PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

IN THE MATTER OF AMANDA L. HARRINGTON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN D. HARRINGTON, II, RESPONDENT-APPELLANT.

IN THE MATTER OF JOHN D. HARRINGTON, II,
PETITIONER-APPELLANT,

V

AMANDA L. HARRINGTON, RESPONDENT-RESPONDENT.

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

EUGENE P. GRIMMICK, TROY, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Steuben County (Joseph W. Latham, J.), entered July 14, 2008 in proceedings pursuant to Family Court Act articles 6 and 8. The order, among other things, awarded petitioner-respondent sole custody of the parties' two children.

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

Memorandum: Respondent-petitioner father appeals from an order that awarded petitioner-respondent mother sole custody of the parties' two children and granted the mother permission for the children to relocate with her to Troy, New York. We reject the father's contention that Family Court failed to consider the best interests of the children in determining that the mother is entitled to sole custody of the children. The court's determination has a sound and substantial basis in the record and should not be disturbed (*see generally Matter of Jennifer L.B. v Jared R.B.*, 32 AD3d 1174, 1175; *Matter of Carl G. v Oneida County Dept. of Social Servs.*, 24 AD3d 1274, 1275). We note in particular that the mother was gainfully employed in Troy, New York and provided the children with a stable home environment, while the father had no gainful employment, and it was unlikely that he could provide a stable home environment.

We also reject the father's contention that the court erred in granting the family offense petition filed by the mother. The record establishes that the mother met her burden of establishing by a preponderance of the evidence that the father engaged in acts constituting the crimes of disorderly conduct and attempted assault (*see Matter of Danielle S. v Larry R.S.,* 41 AD3d 1188, 1189), thus warranting the order of protection issued by the court. The court's mandates therein that the father stay away from the mother and the children for two years with the exception of visitation periods, that the father refrain from contacting the mother with the exception of written communications for the purpose of facilitating visitation, and that he refrain from engaging in behaviors that would place the safety of the mother or the children at risk were reasonably designed to "advance the purpose of 'attempting to stop the violence, end the family disruption and obtain protection' " (*Matter of Mitchell v Muhammed*, 275 AD2d 783, quoting Family Ct Act § 812 [2] [b]), and were in the best interests of the children (*see id.*).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

780

CA 09-00018

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

DAWN DENNIS, INDIVIDUALLY AND AS NATURAL PARENT
AND GUARDIAN OF MARISSA RIOS, AN INFANT UNDER
THE AGE OF 14 YEARS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT VANSTEINBURG, DEFENDANT,
AND VILLAGE OF ILION, DEFENDANT-RESPONDENT.

BRINDISI, MURAD, BRINDISI, PEARLMAN, JULIAN & PERTZ, LLP, UTICA (ANTHONY J. BRINDISI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MURPHY, BURNS, BARBER & MURPHY, LLP, ALBANY (JAMES J. BURNS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered April 8, 2008 in a personal injury action. The order granted the motion of defendant Village of Ilion for summary judgment.

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

Memorandum: Plaintiff, individually and on behalf of her daughter, commenced this action seeking damages for injuries sustained by her daughter when she was struck by a vehicle driven by Robert Vansteinberg (defendant). At the time of the accident, plaintiff's daughter was attempting to cross a two-lane road maintained by defendant Village of Ilion (Village) in order to reach a park. According to plaintiff, the Village was negligent in, inter alia, failing to reduce the speed limit on the road, failing to warn drivers of the presence of children at play and failing to install a crosswalk in the area of the accident. We conclude that Supreme Court properly granted the motion of the Village for summary judgment dismissing the complaint "and all cross claims" against it. Even assuming, arguendo, that the Village breached its duty to maintain the road in a reasonably safe condition (*see generally Lifson v City of Syracuse*, 41 AD3d 1292, 1293), we conclude that the Village established that any such breach was not a proximate cause of the accident (*see Hamilton v State of New York*, 277 AD2d 982, 984, *lv denied* 96 NY2d 704), and plaintiff 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). In support of the motion, the Village submitted the deposition testimony of defendant in which he testified that he had lived in the

area where the accident occurred for over 40 years and that, on numerous occasions prior to the accident, he had observed children cross the road to play in the park. Defendant further testified that he did not need signs on the road to alert him that there were children in the area. Inasmuch as defendant was “well acquainted” with the road, any negligence on the part of the Village “cannot be deemed a proximate cause of [the] injuries” sustained by plaintiff’s daughter (*Atkinson v County of Oneida*, 59 NY2d 840, 842, *rearg denied* 60 NY2d 857; *see Clark v City of Lockport*, 280 AD2d 901, 902, *lv dismissed in part and denied in part* 96 NY2d 932).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

781

CA 08-02132

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

TONY ARNOLD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BALDWIN REAL ESTATE CORPORATION AND
GENESEE WEST ASSOCIATES, LP,
DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, ROCHESTER (RICHARD C. BRISTER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., ROCHESTER (SAREER A. FAZILI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered April 15, 2008 in a personal injury action. The order denied defendants' motion for summary judgment and granted plaintiff's cross motion for partial summary judgment on liability.

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

Memorandum: Plaintiff commenced this Labor Law action seeking damages for injuries he sustained when he fell approximately 11 feet from a ladder to the ground while painting a commercial building. Supreme Court properly granted plaintiff's cross motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) claim. "Plaintiff met his initial burden by submitting his uncontroverted deposition testimony in which he testified that [the] ladder shifted, thus establishing as a matter of law that it was not so placed . . . as to give proper protection to plaintiff" (*Evans v Syracuse Model Neighborhood Corp.*, 53 AD3d 1135, 1136 [internal quotation marks omitted]; *see Whalen v ExxonMobil Oil Corp.*, 50 AD3d 1553), and he further established that defendants' violation of Labor Law § 240 (1) was a proximate cause of his injuries (*see Rudnik v Brogor Realty Corp.*, 45 AD3d 828, 829). Thus, it cannot be said that plaintiff was "solely to blame for [them]" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290; *see Woods v Design Ctr., LLC*, 42 AD3d 876, 877). Defendants failed to raise a triable issue of fact in opposition to the cross motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The evidence submitted by defendants establishing "that the ladder was structurally sound and not defective is not relevant on the issue of whether it was properly placed"

(*Whalen*, 50 AD3d at 1554 [internal quotation marks omitted]).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

782

CA 08-02054

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

VILLAGE OF WARSAW, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID ALMETER, DEFENDANT,
AND GEORGE ANNA ALMETER, DEFENDANT-APPELLANT.

GEORGE ANNA ALMETER, DEFENDANT-APPELLANT PRO SE.

BENJAMIN J. BONARIGO, P.L.L.C., BATAVIA (BENJAMIN J. BONARIGO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wyoming County (Robert C. Noonan, A.J.), entered September 4, 2008. The order, inter alia, held defendants in contempt of court.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law with costs and the motion is denied.

Memorandum: Supreme Court erred in granting plaintiff's motion to hold defendants in contempt of court for their failure to comply with that part of its April 1997 order providing that the third-floor apartment in a building owned by them "shall remain unoccupied until further order of this Court or upon the grant of authorization of the appropriate board and/or agency of [plaintiff]." "In order to prevail on a motion to punish a party for civil contempt, the movant must demonstrate that the party charged violated a clear and unequivocal court order, thereby prejudicing a right of another party to the litigation" (*Goldsmith v Goldsmith*, 261 AD2d 576, 577; *see Town of Lloyd v Moreno*, 297 AD2d 403, 404). The record establishes that in October 1997 defendants obtained authorization from plaintiff's Zoning Board of Appeals to convert the building "into a two[-]family dwelling with the third story of the structure being occupied by the residents of the second[-]floor apartment." Plaintiff has failed to demonstrate that defendants' subsequent conversion of the building into a three-family dwelling or that the occupancy of the third-floor apartment "violated a clear and unequivocal mandate" of the April 1997 order (*Matter of Willard v Meehan*, 35 AD3d 488, 489).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

783

CA 08-00898

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

REGGIE CANSDALE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

POLLY CONN, DEFENDANT-APPELLANT.

EGGER & LEEGANT, ROCHESTER (JOANNE LEEGANT OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (RICHARD P. AMICO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered April 15, 2008 in a personal injury action. The order, insofar as appealed from, denied defendant's motion for summary judgment dismissing the complaint.

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 the remaining wall of a building on defendant's residential property fell on him. The building had previously collapsed under the weight of snow and ice, and plaintiff was hired by defendant's husband, the owner of Conn's Construction, to assist with the demolition of the remainder of the building. We conclude that Supreme Court erred in denying defendant's motion for summary judgment dismissing the complaint. With respect to the Labor Law § 240 (1) and § 241 (6) causes of action, we agree with defendant that she is exempt from liability pursuant to the homeowners' exemption set forth therein inasmuch as she is the owner of a single family dwelling who did not direct or control plaintiff's work. It is undisputed that defendant and her husband permitted individuals to store belongings in the building, some of whom compensated them. Defendant met her burden on the motion with respect to those Labor Law sections, however, by establishing that the building was used primarily for the storage of personal belongings, and plaintiff failed to raise an issue of fact whether the building was used "exclusively for commercial purposes" (*Bartoo v Buell*, 87 NY2d 362, 368). Where, as here, the work "directly relates to the residential use of the home, even if the work also serves a commercial purpose, [the] owner is shielded by the homeowner exemption from the absolute liability of Labor Law §§ 240

and 241″ (*id.*).

We further conclude with respect to the Labor Law § 200 claim and the common-law negligence cause of action that defendant met her burden on the motion by establishing as a matter of law that any negligence on her part was not a proximate cause of plaintiff's injuries, and plaintiff failed to raise an issue of fact sufficient to defeat that part of the motion (*see generally Zuckerman v City of New York*, 69 NY2d 557, 562).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

787

CA 08-01909

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

DONNA M. CHAPMAN AND SAMUEL CHAPMAN,
INDIVIDUALLY AND AS WIFE AND HUSBAND,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

PYRAMID COMPANY OF BUFFALO, THE PYRAMID
COMPANIES, WALDEN GALLERIA LLC, WALDEN
GALLERIA ENTERPRISES, LLC, PYRAMID
MANAGEMENT GROUP, INC., AND PYRAMID
WALDEN COMPANY, L.P.,
DEFENDANTS-RESPONDENTS.

LAWRENCE A. SCHULZ, ORCHARD PARK, FOR PLAINTIFFS-APPELLANTS.

RODGERS LAW FIRM, BUFFALO (MARK C. RODGERS OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered December 3, 2007 in a personal injury action. The order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Donna M. Chapman (plaintiff) when she allegedly slipped and fell on snow and ice in the parking lot of a mall. Supreme Court properly granted defendants' motion seeking summary judgment dismissing the complaint. Contrary to plaintiffs' contention, defendants met their initial burden by submitting evidence establishing that there was a storm in progress at the time of the accident (*see Brierley v Great Lakes Motor Corp*., 41 AD3d 1159, 1160; *Camacho v Garcia*, 273 AD2d 835). In opposition to the motion, plaintiffs failed to raise a triable issue of fact with respect to their allegation that the ice that caused the accident existed prior to the storm, and whether the precipitation from the ongoing storm was a proximate cause of plaintiff's fall (*see Martin v Wagner*, 30 AD3d 733, 735; *Parker v Rust Plant Servs., Inc*., 9 AD3d 671, 672-673; *cf. Pacelli v Pinsley*, 267 AD2d 706, 707-708). Plaintiffs' contention that the court erred in granting the motion because defendants failed to attach a copy of the pleadings to the motion papers is raised for the first time on appeal and thus is not properly before us (*see*

Provident Bank v Giannasca, 55 AD3d 812; *Blazynski v A. Gareleck & Sons, Inc*., 48 AD3d 1168, 1169, *lv dismissed in part and denied in part* 11 NY3d 825).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

788

KA 07-01525

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL C. MOTZER, DEFENDANT-APPELLANT.

TULLY RINCKEY PLLC, ALBANY (GREG T. RINCKEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Orleans County Court (James P. Punch, J.), entered May 29, 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: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

790
KA 07-02425
PRESENT: HURLBUTT, J.P., SMITH, CENTRA, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. BENTLEY, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. BENTLEY, 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 (Sara S. Sperrazza, J.), rendered August 27, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree and assault 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 burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]) and assault in the third degree (§ 120.00 [1]). Contrary to defendant's contention, County Court did not improperly conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea (*see People v Porter*, 55 AD3d 1313, *lv denied* 11 NY3d 899; *cf. People v Moyett*, 7 NY3d 892). We conclude, however, that the waiver by defendant of the right to appeal does not encompass his challenge to the severity of the sentence because he waived his right to appeal before the court advised him of the maximum sentence he could receive (*see People v Martinez*, 55 AD3d 1334, 1335, *lv denied* 11 NY3d 927; *People v Mingo*, 38 AD3d 1270). Nevertheless, we reject defendant's contention that the sentence is unduly harsh or severe. Defendant failed to preserve for our review his contention that the 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]; *People v Ortiz*, 43 AD3d 1348, *lv denied* 9 NY3d 1008). We have considered the contentions raised by defendant in his

pro se supplemental brief and conclude that they are without merit.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

791

KA 06-02303

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JERMAINE E. LANOS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered March 22, 2006. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

792

KA 08-00636

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM D. SMITH, DEFENDANT-APPELLANT.

THOMAS E. ANDRUSCHAT, EAST AURORA, 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 (Thomas P. Franczyk, J.), rendered February 14, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the period of postrelease supervision to a period of five years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]). Defendant failed to preserve for our review his contention that his plea was not knowingly entered (*see People v VanDeViver*, 56 AD3d 1118, *lv denied* 11 NY3d 931), and in any event that contention is without merit. Defendant also failed to preserve for our review his contention that County Court erred in imposing an enhanced sentence without affording him the opportunity to withdraw his plea (*see id.* at 1118-1119). We note, however, that the People correctly concede that the enhanced sentence is illegal inasmuch as it includes a 12-year period of postrelease supervision. At the time defendant committed the crime of which he was convicted, the maximum period of postrelease supervision that could be imposed for a class C violent felony conviction was five years (*see* Penal Law former § 70.45 [2] [f]). We therefore modify the judgment by reducing the period of postrelease supervision to a period of five years. Because the sentence as modified complies with the plea agreement, the sentence is no longer improperly enhanced.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

793
KA 07-01152
PRESENT: HURLBUTT, J.P., SMITH, CENTRA, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FUQUAN FIELDS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Amy J. Fricano, J.), rendered March 8, 2007. The judgment convicted defendant, upon a jury verdict, of assault in the first degree, assault in the third degree, criminal possession of a weapon in the third degree, criminal contempt in the first degree, tampering with a witness in the third degree, intimidating a witness in the third degree and criminal contempt 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 upon a jury verdict of, inter alia, assault in the first degree (Penal Law § 120.10 [1]) and, in appeal No. 2, he appeals from a judgment convicting him upon the same jury verdict of, inter alia, seven counts of criminal possession of a forged instrument in the second degree (§ 170.25). We reject the contention of defendant that he was denied effective assistance of counsel. Defendant failed to show that any prejudice resulted from the untimely filing of his severance motion or the failure to locate certain defense witnesses (*see People v Barber*, 202 AD2d 978, 979, *lv denied* 83 NY2d 908). We conclude that "the evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of the representation, reveal that [defense counsel] provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147). 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 further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The record establishes that defendant abandoned his request to proceed pro se, which in any event was equivocal at best, and thus his further contention that Supreme Court erred in denying that request is not properly before us (*see People v*

Smith, 281 AD2d 957, *lv denied* 96 NY2d 868; *see generally People v Gillian*, 8 NY3d 85, 87-88). Finally, the sentence is not unduly harsh or severe.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

794
KA 07-01153
PRESENT: HURLBUTT, J.P., SMITH, CENTRA, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FUQUAN FIELDS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Amy J. Fricano, J.), rendered March 8, 2007. The judgment convicted defendant, upon a jury verdict, of criminal possession of a forged instrument in the second degree (seven counts) and tampering with a witness in the fourth degree.

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

Same Memorandum as in *People v Fields* ([appeal No. 1] ___ AD3d ___ [June 5, 2009]).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

795

CAF 08-01400

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

IN THE MATTER OF BRENDA R., PETITIONER-RESPONDENT,

V ORDER

RONALD D., RESPONDENT-APPELLANT.

ALEXANDRA C. SISKOPOULOS, BROOKLYN (JOHN V. SISKOPOULOS, OF THE MASSACHUSETTS BAR, ADMITTED PRO HAC VICE, OF COUNSEL), 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 (Patricia E. Gallaher, J.), entered March 25, 2008 in a proceeding pursuant to Family Court Act article 5. The order denied the motion of respondent to vacate an order dated September 24, 2001.

It is hereby ORDERED that the order so appealed from is unanimously affirmed with costs (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984; *see generally City of Albany Indus. Dev. Agency v Garg*, 250 AD2d 991, 993).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

798

CAF 08-01324

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

IN THE MATTER OF PENINA POLLARD,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RAHEEM POLLARD, RESPONDENT-APPELLANT.

MARY ANN BLIZNIK, CLARENCE, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, J.), entered May 30, 2008 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, modified a prior order of joint custody by granting petitioner permission for the parties' children to relocate with her to California.

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, Jefferson County, for a hearing on the petitions.

Memorandum: Respondent father appeals from an order that, inter alia, modified a prior order of joint custody by granting petitioner mother permission for the parties' children to relocate with her to California. We agree with the father that Family Court erred in entering the order upon "default" based on his failure to appear in court. The record establishes that the father was represented by counsel, and we have previously determined that, "[w]here a party fails to appear [in court on a scheduled date] but is represented by counsel, the order is not one entered upon the default of the aggrieved party and appeal is not precluded" (*Matter of Kwasi S.*, 221 AD2d 1029, 1030; *see Matter of Shemeco D.*, 265 AD2d 860, 860-861; *see also Matter of David A.A. v Maryann A.*, 41 AD3d 1300). The court also erred in modifying the prior custody order without conducting an evidentiary hearing. " 'Determinations affecting custody and visitation should be made following a full evidentiary hearing, not on the basis of conflicting allegations' " (*Matter of Kenneth M. v Monique M.*, 48 AD3d 1174, 1174-1175), and we are unable to determine on the record before us whether the court " 'possessed sufficient information to render an informed determination that was consistent with the child[ren]'s best interests' " (*Matter of Hopkins v Gelia*, 56 AD3d 1286). We therefore reverse the order and remit the matter to

Family Court for a hearing on the petitions.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

799

CAF 08-00980

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

IN THE MATTER OF TASHA M.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

TRACY G.-O., RESPONDENT-APPELLANT, ET AL., RESPONDENT.

ORDER

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

DANIEL M. DELAUS, JR., COUNTY ATTORNEY, ROCHESTER (PAUL N. HUMPHREY OF COUNSEL), FOR PETITIONER-RESPONDENT.

CHARLES J. PLOVANICH, LAW GUARDIAN, ROCHESTER, FOR TASHA M.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered March 27, 2008 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent Tracy G.-O. derivatively neglected Tasha M.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

800

TP 09-00093

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

IN THE MATTER OF DIANE M. FOULK, PETITIONER,

V ORDER

GLADYS CARRION, COMMISSIONER, NEW YORK STATE
OFFICE OF CHILDREN AND FAMILY SERVICES,
RESPONDENT.

DIANE M. FOULK, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JULIE S. MERESON 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, Steuben County [Joseph W. Latham, A.J.], entered December 31, 2008) to review a determination of respondent. The determination denied the application of petitioner to amend an indicated report of child maltreatment to an unfounded report and to seal the amended report.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

803

CA 07-02277

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

IN THE MATTER OF DONALD GRASSO, DAVID MONOLOPOLUS, AND DANIEL T. WARREN, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF WEST SENECA, ZONING BOARD OF APPEALS OF TOWN OF WEST SENECA, TOWN OF WEST SENECA BUILDING DEPARTMENT, WILLIAM CZUPRYNSKI, AS CODE ENFORCEMENT OFFICER OF TOWN OF WEST SENECA, CANISIUS HIGH SCHOOL, ALSO KNOWN AS CANISIUS HIGH SCHOOL OF BUFFALO, NEW YORK, AND JAMES P. HIGGINS, S.J., AS PRESIDENT OF CANISIUS HIGH SCHOOL, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

DANIEL T. WARREN, DONALD GRASSO, AND DAVID MONOLOPOLUS, PETITIONERS-APPELLANTS PRO SE.

CONNORS & VILARDO, LLP, BUFFALO (LAWRENCE J. VILARDO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS TOWN OF WEST SENECA, ZONING BOARD OF APPEALS OF TOWN OF WEST SENECA, TOWN OF WEST SENECA BUILDING DEPARTMENT, AND WILLIAM CZUPRYNSKI, AS CODE ENFORCEMENT OFFICER OF TOWN OF WEST SENECA.

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS CANISIUS HIGH SCHOOL, ALSO KNOWN AS CANISIUS HIGH SCHOOL OF BUFFALO, NEW YORK, AND JAMES P. HIGGINS, S.J., AS PRESIDENT OF CANISIUS HIGH SCHOOL.

Appeal from a judgment of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 23, 2007 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

Now, upon the stipulation dismissing the petition against respondent James P. Higgins, S.J., as president of Canisius High School, signed by petitioners and the attorneys for respondents and filed in the Erie County Clerk’s Office on May 1, 2009,

It is hereby ORDERED that said appeal with respect to respondent James P. Higgins, S.J., as president of Canisius High School, is unanimously dismissed upon stipulation and the judgment is otherwise affirmed without costs.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination of respondent Zoning Board of Appeals of the Town of West Seneca (ZBA) issuing a building permit for the construction of athletic facilities to respondent Canisius High School, also known as Canisius High School of Buffalo, New York, and respondent president thereof. They also sought to annul the negative declaration issued pursuant to article 8 of the Environmental Conservation Law (State Environmental Quality Review Act [SEQRA]). We note at the outset that we agree with petitioners that Supreme Court erred in determining that it lacked jurisdiction over petitioners Donald Grasso and David Monolopolus based on their failure to verify the petition. Respondents are deemed to have waived that omission inasmuch as they never raised the issue or notified petitioners of it (*see Lepkowski v State of New York*, 1 NY3d 201, 210; *Matter of Kocur v Erie County Water Auth.*, 292 AD2d 858). We further conclude, however, that the petition need not be reinstated with respect to those petitioners because the court properly dismissed the petition in its entirety, on the merits. The determination of the ZBA that the proposed high school athletic facilities constituted a permissible educational use under the Town Code within the subject zoning district was neither unreasonable nor irrational (*see Matter of Frishman v Schmidt*, 61 NY2d 823, 825; *see generally Town of Islip v Dowling Coll.*, 275 AD2d 366, 367). Further, we conclude on the record before us that respondent Town of West Seneca complied with SEQRA, i.e., it "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417). We have reviewed petitioners' remaining contentions and conclude that they are without merit.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

804

CA 07-02278

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

IN THE MATTER OF DONALD GRASSO, DAVID MONOLOPOLUS, AND DANIEL T. WARREN, PETITIONERS-APPELLANTS,

V ORDER

TOWN OF WEST SENECA, ZONING BOARD OF APPEALS OF TOWN OF WEST SENECA, TOWN OF WEST SENECA BUILDING DEPARTMENT, WILLIAM CZUPRYNSKI, AS CODE ENFORCEMENT OFFICER OF TOWN OF WEST SENECA, CANISIUS HIGH SCHOOL, ALSO KNOWN AS CANISIUS HIGH SCHOOL OF BUFFALO, NEW YORK, AND JAMES P. HIGGINS, S.J., AS PRESIDENT OF CANISIUS HIGH SCHOOL, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

DANIEL T. WARREN, DONALD GRASSO, AND DAVID MONOLOPOLUS, PETITIONERS-APPELLANTS PRO SE.

CONNORS & VILARDO, LLP, BUFFALO (LAWRENCE J. VILARDO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS TOWN OF WEST SENECA, ZONING BOARD OF APPEALS OF TOWN OF WEST SENECA, TOWN OF WEST SENECA BUILDING DEPARTMENT, AND WILLIAM CZUPRYNSKI, AS CODE ENFORCEMENT OFFICER OF TOWN OF WEST SENECA.

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS CANISIUS HIGH SCHOOL, ALSO KNOWN AS CANISIUS HIGH SCHOOL OF BUFFALO, NEW YORK, AND JAMES P. HIGGINS, S.J., AS PRESIDENT OF CANISIUS HIGH SCHOOL.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 23, 2007 in a proceeding pursuant to CPLR article 78. The order, inter alia, denied the request of petitioners for a default judgment against respondents.

Now, upon the stipulation dismissing the petition against respondent James P. Higgins, S.J., as president of Canisius High School, signed by petitioners and the attorneys for respondents and filed in the Erie County Clerk’s Office on May 1, 2009,

It is hereby ORDERED that said appeal with respect to respondent James P. Higgins, S.J., as president of Canisius High School, is unanimously dismissed upon stipulation and the appeal is otherwise

dismissed without costs (*see* CPLR 5701 [b] [1]).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

808

CA 08-02043

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

BRIAN J. SMITH, PLAINTIFF-APPELLANT,

V ORDER

ROMESH K. KOHLI, DEFENDANT-RESPONDENT.

CANTOR, LUKASIK, DOLCE & PANEPINTO, P.C., BUFFALO (FRANK J. DOLCE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF MARY A. BJORK, ROCHESTER (THOMAS P. DURKIN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 1, 2008 in a personal injury action. The order, insofar as appealed from, denied the motion of plaintiff for partial summary judgment on the issue of serious injury.

Now, upon reading and filing the stipulation to withdraw appeal signed by the attorneys for the parties on May 11, 2009,

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

810

KA 08-01025

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES S. ROGERS, ALSO KNOWN AS JIMMY JAZZ,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered June 14, 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.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). We reject the contention of defendant that County Court did not give due consideration to his pro se motion to withdraw his plea. The determination whether to entertain a pro se motion of a defendant who is represented by counsel is solely within the court's discretion (*see People v Rodriguez*, 95 NY2d 497, 500; *People v Minter*, 295 AD2d 927, *lv denied* 98 NY2d 712), and we conclude that the court did not abuse its discretion in this case. We further reject defendant's contention that the bargained-for sentence is unduly harsh or severe. Finally, defendant failed to preserve for our review his contention that the sentence imposed constituted cruel and unusual punishment (*see People v Reese*, 31 AD3d 582, *lv denied* 7 NY3d 851) and, in any event, that contention lacks merit. "There are no exceptional circumstances warranting modification of the sentence, which was the statutory minimum and the result of a negotiated plea" (*id.* at 583).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

811

KA 08-01192

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEONARD A. LEOPOLD, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered March 27, 2008. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk under the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Defendant failed to preserve for our review his present contention that the Board of Examiners of Sex Offenders erred in failing to compare his California offense with New York law (*see generally People v Windham*, 10 NY3d 801; *People v Smith*, 17 AD3d 1045, *lv denied* 5 NY3d 705). We agree with defendant that Supreme Court failed to set forth the requisite findings of fact and conclusions of law upon which it based its risk assessment determination (*see* § 168-n [3]). Nevertheless, we conclude that the record before us is sufficient to enable us to make our own findings of fact and conclusions of law (*see People v Pardo*, 50 AD3d 992, *lv denied* 11 NY3d 703), and we conclude that the upward departure determining that defendant is a level two risk is supported by clear and convincing evidence (*see People v Thomas*, 307 AD2d 759).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

812

KA 08-00581

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EVONY CAPPS, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered February 21, 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.

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of manslaughter in the first degree (Penal Law § 125.20). We conclude that the waiver by defendant of the right to appeal was knowingly and voluntarily entered (*see People v Lopez*, 6 NY3d 248, 256), and that valid waiver encompasses her challenge to the severity of the sentence (*see id.*; *People v Kearns*, 50 AD3d 1514, *lv denied* 11 NY3d 790). The valid waiver also encompasses the contention of defendant that County Court should have afforded her youthful offender status (*see Kearns*, 50 AD3d at 1515) and, in any event, defendant failed to preserve her contention for our review inasmuch as she did not request that status during the plea proceedings or at sentencing (*see People v Fowler*, 28 AD3d 1183, 1184, *lv denied* 7 NY3d 788).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

813

KA 08-01186

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JONATHAN R., DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from an adjudication of the Erie County Court (Shirley Troutman, J.), rendered May 21, 2008. Defendant was adjudicated a youthful offender upon his plea of guilty to burglary in the second degree.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

814
KA 07-02526
PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMONE R. FRAZIER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

DEMONE R. FRAZIER, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered June 6, 2007. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of rape in the third degree (Penal Law § 130.25 [2]), defendant contends that he did not validly waive his right to appeal. We reject that contention (*see People v Calvi*, 89 NY2d 868, 871; *People v Brown [Sean],* 41 AD3d 1234, *lv denied* 9 NY3d 873). "The plea allocution establishes that the waiver of the right to appeal was voluntarily, knowingly, and intelligently entered . . ., even though some of defendant's responses to [County Court's] inquiries were monosyllabic" (*Brown [Sean]*, 41 AD3d 1234 [internal quotation marks omitted]; *see People v Wilson*, 38 AD3d 1348, *lv denied* 9 NY3d 927). The valid waiver by defendant of the right to appeal encompasses his contention that the court erred in denying his motion to dismiss the indictment on the ground that the search of his vehicle was illegal, requiring suppression of the fruits of that search, and in failing to conduct a hearing with respect to the legality of the police conduct during the search (*see People v Kemp*, 94 NY2d 831, 833; *People v Williams*, 49 AD3d 1281, *lv denied* 10 NY3d 940).

The contention of defendant in his pro se supplemental brief that he was denied his right to testify before the grand jury is "foreclosed by defendant's valid waiver of the right to appeal as well as by defendant's guilty plea" (*People v Duzant*, 15 AD3d 860, 861, *lv denied* 5 NY3d 761 [internal quotation marks omitted]; *see People v*

Sachs, 280 AD2d 966, *lv denied* 96 NY2d 834, 97 NY2d 708). To the extent that the further contention of defendant in his pro se supplemental brief concerning ineffective assistance of counsel survives the guilty plea and waiver of the right to appeal, defendant failed to preserve that contention for our review "inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction on that ground" (*People v White*, 37 AD3d 1112, 1113; *see People v Hall*, 50 AD3d 1467, 1468-1469, *lv denied* 11 NY3d 789). Finally, to the extent that defendant's contention with respect to ineffective assistance of counsel is based on defense counsel's alleged failure to discuss the case with defendant, to secure defendant's right to testify before the grand jury or to move to suppress certain medical records, the contention involves matters outside the record on appeal and thus is properly raised by way of a motion pursuant to CPL article 440 (*see Hall*, 50 AD3d at 1469; *People v Leno*, 21 AD3d 1399, *lv denied* 5 NY3d 883).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

815

KA 06-00549

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRY C. ROBINSON, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered January 3, 2006. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals 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)]) and criminal possession of a weapon in the third degree (§ 265.02 [former (4)]). We reject defendant's contention that Supreme Court erred in refusing to charge the defense of temporary innocent possession of the firearm that is the subject of the indictment. Viewing the evidence in the light most favorable to defendant (*see People v Caldarola*, 45 AD3d 600, *lv denied* 10 NY3d 957), we conclude that, although there is a reasonable view of the evidence upon which the jury could have found that defendant had a lawful basis for his initial possession of the firearm, there is no reasonable view of the evidence upon which the jury could have found that defendant's use of the firearm thereafter was lawful (*see generally People v Banks*, 76 NY2d 799, 801; *People v Williams*, 50 NY2d 1043, 1045).

According to his own written statement to the police as well as his trial testimony, defendant was holding the firearm when he intentionally sought out an individual hiding in the bathroom whom he suspected of having sexual relations with the mother of his friend's children (*see generally People v Britton*, 27 AD3d 1014, 1015, *lv denied* 6 NY3d 892). Defendant then waved the firearm around the bathroom in the presence of that individual and two other individuals

who had followed him into the bathroom (*see generally People v Pereira*, 220 AD2d 696, 697, *lv denied* 87 NY2d 1023). When the individual escaped from the bathroom and ran from the house, defendant chased after him, again with the firearm in hand, at which time the firearm discharged. Defendant thereafter left the scene with the gun and hid it on a shelf in his sister's basement (*see generally People v Gonzalez*, 262 AD2d 1061, *lv denied* 93 NY2d 1018). When defendant saw the police arrive at his sister's house, he gave the gun to his brother and asked his brother to hide the gun for him. Defendant then attempted to avoid arrest by fleeing out the back door of his sister's house. Such conduct is "utterly at odds with [any] claim of innocent possession . . . temporarily and incidentally [resulting] from . . . disarming a wrongful possessor" (*People v Snyder*, 73 NY2d 900, 902 [internal quotation marks omitted]; *see People v McCoy*, 46 AD3d 1348, 1349-1350, *lv denied* 10 NY3d 813; *People v Bell*, 46 AD3d 385, *lv denied* 10 NY3d 808).

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

816

KA 07-02566

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS MONTGOMERY, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered November 27, 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.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant challenges the validity of his waiver of the right to appeal. We reject that challenge (*see People v Lopez*, 6 NY3d 248, 256; *People v Washington*, 53 AD3d 1120, *lv denied* 11 NY3d 796). Although the contention of defendant that Supreme Court erred in denying his motion to withdraw the plea survives his valid waiver of the right to appeal, that contention is without merit. The contention of defendant that the plea was coerced is belied by his statements during the plea colloquy (*see People v Gimenez*, 59 AD3d 1088; *People v Farley*, 34 AD3d 1229, *lv denied* 8 NY3d 880). In addition, the record belies the further contention of defendant that he was misled with respect to his potential sentence prior to entering the plea (*see generally People v Elmore* [appeal No. 2], 57 AD3d 1507). Further, we reject the contention of defendant that he should have been permitted to withdraw his plea based on defense counsel's incorrect statement that he could withdraw his plea at any time before sentencing. The issue whether defense counsel made the alleged statement presented a credibility issue that the court was entitled to resolve against defendant after affording him a reasonable opportunity to be heard (*see People v Dozier*, 12 AD3d 1176; *People v Stephens*, 6 AD3d 1123, 1124, *lv denied* 3 NY3d 663, 682; *see also People v Irvine*, 42 AD3d 949, *lv denied* 9 NY3d 962).

Although the further contention of defendant that the court failed to apprehend the extent of its discretion to impose a lesser period of postrelease supervision also survives his waiver of the right to appeal, that contention is without merit (*see People v Burgess*, 23 AD3d 1095, *lv denied* 6 NY3d 810; *People v Tyes*, 9 AD3d 899, *lv denied* 3 NY3d 682; *People v Porter*, 9 AD3d 887, *lv denied* 3 NY3d 710; *cf. People v Stanley*, 309 AD2d 1254). Finally, defendant's challenge to the severity of the sentence is encompassed by the waiver by defendant of the right to appeal (*see Lopez*, 6 NY3d at 256; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

820
KA 08-00466
PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY GILPATRICK, DEFENDANT-APPELLANT.

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

TIMOTHY GILPATRICK, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RAYMOND C. HERMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered August 21, 2007. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class E felony, aggravated unlicensed operation of a motor vehicle in the first degree, and failure to stay within a single lane.

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 driving while intoxicated as a felony (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (i)]), aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]), and failure to stay within a single lane (§ 1128 [a]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict with respect to driving while intoxicated and aggravated unlicensed operation of a motor vehicle is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We further reject the contention of defendant that he was denied the right to effective assistance of counsel. The "failure to make a motion or [an objection] that has little or no chance of success . . . is not ineffective" (*People v Dashnaw*, 37 AD3d 860, 863, *lv denied* 8 NY3d 945 [internal quotation marks omitted]), and defendant has failed to show the absence of strategic or other legitimate explanations for defense counsel's alleged shortcomings (*see generally People v Benevento*, 91 NY2d 708, 712). Viewing defense counsel's representation as a whole and as of the time of the representation, we conclude that defendant received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137,

147). Contrary to the remaining contention of defendant in his main brief, the sentence is not unduly harsh or severe.

We reject the contentions raised by defendant in his pro se supplemental brief. A defendant who is represented by counsel does not have an absolute right to make a pro se motion, and here County Court did not abuse its discretion in refusing to consider defendant's pro se motion (*see People v Lockett*, 1 AD3d 932, 933, *lv denied* 1 NY3d 630; *see generally People v Rodriguez*, 95 NY2d 497, 501). Defendant failed to preserve for our review his contention that the court erred in failing to give a missing witness charge (*see People v Dell*, 11 AD3d 631, 632, *lv denied* 4 NY3d 762) and, in any event, that contention lacks merit inasmuch as there is no indication in the record that defendant was entitled to such a charge (*see generally People v Kitching*, 78 NY2d 532, 536-537; *People v Gonzalez*, 68 NY2d 424, 427-428). Contrary to the further contention of defendant, the People were under no obligation to provide him with evidence concerning which he had prior knowledge (*see generally People v LaValle*, 3 NY3d 88, 110; *People v Doshi*, 93 NY2d 499, 506-507). We have reviewed the remaining contentions of defendant in his pro se supplemental brief and conclude that they are without merit.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

821

CAF 08-00174

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

IN THE MATTER OF DENNIS K.A., III, AND JANET A.

WYOMING COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

DENNIS A., JR., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

MICHAEL STEINBERG, ROCHESTER, FOR RESPONDENT-APPELLANT.

ERIC T. DADD, COUNTY ATTORNEY, WARSAW (JAMIE B. WELCH OF COUNSEL), FOR PETITIONER-RESPONDENT.

TERESA KOWALCZYK, LAW GUARDIAN, WARSAW, FOR DENNIS K.A., III, AND JANET A.

Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J.), entered December 24, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

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

Memorandum: Respondent father appeals from an order terminating his parental rights with respect to his children on the ground of abandonment and, inter alia, placing them in petitioner's custody. The father failed to preserve for our review his contention that the underlying petitions were jurisdictionally defective because they sought to terminate his parental rights on the ground of permanent neglect rather than abandonment (*see generally Matter of Abraham C.*, 55 AD3d 1442, 1442-1443, *lv denied* 12 NY3d 701). In any event, that contention lacks merit. The fact that the petitions were denominated as petitions seeking termination of the father's parental rights on the ground of permanent neglect does not render them jurisdictionally defective because the factual paragraphs in both petitions alleged that the father abandoned his children (*see generally Matter of Shavonda GG.*, 232 AD2d 780, 780-781).

We reject the father's further contention that petitioner failed to establish by the requisite clear and convincing evidence that he had abandoned the children (*see* Social Services Law § 384-b [3] [g] [i]; [4] [b]). Petitioner presented evidence establishing that the father had almost no contact with the children in the five years preceding the filing of the petitions and that he had failed to keep

petitioner apprised of his location. We thus conclude that petitioner established the “intent [of the father] to forego his . . . parental rights and obligations as manifested by his . . . failure to visit the child[ren] and communicate with [them] or [petitioner], although able to do so and not prevented or discouraged from doing so by [petitioner]” (§ 384-b [5] [a]).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

822

CA 09-00234

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

NAOTA M. PINA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PATRICIA J. PRUYN, DEFENDANT,
DENNIS E. FARRELL AND NATIONAL FUEL GAS COMPANY,
DEFENDANTS-RESPONDENTS.

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FELDMAN, KIEFFER & HERMAN, LLP, BUFFALO (STEPHEN M. SORRELS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered April 29, 2008 in a personal injury action. The order granted the motion of defendants Dennis E. Farrell and National Fuel Gas Company 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 she sustained in two motor vehicle accidents. We conclude that Supreme Court properly granted the motion of defendants National Fuel Gas Company and Dennis E. Farrell (collectively, National Fuel defendants), the defendants involved in the second accident, for summary judgment dismissing the complaint against them on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) in that second accident.

The National Fuel defendants met their initial burden on the motion by submitting the records of plaintiff's chiropractor describing the treatment received by plaintiff between the time of the first and second accidents and that received after the second accident (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Those records established that the second accident involved merely a gentle collision, that plaintiff's condition was the "same" after the second accident as it was after the first accident, and that plaintiff's disability from work in the period following the first and second accidents was related solely to the first accident.

In opposition to the motion, plaintiff submitted the affidavit of

her treating chiropractor and the affirmation of her treating orthopedic surgeon, each of whom concluded that plaintiff's injuries were in part related to the second accident. We conclude, however, that the affidavit of the chiropractor and the affirmation of the orthopedic surgeon lack probative value and are insufficient to raise a triable issue of fact with respect to the issue of serious injury (*see generally Gaddy v Eyler*, 79 NY2d 955, 957-958; *Damstetter v Martin* [appeal No. 2], 247 AD2d 893). The chiropractor neither denied having the opportunity to correct the alleged error in his records linking plaintiff's injuries "solely" to the first accident, nor did he account for the notation in his progress notes that he viewed plaintiff's condition to be the "same" immediately after the second accident as it was before that accident. Further, the orthopedic surgeon did not consider the circumstances of either accident and provided no objective basis for his conclusion that plaintiff sustained a new injury or aggravated an existing injury in the second accident (*see generally Mitchell v Atlantic Paratrans of NYC, Inc.*, 57 AD3d 336; *Damstetter*, 247 AD2d 893).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

825

CA 08-01255

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

IN THE MATTER OF CHRISTOPHER YOUNG,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MONROE COUNTY CLERK'S OFFICE AND CHERYL
DINOLFO, RESPONDENTS-RESPONDENTS.

CHRISTOPHER YOUNG, PETITIONER-APPELLANT PRO SE.

DANIEL M. DELAUS, JR., COUNTY ATTORNEY, ROCHESTER (PAUL D. FULLER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (John J. Ark, J.), entered March 14, 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: Supreme Court properly dismissed the CPLR article 78 petition seeking to compel respondents to provide petitioner with a copy of the verdict sheet used at his criminal trial. Respondents have asserted that, in response to petitioner's repeated requests for the verdict sheet, they searched their files relating to petitioner's case "page by page" and determined that they were not in possession of the verdict sheet. Thus, respondents established that they did not "fail[ ] to perform a duty enjoined upon [them] by law" (CPLR 7803 [1]). We further conclude that respondents' responses to petitioner's requests were not "made in violation of lawful procedure, . . . affected by an error of law or . . . arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]). The inability of respondents to locate the verdict sheet in their files constitutes a rational basis for their failure to provide petitioner with a copy of that document (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231). Respondents are "under no obligation to furnish documents [that they] do[ ] not possess" (*Matter of Rivette v District Attorney of Rensselaer County*, 272 AD2d 648, 649).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

826

CA 08-01601

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

ANTHONY FOSTER, TERRIL ELLIS AND ARNOLD PENDER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DEALMAKER, SLS, LLC, AND MATTHEW J. MCCARGAR,
DEFENDANTS-APPELLANTS.

FISCHER, BESSETTE, MULDOWNEY & HUNTER, LLP, MALONE (MATTHEW H. MCARDLE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DAVID SEGAL, NEW YORK CITY, ARNOLD E. DIJOSEPH, P.C. (ARNOLD E. DIJOSEPH, III, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered July 16, 2008 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 reversed on the law without costs, the motion is granted, and the complaint is dismissed.

Memorandum: We agree with defendants that Supreme Court erred in denying their motion for summary judgment dismissing the complaint. The motion was based on the failure of plaintiffs to comply with a conditional order precluding them from introducing any evidence with respect to items demanded in defendants' request for a verified bill of particulars, in the event that they did not comply with those demands. "[T]he conditional order was self-executing and [plaintiffs'] failure to produce [requested] items on or before the date certain rendered it absolute" (*Wilson v Galicia Contr. & Restoration Corp.*, 10 NY3d 827, 830 [internal quotation marks omitted]). "To avoid the adverse impact of the conditional order of preclusion, the plaintiff[s were] required to demonstrate an excusable default and a meritorious cause of action" (*Gilmore v Garvey*, 31 AD3d 381, 382; *see Martin v Salvage*, 238 AD2d 959). Even assuming, arguendo, that plaintiffs demonstrated that their default was excusable, we conclude that they failed to demonstrate that they have a meritorious cause of action inasmuch as they failed to establish that they each sustained a serious injury (*see Rasmussen v Niagara Mohawk Power Corp.*, 294 AD2d 862; *see generally Licari v Elliott*, 57 NY2d 230, 235). Because the preclusion order is in effect, plaintiffs now are precluded from presenting evidence sufficient to establish a prima facie case, i.e., that they sustained a serious injury, and thus

defendants are entitled to summary judgment dismissing the complaint (*see Calder v Cofta*, 49 AD3d 484, 485; *Rahman v MacDonald*, 17 AD3d 438; *see also Koski v Ryder Truck*, 244 AD2d 872, 873). In light of our determination, we need not address defendants' remaining contention.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

829

CA 09-00140

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

MICHAEL HOGAN AND MARY HOGAN,
PLAINTIFFS-RESPONDENTS,

V ORDER

GEORGE TRITSCH, DEFENDANT-APPELLANT.

BOUVIER PARTNERSHIP, LLP, BUFFALO (JOHN P. DEPAOLO OF COUNSEL), FOR DEFENDANT-APPELLANT.

SIEGEL, KELLEHER & KAHN, LLP, BUFFALO (ROBERT D. STEINHAUS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered April 23, 2008 in a personal injury action. The order denied defendant's motion for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on April 2, 2009,

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

830

KA 07-00613

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BRANDON LATSON, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (ELIZABETH CLIFFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered September 21, 2005. The judgment convicted defendant, upon his plea of guilty, of murder in the first degree and conspiracy in the second degree.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

831
KA 07-01041
PRESENT: HURLBUTT, J.P., CENTRA, PERADOTTO, CARNI, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

STEPHEN L. MYERS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TULLY RINCKEY PLLC, ALBANY (GREG T. RINCKEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered March 26, 2007. The judgment convicted defendant, upon his plea of guilty, of reckless endangerment in the first degree.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

832

KA 07-01042

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

STEPHEN L. MYERS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TULLY RINCKEY PLLC, ALBANY (GREG T. RINCKEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered March 26, 2007. The judgment convicted defendant, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the first degree.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

833

KA 06-01050

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JABAD JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered February 1, 2006. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The jury was entitled to credit the testimony of the victim with respect to the identity of his assailant (*see generally id.*). Finally, the sentence is not unduly harsh or severe.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

835
KA 08-00675
PRESENT: HURLBUTT, J.P., CENTRA, PERADOTTO, CARNI, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANNON JONES, DEFENDANT-APPELLANT.

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

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (CHRISTOPHER BOKELMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered February 7, 2008. The judgment convicted defendant, upon a jury verdict, of criminal contempt 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 a jury verdict of two counts of criminal contempt in the first degree (Penal Law § 215.51 [c]), defendant contends that the evidence is legally insufficient to support the conviction because the indictment alleged that defendant intentionally disobeyed orders of protection that did not arise from a labor dispute and the People failed to present evidence that the orders of protection did not arise from a labor dispute. We reject that contention. "[T]he 'labor disputes' clause [of Penal Law § 215.50 (3)] operates as a proviso that the [defendant] may raise in defense of the charge" (*People v Santana*, 7 NY3d 234, 237). Here defendant did not timely raise the issue, nor would it have been appropriate to do so because the orders of protection state that they were issued pursuant to CPL 530.12, which concerns orders of protection for victims of family offenses. Thus, contrary to defendant's contention, the evidence is legally sufficient to establish that the orders of protection did not arise from a labor dispute.

We agree with defendant, however, that County Court erred in refusing to suppress his statement to the police concerning an allegedly false birth date. The officer who testified at the suppression hearing failed to provide "some articulable basis" for his stop of the vehicle in which defendant was a passenger inasmuch as he did not testify that he had a reasonable suspicion that the driver or occupants of the vehicle had committed, were committing, or were about

to commit a crime or a traffic violation (*People v Spencer*, 84 NY2d 749, 753, *cert denied* 516 US 905; *see People v Hoglen*, 162 AD2d 1036, 1037-1038, *lv dismissed* 76 NY2d 987). We nevertheless conclude that the error is harmless, because the court dismissed the false personation count and the officer's testimony was merely cumulative with respect to the criminal contempt counts (*see generally People v Crimmins*, 36 NY2d 230, 241-242). We have considered defendant's remaining contention and conclude that it is without merit.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

836

KA 05-02382

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROCKEL BYRON FRANCIS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS 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 (Thomas M. Van Strydonck, J.), rendered June 21, 2005. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a controlled substance in the second degree (two counts) and criminal possession of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of, inter alia, two counts of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]). We reject the contention of defendant that he was denied effective assistance of counsel based on the failure of defense counsel to challenge the search warrant for his residence. According to defendant, the issuance of the search warrant was not supported by probable cause. "There can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Here, the information in the search warrant application demonstrated an ongoing drug operation at defendant's residence, and the application thus "established probable cause to believe that a search of defendant's residence would result in evidence of drug activity" (*People v McLaughlin*, 269 AD2d 858, 858, *lv denied* 95 NY2d 800; *see People v Casolari*, 9 AD3d 894, 895, *lv denied* 3 NY3d 672). Defendant failed to preserve for our review his challenge to Supreme Court's *Molineux* ruling (*see* CPL 470.05 [2]), and we decline to exercise our power to review that challenge as a matter

of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

837

CAF 08-01167

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

IN THE MATTER OF AKURA R., JONATHON R.,
AND TIMOTHY A.R.

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

MICHELLE A.R., RESPONDENT-RESPONDENT.

THERESA M. GIROUARD, ESQ., APPELLANT.
(APPEAL NO. 1.)

ABBIE GOLDBAS, UTICA, FOR APPELLANT.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered April 23, 2008 in a proceeding pursuant to Family Court Act article 6. The order removed Theresa M. Girouard, Esq. as Law Guardian for the children on the ground of conflict of interest with petitioner.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

838

CAF 08-01559

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

IN THE MATTER OF KAIDEN F.F., KILEE F., AND SHELBY G.P.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

JEREMY F. AND CORISSA A.O., RESPONDENTS-RESPONDENTS.

IN THE MATTER OF DUSTIN A.P., PETITIONER-RESPONDENT,

V

CORISSA O., RESPONDENT-RESPONDENT.

THERESA M. GIROUARD, ESQ., APPELLANT.
(APPEAL NO. 2.)

ORDER

ABBIE GOLDBAS, UTICA, FOR APPELLANT.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered July 2, 2008 in a proceeding pursuant to Family Court Act article 6. The order removed Theresa M. Girouard, Esq. as Law Guardian for the children on the ground of conflict of interest with petitioner Oneida County Department of Social Services.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

839

CAF 08-01954

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

IN THE MATTER OF QUANEESHA S.G.,
RESPONDENT.
---------- ORDER
ONEIDA COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

THERESA M. GIROUARD, ESQ., APPELLANT.
(APPEAL NO. 3.)

ABBIE GOLDBAS, UTICA, FOR APPELLANT.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered July 28, 2008 in a proceeding pursuant to Family Court Act article 3. The order removed Theresa M. Girouard, Esq. as Law Guardian for the child on the ground of conflict of interest with petitioner.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

842

CA 08-02259

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

BENEFICIAL NEW YORK, INC., PLAINTIFF-APPELLANT,

V ORDER

JERRY HUNTER, DEFENDANT-RESPONDENT.

GIRVIN & FERLAZZO, P.C., ALBANY (CHRISTOPHER P. LANGLOIS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BILGORE, REICH, LEVINE & KANTOR, ROCHESTER (THEODORE S. KANTOR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered January 15, 2008 in an action for breach of contract. The order granted the motion of defendant to vacate a default 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: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

843

CA 08-01816

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

CANDACE SUNDBY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TERRY R. KAY AND JEAN S. KAY,
DEFENDANTS-RESPONDENTS.

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

PINNISI & ANDERSON, LLP, ITHACA (MICHAEL D. PINNISI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered November 7, 2007. The order, following a bifurcated trial, dismissed the first cause of action to the extent that it alleges interference with the right to use an easement along defendants' lake frontage for other than pedestrian traffic.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, to enjoin defendants from interfering with her right to cross defendants' land "by vehicle" pursuant to an easement. Plaintiff and defendants own adjoining lakefront property and, in the absence of the easement, plaintiff is unable to access by vehicle both the shoreline of her property and a cottage located there, based on the topography of the property. In 1987 the prior owner of defendants' property granted plaintiff's predecessor in title an easement "over the drive-way owned by [defendants' predecessor in title] and along the lake shore . . . for all ordinary purposes of ingress and egress," and also granted plaintiff's predecessor in title the right to park a vehicle on the servient premises "in an area to be agreed upon by the parties to this agreement." We conclude that the language of the easement is ambiguous with respect to whether it was intended to include vehicular use along the shoreline inasmuch as it is "reasonably susceptible of more than one interpretation" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573). We further conclude that Supreme Court's determination that the easement was not intended to include vehicular use along the shoreline is supported by a fair interpretation of the evidence (*see generally Treat v Wegmans Food Mkts., Inc.*, 46 AD3d 1403, 1404-1405). We have considered plaintiff's remaining contention and conclude that it is

without merit.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

844

TP 09-00216

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

IN THE MATTER OF CHRISTEN VIVIAN AND
JEAN-PIERRE VIVIAN, PETITIONERS,

V ORDER

GLADYS CARRION, COMMISSIONER, NEW YORK
STATE OFFICE OF CHILDREN AND FAMILY
SERVICES, AND ANTHONY J. RESTAINO,
COMMISSIONER, NIAGARA COUNTY DEPARTMENT
OF SOCIAL SERVICES, RESPONDENTS.

SCOTT A. STEPIEN, NIAGARA FALLS, FOR PETITIONERS.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR RESPONDENT GLADYS CARRION, COMMISSIONER, NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES.

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, Niagara County [Richard C. Kloch, Sr., A.J.], entered January 20, 2009) to review a determination of respondent Gladys Carrion, Commissioner, New York State Office of Children and Family Services. The determination denied the application of petitioners to amend an indicated report of child maltreatment to an unfounded report and to seal the amended report.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

847

CA 08-02391

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

CHERYL KALENDA AND MENYHERT KALENDA, JR.,
PLAINTIFFS-APPELLANTS,

V ORDER

MAR-WAL CONSTRUCTION CO., INC.,
DEFENDANT-RESPONDENT.

ROBERT H. PERK, BUFFALO, FOR PLAINTIFFS-APPELLANTS.

GOERGEN & MANSON, WILLIAMSVILLE (JOSEPH G. GOERGEN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered June 6, 2008 in a personal injury action. The order, among other things, granted defendant's motion for summary judgment dismissing the complaint.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

848

CA 08-02303

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

JOHN K. SABUNCU AND DEBBIE E. SABUNCU,
PLAINTIFFS-APPELLANTS,

V ORDER

THANEY & ASSOCIATES CPAS, P.C. AND GREGG
GENOVESE, C.P.A., DEFENDANTS-RESPONDENTS.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

RICOTTA & VISCO, ATTORNEYS & COUNSELORS AT LAW, BUFFALO (BRETT GLIOSCA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered June 17, 2008 in an action for accounting malpractice and fraud. The order granted the motion of defendants to dismiss the first, third, fourth and fifth causes of action and the claim for punitive damages.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

849

CA 08-01625

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

DEPEW COLLISION AND FRAME SERVICE, INC.,
PLAINTIFF-APPELLANT,

V ORDER

GURNEY, BECKER & BOURNE, INC. AND MAX BECKER,
DEFENDANTS-RESPONDENTS.

ANTHONY F. CERRONE, BUFFALO (RICHARD G. BERGER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FELDMAN, KIEFFER & HERMAN, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered April 14, 2008 in a negligence action. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

854

KA 07-02196

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID L. CHEAL, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (ESTHER COHEN LEE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (MATTHEW P. WORTH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered August 10, 2007. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class E felony, aggravated unlicensed operation of a motor vehicle in the first degree and reckless driving.

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, felony driving while intoxicated (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (i)]), defendant contends that County Court erred in allowing a police officer to testify with respect to the way in which his observation of nystagmus in defendant's right eye affected his opinion concerning defendant's intoxication. That contention is not preserved for our review (*see generally People v Hall*, 53 AD3d 1080, 1082, *lv denied* 11 NY3d 855), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). The sentence is not unduly harsh or severe.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

855

KA 08-01213

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER FARNSWORTH, DEFENDANT-APPELLANT.

SCHLATHER, GELDENHUYS, STUMBAR, SALK & PARKS, ITHACA (DAVID M. PARKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (DAVID V. SHAW OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Stephen R. Sirkin, J.), rendered May 30, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of stolen property in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of criminal possession of stolen property in the third degree (Penal Law § 165.50). Contrary to defendant's contention, the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Contrary to defendant's further contention, County Court's *Sandoval* ruling did not constitute an abuse of discretion. "The record establishes that the court properly balanced the probative value of [defendant's] prior convictions against the potential for undue prejudice" (*People v Montgomery*, 288 AD2d 909, 910, *lv denied* 97 NY2d 685; *see People v Hayes*, 97 NY2d 203, 207-208; *People v Walker*, 83 NY2d 455, 459; *People v Arguinzoni*, 48 AD3d 1239, 1240-1241, *lv denied* 10 NY3d 859), as well as the probative value of the facts underlying defendant's prior youthful offender adjudication (*see People v Greer*, 42 NY2d 170, 176; *People v Duffy*, 36 NY2d 258, 264, *mot to amend remittitur granted* 36 NY2d 857, 875, *cert denied* 423 US 861; *People v Colf*, 286 AD2d 888, 889, *lv denied* 97 NY2d 655).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

856

KA 08-01500

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WOODROW HOLMES, 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 Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered June 30, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that Supreme Court erred in refusing to suppress the tangible evidence seized from his person and statements that he made to police detectives after they stopped the vehicle in which he was a passenger. We reject that contention. The record of the suppression hearing supports the court's determination that the detectives stopped defendant's vehicle based on their observation of a traffic violation and that they questioned defendant after finding drugs in the vehicle. Contrary to defendant's contention, "the fact that [the detectives] also had other underlying reasons or motives [for stopping the vehicle] is immaterial" (*People v Douglas*, 42 AD3d 756, 757, *lv denied* 9 NY3d 922; *see People v Garcia*, 30 AD3d 833, 834*; see generally People v Robinson*, 97 NY2d 341, 348-350). Furthermore, the testimony of defendant at the suppression hearing that the detectives who stopped the vehicle did not observe a traffic violation merely presents an issue of credibility that the court was entitled to resolve in favor of the People (*see People v Hackett*, 49 AD3d 1285, *lv denied* 10 NY3d 864; *People v Johnson*, 286 AD2d 929, *lv denied* 97 NY2d 756).

Even assuming, arguendo, that defendant was illegally detained after the vehicle was stopped, we reject his contention that the court

erred in refusing to suppress the evidence in question as the fruit of that detention. In reviewing defendant's contention, "the dispositive inquiry is whether the challenged evidence is come at by the *exploitation* of that illegality so as to make it the *product* of that illegality" (*People v Richardson*, 9 AD3d 783, 789, *lv denied* 3 NY3d 680). "Under the circumstances of this case, we conclude that defendant's statements [and the tangible evidence seized from defendant's person] were not obtained by exploitation" of the allegedly illegal detention (*People v Powers*, 288 AD2d 861, 862, *lv denied* 97 NY2d 732).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

858

KA 06-00408

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DAVID A. STURGIS, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (ELIZABETH CLIFFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered December 14, 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.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

859

KA 08-01165

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STANLEY A. BROWN, DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (AARON D. CARR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered May 7, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted course of sexual conduct against a child in the first degree and attempted sodomy in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, attempted course of sexual conduct against a child in the first degree (Penal Law §§ 110.00, 130.75 [1] [a]), defendant contends that County Court erred in refusing to suppress his statement to the police on the ground that it was involuntary. We reject that contention. "[A] court's determination that [a] statement was voluntarily made 'is entitled to great deference and will not be disturbed where, as here, it is supported by the record' " (*People v Childres*, 60 AD3d 1278, 1278). To the extent that the further contention of defendant that he was denied effective assistance of counsel at the suppression hearing is not forfeited by the guilty plea (*see People v Petgen*, 55 NY2d 529, 534-535, *rearg denied* 57 NY2d 674; *People v Santos*, 37 AD3d 1141, *lv denied* 8 NY3d 950), it is lacking in merit (*see generally People v Ford*, 86 NY2d 397, 404).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

861

CAF 08-01152

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

IN THE MATTER OF MARLENE M. RUGGIERI,
PETITIONER-RESPONDENT,

V ORDER

SHIRLEY BRYAN, RESPONDENT-APPELLANT.

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

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

BARBARA E. MOSHER, LAW GUARDIAN, MANLIUS, FOR KAHLIL R.

Appeal from an order of the Family Court, Onondaga County (George M. Raus, Jr., R.), entered February 14, 2008 in a proceeding pursuant to Family Court Act article 6. The order granted the petition to modify a prior order of visitation.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

862

CAF 07-02301

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

IN THE MATTER OF GIOVANNI E., JR.

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

GIOVANNI E., SR., RESPONDENT-APPELLANT,
ET AL., RESPONDENT.

PETER J. DIGIORGIO, JR., UTICA, FOR RESPONDENT-APPELLANT.

CHESTER W. JASKOLKA, UTICA, FOR PETITIONER-RESPONDENT.

KRISTINE A. KIPERS, LAW GUARDIAN, NEW HARTFORD, FOR GIOVANNI E., JR.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered September 18, 2007 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, adjudged that respondent Giovanni E., Sr. neglected his child.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

872
CA 08-02395
PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

DENNIS R. CROMWELL AND BARBARA CROMWELL,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

KENNETH E. HESS AND DIANA L. HESS,
DEFENDANTS-RESPONDENTS-APPELLANTS.

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

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (WENDY A. SCOTT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered January 3, 2008 in a personal injury action. The order denied plaintiffs' motion for partial summary judgment and defendants' cross motion for summary judgment.

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

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Dennis R. Cromwell (plaintiff) when he fell from a ladder while attaching siding to rental property owned by defendants. Plaintiffs appeal and defendants cross-appeal from an order denying plaintiffs' motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) claim and denying defendants' cross motion for summary judgment dismissing the complaint. We affirm. To be entitled to the protection of Labor Law § 240 (1), a plaintiff must "demonstrate that he [or she] was both permitted or suffered to work on a building or structure and that he [or she] was hired by someone, be it [the] owner, contractor or their agent" (*Stringer v Musacchia*, 11 NY3d 212, 215 [internal quotation marks omitted]; *see Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970). It is well established that Labor Law § 240 (1) does not afford protection to volunteers (*see Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 577; *Whelen*, 47 NY2d 970; *Fuller v Spiesz*, 53 AD3d 1093, 1094), and here there is an issue of fact whether there was an agreement pursuant to which plaintiff was to perform a service in return for compensation, thus rendering him an employee rather than a volunteer (*see Stringer*, 11 NY3d at 215-216). Contrary to the further contention of defendants, Supreme Court properly denied those parts of their cross motion for summary judgment

dismissing the Labor Law § 200 claim and common-law negligence cause of action. Even assuming, arguendo, that defendants met their initial burden by establishing that they did not supervise or control plaintiff's work and that they lacked actual notice of the alleged dangerous condition, we conclude that they failed to establish that they lacked constructive notice of that alleged condition (*see generally Fuller*, 53 AD3d at 1095).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

873

KA 06-03241

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

NELSON HALL, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD 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 June 23, 2006. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class D felony.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

874

KA 08-00383

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM D. HARRIS, III, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Debra L. Givens, A.J.), rendered January 28, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [c]), defendant contends that County Court erred in failing to conduct an evidentiary hearing before denying his oral motion to withdraw his guilty plea. We reject that contention. "Only in the rare instance will a defendant be entitled to an evidentiary hearing [on such a motion] . . . The defendant should be afforded a reasonable opportunity to present his contentions and the court should be enabled to make an informed determination" (*People v Tinsley*, 35 NY2d 926, 927). Here, the court adjourned the sentencing proceedings several times and afforded defendant multiple opportunities to present his contentions to the court with respect to the motion. Those contentions, i.e., that defendant was denied effective assistance of counsel and that the plea was coerced by defense counsel's "stories," are belied by his statements during the plea colloquy (*see People v Farley*, 34 AD3d 1229, *lv denied* 8 NY3d 880).

Contrary to the further contention of defendant, he forfeited his right to be present at sentencing by willfully absenting himself from the courtroom "for the purpose of frustrating the sentencing process" (*People v Weinberg*, 183 AD2d 932, 935, *lv denied* 80 NY2d 977; *see People v Corley*, 67 NY2d 105, 109-110). Defendant failed to preserve for our review his contention concerning the order of protection (*see generally 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: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

875

KA 05-01531

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAVERNE SINGLETARY, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered June 23, 2005. The judgment convicted defendant, upon a jury verdict, of attempted burglary in the third degree, attempted assault in the third degree and criminal mischief in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, attempted burglary in the third degree (Penal Law §§ 110.00, 140.20), defendant contends that reversal is warranted based on County Court's mishandling of his complaints concerning his second attorney. We reject that contention. The record belies the contention of defendant that he requested new assigned counsel, and thus it cannot be said that the court erred in failing to conduct an inquiry to determine whether good cause was shown to substitute counsel (*see People v La Bar*, 16 AD3d 1084, *lv denied* 5 NY3d 764; *cf. People v Sides*, 75 NY2d 822, 824-825). Even assuming, arguendo, that defendant's complaints " 'suggest[ed] a serious possibility of good cause for substitution' requiring a need for further inquiry" (*People v Reese*, 23 AD3d 1034, 1035, *lv denied* 6 NY3d 779), we conclude that the court afforded defendant the opportunity to express his objections concerning his second attorney, and the court thereafter " 'reasonably concluded that defendant's . . . objections had no merit or substance' " (*id*. at 1035; *see People v Linares*, 2 NY3d 507, 511). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

876

KA 06-00410

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER S. SMITH, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM CLAUSS 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 December 14, 2005. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the third degree (Penal Law § 265.02 [former (4)]), defendant contends that County Court erred in refusing to charge the defense of temporary innocent possession of a weapon.

We reject that contention. The evidence presented at trial established that, rather than relinquishing the gun to the police, defendant fled on foot and threw the weapon onto a roof. Defendant's conduct was "utterly at odds with any claim of innocent possession" (*People v Williams*, 50 NY2d 1043, 1045; *see People v McCoy*, 46 AD3d 1348, 1349-1350, *lv denied* 10 NY3d 813) and, thus, " 'there was no reasonable view of the evidence upon which the jury could have found that the defendant's possession [of the weapon] was innocent' " (*McCoy*, 46 AD3d at 1349-1350).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

877
KA 08-00333
PRESENT: MARTOCHE, J.P., SMITH, FAHEY, CARNI, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES C. WOODARD, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (MICHELLE H. CROWLEY OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Ontario County Court (William F. Kocher, J.), entered January 25, 2008. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). The total risk factor score on the risk factor instrument prepared by the Board of Examiners of Sex Offenders (Board) resulted in the presumptive classification of defendant as a level two risk, but the Board recommended a downward departure. County Court, however, was not bound by the Board's recommendation and, in the proper exercise of its discretion, the court determined defendant's risk level based upon the record before it (*see People v Charache*, 32 AD3d 1345, *affd* 9 NY3d 829; *People v Walker*, 47 AD3d 692, 693-694). "The record supports the court's determination that there was no 'mitigating factor of a kind, or to a degree, not otherwise adequately taken into account by the guidelines,' and thus that a departure from the presumptive risk level was not warranted" (*Charache*, 32 AD3d 1345).

We reject defendant's contention that the assessment of 15 points for drug or alcohol abuse is not supported by the requisite clear and convincing evidence (*see generally* Correction Law § 168-n [3]). At the SORA hearing, defendant admitted that he had a history of drug and alcohol abuse prior to the current offense and that, during his incarceration, there was a determination against him following a Tier III hearing resulting from his possession of marihuana (*see generally People v MacDowall*, 59 AD3d 763). The court was entitled to reject the further testimony of defendant that he had a prolonged period of

abstinence from alcohol or drugs inasmuch as defendant's testimony was contradicted by the determination following the Tier III hearing and the statements of defendant regarding his alcohol use set forth in the presentence report (*see People v Longtin*, 54 AD3d 1110, 1111, *lv denied* 11 NY3d 714).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

878

KA 08-00836

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LUIS A. SANTIAGO, DEFENDANT-APPELLANT.

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

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH (MICHAEL D. MCCARTNEY OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Steuben County Court (Marianne Furfure, J.), entered March 4, 2008. The order directed defendant to pay restitution.

It is hereby ORDERED that said appeal is unanimously dismissed (*see* CPL 450.10; *People v Fricchione*, 43 AD3d 410, 411).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

879

KA 08-00433

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY ALLAN WATKINS, DEFENDANT-APPELLANT.

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

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (DAVID V. SHAW OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Stephen R. Sirkin, J.), rendered October 19, 2007. The judgment convicted defendant, after a nonjury trial, of assault in the third degree (two counts), assault in the second degree, and criminal possession of a weapon in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of assault in the third degree under counts one and two of the indictment and dismissing those counts of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of two counts of assault in the third degree (Penal Law § 120.00 [1]) and one count each of assault in the second degree (§ 120.05 [2]) and criminal possession of a weapon in the fourth degree (§ 265.01 [2]). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The testimony of the People's witnesses was not incredible as a matter of law (*see People v Ptak*, 37 AD3d 1081, *lv denied* 8 NY3d 949), and we see no reason to disturb County Court's resolution of credibility issues (*see People v Burroughs*, 57 AD3d 1459, *lv denied* 12 NY3d 756; *People v Reddick*, 43 AD3d 1334, 1335-1336, *lv denied* 10 NY3d 815). Although we agree with defendant that the court erred in precluding a defense witness from testifying that he heard the victim threaten defendant (*see People v Dixon*, 138 AD2d 929; *see generally People v Petty*, 7 NY3d 277, 285; *People v Miller*, 39 NY2d 543, 549), we nevertheless conclude that the error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242). The proof of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the error

(*see People v Bruner*, 222 AD2d 738, 739, *lv denied* 88 NY2d 981; *see generally Crimmins*, 36 NY2d at 241-242). We note in particular that defendant presented extensive testimony in support of his justification defense and thus that he was afforded "a meaningful opportunity to present a complete defense" (*People v Ramsey*, 59 AD3d 1046, 1048 [internal quotation marks omitted]; *see People v Starostin*, 265 AD2d 267, *lv denied* 94 NY2d 885; *cf. People v Loria*, 190 AD2d 1006).

As the People correctly concede, those parts of the judgment convicting defendant of assault in the third degree under counts one and two of the indictment must be reversed, and those counts dismissed, because assault in the third degree is a lesser included offense of assault in the second degree (*see People v Romain*, 5 AD3d 611, *lv denied* 2 NY3d 805; *People v Jones*, 277 AD2d 329, *lv denied* 96 NY2d 784; *see generally* CPL 300.40 [3] [b]). We therefore modify the judgment accordingly.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

880

KA 07-01966

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM T. LOMACK, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered February 24, 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: On appeal from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [2]), defendant contends that his right to due process was violated by the failure of the police to record his interrogation. Defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]) and, in any event, it lacks merit. "[T]his Court has repeatedly determined that the failure to record a defendant's interrogation electronically does not constitute a denial of due process" (*People v Malave*, 52 AD3d 1313, 1315, *lv denied* 11 NY3d 790; *see e.g. People v Mendez*, 50 AD3d 1526, *lv denied* 11 NY3d 739; *People v Williams*, 39 AD3d 1200, *lv denied* 9 NY3d 853).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

882

KA 07-02063

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND E. JOSEPH, III, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT R. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered July 9, 2007. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the third degree (Penal Law § 140.20). The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish that defendant entered the building with the intent to commit a crime therein (*see People v Gates*, 170 AD2d 971, *lv denied* 78 NY2d 922). Defendant's further challenges to the legal sufficiency of the evidence are not preserved for our review (*see People v Gray*, 86 NY2d 10, 19). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant failed to preserve for our review his contentions that County Court's *Sandoval* ruling constituted an abuse of discretion (*see People v Robles*, 38 AD3d 1294, 1295, *lv denied* 8 NY3d 990), and that he was denied a fair trial by the prosecutor's allegedly improper remarks on summation (*see People v Searles*, 28 AD3d 1205, *lv denied* 7 NY3d 817). 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]). Finally, the sentence is not unduly harsh or severe.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

883

KA 07-02578

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND E. JOSEPH, III, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT R. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), entered October 26, 2007. The order directed defendant to pay restitution.

It is hereby ORDERED that the order so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the amount of restitution ordered and as modified the order is affirmed, and the matter is remitted to Genesee County Court for a new hearing in accordance with the following Memorandum: On appeal from an order directing him to pay restitution in the amount of $551.82 plus a 5% surcharge, defendant contends that County Court erred in delegating its responsibility to conduct the restitution hearing to its court attorney, who prepared a preliminary fact-finding report that was adopted by the court. We agree, for the same reason as that set forth in our decision in *People v Bunnell* (59 AD3d 942, *amended on rearg* ___ AD3d ___ [June 5, 2009]). We note that, although defendant failed to preserve his contention for our review (*see* CPL 470.05 [2]), we exercise our power to review his contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We therefore modify the order 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: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

884

KA 07-00142

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL SHOAF, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered January 3, 2006. 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: On appeal from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [1] [a]), defendant contends that he should have been afforded youthful offender status. Defendant failed to preserve that contention for our review inasmuch as he did not request a determination concerning youthful offender treatment at the time of the plea or at sentencing (*see People v Hoag*, 23 AD3d 1031, *lv denied* 6 NY3d 814). In any event, the record establishes that defendant "made a voluntary choice to accept a plea bargain containing a provision specifically precluding" youthful offender treatment (*People v Sharlow*, 12 AD3d 724, 726, *lv denied* 4 NY3d 748). The sentence is not unduly harsh or severe.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

885

CAF 08-01157

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

IN THE MATTER OF JOSEPH R. MCCOOEY,
PETITIONER-APPELLANT,

V ORDER

GAIL L. ALENIKOV, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

ABBIE GOLDBAS, UTICA, FOR PETITIONER-APPELLANT.

TRACY L. PUGLIESE, CLINTON, FOR RESPONDENT-RESPONDENT.

JOHN G. KOSLOSKY, LAW GUARDIAN, UTICA, FOR KATHRYN M., JAMES M. AND JACOB M.

Appeal from an order of the Family Court, Herkimer County (Anthony J. Garramone, J.H.O.), entered March 12, 2008 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, denied in part the violation 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, 985).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

886

CAF 08-01158

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

IN THE MATTER OF JOSEPH R. MCCOOEY,
PETITIONER-APPELLANT,

V ORDER

GAIL L. ALENIKOV, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

ABBIE GOLDBAS, UTICA, FOR PETITIONER-APPELLANT.

TRACY L. PUGLIESE, CLINTON, FOR RESPONDENT-RESPONDENT.

JOHN G. KOSLOSKY, LAW GUARDIAN, UTICA, FOR KATHRYN M., JAMES M. AND JACOB M.

Appeal from an order of the Family Court, Herkimer County (Anthony J. Garramone, J.H.O.), entered March 13, 2008 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition to modify a prior order of custody and visitation.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

887

CA 09-00226

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

TRACY L. WILLIAMS, PLAINTIFF-RESPONDENT,

V ORDER

MARTIN JOHNSON, DEFENDANT-APPELLANT.

MARTIN JOHNSON, DEFENDANT-APPELLANT PRO SE.

Appeal from an order of the Monroe County Court (John J. Connell, J.), entered September 25, 2008. The order affirmed a judgment of the Rochester City Court (John E. Elliott, J.), entered May 9, 2008 in favor of plaintiff in a small claims action.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

889

CA 09-00037

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

COTY TAYLOR, PLAINTIFF-APPELLANT,

V ORDER

MARY S. REEVES, DEFENDANT-RESPONDENT.

THE KAMMHOLZ LAW FIRM, FAIRPORT (BRADLEY P. KAMMHOLZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GALLO & IACOVANGELO, LLP, ROCHESTER (SEEMA ALI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered March 20, 2008 in a personal injury action. The order, insofar as appealed from, granted in part the motion of defendant for summary judgment.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

891

CA 06-03320

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

IN THE MATTER OF CHRISTOPHER SHAPARD,
PETITIONER-APPELLANT,

V ORDER

ANTHONY ZON, SUPERINTENDENT, WENDE
CORRECTIONAL FACILITY, AND GLENN S. GOORD,
COMMISSIONER, NEW YORK STATE DEPARTMENT
OF CORRECTIONAL SERVICES,
RESPONDENTS-RESPONDENTS.

CHRISTOPHER SHAPARD, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Shirley Troutman, A.J.), entered August 25, 2006 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

894

CA 09-00036

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

ALEXANDER I. NWORA AND AMY NWORA,
PLAINTIFFS-APPELLANTS,

V ORDER

CITY OF BUFFALO, CITY OF BUFFALO POLICE DEPARTMENT, SALVATORE VALVO, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES AS DETECTIVE AND SECRETARY OF THE SEX OFFENSE SQUAD OF CITY OF BUFFALO POLICE DEPARTMENT,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

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

ALISA A. LUKASIEWICZ, CORPORATION COUNSEL, BUFFALO (TIMOTHY A. BALL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered March 28, 2008 in an action for malicious prosecution and false arrest. The order, insofar as appealed from, granted the motion of defendants City of Buffalo, City of Buffalo Police Department and Salvatore Valvo, in his individual and official capacities as detective and secretary of the Sex Offense Squad of City of Buffalo Police Department, 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: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

895

CAF 08-01304

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

IN THE MATTER OF CHRISTOPHER J., III AND
RICHARD J.

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

CHRISTOPHER J., RESPONDENT-APPELLANT,
ET AL., RESPONDENT.

JOHN M. MURPHY, JR., PHOENIX, FOR RESPONDENT-APPELLANT.

CARACCIOLI & NELSON, PLLC, MEXICO (KATHRYN G. WOLFE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oswego County (David J. Roman, J.), entered May 16, 2008 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, revoked a suspended judgment and terminated the parental rights of respondent Christopher J. with respect to two of his children.

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

Memorandum: Respondent father appeals from an order revoking a suspended judgment and terminating his parental rights with respect to two of his children. Contrary to the contention of the father, Family Court properly determined by a preponderance of the evidence that he violated several of the terms of the suspended judgment and that terminating his parental rights was in the best interests of the children (*see Matter of Christopher J.*, 60 AD3d 1402; *Matter of Ronald O.*, 43 AD3d 1351; *Matter of Aaron S.*, 15 AD3d 585, 586). The father "did not ask the court to consider post-termination contact with the children in question or to conduct a hearing on that issue, and we conclude in any event that [he] 'failed to establish that such contact would be in the best interests of the children' " (*Christopher J.*, 60 AD3d at 1403). We have considered the father's remaining contentions and conclude that they are without merit.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

897
CAF 08-01179
PRESENT: CENTRA, J.P., PERADOTTO, GREEN, PINE, AND GORSKI, JJ.

IN THE MATTER OF JUANITA AIKENS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH MARK NELL, RESPONDENT-APPELLANT.

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

SUSAN GRAY JONES, LAW GUARDIAN, CANANDAIGUA, FOR ANGELA M.S.

Appeal from an order of the Family Court, Ontario County (Craig J. Doran, J.), entered May 21, 2008 in a proceeding pursuant to Family Court Act article 4. The order denied respondent's objections to the order of the Support Magistrate.

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

Memorandum: Petitioner mother commenced this proceeding seeking a determination that respondent is the father of her then-12-year-old child and seeking an award of child support. Respondent appeals from an order denying his objections to the order of the Support Magistrate directing him to pay child support following the entry of an order of filiation. Contrary to the contention of respondent, Family Court properly determined that he may not invoke the doctrine of equitable estoppel. "[W]hile the doctrine of equitable estoppel is applicable in paternity proceedings where it is invoked to further the best interests of the child . . ., it generally is not available to a party seeking to disavow the allegation of parenthood for the purpose of avoiding child support" (*Matter of Dowed v Munna*, 306 AD2d 278, 279; *see Matter of Ruby M.M. v Moses K.*, 18 AD3d 471, 472). We reject the further contentions of respondent that he was denied both the right to counsel and to the effective assistance of counsel. The record establishes that, at the initial appearance on the petition, the Support Magistrate advised respondent of his right to counsel and that he elected to proceed pro se (*see Matter of Falcon v Accardi*, 193 AD2d 1063, 1064; *cf. Matter of Allegany County Dept. of Social Servs. v Thomas T.*, 273 AD2d 916, 917). Although the Support Magistrate failed to advise respondent that he had a right to have counsel assigned if he was financially unable to retain counsel (*see* Family Ct Act § 262 [a]), we conclude that respondent waived his right to appellate review of that omission by failing to raise it in his written objections to

the order of the Support Magistrate (*see* § 439 [e]; *Matter of Meriwether v Howe*, 286 AD2d 832, 833, *lv denied* 97 NY2d 609; *cf. Allegany County Dept. of Social Servs*., 273 AD2d at 917). Finally, we reject the contention of respondent that he was denied effective assistance of counsel.

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

898
CA 08-02087
PRESENT: CENTRA, J.P., PERADOTTO, PINE, AND GORSKI, JJ.

DINO DICIENZO AND INTERTRUST DEVELOPMENT, INC.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NIAGARA FALLS URBAN RENEWAL AGENCY,
DEFENDANT-RESPONDENT.

THE NIAGARA VENTURE, APPELLANT.
(APPEAL NO. 1.)

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (JOHN P. BARTOLOMEI OF COUNSEL), FOR APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (CYNTHIA L. THOMPSON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

THOMAS M. O'DONNELL, CORPORATION COUNSEL, NIAGARA FALLS (RICHARD ZUCCO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered June 23, 2008. The order denied the motion of The Niagara Venture for leave to reargue or renew the denial of its motion to intervene.

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

Memorandum: The Niagara Venture (NV) appeals from three orders denying its motions for "reargument and renewal" of prior motions seeking to intervene in action No. 1 and to consolidate action Nos. 1 and 2. We conclude that Supreme Court properly deemed the current motions only as motions for leave to reargue. NV failed to establish that the alleged new facts could not have been presented on the original motions (*see generally* CPLR 2221 [e] [3]; *Welch Foods v Wilson*, 247 AD2d 830). "[R]enewal is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Welch Foods*, 247 AD2d at 830 [internal quotation marks omitted]; *see Kahn v Levy*, 52 AD3d 928, 930), and the motions at issue on these appeals are based on facts that could have, with due diligence, been submitted in support of the initial motions (*see Salgado v Ring*, 21 AD3d 363; *Empire Ins. Co. v Food City*, 167 AD2d 983). No appeal lies from the denial of a motion for leave to reargue (*see Hale v Wilmorite, Inc.*, 35 AD3d 1251; *Empire Ins. Co.*,

167 AD2d 983).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

899

CA 08-02164

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

DINO DICIENZO AND INTERTRUST DEVELOPMENT, INC.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NIAGARA FALLS URBAN RENEWAL AGENCY,
DEFENDANT-RESPONDENT.

THE NIAGARA VENTURE, APPELLANT.
(APPEAL NO. 2.)

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (JOHN P. BARTOLOMEI OF COUNSEL), FOR APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (CYNTHIA L. THOMPSON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

THOMAS M. O'DONNELL, CORPORATION COUNSEL, NIAGARA FALLS (RICHARD ZUCCO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered June 23, 2008. The order denied the motion of The Niagara Venture for leave to reargue or renew the denial of its motion to intervene.

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

Same Memorandum as in *DiCienzo v Niagara Falls Urban Renewal Agency* ([appeal No. 1] ___ AD3d ___ [June 5, 2009]).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

900

CA 08-02086

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

THE NIAGARA VENTURE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NIAGARA FALLS URBAN RENEWAL AGENCY, CITY OF NIAGARA FALLS, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(ACTION NO. 1.)

DINO DICIENZO AND INTERTRUST DEVELOPMENT, INC., PLAINTIFFS-RESPONDENTS,

V

NIAGARA FALLS URBAN RENEWAL AGENCY, DEFENDANT-RESPONDENT.
(ACTION NO. 2.)
(APPEAL NO. 3.)

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (JOHN P. BARTOLOMEI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THOMAS M. O'DONNELL, CORPORATION COUNSEL, NIAGARA FALLS (RICHARD ZUCCO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

PHILLIPS LYTLE LLP, BUFFALO (CYNTHIA L. THOMPSON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered June 23, 2008. The order denied the motion of The Niagara Venture for leave to reargue or renew the denial of its motion to consolidate action Nos. 1 and 2.

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

Same Memorandum as in *DiCienzo v Niagara Falls Urban Renewal Agency* ([appeal No. 1] ___ AD3d ___ [June 5, 2009]).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

901

CA 09-00146

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

KENNETH S. COHEN, PLAINTIFF-RESPONDENT,

V ORDER

AMY J. COHEN, DEFENDANT-APPELLANT.

ARTHUR J. RUMIZEN, BUFFALO, FOR DEFENDANT-APPELLANT.

KEITH B. SCHULEFAND, WILLIAMSVILLE (RANDY S. MARGULIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered March 31, 2008. The order, among other things, determined plaintiff's child support obligation and share of the education costs for the parties' daughter.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

902

CA 09-00106

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

ALLYSON N. DANIELLO, PLAINTIFF-APPELLANT,

V ORDER

JUSTIN J. POWELL AND THOMAS HARE, JR.,
DEFENDANTS-RESPONDENTS.

BRINDISI, MURAD, BRINDISI, PEARLMAN, JULIAN & PERTZ, LLP, UTICA (ANTHONY J. BRINDISI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered May 6, 2008 in a personal injury action. The order granted the motion of defendants for summary judgment and dismissed the complaint.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on April 6, 2009,

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

903

CA 08-02425

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

MARK REAGAN, PLAINTIFF-APPELLANT,

V ORDER

VILLAGE OF NORTH SYRACUSE, VILLAGE OF NORTH SYRACUSE POLICE DEPARTMENT, AND DAVID E. WILKINSON, INDIVIDUALLY AND AS CHIEF OF POLICE, DEFENDANTS-RESPONDENTS.

GEORGE S. MEHALLOW, NORTH SYRACUSE, FOR PLAINTIFF-APPELLANT.

THE WLADIS LAW FIRM, P.C., DEWITT (HEATHER M. COLE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered February 8, 2008 in a breach of contract action. The judgment dismissed the complaint after a nonjury trial.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

904

CA 08-02604

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

RONALD SPANOS AND MARIANNE SPANOS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MICHAEL R. FANTO AND MICHAEL FANTO,
DEFENDANTS-APPELLANTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SEGAR & SCIORTINO, ROCHESTER (STEPHEN A. SEGAR OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered August 8, 2008 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 reversed on the law without costs, the motion is granted and the complaint is dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Ronald Spanos (plaintiff) when he was struck by a vehicle owned by one defendant and operated by the other defendant. Supreme Court erred in denying defendants' motion seeking summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury in the accident (*see* Insurance Law § 5102 [d]). Defendants met their initial burden by submitting medical records and reports constituting "persuasive evidence that plaintiff's alleged pain and injuries were related to . . . preexisting condition[s]" (*Pommells v Perez*, 4 NY3d 566, 580; *see Valentin v Pomilla*, 59 AD3d 184, 186; *Clark v Perry*, 21 AD3d 1373, 1374), and plaintiffs failed to raise a triable issue of fact whether plaintiff's alleged pain and injuries were causally related to the subject accident rather than those preexisting conditions (*see Valentin*, 59 AD3d at 186; *Coston v McGray*, 49 AD3d 934, 935; *Anania v Verdgeline*, 45 AD3d 1473). The conclusory statement of the examining physician for defendants that plaintiff's complaints of "right hip and leg pain with minimal complaints of low back pain . . . are causally related to [the accident]" is insufficient to raise a triable issue of fact, particularly in view of the further statement of that physician that he found no objective evidence that plaintiff sustained an injury in the accident (*see Dantini v Cuffie*, 59 AD3d 490, 491; *Eastman v*

Holland, 19 AD3d 444). Finally, we note that, although plaintiffs are correct that they generally would be entitled to recover for economic loss in excess of basic economic loss without proof of serious injury (*see generally Colvin v Slawoniewski*, 15 AD3d 900), they made no claim for such loss in this case (*cf. Barnes v Kociszewski*, 4 AD3d 824, 825).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

906

CA 08-01745

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

HYDI TORRES, AS PARENT AND NATURAL GUARDIAN OF
ALEXIS CRUZ, PLAINTIFF-RESPONDENT,

V ORDER

LOCKPORT HOUSING AUTHORITY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

SLIWA & LANE, BUFFALO (MICHAEL T. COUTU OF COUNSEL), FOR DEFENDANT-APPELLANT.

NICHOLAS, PEROT, SMITH, BERNHARDT & ZOSH, P.C., AKRON (JASON R. JURON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered June 16, 2008 in a personal injury action. The order, insofar as appealed from, denied those parts of the motion of defendant to set aside the jury verdict on liability and to grant judgment notwithstanding the verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see generally Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 137).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

907

CA 08-01853

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

HYDI TORRES, AS PARENT AND NATURAL GUARDIAN OF
ALEXIS CRUZ, PLAINTIFF-RESPONDENT,

V ORDER

LOCKPORT HOUSING AUTHORITY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

SLIWA & LANE, BUFFALO (MICHAEL T. COUTU OF COUNSEL), FOR DEFENDANT-APPELLANT.

NICHOLAS, PEROT, SMITH, BERNHARDT & ZOSH, P.C., AKRON (JASON R. JURON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Frank Caruso, J.), entered August 21, 2008 in a personal injury action. The judgment awarded plaintiff money damages upon a jury verdict.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

908

CA 08-01854

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

HYDI TORRES, AS PARENT AND NATURAL GUARDIAN OF
ALEXIS CRUZ, PLAINTIFF-RESPONDENT,

V ORDER

LOCKPORT HOUSING AUTHORITY, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

SLIWA & LANE, BUFFALO (MICHAEL T. COUTU OF COUNSEL), FOR DEFENDANT-APPELLANT.

NICHOLAS, PEROT, SMITH, BERNHARDT & ZOSH, P.C., AKRON (JASON R. JURON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered August 26, 2008 in a personal injury action. The order denied the motion of defendant to set aside the jury verdict and to grant a new trial.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see generally Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 137).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

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

916
CAF 08-01777
PRESENT: CENTRA, J.P., PERADOTTO, GREEN, PINE, AND GORSKI, JJ.

IN THE MATTER OF THOMAS M.F.,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

LORI A.A.,
RESPONDENT-APPELLANT-RESPONDENT.

IN THE MATTER OF LORI A.A.,
PETITIONER-APPELLANT-RESPONDENT,

V

THOMAS M.F.,
RESPONDENT-RESPONDENT-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (KATHRYN B. FRIEDMAN OF COUNSEL), FOR RESPONDENT-APPELLANT-RESPONDENT AND PETITIONER-APPELLANT-RESPONDENT.

HOGAN WILLIG, AMHERST (ELIZABETH M. DIPIRRO OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT AND RESPONDENT-RESPONDENT-APPELLANT.

CARLA E. HIGGINS, LAW GUARDIAN, BUFFALO, FOR MICHAEL F. AND JENNA F.

Appeal and cross appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered May 1, 2008 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the parties' children to petitioner-respondent.

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

Memorandum: Respondent-petitioner mother appeals and petitioner-respondent father cross-appeals from an order that, inter alia, granted sole custody of the parties' two children to the father and granted unsupervised visitation to the mother. The mother failed to preserve for our review her contention that Family Court erred in admitting hearsay evidence (*see generally Matter of Peter S. v Cheryl A.S.*, 190 AD2d 1038) and, in any event, that contention is without merit. "It is well settled that there is 'an exception to the hearsay rule in custody cases involving allegations of abuse and neglect of a child, based on the Legislature's intent to protect children from

abuse and neglect as evidenced in Family [Court] Act § 1046 (a) (vi)' . . . where, as here, the statements are corroborated" (*Matter of Mateo v Tuttle*, 26 AD3d 731, 732; *see Matter of Stacey L.B. v Kimberly R.L.*, 12 AD3d 1124, 1125, *lv denied* 4 NY3d 704). The father presented medical evidence corroborating the hearsay evidence with respect to an incident in December 2006 in which his daughter was allegedly sexually abused by the mother's former boyfriend, and he presented testimony that the mother's boyfriend was "deceptive" when questioned by the police concerning the incident, also thereby corroborating the hearsay evidence concerning the December 2006 incident (*see generally Matter of Cobane v Cobane*, 57 AD3d 1320, 1321, *lv denied* 12 NY3d 706).

Contrary to the further contention of the mother, the court did not abuse its discretion in precluding her from offering allegedly corroborating testimony concerning an incident in September 2007 in which her daughter was allegedly sexually abused by the father's girlfriend. The court properly limited the testimony of the mother's neighbor with respect to that incident because, although the parties' daughter purportedly repeated the accusations to the neighbor that she had previously made to the mother, "the mere repetition of . . . accusation[s] by a child is not sufficient to corroborate his or her prior statement" (*Matter of Jared XX.*, 276 AD2d 980, 981; *see Matter of Peter G.*, 6 AD3d 201, 204, *appeal dismissed* 3 NY3d 655).

Finally, we reject the contention of the father on his cross appeal that the court abused its discretion in determining "that the exceedingly restrictive remedy of supervised visitation" with the mother was not in the children's best interests (*Ulmer v Ulmer*, 254 AD2d 541, 542).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

917

CA 08-00059

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

LESTER A. JOHNS, PLAINTIFF-RESPONDENT,

V ORDER

LESTER JOHNS, INC., MCN CONSTRUCTION, INC., PHILIP E. MCNULTY, INDIVIDUALLY, AND FRANCES MCNULTY, INDIVIDUALLY, DEFENDANTS-APPELLANTS.

IN THE MATTER OF LESTER A. JOHNS, PETITIONER-RESPONDENT,

V

LESTER JOHNS, INC., MCN CONSTRUCTION, INC., PHILIP E. MCNULTY, INDIVIDUALLY, FRANCES MCNULTY, INDIVIDUALLY, RESPONDENTS-APPELLANTS, ET AL., RESPONDENTS.
(APPEAL NO. 1.)

DADD AND NELSON PLLC, ATTICA (DAVID H. NELSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND RESPONDENTS-APPELLANTS.

GLENN R. MORTON, BATAVIA, FOR PLAINTIFF-RESPONDENT AND PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered April 19, 2007. The order awarded judgment in favor of plaintiff-petitioner on certain causes of action after a nonjury trial.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

918

CA 08-00552

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

LESTER A. JOHNS, PLAINTIFF-RESPONDENT,

V ORDER

LESTER JOHNS, INC., MCN CONSTRUCTION, INC., PHILIP E. MCNULTY, INDIVIDUALLY, AND FRANCES MCNULTY, INDIVIDUALLY, DEFENDANTS-APPELLANTS.

IN THE MATTER OF LESTER A. JOHNS, PETITIONER-RESPONDENT-APPELLANT,

V

LESTER JOHNS, INC., MCN CONSTRUCTION, INC., PHILIP E. MCNULTY, INDIVIDUALLY, FRANCES MCNULTY, INDIVIDUALLY, RESPONDENTS-APPELLANTS-RESPONDENTS, ET AL., RESPONDENTS.
(APPEAL NO. 2.)

DADD AND NELSON PLLC, ATTICA (DAVID H. NELSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND RESPONDENTS-APPELLANTS-RESPONDENTS.

GLENN R. MORTON, BATAVIA, FOR PLAINTIFF-RESPONDENT AND PETITIONER-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered February 13, 2008. The order, inter alia, awarded prejudgment interest to plaintiff-petitioner.

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

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court

MOTION NO. (1197/02) KA 00-02618. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILMY GARRIDO-VALDEZ, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: HURLBUTT, J.P., CENTRA, CARNI, GREEN, AND GORSKI, JJ. (Filed June 5, 2009.)

MOTION NO. (1316/06) KA 04-02937. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CONSTANTINE L. JACKSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: HURLBUTT, J.P., SMITH, CENTRA, GREEN, AND PINE, JJ. (Filed June 5, 2009.)

MOTION NO. (1437/06) OP 06-01392. -- IN THE MATTER OF SEPHORA K. DAVIS, PETITIONER, V JOAN S. KOHOUT, AS ACTING LIVINGSTON COUNTY COURT JUDGE, AND THOMAS E. MORAN, AS LIVINGSTON COUNTY DISTRICT ATTORNEY, RESPONDENTS. -- Motion for writ of error coram nobis and for other relief denied. PRESENT: HURLBUTT, J.P., SMITH, CENTRA, AND PINE, JJ. (Filed June 5, 2009.)

MOTION NO. (1124/07) KA 03-01578. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RAHAD ROSS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, AND PINE, JJ. (Filed June 5, 2009.)

MOTION NO. (542/08) KA 04-01460. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANGEL CARRASQUILLO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: MARTOCHE, J.P., CENTRA, PERADOTTO, AND GREEN, JJ. (Filed June 5, 2009.)

MOTION NO. (1419/08) CA 08-01064. -- ROBERT W. BLOOM, JR. AND CHARMAYNE R. BLOOM, PLAINTIFFS-APPELLANTS, V RENE F. HENSEL, ESQ., DEFENDANT, AND THOMAS D. CALANDRA, ESQ., DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, FAHEY, AND PERADOTTO, JJ. (Filed June 5, 2009.)

MOTION NO. (1489/08) CA 08-00507. -- BETSY ROSS REHABILITATION CENTER, INC., PLAINTIFF-RESPONDENT, V 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. -- Motion for clarification granted to the extent that the memorandum and order entered February 6, 2009 is amended by adding “with interest at the rate of 9% per annum commencing February 6, 2009” after the dollar amount in the ordering paragraph and after the dollar amount in the penultimate sentence of the memorandum, and the motion is otherwise denied. PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ. (Filed June 5, 2009.)

MOTION NO. (1560/08) KA 03-01576. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSE A. ROMAN, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for reargument denied. PRESENT: CENTRA, J.P., PERADOTTO, GREEN,

AND PINE, JJ. (Filed June 5, 2009.)

MOTION NO. (1561/08) KA 03-01577. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSE A. ROMAN, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ. (Filed June 5, 2009.)

MOTION NO. (1681/08) CA 08-01118. -- ARDA MAKARCHUK, PLAINTIFF-APPELLANT, V EDWARD MAKARCHUK, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, PERADOTTO, AND PINE, JJ. (Filed June 5, 2009.)

MOTION NO. (53/09) KA 07-01035. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALEXIS OBERLANDER, DEFENDANT-APPELLANT. -- Motion for reargument and reconsideration denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, AND GORSKI, JJ. (Filed June 5, 2009.)

MOTION NO. (55/09) KA 06-03548. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V GERRI L. BUNNELL, DEFENDANT-APPELLANT. -- Motion for reargument and other relief granted to the extent that, upon reargument, the memorandum and order entered February 6, 2009 is amended by adding the following sentences before the last sentence of the memorandum: “It cannot be said that the procedure utilized by the court is authorized by *People v Fuller* (57 NY2d 152). Indeed, the court attorney did not act merely as a

'preliminary fact finder' (*id.* at 158) but, rather, he conducted an adversarial hearing and made credibility determinations, thereby assuming a role specifically limited to the authority of the court (*see* Penal Law § 60.27 [2]; *Fuller*, 57 NY2d at 158-159)." PRESENT: SMITH, J.P., CENTRA, PERADOTTO, AND GORSKI, JJ. (Filed June 5, 2009.)

MOTION NO. (124/09) KA 06-03044. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CONSTANTINE JACKSON, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, PERADOTTO, AND PINE, JJ. (Filed June 5, 2009.)

MOTION NO. (124/09) KA 06-03044. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CONSTANTINE JACKSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: HURLBUTT, J.P., SMITH, CENTRA, GREEN, AND PINE, JJ. (Filed June 5, 2009.)

MOTION NO. (154/09) CA 08-00707. -- IN THE MATTER OF LARRY BALL, MICHAEL CULKIN, THOMAS P. WEIGAND, PAUL R. THOMPSON, AND DAVID J. WALTERS, PETITIONERS-APPELLANTS-RESPONDENTS, V CITY OF SYRACUSE, ITS OFFICERS, AGENTS, SERVANTS, REPRESENTATIVES, OFFICIALS, AND/OR EMPLOYEES, RESPONDENTS-RESPONDENTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals and cross motion for reargument denied. PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed June 5, 2009.)

MOTION NO. (246/09) CAF 08-00290. -- IN THE MATTER OF SAMANTHA K. ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; KENNETH K., RESPONDENT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ. (Filed June 5, 2009.)

MOTION NO. (282/09) TP 08-01569. -- IN THE MATTER OF JOHN NEVAREZ, PETITIONER, V CARL B. HUNT, SUPERINTENDENT, GROVELAND CORRECTIONAL FACILITY, RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ. (Filed June 5, 2009.)

MOTION NOS. (292/09 AND 297/09) CA 08-02202. -- IN THE MATTER OF COUNTY OF HERKIMER, PETITIONER-RESPONDENT, V RICHARD F. DAINES, AS COMMISSIONER OF NEW YORK STATE DEPARTMENT OF HEALTH, AND NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENTS-APPELLANTS. CA 08-02203. -- IN THE MATTER OF COUNTY OF NIAGARA, PETITIONER-RESPONDENT, V RICHARD F. DAINES, AS COMMISSIONER OF NEW YORK STATE DEPARTMENT OF HEALTH, AND NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ. (Filed June 5, 2009.)

MOTION NO. (298/09) CA 08-01318. -- IN THE MATTER OF THE ARBITRATION

BETWEEN ROBERT E. PURCELL, CLAIMANT-APPELLANT, AND MARJAMA & BILINSKI, FORMERLY KNOWN AS WALL, MARJAMA & BILINSKI, LLP, RESPONDENT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ. (Filed June 5, 2009.)

MOTION NO. (335/09) CA 08-00918. -- JOSEPH P. HYLANT, PLAINTIFF-APPELLANT, V MANUFACTURERS AND TRADERS TRUST COMPANY, DEFENDANT-RESPONDENT. -- Motion for reargument denied. PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ. (Filed June 5, 2009.)

MOTION NO. (341/09) CA 08-02010. -- PATRICK M. SCIORTINO, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ANTHONY J. SCIORTINO, JR., DECEASED, PLAINTIFF-RESPONDENT, V MARK A. LEO, DEFENDANT, ONEIDA COUNTY DEPARTMENT OF EMERGENCY SERVICES, ONEIDA COUNTY SHERIFF'S DEPARTMENT AND COUNTY OF ONEIDA, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ. (Filed June 5, 2009.)

MOTION NO. (450/09) CA 08-01452. -- IN THE MATTER OF JOANNE OUTLEY, PETITIONER-RESPONDENT, V UPSTATE MEDICAL UNIVERSITY, RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PINE, JJ. (Filed June 5, 2009.)

KA 07-01188. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM BUCHANAN, 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 Herkimer County Court, Patrick L. Kirk, J. - Criminal Contempt, 1st Degree). PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ. (Filed June 5, 2009.)

KA 07-01849. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RANDALL S. CLARK, 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 Ontario County Court, Frederick G. Reed, J. - Violation of Probation). PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ. (Filed June 5, 2009.)

KA 08-00888. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LAMAR J. COOPER, 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 Monroe County Court, Frank P. Geraci, Jr., J. - Sex Offender Registration Act). PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ. (Filed June 5, 2009.)

KA 08-01503. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V COREY SIMMONS, 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 Wyoming County Court, Mark H. Dadd, J. - Attempted Promoting Prison Contraband, 1st Degree). PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ. (Filed June 5, 2009.)

KA 08-00640. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DWAYNE WIGGINS, 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, Erie County, Christopher J. Burns, J. - Burglary, 2nd Degree). PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ. (Filed June 5, 2009.)