SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 20, 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

999

CA 09-00658

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

IN THE MATTER OF LEGACY AT FAIRWAYS, LLC, US HOMES CO., INC., MARK IV CONSTRUCTION CO., INC., AND CHRISTOPHER A. DIMARZO, PETITIONERS-PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SEAN MCADOO, ALLAN J. BENEDICT, ZONING BOARD OF APPEALS OF TOWN OF VICTOR AND TOWN OF VICTOR, RESPONDENTS-DEFENDANTS-APPELLANTS.

THE WOLFORD LAW FIRM LLP, ROCHESTER (CHRISTOPHER D. LINDQUIST OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

GATES & ADAMS, P.C., ROCHESTER (DOUGLAS S. GATES OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered June 10, 2008 in a CPLR article 78 proceeding and a declaratory judgment action. The order, inter alia, denied the pre-answer motion of respondents-defendants to dismiss the petition-complaint.

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

Memorandum: Petitioners-plaintiffs (petitioners) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul the determination imposing a per unit recreation fee pursuant to Town Law §§ 274-a and 277 and section 27-8 (J) of the Code of respondent-defendant Town of Victor (Town) upon property in the Town owned and developed by petitioners as an assisted living facility. We note at the outset that where, as here, issues of law are limited to whether a determination was affected by an error of law, arbitrary and capricious, an abuse of discretion, or irrational, the issues are subject to review only pursuant to CPLR article 78 (*see Matter of 1300 Franklin Ave. Members, LLC v Board of Trustees of Inc. Vil. of Garden City*, 62 AD3d 1004, 1007). Indeed, "a declaratory judgment action is not an appropriate procedural vehicle for challenging the . . . administrative determination[] [in question], and thus the proceeding/declaratory judgment action . . . is properly only a proceeding pursuant to CPLR article 78" (*Matter of Potter v Town Bd. of Town of Aurora*, 60 AD3d 1333, 1334, *appeal dismissed* 12 NY3d 882, *lv denied* 13 NY3d 707). We further note that, "although no

appeal lies as of right from a nonfinal order in a CPLR article 78 proceeding . . ., we nevertheless treat the notice of appeal as an application for permission to appeal" and grant respondents-defendants (respondents) such permission (*Matter of Custom Topsoil, Inc. v City of Buffalo*, 63 AD3d 1511, 1511; *see* CPLR 5701 [b] [1]; [c]).

We conclude that Supreme Court properly denied the pre-answer motion of respondents to the extent that it sought to dismiss the petition pursuant to CPLR 7804 (f) and instead permitted them to answer the petition (*Legacy at Fairways, LLC v McAdoo*, 20 Misc 3d 1134[A], 2008 NY Slip Op 51730[U], *15). It is well settled that, in determining a motion pursuant to CPLR 7804 (f), only the petition, without additional facts alleged in support of the motion, may be considered; that the allegations contained in the petition are deemed to be true; and that petitioners are to be accorded the benefit of every possible inference (*see Matter of Golden Horizon Terryville Corp. v Prusinowski*, 63 AD3d 930, 934). We conclude that the allegations in the petition herein demonstrate " 'the existence of a bona fide justiciable controversy' " with respect to, inter alia, the propriety of the imposition of the recreation fee, thereby warranting the denial of respondents' pre-answer motion (*id.* at 933). We further note that there are triable issues of fact with respect to, inter alia, whether the Town Planning Board imposed the recreation fee, and thus the court's factual determinations with respect to the merits of those issues before respondents answered the petition were premature (*cf. Matter of Kuzma v City of Buffalo*, 45 AD3d 1308, 1310-1311). We therefore have not considered the parties' contentions with respect to those factual determinations.

Entered: November 20, 2009 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1286

CA 08-01845

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

IN THE MATTER OF THOMAS A. TURNER AND
MICHELLE M. TURNER, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

DUANE F. ANDERSON, P.J. WENDEL, JOSEPH TROCHE,
AND DAVID T. WORDELMANN, CONSTITUTING BOARD OF
TRUSTEES FOR VILLAGE OF LAKEWOOD, AND VILLAGE
OF LAKEWOOD, RESPONDENTS-RESPONDENTS.

LAW OFFICE OF BRUCE S. ZEFTEL, BUFFALO (BRUCE S. ZEFTEL OF COUNSEL), FOR PETITIONERS-APPELLANTS.

GOODELL & RANKIN, JAMESTOWN (ANDREW W. GOODELL OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered August 1, 2008 in a proceeding pursuant to CPLR article 78. The judgment, among other things, dismissed the petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul the determination denying their request for vehicular access over a "paper street" known as Ohio Avenue on the grounds that it was arbitrary and capricious or affected by an error of law. We conclude that Supreme Court properly granted respondents' motion for summary judgment dismissing the petition.

Petitioners own a parcel of land in respondent Village of Lakewood, the south line of which abuts the mapped "paper street" portion of Ohio Avenue. They contend that, because the deed creating their lot in 1958 referred to an 1874 subdivision map that did not include their lot, they are entitled to the benefit of the "paper street" easement over Ohio Avenue. We reject that contention.

" 'The rule of law is that when an owner of property sells lots in reference to a map, which lots abut upon a street as shown on the map, the grantees are entitled to have the land shown as a street left open forever as a street or highway and this is so whether or not it is accepted by the . . . municipality as a public highway' " (*Wysocki v Kugel*, 282 App Div 112, 115, *affd* 307 NY 653). "Nevertheless,

'[f]or an easement by grant to be effective, the dominant and servient properties must have a common grantor' . . ., and the creation of the easement is dependent upon the intent of that original grantor at the time of the original conveyance" (*H.S. Farrell, Inc. v Formica Constr. Co., Inc.*, 41 AD3d 652, 654). Here, there is no indication in the record that the property in question was subdivided into lots by the original grantor in accordance with the subdivision map, and thus petitioners have failed to establish by clear and convincing evidence the original grantor's intent to create a "paper street" easement over Ohio Avenue (*see id.* at 654-655). Indeed, the 1874 subdivision map upon which petitioners rely contains lots that are described by number and that abut "Ohio Avenue," and the land upon which petitioners' parcel is situated is not among those lots. Rather, petitioners' parcel is included in a tract of land depicted on the subdivision map as "unplotted," and it continued to be included in that tract of "unplotted" land until it was carved out therefrom pursuant to a conveyance in 1884. However, in 1884 the owner of the "unplotted" tract of land was not the original grantor who had created the subdivision with the numbered lots that did not include petitioners' parcel. Petitioners' lot was not created and separately described until it was conveyed from a larger tract in 1958. Thus, it cannot be said that the determination in question was arbitrary and capricious or affected by an error of law (*see* CPLR 7803 [3]).

Entered: November 20, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1293

CA 09-01063

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

DONALD GIMENO, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

AMERICAN SIGNATURE, INC., DOING BUSINESS AS VALUE-CITY FURNITURE, CONSTRUCTION ONE, DEFENDANTS-RESPONDENTS, MELCO CONSTRUCTION SERVICES, INC., MIDWEST INTERIORS, DEFENDANTS-RESPONDENTS-APPELLANTS, ET AL., DEFENDANT.

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

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF COUNSEL), FOR DEFENDANT-RESPONDENT CONSTRUCTION ONE.

GOLDBERG SEGALLA LLP, BUFFALO (DENNIS P. GLASCOTT OF COUNSEL), FOR DEFENDANT-RESPONDENT AMERICAN SIGNATURE, INC., DOING BUSINESS AS VALUE-CITY FURNITURE.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (NELSON E. SCHULE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered December 10, 2008 in a personal injury action. The order, inter alia, denied the motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiff's motion and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained while attaching plastic sheeting over scaffolding from the top of a building under renovation. Plaintiff performed his work from a platform attached to a lull, a forklift-like device used to lift the platform. At the time of the accident, he was wearing a harness and lanyard, which he secured to the platform. The accident occurred when the platform detached from the lull and fell approximately 15 feet to the ground, with plaintiff attached to it.

We agree with plaintiff that Supreme Court erred in denying his

motion seeking partial summary judgment on liability with respect to the Labor Law § 240 (1) claim against American Signature, Inc., doing business as Value-City Furniture, Melco Construction Services, Inc. (Melco), Midwest Interiors (Midwest) and Construction One (collectively, defendants), and we therefore modify the order accordingly. "Plaintiff met his initial burden by establishing that his injury was proximately caused by the failure of a safety device to afford him proper protection from an elevation-related risk" (*Raczka v Nichter Util. Constr. Co.*, 272 AD2d 874, 874; *see Guaman v Ginestri*, 28 AD3d 517, 518). The evidence submitted by defendants in opposition to the motion establishing that plaintiff himself attached the platform to the lull, without more, is insufficient to raise a triable issue of fact whether plaintiff's actions were the sole proximate cause of the accident (*see Evans v Syracuse Model Neighborhood Corp.*, 53 AD3d 1135, 1137; *Rudnik v Brogor Realty Corp.*, 45 AD3d 828, 829; *Woods v Design Ctr., LLC*, 42 AD3d 876, 877). There is no evidence that plaintiff received any instruction concerning the method of attaching the platform to the lull (*see Ganger v Anthony Cimato/ACP Partnership*, 53 AD3d 1051, 1053; *cf. Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40), or that "plaintiff, based on his training, prior practice, and common sense, knew or should have known" of a different method of attaching the platform to the lull (*Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1427; *see Ganger*, 53 AD3d at 1053). In view of our determination with respect to plaintiff's appeal, we reject the contention of Melco and Midwest on their cross appeal that the court erred in denying that part of their cross motion seeking summary judgment dismissing the Labor Law § 240 (1) claim against them.

Finally, we note that plaintiff does not contend in his brief that the court erred in granting the cross motion of defendant-third-party plaintiff Admar Supply Co., Inc. seeking summary judgment dismissing the complaint against it or those parts of the cross motions of defendants seeking summary judgment dismissing the Labor Law §§ 200 and 241 (6) and common-law negligence claims against them, and we thus deem any issues with respect thereto abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

Entered: November 20, 2009

Patricia L. Morgan
Clerk of the Court

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

1300

KA 07-02177

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROGER ODUM, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRENTON P. DADEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered September 25, 2007. The judgment convicted defendant, upon a jury verdict, of attempted 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 a jury verdict of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [3]), defendant contends that County Court erred in denying his challenge for cause with respect to a prospective juror. We reject that contention. It is well settled that "a prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the [prospective] juror states unequivocally on the record that he or she can be fair and impartial" (*People v Chambers*, 97 NY2d 417, 419; *see People v Nicholas*, 98 NY2d 749, 751-752). Here, the prospective juror never expressed any doubt concerning his ability to be fair and impartial (*see People v Semper*, 276 AD2d 263, *lv denied* 96 NY2d 738). We conclude that, viewing the statements of the prospective juror as a whole, the statements were unequivocal despite the use of the words "think" and "try" (*see People v Shulman*, 6 NY3d 1, 28, *cert denied* 547 US 1043; *Chambers*, 97 NY2d at 419; *People v Jones*, 21 AD3d 860, *lv denied* 6 NY3d 755; *Semper*, 276 AD2d 263).

Defendant failed to preserve for our review his further contention that the interpreter assigned to assist him was inadequate because he lacked experience and was uncertified (*see People v Santiago*, 265 AD2d 827, *lv denied* 94 NY2d 866; *People v Hatzipavlou*, 175 AD2d 969, *lv denied* 79 NY2d 827). In any event, that contention is without merit. Although the interpreter did not have any prior

experience interpreting during a trial, the record establishes that he nevertheless was qualified to do so (*see generally Hatzipavlou*, 175 AD2d 969). The fact that the interpreter was not a certified interpreter does not invalidate his assistance to defendant (*see People v Costa*, 186 AD2d 299, *lv denied* 81 NY2d 761; *see generally* Judiciary Law § 387). Finally, we reject the contention of defendant that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: November 20, 2009 Patricia L. Morgan
Clerk of the Court

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

1302

KA 09-01072

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V OPINION AND ORDER

TIMOTHY S. LEROW, DEFENDANT-RESPONDENT.

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (DEREK V. GREGORY OF COUNSEL), FOR APPELLANT.

JAMES P. SUBJACK, FREDONIA, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Chautauqua County Court (John T. Ward, J.), entered September 8, 2008. The order, insofar as appealed from, granted the motion of defendant to suppress the results of a chemical blood alcohol test.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law, the suppression motion is denied, and the matter is remitted to Chautauqua County Court for further proceedings on the indictment.

Opinion by PERADOTTO, J.: The primary issue on this appeal by the People from an order granting defendant's motion to suppress the results of a chemical blood alcohol test is one of first impression, namely, whether a New York State police officer has the authority, pursuant to New York's implied consent statute (Vehicle and Traffic Law § 1194 [2] [a]), to direct the withdrawal of blood from a suspect who is physically located outside of the state. We agree with the People that, under the circumstances of this case, County Court erred in suppressing the results of the blood test. We therefore conclude that the order insofar as appealed from should be reversed.

Factual History and Procedural Background

On June 29, 2007, shortly before midnight, defendant was involved in a single-vehicle motorcycle accident in the Town of Charlotte. Defendant was traveling at a high rate of speed when he failed to negotiate a curve in the road, drove off the roadway, struck a large rock, and was ejected from his motorcycle. An eyewitness and police and fire officials who responded to the scene of the accident detected alcohol on defendant's breath. Defendant was initially transported to WCA Hospital (WCA) in Jamestown, New York, and was later transferred to Hamot Medical Center (Hamot) in Erie, Pennsylvania. Chautauqua County Sheriff's Deputy Forsberg traveled to Hamot and asked a

registered nurse to obtain a blood sample from defendant, who was unconscious. After Deputy Forsberg explained the procedures for a legal blood draw in New York State and supplied a blood draw kit, the nurse complied with his request and drew a sample of defendant's blood. A subsequent blood test performed in New York revealed that defendant had a .12% blood alcohol content.

Thereafter, defendant was indicted by a Chautauqua County grand jury and was charged with two counts of driving while intoxicated ([DWI] Vehicle and Traffic Law § 1192 [2], [3]). Defendant moved to suppress the results of the blood test and contended, inter alia, that the police lacked probable cause to arrest him and that the blood sample was obtained without his consent and in violation of Pennsylvania law. At the suppression hearing, the eyewitness estimated that defendant was traveling at a speed of approximately 75 to 80 miles per hour immediately prior to the accident. When the eyewitness approached defendant and attempted to ascertain if defendant was breathing, he smelled the odor of alcohol emanating from defendant's body. The eyewitness relayed this observation to the police officers who responded to the scene.

Deputy Desnerck of the Chautauqua County Sheriff's Department testified at the suppression hearing that he was the first officer to respond to the scene. Upon his arrival, defendant was being treated by members of the fire rescue unit, who indicated to the Deputy that defendant had been drinking. Deputy Desnerck knelt down beside defendant in an attempt to engage him in conversation, but defendant was unable to respond. At that point, the Deputy detected the odor of alcohol on defendant's breath, and he requested the presence of a DWI unit.

Deputy Forsberg, a member of the DWI unit, testified that he responded to the accident scene and spoke with Deputy Desnerck and the eyewitness, each of whom informed him that they had detected the odor of alcohol on defendant. Defendant was airlifted to WCA, and Deputy Forsberg followed the helicopter to the hospital. When Deputy Forsberg asked staff members at WCA to obtain a blood sample, they refused to do so, advising him that they were performing only lifesaving measures. Defendant was thereafter transported by Starflight to Hamot, the hospital in Pennsylvania. As previously noted, defendant was unconscious when Deputy Forsberg arrived at Hamot, and a registered nurse complied with his request to obtain a blood sample. Deputy Forsberg testified that he followed the same procedure in Pennsylvania for obtaining a blood sample that he would have followed had defendant been located in New York.

Following the suppression hearing, the court denied defendant's suppression motion, concluding that Deputy Forsberg had reasonable cause to believe that defendant had been operating his motorcycle in violation of Vehicle and Traffic Law § 1192 and reasoning that "[d]efendant should not be allowed to obtain a fortuitous benefit simply because medical personnel chose to treat him at a facility outside of New York State." Defendant then filed a motion for reconsideration, contending that his blood was withdrawn in violation

of a Pennsylvania statute (75 Pa Cons Stat § 3755 [a]), which according to defendant required that blood be withdrawn by an emergency room physician or his or her designee. In granting defendant's motions for reconsideration and for suppression, the court agreed with defendant that the blood was not drawn in compliance with Pennsylvania law. The court further concluded that, under New York's implied consent law, a New York police officer may not request the withdrawal of blood from an unconscious suspect while the suspect is located outside of the state.

Discussion

We note at the outset that the People are correct that New York law applies to the administration of defendant's blood test because "procedural and evidentiary issues are governed by the law of the forum" state (*People v Benson*, 88 AD2d 229, 231; *see People v Johnson*, 303 AD2d 903, 904, *lv denied* 100 NY2d 539; *People v Sebelist*, 206 AD2d 901, *lv denied* 84 NY2d 910), and "New York has a paramount interest in the application of its laws to this case" (*Benson*, 88 AD2d at 231; *see People v Ostas*, 179 AD2d 893, 894, *lv denied* 80 NY2d 932).

Under New York's implied consent law, any person who operates a motor vehicle within the state is deemed to have consented to a chemical blood alcohol test conducted "at the direction of a police officer . . . having reasonable grounds to believe" such person to have been operating a motor vehicle in violation of Vehicle and Traffic Law § 1192, provided that the test is administered "within two hours after such person has been placed under arrest for any such violation" (§ 1194 [2] [a] [1]; *see People v Goodell*, 79 NY2d 869, 870). "Where these conditions are satisfied, the statute furnishes authority for the administration of a blood alcohol test even in the absence of a court order or the suspect's actual consent" (*id.*). A formal arrest is not required where the suspect is unconscious or is otherwise unable to appreciate the significance of an arrest (*see Goodell*, 164 AD2d 321, 325, *affd* 79 NY2d 869; *People v Bradway*, 285 AD2d 831, 833, *lv denied* 97 NY2d 639 ["the necessity of a formal arrest prior to a blood test may be 'vitiated by [a] defendant's unconscious and delirious condition,' " quoting *People v Bagley*, 211 AD2d 882, 883, *lv denied* 86 NY2d 779]; *see also People v Skinner*, 203 AD2d 891, *lv denied* 84 NY2d 832). Under those circumstances, a chemical blood alcohol test may be administered provided that the police officer who orders the test has probable cause to arrest the suspect (*see Goodell*, 164 AD2d at 325; *see also People v Carkner*, 213 AD2d 735, 739, *lv denied* 85 NY2d 970, 86 NY2d 733).

The People contend that, at the time the blood test was ordered, Deputy Forsberg had probable cause to believe that defendant had been operating his motorcycle under the influence of alcohol, in violation of Vehicle and Traffic Law § 1192. We agree. Upon arriving at the scene, Deputy Forsberg spoke with two other Deputies and an eyewitness, each of whom indicated that defendant had been traveling at a high rate of speed immediately prior to the accident. Defendant's motorcycle had crossed over into the left lane of the

roadway and entered an adjoining yard, where the motorcycle crashed into a large rock and defendant was ejected therefrom. Both Deputy Desnerck and the eyewitness informed Deputy Forsberg that they detected the odor of alcohol emanating from defendant. We therefore conclude from the totality of the circumstances, including the nature of the accident and the odor of alcohol detected by the eyewitness and police and fire personnel, that there was probable cause to believe that defendant was driving in violation of Vehicle and Traffic Law § 1192 (*see People v Mojica*, 62 AD3d 100, 114, *lv denied* 12 NY3d 856; *People v Scalzo*, 176 AD2d 363, 364, *mot to amend remittitur granted* 178 AD2d 444; *People v Rollins*, 118 AD2d 949, 950).

Thus, Deputy Forsberg complied with the requirements of Vehicle and Traffic Law § 1194 inasmuch as defendant's blood was drawn by a registered nurse at his direction and based upon the requisite probable cause that defendant had been operating his vehicle while under the influence of alcohol (*see* Vehicle and Traffic Law § 1194 [2] [a] [1]; [4]). Here, however, because defendant's blood was drawn at a hospital in Pennsylvania, the issue is whether Deputy Forsberg, a New York State police officer, had the authority to order a blood draw in Pennsylvania. In other words, what is the effect of New York's implied consent law beyond the territorial jurisdiction of the state?

As noted at the outset, the specific question of whether a New York State police officer has the authority, under New York's implied consent law, to direct the withdrawal of blood from a suspect who is physically located outside of the state is a case of first impression in New York. "Generally, police officers have no power, including the authority to arrest, outside their geographical jurisdiction" (*People v La Fontaine*, 235 AD2d 93, 95, *revd on other grounds* 92 NY2d 470, *rearg denied* 93 NY2d 849; *see also People v Johnson*, 303 AD2d 903, 905, *lv denied* 100 NY2d 539). Nonetheless, law enforcement officers may conduct investigations and collect evidence, including by seizure, outside their jurisdictional territory (*see People v Neil*, 24 AD3d 893; *People v Mitchell*, 283 AD2d 769, 770-771, *lv denied* 97 NY2d 642, 97 NY2d 731; *People v Buggenhagen*, 57 AD2d 466, 470). Thus, courts in various other states have concluded that a police officer may direct the withdrawal of blood from a DWI suspect who has been transported across state lines for medical treatment because "this type of evidence gathering activity by a law enforcement officer is not limited to the officer's territorial jurisdiction" (*Johnson v North Dakota Dept. of Transp.*, 683 NW2d 886, 890 [ND]; *see People v Every*, 184 Ill 2d 281, 289, 703 NE2d 897, 901 ["Although the deputy does not have official powers beyond the state's borders, he is still an agent of the state, and we believe that he continued to possess the authority to collect evidence from the defendant, even in another state"]; *State of Iowa v Wagner*, 359 NW2d 487, 490 [characterizing Iowa state trooper's actions in directing medical technicians at Wisconsin hospital to draw defendant's blood as "the type of evidence gathering activities which do not depend on a grant of authority from a sovereign body"]).

Here, although Deputy Forsberg was no longer cloaked with state

authority once he crossed the border into Pennsylvania, we conclude that he nonetheless remained a "police officer" for purposes of administering New York's implied consent law, even though defendant was physically located in Pennsylvania when the Deputy requested the blood draw (*see* Vehicle and Traffic Law §§ 132, 1194 [2] [a] [1]; CPL 1.20 [34] [b]; *see also Every*, 184 Ill 2d at 289, 703 NE2d at 901; *State of Connecticut v Stevens*, 224 Conn 730, 742, 620 A2d 789, 795). Section 1194 contains no geographic limitation on a police officer's authority to direct medical personnel to draw blood from a suspect motorist for purposes of blood alcohol testing. In our view, where, as here, an accident occurs in New York and the circumstances giving rise to an officer's reasonable grounds to believe that a suspect has violated Vehicle and Traffic Law § 1192 arise in New York, the mere fortuity of the suspect's removal from the state for the purpose of medical treatment should not deprive New York of the ability to enforce its laws proscribing the operation of a motor vehicle on its roadways while under the influence of alcohol. As the Illinois Supreme Court reasoned in confronting analogous facts, "[t]he defendant should not be released from the statutory consequences of his [or her] actions merely because [the defendant] was taken to an adjoining state for treatment of his [or her] injuries" (*Every*, 184 Ill 2d at 287, 703 NE2d at 900).

Moreover, we conclude that the enforcement of New York's implied consent statute in this case does not infringe upon the sovereignty of Pennsylvania or otherwise offend Pennsylvania public policy. Indeed, Pennsylvania has a similar implied consent statute, which provides in relevant part that

> "[a]ny person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood . . . if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle . . . in violation of section . . . 3802 (relating to driving under influence of alcohol or controlled substance)" (75 Pa Cons Stat § 1547 [a] [1]).

Pennsylvania law broadly defines the term "police officer" as "[a] natural person authorized by law to make arrests for violations of law" (75 Pa Cons Stat § 102). Contrary to the contention of defendant and the conclusion of the suppression court, Pennsylvania's implied consent statute does not require that blood be withdrawn by an emergency room physician or his or her designee, but instead requires only that a "qualified person" conduct the test (75 Pa Cons Stat § 1547 [c] [2] [i]). In fact, the statute provides that no "physician, nurse or technician" who withdraws blood at the request of a police officer pursuant to the statute shall be "civilly liable" (75 Pa Cons Stat § 1547 [j]), thereby indicating that the registered nurse who

drew defendant's blood in this case is a "qualified person" under Pennsylvania law. The phrase "emergency room physician or his designee" appears in a separate section of Pennsylvania law, which *requires* that emergency room personnel "promptly" take blood samples from a person involved in a motor vehicle accident where there is probable cause to believe that alcohol was involved in the crash (75 Pa Cons Stat § 3755 [a]).

In view of the fact that Pennsylvania has a similar implied consent statute and, indeed, requires the taking of a blood sample where a serious accident is suspected to be alcohol-related, even in the absence of a request from a police officer, it cannot be said that Deputy Forsberg's request violated Pennsylvania law or otherwise offended Pennsylvania's public policy. Notably, a Pennsylvania court presented with a similar issue refused to suppress the results of a blood test despite the fact that the blood was drawn in Port Jervis, New York, where the defendant was hospitalized (*Commonwealth v Graydon*, 22 Pa D & C 4th 128 [Ct of Common Pleas of Pa 1994]).

With respect to defendant's contention that Deputy Forsberg should have obtained a search warrant or a court order before requesting the withdrawal of defendant's blood, we note that there is no such requirement in Vehicle and Traffic Law § 1194 (*see Goodell*, 79 NY2d at 870; *People v Dombrowski-Bove*, 300 AD2d 1122, 1123-1124). The United States Supreme Court and the New York Court of Appeals have recognized the unique circumstances involved in testing a suspect's blood for alcohol given the fact that the evidence rapidly metabolizes with the passage of time (*see Schmerber v California*, 384 US 757, 770-771; *see generally People v Kates*, 53 NY2d 591, 594-595). As the Supreme Court wrote in *Schmerber*:

> "[T]he percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest" (384 US at 770-771).

Exigent circumstances were similarly present in this case. The accident occurred shortly before midnight, the police arrived sometime after midnight, and emergency personnel took some time in attempting to stabilize defendant at the scene. Defendant was first transported to a hospital in Jamestown, and was then taken to a hospital in Pennsylvania. Thus, by the time Deputy Forsberg drove to the Pennsylvania hospital and requested a blood draw, any evidence of intoxication was rapidly deteriorating. Under those circumstances, Deputy Forsberg was not required to take the additional time to secure a warrant or a court order in Pennsylvania.

Conclusion

Accordingly, inasmuch as defendant's blood was drawn at the direction of a police officer who possessed probable cause to believe that defendant had operated a motor vehicle under the influence of alcohol in violation of Vehicle and Traffic Law § 1192 and the blood sample was obtained pursuant to the procedures set forth in section 1194, we conclude that the court erred in granting the motion of defendant to suppress the results of the blood draw and that the order insofar as appealed from should be reversed, defendant's suppression motion denied, and the matter remitted to County Court for further proceedings on the indictment.

Entered: November 20, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1311

CA 09-00707

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

JASON ANDREWS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NORTHWEST AUTO MALL AND FRANK SANTONASTASO,
DEFENDANTS-APPELLANTS.

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

CELLINO & BARNES, P.C., ROCHESTER (RICHARD P. AMICO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered November 10, 2008 in a personal injury action. The order, insofar as appealed from, denied in part defendants' motion for summary judgment and granted plaintiff's cross motion for partial summary judgment.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell from a ladder while installing a security system in a building owned by defendants. We conclude that Supreme Court properly granted plaintiff's cross motion seeking partial summary judgment on liability with respect to the Labor Law § 240 (1) cause of action. Contrary to defendants' contention, plaintiff was engaged in "altering" a building within the meaning of Labor Law § 240 (1) at the time of the accident (*see e.g. Enge v Ontario County Airport Mgt. Co., LLC*, 26 AD3d 896). Further, "[t]o 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' " (*Lovall v Graves Bros., Inc.*, 63 AD3d 1528, 1529, quoting *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554). Here, plaintiff established that defendants violated Labor Law § 240 (1) by furnishing him with a defective ladder, and he established that the violation was a proximate cause of his fall and resulting injuries. Defendants failed to raise a triable issue of fact to defeat the cross motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We have considered the remaining contentions of defendants and

conclude that they are without merit.

Entered: November 20, 2009 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1312

CA 09-01053

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

IN THE MATTER OF CRAIG EMMERLING AND
LYNN EMMERLING, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF RICHMOND ZONING BOARD OF APPEALS
AND JAMES S. MOORE, CODE ENFORCEMENT OFFICER,
RESPONDENTS-RESPONDENTS.

KRUK & CAMPBELL, P.C., LIMA (ANDREW F. EMBORSKY OF COUNSEL), FOR PETITIONERS-APPELLANTS.

MICHAEL A. JONES, JR., TOWN ATTORNEY, VICTOR, FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered July 25, 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 reversed on the law without costs, the petition is granted in part and the determination is annulled.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination of respondent Town of Richmond Zoning Board of Appeals (ZBA) that a site plan review by the Town of Richmond Planning Board (Planning Board) was required before petitioners would be permitted to erect a fence on their property. We conclude that Supreme Court erred in dismissing the petition in its entirety.

The interpretation by a zoning board of its governing code is generally entitled to great deference by the courts (*see Appelbaum v Deutsch*, 66 NY2d 975, 977-978; *Matter of Concetta T. Cerame Irrevocable Family Trust v Town of Perinton Zoning Bd. of Appeals*, 6 AD3d 1091, 1092) and, so long as the interpretation "is neither 'irrational, unreasonable nor inconsistent with the governing [code],' it will be upheld" (*Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 419, quoting *Matter of Trump-Equitable Fifth Ave. Co. v Gliedman*, 62 NY2d 539, 545). "Where, however, the question is one of pure legal interpretation of [the code's] terms," deference to the zoning board is not required (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 419; *see Matter of J & M Harriman*

Holding Corp. v Zoning Bd. of Appeals of Vil. of Harriman, 62 AD3d 705, 707). Moreover, an interpretation that " 'runs counter to the clear wording of a [code] provision is given little weight' " (*Matter of Conti v Zoning Bd. of Appeals of Vil. of Ardsley*, 53 AD3d 545, 547, quoting *Matter of Excellus Health Plan v Serio*, 2 NY3d 166, 171).

Here, the ZBA's determination that site plan review was required prior to petitioners' erection of a fence is contrary to the " 'clear wording' " of the Zoning Law of the Town of Richmond (*Conti*, 53 AD3d at 547), set forth in chapter 200 of the Town of Richmond Code (Code), and it therefore is not entitled to deference (*see Matter of Brancato v Zoning Bd. of Appeals of City of Yonkers, N.Y.*, 30 AD3d 515, 515-516). Section 200-69 (A) of the Code requires the preparation of a site plan prior to the issuance of a zoning permit "except for single-family residences, accessory buildings or uses and agricultural buildings or uses." Pursuant to the Code, fences are "[p]ermitted accessory uses" in the E Business District where petitioners' property is located (*see* § 200-16 [C] [3]). Thus, under a plain reading of the Code, petitioners were not required to undergo a site plan review before constructing a fence on their property.

Respondents' contention that a site plan review is required in this case because the purpose of the fence is to change the traffic flow on petitioners' property, a factor considered by the Planning Board during the site review process (*see* Code § 200-69 [C] [1] [a], [b]), is without merit. Indeed, the Code's definition of "fence" specifically contemplates that fences will be used to regulate the flow of traffic inasmuch as section 200-7 defines a fence as "[a] structure . . . [that] prohibits or inhibits unrestricted travel or view between properties or portions of properties or between the street or public right-of-way and a property, artificially erected for the purpose of assuring privacy or protection." Respondents further contend that site plan review is required prior to the erection of petitioners' fence because the fence was not included in the original site plan for petitioners' property, which was approved by the Planning Board in 1998. We reject that contention as well. There is no provision in the Code requiring property owners to return to the Planning Board each time they wish to add a permitted accessory use to their property. To the contrary, such uses are specifically exempt from the site plan review process under the clear wording of the Code (*see* § 200-69 [A]).

Inasmuch as the ZBA's interpretation of the Code was irrational, unreasonable and inconsistent with the clear language of the Code (*see New York Botanical Garden*, 91 NY2d at 419), we reverse the judgment, grant the petition in part and annul the determination of the ZBA (*see generally Matter of AA&L Assoc. v Casella*, 207 AD2d 1012, 1014).

Entered: November 20, 2009

Patricia L. Morgan
Clerk of the Court

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

1329

CA 09-00217

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

GABRIELLE CARR, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MIDTOWN ROCHESTER PROPERTIES, LLC,
DEFENDANT-RESPONDENT.

MIDTOWN ROCHESTER PROPERTIES, LLC,
THIRD-PARTY PLAINTIFF,

V

ONESOURCE FACILITY SERVICES, INC.,
THIRD-PARTY DEFENDANT-RESPONDENT.

SCHELL & SCHELL, P.C., FAIRPORT (GEORGE A. SCHELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF LAURIE G. OGDEN, ESQ., ROCHESTER (LOUISE BOILLAT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

LAW OFFICES OF MICHAEL PILARZ, BUFFALO (MICHAEL PILARZ OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered September 19, 2008 in a personal injury action. The order, insofar as appealed from, granted the motions of defendant and third-party defendant for summary judgment dismissing the complaint insofar as the complaint, as amplified by the bill of particulars, alleges that defendant had constructive notice of the allegedly dangerous condition.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motions are denied in part and the complaint is reinstated insofar as the complaint, as amplified by the bill of particulars, alleges that defendant had constructive notice of the allegedly dangerous condition.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell on property owned by defendant-third-party plaintiff (defendant). Supreme Court granted the motions of defendant and third-party defendant for summary judgment dismissing the complaint, and plaintiff contends on appeal only that the court erred in granting the motions insofar as the

complaint, as amplified by the bill of particulars, alleges that defendant had constructive notice of the allegedly dangerous condition. We agree with plaintiff's contention on appeal. Defendant and third-party defendant failed to establish as a matter of law that defendant lacked constructive notice of the allegedly dangerous condition (*see Bailey v Curry*, 1 AD3d 1059; *Mancini v Quality Mkts.*, 256 AD2d 1177), and thus the burden never shifted to plaintiff to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Although evidence was submitted in support of the motions concerning general safety practices at the premises, no evidence was submitted establishing that any inspections were performed on the date of the accident (*see Bailey*, 1 AD3d 1059; *Mancini*, 256 AD2d at 1178).

Entered: November 20, 2009

Patricia L. Morgan
Clerk of the Court

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

1354

CA 09-00229

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

MICHAEL PASSUCCI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE HOME DEPOT, INC., THE HOME DEPOT SPECIAL SERVICES, INC., MICHAEL BLAIR AND MICHAEL KEITH NAZAR, DEFENDANTS-APPELLANTS.

D'AMATO & LYNCH, LLP, NEW YORK CITY (PETER A. STROILI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MICKEY H. OSTERREICHER, BUFFALO (ALAN BIRNHOLZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered August 13, 2008. The order, insofar as appealed from, denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for defendants' alleged malicious prosecution and "infliction of emotional distress." Plaintiff also sought damages based on the alleged negligent training and supervision of employees by The Home Depot, Inc. and The Home Depot Special Services, Inc. (collectively, Home Depot defendants).

We agree with defendants that Supreme Court erred in denying that part of their motion for summary judgment dismissing the malicious prosecution cause of action. A plaintiff asserting such a cause of action " 'must establish that a criminal proceeding was commenced, that it was terminated in favor of the [plaintiff], that it lacked probable cause, and that the proceeding was brought out of actual malice' " (*Watson v City of Jamestown*, 56 AD3d 1289, 1291, quoting *Martinez v City of Schenectady*, 97 NY2d 78, 84). In the context of a malicious prosecution cause of action, probable cause "consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty" (*Colon v City of New York*, 60 NY2d 78, 82, *rearg denied* 61 NY2d 670; *see Hicks v City of Buffalo*, 295 AD2d 880, 884). As defendants correctly contended in support of their motion, plaintiff's conviction of petit larceny in the underlying criminal proceeding created a presumption of the

existence of probable cause for that criminal proceeding despite the fact that the judgment of conviction was later reversed on appeal (*see Goddard v Daly*, 295 AD2d 314). Defendants thus met their initial burdens, and we conclude that plaintiff failed to rebut the presumption and therefore failed to raise an issue of fact (*see id.*). "The presumption may be overcome only by evidence establishing that the . . . witnesses [in the underlying criminal proceeding] have not made a complete and full statement of facts . . ., that they have misrepresented or falsified evidence, that they have withheld evidence or otherwise acted in bad faith" (*Colon*, 60 NY2d at 82-83), and plaintiff presented no such evidence. Plaintiff's contention that the motion with respect to the malicious prosecution cause of action was premature inasmuch as facts essential to justify opposition to that part of the motion may exist but cannot be stated is without merit (*see Newman v Regent Contr. Corp.*, 31 AD3d 1133, 1134-1135; *see generally* CPLR 3212 [f]).

We further agree with defendants that the court erred in denying that part of their motion to dismiss as time-barred the cause of action for "infliction of emotional distress" to the extent that it is based upon intentional conduct. Pursuant to CPLR 215 (3), an action to recover damages arising from an intentional tort must be commenced within one year (*see Foley v Mobil Chem. Co.*, 214 AD2d 1003, 1004). The statute of limitations begins to run on the date of the injury (*see Dana v Oak Park Marina*, 230 AD2d 204, 210), and plaintiff commenced this action nearly three years after he allegedly was injured. In addition, we conclude that the court erred in denying that part of defendants' motion for summary judgment dismissing the cause of action for "infliction of emotional distress" to the extent that it is based upon negligent conduct. " 'Although physical injury is no longer a necessary element of [a] cause of action for negligent infliction of emotional distress, such a cause of action generally must be premised on conduct that unreasonably endangers the plaintiff's physical safety or causes the plaintiff to fear for his or her physical safety' " (*Padilla v Verczky-Porter*, ___ AD3d ___, ___ [Oct. 2, 2009]; *see Andrewski v Devine*, 280 AD2d 992). Here, defendants established in support of their motion that their conduct did not endanger plaintiff or cause him to fear for his safety, and plaintiff failed to raise a triable issue of fact with respect thereto (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We agree with defendants that the court erred in denying that part of their motion for summary judgment dismissing the cause of action for negligent training and supervision. " 'Such a cause of action does not lie where, as here, the employee is acting within the scope of his or her employment, thereby rendering the employer liable for damages caused by the employee's negligence under the [alternative] theory of respondeat superior' " (*Drisdom v Niagara Falls Mem. Med. Ctr.*, 53 AD3d 1142, 1143). In support of their motion, defendants submitted evidence establishing that defendants Michael Blair and Michael Keith Nazar were acting within the scope of their employment with the Home Depot defendants at the time plaintiff was detained through the time of his arrest, and plaintiff failed to

raise a triable issue of fact in opposition (*see generally Zuckerman*, 49 NY2d at 562). Finally, plaintiff's contention that the motion with respect to the cause of action for negligent training and supervision is premature because further discovery may reveal facts justifying denial of that part of the motion likewise is without merit (*see generally* CPLR 3212 [f]).

Entered: November 20, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1358

KA 08-01146

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTOINE WEDLINGTON, DEFENDANT-APPELLANT.

THOMAS E. ANDRUSCHAT, EAST AURORA, 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 (Michael L. D'Amico, J.), rendered April 22, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of robbery in the second degree (Penal Law § 160.10 [1]), defendant contends that reversal is required based upon, inter alia, a *Payton* violation (*Payton v New York*, 445 US 573). We conclude that there was in fact no *Payton* violation. The People presented evidence at the suppression hearing establishing that, after the commission of the robbery, the victim observed defendant and his codefendant enter a house where, pursuant to the determination of County Court, defendant was a regular overnight visitor. Upon responding to the victim's 911 telephone call, the police pushed aside the cardboard and curtain covering the front window of the house and observed defendant and his codefendant inside the house. The police identified themselves, and the occupants permitted their entry only after the police attempted to break down the door. Contrary to the contention of defendant, the police did not violate his *Payton* rights inasmuch as the court properly determined that there were exigent circumstances justifying the entry, i.e., the risk that defendant and his codefendant would dispose of the stolen money (*see People v Saunders*, 290 AD2d 461, 463, *lv denied* 98 NY2d 681; *People v Foster*, 245 AD2d 1074, *lv denied* 91 NY2d 972).

We also reject the contention of defendant that the People failed to prove his guilt beyond a reasonable doubt. To the extent that defendant's contention may be deemed to challenge the legal sufficiency of the evidence, we conclude that defendant's contention lacks merit. Viewing the evidence in the light most favorable to the

People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to establish defendant's commission of robbery in the second degree pursuant to Penal Law § 160.10 (1) (*see generally People v Conway*, 6 NY3d 869, 872; *People v Santi*, 3 NY3d 234, 246). To the extent that defendant's contention may be deemed to challenge the weight of the evidence, we reject that contention as well. Viewing the evidence in light of the elements of the crime of robbery 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). Because the victim's credibility was damaged at trial, we conclude that an acquittal would not have been unreasonable (*see Danielson*, 9 NY3d at 348; *People v Alexis*, 65 AD3d 1160; *People v Griffin*, 63 AD2d 635, 638). However, "giving 'appropriate deference to the jury's superior opportunity to assess the witnesses' credibility' " (*People v Marshall*, 65 AD3d 710, 712), we conclude that the jury was entitled to credit the victim's version of events over that of defendant.

Contrary to defendant's further contention, the court properly determined that the prosecutor's explanation for exercising a peremptory challenge with respect to an African-American prospective juror was race-neutral and not pretextual (*see generally People v Collins*, 63 AD3d 1609, *lv denied* 13 NY3d 795; *People v Wint*, 237 AD2d 195, 196-197, *lv denied* 89 NY2d 1103). The prosecutor excused the prospective juror because he previously had witnessed a shooting, he knew both the shooter and the victim of the shooting, and he had failed to contact the police with information concerning that crime either on the night of the shooting or at any time thereafter. We note that the prosecutor had previously excused a non-African-American prospective juror for similar reasons.

Defendant further contends that the court erred in failing to give an adverse inference instruction to the jury as required by Penal Law § 450.10 (10), inasmuch as the statutory procedure for returning stolen property to the victim, i.e., the cash, was not followed (*see People v Perkins*, 56 AD3d 944, 945, *lv denied* 12 NY3d 786; *People v Watkins*, 239 AD2d 448, *lv denied* 91 NY2d 837; *People v Graham*, 186 AD2d 47, *lv denied* 80 NY2d 975). Defendant never requested such an instruction and thus failed to preserve his contention for our review (*see* CPL 470.05 [2]). In fact, the record establishes that the only relief defendant requested was that the cash stolen from the victim not be admitted in evidence, and that relief was granted. In any event, there is no indication in the record that either defendant or the prosecution ever sought to examine or test the cash (*see People v Lathigee*, 254 AD2d 687, *lv denied* 92 NY2d 1034), nor is there any indication that the violation of Penal Law § 450.10 was intentional or that the cash was returned in bad faith (*see People v McDowell*, 264 AD2d 858; *People v Perez*, 262 AD2d 502; *Graham*, 186 AD2d 47).

We also reject defendant's contention that reversal is required based on the court's refusal to instruct the jury that a statement made by the codefendant at his arraignment threatening to kill the victim could not be attributed to defendant. Even assuming, arguendo,

that the court erred in refusing to give the instruction (*see generally People v Jackson*, 45 AD3d 433, 434, *lv denied* 10 NY3d 812, *cert denied* ___ US ___, 129 S Ct 462; *People v Paulino*, 187 AD2d 736, *lv denied* 81 NY2d 792), we conclude that the error is harmless because there is no reasonable possibility that it contributed to the jury's verdict (*see People v Douglas*, 4 NY3d 777, 779; *People v Crimmins*, 36 NY2d 230, 237). The court generally instructed the jury that it must consider the evidence against each defendant separately, the statement did not directly implicate either defendant or the codefendant in the crime, and the discovery of the money on the codefendant as described by the victim and in the same amount as described by the victim rendered negligible any possible adverse inference that may have been created by the court's refusal to give the instruction. Finally, the court did not err in denying defendant's CPL 330.30 (1) motion to set aside the verdict.

Entered: November 20, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1380

KA 08-01805

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEAN MCGRATH, 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 (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered July 15, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the third degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of two counts of attempted burglary in the third degree (Penal Law §§ 110.00, 140.20), defendant contends that his waiver of the right to appeal was not knowingly, intelligently and voluntarily entered because County Court failed to elicit from defendant, in his own words, his understanding of the waiver and its consequences. We reject that contention (*see People v Ludlow*, 42 AD3d 941). " '[T]here is no requirement that the . . . court engage in any particular litany' when accepting a defendant's waiver of the right to appeal" (*id.* at 942, quoting *People v Callahan*, 80 NY2d 273, 283). The valid waiver by defendant of his right to appeal encompasses his challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737).

Although the contention of defendant that he was denied due process when the court determined that he violated the plea agreement is not encompassed by his valid waiver of the right to appeal and thus is properly before us (*see People v Butler*, 49 AD3d 894, 895, *lv denied* 10 NY3d 932, 11 NY3d 830), that contention is without merit. Pursuant to the terms of the plea agreement, defendant's sentencing was held in abeyance while defendant participated in a drug treatment program for 15 months. The plea agreement provided that, in the event that defendant did not successfully complete the program, he would be sentenced to an indeterminate sentence of four to eight years.

Defendant was expelled from the program after being arrested for assault and drug possession. "[T]o satisfy due process, a sentencing court must, prior to imposing the prison alternative pursuant to a plea agreement, conduct an inquiry sufficient to conclude that a violation of the plea agreement occurred" (*People v Valencia*, 3 NY3d 714, 715; *see People v Outley*, 80 NY2d 702, 713) and, contrary to defendant's contention, the court made the requisite inquiry (*see Valencia*, 3 NY3d at 715).

Entered: November 20, 2009 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1411

CAF 08-02310

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

IN THE MATTER OF EMAD LOUKA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TERIZA SHEHATOU, RESPONDENT-RESPONDENT.

SCOLARO, SHULMAN, COHEN, FETTER & BURSTEIN, P.C., SYRACUSE (SHARI R. COHEN OF COUNSEL), FOR PETITIONER-APPELLANT.

ALDERMAN AND ALDERMAN, SYRACUSE (DAVID S. TAMBER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

SUSAN BASILE JANOWSKI, LAW GUARDIAN, LIVERPOOL, FOR CINDY L. AND SALLY L.

Appeal from an order of the Family Court, Onondaga County (George M. Raus, R.), entered August 1, 2008 in a proceeding pursuant to Domestic Relations Law article 5-A. The order denied the motion of petitioner to vacate an amended order entered upon default.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, the amended order entered December 19, 2007 is vacated, and the matter is remitted to Family Court, Onondaga County, for a hearing on the petition.

Memorandum: Petitioner father appeals from an order denying his motion to vacate an amended order entered upon his default. The amended order granted respondent mother sole legal and physical custody of the parties' children and permanently terminated all of the father's prior custodial and visitation rights. We note that, although the determination of the father's motion was in fact contained in a letter, no order was entered thereon. We further note however, that the Referee filed the letter with the Family Court Clerk and that the letter resolved the motion and advised the father that he had a right to appeal. Thus, by an order of this Court entered December 3, 2008 in connection with the mother's motion to dismiss this appeal, we determined that the letter would be treated as an order (*cf. Kuhn v Kuhn*, 129 AD2d 967).

We conclude that the Referee erred in denying the father's motion. The father resides in California, and he asserted in an affidavit in support of his motion that he failed to appear on the

date scheduled for trial because he relied upon the representation of his attorney that the trial had been adjourned. The father's attorney was suspended from practice for misconduct, however, including misconduct in failing to appear at the trial of this matter despite the Referee's denial of his request for an adjournment (*Matter of Williams*, 62 AD3d 130, 131). The father further asserted that the mother has denied him access to their children. We note the "strong public policy in favor of resolving cases on the merits" (*Orwell Bldg. Corp. v Bessaha*, 5 AD3d 573, 574, *appeal dismissed* 3 NY3d 703), and we conclude under the circumstances of this case that the Referee abused his discretion in denying the father's motion.

Entered: November 20, 2009 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1423

KA 09-00873

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE D. GUNTHER, DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (THOMAS A. DESIMON OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD H. DODD, DISTRICT ATTORNEY, OSWEGO (GREGORY S. OAKES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (James W. McCarthy, J.), rendered December 19, 2007. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree, sodomy in the first degree (two counts), rape in the first degree (three counts), sexual abuse in the first degree (five counts) and endangering the welfare of a child.

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

Memorandum: On appeal from a judgment convicting him, following a jury trial, of various sex crimes committed by defendant against three children, defendant contends that the conviction is not supported by legally sufficient evidence. Defendant preserved his contention for our review with respect to seven counts of the indictment, but we conclude that his contention lacks merit with respect to those counts (*see generally People v Bleakley*, 69 NY2d 490, 495). We agree with defendant, however, that the judgment must be modified by reversing that part convicting defendant of sexual abuse in the first degree under the fifth count of the indictment, charging defendant with sexual abuse by touching the vagina of one of the victims with his penis. There was no evidence presented at trial that defendant touched that victim's vagina with his penis. Instead, the People adduced evidence that, on two occasions during the relevant time frame, defendant touched that victim's leg and buttocks and rubbed his penis against her back. It is well established that a defendant cannot be convicted of a crime based on evidence of an "uncharged theory" (*People v Grega*, 72 NY2d 489, 496; *see People v Greaves*, 1 AD3d 979; *see generally People v Bradford*, 61 AD3d 1419,

1420-1421). Defendant was not required to preserve his contention for our review inasmuch as "[t]he right of an accused to be tried and convicted of only those crimes and upon only those theories charged in the indictment is fundamental and nonwaivable" (*People v Rubin*, 101 AD2d 71, 77, *lv denied* 63 NY2d 711). Viewing the evidence in light of the elements of the remaining crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

County Court did not err in admitting the testimony of the expert concerning Child Sexual Abuse Accommodation Syndrome. The testimony of the expert was admissible for the purpose of "explain[ing] behavior of a victim that might appear unusual or that jurors may not be expected to understand" (*People v Carroll*, 95 NY2d 375, 387, citing *People v Taylor*, 75 NY2d 277). The court also did not err in precluding defendant from presenting evidence that two of the victims had made prior claims of sexual assault. Although the testimony of the two victims included a phrase that generally referred to a molester, that testimony does not rise to the level of a formal complaint, and there was no evidence of a formal complaint of sexual assault made by those victims (*see People v Mandel*, 48 NY2d 952, *cert denied and appeal dismissed* 446 US 949, *reh denied* 448 US 908; *People v Breheny*, 270 AD2d 926, *lv denied* 95 NY2d 851). Finally, the sentence is not unduly harsh or severe.

Entered: November 20, 2009 Patricia L. Morgan
Clerk of the Court

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

1424

KA 08-01903

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DORIAN FACEN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL C. WALSH 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 Erie County Court (Sheila A. DiTullio, J.), rendered August 18, 1999. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from three judgments convicting him, collectively, upon his pleas of guilty of two counts of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]) and one count of criminal possession of a weapon in the third degree (§ 265.02 [former (4)]). We agree with defendant with respect to each appeal that his waivers of the right to appeal were invalid inasmuch as the record fails to "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 Moorer*, 63 AD3d 1590; *People v Hendrix*, 62 AD3d 1261, *lv denied* 12 NY3d 925). Thus, his contention that County Court abused its discretion in refusing to adjudicate him a youthful offender is not encompassed by the invalid waiver (*cf. People v Capps*, 63 AD3d 1632). Nevertheless, we reject defendant's contention that the court abused its discretion, and we decline to grant his further request that we exercise our interest of justice jurisdiction to adjudicate him a youthful offender (*see People v Bell*, 56 AD3d 1227, *lv denied* 12 NY3d 781; *People v Potter*, 13 AD3d 1191, *lv denied* 4 NY3d 889).

To the extent that defendant in his brief on appeal addresses the imposition of a period of postrelease supervision with respect to appeal No. 2, we note that the period of postrelease supervision has

expired. Because we cannot afford defendant any meaningful relief with respect thereto, we dismiss that part of the appeal from the judgment in appeal No. 2 as moot (*see generally Matter of Wilson v New York State Dept. of Correctional Servs.*, 43 AD3d 1227).

Entered: November 20, 2009

Patricia L. Morgan
Clerk of the Court

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

1425

KA 08-01904

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DORIAN FACEN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL C. WALSH 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 Erie County Court (Sheila A. DiTullio, J.), rendered August 18, 1999. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed a sentence of a period of postrelease supervision is unanimously dismissed and the judgment is otherwise affirmed.

Same Memorandum as in *People v Facen* ([appeal No. 1] ___ AD3d ___ [Nov. 20, 2009]).

Entered: November 20, 2009

Patricia L. Morgan
Clerk of the Court

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

1426

KA 08-01905

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DORIAN FACEN, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL C. WALSH 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 Erie County Court (Sheila A. DiTullio, J.), rendered August 18, 1999. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Same Memorandum as in *People v Facen* ([appeal No. 1] ___ AD3d ___ [Nov. 20, 2009]).

Entered: November 20, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1446

KA 07-00815

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE MCCLAIN, 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 Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered April 3, 2007. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon a plea of guilty, of murder in the second degree (Penal Law § 125.25 [3]), defendant contends that the police lacked probable cause to arrest him and that Supreme Court therefore erred in refusing to suppress his statement to the police made as the result of that allegedly unlawful arrest. We reject that contention. The record of the suppression hearing establishes that an identified citizen observed defendant at the crime scene and informed the police that defendant was involved in the homicide. We note in addition that a second identified citizen verified defendant's presence at the crime scene. It is well settled that "information provided by an identified citizen accusing another individual of the commission of a specific crime is sufficient to provide the police with probable cause to arrest" (*People v Williams*, 301 AD2d 543, *lv denied* 100 NY2d 589; *see People v Brito*, 59 AD3d 1000, *lv denied* 12 NY3d 814; *People v Grant*, 254 AD2d 700, 700-701, *lv denied* 93 NY2d 853). "When the witness supplying information to the police is an identified citizen relating information about a crime the citizen personally observed, the People need not make an independent showing of the . . . reliability and basis of knowledge" of the witness (*People v Martin*, 221 AD2d 568, 568, *lv denied* 87 NY2d 1021; *see People v Rivera*, 210 AD2d 895). Moreover, "[w]e accord great deference to the determination of [Supreme] Court crediting the testimony of the police officer concerning the information provided by the citizen informant" (*Brito*,

59 AD3d at 1000). Finally, we reject defendant's contention that the sentence is unduly harsh or severe.

Entered: November 20, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1449

KA 08-01690

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LISA L. SCHWANDNER, ALSO KNOWN AS LISA TRICKEY,
DEFENDANT-APPELLANT.

MARK D. FUNK, ROCHESTER, 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 July 1, 2008. The judgment convicted defendant, upon her plea of guilty, of driving while intoxicated, a class D felony.

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of felony driving while intoxicated (Vehicle and Traffic Law § 1192 [2]; § 1193 [1] [c] [former (ii)]). Contrary to the contention of defendant, we conclude that her waiver of the right to appeal was voluntarily, knowingly and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256; *People v Seaberg*, 74 NY2d 1, 11-12). The valid waiver of the right to appeal encompasses the further contention of defendant that County Court abused its discretion in terminating her from the drug court program (*see People v Rodriguez*, 46 AD3d 356, *lv denied* 10 NY3d 815), as well as her challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737; *People v Heer*, 309 AD2d 1191, *lv denied* 1 NY3d 573). To the extent that the contention of defendant that she was denied effective assistance of counsel survives her guilty plea and her waiver of the right to appeal (*see People v Santos*, 37 AD3d 1141, *lv denied* 8 NY3d 950), we conclude that defendant failed to preserve her contention for our review by failing to move to withdraw her plea or to vacate the judgment of conviction on that ground (*see People v Grandin*, 63 AD3d 1604, *lv denied* 13 NY3d 744).

Entered: November 20, 2009

Patricia L. Morgan
Clerk of the Court

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

1450

CAF 08-01052

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

IN THE MATTER OF ERIC R. SIMONDS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TONI M. KIRKLAND, RESPONDENT-APPELLANT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., LIVINGSTON COUNTY CONFLICT DEFENDERS, WARSAW (NEAL J. MAHONEY OF COUNSEL), FOR RESPONDENT-APPELLANT.

KRUK & CAMPBELL, P.C., LIMA (ANDREW F. EMBORSKY OF COUNSEL), FOR PETITIONER-RESPONDENT.

JOHN M. LOCKHART, LAW GUARDIAN, GENESEO, FOR ANTHONY S.

Appeal from an order of the Family Court, Livingston County (Dennis S. Cohen, J.), entered April 22, 2008 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole legal custody of the parties' son to petitioner.

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

Memorandum: On appeal from an order modifying a prior order by granting sole legal custody of the parties' son to petitioner father, respondent mother contends that Family Court erred, inter alia, in relying upon evidence that her paramour sexually abused the son's stepsisters in determining that the father made the requisite showing of a change of circumstances to warrant an inquiry into whether modification of the existing custody arrangement was in the son's best interests. We note at the outset that the mother may not assert the defense of collateral estoppel concerning that sexual abuse. Although the mother belatedly objected to the introduction of the evidence concerning that sexual abuse, she did not object based on the defense of collateral estoppel, nor did she raise that defense in her answer or move to dismiss the petition on that ground. We thus conclude that the mother waived her right to assert that defense (*see* CPLR 3018 [b]; 3211 [a] [5]; [e]; *Mayers v D'Agostino*, 58 NY2d 696; *Matter of Hall*, 275 AD2d 979).

Contrary to the mother's further contention, based on the evidence in the record before us we conclude that the father established a sufficient change of circumstances to warrant an inquiry

into whether a modification of the existing custody arrangement was in the son's best interests. In addition to the evidence of sexual abuse of the son's stepsisters (*see generally Matter of Alan YY. v Laura ZZ.*, 209 AD2d 902, 904-905, *lv denied* 85 NY2d 806), the record establishes that the mother continued to reside with her paramour thereafter, that she planned to exercise her visitation with the parties' son in a basement room with no furniture, and that she routinely placed him in an environment where he was exposed to pornography and excessive alcohol and drug consumption (*see generally Friederwitzer v Friederwitzer*, 55 NY2d 89; *Matter of Breitung v Trask*, 279 AD2d 677, 678).

The mother also will not be heard to contend that the court erred in permitting the amendment of the pleadings to conform to the evidence presented at the hearing on the petition, inasmuch as the record establishes that the mother's attorney consented to that amendment (*see McLaughlin v City of New York*, 294 AD2d 136; *see also Atweh v Hashem*, 284 AD2d 216, 217). In any event, "[t]he court has discretion to permit an amendment to conform the pleadings to the proof . . . [and i]t is an abuse of discretion to [withhold such permission] unless the opposing party can allege demonstrable and real surprise or prejudice" (*General Elec. Co. v A. C. Towne Corp.*, 144 AD2d 1003, 1004, *lv dismissed* 73 NY2d 994; *see* CPLR 3025 [c]). Even assuming, arguendo, that the mother was in fact "an opposing party," we conclude that she failed to demonstrate that she sustained any "real surprise or prejudice" arising from the amendment (*General Elec. Co.*, 144 AD2d at 1004).

Finally, even assuming, arguendo, that the child was aggrieved when the court denied the mother's request that the court recuse itself, we conclude that the Law Guardian did not take a cross appeal from the order and thus may not seek affirmative relief with respect to the denial of the mother's request (*see Bielli v Bielli*, 60 AD3d 1487, *lv dismissed* 12 NY3d 896).

Entered: November 20, 2009 Patricia L. Morgan
Clerk of the Court

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

1451

CA 09-00434

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

COUNSEL FINANCIAL SERVICES, LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID MCQUADE LEIBOWITZ, P.C. AND DAVID
MCQUADE LEIBOWITZ, DEFENDANTS-APPELLANTS.

LAW OFFICE OF BRUCE S. ZEFTEL, BUFFALO (BRUCE S. ZEFTEL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PHILIP B. ABRAMOWITZ, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John M. Curran, J.), entered November 25, 2008. The order and judgment granted plaintiff's motion for summary judgment in lieu of complaint.

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

Memorandum: Defendants appeal from an order and judgment granting plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213. In granting plaintiff's motion, Supreme Court, inter alia, ordered defendants to pay a specified amount due on a promissory note executed by defendant David McQuade Leibowitz, P.C. (DML), and personally guaranteed by David McQuade Leibowitz (defendant). We note at the outset that the contentions of defendants are properly before us despite the fact that the order and judgment was entered upon their default. Although defendants did not move to vacate the order and judgment, they appeared in court on the adjourned return date of the motion and contested the entry of a default judgment (*see Spano v Kline*, 50 AD3d 1499, *lv denied* 11 NY3d 702, 12 NY3d 704; *Jann v Cassidy*, 265 AD2d 873, 874; *Spatz v Bajramoski*, 214 AD2d 436). Nevertheless, we conclude that the court properly granted the motion.

Plaintiff met its initial burden by submitting the promissory note, the personal guarantee, and evidence of DML's default (*see LaMar v Vasile* [appeal No. 4], 49 AD3d 1218; *Judarl LLC v Cycletech, Inc.*, 246 AD2d 736, 737). The record establishes that only plaintiff's counsel appeared in court on the initial return date of the motion but that the court thereafter granted defendants additional time in which to submit papers in opposition to the motion and adjourned the matter

to a date subsequent thereto. The court stated that, in the event that defendant failed to appear on the adjourned return date, "the matter will be deemed submitted." Defendants failed to submit any opposing papers by the date specified by the court and, although defendant appeared in court on the adjourned return date, he requested a second adjournment at that time, in which to prepare opposing papers. The court determined that defendants already were in default at that time, inasmuch as they had failed to submit opposing papers. "Having defaulted, . . . defendant[s] may not now challenge the merits of plaintiff['s] claims collaterally" (*Porisini v Petricca*, 90 AD2d 949, 949; *see Constandinou v Constandinou* [appeal No. 1], 265 AD2d 890). Finally, under the circumstances of this case, we reject the contention of defendants that the court abused or improvidently exercised its discretion in denying their second request for an adjournment in order to submit opposing papers (*see generally Pitts v City of Buffalo*, 19 AD3d 1030).

Entered: November 20, 2009 Patricia L. Morgan
Clerk of the Court

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

1463

CA 09-00673

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

IN THE MATTER OF KYLE O. TROTMAN,
CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

ROCHESTER CITY SCHOOL DISTRICT,
RESPONDENT-RESPONDENT.

LAW OFFICE OF RICK S. GEIGER, LLC, PITTSFORD (RICK S. GEIGER OF COUNSEL), FOR CLAIMANT-APPELLANT.

CHARLES G. JOHNSON, ROCHESTER (CARA M. BRIGGS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered January 17, 2009. The order denied claimant's application for leave to serve a late notice of claim.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the application is granted and the notice of claim is deemed timely served nunc pro tunc.

Memorandum: We conclude that Supreme Court abused its discretion in denying claimant's application for leave to serve a late notice of claim. Although claimant failed to offer a reasonable excuse for the delay in serving a notice of claim, that delay is not fatal inasmuch as respondent had actual notice of the facts underlying the claim and was not substantially prejudiced by the delay (*see Matter of Lindstrom v Board of Educ. of Jamestown City School Dist.*, 24 AD3d 1303; *Hale v Webster Cent. School Dist.*, 12 AD3d 1052). Claimant, a student in respondent school district, alleged in support of his motion that he was sexually abused by one of respondent's employees, and that the alleged abuse occurred between February 2006 and July 2006. The record establishes that the respondent acquired actual knowledge of the abuse no later than January 2007, when the employee in question was arrested on criminal charges and was suspended without pay. There is no support for the conclusory assertions of respondent that the delay in filing the notice of claim impeded its ability to investigate the incident or to interview witnesses (*see Matter of Gilbert v Eden Cent. School Dist.*, 306 AD2d 925, 926-927). Once respondent was advised of the criminal charges asserted against its employee, respondent should have conducted a prompt investigation of the incidents underlying the charges (*see Matter of Bird v Port Byron Cent. School Dist.*, 231 AD2d 916). " 'Having failed to do so,

respondent cannot now be heard to complain that the late filing of [the] claim will prejudice its preparation of a defense' " (*id.*; *see Matter of Courtney Nicole R. v Moravia Cent. School Dist*. [appeal No. 2], 28 AD3d 1134, 1135).

Entered: November 20, 2009

Patricia L. Morgan
Clerk of the Court