SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 2, 2010

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

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. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

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

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KA 08-01772

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD MORGAN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (AMANDA TOWNSEND, TIMOTHY P. MURPHY, 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 Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered September 25, 2006. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, grand larceny in the third degree, criminal possession of a forged instrument in the second degree and criminal possession of a controlled substance in the seventh degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that Supreme Court erred in permitting the prosecutor to exercise a peremptory challenge to exclude a black prospective juror. We agree. Following defendant's *Batson* objection, the prosecutor explained that she excluded the prospective juror in question because (1) the prospective juror indicated that she had served on a jury in a criminal case "years ago" but could not recall what the case involved; (2) the prospective juror acknowledged that she knew people who used cocaine; and (3) the prospective juror's son had been accused of a crime "years ago" and was not convicted. In response to the prosecutor's explanation, defense counsel noted that another prospective juror had been accused of a crime and was not challenged by the prosecutor on that or any other ground. Likewise, defense counsel noted that another prospective juror admitted that he knew someone who used cocaine and that prospective juror also was not challenged by the prosecutor. Finally, defense counsel contended that the son of the challenged prospective juror, "not herself, twenty years ago in Family Court as a juvenile might have had something. And for the fact that she can't remember something that she served on years ago, I don't see how that's relevant. I haven't heard one race neutral explanation yet." Upon the court's denial of defendant's

Batson challenge, defense counsel asked the court to articulate the grounds for its ruling. In response, the court stated only that "[t]he grounds were quite sufficient as stated by the District Attorney," and that "there is no pattern of discrimination."

On the record before us, we agree with defendant that reversal is required based on the court's denial of defendant's *Batson* challenge. Trial courts are required to follow a three-step procedure in determining whether a peremptory challenge has been used to exclude a prospective juror based on race: "As a first step, the moving party bears the burden of establishing a prima facie case of discrimination in the exercise of peremptory challenges. Second, the nonmoving party must give a race-neutral reason for each potential juror challenged. In step three, the court determines whether the reason given is merely a pretext for discrimination" (*People v Smocum*, 99 NY2d 418, 420; *see People v Payne*, 88 NY2d 172, 181). "The third step of the *Batson* inquiry requires the trial court to make an ultimate determination on the issue of discriminatory intent based on all of the facts and circumstances presented" (*Smocum*, 99 NY2d at 422). That determination presents a "question of fact, focused on the credibility of the race-neutral reasons" (*id.*; *see generally People v Allen*, 86 NY2d 101, 110), and thus great deference is accorded to the determination of the trial court (*see Hernandez v New York*, 500 US 352, 364-365; *People v Carter*, 38 AD3d 1256, 1256-1257, *lv denied* 8 NY3d 982).

In this case, the prosecutor met her "quite minimal" burden at the second stage of the *Batson* inquiry (*Payne*, 88 NY2d at 183), inasmuch as she articulated three "facially neutral" reasons for excluding the prospective juror at issue (*Allen*, 86 NY2d at 109; *see Smocum*, 99 NY2d at 422). At that point, the court should have proceeded to the third step of the *Batson* inquiry, namely, "a determination of pretext" (*Smocum*, 99 NY2d at 423). Instead, however, the court summarily concluded that the prosecutor's stated reasons for exercising the peremptory challenge in question were sufficient without determining whether those reasons "should be believed" (*Hernandez*, 500 US at 365; *see Smocum*, 99 NY2d at 422-423; *see also Dolphy v Mantello*, 552 F3d 236, 239; *Jordan v Lefevre*, 206 F3d 196, 201). The court's acceptance of the prosecutor's reasons without an assessment of credibility is particularly troublesome where, as here, the defendant rebutted each of the proffered reasons. Defendant rebutted two of the prosecutor's race-neutral explanations by showing that similarly-situated prospective jurors were not challenged by the prosecutor. The remaining reason articulated by the prosecutor——that the prospective juror could not remember the specifics of a trial in which she had served as a juror more than a decade earlier——was not relevant to the prospective juror's qualifications to serve in this case. Contrary to the prosecutor's assertion that the prospective juror did not "remember what the verdict was" in the prior case the record reflects that the prospective juror was never asked such a question. Nonetheless, the court merely accepted the prosecutor's explanations without determining whether those explanations were pretextual, a practice that, in our view, "falls short of a 'meaningful inquiry into the question of discrimination' " (*Smocum*, 99

NY2d at 423, quoting *Jordan*, 206 F3d at 201).

Inasmuch as the court failed to make the requisite credibility determination at step three of the *Batson* inquiry, there is no basis upon which to defer to the trial court on this record (*see Dolphy*, 552 F3d at 239; *Jordan*, 206 F3d at 201). Although the dissent concludes that the prospective juror was not similarly situated to the other prospective jurors who ultimately were seated because those jurors did not possess all three characteristics cited by the prosecutor, neither the prosecutor nor the court articulated that ground as a basis for denying defendant's *Batson* challenge. In our view, a post hoc justification for a party's use of a peremptory challenge cannot excuse the failure of a trial court to engage in the requisite inquiry at the time of trial. As the Court of Appeals stated in *Payne* (88 NY2d at 183), trial courts "must in all cases make a step three pretext determination . . . [and it is] the trial courts' responsibility to make a sufficient record to allow for meaningful appellate review that insures and reflects that each party fulfills its burden and has an opportunity for input." That record should "reflect[ ] the basis for [the trial court's] rulings" (*id.* at 184). Here, the court failed to make *any* determination on the record with respect to the issue of pretext. Even assuming, arguendo, that the court "implicitly determined" that the prosecutor's explanations were not pretextual (*People v Parker*, 304 AD2d 146, 156, *lv denied* 100 NY2d 585), we conclude that such a determination is not supported by the record in this case (*cf. People v Robinson*, 1 AD3d 985, 986, *lv denied* 1 NY3d 633, 2 NY3d 805).

We further note that the court also erred in denying defendant's *Batson* challenge on the ground that there was "no pattern of discrimination." It is well established that "a prima facie case may be made based on the peremptory challenge of a single juror that gives rise to an inference of discrimination" (*Smocum*, 99 NY2d at 422), and that the "[i]mproper removal of even a single juror may be a violation of equal protection" (*id.* at 423). We therefore reverse the judgment of conviction and grant a new trial (*see People v Wilmot*, 34 AD3d 1225, 1226, *lv denied* 8 NY3d 886).

Although we are granting a new trial on *Batson* grounds and thus need not address the contention of defendant that he was deprived of a fair trial by prosecutorial misconduct, we nevertheless note our strong disapproval of the misconduct of the prosecutor on summation in improperly shifting the burden of proof onto defendant and in improperly vouching for the credibility of the People's witnesses. Among other objectionable remarks, the prosecutor stated on summation that "[t]he only way that you can find the defendant not guilty of burglary is if you believe that he falsely admitted to a crime that he didn't commit." The prosecutor also stated that, "to believe what [defendant] want[s] you to believe, you have to conclude that [two police detectives] are liars. Two police officers with forty years of experience between them . . . They're going to come in here and perjure themselves on the stand, and risk prosecution themselves, for what? For this?"

Contrary to the further contention of defendant, we conclude that the court properly refused to suppress his statement to the police on the grounds that the statement was the product of an unlawful arrest and was obtained in violation of his *Miranda* rights. The record of the suppression hearing establishes that the police had probable cause to arrest defendant based upon information provided by an identified citizen informant and other witnesses (*see People v Brito*, 59 AD3d 1000, *lv denied* 12 NY3d 814; *People v Crews*, 162 AD2d 462, *lv denied* 76 NY2d 854). In addition, the record of the suppression hearing supports the court's conclusion that defendant knowingly, voluntarily, and intelligently waived his *Miranda* rights before he made his statement to the police (*see People v Shaw*, 66 AD3d 1417, 1418, *lv denied* 14 NY3d 773). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence inasmuch as he made only a general motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19). In addition, viewing the evidence in light of the elements of the crime of burglary 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).

In view of our determination with respect to the *Batson* issue, we do not address defendant's remaining contentions.

All concur except Scudder, P.J., and Carni, J., who dissent and vote to affirm in the following Memorandum: We respectfully disagree with the conclusion of our colleagues that Supreme Court erred in denying defendant's *Batson* challenge. We therefore dissent.

While the majority criticizes the court for failing to conduct a "meaningful inquiry into the question of discrimination," we note that this Court has frequently approved the trial court's practice of "implicitly" determining that race-neutral explanations offered by the prosecutor are not pretextual (*see e.g. People v Dickerson*, 55 AD3d 1276, 1277, *lv denied* 11 NY3d 924; *People v Carmack*, 34 AD3d 1299, 1301, *lv denied* 8 NY3d 879; *People v Dandridge*, 26 AD3d 779, 780). In addition, the court's determination that the race-neutral reasons offered by the prosecutor are not pretextual is entitled to deference (*see People v Wells*, 7 NY3d 51, 59; *Dickerson*, 55 AD3d at 1277; *Dandridge*, 26 AD3d at 780). Judicial deference is especially appropriate where, as here, the assessment turns on the credibility of the attorney exercising the challenge (*see People v Hernandez*, 75 NY2d 350, 356, *affd* 500 US 352). Although the majority concludes that the court failed to make "*any*" determination on the record as to the prosecutor's credibility on the issue of pretext, we are mindful of the well-settled principle that "[t]rial courts . . . need not recite a particular formula of words, or mantra" in applying the third *Batson* prong (*Dolphy v Mantello*, 552 F3d 236, 239). "The trial court is not compelled to make intricate factual findings in connection with its ruling in order to comply with *Batson*" (*Messiah v Duncan*, 435 F3d 186, 198). The Second Circuit in *Messiah* cited *Miller-El v Cockrell* (537 US 322, 347), which as set forth in *Messiah* explains that " 'a state court need not make detailed findings addressing all the evidence

before it' to render a proper *Batson* ruling" (*Messiah*, 435 F3d at 198). "As long as a trial judge affords the parties a reasonable opportunity to make their respective records, he [or she] may express [a] *Batson* ruling on the credibility of a proffered race-neutral explanation in the form of a clear rejection or acceptance of a *Batson* challenge" (*id.*, citing *McKinney v Artuz*, 326 F3d 87, 100). The court in *Messiah* quoted from *McKinney* for the proposition that, " '[a]lthough reviewing courts might have preferred the trial court to provide express reasons for each credibility determination, no clearly established federal law required the trial court to do so.' "

Here, after being provided with an opportunity to satisfy his "ultimate burden of persuading the court" that the prosecutor's race-neutral reasons were pretextual (*People v Smocum*, 99 NY2d 418, 422), defense counsel requested that the court articulate the grounds for denying defendant's *Batson* challenge. In response, the court stated that "[t]he grounds were quite sufficient as stated by the District Attorney." In our view, that " 'unambiguous rejection' " of defendant's *Batson* challenge demonstrates with sufficient clarity that the trial court (1) deemed defendant to have failed to meet his ultimate burden of showing that the prosecutor's proffered race-neutral explanations were pretextual and (2) credited the prosecutor's race-neutral explanations for striking the subject venireperson (*Dolphy*, 552 F3d at 239, quoting *Messiah*, 435 F3d at 198). Thus, we conclude that the court fulfilled its duty to rule at the so-called "step three" of the *Batson* framework by expressing its intention to refuse to strike the subject venireperson after listening to the challenge, the race-neutral explanations and the arguments of the prosecutor and defense counsel.

We therefore cannot agree with the majority's conclusion, apparently based upon the absence of formulaic words, a "talismanic recitation of specific words," or a credibility mantra, that the court failed to make any determination as to pretext or the prosecutor's credibility (*Galarza v Keane*, 252 F3d 630, 640 n 10).

The record establishes that the prosecutor offered three race-neutral reasons for exercising the peremptory challenge in question. First, the venireperson's son was accused but not convicted of a crime because, as the venireperson described it, the case was "thrown out." This is a race-neutral reason for exercising a peremptory challenge (*see People v Noone*, 8 AD3d 97, 98). Second, the venireperson stated that she knew persons who used cocaine - the same controlled substance supporting one of the counts of the indictment against defendant. As the majority properly concludes, this is also a race-neutral explanation.

Third, the venireperson was unable to provide details of the nature or outcome of a criminal trial in which she served as a juror. The majority concludes that the venireperson's prior jury service is "irrelevant" to the service of the venireperson in this case. We disagree. A peremptory challenge based upon prior jury service is not only relevant and race-neutral but, in addition, it is " 'not

pretextual on [its] face' " (*People v Richie*, 217 AD2d 84, 89, *lv denied* 88 NY2d 940, quoting *People v Dixon*, 202 AD2d 12, 18).

The majority concludes that defendant rebutted two of the prosecutor's race-neutral explanations by showing that "similarly-situated" venirepersons were not challenged by the prosecutor. Thus, because the majority has placed this characterization upon the comparative analysis, and not because it was specifically articulated by the prosecutor, we are compelled to address it herein. In our view, the record does not support the conclusion that the other venirepersons not challenged were "similarly-situated" as the challenged venireperson. One of the venirepersons shared the singular characteristic of having been accused, but not convicted, of a crime. However, this venireperson did not share the characteristics of prior jury service and knowing anyone who used cocaine. The other venireperson, also described by the majority as "similarly situated," shared the singular characteristic of knowing persons who used cocaine. Importantly, that venireperson did not share the characteristics of prior jury service and having had a family member accused but not convicted of a crime.

Thus, in our view, although the challenged venireperson shared one similar characteristic with each of two other venirepersons, it is not accurate to describe all three venirepersons as "similarly situated." Indeed, "uneven application of neutral factors may not always indicate pretext, however, but simply an incomplete understanding of the full reasons for the prosecutor's decision to seat some jurors while challenging others" (*People v Allen*, 86 NY2d 101, 110).

Defendant, as the moving party, had the ultimate burden of persuading the court that the prosecutor's reasons were merely a pretext for intentional discrimination (*see People v Payne*, 88 NY2d 172, 183-184). Inasmuch as the People met their burden by " 'offering [three] facially neutral reason[s] for the challenge——even if [those] reason[s] [were] ill-founded——so long as the reason[s] [do] not violate equal protection . . ., we cannot say that the prosecutor's justifications for the use of the peremptory challenge were inadequate' " (*Wells*, 7 NY3d at 59).

We have reviewed the remaining contentions of defendant that were not addressed by the majority in light of its *Batson* determination, and we conclude that they are without merit. We therefore would affirm the judgment.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

259

CA 09-00630

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

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

V MEMORANDUM AND ORDER

STEVEN CHRISMAN, AN INMATE IN THE CUSTODY
OF NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES, RESPONDENT-APPELLANT.

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ANDREW B. AYERS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered December 15, 2008 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued respondent's commitment to a secure treatment facility.

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

Memorandum: Respondent appeals from an order pursuant to Mental Hygiene Law article 10 that, inter alia, continued his commitment to a secure treatment facility based on a jury finding that he is a detained sex offender with a mental abnormality that predisposes him to commit further sex offenses. We reject respondent's contention that, because there were "conflicting expert opinions," petitioner failed to establish by clear and convincing evidence that respondent suffered from a mental abnormality (*see* § 10.07 [d]; *Matter of State of New York v Timothy JJ.*, 70 AD3d 1138, 1140; *Matter of State of New York v Shawn X.*, 69 AD3d 165, 168, *lv denied* 14 NY3d 702). The jury verdict is entitled to great deference based on the jury's opportunity to evaluate the weight and credibility of conflicting expert testimony (*see Matter of State of New York v Donald N.*, 63 AD3d 1391, 1394).

Respondent failed to preserve for our review his further contention that Supreme Court erred in admitting in evidence various documentary exhibits, except insofar as he objected to the admission in evidence of his criminal records from Florida (*see generally* CPLR 5501; *Palmer v CSX Transp., Inc.* [appeal No. 2], 68 AD3d 1626, 1627-1628). Even assuming, arguendo, that respondent's criminal records from Florida were not properly certified, we conclude that, under the

circumstances of this case, the lack of certification is at most a technical irregularity that may be disregarded (*see* CPLR 2001; *Borchardt v New York Life Ins. Co.*, 102 AD2d 465, 467, *affd* 63 NY2d 1000, *rearg denied* 64 NY2d 776). Respondent contends that he was denied a fair trial based on the misconduct of the Assistant Attorney General. Respondent failed to object to the majority of the instances of alleged misconduct at issue, and thus he failed to preserve his contention with respect to those instances for our review (*see Short v Daloia*, 70 AD3d 1384). With respect to the single instance of alleged misconduct that is preserved for our review, we conclude that the conduct of the Assistant Attorney General was not so egregious or prejudicial as to deny respondent his right to a fair trial (*see Duncan v Mount St. Mary's Hosp. of Niagara Falls*, 272 AD2d 862, 863, *lv denied* 95 NY2d 760).

Respondent failed to preserve for our review his contention that the verdict sheet was improper (*see Halbreich v Braunstein*, 13 AD3d 1137, *lv denied* 5 NY3d 704). In any event, that contention lacks merit inasmuch as respondent failed to demonstrate that the jury was confused by the verdict sheet (*see generally Alvarado v Dillon*, 67 AD3d 1214, 1215-1216).

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

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CA 09-00929

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

CONSTANCE J. ANDRITZ, AS ADMINISTRATRIX
OF THE ESTATE OF GERALD J. ANDRITZ, DECEASED,
PLAINTIFF-RESPONDENT,

V ORDER

TOWN OF SALINA, ET AL., DEFENDANTS,
AND FEDERAL EXPRESS CORPORATION,
DEFENDANT-APPELLANT.

FEDERAL EXPRESS CORPORATION, THIRD-PARTY
PLAINTIFF,

V

AEROMECH, INC., THIRD-PARTY DEFENDANT-APPELLANT.

CITY OF SYRACUSE, SECOND THIRD-PARTY PLAINTIFF,

V

AEROMECH, INC., SECOND THIRD-PARTY
DEFENDANT-APPELLANT.

CONSTANCE J. ANDRITZ, AS ADMINISTRATRIX
OF THE ESTATE OF GERALD J. ANDRITZ, DECEASED,
PLAINTIFF-RESPONDENT,

V

HANCOCK INTERNATIONAL ASSOCIATES, INC., DEFENDANT,
AND AERO SYRACUSE, LLC, DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANT-APPELLANT FEDERAL EXPRESS CORPORATION.

BARRY, MCTIERNAN & WEDINGER, EDISON, NEW JERSEY (RICHARD W. WEDINGER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT, SECOND THIRD-PARTY DEFENDANT-APPELLANT AND DEFENDANT-APPELLANT AERO SYRACUSE, LLC.

PAUL WILLIAM BELTZ, P.C., BUFFALO (STEPHEN R. FOLEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered July 21, 2008. The order granted the

motion of plaintiff for partial summary judgment and denied the motion of defendant Federal Express Corporation for partial summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 28, 2010,

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

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

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CAF 09-00139

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

IN THE MATTER OF ANDREW J. SCHOLL,
PETITIONER-RESPONDENT,

V ORDER

MARY ANN LOY, RESPONDENT-APPELLANT.

ABBIE GOLDBAS, UTICA, FOR RESPONDENT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR PETITIONER-RESPONDENT.

WILLIAM L. KOSLOSKY, ATTORNEY FOR THE CHILD, UTICA, FOR ISABELLA S.S.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered December 29, 2008 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted custody of the subject child to petitioner.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 18 and 23, 2010 and by the Attorney for the Child on June 19, 2010,

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

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

360

CA 09-01982

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

THOMAS M. SULLIVAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TROSER MANAGEMENT, INC., DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

J. RAYMOND BROWN, PENFIELD, FOR PLAINTIFF-APPELLANT.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (RICHARD GLEN CURTIS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered January 29, 2009. The order granted defendant's motion to strike plaintiff's demand for a jury trial and denied 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 granting the cross motion and as modified the order is affirmed without costs.

Memorandum: Plaintiff, defendant's former director of sales for the operation of a ski resort, commenced this action seeking, inter alia, an 18% equity interest in defendant corporation. Defendant thereafter issued to plaintiff 18% of its shares of stock, and the dispute now relates to the value of that stock under the parties' "buy-sell" agreement (agreement). According to plaintiff, the purchase price provision of the agreement is unenforceable, and the value of plaintiff's stock should therefore be determined pursuant to the formula set forth in *Lewis v Vladeck, Elias, Vladeck, Zimny & Engelhard* (57 NY2d 975), i.e., based on a percentage interest in defendant's assets. According to defendant, however, this Court in a prior appeal has already decided that the agreement is enforceable (*Sullivan v Troser Mgt., Inc.*, 34 AD3d 1233) and that an issue of fact exists with respect to the method of determining the value of plaintiff's stock.

As a preliminary matter, we conclude that Supreme Court properly granted defendant's motion to strike plaintiff's demand for a jury trial inasmuch as the amended complaint asserts causes of action seeking equitable relief. It is well settled that plaintiff's "deliberate joinder of claims for legal and equitable relief arising out of the same transaction amounts to a waiver of the right to demand a jury trial" (*Hebranko v Bioline Labs.*, 149 AD2d 567, 567; *see*

Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr., 59 AD3d 481; *Chichilnisky v Trustees of Columbia Univ. in City of N.Y.*, 52 AD3d 206). The right to a jury trial is not revived upon withdrawal or dismissal of the equitable relief sought (*see Willis Re Inc. v Hudson*, 29 AD3d 489). Plaintiff's reliance on *Arrow Communication Labs. v Pico Prods.* (219 AD2d 859) is misplaced. The complaint in that case sought monetary damages, and only a sum of money could provide full relief to the plaintiff therein. In this case, by contrast, the amended complaint does not request a money judgment. Although both parties have asked the court to determine the price of plaintiff's shares, the agreement does not compel defendant to purchase those shares. Rather, pursuant to the terms of the agreement, defendant has the "absolute option" of purchasing the shares, and plaintiff is thus entitled to monetary relief only in the event that defendant elects to exercise that option.

We further conclude, however, that the court erred in denying the cross motion of plaintiff for partial summary judgment seeking an order determining that his shares "be valued on the basis of his percentage interest in Defendant's assets" in the event that defendant exercises its option to purchase his shares, and we therefore modify the order accordingly. The "Purchase Price" provision of the agreement expressly states that the price of the shares of stock shall be "an amount agreed upon annually by the Stockholders as set forth on the attached Schedule A." It is undisputed that no Schedule A exists. That provision further states that, "[i]n the event that no annual value is established, the value shall be the last agreed upon value except that if no such agreed upon value is established for a period of two years, the value shall be the last agreed upon value increased or decreased by reference to an increase or decrease in book value of [defendant] from the date of the last agreed upon value to the date of death or disability" of the stockholder seeking to sell his or her shares.

Plaintiff met his initial burden on his cross motion by establishing as a matter of law that the stockholders have never agreed upon a value of the stock, and that the purchase price of his shares therefore cannot be ascertained in accordance with the terms of the agreement, and defendant failed to raise an issue of fact to defeat the cross motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The fact that defendant submitted evidence that the value of the stock had been determined at other times is of no moment inasmuch as plaintiff was not a party to any of those transactions. In accordance with the terms of the "Purchase Price" provision of the agreement, the value of the stock is that "agreed upon annually by the Stockholders," and plaintiff is identified in the preamble of the agreement as a "Stockholder." Indeed, there is no evidence in the record that plaintiff has ever agreed upon a value of the stock.

Finally, there is no merit to the contention of defendant that our decision in the prior appeal compels a ruling in its favor on the valuation issue. We previously held that defendant failed to meet its initial burden of demonstrating "that its interpretation of the . . .

agreement [was] the only construction that [could] fairly be placed upon it" and that, in any event, plaintiff raised an issue of fact whether a different method of valuation was plausible (*Sullivan*, 34 AD3d at 1235). The fact that we held that plaintiff raised an issue of fact with respect to defendant's interpretation of the agreement does not compel the conclusion that there are issues of fact with respect to plaintiff's proposed method of valuation.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

361

CA 09-02110

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

THOMAS M. SULLIVAN, PLAINTIFF-APPELLANT,

V ORDER

TROSER MANAGEMENT, INC., DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

J. RAYMOND BROWN, PENFIELD, FOR PLAINTIFF-APPELLANT.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (RICHARD GLEN CURTIS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered January 29, 2009. The order granted defendant's motion to preclude certain expert testimony at trial.

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

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

515

CA 09-02410

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

LUIS E. BASSAT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALPHA IRON WORKS, INC., ALPHA IRON WORKS, LLC,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

THOMAS R. MONKS, ROCHESTER, FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, ROCHESTER (RICHARD C. BRISTER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered July 7, 2009 in a personal injury action. The order, insofar as appealed from, granted that part of the motion of defendants Alpha Iron Works, Inc. and Alpha Iron Works, LLC for summary judgment dismissing the first cause of action, for negligence, against them insofar as that cause of action alleges that those defendants created the allegedly dangerous condition.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part and the first cause of action against defendants Alpha Iron Works, Inc. and Alpha Iron Works, LLC is reinstated insofar as that cause of action alleges that those defendants created the allegedly dangerous condition.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained working as a tile cutter and installer for E.G. Sackett, Inc. (Sackett), a subcontractor on a construction project. He was carrying a tile cutting machine down a flight of stairs in the building with a coworker when he tripped over a red and black cord or cable that diagonally traversed the stairway, causing him to stumble and to injure his lower back. According to the deposition testimony of plaintiff, he believed that the cord or cable was attached to a generator on the first floor of the building. We note at the outset that, although Supreme Court granted the motion of defendants-respondents (collectively, Alpha defendants) for summary judgment dismissing the complaint against them, plaintiff contends on appeal only that the court erred in granting that part of the motion dismissing the first cause of action, for negligence, against those defendants, who also were subcontractors on the project, insofar as that cause of action alleges that they created the allegedly dangerous condition. Plaintiff has thus abandoned any other issues concerning

that cause of action and the remaining causes of action asserted against the Alpha defendants (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

In support of their motion, the Alpha defendants submitted evidence establishing that they neither owned the cord or cable over which plaintiff tripped nor placed it on the stairway. The Alpha defendants further established that they did not use any red and black cords or cables and that their employees had no need to use a generator on the first floor of the building because there were temporary power sources available on each floor of the building where they were working. The Alpha defendants also submitted evidence establishing that plaintiff's employer, Sackett, owned red and black extension cords. We conclude that the Alpha defendants thereby met their initial burden of establishing as a matter of law that they did not create the allegedly dangerous condition that caused the accident (*see generally Derosia v Gasbarre & Szatkowski Assn.*, 66 AD3d 1423; *Pelow v Tri-Main Dev.*, 303 AD2d 940, 941), thus shifting the burden to plaintiff to raise an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562).

In opposition to the motion, plaintiff submitted an affidavit from a private investigator who averred that the president of the Alpha defendants acknowledged that three or four of his employees were working on the staircase on the day of plaintiff's injury. The president informed the private investigator that his employees were doing " 'grinding and polishing work' " with tools that required electrical power. Plaintiff also submitted evidence that only one contractor worked on the staircase at a given time, that the Alpha defendants and Sackett were the only contractors who performed work on the staircase, and that none of plaintiff's coworkers was working on the stairs on the day in question. In our view, that evidence is sufficient to raise an issue of fact whether an employee of the Alpha defendants left the cord or cable on the stairway and thereby created a dangerous condition that caused plaintiff's injuries.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

546

CA 09-02316

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

JAMES WILK AND LORIANN WILK,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

LEWIS & LEWIS, P.C. AND MICHAEL J.
SKONEY, ESQ., DEFENDANTS-APPELLANTS.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (MICHELLE M. PARKER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE MCGORRY LAW FIRM, LLP, BUFFALO, LIPPES MATHIAS WEXLER FRIEDMAN LLP (KENNETH R. KIRBY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered March 23, 2009 in a legal malpractice action. The order denied the motion of defendants for summary judgment and granted the cross motion of plaintiffs for partial summary judgment to the extent that malpractice is established against defendants.

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 legal malpractice cause of action insofar as that cause of action is asserted with respect to the defendant Ford Motor Company in the underlying action, and by denying that part of the cross motion for partial summary judgment on liability on the legal malpractice cause of action insofar as that cause of action is asserted with respect to that defendant in the underlying action and as modified the order is affirmed without costs.

Memorandum: James Wilk (plaintiff) was allegedly injured while repairing railroad cars, and he retained defendants to represent him, along with his wife, in seeking damages for those injuries. Defendants commenced a pre-action discovery proceeding against plaintiff's employer to obtain information concerning the accident and, when defendants thereafter commenced a Labor Law and common-law negligence action on behalf of plaintiffs (hereafter, underlying action), they used the same index number that had been used in the pre-action discovery proceeding. Supreme Court granted the motions of the defendants in the underlying action (Labor Law defendants) to dismiss the complaint. Under the law at that time, the failure to purchase a new index number rendered the action a nullity because it was never properly commenced (*see Chiacchia & Fleming v Guerra*, 309

AD2d 1213, 1214, *lv denied* 2 NY3d 704). No appeal was taken by plaintiffs from that order, although plaintiffs retained other attorneys (plaintiffs' successor counsel) shortly prior to the expiration of the time in which to take an appeal. Plaintiffs commenced a second Labor Law and common-law negligence action against the Labor Law defendants, who moved to dismiss the complaint as time-barred. We previously reversed an order denying those motions and instead granted the motions and dismissed the complaint (*Wilk v Genesee & Wyoming R.R. Co.*, 45 AD3d 1274). We concluded that the second action did not relate back to the filing of the underlying action pursuant to CPLR 205 (a) because the failure to purchase a new index number rendered the underlying action a nullity (*id*. at 1275).

Plaintiffs commenced the instant legal malpractice action seeking damages arising from the dismissal of the underlying action. Defendants appeal from an order denying their motion for summary judgment dismissing the complaint and granting plaintiffs' cross motion for partial summary judgment "to the extent that malpractice is established against . . . defendants." That was error only insofar as the malpractice cause of action is asserted with respect to the defendant Ford Motor Company (Ford) in the underlying action. We therefore modify the order accordingly.

"To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove that the defendant attorney failed to exercise 'the ordinary reasonable skill and knowledge commonly possessed by a member of the legal community, and that the attorney's breach of [that] duty proximately caused plaintiff to sustain actual and ascertainable damages' " (*Velie v Ellis Law, P.C.*, 48 AD3d 674, 675, quoting *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442). The plaintiff must also establish that he or she "would have succeeded on the merits of the underlying action 'but for' the attorney's negligence" (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434). "To succeed on a motion for summary judgment, the defendant in a legal malpractice action must present evidence in admissible form establishing that the plaintiff is unable to prove at least one of [those] essential elements" (*Velie*, 48 AD3d at 675). Here, defendants submitted evidence in support of their motion establishing that Ford "is not an owner or contractor and that it lacked 'contractual or other actual authority to control the activity bringing about [plaintiff's] injury' " (*Scally v Regional Indus. Partnership*, 9 AD3d 865, 867-868). Thus, they met their initial burden of establishing that plaintiffs would not have succeeded in the underlying action against Ford "but for" their negligence (*see AmBase Corp.*, 8 NY3d at 434), and plaintiffs failed to raise a triable issue of fact with respect thereto.

Contrary to the further contention of defendants, the court properly denied those parts of their motion seeking dismissal of the instant complaint with respect to their failure to commence the underlying action against the remaining Labor Law defendants in a timely manner. In their answer to the instant complaint, defendants admitted that they used the same index number to commence the underlying action that had been previously used to commence the pre-

action discovery proceeding. The failure to commence the underlying action in a timely manner, absent factors not at issue here, is sufficient to establish that defendants "failed to exercise 'the ordinary reasonable skill and knowledge commonly possessed by a member of the legal community' " (*Velie*, 48 AD3d at 675, quoting *Rudolf*, 8 NY3d at 442).

Defendants also failed to establish that plaintiffs could not prove the remaining elements of a legal malpractice cause of action. Defendants contend that their negligence was not a proximate cause of plaintiffs' injuries because plaintiffs' successor counsel did not file a notice of appeal when the Court of Appeals issued its decision in *Harris v Niagara Falls Bd. of Educ.* (6 NY3d 155). We reject that contention. Defendants are correct that the Court of Appeals changed the law by holding in *Harris* that a defendant could waive a defect in connection with filing requirements such as the failure to purchase a new index number (*see id.* at 159). Even assuming, arguendo, however, that we agree with defendants that the time within which plaintiffs could file a notice of appeal expired 35 days after the final Labor Law defendant had served the order dismissing the first complaint against the Labor Law defendants (*see Blank v Schafrann*, 206 AD2d 771, 773; *Williams v Forbes*, 157 AD2d 837, 838-839; *Dobess Realty Corp. v City of New York*, 79 AD2d 348, 352, *appeal dismissed* 53 NY2d 1054, 54 NY2d 754), we note that the time in which to file a notice of appeal against that final Labor Law defendant expired approximately 30 hours after the *Harris* decision was issued. It cannot be said that the failure of plaintiffs' successor counsel to learn of the *Harris* decision and file a notice of appeal within that narrow time period constituted an "intervening and superseding failure of plaintiff[s'] successor [counsel]" to file a timely notice of appeal (*Pyne v Block & Assoc.*, 305 AD2d 213). Defendants thus failed to establish that "plaintiff[s'] successor counsel had sufficient time and opportunity to adequately protect plaintiff[s'] rights" (*Somma v Dansker & Aspromonte Assoc.*, 44 AD3d 376, 377; *cf. Ramcharan v Pariser*, 20 AD3d 556, 557; *Albin v Pearson*, 289 AD2d 272).

Contrary to the further contention of defendants, the court did not abuse its discretion in considering the cross motion of plaintiffs for partial summary judgment on liability despite their failure to submit the cross motion in proper form. In any event, defendants moved for summary judgment, and it is well settled that, "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a [cross motion]" (CPLR 3212 [b]; *see Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430; *JCS Controls, Inc. v Stacey*, 57 AD3d 1372, 1373).

Finally, defendants' remaining contention concerning the issues of contribution and indemnification is not properly before us. Neither the motion nor the cross motion sought relief with respect to those issues, and said issues may not be raised for the first time on

appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

587

CA 09-01851

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

IN THE MATTER OF THE ARBITRATION BETWEEN
BUFFALO COUNCIL OF SUPERVISORS AND
ADMINISTRATORS, LOCAL NO. 10, AMERICAN
FEDERATION OF SCHOOL ADMINISTRATORS,
PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

BOARD OF EDUCATION OF CITY SCHOOL DISTRICT OF
BUFFALO, RESPONDENT-RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN M. LICHTENTHAL OF COUNSEL), FOR PETITIONER-APPELLANT.

ALEXANDER C. COLLICHIO, BUFFALO, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered December 10, 2008 in a proceeding pursuant to CPLR article 75. The order denied the petition to confirm an arbitration award.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the petition in part and confirming the arbitration award with the exception of that part concerning Article 4 of the collective bargaining agreement and as modified the order is affirmed without costs.

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 75 seeking to confirm an arbitration award that, inter alia, directed respondent to reinstate 17 members of petitioner who had been laid off. Respondent had previously negotiated with petitioner and other employee unions in an attempt to persuade the unions to accept a single health insurance carrier plan in place of the multiple health insurance carrier plan then required by each union's collective bargaining agreement (CBA) (*see generally Matter of Buffalo Teachers Fedn., Inc. v Board of Educ. of City School Dist. of City of Buffalo*, 50 AD3d 1503, *lv denied* 11 NY3d 708). Petitioner refused to consent to the change and obtained an injunction to prevent respondent from imposing the single health insurance carrier plan on its members. Respondent subsequently laid off 26 of petitioner's members, purportedly in anticipation of the budgetary shortfall that would result from petitioner's refusal to accept the single health insurance carrier plan. As a result, petitioner filed two grievances alleging violations of certain provisions of the CBA, and those

grievances proceeded to arbitration.

We agree with petitioner that Supreme Court erred in denying in its entirety the petition to confirm the arbitration award. The role of the courts with respect to disputes submitted to binding arbitration pursuant to a CBA is limited, and a court should not substitute its judgment for that of the arbitrator (*see Matter of Windsor Cent. School Dist. [Windsor Teachers Assn.]*, 306 AD2d 669, 670, *lv denied* 100 NY2d 510). Unless the arbitration award "is clearly violative of a strong public policy, . . . is totally or completely irrational, or . . . manifestly exceeds a specific, enumerated limitation on the arbitrator[']s power," the award must be confirmed (*Matter of NFB Inv. Servs. Corp. v Fitzgerald*, 49 AD3d 747, 748; *see* CPLR 7510; *Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79). "An award is irrational if there is 'no proof whatever to justify the award' " (*NFB Inv. Servs. Corp.*, 49 AD3d at 748).

Pursuant to the provisions of the CBA, the arbitrator was empowered to make decisions regarding "application and interpretation of the provisions of [that] contract," and those decisions were to "be accepted as final by the parties." The arbitrator interpreted Article 3, § O of the CBA to require respondent to afford petitioner an opportunity to be heard on the layoff and method of layoff of 26 assistant principals. Such an interpretation is rationally based on the plain language of that section, which states that petitioner or its representative shall be consulted in "matters that affect the administration and supervision of all schools." The extent, if any, to which "the arbitrator may have misconstrued or disregarded the plain meaning of the contract" is of no moment where, as here, the arbitrator's determination is not irrational (*Matter of Peckerman v D & D Assoc.*, 165 AD2d 289, 296).

We further conclude that the arbitrator's determination that Article 3, § V of the CBA required respondent to establish a list for each tenure area and maintain that list for the purpose of recalling laid-off employees was also rational. That section states that any employee covered by the CBA who is terminated for any reason other than evaluation "shall be assigned to the next available vacancy in the same or similar tenure area according to seniority." Here, there was evidence before the arbitrator that respondent had a past practice of distinguishing between elementary and secondary school assistant principals for the purpose of tenure (*see Windsor Cent. School Dist.*, 306 AD2d at 670; *see also Rochester City School Dist. v Rochester Teachers Assn.*, 41 NY2d 578, 583). The arbitrator's determination requiring respondent "to cease and desist from using separate [tenure] lists for layoff[s] and recall[s]," as well as requiring the parties to discuss their respective positions concerning the meaning of the term "tenure area" as used in the CBA, was within the arbitrator's broad powers to fashion an appropriate remedy to resolve the dispute (*see generally Board of Educ. of Yonkers City School Dist. v Yonkers Fedn. of Teachers*, 46 NY2d 727, 729; *Matter of Bridge & Tunnel Officers Benevolent Assn. v Triborough Bridge & Tunnel Auth.*, 57 AD3d

398, 399, *lv denied* 12 NY3d 711). The arbitrator properly retained jurisdiction to determine the issue if the parties failed to reach an agreement (*see Bridge & Tunnel Officers Benevolent Assn.*, 57 AD3d at 399).

Contrary to the further contention of petitioner, however, the court properly refused to confirm that part of the arbitration award determining that respondent violated Article 4 of the CBA and directing respondent to reinstate all but the nine least senior assistant principals who had been laid off. The arbitrator explicitly recognized that respondent had the authority to lay off employees for economic reasons without violating the CBA but nevertheless concluded that petitioner bore a disproportionate share of the projected budgetary shortfall. In reaching that conclusion, however, the arbitrator erred in considering the financial savings that resulted from the layoffs of petitioner's members against the $800,000 projected budgetary shortfall directly related to petitioner's refusal to accept the single health insurance carrier plan rather than against the $12 million projected overall budgetary shortfall for the fiscal year. The arbitrator also failed to account for those laid-off employees who were not members of petitioner in his determination of proportionality. Thus, that part of the arbitration award is irrational because "there is 'no proof whatever to justify [it]' " (*NFB Inv. Servs. Corp.*, 49 AD3d at 748). Moreover, by reinstating several of those assistant principals who were laid off, "the arbitrator conferred a benefit on [those employees] to which they were not contractually entitled, i.e., a job security clause, and thereby modified the terms of the CBA in contravention of the explicitly enumerated limitation on his powers" (*Buffalo Teachers Fedn., Inc.*, 50 AD3d at 1507).

We therefore modify the order by granting the petition in part and confirming the award with the exception of that part concerning Article 4 of the CBA.

All concur except SCUDDER, P.J., and MARTOCHE, J., who dissent in part and vote to affirm in the following Memorandum: We respectfully dissent in part and would affirm the order that denied in its entirety the petition to confirm the arbitration award. The majority concludes that Supreme Court erred in refusing to confirm those parts of the arbitration award determining that respondent violated Article 3, § O and § V of the collective bargaining agreement (CBA). We disagree.

Article 3, § O of the CBA provides that the parties

> "jointly recognize Principals as the responsible professional heads and educational leaders of the schools they administer, and Assistant Principals as their immediate aides. In this capacity, Principals shall be consulted in all matters directly affecting the operation of their schools. Concerning matters that affect the administration and supervision of all schools, which are provided for in this contract, the Superintendent shall

> consult [petitioner] or its representative. This shall not be interpreted as affecting the rights and responsibility of [respondent] to make policy decisions affecting the schools."

The majority concludes that the arbitrator's interpretation of that provision is rational and that respondent was required to consult with petitioner on the matter of layoffs because it affected " 'the administration and supervision of all schools.' " We disagree with the majority's conclusion that such consultation did not take place. The record establishes that respondent consulted with petitioner through negotiations concerning the underlying issue of the single health insurance carrier plan and the alternatives available to respondent if petitioner did not accept that plan. The arbitrator conceded as much when he stated that petitioner "steadfastly refused to agree to a single [health insurance] carrier [plan] as it bargained with [respondent]. Unrefuted testimony presented shows that at a bargaining session . . ., when the parties did not reach agreement on the single [health insurance] carrier issue, [respondent] ended the session by telling [petitioner's] negotiators that" layoffs were imminent. That statement establishes that the single health insurance carrier issue was negotiated at length and that respondent made petitioner well aware that, if the single health insurance carrier plan was not accepted, there would be a significant financial shortfall that would require the termination of some of petitioner's members. The majority does not state what sort of "consultation" would be legally required and, in our view, this is not a situation where the employer arbitrarily and unilaterally imposed a condition on employees without prior notice or discussion.

We further conclude that the arbitrator's interpretation of Article 3, § O is irrational (*see generally Matter of NFB Inv. Servs. Corp. v Fitzgerald*, 49 AD3d 747). The terms "administration" and "supervision" contained therein are not otherwise defined in the CBA, and matters on which petitioner must be consulted are limited to those matters of administration and supervision that "are provided for in [the CBA]." We find no provision in the CBA that encompasses the termination of employees for financial reasons.

We reach a similar conclusion with respect to the arbitrator's determination that respondent violated Article 3, § V of the CBA, which states that, "[s]hould the position held by an employee covered by [the CBA] be eliminated for reasons other than evaluation, the employee shall be advised of the reason or reasons and shall be assigned to the next available vacancy in the same or similar tenure area according to seniority." The arbitrator interpreted that provision to require respondent to establish a list for each tenure area and maintain that list for the purpose of recalling laid-off employees. Petitioner contends that respondent improperly used one list for layoffs and another for recalls. It further contends that the assistant principals were pooled together in the general tenure area of "assistant principal" for the purpose of layoffs, without distinction between elementary and secondary school principals but that they were not recalled pursuant to the same list. We reject

those contentions. The plain language of the CBA states that laid-off employees shall be recalled "to the next available vacancy in the same or similar tenure area" and, at the time of the grievance hearing, many of the laid-off assistant principals were recalled, but it is unclear from the record what list was used to recall them.

The Court of Appeals has held that decisions regarding general and narrow tenure area designations are to be made at the discretion of the school district (*see generally Matter of Bell v Board of Educ. of Vestal Cent. School Dist.*, 61 NY2d 149, 151-152). Here, respondent classifies assistant principals as a tenure area, but it does not distinguish between elementary and secondary school assistant principals. Because petitioner failed to establish which list was used to recall the assistant principals, it is impossible to determine whether laid-off assistant principals were recalled to "same or similar tenure area[s]." Thus, we conclude that the arbitrator's determination that respondent violated Article 3, § V is irrational and that the arbitrator exceeded his authority in directing respondent to create such lists.

The irrationality of the arbitrator's interpretation of the CBA is underscored by the majority's conclusion that the arbitrator erred in directing respondent to reinstate all but the nine least senior assistant principals who had been laid off. The majority recognizes that, by reinstating several of those assistant principals who were laid off, "the arbitrator conferred a benefit on [those employees] to which they were not contractually entitled, i.e., a job security clause, and thereby modified the terms of the CBA in contravention of the explicitly enumerated limitation on his powers" (*Matter of Buffalo Teachers Fedn., Inc. v Board of Educ. of City School Dist. of City of Buffalo*, 50 AD3d 1503, 1507, *lv denied* 11 NY3d 708). If, as the majority otherwise concludes, respondent violated the CBA by failing to consult with petitioner concerning a matter affecting "the administration and supervision of all schools," i.e., layoffs based on a financial emergency, then the obvious remedy is for the arbitrator to require such consultation, as part of his broad powers to fashion an appropriate remedy to resolve the dispute (*see generally Board of Educ. of Yonkers City School Dist. v Yonkers Fedn. of Teachers*, 46 NY2d 727, 729). If, however, the ultimate remedy recommended by the arbitrator of reinstating certain assistant principals is outside the scope of the arbitrator's authority, then we cannot see how laying off of members of petitioner may be considered within the scope of "the administration and supervision of all schools," so that respondent was required to consult with petitioner with respect thereto and violated the CBA by failing to do so. Where a school district is "[f]aced with spiraling operating costs and ever increasing demands on [its] tax base[], [it] must have sufficient latitude within the law to manage [its] affairs efficiently and effectively. This implies, where appropriate, the power to consolidate and abolish positions for economic reasons" (*Matter of Young v Board of Educ. of Cent. School Dist. No. 6, Town of Huntington*, 35 NY2d 31, 34). Thus, where parties to a CBA do not agree to a job security clause, a school board such as respondent is free to abolish positions "provided [its] action[s are] done for the purpose of managing its affairs efficiently and

economically" (*Board of Educ. of Cent. School Dist. No. 1 of Towns of Niagara, Wheatfield, Lewiston & Cambria v Niagara Wheatfield Teachers Assn.*, 54 AD2d 281, 283, *lv denied* 41 NY2d 801). We therefore conclude that the court properly denied the petition in its entirety.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

678

CA 09-01807

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

TERRY JOHNSON, RICHARD JOHNSON AND
PITTSFORD VISION, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

OPTOMETRIX, INC., DEFENDANT-RESPONDENT.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (RICHARD GLEN CURTIS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered August 28, 2009 in a breach of contract action. The order, insofar as appealed from, denied that part of the motion of plaintiffs seeking permission to pay certain escrow funds into court and granted that part of the cross motion of defendant seeking to release those funds to its counsel.

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

Memorandum: Plaintiffs appeal from an order denying that part of their motion to direct the payment of $100,000 in escrow funds into Supreme Court and granting that part of the cross motion of defendant seeking to release those funds to its counsel. We affirm. We conclude that the escrow account was established pursuant to an agreement between the parties and that the funds were intended to be a deposit by defendant pending the negotiation of terms for the purchase of the corporation owned by plaintiffs (*cf. Rock Oak Estates v Katahdin Corp*. [appeal No. 2], 280 AD2d 960, 961-962). Inasmuch as the record establishes that the parties were unable to reach an agreement on the terms of the sale, defendant is entitled to the return of the deposit (*see Fumerelle v Performance Rides*, 188 AD2d 1014).

All concur except SMITH, J.P., who dissents and votes to reverse the order insofar as appealed from in accordance with the following Memorandum: I respectfully dissent. Plaintiffs commenced this breach of contract action seeking, inter alia, immediate possession of a retail eyewear store that defendant was operating pursuant to an agreement with plaintiffs. After defendant answered the complaint, the parties began to negotiate a settlement of both this breach of

contract action and a related summary eviction proceeding pending in a local court. As part of those negotiations, defendant was to pay $100,000 to plaintiffs' attorney, to be held in escrow. No written escrow agreement was signed, however, and the parties now disagree with respect to the terms of their oral escrow agreement. In conjunction with defendant's payment of the final $75,000 to be held in escrow, defendant's attorney sent a letter to plaintiffs' attorney stating, inter alia, "[e]nclosed herewith please find bank draft in the amount of $75,000 payable to your firm as attorneys, to be held in escrow until all parties have executed a written settlement agreement encompassing the terms and conditions discussed at your office" on a specified date. Defendant's attorney eventually indicated that there would be no settlement and requested the return of the $100,000 in escrow funds. Plaintiffs' attorney refused to remit the funds, contending that they were to be held "pending the resolution of this matter." Supreme Court thereafter denied that part of the motion of plaintiffs' attorney seeking permission to pay the funds into court and granted that part of defendant's cross motion for an order directing that the funds be released to defendant's attorney. In my view, the court erred in granting that part of defendant's cross motion and instead should have granted that part of plaintiffs' motion seeking permission to pay the escrow funds into court.

Because the funds were deposited in escrow with plaintiffs' attorney, the attorney became a stakeholder of those funds (*see generally* CPLR 1006 [a]; *Great Am. Ins. Co. v Canandaigua Natl. Bank & Trust Co.*, 23 AD3d 1025, 1027-1028, *lv denied* 7 NY3d 741). As a stakeholder, plaintiffs' attorney was entitled to commence an "action of interpleader" pursuant to CPLR 1006 (a) and, pursuant to CPLR 1006 (g), he was entitled to move for an order permitting him to pay the escrow funds into court. Here, based on the motion and cross motion before it, the court's only authority to order disbursement of the $100,000 was pursuant to the interpleader statute (*see generally* CPLR 1006), and I thus conclude that the court erred by in effect granting summary judgment in favor of defendant, ordering that the funds be released to its attorney.

Plaintiffs' attorney, as escrowee, "owed the other parties to the agreement the fiduciary duty of a trustee and was under 'a duty not to deliver the escrow to [anyone] except upon strict compliance with the conditions imposed' by the escrow agreement" (*Great Am. Ins. Co.*, 25 AD3d at 1027-1028; *see Farago v Burke*, 262 NY 229, 233; *Takayama v Schaefer*, 240 AD2d 21, 25). Although the court may grant summary judgment in an interpleader action in the event that a party demonstrates as a matter of law that it is entitled to the funds under the terms of the escrow agreement (*see e.g. Welch v Hauck*, 18 AD3d 1096, 1097-1098, *lv denied* 5 NY3d 708; *Manufacturers & Traders Trust Co. v Reliance Ins. Co.*, 303 AD2d 1002), I cannot conclude that the court properly disbursed the escrow funds at issue here. The parties disagree with respect to the terms of the agreement under which the funds were placed into escrow, and the only written condition is that they will be held by plaintiffs' attorney "until all parties have executed a written settlement agreement encompassing the terms and conditions discussed." The parties agree that no written agreement

was executed. The court therefore could not direct that the escrow funds be returned as a matter of law (*cf. Barton v Lerman*, 233 AD2d 555), nor may the court direct payment of the escrow funds where, as here, "there are triable questions of fact as to what agreement, if any, the parties ha[ve] reached as to the disposition of those funds" (*Bender Burrows & Rosenthal, LLP v Simon*, 65 AD3d 499, 499; *see Romeo v Schmidt* [appeal No. 3], 244 AD2d 861). I therefore would reverse the order insofar as appealed from, grant that part of plaintiffs' motion with respect to the payment of escrow funds, direct plaintiffs' attorney to pay the funds into court, deny that part of defendant's cross motion with respect to release of the funds and vacate the directive to release the funds to defendant's attorney.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

682

CA 09-02456

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

CATHERINE B. WHITE AND SCOTT C. SMITH, AS ATTORNEY IN FACT FOR CATHERINE B. WHITE, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

F.F. THOMPSON HEALTH SYSTEM, INC., AND F.F.T. SENIOR COMMUNITIES, INC., DOING BUSINESS AS FERRIS HILLS AT WEST LAKE, DEFENDANTS-APPELLANTS.

WARD NORRIS HELLER & REIDY LLP, ROCHESTER (THOMAS S. D'ANTONIO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MICHAEL T. DIPRIMA, ROCHESTER, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered October 23, 2009 in an action for, inter alia, a permanent injunction. The order granted the motion of plaintiffs for a preliminary injunction.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is denied, and the preliminary injunction is vacated.

Memorandum: Catherine B. White (plaintiff) is a resident of Ferris Hills at West Lake (Ferris Hills), an independent senior living facility owned and operated by defendants. Ferris Hills does not provide medical or health care services to its residents. The residents or their families may, however, hire their own aides to come to the facility to provide treatment and care. Pursuant to the Residency Agreement executed by plaintiff when she moved into her apartment at Ferris Hills, she is required to "comply with all reasonable procedures, policies and rules" set by defendants at that time or in the future. In response to complaints from residents and their families concerning inappropriate conduct by aides at the facility, defendants subsequently required all aides who enter Ferris Hills to sign a Caregiver Agreement (agreement), which sets forth rules and regulations for aides to follow while at the facility. Defendants also required the residents who employed the aides to sign the agreement. Plaintiff and her sons objected to the proposed agreement and, despite the fact that defendants made several accommodations for plaintiff and struck various provisions of the agreement at her sons' request, plaintiff refused to sign it. When defendants notified plaintiff that her aides would be prohibited from

entering Ferris Hills if she and they did not sign the agreement as modified, plaintiffs commenced this action seeking, inter alia, injunctive relief. Plaintiffs also moved by order to show cause for a preliminary injunction enjoining defendants from prohibiting plaintiff's three aides from entering Ferris Hills. Supreme Court issued a preliminary injunction, and defendant appealed. We now reverse.

To prevail on a motion for a preliminary injunction, the moving party must establish, inter alia, that irreparable harm will result if provisional relief is not granted (*see Doe v Axelrod*, 73 NY2d 748 [1988]). The prospect of irreparable harm must be "imminent, not remote or speculative" (*Golden v Steam Heat*, 216 AD2d 440, 442), and, here, plaintiff failed to make such a showing (*see generally GFI Sec., LLC v Tradition Asiel Sec., Inc.*, 61 AD3d 586; *Copart of Conn., Inc. v Long Is. Auto Realty, LLC*, 42 AD3d 420, 421). As the Director of Ferris Hills made clear in an affidavit submitted in opposition to the order to show cause, defendants have no objection to the aides who currently provide services to plaintiff, provided that they sign the agreement and follow the rules set forth therein. Plaintiffs did not dispute that point. Additionally, there is no evidence that any of plaintiff's aides expressed opposition to signing the agreement. Thus, plaintiff would be harmed by enforcement of the agreement only in the event that her aides refused to sign the agreement or failed to comply with its rules, and there is no indication in the record that either scenario is likely to occur. In the absence of a showing that plaintiff faced the imminent prospect of irreparable harm in the absence of provisional relief, the court abused its discretion in issuing a preliminary injunction, and, accordingly, there is no need for us to determine whether plaintiffs demonstrated a likelihood of success on the merits or whether the equities weigh in their favor (*see generally Golden*, 216 AD2d at 442).

All concur except SMITH, J.P., and PINE, J., who dissent and vote to affirm in the following Memorandum: We respectfully dissent. It is well established that a party seeking a preliminary injunction "must establish, by clear and convincing evidence . . ., three separate elements: '(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor' " (*Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216, quoting *Doe v Axelrod*, 73 NY2d 748, 750; *see J. A. Preston Corp. v Fabrication Enters.*, 68 NY2d 397, 406). It is also well established that "[a] motion for a preliminary injunction is addressed to the sound discretion of the trial court[,] and the decision of the trial court on such a motion will not be disturbed on appeal, unless there is a showing of an abuse of discretion" (*Destiny USA Holdings, LLC*, 69 AD3d at 216 [internal quotation marks omitted]; *see Axelrod*, 73 NY2d at 750). We conclude that Supreme Court did not abuse its discretion in determining that plaintiffs established their entitlement to a preliminary injunction prohibiting defendants from restraining three caregivers employed by Catherine B. White (plaintiff) from entering defendants' property at Ferris Hills at West Lake (Ferris Hills) solely to provide care to

plaintiff.

Plaintiff entered into a Residency Agreement with defendant F.F.T. Senior Communities, Inc., doing business as Ferris Hills at West Lake (FFTSC), pursuant to which she would occupy a one-bedroom apartment in the independent living facility at Ferris Hills. Pursuant to the terms of that agreement, plaintiff agreed "[t]o comply with all reasonable procedures, policies and rules of Ferris Hills . . . including specifically those contained from time to time in any Resident Handbook, in each case as such procedures, policies and rules are now in effect or are hereafter amended or adopted . . . ." The Residency Agreement further provided, however, that "[n]o amendment of this Agreement shall be valid unless in writing executed by Ferris Hills . . . and [the r]esident."

After FFTSC began experiencing problems with caregivers who would solicit other residents at Ferris Hills and take advantage of residents financially, FFTSC sought to have all caregivers sign a Caregiver Agreement establishing a code of conduct for caregivers. Notably, residents were also required to sign the Caregiver Agreement. Plaintiff's sons, including plaintiff Scott C. Smith, opposed the proposed Caregiver Agreement because, inter alia, it afforded FFTSC the ability to terminate a caregiver "immediately" and solely at its discretion should it determine that the caregiver failed to comply with the Caregiver Agreement or otherwise engaged in "[i]mproper professional or personal conduct or unethical practices." [1]

When plaintiff's sons and defendants were unable to reach an agreement concerning the Caregiver Agreement, FFTSC informed Smith that, if FFTSC did not receive a signed Caregiver Agreement by a certain date, FFTSC would deny access to plaintiff's caregivers who had not signed a Caregiver Agreement. Plaintiffs commenced this action seeking, inter alia, a preliminary and permanent injunction, and they also moved by order to show cause for a preliminary injunction.

Contrary to defendants' contentions, plaintiffs have the requisite standing to bring this action (*see generally Caprer v Nussbaum*, 36 AD3d 176, 182), and plaintiffs' assertions of potential injury are neither speculative nor conclusory (*cf. Matter of Bolton v Town of S. Bristol Planning Bd.*, 38 AD3d 1307). We thus turn to the merits of plaintiffs' motion.

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[1] We note that different versions of the proposed Caregiver Agreement appear in the record on appeal. The one submitted by plaintiffs in support of their motion for a preliminary injunction is the version that they were sent by FFTSC. That version does not afford the caregivers or the resident notice or an opportunity to be heard before FFTSC can deny access to the caregiver on the ground that the caregiver, inter alia, engaged in "[i]mproper professional or personal conduct or unethical practices." A version of the Caregiver Agreement submitted by defendants in opposition to plaintiffs' motion included such a provision. While that provision could refute plaintiffs' contentions concerning irreparable harm, we feel constrained to rely on the version of the Caregiver Agreement sent to plaintiffs and attached to their motion.

We conclude that the court did not abuse its discretion in determining that plaintiffs had established a likelihood of success on the merits. Although the Residency Agreement requires plaintiff to comply with "all *reasonable* procedures, policies and rules" that were then in effect or thereafter adopted, the question of what is reasonable is a question of fact (emphasis added). Furthermore, the Residency Agreement also provided that it could not be amended without a resident's written consent. Thus, the Residency Agreement is ambiguous concerning whether FFTSC could require a resident to sign a Caregiver Agreement giving FFTSC the sole discretion to terminate a resident's caregivers. "It is not disputed that the [Residency Agreement] was drafted by defendant[s] and any ambiguity therein should be resolved against [them]" (*Hodom v Stearns*, 32 AD2d 234, 236, *appeal dismissed* 25 NY2d 722).

We likewise conclude that the court did not abuse its discretion in determining that plaintiffs had established the prospect of irreparable harm. Plaintiff is a 90-year-old woman who has used the same caregivers for approximately five years. Those caregivers provide highly personal hygienic care to plaintiff and have earned her trust over the years. To give FFTSC the ability to deny those caregivers access to plaintiff at its sole discretion creates a potential for immense irreparable harm. Such a loss cannot be adequately compensated for by money damages (*see Olean Med. Group LLP v Leckband*, 32 AD3d 1214; *Klein, Wagner & Morris v Lawrence A. Klein, P.C.*, 186 AD2d 631, 633). Furthermore, it is well settled that the loss of a trusted employee can constitute irreparable harm (*see generally Purchasing Assoc. v Weitz*, 13 NY2d 267, 274, *rearg denied* 14 NY2d 584; *Urban Archaeology Ltd. v Dencorp Invs., Inc.*, 12 AD3d 96, 105).

Finally, although we conclude that defendants' overall goal of protecting the vulnerable, elderly residents of Ferris Hills from rogue caregivers is laudable, we agree with the court that the potential immediate loss to plaintiff of her trusted caregivers is not outweighed by that goal. Although defendants have identified no concerns with respect to plaintiff's caregivers and, indeed, have conceded that they do not pose any threat to Ferris Hills residents, the proposed Caregiver Agreement nevertheless gives FFTSC the power to deny those caregivers access to plaintiff at its sole discretion based on its determination that they engaged in unprofessional, improper or unethical conduct. Thus, recognizing that "[e]ntitlement to a preliminary injunction 'depends upon probabilities, any or all of which may be disproven when the action is tried on the merits' " (*Destiny USA Holdings, LLC*, 69 AD3d at 216, quoting *J. A. Preston Corp.*, 68 NY2d at 406), we conclude that the court did not abuse its discretion in determining that the balance of equities lies in plaintiffs' favor.

Because our review is limited to a determination whether the court abused its discretion in granting the preliminary injunction and we find no such abuse, we would affirm.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

689

KA 09-01075

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS J. JOSEPH, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered May 12, 2009. The judgment convicted defendant, upon a nonjury verdict, of aggravated vehicular assault, assault in the second degree (two counts), leaving the scene of a personal injury accident, driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs, criminal possession of a controlled substance in the seventh degree, and perjury 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 nonjury verdict, of one count each of aggravated vehicular assault (Penal Law § 120.04-a [4]), leaving the scene of a personal injury accident (Vehicle and Traffic Law § 600 [2] [a]), driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs (§ 1192 [4-a] [DWAI]), criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03), and perjury in the first degree (§ 210.15), and two counts of assault in the second degree (§ 120.05 [4]). We reject defendant's contention that Supreme Court erred in admitting in evidence the test results of blood samples taken from the interior of the vehicle driven by defendant on the date of the accident. " 'Where, as here, the circumstances provide reasonable assurances of the identity and unchanged condition of the evidence, any deficiencies in the chain of custody go to the weight of the evidence and not its admissibility' " (*People v Caswell*, 56 AD3d 1300, 1303, *lv denied* 11 NY3d 923, 12 NY3d 781). We also reject the contention of defendant that the court erred in allowing the People's expert to testify that the cocaine found in the blood samples taken from defendant's car was present in defendant's bloodstream prior to the accident. Based upon our review

of the transcript of the *Frye* hearing, we conclude that the court properly determined that the techniques employed by the laboratory personnel were generally accepted as reliable within the scientific community (*see People v LeGrand*, 8 NY3d 449, 457; *People v Wesley*, 83 NY2d 417, 422-423). Although the samples tested by the People's expert were unique in the respect that they consisted of dried blood, the techniques employed by the expert, i.e., gas chromatography-mass spectrometry and immunoassay, were routine and generally accepted as reliable to detect the presence of cocaine and its metabolites.

Contrary to the further contention of defendant, the conviction of aggravated vehicular assault should not be deemed a dismissal of the DWAI count and the two counts of assault in the second degree, inasmuch as they are not inclusory concurrent counts of aggravated vehicular assault. Concurrent counts are inclusory "when the offense charged in one is greater than any of those charged in the others and when the latter are all lesser included offenses included within the greater" (CPL 300.30 [4]). "When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a 'lesser included offense' " (CPL 1.20 [37]). Whether a particular crime is a lesser included offense of another crime, which as noted is a necessary element of an inclusory concurrent offense (*see* CPL 300.30 [4]), "turns not on the facts of a particular case but on 'a comparative examination of the statutes defining the two crimes, in the abstract' " (*People v Leon*, 7 NY3d 109, 112, quoting *People v Glover*, 57 NY2d 61, 64). Because it is possible to commit aggravated vehicular assault without concomitantly, by the same conduct, driving in a condition impaired by the combined influence of drugs or of alcohol and any drug or drugs, the latter is not a lesser included count of the former (*see id.*). Nor is assault in the second degree a lesser included count of aggravated vehicular assault, because the former offense requires proof of an element not required by the latter, i.e., a mens rea of recklessness (*see generally People v Acevedo*, 40 NY2d 701, 706; *People v Edwards*, 39 AD3d 875).

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 further contention that the verdict is against the weight of the evidence with respect to specified counts of the indictment (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his present contention that the evidence at trial is legally insufficient to support the conviction of leaving the scene of a personal injury accident because he failed to raise that contention in support of his motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19). In any event, there is no merit to the present contention of defendant that the People failed to establish that he knew or had reason to know that he caused serious physical injury to an individual in the stalled vehicle that he struck. To establish a violation of Vehicle and Traffic Law § 600 (2) (a), the People were required to establish only that defendant "kn[ew] or ha[d] cause to know that

personal injury ha[d] been caused to another person" as a result of the accident. Here, the People presented evidence at trial establishing that defendant's vehicle slammed into the rear end of the stopped vehicle at a speed of 75 miles per hour, causing significant damage to the front end of defendant's vehicle and causing the trunk of the other vehicle to be pushed into the back seat of that vehicle (*see generally Bleakley*, 69 NY2d at 495). Further, as defendant correctly concedes, he also failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction of aggravated vehicular assault and assault in the second degree with respect to the infant victim (*see Gray*, 86 NY2d at 19).

Finally, the sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they are without merit.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

712

KA 08-00646

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY C. HERNDON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD 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 February 21, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the seventh degree (§ 220.03), defendant contends that the prosecutor's peremptory challenge with respect to an African-American prospective juror constituted a *Batson* violation. We reject that contention inasmuch as the prosecutor offered legitimate, nonpretextual reasons for exercising a peremptory challenge with respect to that prospective juror (*see generally People v Smocum*, 99 NY2d 418, 422-423).

We also reject the contention of defendant that County Court erred in refusing to suppress the drugs found in his vehicle and on his person. "The automobile exception to the warrant requirement authorizes the search of a vehicle when the police have probable cause to believe that the vehicle contains contraband, evidence of a crime or a weapon" (*People v Daniels*, 275 AD2d 1006, *lv denied* 95 NY2d 962; *see People v Belton*, 55 NY2d 49, 54-55, *rearg denied* 56 NY2d 646; *People v Goss*, 204 AD2d 984, 985, *lv denied* 84 NY2d 826). Here, the police had probable cause to search the vehicle in question based on the observations of an experienced police detective who observed what appeared to be a hand-to-hand drug transaction inside that vehicle in an area known for drug activity (*see People v Jones*, 90 NY2d 835, 837;

People v Kirkland, 56 AD3d 1221, *lv denied* 12 NY3d 785). Moreover, the court also determined that defendant voluntarily consented to the search of the vehicle and his person at the scene. The court's determination "should not be disturbed unless clearly erroneous or unsupported by the [suppression] hearing evidence" (*People v Scaccia*, 4 AD3d 808, 808, *lv denied* 3 NY3d 647), and that is not the case here (*see People v Tejada*, 217 AD2d 932, 933-934, *lv denied* 87 NY2d 908).

Finally, we have considered defendant's remaining contentions and conclude that they are without merit.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

720

CA 09-01804

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

DAVID J. SMITH,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC.
AND EUGENE B. JENKINS,
DEFENDANTS-APPELLANTS-RESPONDENTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS J. SPEYER OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

LAW OFFICES OF EUGENE C. TENNEY, BUFFALO (EUGENE C. TENNEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered December 10, 2008 in a personal injury action. The order granted plaintiff's motion, set aside the verdict and granted a new trial, unless defendants stipulated to increase the award of damages to $350,000.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion for a directed verdict is denied, the verdict is set aside and a new trial is granted, and the post-trial motion is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when a bus driven by defendant Eugene B. Jenkins, an employee of defendant Niagara Frontier Transit Metro System, Inc., backed up and struck plaintiff, who was stopped behind the bus on a motorcycle. We note at the outset that the contention of defendants on their appeal that Supreme Court erred in granting plaintiff's motion for a directed verdict on liability is " 'reviewable only on an appeal from the final judgment, and no final judgment has been entered' . . . 'Nevertheless, in the interest of judicial economy and in the exercise of our discretion, we treat the notice of appeal as an application for permission to appeal from [that] trial ruling and grant such permission' " (*Campo v Neary*, 52 AD3d 1194, 1196).

We agree with defendants that the court abused its discretion in granting plaintiff's motion for a directed verdict on liability. Plaintiff had the burden of demonstrating that the evidence, viewed in the light most favorable to defendants, established as a matter of law that there was no rational process by which the jury could find in

favor of defendants (*see Brown v Concord Nurseries, Inc.* [appeal No. 2], 53 AD3d 1067, *lv denied* 11 NY3d 714; *Pecora v Lawrence*, 28 AD3d 1136, 1137). Here, the jury could have rationally found that Jenkins exercised reasonable care in backing up the bus and that he did not observe plaintiff on the motorcycle behind him, despite looking in the mirrors of the bus (*see Hargis v Sayers* [appeal No. 2], 38 AD3d 1228, 1229-1230). In addition, "there were disputed factual issues concerning the [distance between the bus and the motorcycle and plaintiff's opportunity to avoid] the accident that can only be resolved after a jury assesses the credibility of the witnesses" (*id*. at 1230). Thus, we reverse the order, deny the motion for a directed verdict, set aside the verdict and grant a new trial on the issues of liability and damages. In view of our determination, we do not address the remaining contentions of defendants on their appeal or the contentions of plaintiff on his cross appeal and dismiss as moot plaintiff's post-trial motion to set aside the verdict as inadequate.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

782

TP 10-00197

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND PINE, JJ.

IN THE MATTER OF WARREN KERNER, BY HIS ATTORNEY-IN-FACT, JONATHAN KERNER, PETITIONER,

V MEMORANDUM AND ORDER

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES AND NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENTS.

HARRIS BEACH PLLC, PITTSFORD (CHRISTOPHER A. DIPASQUALE OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT NEW YORK STATE DEPARTMENT OF HEALTH.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Thomas A. Stander, J.], entered September 29, 2009) to annul a determination of respondent Monroe County Department of Human Services. The determination, among other things, adjudged that petitioner was not Medicaid-eligible for nursing facility services for a certain period of time.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs, the petition is granted, and the matter is remitted to respondent Monroe County Department of Human Services for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination that he was not Medicaid-eligible for nursing facility services for a period of 13 months on the ground that he had made uncompensated transfers during the "look-back" period (*see* 42 USC § 1396p [c] [1] [B]; Social Services Law § 366 [5] [a], [e] [1] [vi]). The determination of respondent Monroe County Department of Human Services (DHS) that petitioner was not eligible for those services was affirmed by respondent New York State Department of Health. Pursuant to a personal service agreement (PSA) between petitioner's son, Jonathan, and petitioner, Jonathan agreed to provide petitioner with "room and board; care and supervision; food and food preparation - both meals and snacks; any daily assistance . . . with showering, dressing, etc; laundry & cleaning; medical office visits and transportation thereof; and any medical care such as changing bandages or assisting with medications [petitioner] might need." In exchange for those services, Jonathan would be paid $9,283 per month, a sum that petitioner and Jonathan alleged was "commensurate with nursing home costs."

From September 2006 until July 17, 2007, when petitioner entered a nursing facility, petitioner resided with Jonathan and his wife and paid them in accordance with the PSA. In March 2008 petitioner applied for Medicaid, and DHS ultimately assessed a penalty period of 13 months (*see* Social Services Law § 366 [5] [e] [3], [4] [iii] [A]). DHS concluded that the transfers to Jonathan were uncompensated transfers because the PSA provided for services on an as-needed basis and no credible documentation was provided concerning the services actually rendered to petitioner. Jonathan requested a fair hearing and, following a stipulated reduction in the amount of the penalty, the Administrative Law Judge upheld the determination of DHS that $105,041 paid by petitioner to Jonathan constituted an uncompensated transfer.

"In reviewing a Medicaid eligibility determination made after a fair hearing, 'the court must review the record, as a whole, to determine if the agency's decisions are supported by substantial evidence and are not affected by an error of law' . . . Substantial evidence is 'such relevant proof as a reasonable mind may accept as adequate to support a conclusion or [an] ultimate fact' . . . 'The petitioner[] bear[s] the burden of demonstrating eligibility' " (*Matter of Barbato v New York State Dept. of Health*, 65 AD3d 821, 822-823, *lv denied* 13 NY3d 712; *see Matter of Gabrynowicz v New York State Dept. of Health*, 37 AD3d 464, 465). Because there is no detailed summary of the services rendered and the number of hours spent rendering those services, the PSA amounts to an as-needed agreement and "there is no basis upon which to conclude that the transfer of a specific amount of assets for [those] services . . . [was] for fair value" (*Barbato*, 65 AD3d at 823).

While a daily log of hours worked and services rendered is not necessarily required, we agree with the DHS that the generalized, after-the-fact summary of a typical day provided in this case is insufficient to constitute the type of credible documentation needed to assess the fair market value of the services actually rendered. Nevertheless, we agree with petitioner that it is undisputed that services were actually rendered by Jonathan and his wife, and thus the DHS's determination that the transfers to Jonathan were uncompensated transfers is not supported by substantial evidence.

We therefore annul the determination, grant the petition, and remit the matter to DHS to determine petitioner's eligibility for medical assistance benefits following recalculation of the period set forth in Social Services Law § 366 (5). In recalculating that period, DHS must afford petitioner the opportunity to identify with reasonable specificity the services rendered and the number of hours spent rendering those services, as well as the fair market value of those services.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

785

CAF 09-00479

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND PINE, JJ.

IN THE MATTER OF ROBERT A. TUCKER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ERIC R. MARTIN, SR., RESPONDENT-RESPONDENT,
ET AL., RESPONDENT.
(APPEAL NO. 1.)

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

PAUL SKAVINA, ATTORNEY FOR THE CHILD, ROME, FOR SAMANTHA A.

Appeal from an order of the Family Court, Oneida County (Brian M. Miga, J.H.O.), entered February 17, 2009 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: Robert A. Tucker, the petitioner in appeal No. 1 and the respondent in appeal No. 2, is the father of the child who is the subject of this custody proceeding. Eric R. Martin, Sr., a respondent in appeal No. 1 and the petitioner in appeal No. 2, was the boyfriend of the child's now-deceased mother and had lived with the child and the mother for 12 years, since the child was two years old. After the mother's death, both the father (appeal No. 1) and Martin (appeal No. 2) filed petitions seeking custody of the subject child. The father contends in appeal No. 1 that Family Court erred in dismissing his petition seeking custody of his child, and he contends in appeal No. 2 that the court erred in awarding Martin primary physical custody of the child, with joint custody with the father and Martin.

Addressing first the order in appeal No. 2, we agree with the court and the Attorney for the Child that Martin met his burden of establishing that extraordinary circumstances exist to warrant an inquiry into whether it is in the best interests of the child to award him custody (*see generally Matter of Bennett v Jeffreys*, 40 NY2d 543, 548). Where, as here, there is no evidence that the parent surrendered, abandoned or neglected the child or is otherwise an unfit parent, the question of "[w]hat proof is sufficient to establish such equivalent but rare extraordinary circumstances cannot be precisely measured. We do know that it is not enough to show that the nonparent could do a better job of raising the child . . . Further, the fact that the parent agreed that a nonparent should have physical custody

of the child . . . is not sufficient, by itself, to deprive the parent of custody" (*Matter of Michael G.B. v Angela L.B.*, 219 AD2d 289, 292-293 [internal quotation marks and citations omitted]; *see generally Matter of Corey L. v Martin L.*, 45 NY2d 383, 391). On the other hand, extraordinary circumstances may be found based on prolonged separation between the parent and a child born out of wedlock, the attachment of the child to the custodian and the parent's lack of an established household (*see Matter of Isaiah O. v Andrea P.*, 287 AD2d 816, 817; *Matter of Commissioner of Social Servs. of City of N.Y. [Sarah P.]*, 216 AD2d 387, 388; *see generally Michael G.B.*, 219 AD2d at 293).

We reject the contention of the father with respect to both appeals that the court erred in denying what he characterizes as his motion for summary judgment seeking custody of the child. The father in fact moved for dismissal of Martin's petition seeking custody of the child pursuant to CPLR 3211 (a) (7) as well as for summary judgment on the issue of custody but submitted no evidence in support of that part of the motion seeking summary judgment. Indeed, the father appears to have premised his request for summary judgment on the issue of custody on the assumption that the court would grant that part of his motion pursuant to CPLR 3211 (a) (7). The court denied that part of the motion, however, and we conclude on the record before us that the father failed to meet his initial burden on that part of the motion seeking summary judgment, having failed to submit any evidence in support thereof (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

With respect to the court's determination concerning the existence of extraordinary circumstances in appeal No. 2, we conclude that the evidence adduced at the custody hearing supports that determination. The testimony of Martin that he fulfilled a "father" role for the child is supported by the record. The record also establishes that the most familiar and comfortable setting for the child is with Martin, who was part of the only family unit known by the child from the age of two through the time of the custody hearing. Even if, as our dissenting colleagues contend, the child had expressed a desire to live with the father before the onset of the illness that led to the mother's death, the inescapable reality is that the only family truly known by the child had Martin and the now-deceased mother at its core. That family also included half-siblings with whom the child has a close relationship, and grandparents, uncles, aunts, and cousins living in the area where she resided with her mother and Martin.

Reduced to its essence, this case is one in which Martin and the mother primarily provided for the needs of the child since the age of two, and it appears that the father had only limited involvement with the child (*see Matter of McDevitt v Stimpson*, 1 AD3d 811, 812, *lv denied* 1 NY3d 509). Separating the child from her home and what is left of the above-described family following the death of her mother and requiring her to live hundreds of miles away from that family with her father, whom she may have seen for only 20 days per year, would undoubtably exacerbate the already significant emotional injury suffered by the child as the result of her mother's death (*see Matter*

of Curry v Ashby, 129 AD2d 310, 318). Important, too, is the fact that the separation of the child from that family would require her to attend a different school, and we note that the father implicitly conceded that it was important to allow the child to stay in the same school for her remaining four years of schooling.

We must also examine the child's prospective destination in determining whether extraordinary circumstances exist, and we are troubled by that prospective destination. The father was, by all indications, separated from his spouse at the time of the custody hearing and was earning a living managing parking lots while he pursued a bachelor's degree. The father also appeared to rely heavily on student loans for financial support and was unsure where he would live after he received his bachelor's degree, which he expected would be within approximately 18 months of the hearing. Based on those factors, as well as the factors set forth herein concerning what was effectively the separation between the father and the child since she was two years old, the child's attachment to the family unit with Martin, with whom she has resided for most of her life, and the drastic change in environment that would result from a change in physical custody, we conclude that there are extraordinary circumstances supporting the consideration of the child's best interests (*see generally Isaiah O.*, 287 AD2d at 817-818; *Michael G.B.*, 219 AD2d at 293-294; *Sarah P.*, 216 AD2d at 388).

It is well settled that, "once extraordinary circumstances are found, the court must then make the disposition that is in the best interest[s] of the child" (*Bennett*, 40 NY2d at 548), and we likewise agree with the court and the Attorney for the Child with respect to both appeals that the child's best interests are served by awarding the father and Martin joint custody of the child, with primary physical custody with Martin. In making a best interests determination, parental rights may not be "relegated to a parity with all the other surrounding circumstances in the analysis of what is best for the child" (*id.*). Indeed, "in ascertaining the child's best interest[s], the court is guided by principles which reflect a 'considered social judgment in this society respecting the family and parenthood' " (*id.* at 549, quoting *Matter of Spence-Chapin Adoption Serv. v Polk*, 29 NY2d 196, 204). A best interests analysis is comprised of numerous factors, " 'including the continuity and stability of the existing custodial arrangement, the quality of the child's home environment and that of the [party] seeking custody, the ability of each [party seeking custody] to provide for the child's emotional and intellectual development, the financial status and ability of each [party seeking custody] to provide for the child, and the individual needs and expressed desires of the child' " (*Matter of Michael P. v Judi P.*, 49 AD3d 1158, 1159; *see generally Fox v Fox*, 177 AD2d 209).

"It is well established that a trial court's determination of a child's best interests must be accorded the greatest respect . . ., and will not be disturbed if it has a sound and substantial basis in the record" (*Matter of Deborah E.C. v Shawn K.*, 63 AD3d 1724, 1725, *lv*

denied 13 NY3d 710 [internal quotation marks omitted]). We conclude on the record before us that the court's custody determination has a sound and substantial basis in the record (*see generally Matter of Goossen v Goossen*, 72 AD3d 1591; *cf. Michael P.*, 49 AD3d at 1159-1160). The child was 14 years old at the time of the hearing, and the essential components of her life, i.e., most of her relatives, her school, her physicians and her friends, are in the county in which she currently lives. By contrast, the child, who is now 16 years of age, knows no one but the father at the out-of-state location where the father resides. The record also establishes that Martin is more financially stable than the father and is better equipped to provide for the child's health and prospective post-secondary educational needs. We thus decline to disturb the court's custody determination.

Finally, with respect to appeal No. 2, the father does not challenge any issues concerning his visitation rights and has thus abandoned any issue with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984). We further note that the consolidated record contains a transcript of a proceeding held after the filing of the notice of appeal in appeal No. 1, in which the court dismissed the father's custody petition, and after the dispositional hearing in appeal No. 2. That transcript indicates that the father refused to return the child's telephone calls, kept the child's social security checks, had the child's cellular telephone disconnected and showed no interest in contacting the child. Martin, in a statement not disputed by the Attorney for the Child, characterized that behavior as "emotionally tearing [the child] apart."

All concur except CENTRA, J.P., and PERADOTTO, J., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent inasmuch as we cannot agree with the majority that nonparent Eric R. Martin, Sr., a respondent in appeal No. 1 and the petitioner in appeal No. 2, met his burden of establishing the requisite "extraordinary circumstances" to deprive the child's biological father, Robert A. Tucker, the petitioner in appeal No. 1 and the respondent in appeal No. 2, of custody of his daughter.

The child who is the subject of this proceeding is the daughter of the late Michele M. Mackey, a respondent in appeal No. 1, and Tucker. When the child was two years old, the mother became Martin's live-in girlfriend, and the child and the mother resided with Martin for the next 12 years, along with three of the child's half-brothers. The child was born in 1994, and in 2000 the mother was granted custody of the child, with extensive visitation to the father, pursuant to a Family Court order entered upon stipulation of the parties. After the mother passed away in 2008, both the father and Martin petitioned for custody of the child. By the order in appeal No. 1 Family Court dismissed the father's petition, and by the order in appeal No. 2 the court granted primary physical custody of the child to Martin. The father has appealed and, notably, Martin has not appeared in these appeals.

There can be no question that "as between a parent and a nonparent, the parent has a superior right to custody that cannot be

denied unless the nonparent establishes that the parent has relinquished that right because of 'surrender, abandonment, persisting neglect, unfitness *or other like extraordinary circumstances*' " (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981, quoting *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [emphasis added]). As the Court of Appeals stated even more forcefully in *Matter of Male Infant L.* (61 NY2d 420, 427), "[s]o long as the parental rights have not been forfeited by gross misconduct . . . or other behavior evincing utter indifference and irresponsibility . . ., the [biological] parent may not be supplanted . . . ." "Indeed, for a court to award custody of a child to a nonparent without proof of the parent's disqualification is a denial of the parent's constitutional rights" (*Raysor v Gabbey*, 57 AD2d 437, 440, citing *Stanley v Illinois*, 405 US 645, 651). Here, it is undisputed that the father did not surrender, abandon, or neglect the child, and both Martin and the Attorney for the Child acknowledge that the father is a fit and, indeed, a good parent. Thus, the issue before the court was whether Martin established the requisite " 'equivalent but rare extraordinary circumstance' " (*Matter of Michael G.B. v Angela L.B.*, 219 AD2d 289, 292), which is necessary to warrant overriding the "right and responsibility of a [biological] parent to custody of her or his child" (*Bennett*, 40 NY2d at 549). "Without a finding of the existence of extraordinary circumstances, 'the inquiry ends' and the court will not reach the issue of the best interests of the child" (*Matter of Jody H. v Lynn M.*, 43 AD3d 1318, 1318).

We agree with the father that Martin failed to meet his burden of establishing the existence of extraordinary circumstances, as that term is defined by the Court of Appeals in *Bennett* (40 NY2d at 544; *see Matter of Judware v Judware*, 197 AD2d 752, 753). The Attorney for the Child and Martin relied on the following circumstances in support of Martin's petition for custody: (1) the death of the mother; (2) the length of Martin's relationship with the child; (3) Martin's proximity to the child's friends and extended family; (4) the father's relocation to Pittsburgh to pursue his education; and (5) the desire of the child to remain with Martin. While we in no way seek to minimize such circumstances, we simply cannot conclude that they are "on a level with unfitness, abandonment, persistent neglect *or other 'gross misconduct' or 'grievous cause'* " (*Male Infant L.*, 61 NY2d at 429 [emphasis added]).

The death of a custodial parent is not an extraordinary circumstance sufficient to deprive a biological parent of the custody of his or her child (*see e.g. Matter of Tyrrell v Tyrrell*, 67 AD2d 247, 251, *affd* 47 NY2d 937). While the "protracted separation" of a parent from a child may, when coupled with other factors, be sufficient to establish extraordinary circumstances (*Bennett*, 40 NY2d at 550), the record clearly establishes that there was no such separation between the father and the child in this case. Quite to the contrary, the record reflects that, since the child's birth, the father has consistently exercised biweekly visitation with the child as well as extended visitation in the summer, and has paid child support (*see generally Matter of Woodhouse v Carpenter*, 134 AD2d 924,

925). Thus, the majority's characterization of the involvement of the father in the child's life as "limited" is simply not supported by the record. Martin testified that, before the father moved to Pittsburgh approximately 18 months before the hearing in this matter, the father exercised "75-80 percent" of his court-ordered visitation, which consisted of every other weekend, every other holiday, and two weeks each summer. Although the visitation of the father allegedly decreased after he moved to Pittsburgh, it is undisputed that he continued to maintain regular contact with the child and, indeed, the child spent three weeks with the father in Pittsburgh during the summer before the mother's death. Martin conceded that, even after the father moved to Pittsburgh to pursue his education, the father drove to New York to visit with the child one to two times per month. On these facts, the conclusion that extraordinary circumstances exist is simply not warranted (*see Matter of Guzzey v Titus*, 220 AD2d 976, *lv denied* 87 NY2d 807; *Woodhouse*, 134 AD2d at 924-925; *cf. Matter of Holmes v Glover*, 68 AD3d 868; *Matter of Mace v Mace*, 45 AD3d 1193, *lv denied* 10 NY3d 701).

As for the child's relationship with Martin, it is well established that "the disruption of a psychological bond between a child and his or her nonparental caregiver does not rise to the level of extraordinary circumstances absent 'unfitness, abandonment, persistent neglect or other gross misconduct or grievous cause' " (*Matter of Burghdurf v Rogers*, 233 AD2d 713, 715, *lv denied* 89 NY2d 810; *see Jody H.*, 43 AD3d at 1319). Although Martin alleged in his petition that the child "would suffer emotionally if separated from [the] family [with whom] she was raised," there is simply no evidence in the record that awarding custody to the father would result in "psychological trauma . . . grave enough to threaten destruction of the child" (*Bennett*, 40 NY2d at 550). The court herein explicitly recognized that the child "loves both her father and . . . Martin," and described the child as a "wonderful, articulate young lady." Significantly, Martin candidly acknowledged that, prior to the mother's brief illness and resultant death, the child had expressed a desire to live with the father and, indeed, she chose to live with the father and attended school in Pittsburgh in January 2009. In any event, the desire of the child at the time of the hearing to remain with Martin does not constitute an extraordinary circumstance justifying an award of custody to Martin against the wishes of the father (*see People ex rel. Anderson v Mott*, 199 AD2d 961, 962).

In our view, in upholding the court's award of custody to Martin, the majority inappropriately conflates extraordinary circumstances with a best interests determination. However, as previously noted, "[a]bsent a showing of extraordinary circumstances sufficient to deprive the [biological] parent of a superior right to custody, the question of best interests of the child is not reached" (*Woodhouse*, 134 AD2d at 925; *see Jody H.*, 43 AD3d at 1318; *Tyrrell*, 67 AD2d at 248). In its analysis of extraordinary circumstances, the majority discusses the school that the child would attend if custody were awarded to the father, the father's financial situation, and the father's home environment. While such considerations are relevant in conducting a best interests analysis, we submit that they are wholly

insufficient to establish extraordinary circumstances sufficient to divest a biological parent of custody of his or her child. As the Court of Appeals stated in *Bennett* (40 NY2d at 548), "neither decisional rule nor statute can displace a fit parent because someone else could do a 'better job' of raising the child in the view of the court . . ., so long as the parent . . . ha[s] not forfeited [his or her] 'rights' by surrender, abandonment, unfitness, persisting neglect or other extraordinary circumstance. These 'rights' are not so much 'rights', but responsibilities which reflect the view . . . that, *except when disqualified or displaced by extraordinary circumstances*, parents are generally best qualified to care for their own children and therefore entitled to do so" (emphasis added). In any event, we note that the record reflects that the father has an established residence with a separate bedroom for the child, and that he is able to provide for the child financially through his full-time employment, financial aid, and public assistance.

Finally, we conclude that the majority's reliance on allegations made by Martin during an informal proceeding after the hearing is inappropriate. Those statements were neither made under oath nor elicited by the court, the father was not present to rebut them, and the father's attorney repeatedly objected to the court's consideration of the statements. We note that the unsupported statement relied upon by the majority to the effect that the father's post-hearing behavior was "emotionally tearing [the child] apart" was made by Martin, not the child or the Attorney for the Child, and there is no indication in the record that the Attorney for the Child agreed with Martin's characterization of the father's post-hearing behavior.

We therefore would reverse the order in appeal No. 1, grant the father's petition, and award sole custody of the child to the father, and we would reverse the order in appeal No. 2 and deny Martin's petition.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

786

CAF 09-01097

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND PINE, JJ.

IN THE MATTER OF ERIC R. MARTIN, SR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT A. TUCKER, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

PAUL SKAVINA, ATTORNEY FOR THE CHILD, ROME, FOR SAMANTHA A.

Appeal from an order of the Family Court, Oneida County (Brian M. Miga, J.H.O.), entered May 1, 2009 in a proceeding pursuant to Family Court Act article 6. The order awarded petitioner primary physical custody of the child, with joint custody with respondent and petitioner.

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

Same Memorandum as in *Matter of Tucker v Martin* (___ AD3d ___ [July 2, 2010]).

All concur except CENTRA, J.P., and PERADOTTO, J., who dissent and vote to reverse in accordance with the same dissenting Memorandum as in *Matter of Tucker v Martin* (___ AD3d ___ [July 2, 2010]).

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

831

CA 09-02325

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

AUDREY A. TUCKER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROY S. SANDERS, SANDERS INVESTORS, INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

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

BOND, SCHOENECK & KING, PLLC, SYRACUSE (STEPHANIE CAMPBELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered February 10, 2009. The order denied the motion of defendants Roy S. Sanders and Sanders Investors, Inc. to dismiss 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 resulting from defendants' alleged fraud, deceptive business practices, and breach of fiduciary duty and covenant of good faith with respect to a real estate investment made by plaintiff in Florida. Roy S. Sanders and Sanders Investors, Inc. (collectively, defendants) moved to dismiss the complaint on the ground that Supreme Court lacked personal jurisdiction over them. In a supporting affidavit, Sanders stated that he and his corporation are domiciled in Florida and that neither he nor his corporation conduct business in New York. Plaintiff in opposition contended that defendants are subject to personal jurisdiction inasmuch as they and their coconspirator, defendant John C. Kanaley, transmitted fraudulent statements to plaintiff in New York and committed acts in furtherance of the fraud. We conclude that the court properly denied the motion.

In order to defeat a motion to dismiss based upon lack of personal jurisdiction, a plaintiff "need only demonstrate that facts 'may exist' to exercise personal jurisdiction over the defendant[s]" (*Ying Jun Chen v Lei Shi*, 19 AD3d 407, 408, quoting *Peterson v Spartan Indus.*, 33 NY2d 463, 467). Under New York's long-arm statute, "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . commits a tortious act

within the state," with one exception not relevant here (CPLR 302 [a] [2]). Here, it is undisputed that plaintiff and Sanders met at a hotel in Syracuse to discuss investment opportunities, although the parties do not agree with respect to the extent of that conversation. According to the evidence submitted by plaintiff in opposition to the motion, during the meeting Sanders told her about a specific real estate investment opportunity known as "Key Marco" in Florida and showed her a booklet concerning the Key Marco property. In addition, Sanders told her that he had "control" over several of the vacant lots, indicated that Key Marco was "a phenomenal business opportunity," and assured plaintiff that he was "fully devoted to this Key Marco project." After the meeting, Sanders sent e-mail and mail correspondence to plaintiff's address in New York that, according to plaintiff, contained material misrepresentations in furtherance of the alleged fraud. Thus, accepting the facts as alleged in the complaint as true and according plaintiff the benefit of every possible favorable inference, as we must on a motion to dismiss (*see Leon v Martinez*, 84 NY2d 83, 87-88), we conclude that plaintiff has set forth sufficient facts to render defendants subject to the court's jurisdiction based on their allegedly tortious conduct in New York (*see* CPLR 302 [a] [2]; *CPC Intl. v McKesson Corp.*, 70 NY2d 268, 286-287; *Bernstein v Kelso & Co.*, 231 AD2d 314, 325; *Philan Ins. v Hall & Co.*, 215 AD2d 112).

We further conclude in any event that plaintiff sufficiently pleaded that Kanaley, a New York resident, acted as defendants' agent with respect to the real estate investment at issue (*see* CPLR 302 [a] [2]), and thus that the motion was properly denied on that ground as well. Kanaley arranged the meeting between Sanders and plaintiff and ultimately received compensation from Sanders. Moreover, Kanaley relayed numerous messages to plaintiff on behalf of Sanders concerning the Key Marco property. We thus conclude that plaintiff has set forth sufficient facts from which to conclude that Kanaley "engaged in purposeful activities in this State in relation to his transaction for the benefit of and with the knowledge and consent of the . . . defendants and that they exercised some control over [Kanaley] in this matter" (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467; *see Philan Ins.*, 215 AD2d at 112).

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

844

CAF 09-01219

PRESENT: MARTOCHE, J.P., FAHEY, CARNI, SCONIERS, AND GREEN, JJ.

IN THE MATTER OF CATTARAUGUS COUNTY DEPARTMENT
OF SOCIAL SERVICES, ON BEHALF OF JAMES C. WEISS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MARGARET O. STARK, RESPONDENT-APPELLANT.

ANDREW J. CORNELL, WELLSVILLE, FOR RESPONDENT-APPELLANT.

STEPHEN D. MILLER, OLEAN, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered January 29, 2009 in a proceeding pursuant to Family Court Act article 4. The order, among other things, committed respondent to the Cattaraugus County Jail for a term of six months.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the objection is granted, respondent's petition is granted and respondent's child support obligation is reduced to $25 per month effective October 28, 2008.

Memorandum: Petitioner commenced this proceeding on behalf of the father of the child at issue, alleging that respondent mother was in violation of a prior order directing her to pay child support in the amount of $167 per month and seeking relief pursuant to Family Court Act § 454. Family Court erred in finding the mother in willful violation of the prior child support order. Petitioner established that the mother failed to pay support, which constitutes "prima facie evidence of a willful violation" (§ 454 [3] [a]; *see Matter of Powers v Powers*, 86 NY2d 63, 68-69). The mother, however, presented " 'competent, credible evidence of [her] inability to make the required payments' " (*Matter of Christine L.M. v Wlodek K.*, 45 AD3d 1452, 1452, quoting *Powers*, 86 NY2d at 70).

The court also erred in denying the objection of the mother to that part of the Support Magistrate's order continuing the prior child support order and in denying her petition seeking a downward modification of her support obligation. The mother established that she was unable to maintain steady employment and that her income was well below the poverty line, and thus her support obligation should have been reduced to the minimum level of $25 per month (*see* Family Ct

Act § 413 [1] [d]; *Matter of Paige v Austin*, 27 AD3d 474; *Matter of Simmons v Hyland*, 235 AD2d 67, 70-71).

Finally, the mother contends that the court erred in failing to cap her unpaid child support arrears at $500 (*see* Family Ct Act § 413 [1] [g]). That contention is raised for the first time on appeal and thus is not preserved for our review (*see Creighton v Creighton*, 222 AD2d 740, 743; *see also Matter of White v Knapp*, 66 AD3d 1358).

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

845

CAF 09-00545, CAF 09-00567

PRESENT: MARTOCHE, J.P., FAHEY, CARNI, SCONIERS, AND GREEN, JJ.

IN THE MATTER OF TATEONA B.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

JENNIFER B., RESPONDENT-APPELLANT.

IN THE MATTER OF TATEONA B.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

DRACY S., RESPONDENT-APPELLANT.

SCOTT T. GODKIN, UTICA, FOR RESPONDENT-APPELLANT JENNIFER B.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR RESPONDENT-APPELLANT DRACY S.

JOHN HERBOWY, UTICA, FOR PETITIONER-RESPONDENT.

KAREN STANISLAUS-FUNG, ATTORNEY FOR THE CHILD, CLINTON, FOR TATEONA B.

Appeals from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered March 3, 2009 in proceedings pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondents.

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

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

853

CA 10-00235

PRESENT: MARTOCHE, J.P., FAHEY, CARNI, SCONIERS, AND GREEN, JJ.

SCOTT WILD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARRANO/MARC EQUITY CORPORATION,
DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (WENDY A. SCOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE BALLOW LAW FIRM, P.C., WILLIAMSVILLE (JASON A. RICHMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered January 26, 2009 in a personal injury action. The order granted the motion of plaintiff 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 into an excavation that was immediately adjacent to the area where he was applying siding to a house. When plaintiff stepped onto a plank that partially covered the excavation, his foot slipped, causing him to fall into the excavation. Supreme Court properly granted plaintiff's motion seeking partial summary judgment on liability with respect to the Labor Law § 240 (1) claim. Contrary to the contention of defendant, plaintiff's fall into an excavation from ground level is " 'the type of elevation-related risk for which Labor Law § 240 (1) provides protection' " (*Congi v Niagara Frontier Transp. Auth.*, 294 AD2d 830, quoting *Covey v Iroquois Gas Transmission Sys.*, 89 NY2d 952, 954; *see Jiminez v Nidus Corp.*, 288 AD2d 123; *Bockmier v Niagara Recycling*, 265 AD2d 897). Contrary to defendant's further contention, the record establishes that the plank from which plaintiff fell was not being "used as a passageway or stairway" (*Paul v Ryan Homes, Inc.*, 5 AD3d 58, 60) but, rather, it "served as the functional equivalent of a scaffold" (*id.* at 61).

We have considered defendant's remaining contentions and conclude

that they are without merit.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

863

KAH 09-00994

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ROBERT S. FORSHEY, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DENNIS JOHN, SHERIFF, CATTARAUGUS COUNTY, AND
NEW YORK STATE DIVISION OF PAROLE,
RESPONDENTS-RESPONDENTS.

CARR SAGLIMBEN LLP, OLEAN (JAY D. CARR OF COUNSEL), FOR PETITIONER-APPELLANT.

ROBERT S. FORSHEY, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF COUNSEL), FOR RESPONDENT-RESPONDENT NEW YORK STATE DIVISION OF PAROLE.

Appeal from a judgment (denominated order) of the Supreme Court, Cattaraugus County (Larry M. Himelein, A.J.), entered November 25, 2008 in a habeas corpus proceeding. The judgment denied the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the writ of habeas corpus is sustained.

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus on the ground that he was unlawfully incarcerated for violating his parole. According to petitioner, his sentence was terminated pursuant to Executive Law § 259-j (3-a) by the date of the alleged parole violation and thus he was no longer on parole. We agree with petitioner, and we therefore further agree with him that Supreme Court erred in failing to sustain the writ.

The record establishes that in 2000 petitioner pleaded guilty to attempted criminal possession of a controlled substance in the third degree and attempted criminal sale of a controlled substance in the third degree and was sentenced to concurrent terms of incarceration of 6 to 12 years. It is undisputed that his presumptive release was in April 2005, and that he was charged with a parole violation in July 2007 and was eventually arrested for that parole violation in August 2008. Petitioner challenged the authority of the New York State Division of Parole (respondent) to arrest him based on the parole violation in July 2007 because, pursuant to Executive Law § 259-j (3-a), his sentence was terminated in April 2007, i.e., after his presumptive release in April 2005 followed by two years of unrevoked

parole. Respondent contended in response, however, that the version of Executive Law § 259-j (3-a) as amended in 2004 did not include parolees on presumptive release, such as petitioner, and the 2008 amendment to Executive Law § 259-j (3-a), which specifically encompasses parolees on presumptive release, should not be applied retroactively. We reject respondent's contention that the statute should not be applied retroactively.

The legislative history of Executive Law § 259-j (3-a) establishes that the statute was amended in 2008 in order to "correct an oversight in a chapter of the laws of 2004 that unintentionally neglected to include certain offenders who are presumptively released in the mandatory termination of parole supervision provisions" and that the exclusion of such offenders from the statute was a "drafting oversight" (Senate Mem in Support, 2008 McKinney's Session Laws of NY, at 2159). Although amendments to statutes are presumed to have prospective application only, unless the Legislature's preference for retroactivity is explicitly stated or otherwise indicated, it is also the case that "remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose" (*Matter of Gleason [Michael Vee, Ltd.]*, 96 NY2d 117, 122). We conclude that the 2008 amendment to Executive Law § 259-j (3-a) is remedial inasmuch as the legislative history establishes that the purpose of the 2008 amendment was " 'to clarify what the law *was always meant to say and do*' " (*Brothers v Florence*, 95 NY2d 290, 299). Thus, we conclude that the 2008 amendment to Executive Law § 259-j (3-a) should be given retroactive effect (*see Matter of OnBank & Trust Co.*, 90 NY2d 725, 731). As so applied, petitioner's sentence should have been terminated in April 2007, following two years of unrevoked parole, and the court should have sustained the writ of habeas corpus and ordered petitioner's immediate release. Although petitioner has been released from custody, we conclude under the limited circumstances of this case that the exception to the mootness doctrine applies (*cf. People ex rel. Hampton v Dennison*, 59 AD3d 951, *lv denied* 12 NY3d 711; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

871

CA 09-02628

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF MERCURY FACTORING, LLC,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PARTNERS TRUST BANK, RESPONDENT,
AND LENNON'S LITHO, INC., RESPONDENT-RESPONDENT.

MICHAEL J. KAWA, SYRACUSE, FOR PETITIONER-APPELLANT.

MICHAEL A. CASTLE, HERKIMER (SCOTT H. OBERMAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered October 9, 2009. The order, insofar as appealed from, denied the motion of petitioner seeking, inter alia, the entry of a satisfaction of judgment pursuant to CPLR 5021.

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 matter is remitted to Supreme Court, Herkimer County, for further proceedings in accordance with the following Memorandum: Respondent Lennon's Litho, Inc. (Litho) obtained a judgment in the amount of $81,600 against petitioner, Mercury Factoring, LLC (Mercury), and filed an execution seeking to enforce that judgment against two parcels of real property owned by Mercury. Mercury established that the parcels had a fair market value in excess of $95,000, and Litho does not contest that valuation. A sheriff's sale was conducted, at which the sole bid of $10,000 was made by Robert J. Lennon, the owner of Litho, in his personal capacity. The premises were conveyed to Lennon for that amount and, after deduction of the Sheriff's poundage and fees and the addition of interest, the judgment was reduced to approximately $76,000. Litho thereafter began proceedings to execute upon equipment owned by Mercury, whereupon Mercury moved for an order seeking, inter alia, the entry of a satisfaction of the judgment pursuant to CPLR 5021. We agree with Mercury that Supreme Court erred in denying its motion.

" 'Where the judgment debtor can show not merely disparity in price, but in addition one of the categories integral to the invocation of equity, such as fraud, mistake or exploitive overreaching, a court of equity may grant relief' " (*Merchants Natl. Bank & Trust Co. of Syracuse v H. H. & F. E. Bean*, 142 AD2d 928, 929; *see Yellow Cr. Hunting Club v Todd Supply*, 145 AD2d 679). Here, it is

undisputed that Mercury's property had a fair market value in excess of $95,000, but the judgment obtained by Litho has been reduced by no more than approximately $9,500, not taking into account the additional interest included in the judgment. Consequently, although the sheriff's sale was procedurally proper, we nevertheless conclude that in support of its motion Mercury has demonstrated exploitative overreaching sufficient to compel the conclusion that the judgment should be deemed satisfied (*see generally Federal Deposit Ins. Corp. v Forte*, 144 AD2d 627, 628). We therefore reverse the order insofar as appealed from, grant the motion, and remit the matter to Supreme Court to grant Mercury the relief requested.

Contrary to the contention of Litho, the acquisition of the property by Lennon in his personal capacity does not require a different result. "Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, pierce the corporate veil, whenever necessary to prevent fraud or to achieve equity" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [internal quotation marks omitted]; *see Walkovszky v Carlton*, 18 NY2d 414, 417). Mercury established in support of its motion that Litho ceased doing business at the time Mercury purchased the subject property from Litho prior to this litigation, before it was repurchased from Mercury by Lennon, and that Litho had ceased paying corporate taxes and had no assets other than the instant judgment. Furthermore, Mercury established that Lennon was the principal of Litho, and that any amounts collected on the judgment would inure to his sole benefit. Neither Lennon nor Litho submitted any evidence to contravene those facts established by Mercury in support of its motion. Inasmuch as the record establishes that Lennon received the full value of the judgment against Mercury by "exercis[ing] complete domination of the corporation with respect to the transaction in question and said domination was used to commit a . . . wrong against [Mercury,] resulting in [Mercury]'s injury" (*Austin Powder Co. v McCullough*, 216 AD2d 825, 826; *see Morris*, 82 NY2d at 141), the court should have pierced the corporate veil and granted the relief requested by Mercury.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

876

TP 10-00428

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

IN THE MATTER OF RICHARD BAUSANO, 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 February 18, 2010) to review determinations of respondent. The determinations found after Tier III hearings that petitioner had violated various inmate rules.

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

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

879

KA 09-00717

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

EDWARD RICHARDSON, 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 Supreme Court, Erie County (M. William Boller, A.J.), rendered March 19, 2009. 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 (*see People v Hidalgo*, 91 NY2d 733, 737).

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

880

KA 09-00743

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JERRY L. GAREY, 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 (DOUGLAS A. GOERSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered September 17, 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.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

881

KA 09-02167

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TONY L. MOORE, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER 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 (Matthew J. Murphy, III, J.), rendered August 20, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal use of a firearm 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).

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

882

KA 07-01910

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SERGIO PONDER, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Monroe County Court (Richard A. Keenan, J.), rendered July 26, 2007. Defendant was resentenced upon his conviction of robbery in the first degree, robbery in the second degree (two counts), assault in the second degree and grand larceny in the fourth degree.

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

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

883

KA 09-00721

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

VINCENT HITCHCOCK, 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 (DOUGLAS A. GOERSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered February 11, 2009. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree.

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

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

885

CA 09-02294

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

IN THE MATTER OF EMMANUEL D. PATTERSON,
PETITIONER-APPELLANT,

V ORDER

JAMES L. BERBARY, SUPERINTENDENT, COLLINS
CORRECTIONAL FACILITY, ET AL.,
RESPONDENTS-RESPONDENTS.

EMMANUEL D. PATTERSON, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered September 18, 2009 in a proceeding pursuant to CPLR articles 70 and 78. The judgment dismissed the petition.

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

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

886

KA 06-00233

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN H. BUTLER, DEFENDANT-APPELLANT.

STEPHEN BIRD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered November 21, 2005. The appeal was held by this Court by order entered December 21, 2007, decision was reserved and the matter was remitted to Orleans County Court for further proceedings (46 AD3d 1446). The proceedings were held and completed.

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]). We previously held the case, reserved decision and remitted the matter to County Court for a reconstruction hearing to determine whether the prospective jurors had been properly sworn in compliance with CPL 270.15 (1) (a) (*People v Butler*, 46 AD3d 1446). Upon remittal, we conclude that the court properly determined that there was such compliance with the statute. Defendant's remaining contentions extend beyond the scope of the remittal and were not raised by defendant prior to remittal. Even assuming, arguendo, that those contentions are properly before us, we would conclude that they are without merit.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

887

TP 09-01621

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

IN THE MATTER OF ANWATZ HAQUE, PETITIONER,

V ORDER

NORMAN B. BEZIO, DIRECTOR, SPECIAL HOUSING/ INMATE DISCIPLINARY PROGRAM, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, AND BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENTS.

ANWATZ HAQUE, 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, Seneca County [Dennis F. Bender, A.J.], entered August 7, 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.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

889

KA 09-00722

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

PAULETTE CZUBA, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN RUSSO-MCLAUGHLIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DOUGLAS A. GOERSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered March 11, 2009. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Lococo*, 92 NY2d 825, 827).

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

890

KA 09-00605

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSEPH M. MARRANCO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (MELISSA L. CIANFRINI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (KEVIN T. FINNELL OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Genesee County Court (Robert C. Noonan, J.), rendered February 11, 2009. Defendant was resentenced upon his conviction of burglary in the third degree.

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

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

892

KA 09-01508

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CONSUALO T. SANDERS, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER W. SCHLECHT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered March 20, 2008. The judgment convicted defendant, upon her 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.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

893

KA 09-02087

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JEDEDIAH SHAW, DEFENDANT-APPELLANT.

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (DAVID E. GANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered August 11, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of marihuana in the third degree.

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

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

894

KA 09-00723

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

PAULETTE CZUBA, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN RUSSO-MCLAUGHLIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DOUGLAS A. GOERSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered March 11, 2009. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the fourth degree.

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

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

895

KA 09-00606

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSEPH M. MARRANCO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (MELISSA L. CIANFRINI 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 February 11, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree.

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

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

896

CA 09-01650

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

HALBERT L. BROOKS, JR., PLAINTIFF-APPELLANT,

V ORDER

PAULA GREENE, DEFENDANT-RESPONDENT.

HALBERT L. BROOKS, JR., PLAINTIFF-APPELLANT PRO SE.

COLUCCI & GALLAHER, P.C., BUFFALO (GILLIAN D. BROWN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered June 17, 2009. The order, insofar as appealed from, denied the motion of plaintiff for leave to renew his opposition to defendant's motion 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.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

897

TP 09-02233

PRESENT: SMITH, J.P., FAHEY, LINDLEY, SCONIERS, AND GREEN, JJ.

IN THE MATTER OF ADDULLAH RAHMAN, PETITIONER,

V ORDER

JAMES A. MANCE, SUPERINTENDENT, MARCY CORRECTIONAL FACILITY, ET AL., RESPONDENTS.

ADDULLAH RAHMAN, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Samuel D. Hester, J.], entered September 30, 2009) to review a determination of respondent James A. Mance, Superintendent, Marcy Correctional Facility. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

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

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

899

KA 09-00902

PRESENT: SMITH, J.P., FAHEY, LINDLEY, SCONIERS, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS B. SIMCOE, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

THOMAS B. SIMCOE, 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 December 19, 2008. The judgment convicted defendant, upon a nonjury verdict, of attempted murder in the first degree, attempted murder in the second degree, attempted assault in the first degree (three counts), assault in the second degree (two counts), assault in the third degree, criminal possession of a weapon in the fourth degree (two counts) and endangering the welfare of a child.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), for beating and choking his wife, and attempted murder in the first degree (§§ 110.00, 125.27 [1] [a], [b]), for attempting to stab a police officer who responded to a 911 call from defendant's son, defendant contends that the verdict on those two counts is against the weight of the evidence. Viewing the evidence in light of the elements of those counts in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although a finding that defendant did not intend to kill the victims would not have been unreasonable (*see generally id.*), it cannot be said that County Court, which saw and heard the witnesses and thus was able to " 'assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record,' " failed to give the evidence the weight it should be accorded (*People v Harris*, 72 AD3d 1492, 1492). We note that the intent of defendant to kill the

victims may be inferred from his actions (*see People v Broadnax*, 52 AD3d 1306, 1307, *lv denied* 11 NY3d 830; *People v Switzer*, 15 AD3d 913, 914, *lv denied* 5 NY3d 770). Those actions included choking his wife with a rope to the point of rendering her unconscious and fracturing her skull by repeatedly smashing her head on the hardwood floor, and then stabbing the responding police officer three times in the upper torso area. The fact that the officer was protected from injury by a bulletproof vest does not in any way negate defendant's intent to kill the officer, inasmuch as defendant did not know that the officer was so protected. We further note that, after smashing his wife's head on the floor and biting off a portion of his wife's lower lip, defendant yelled to his son, "come downstairs and see what I did to your mother." In addition, defendant refused to allow the police to enter the house despite the fact that his wife was unconscious and struggling to breathe, thus further jeopardizing her life. Although defendant testified that he did not intend to kill either victim, the court was free to reject that self-serving testimony (*see generally Harris*, 72 AD3d at 1492).

Contrary to the further contention of defendant, he was not denied effective assistance of counsel. Defendant failed "to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's failure to conduct an inquiry into the qualifications of the People's expert or to object to certain testimony (*People v Rivera*, 71 NY2d 705, 709), and defendant was not otherwise deprived of assistance of counsel by the remaining alleged shortcomings of defense counsel (*see generally People v Baldi*, 54 NY2d 137, 147; *People v Walker*, 50 AD3d 1452, 1453, *lv denied* 11 NY3d 795, 931). Considering the brutal nature of the crimes, as well as defendant's lack of remorse and failure to accept responsibility, we conclude that the sentence is not unduly harsh or severe.

We have reviewed the remaining contentions of defendant in his pro se supplemental brief and conclude that they are unpreserved for our review (*see* CPL 470.05 [2]), and in any event are without merit.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

900

KA 09-02162

PRESENT: SMITH, J.P., FAHEY, LINDLEY, SCONIERS, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES R. POLEUN, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER 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 (Matthew J. Murphy, III, J.), rendered July 20, 2009. The judgment convicted defendant, upon his plea of guilty, of possessing a sexual performance by a child.

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 possessing a sexual performance by a child (Penal Law § 263.16). Contrary to defendant's contention, the record of the plea proceeding establishes that defendant understood that the waiver of the right to appeal was separate from his plea of guilty (*see People v Dillon*, 67 AD3d 1382). We conclude that his waiver of the right to appeal was knowingly, intelligently, and voluntarily entered, and that it encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256). Although the further contention of defendant that the plea was not voluntarily entered survives his waiver of the right to appeal, he failed to preserve that contention for our review because he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Diaz*, 62 AD3d 1252, *lv denied* 12 NY3d 924; *see also People v Burney*, 30 AD3d 1082, *amended on rearg* 32 AD3d 1366, *lv denied* 7 NY3d 866, 8 NY3d 844). In any event, that contention is lacking in merit. Although the People incorrectly informed defendant at the plea proceeding that he could be sentenced to a determinate term of incarceration of up to four years and a period of postrelease supervision of up to 10 years, County Court thereafter correctly advised defendant of his maximum sentencing exposure (*see People v Johnson*, 71 AD3d 1048), and the court properly sentenced defendant to an indeterminate term of incarceration without a period of postrelease supervision (*see*

generally Burney, 30 AD3d 1082).

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

901

CA 09-02229

PRESENT: SMITH, J.P., FAHEY, LINDLEY, SCONIERS, AND GREEN, JJ.

IN THE MATTER OF FREDERIC C. CARPENTER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL CORCORAN, SUPERINTENDENT, CAYUGA CORRECTIONAL FACILITY, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, AND ANDREA EVANS, ACTING CHIEF COMMISSIONER, NEW YORK STATE DIVISION OF PAROLE,
RESPONDENTS-RESPONDENTS.

FREDERIC C. CARPENTER, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (RAJIT S. DOSANJH OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered September 29, 2009 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of the New York State Department of Correctional Services (DOCS) calculating the sentences he received for three convictions. Two of the sentences were indeterminate terms of imprisonment, and the third was a determinate term of imprisonment that included a period of postrelease supervision (PRS). In accordance with the directive of the sentencing court, DOCS calculated the three terms of imprisonment to run concurrently. Contrary to the contention of petitioner, however, DOCS properly determined that the period of PRS would commence upon his release from imprisonment and would not run concurrently with the other two sentences of imprisonment. Indeed, Penal Law § 70.45 (5) (a) expressly provides that a period of PRS shall not commence to run until an individual has been released from imprisonment. Petitioner further challenges the sentencing proceeding, contending that he is entitled to be resentenced because Supreme Court did not adequately explain the PRS portion of his determinate sentence to him when he entered the underlying pleas of guilty. That challenge is not properly before us, inasmuch as "a proceeding pursuant to CPLR article 78 generally does not lie to review errors claimed to have occurred in a criminal

proceeding or to challenge a judgment of conviction rendered by a criminal court . . . Rather, such a challenge must be made by way of a direct appeal of the judgment of conviction" (*Matter of Garcha v City Ct. [City of Beacon]*, 39 AD3d 645, 646; *see Matter of Hennessy v Gorman*, 58 NY2d 806).

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

902

KA 09-01891

PRESENT: SMITH, J.P., FAHEY, LINDLEY, SCONIERS, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WAYNE F. STAUFFER, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered June 5, 2009. 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.

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

903

TP 10-00113

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF WILLIAM REED, PETITIONER,

V ORDER

JAMES L. BERBARY, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY, RESPONDENT.

WILLIAM REED, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [John L. Michalski, A.J.], entered May 11, 2009) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated an inmate rule.

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

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

905

KAH 10-00587

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JOE THOMAS, PETITIONER-RESPONDENT,

V ORDER

MICHAEL NASH, ACTING SUPERINTENDENT, WILLARD
DRUG TREATMENT CAMPUS, RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (RAJIT S. DOSANJH OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), dated June 3, 2009 in a habeas corpus proceeding. The judgment granted the petition and directed release of petitioner to parole supervision.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the petition is dismissed (*see People ex rel. Van Steenburg v Wasser*, 69 AD3d 1135, *lv denied in part and dismissed in part* 14 NY3d 883; *People ex rel. Muhammad v Bradt*, 68 AD3d 1391; *People ex rel. Almodovar v Berbary*, 67 AD3d 1419, *lv denied* 14 NY3d 703).

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

906

KA 08-00396

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT H. SMITH, DEFENDANT-APPELLANT.

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

THOMAS E. MORAN, DISTRICT ATTORNEY, GENESEO (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Livingston County Court (Dennis S. Cohen, J.), entered November 28, 2007. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Contrary to the contention of defendant, County Court properly assessed 10 points against him under the risk factor for acceptance of responsibility. Although defendant pleaded guilty to the crime underlying the SORA determination, the court properly concluded that the statements contained in the letter that he submitted to the Board of Examiners of Sex Offenders and the statements that he made during the SORA hearing did not "reflect a genuine acceptance of responsibility as required by the risk assessment guidelines developed by the Board [of Examiners of Sex Offenders]" (*People v Noriega*, 26 AD3d 767, *lv denied* 6 NY3d 713 [internal quotation marks omitted]; *see People v Carman*, 33 AD3d 1145, 1146; *People v Mitchell*, 300 AD2d 377, 378, *lv denied* 99 NY2d 510).

Contrary to the further contention of defendant, he failed to present clear and convincing evidence of special circumstances justifying a downward departure from his presumptive risk level (*see People v Clark*, 66 AD3d 1366, *lv denied* 13 NY3d 713; *People v McDaniel*, 27 AD3d 1158, *lv denied* 7 NY3d 703).

Finally, we conclude that the court's oral findings of fact and conclusions of law "are clear, supported by the record and

sufficiently detailed to permit intelligent appellate review" (*People v Roberts*, 54 AD3d 1106, 1106-1107, *lv denied* 11 NY3d 713; *see People v Wood*, 60 AD3d 1350; *People v Leibach*, 39 AD3d 1093, 1094, *lv denied* 9 NY3d 806).

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

907

KA 09-00934

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON J. VIEHDEFFER, 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 resentence of the Genesee County Court (Robert C. Noonan, J.), rendered December 10, 2008. Defendant was resentenced upon his conviction of burglary in the second degree.

It is hereby ORDERED that the resentence so appealed from is unanimously reversed on the law, the original sentence is reinstated and the matter is remitted to Genesee County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a resentence pursuant to which, following a hearing, County Court sentenced him to a five-year period of postrelease supervision. We agree with defendant that the court erred in imposing a period of postrelease supervision after he had been conditionally released from the previously imposed determinate sentence of incarceration. Inasmuch as he had been released from custody, defendant had "a legitimate expectation that the sentence, although illegal under the Penal Law, is final[,] and the Double Jeopardy Clause prevents a court from modifying the sentence to include a period of postrelease supervision" (*People v Williams*, 14 NY3d 198, 219-220; *see People v Appleby*, 71 AD3d 1545).

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

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

908

KA 09-01482

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DONALD J. WILLIAMS, 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 (DOUGLAS A. GOERSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered June 17, 2009. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree.

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

Patricia L. Morgan

Entered: July 2, 2010

Clerk of the Court

MOTION NO. (121/91) KA 09-01579. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL J. HILL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: PERADOTTO, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ. (Filed July 2, 2010.)

MOTION NO. (1500/04) KA 03-00777. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BERNARD J. SORRENTINO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, LINDLEY, AND PINE, JJ. (Filed July 2, 2010.)

MOTION NO. (100/06) KA 02-01346. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DONTAE WILLIAMS, DEFENDANT-APPELLANT. -- Motion to vacate the order denying a motion for a writ of error coram nobis denied. PRESENT: SCUDDER, P.J., LINDLEY, GREEN, AND GORSKI, JJ. (Filed July 2, 2010.)

MOTION NO. (1648/06) KA 04-02967. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLEOTIS MERCER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, AND PINE, JJ. (Filed July 2, 2010.)

MOTION NO. (1116/08) CA 07-02611. -- GLACIAL AGGREGATES LLC, PLAINTIFF-RESPONDENT, V TOWN OF YORKSHIRE, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, CENTRA, AND PERADOTTO, JJ. (Filed July 2, 2010.)

MOTION NO. (238/09) KA 05-01036. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY FOSTER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ. (Filed July 2, 2010.)

MOTION NO. (729/09) KA 07-02179. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JASON L. SCOTT, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: MARTOCHE, J.P., FAHEY, CARNI, AND PINE, JJ. (Filed July 2, 2010.)

MOTION NO. (233/10) CA 09-01697. -- MICRO-LINK, LLC, PLAINTIFF-RESPONDENT-APPELLANT, V TOWN OF AMHERST, DEFENDANT-APPELLANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed July 2, 2010.)

MOTION NO. (325/10) TP 09-01934. -- IN THE MATTER OF IDELLA ABRAM, PETITIONER, V NEW YORK STATE DIVISION OF HUMAN RIGHTS, CITY OF BUFFALO AND BUFFALO POLICE DEPARTMENT, RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals dismissed as untimely. PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND PINE, JJ. (Filed July 2, 2010.)

MOTION NO. (498/10) CA 09-01787. -- IN THE MATTER OF THE JUDICIAL

SETTLEMENT OF FINAL ACCOUNT OF MANUFACTURERS AND TRADERS TRUST COMPANY, PETITIONER-RESPONDENT-APPELLANT, AS EXECUTOR UNDER LAST WILL AND TESTAMENT OF JOHN CLARKE ADAMS. PETER ADAMS AND CYNTHIA ADAMS, INDIVIDUALLY AND AS TESTAMENTARY TRUSTEES OF THEIR CHILDREN ARMAND ADAMS AND MAXINE ADAMS, AND MARC ADAMS, RESPONDENTS-APPELLANTS-RESPONDENTS. -- Motion for reargument denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, AND PINE, JJ. (Filed July 2, 2010.)

MOTION NO. (518/10) CA 09-01531. -- TRACI BUTLER, PLAINTIFF-APPELLANT, V STAGECOACH GROUP, PLC, COACH USA, INC., INDIVIDUALLY AND DOING BUSINESS AS COACH CANADA, INC., TRENTWAY-WAGAR, INC., ERIE COACH LINES COMPANY, RYAN A. COMFORT, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (APPEAL NO. 1.) -- Motion for reargument denied. Leave to appeal to the Court of Appeals granted. PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ. (Filed July 2, 2010.)

MOTION NO. (519/10) CA 09-01532. -- TRACI BUTLER, PLAINTIFF-APPELLANT, V STAGECOACH GROUP, PLC, ET AL., DEFENDANTS, J&J HAULING, INC., JOSEPH R. FRENCH, INDIVIDUALLY AND DOING BUSINESS AS J&J TRUCKING, INC., AND/OR J&J HAULING, INC., AND PAMELA ZEISET, AS ADMINSTRATRIX OF THE ESTATE OF ERNEST D. ZEISET, JR., DECEASED, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.) -- Motion for reargument denied. Leave to appeal to the Court of Appeals granted. PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ. (Filed July 2, 2010.)

MOTION NO. (520/10) CA 09-01534. -- COURTNEY COWAN, KELLY COWAN AND BRIAN COWAN, PLAINTIFFS-APPELLANTS, V STAGECOACH GROUP, PLC, COACH USA, INC., INDIVIDUALLY AND DOING BUSINESS AS COACH CANADA, INC., TRENTWAY-WAGAR, INC., ERIE COACH LINES COMPANY, RYAN A. COMFORT, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (APPEAL NO. 3.) -- Motion for reargument denied. Leave to appeal to the Court of Appeals granted. PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ. (Filed July 2, 2010.)

MOTION NO. (521/10) CA 09-01535. -- COURTNEY COWAN, KELLY COWAN AND BRIAN COWAN, PLAINTIFFS-APPELLANTS, V STAGECOACH GROUP, PLC, ET AL., DEFENDANTS, J&J HAULING, INC., JOSEPH R. FRENCH, INDIVIDUALLY AND DOING BUSINESS AS J&J TRUCKING, INC., AND/OR J&J HAULING, INC., AND PAMELA ZEISET, AS ADMINSTRATRIX OF THE ESTATE OF ERNEST D. ZEISET, JR., DECEASED, DEFENDANTS-RESPONDENTS. (APPEAL NO. 4.) -- Motion for reargument denied. Leave to appeal to the Court of Appeals granted. PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ. (Filed July 2, 2010.)

MOTION NO. (522/10) CA 09-01537. -- MEAGAN GODWIN, CARRIE LONG AND CARLEIGH WELDON, PLAINTIFFS-APPELLANTS, V STAGECOACH GROUP, PLC, COACH USA, INC., INDIVIDUALLY AND DOING BUSINESS AS COACH CANADA, INC., TRENTWAY-WAGAR, INC., ERIE COACH LINES COMPANY, RYAN A. COMFORT, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (APPEAL NO. 5.) -- Motion for reargument denied. Leave to appeal to the Court of Appeals granted. PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ. (Filed July 2, 2010.)

MOTION NO. (523/10) CA 09-01538. -- MEAGAN GODWIN, CARRIE LONG AND CARLEIGH WELDON, PLAINTIFFS-APPELLANTS, V STAGECOACH GROUP, PLC, ET AL., DEFENDANTS, J&J HAULING, INC., JOSEPH R. FRENCH, INDIVIDUALLY AND DOING BUSINESS AS J&J TRUCKING, INC., AND/OR J&J HAULING, INC., AND PAMELA ZEISET, AS ADMINSTRATRIX OF THE ESTATE OF ERNEST D. ZEISET, JR., DECEASED, DEFENDANTS-RESPONDENTS. (APPEAL NO. 6.) -- Motion for reargument denied. Leave to appeal to the Court of Appeals granted. PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ. (Filed July 2, 2010.)

MOTION NO. (527/10) CA 09-01547. -- SHEILA ELIZABETH EDWARDS, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF RICHARD F. EDWARDS, DECEASED, AND AS ADMINISTRATRIX OF THE ESTATE OF BRIAN EDWARDS, DECEASED, KELLY ELIZABETH EDWARDS, JANNA MARIE DESMARAIS, ROBERT JOSEPH DESMARAIS, TRACY LYNN DESMARAIS, JENNA M. UNDERWOOD, PATRICIA UNDERWOOD, DONALD UNDERWOOD, CARLY A. LABADIE, GUY P. LABADIE, NANCY LABADIE, MICHAEL W. COWAN, TORY J. GAULT, RANDY MICHAEL PAGEAU, LINDA JEAN PAGEAU, JASON P. MAILLOUX, MARCEL MAILLOUX, LOU-ANN MAILLOUX, TIFFANY STROUD, GARY LANGILL, AND CARRIE LANGILL, PLAINTIFFS-APPELLANTS, V ERIE COACH LINES COMPANY, COACH CANADA, INC., TRENTWAY-WAGAR, INC., RYAN A. COMFORT, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (APPEAL NO. 10.) -- Motion for reargument denied. Leave to appeal to the Court of Appeals granted. PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ. (Filed July 2, 2010.)

MOTION NO. (528/10) CA 09-01548. -- SHEILA ELIZABETH EDWARDS, INDIVIDUALLY

AND AS EXECUTRIX OF THE ESTATE OF RICHARD F. EDWARDS, DECEASED, AND AS ADMINISTRATRIX OF THE ESTATE OF BRIAN EDWARDS, DECEASED, KELLY ELIZABETH EDWARDS, JANNA MARIE DESMARAIS, ROBERT JOSEPH DESMARAIS, TRACY LYNN DESMARAIS, JENNA M. UNDERWOOD, PATRICIA UNDERWOOD, DONALD UNDERWOOD, CARLY A. LABADIE, GUY P. LABADIE, NANCY LABADIE, MICHAEL W. COWAN, TORY J. GAULT, RANDY MICHAEL PAGEAU, LINDA JEAN PAGEAU, JASON P. MAILLOUX, MARCEL MAILLOUX, LOU-ANN MAILLOUX, TIFFANY STROUD, GARY LANGILL, AND CARRIE LANGILL, PLAINTIFFS-APPELLANTS, V ERIE COACH LINES COMPANY, ET AL., DEFENDANTS, J&J TRUCKING, J&J HAULING, INC., JOSEPH R. FRENCH, AND PAMELA ZEISET, AS ADMINISTRATRIX OF THE ESTATE OF ERNEST D.ZEISET, JR., DECEASED, DEFENDANTS-RESPONDENTS. (APPEAL NO. 11.) -- Motion for reargument denied. Leave to appeal to the Court of Appeals granted. PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ. (Filed July 2, 2010.)

MOTION NO. (547/10) CA 09-02327. -- JUSTIN W. FRANCIS, PLAINTIFF-APPELLANT, V SUSANNE FRANCIS, DEFENDANT-RESPONDENT. -- Motion for reargument denied. PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND PINE, JJ. (Filed July 2, 2010.)

KA 09-01860. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TOMMY BRINSON, 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 Wayne County Court, Dennis Kehoe, J. - Felony Driving While Intoxicated). PRESENT: SCUDDER, P.J., PERADOTTO,

CARNI, PINE, AND GORSKI, JJ. (Filed July 2, 2010.)

KA 09-00817. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY CASSATA, 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 Livingston County Court, Robert B. Wiggins, J. - Forgery, 2nd Degree). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, PINE, AND GORSKI, JJ. (Filed July 2, 2010.)

KA 09-01486. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V STEPHEN CAVITT, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Steuben County Court, Joseph William Latham, J. - Grand Larceny, 4th Degree). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, PINE, AND GORSKI, JJ. (Filed July 2, 2010.)

KA 10-01217. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V STEPHEN CAVITT, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Steuben County Court, Joseph William Latham, J. - Violation of Probation). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, PINE, AND GORSKI, JJ. (Filed July 2, 2010.)

KA 09-00299. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EULESE N. CRUZ, ALSO KNOWN AS MARCO AGUAY, DEFENDANT-APPELLANT. -- The case is

held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon his *Alford* plea of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [3]), and upon his guilty plea of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38). However, our review of the record reveals the existence of nonfrivolous issues for appeal, specifically, whether County Court erred in denying defendant's motion seeking to suppress the photo array identification of defendant, and whether there was sufficient evidence of guilt in the record to support defendant's *Alford* plea (*see People v Richardson*, 72 AD3d 1578). Therefore, we relieve counsel of his assignment and assign new counsel to brief these issues, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Jefferson County Court, Kim Hawn Martusewicz, J. - Attempted Robbery, 1st Degree). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, PINE, AND GORSKI, JJ. (Filed July 2, 2010.)

KA 08-02028. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSE GARCIA, 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 Oneida County Court, Michael L. Dwyer, J. - Criminal Sale of a Controlled Substance, 3rd Degree). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, PINE, AND GORSKI, JJ. (Filed July 2,

2010.)

KA 08-02680. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAVID W. JOHNSON, 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, Craig J. Doran, J. - Criminal Sale of a Controlled Substance, 3rd Degree). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, PINE, AND GORSKI, JJ. (Filed July 2, 2010.)

KA 07-01785. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOHN RANSOM, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Monroe County Court, Patricia D. Marks, J. - Violation of Probation). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, PINE, AND GORSKI, JJ. (Filed July 2, 2010.)

KA 08-01762. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CONSUALO T. SANDERS, 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, Craig J. Doran, J. - Violation of Probation). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, PINE, AND GORSKI, JJ. (Filed July 2, 2010.)

KA 07-01860. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SUSAN

SILVER, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Monroe County Court, Patricia D. Marks, J. - Violation of Probation). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, PINE, AND GORSKI, JJ. (Filed July 2, 2010.)

KA 09-00643. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MATTHEW L. TOWNSEND, 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 Oneida County Court, Barry M. Donalty, J. - Manslaughter, 1st Degree). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, PINE, AND GORSKI, JJ. (Filed July 2, 2010.)