



SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

DECEMBER 30, 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

1066

CA 09-02227

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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

V

ORDER

ANDREW J. INGERSOLL, DEFENDANT-RESPONDENT,
AND NOCO EXPRESS, A DIVISION OF NOCO ENERGY
CORP., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JAECKLE, FLEISCHMANN & MUGEL, LLP, BUFFALO (DAVID G. BROCK OF
COUNSEL), FOR DEFENDANT-APPELLANT.

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

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered June 11, 2009 in a personal injury action. The judgment awarded plaintiffs the sum of \$2,472,243.30 against defendant Noco Express, a Division of Noco Energy Corp.

Now, upon the stipulation of discontinuance of action signed by the attorneys for the parties on November 16, 2010, and filed in the Erie County Clerk's Office on November 22, 2010,

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1067

CA 10-00040

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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

V

ORDER

ANDREW J. INGERSOLL, DEFENDANT-RESPONDENT,
AND NOCO EXPRESS, A DIVISION OF NOCO ENERGY
CORP., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JAECKLE, FLEISCHMANN & MUGEL, LLP, BUFFALO (DAVID G. BROCK OF
COUNSEL), FOR DEFENDANT-APPELLANT.

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

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered May 18, 2009 in a personal injury action. The order denied a motion by defendant Noco Express, a Division of Noco Energy Corp., to set aside the jury verdict and for a new trial.

Now, upon the stipulation of discontinuance of action signed by the attorneys for the parties on November 16, 2010, and filed in the Erie County Clerk's Office on November 22, 2010,

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1068

CA 10-00041

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

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

V

ORDER

ANDREW J. INGERSOLL, DEFENDANT-RESPONDENT,
AND NOCO EXPRESS, A DIVISION OF NOCO ENERGY
CORP., DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

JAECKLE, FLEISCHMANN & MUGEL, LLP, BUFFALO (DAVID G. BROCK OF
COUNSEL), FOR DEFENDANT-APPELLANT.

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

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered July 9, 2009 in a personal injury action. The judgment dismissed the amended complaint and cross claim against defendant Andrew J. Ingersoll.

Now, upon the stipulation of discontinuance of action signed by the attorneys for the parties on November 16, 2010, and filed in the Erie County Clerk's Office on November 22, 2010,

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1077

CA 10-00534

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

ARLENE S. GARLAND, AS EXECUTRIX OF THE ESTATES
OF RICHARD T. SHANOR AND GENELLE M. SHANOR,
DECEASED, PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

RLI INSURANCE COMPANY,
DEFENDANT-RESPONDENT-APPELLANT,
ET AL., DEFENDANT.

BROWN CHIARI LLP, LANCASTER (MICHAEL R. DRUMM OF COUNSEL), FOR
PLAINTIFF-APPELLANT-RESPONDENT.

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

Appeal and cross appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered April 28, 2009. The order granted the motion of plaintiff for leave to renew and reargue and, upon reargument, denied the motion of plaintiff and the cross motion of defendant RLI Insurance Company for summary judgment.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs and the motion for leave to renew and reargue is denied.

Memorandum: Supreme Court erred in granting the motion of plaintiff seeking leave to "renew and reargue" her motion for, *inter alia*, summary judgment on the complaint and to reargue her opposition to the cross motion of RLI Insurance Company (defendant) for summary judgment dismissing the complaint against it. With respect to that part of the motion seeking leave to renew, it "must be based upon new facts that were unavailable at the time of the original motion" (*Boreanaz v Facer-Kreidler*, 2 AD3d 1481, 1482; see *Foxworth v Jenkins*, 60 AD3d 1306). "Although a court has discretion to 'grant renewal, in the interest of justice, upon facts [that] were known to the movant at the time the original motion was made' . . . , it may not exercise that discretion unless the movant establishes a 'reasonable justification for the failure to present such facts on the prior motion' " (*Robinson v Consolidated Rail Corp.*, 8 AD3d 1080; see *Foxworth*, 60 AD3d 1306). Here, the allegedly "new" evidence submitted by plaintiff consists of an affidavit of her attorney detailing his efforts to ascertain the insurance coverage in question from the time that he was retained until plaintiff notified defendant of the accident, approximately 20

months later. It is undisputed that those facts were known to plaintiff at the time of her prior motion, and the only excuse provided by plaintiff for failing to submit the affidavit of her attorney in support of that motion was her mistaken belief that such facts were not relevant to the issue whether her notice to defendant was timely. We conclude that, under the circumstances of this case, the inability of plaintiff to identify the applicable legal standard does not constitute a reasonable justification for her failure to submit the affidavit in support of the prior motion (see generally *Valenti v Exxon Mobil Corp.*, 50 AD3d 1382, 1383; *Zarecki & Assoc., LLC v Ross*, 50 AD3d 679; *Reshevsky v United Water N.Y., Inc.*, 46 AD3d 532, *lv dismissed* 10 NY3d 785).

With respect to those parts of the motion of plaintiff seeking leave to reargue her prior motion and her opposition to defendant's cross motion, they must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion [and cross motion]" (CPLR 2221 [d] [2]). "Reargument does not provide a party 'an opportunity to advance arguments different from those tendered on the original application' " (*Rubinstein v Goldman*, 225 AD2d 328, 328, *lv denied* 88 NY2d 815). Here, those parts of plaintiff's motion seeking leave to reargue were premised upon a legal theory not advanced in support of the original motion or in opposition to defendant's cross motion, and thus they should have been denied (see *V. Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874).

All concur except SCONIERS, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent, inasmuch as I disagree with my colleagues that Supreme Court erred in granting the motion of plaintiff seeking leave to "renew and reargue" her motion for, inter alia, summary judgment on the complaint and to reargue her opposition to the cross motion of RLI Insurance Company (defendant) for summary judgment dismissing the complaint against it. In granting that part of the motion seeking leave to renew, the court carefully considered the factors set forth in CPLR 2221 (e) and specifically addressed "[t]he critical issue . . . whether plaintiff . . . presented a reasonable justification for her failure to present such facts on the prior motion." In addition to concluding "that plaintiff . . . furnished a reasonable justification for failing to adduce the new facts on the prior motion," the court understandably was "not inclined to ignore the newly determinative fact that plaintiff . . . may . . . have exercised due diligence in attempting to ascertain the tortfeasors' insurance situation[, especially where] ignor[ing] that critical fact would be to deprive plaintiff of significant legal rights[] and to permit an unjustified evasion of defendant['s] . . . significant contractual responsibilities."

In a case such as this, where the court gave due weight and consideration to the relevant factors in granting that part of the motion seeking leave to renew, we should not second guess the court's exercise of discretion, especially where doing so would deprive a party of a determination on the merits. It is one thing to reverse an order denying a motion seeking leave to renew and thereby decide a

case on the merits (see *Foxworth v Jenkins*, 60 AD3d 1306), but it is quite another to reverse an order granting a motion seeking leave to renew, thus depriving a party of the benefit of a determination on the merits. This Court has been, and should be, reluctant to do so. In fact, I could find only one instance since CPLR 2221 was amended in 1999 where this Court reversed an order granting a motion seeking leave to renew, and that was in a case where virtually no justification was provided for the "failure to produce the additional proof on the prior motion" (*Robinson v Consolidated Rail Corp.*, 8 AD3d 1080). Further, this Court has not previously reversed an order granting a motion seeking leave to reargue where the motion was timely.

When CPLR 2221 was substantially amended in 1999, the Committee on Civil Practice Law and Rules of the New York State Bar Association (hereafter, Committee) approved the legislation but noted that it was divided because some members of the Committee expressed concern that the "legislation . . . might be interpreted to . . . effectively deprive courts of flexibility needed in this area" (Mem of Comm on CPLR, Bill Jacket, L 1999, ch 281). In supporting the legislation, however, the Committee concluded that "[t]he new proposal does allow for judicial discretion and flexibility" (*id.*). Unfortunately, it appears that those concerns were warranted (see e.g. *V. Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874). The fundamental and overriding purpose of CPLR 2221 should be to give courts and litigants every reasonable opportunity to obtain the legally correct and just result based on the merits of the case. Here, while plaintiff may have ultimately been unsuccessful in recovering the proceeds of the insurance policy in question, she should have been afforded the opportunity to resolve her claim for coverage on the merits. I therefore would affirm the order for the reasons stated at Supreme Court.

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

1115

CA 09-00990

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

LINDA M. BROWN, AS ADMINISTRATRIX OF THE ESTATE
OF WAYNE BROWN, DECEASED, CLAIMANT-APPELLANT,

V

MEMORANDUM AND ORDER

THE STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 108961.)

LINDA M. BROWN, CLAIMANT-APPELLANT,

V

THE STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 110037.)

THE PALMIERE LAW FIRM, ROCHESTER (NORMAN ANDREW PALMIERE OF COUNSEL),
FOR CLAIMANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (EDWARD MCARDLE OF COUNSEL),
FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Nicholas V. Midey, Jr., J.), entered August 8, 2008. The judgment dismissed the claims for personal injury and wrongful death.

It is hereby ORDERED that the judgment so appealed from is modified on the law by granting that part of the post-trial motion with respect to the issue of proximate cause and as modified the judgment is affirmed without costs, and the matter is remitted to the Court of Claims for a determination on the issue of proximate cause in accordance with the following Memorandum: Claimant commenced these consolidated actions, individually and as administratrix of the estate of her husband (hereafter, decedent), seeking damages for her injuries and his wrongful death resulting from a right-angle motor vehicle accident in an intersection. At the time of the accident, decedent was operating a motorcycle north on State Route 350 (Route 350), near the intersection of Paddy Lane in the Town of Ontario, and claimant was a passenger on that motorcycle. The posted speed limit on Route 350 in that area was 55 miles per hour. William Friend was contemporaneously operating a pickup truck east on Paddy Lane. After stopping at the stop sign at the intersection of Paddy Lane and Route 350 (intersection), Friend looked both ways down Route 350 and then proceeded to drive his vehicle straight across Route 350 at an approximate speed of five miles per hour. Before safely reaching the

other side of Route 350, Friend experienced what he described as a "ground explosion." It is undisputed that what Friend was in fact experiencing was a collision between his vehicle and decedent's motorcycle while the vehicle driven by Friend was still crossing the intersection. Friend indicated that, although he looked in both directions, he never observed decedent's motorcycle at any time prior to the collision in the intersection.

According to claimant's pleadings, the intersection "has a long history of motor vehicle accidents due to a negligent and improper design of the intersection; excessive speed limit for Route 350 relative to the topography of [that road] south of the intersection . . . ; [and] inadequate posting of signs and/or lack of signs including but not limited to flashing warning signs." Claimant further alleged that defendant had been "warned of the dangerous nature of the intersection . . . and . . . negligently failed to take any action to reduce [its] apparent dangerous nature." In its answer to each claim, defendant asserted the affirmative defense of governmental immunity (see *Weiss v Fote*, 7 NY2d 579, 588, *rearg denied* 8 NY2d 934). Following a trial, the Court of Claims concluded that defendant was not entitled to governmental immunity pursuant to *Weiss v Fote* inasmuch as defendant abandoned its study of the intersection that began approximately four years prior to the accident.

Nevertheless, the court concluded that claimant was required to establish that defendant's "failure to complete [the] intersection safety study was a proximate cause of the accident forming the basis of [the] claim[s]." The court determined that claimant failed to meet that burden and dismissed the claims. In denying claimant's post-trial motion to set aside the decision and for a new decision pursuant to CPLR 4404 (b), the court explained that in its original decision it found that defendant "had notice of a dangerous condition and had failed to take reasonable measures to remedy that condition" and determined that defendant's failure "to implement a safety plan for [the] intersection within a reasonable period of time was not a proximate cause of the accident"

We note at the outset that, although claimant appeals from the court's "[d]ecision and [o]rder," that document is only a decision from which no appeal lies (see *Pecora v Lawrence*, 28 AD3d 1136, 1137). We nevertheless exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the judgment entered in these consolidated actions (see CPLR 5520 [c]; *Ponzi v Ponzi*, 45 AD3d 1327; *Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988). On appeal, claimant contends that the court applied an inappropriate breach of duty, negligence and proximate cause analysis. Claimant further contends that, in the undisputed absence of any *Weiss v Fote* issues, her burden at trial was limited to establishing that the intersection presented a dangerous condition of which defendant had notice and that the dangerous condition was a proximate cause of the accident, claimant's injuries and the death of decedent. We agree and conclude that, inasmuch as the court incorrectly applied elements of the *Weiss v Fote* doctrine to the negligence and proximate cause analysis after determining that defendant was not entitled to the benefits of that

doctrine, the matter must be remitted to the Court of Claims for a proximate cause determination that utilizes the proper standard.

There are certain undisputed facts that guide our analysis. First, defendant abandoned any study that had been undertaken with respect to the conditions of the intersection and the speed limit for vehicles approaching the intersection while traveling on Route 350. Second, no study or plan was underway at the time of the accident. Third, defendant did not present any evidence at trial establishing that the design and signage of the intersection on the date of the accident was the product of any prior study or plan. Therefore, inasmuch as the evidence established that the signage, configuration and sight distance of the intersection, together with their interaction with the approaching speed limit on Route 350 (see e.g. *Vega v State of New York*, 10 Misc 3d 822, 829-830, *affd* 37 AD3d 825, *lv denied* 9 NY3d 812), were not "the product of a governmental plan or study," the doctrine of *Weiss v Fote* and all of its component parts "do[] not apply" to the analysis of this appeal (*Cummins v County of Onondaga*, 198 AD2d 875, 877, *affd* 84 NY2d 322). Defendant therefore correctly concedes that it is not entitled to governmental immunity pursuant to *Weiss v Fote*.

However, notwithstanding its rejection of defendant's *Weiss v Fote* defense, the court proceeded to reintroduce elements of the *Weiss v Fote* doctrine into the analysis when it concluded that claimant's burden of proof still required claimant to establish that the "failure to complete [the] intersection safety study was a proximate cause of the accident." That was error. The appropriate inquiry was whether defendant was made aware of a dangerous condition and failed to take action to remedy it and whether the dangerous condition was the proximate cause of the accident (see *Posman v State of New York*, 117 AD2d 915, 917).

Claimant established at trial that, prior to the accident in April 2003, the Department of Transportation (DOT) received accident history data from the State Accident Surveillance System, which indicated that at least 17 right-angle accidents involving failure to yield the right-of-way as a contributing factor occurred at the intersection between August 1996 and June 2002. In six of those accidents, the drivers reported that they stopped on Paddy Lane but did not see the oncoming vehicles on Route 350 before the accident. Defendant's traffic safety engineering expert testified that "the pattern of right-angle accidents involved . . . people coming to the stop sign on [Paddy Lane] and then entering the intersection." In a 1999 resolution, the Ontario Town Board asked the Wayne County Superintendent of Highways to request that the DOT reduce the speed limit on Route 350 from 55 miles per hour to 45 miles per hour and "review the feasibility of installing a blinking caution light at the intersection." It is undisputed that, in response to that data and the resolution, defendant did not reduce the speed limit on Route 350 approaching the intersection, nor did it change the design or signage of the intersection. Claimant's traffic engineering expert testified that a vertical curve in Route 350 south of the intersection, combined

with the speed limit on Route 350 of 55 miles per hour, were relevant factors in the right-angle accident pattern and that the dangerous condition of the intersection and the pattern of accidents could have been remedied by the installation of four-way stop signs. Although defendant contends that certain incremental steps would have been attempted at the intersection prior to the installation of four-way stop signs, defendant took none of those steps. Defendant offered no evidence that the intersection was "reasonably safe" as configured or that it complied with any highway engineering standards at the time it was built or at the time of the accident. The fact that defendant failed to complete any study of the intersection belies its contention that one or more incremental steps were necessary before four-way stop signs would be installed.

It is well settled that, "[i]f the conditions were substantially the same, evidence of prior accidents is admissible: first, to show the dangerous condition [that] caused the accident; and second, to prove that the [entity] responsible had notice of such conditions" (Prince, Richardson on Evidence § 4-622 [Farrell 11th ed]). "It was incumbent upon claimant to establish not only the number of prior accidents at the subject location[] but also to produce evidence that the prior accidents were of a similar nature to the accident [in question]. In addition, the burden upon claimant required her to prove that prior accidents of a similar nature were caused by the same or similar contributing factors [that] caused the instant accident" (*Hough v State of New York*, 203 AD2d 736, 738-739). The evidence amply demonstrated that defendant's design of the intersection with two-way stop signs had proven inadequate in light of the accident history (see *Posman*, 117 AD2d at 917). When defendant is made aware of a dangerous highway condition and does not take steps to remedy it, defendant can be held liable for the resulting injuries (see *Ernest v Red Cr. Cent. School Dist.*, 93 NY2d 664, 673-674, *rearg denied* 93 NY2d 1042; *Scheemaker v State of New York*, 125 AD2d 964, *affd* 70 NY2d 985 ["State's failure to post lower mandatory speed limit signs at this dangerous intersection may be deemed a proximate cause of the accident"])).

Here, based upon that evidence, we conclude the court properly determined with respect to defendant's negligence that claimant established that defendant had notice of the dangerous condition of the intersection and failed to take remedial action. That determination correctly resolved in claimant's favor defendant's failure to maintain the highway and the intersection in a "reasonably safe" condition (*cf. Marshall v State of New York*, 252 AD2d 852, 853-854 [no evidence of prior similar accidents, and the State rebutted the claimant's inadequate sight distance theory]). Thus, we agree with claimant that the remaining issue to be determined was whether the dangerous condition of the intersection was a proximate cause of the accident.

We note that this case is unlike those cases where the issue of the applicability of the *Weiss v Fote* doctrine is at issue because the State relies upon the existence of an allegedly adequate and well-reasoned plan or study. In such cases, even though the State has a

plan or study, a claimant may still overcome *Weiss v Fote* immunity by demonstrating that the State was negligent in failing to implement a remedial highway planning decision once it has been made (see *Friedman v State of New York*, 67 NY2d 271, 284), or where "the plan either was evolved without adequate study or lacked reasonable basis" (*Weiss*, 7 NY2d at 589; see *Alexander v Eldred*, 63 NY2d 460, 466-467). However, because defendant does not rely upon such a plan or study, this case should proceed, as the Court of Appeals made clear in *Weiss v Fote*, under the "different theory" that, "having planned the intersection, [defendant] was under a continuing duty to review its plan in the light of its actual operation and that the proof established a breach of such duty" (7 NY2d at 587). Here, as the Court of Claims found in *Eastman v State of New York* (303 NY 691, revg 278 App Div 1), the evidence established that at the time of the accident and prior thereto, the intersection was an unreasonably dangerous intersection (see *id.* at 692). Thus, this case is among those where the negligence of the State or the municipality was established by the need for remedial action "necessitated by a known dangerous condition or a prior history of accidents at the site" (*Chunhye Kang-Kim v City of New York*, 29 AD3d 57, 61).

We conclude under the circumstances of this case that the court is in the best position to determine the issue of proximate cause. We therefore modify the judgment by granting that part of the post-trial motion to set aside "the decision" with respect to the issue of proximate cause. We remit the matter to the Court of Claims for a determination on this record of whether the dangerous condition of the intersection because of the vertical curve in the line of sight looking south from Paddy Lane, combined with the speed limit of 55 miles per hour and the absence of four-way stop signs at the intersection, "may be deemed a proximate cause of the accident" (*Scheemaker*, 125 AD2d at 965).

The conclusion to the contrary by our dissenting colleagues that, notwithstanding the inapplicability of *Weiss v Fote*, claimant was still "required to show what corrective action should have been taken by defendant and that such corrective action would have been completed before and would have prevented the accident" may be readily dispensed with. Initially, and inasmuch as the evidence established that this case rests upon the "entirely different theory" that defendant "was under a continuing duty to review its [intersection] plan in the light of its actual operation" (*Weiss*, 7 NY2d at 587), the dissent's highway planning and design implementation analysis is misplaced. Second, where claimant's case proceeds upon a "different theory" (*id.*), as it does here, the dissent's imposition upon claimant of the burden of proving what corrective action would have "prevented the accident" has been rejected (see *id.*, discussing *Eastman*, 303 NY 691, revg 278 App Div 1, 4). Third, *Ernest v Red Cr. Cent. School Dist.* (93 NY2d at 675), decided subsequent to *Alexander v Eldred*, upon which the dissent relies, makes clear that a claimant need only establish that the absence of safety measures "contributed to the happening of the accident by materially increasing the risk," or by " 'greatly increasing the probability of its occurrence' " (*id.*, quoting *Humphrey*

v State of New York, 90 AD2d 901, 902, *affd* 60 NY2d 742).

Finally, we note that the record demonstrates that decedent was operating the motorcycle "within the law and in accordance with common practice," and thus decedent's familiarity with the accident site does not preclude liability as a matter of law (*Scheemaker*, 125 AD2d at 965).

All concur except CENTRA, J.P., and PERADOTTO, J., who dissent and vote to affirm in the following Memorandum: We respectfully dissent and would affirm the judgment dismissing the claims. Claimant was seriously injured and her husband (decedent) died when a pickup truck collided with their motorcycle at an intersection in Wayne County. The driver of the pickup truck stopped at the stop sign on Paddy Lane, but he failed to yield the right-of-way to decedent and pulled in front of and collided with the motorcycle. Decedent was operating the motorcycle on State Route 350 (Route 350), which did not have a stop sign or other traffic control device at the intersection with Paddy Lane (intersection). According to claimant, there was a history of accidents at the intersection based on, inter alia, its negligent design and "inadequate posting of signs and/or lack of signs including but not limited to flashing warning signs."

On this appeal from a judgment following a nonjury trial, we must view the record in the light most favorable to sustain the judgment and give " 'due deference to the . . . court's determinations regarding witness credibility' " (*Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170). Further, "the decision of the . . . court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [internal quotation marks omitted], *rearg denied* 81 NY2d 835; *see Garofalo v State of New York*, 17 AD3d 1109, 1110, *lv denied* 5 NY3d 707; *Farace v State of New York*, 266 AD2d 870, 871).

The Court of Claims properly concluded that defendant is not entitled to qualified immunity pursuant to *Weiss v Fote* (7 NY2d 579). Although defendant was notified that the intersection was potentially dangerous and initiated a study in February 1999, it abandoned and never completed that study before the accident at issue in April 2003. Defendant therefore may be liable for its failure to undertake an adequate study (*see generally Friedman v State of New York*, 67 NY2d 271, 284). We cannot agree with the majority, however, that the court erred in failing to determine whether the dangerous condition of the intersection was a proximate cause of the accident. Indeed, we agree with the court that defendant's negligence was not a proximate cause of the accident.

"One who is injured in a traffic accident can recover against [the State] if it is shown that its failure to install a traffic control or warning device was negligent under the circumstances, that [such] omission was a contributing cause of the mishap, and that there was no reasonable basis for the [State's] inaction" (*Alexander v*

Eldred, 63 NY2d 460, 463-464). In our view, claimant was required to show more than that the potentially dangerous condition of the intersection was a proximate cause of her injuries and decedent's death. Rather, she was required to show what corrective action should have been taken by defendant and that such corrective action would have been completed before and would have prevented the accident. For example, in *Alexander*, the plaintiff established that there was an inadequate study and unreasonable basis for the defendant municipality's traffic plan (*id.* at 466). At trial, the plaintiff submitted evidence that a stop sign should have been in place, and that evidence was unrefuted by the defendant municipality (*id.* at 464-465). The Court of Appeals determined that the plaintiff presented evidence establishing that the defendant municipality failed to install the necessary stop sign without an adequate study or reasonable basis, that the driver failed to stop at the proper location and that the accident might have been avoided had a stop sign been in place (*id.* at 469).

In this case, the court rejected the opinion of claimant's expert that, had defendant completed its study, a four-way stop would necessarily have been installed at the intersection prior to the accident. The court accepted the conclusions of defendant's expert that any corrective action would have been implemented incrementally, and thus the court determined that it was pure speculation to conclude that a four-way stop—the corrective action suggested by claimant's expert—would have been in place before claimant's accident even if defendant had undertaken a timely and adequate study. The court noted that claimant's expert agreed that the actions of defendant in remedying the condition following a study would have been incremental and that a four-way stop would have been installed only if other measures proved ineffective.

The court's determination is supported by the testimony of defendant's expert that a four-way stop was not "a typical corrective action" where, as here, the majority of vehicles involved in accidents at an intersection are stopping at the posted stop signs. Indeed, that expert testified that four-way stops are "rarely used approaches to addressing accident histories." Defendant's expert further testified that, depending on the findings following a study, defendant may not have taken any corrective action and that there were already intersection warning signs in place on Route 350 and stop signs controlling traffic on Paddy Lane.

We therefore conclude that the determination of the court that defendant's negligence was not a proximate cause of the injuries sustained by claimant and decedent's death is supported by a fair interpretation of the evidence.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1130

CA 10-00097

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

THOMAS E. DOMBROWSKI, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

RAYMOND W. BULSON, DEFENDANT-RESPONDENT.

CANTOR, LUKASIK, DOLCE & PANEPINTO, P.C., BUFFALO (JEREMY C. TOTTH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAMON MOREY LLP, BUFFALO (VINCENT G. SACCOMANDO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (John A. Michalek, J.), entered July 17, 2009 in a legal malpractice action. The order granted the motion of defendant for summary judgment, dismissed the complaint and denied plaintiff's cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint only insofar as it seeks damages for nonpecuniary loss and as modified the order is affirmed without costs.

Memorandum: In this legal malpractice action, plaintiff alleges that defendant negligently represented him in a criminal action and that, as a result of defendant's negligence, plaintiff was convicted following a jury trial of two felonies and one misdemeanor and was sentenced to a determinate term of incarceration of four years plus a period of postrelease supervision. County Court denied plaintiff's subsequent motion to vacate the judgment of conviction pursuant to CPL 440.10 on the ground of ineffective assistance of counsel, and we denied plaintiff's motion for leave to appeal from the order denying that motion. Plaintiff thereafter commenced a proceeding in Federal District Court seeking a writ of habeas corpus, again contending that he was denied effective assistance of counsel. In granting the petition in that proceeding almost three years later, the Magistrate determined that defense counsel failed to conduct an adequate investigation and failed to conduct a sufficient cross-examination of the complainant, who is plaintiff's daughter, regarding prior inconsistent statements. When the Magistrate issued his ruling, however, plaintiff had been incarcerated for more than five years, and the prosecution declined to retry him. The indictment was thus dismissed. Plaintiff then commenced this legal malpractice action, seeking money damages for his loss of liberty arising from his alleged

wrongful incarceration and for lost wages.

Supreme Court granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff has no right to recover any money damages. With respect to loss of liberty, the court determined that damages for such nonpecuniary loss are not recoverable in a legal malpractice action and, with respect to lost wages, the court determined that plaintiff was estopped from seeking such damages because he had been deemed disabled by the Social Security Administration prior to his incarceration and had received disability payments while incarcerated. We conclude that the court erred in determining that plaintiff is not entitled to seek damages for nonpecuniary loss arising from his loss of liberty, and we therefore modify the order accordingly. We further conclude, however, that the court properly granted that part of defendant's motion with respect to damages for lost wages, in view of plaintiff's receipt of disability payments while incarcerated.

"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). It is well settled that nonpecuniary damages are not recoverable in a legal malpractice action involving the negligence of an attorney in a civil matter (see e.g. *Wolkstein v Morgenstern*, 275 AD2d 635, 637; *Dirito v Stanley*, 203 AD2d 903). Here, however, the issue before us is whether that rule should also apply to legal malpractice actions where the underlying matter is criminal rather than civil in nature. The only New York appellate court decision on point is that of the First Department in *Wilson v City of New York* (294 AD2d 290), which held that recovery of nonpecuniary damages is not permitted. In our view, the reasoning of the First Department in *Wilson* is not persuasive, and we therefore decline to follow the holding in *Wilson*.

"It is fundamental to our common-law system that one may seek redress for every substantial wrong. 'The best statement of the rule is that a wrong-doer is responsible for the natural and proximate consequences of his [or her] misconduct' " (*Battalla v State of New York*, 10 NY2d 237, 240; see *Derby v Prewitt*, 12 NY2d 100, 105-106). Where emotional or other nonpecuniary loss is a direct result of a defendant's breach of duty, a plaintiff may recover damages for such loss (see generally *Martinez v Long Is. Jewish Hillside Med. Ctr.*, 70 NY2d 697, 699; *Kennedy v McKesson Co.*, 58 NY2d 500, 504-506). The risk of imprisonment is a direct result of attorney malpractice in a criminal case and, indeed, it is the primary risk involved in most criminal cases. In our view, a cause of action for criminal legal malpractice is analogous to causes of action for false arrest and malicious prosecution, both of which allow recovery for the plaintiff's loss of liberty resulting from the plaintiff's wrongful

incarceration (see *Strader v Ashley*, 61 AD3d 1244, lv dismissed 13 NY3d 756; *Lynch v County of Nassau*, 278 AD2d 205; see generally *Britt v Legal Aid Socy.*, 95 NY2d 443, 448). We thus conclude that a plaintiff who establishes that he or she was wrongfully convicted due to the malpractice of his or her attorney in a criminal case may recover compensatory damages for the actual injury sustained, i.e., loss of liberty, and any consequent emotional injuries or other losses directly attributable to his or her imprisonment.

We note in addition that the recent trend in other states with respect to this issue is in favor of allowing recovery for loss of liberty in criminal legal malpractice cases, even in those states that, in conformity with the general rule, do not otherwise allow recovery of nonpecuniary damages in malpractice actions (see e.g. *Wagenmann v Adams*, 829 F2d 196, 221-222 [1st Cir 1987]; *Snyder v Baumecker*, 708 F Supp 1451, 1464 [US Dist Ct, NJ, 1989]; *Rowell v Holt*, 850 So 2d 474 [Fla 2003]; *Holliday v Jones*, 215 Cal App 3d 102, 118-119 [1989]). As has been noted, "[w]hen an attorney's negligence causes a client's loss of liberty, courts have been willing to step away from the general rule barring damages for emotional distress. Generally, these cases hold that when an attorney represents a criminal defendant, incarceration is the foreseeable result of negligence. Accordingly, damages for the mental anguish arising from that foreseeable result, a nonpecuniary damage, should not be barred" (*Rhoades and Morgan, Recovery for Emotional Distress Damages in Attorney Malpractice Actions*, 45 SC L Rev 837, 845 [1994]; see also *Barry, Legal Malpractice in Massachusetts: Recent Developments*, 78 Mass L Rev 74, 82 [1993] ["Courts in other jurisdictions have frequently held that emotional distress damages are recoverable where the attorney's malpractice results in the client's wrongful deprivation of liberty," noting cases in Massachusetts, New Jersey and California]).

Finally, with respect to plaintiff's remaining contentions, we conclude that the mere fact that the Federal Magistrate in granting his petition for a writ of habeas corpus determined that he was denied effective assistance of counsel does not establish plaintiff's innocence as a matter of law, nor does it have collateral estoppel effect on the issue of causation.

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

1158

CA 10-01201

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

JAMES V. AQUAVELLA, M.D., P.C., AND JAMES V.
AQUAVELLA, M.D., PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

RALPH S. VIOLA, M.D., DEFENDANT-RESPONDENT.

CALIHAN LAW PLLC, ROCHESTER (ROBERT B. CALIHAN OF COUNSEL), AND NIXON
PEABODY LLP, FOR PLAINTIFFS-APPELLANTS.

CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD LLP, ROCHESTER (MICHAEL
T. HARREN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered August 24, 2009 in a breach of contract action. The order granted the motion of defendant to set aside the jury verdict and dismissed the amended complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for defendant's breach of a 1998 oral employment agreement (1998 oral agreement) pursuant to which defendant was to be an employee of plaintiff James V. Aquavella, M.D., P.C. (Aquavella, P.C.). According to plaintiffs, the 1998 oral agreement incorporated all of the terms and conditions of a 1996 written employment agreement (1996 written agreement) between defendant and Urban Oncology Service, P.C., doing business as Eye Care of Genesee Valley (Urban Oncology). The 1996 written agreement contained, inter alia, a noncompete clause prohibiting defendant from competing with Urban Oncology's business for two years after the expiration of the 1996 written agreement or termination of defendant's employment, whichever occurred later.

In 1995, plaintiff James V. Aquavella, M.D. (Aquavella) sold the assets of his ophthalmology practice to EquiVision, Inc. (EquiVision), which then entered into a Services Agreement with Urban Oncology. Aquavella then became an employee of Urban Oncology. Pursuant to the Services Agreement, Urban Oncology would provide professional medical patient services, including hiring and contracting with physicians, and EquiVision would serve as business manager for the practice. Ultimately, EquiVision, then known as EquiMed, sold its interest in the assets of the practice to Physicians Resource Group, Inc. (PRG). In 1998, following a dispute with Aquavella, PRG terminated all non-

medical employees and Urban Oncology stopped paying the physicians. In 1998, Aquavella spoke with defendant, and the parties agreed that defendant would continue his employment at the practice with plaintiffs as his employers. However, the parties sharply dispute whether their 1998 oral agreement included all of the terms and conditions of the 1996 written agreement between defendant and Urban Oncology, inclusive of the two-year noncompete clause.

In 1999, plaintiffs executed an agreement with PRG that, *inter alia*, provided for plaintiffs' purchase of the assets of the practice. In August 1999, the parties undertook negotiations concerning defendant's proposed purchase of the practice. Those negotiations were not successful and, in 2002, defendant departed from plaintiffs' practice and opened a competing practice within 300 yards of his former employers.

Plaintiffs' amended complaint alleged that defendant breached the noncompete clause in the 1996 written agreement that, according to plaintiffs, had been incorporated in its entirety as a term and condition of the 1998 oral agreement. Following trial, the jury determined that Aquavella and defendant entered into an oral employment agreement that included all of the terms and conditions of defendant's 1996 written agreement with Urban Oncology. The jury further determined that defendant had breached the noncompete clause and awarded plaintiffs damages in the sum of \$248,798.76. Supreme Court granted defendant's motion pursuant to CPLR 4404 (a) for judgment notwithstanding the verdict and dismissed plaintiffs' amended complaint on the grounds that defendant had not made any admission that the terms and conditions of the 1996 written agreement were incorporated into the 1998 oral agreement and that the writings proffered by plaintiff, either alone or in combination, were insufficient to satisfy the statute of frauds (*see* General Obligations Law § 5-701 [a] [1]). We affirm.

Inasmuch as the noncompete clause plaintiffs seek to enforce spanned a period of two years, it cannot be performed within one year and thus is subject to the statute of frauds (*see id.*). The record belies plaintiffs' contention that defendant admitted through his pleadings and trial testimony that the terms and conditions of the 1996 written agreement were incorporated into the 1998 oral agreement and, indeed, the record establishes that defendant sharply disputed it throughout the litigation (*see Tallini v Business Air*, 148 AD2d 828, 829-830; *see also Williams v Lynch*, 245 AD2d 715, *appeal dismissed* 91 NY2d 957). We reject plaintiffs' further contention that various writings admitted in evidence, including some that were signed by defendant, satisfy the statute of frauds. "[T]he memorandum [necessary to satisfy the statute of frauds] . . . may be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject matter and occasion" (*Crabtree v Elizabeth Arden Sales Corp.*, 305 NY 48, 54, quoting *Marks v Cowdin*, 226 NY 138, 145) and, in the event "that . . . one of the writings is unsigned, [it] may be 'read together [with the signed writings], provided that they clearly refer to the same subject matter or transaction'" (*Scheck v Francis*, 26 NY2d 466, 471, quoting

Crabtree, 305 NY at 55). All of the terms of the contract, however, "must be set out in the various writings presented to the court, and at least one writing, the one establishing a contractual relationship between the parties, must bear the signature of the party to be charged, while the unsigned document[s] must . . . refer to the same transaction as that set forth in the one that was signed" (*Crabtree*, 305 NY at 55-56).

Here, plaintiffs contend that the parties' 1998 oral agreement incorporated all of the terms and conditions of defendant's 1996 written agreement with his former employer, Urban Oncology. That essential term does not appear in any of the writings, leaving a fatal void in plaintiffs' attempt to piece together a sufficient memorandum through the presentation of various signed and unsigned documents (see *id.* at 55). Plaintiffs further contend that the Letters of Intent signed by defendant in 1999 with respect to his proposed purchase of the practice constitute evidence of defendant's agreement to incorporate all of the terms and conditions of the 1996 written agreement into the 1998 oral agreement. We reject that contention. Pursuant to paragraph 4 (e) of the Letters of Intent, one of the conditions to closing the transaction was "(e) a written termination of the employment contract between [defendant] and Aquavella[, P.C.], together with a release of all covenants contained therein, and . . . proof satisfactory to [defendant] that Aquavella[, P.C.] is the sole unencumbered assignee of said contract (named party is Urban Oncology Services, P.C. [doing business as] 'Eye Care of the Genesee Valley')." The 1996 written agreement required that any mutual termination thereof be in writing. We conclude that paragraph 4 (e) is an unequivocal attempt by defendant, as part of the due diligence process in the practice purchase transaction, to extinguish any lingering obligations or covenants arising from the "said contract," i.e., the 1996 written agreement. A fair reading of defendant's trial testimony compels the same conclusion. The request for "proof satisfactory" to defendant that Aquavella, P.C. was the sole "assignee" of that contract demonstrates that defendant was requiring Aquavella, P.C. to establish that it was the successor by assignment to defendant's 1996 written agreement with Urban Oncology and therefore had the right to terminate the noncompete clause contained in that agreement. It is noteworthy that, when plaintiffs commenced this action in 2002, the complaint did not contain any claim that the parties had adopted or incorporated the 1996 written agreement into the 1998 oral agreement. Instead, plaintiffs' complaint was based entirely upon the claim that Aquavella, P.C. was the sole assignee of the 1996 written agreement. In 2007, this Court modified a prior order in this case, affirming that part of the order that, inter alia, denied that part of plaintiffs' motion for partial summary judgment on the claims arising from the 1996 written agreement on the ground that "plaintiffs failed to establish as a matter of law that the [1996] agreement was validly assigned and was in effect when defendant opened his own practice" (*James V. Aquavella, M.D., P.C. v Viola* [appeal No. 2], 39 AD3d 1191, 1192). In 2009, three days before trial, plaintiffs amended the complaint to advance the claim for the first time that the parties had incorporated the 1996 written agreement into the 1998 oral agreement. On the second day of trial, plaintiffs abandoned their original claim

when Aquavella acknowledged that no such assignment had occurred.

Further, paragraph 4 (e) in each Letter of Intent makes no reference, express or implied, to the 1998 oral agreement. Plaintiffs' contention to the contrary is belied by the separate language contained in paragraph 4 (f) of each Letter of Intent, which requires "(f) written releases executed by [defendant] and Aquavella each releasing the other from any claims relating to the *current employment* of [defendant]" (emphasis added). Paragraph 4 (f) thereby separately addresses the 1998 oral agreement under which the parties were operating in 1999 and, when read together, paragraphs 4 (e) and (f) demonstrate that defendant did not agree to incorporate all of the terms and conditions of the 1996 written agreement into the 1998 oral agreement. The draft Asset Purchase Agreement, upon which plaintiffs also rely, contains identical language and is likewise insufficient.

We note that our dissenting colleagues have failed to explain the specific use in paragraph 4 (f) of the term "*current employment*" (emphasis added), as distinguished from past employment, i.e., the employment set forth in the 1996 written agreement with Urban Oncology specifically described in paragraph 4 (e). If, as the dissent suggests, paragraph 4 (e) referred to the 1998 oral agreement inclusive of the 1996 written agreement, there would be no need to use the distinguishing term "current employment" in paragraph 4 (f). Further, if paragraph 4 (e) was, as the dissent suggests, referring to the 1998 oral agreement, any reference to the alleged assignment of the 1996 written agreement to Aquavella, P.C. would be irrelevant and superfluous. Under plaintiffs' incorporation theory, the 1998 oral agreement simply incorporated the terms and conditions of the 1996 written agreement into a new agreement. That theory does not depend in any manner upon assignment of the 1996 written agreement to Aquavella, P.C. Thus, the reference to Aquavella, P.C. as the "sole unencumbered assignee of said contract" in paragraph 4 (e) is inconsistent with the interpretation of that clause advanced by plaintiffs and the dissent. The dissent offers no explanation—and, in particular, no explanation consistent with plaintiffs' theory—why proof relating to the assignment to Aquavella, P.C. of "said contract" was specifically included in the language used in paragraph 4 (e). That approach disregards the well-settled rule that a contract must be "read as a whole to determine its purpose and intent" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162), and it "should be interpreted in a way [that] reconciles all its provisions, if possible" (*Green Harbour Homeowners' Assn., Inc. v G.H. Dev. & Constr., Inc.*, 14 AD3d 963, 965; see *Beal Sav. Bank v Sommer*, 8 NY3d 318, 324). "Effect and meaning must be given to every term of the contract . . . , and reasonable effort must be made to harmonize all of its terms" (*Village of Hamburg v American Ref-Fuel Co. of Niagara*, 284 AD2d 85, 89, lv denied 97 NY2d 603; see *Matter of El-Roh Realty Corp.*, 74 AD3d 1796, 1799; see generally *Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 171-172). When all of the provisions of the Letters of Intent are read as a whole, it is clear that paragraph 4 (e) addresses defendant's desire to terminate any remaining rights and obligations under the 1996 written agreement with Urban Oncology and paragraph 4

(f) separately addresses the extinguishment of any rights and obligations arising from the 1998 oral agreement. As the litigation has progressed, it has become clear that defendant's concern—clearly expressed in paragraph 4 (e)—about the possibility of lingering claims arising out of the 1996 written agreement with Urban Oncology was well founded. Plaintiffs commenced this action on the sole theory that Aquavella, P.C. was the assignee of the 1996 written agreement. The record demonstrates that, when it became clear that Aquavella, P.C. was not an assignee of that agreement and that plaintiffs therefore had no standing to assert any rights thereunder, the complaint was amended three days before trial to add the theory that the 1996 written agreement was incorporated into the 1998 oral agreement.

The dissent concludes that "the parties orally adopted the 1996 written agreement as the memorandum of the terms of their 1998 oral agreement, and we may therefore look to the 1996 written agreement to supply all of the essential terms of the 1998 oral agreement." While the 1996 written agreement contains many terms and conditions that were no doubt essential to the parties at the time that agreement was made, there is one term that is essential to plaintiffs' version of the 1998 oral agreement that is not and could not be contained in the 1996 written agreement—the oral incorporation of the 1996 written agreement that allegedly took place in 1998. The dissent's analysis fails to recognize that the only evidence of the alleged 1998 oral adoption of the 1996 written agreement—clearly an essential term of the 1998 oral agreement under plaintiffs' theory—is Aquavella's testimony at trial. The dissent's reliance upon parol evidence to fill that gap in the writings is misplaced (*see Henry L. Fox Co. v Kaufman Org.*, 74 NY2d 136, 143). "Parol evidence is admissible only to connect the papers, not to establish missing terms of the agreement" (*id.* at 142-143).

We cannot accept the dissent's conclusion that the written agreement executed in 1996 could include an essential term of the oral agreement that was not made until 1998. There simply is no writing, signed or unsigned by defendant, that contains any language reflecting any incorporation of the 1996 written agreement into the parties' 1998 oral agreement. "It is not sufficient that the note or memorandum may express the terms of a contract. It is essential that it shall completely evidence the contract [that] the parties made" (*Poel v Brunswick-Balke-Collender Co. of N.Y.*, 216 NY 310, 314, *rearg denied* 216 NY 771). The writings are insufficient because, in order to satisfy the statute of frauds, " 'the memorandum must state the essential terms of the oral contract' " (*Nathan v Spector*, 281 App Div 451, 455 [emphasis added]). While defendant has never disputed that he had an oral employment agreement with plaintiffs, he has steadfastly denied that the 1996 written agreement was adopted by the parties in the 1998 oral agreement. Thus, the dissent's reliance upon the recovery of compensation by defendant under the 1998 oral agreement provides no basis to conclude that he agreed to the adoption of the 1996 written agreement into the 1998 oral agreement (*see Williams*, 245 AD2d 715; *Tallini*, 148 AD2d at 829-830).

Inasmuch as the only evidence supporting plaintiffs' contention

that all of the terms and conditions of the 1996 written agreement were incorporated into the 1998 oral agreement is Aquavella's testimony at trial, we conclude that plaintiffs' version of the 1998 oral agreement is unenforceable and void under the statute of frauds (see generally *Shirley Polykoff Adv. v Houbigant, Inc.*, 43 NY2d 921, 922).

All concur except SCUDDER, P.J., and PERADOTTO, J., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent because we agree with plaintiffs that the signed and unsigned writings admitted in evidence at trial are sufficient to satisfy the statute of frauds (see General Obligations Law § 5-701 [a] [1]).

Plaintiff James V. Aquavella, M.D. is an ophthalmologist who established a medical practice (practice) in Rochester in the 1980s. He is also the sole shareholder and director of plaintiff James V. Aquavella, M.D., P.C. (Aquavella, P.C.). In the mid-1990s, Aquavella sold the assets of the practice to EquiMed, formerly known as EquiVision, a practice management company, although he continued to manage the practice. EquiMed thereafter established Urban Oncology Services, P.C., doing business as Eye Care of Genesee Valley (Urban Oncology), to pay the practice's physicians and maintain their employment contracts.

Defendant began working at the practice as a fellow under Aquavella's supervision in July 1995. In July 1996 defendant was hired by the practice as a staff ophthalmologist and executed an "M.D. Employment Agreement" with Urban Oncology (1996 written agreement). The 1996 written agreement contained a restrictive covenant prohibiting defendant from competing with the practice within a 50-mile radius for a period of two years following his termination of employment or the expiration of the agreement, whichever occurred later, as well as a liquidated damages provision in the event of defendant's breach of the agreement.

Shortly after defendant entered into the 1996 written agreement, EquiMed sold the assets of the practice to Physicians Resource Group, Inc. (PRG). In October 1998, following a dispute with Aquavella, PRG terminated the practice's nonmedical staff, and Urban Oncology ceased paying its physicians. Soon thereafter, Aquavella and defendant agreed that defendant would continue working at the practice as an employee of Aquavella, P.C., although the parties dispute the terms of that oral agreement (1998 oral agreement). According to Aquavella, the parties "reaffirmed" or "adopted" all of the terms and conditions of the 1996 written agreement, including the restrictive covenant and the liquidated damages provision. Defendant acknowledged that he orally agreed to continue working for the practice in exchange for certain compensation and benefits, but he denied that the parties discussed the 1996 written agreement or reaffirmed the terms thereof. The parties subsequently entered into formal negotiations for the possible sale of the practice to defendant. After those negotiations were unsuccessful, defendant left the practice and opened a competing practice across the street from the office of Aquavella, P.C.

Plaintiffs commenced this action seeking damages for defendant's alleged breach of the restrictive covenant contained in the 1996 written agreement. Plaintiffs alleged that, pursuant to their 1998 oral agreement, the parties adopted the terms and conditions set forth in the 1996 written agreement, including the restrictive covenant. Defendant asserted, inter alia, a counterclaim seeking \$20,000 in compensation for medical services allegedly provided to plaintiffs pursuant to the 1998 oral agreement.

At trial, Aquavella testified that, within 24 hours of PRG's termination of all nonmedical employees, he "reaffirmed" the terms of the 1996 written agreement with defendant. Aquavella stated that the parties "adopted the exist[ing] contract and . . . continued to function under it." From that point forward, Aquavella, P.C. paid the salaries of defendant and the other physicians in accordance with their agreements with Urban Oncology. Aquavella further testified that, during the parties' negotiations concerning the possible sale of the practice, he and defendant discussed the fact that "the existing agreement [i.e., the 1996 written agreement], would have to be terminated" According to Aquavella, he and defendant "both recognized that the [1996 written agreement] was in effect. In order for [Aquavella] to sell [defendant] the practice, that had to be terminated."

By contrast, defendant testified at trial that, following what he believed was PRG's termination of his employment, he and Aquavella "struck up an oral agreement for [defendant] to continue working [at the practice]." Defendant agreed to continue working at the productivity compensation rate of 30% of his gross patient cash revenues, as set forth in the 1996 written agreement. Defendant testified, however, that Aquavella did not mention the 1996 written agreement, which defendant thought was "dead," and the parties did not discuss any postemployment restrictions. Defendant specifically denied having a conversation with Aquavella wherein they "reaffirmed" the 1996 written agreement or agreed that the terms thereof would apply to his employment with Aquavella, P.C. Nevertheless, defendant acknowledged that he continued performing the same duties in the course of his employment with Aquavella, P.C. as he performed under his employment with Urban Oncology and, indeed, his retirement funds, health and malpractice insurance and other benefits were transferred to Aquavella, P.C. when he entered into the 1998 oral agreement with plaintiffs.

By its verdict, the jury determined that the parties entered into an oral employment agreement that contained all of the terms and conditions of the 1996 written agreement, including the restrictive covenant and liquidated damages provision. The jury further determined that defendant violated the restrictive covenant by opening an office across the street from the practice and awarded damages to Aquavella, P.C. in the amount of \$248,798.76 in accordance with the parties' stipulation. Defendant thereafter moved for judgment notwithstanding the verdict or a new trial pursuant to CPLR 4404 (a), contending, inter alia, that the 1998 oral agreement was void pursuant to the statute of frauds. Supreme Court granted that part of

defendant's motion for judgment notwithstanding the verdict and dismissed the amended complaint on the grounds that defendant did not admit that the parties orally adopted the terms of the 1996 written agreement and that none of the writings presented by plaintiffs satisfied the statute of frauds. We disagree.

At the outset, we agree with the majority and defendant that the 1998 oral agreement is subject to the statute of frauds inasmuch as the restrictive covenant contained in the 1996 written agreement and orally adopted in 1998 cannot be performed within one year (see General Obligations Law § 5-701 [a] [1]). Pursuant to the statute of frauds, "[e]very agreement, promise or undertaking . . . [that, b]y its terms is not to be performed within one year from the making thereof" is "void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his [or her] lawful agent" (*id.* [emphasis added]).

It is well established that "[t]he statute of frauds does not require the 'memorandum . . . to be in one document. It may be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject matter and occasion' " (*Crabtree v Elizabeth Arden Sales Corp.*, 305 NY 48, 54). "All of [the terms of the contract] must be set out in the various writings presented to the court, and at least one writing, the one establishing a contractual relationship between the parties, must bear the signature of the party to be charged" (*id.* at 55-56). Thus, "[s]igned and unsigned writings relating to the same transaction and containing all the essential terms of a contract may be read together to evidence a binding contract" (*Weiner & Co. v Teitelbaum*, 107 AD2d 583, 583; see *Western N.Y. Land Conservancy v Town of Amherst*, 4 AD3d 889, 890). Moreover, "parol evidence is admissible to show the connection between the writings and the defendant's agreement to them" (*Western N.Y. Land Conservancy*, 4 AD3d at 890; see *Crabtree*, 305 NY at 55-56).

The sufficiency of the proffered writings should be considered in light of the purpose of the statute of frauds, i.e., "the prevention of successful fraud by inducing the enforcement of contracts that were never in fact made" (4 Corbin on Contracts § 22.1, at 703 [rev ed 1997]; see *Morris Cohon & Co. v Russell*, 23 NY2d 569, 574). Thus, "we should always be satisfied with 'some note or memorandum' that is adequate, when considered with the admitted facts, the surrounding circumstances, and all explanatory and corroborative and rebutting evidence, to convince the court that there is no serious possibility of consummating a fraud by enforcement. When the mind of the court has reached such a conviction as that, it neither promotes justice nor lends respect to the statute to refuse enforcement because of informality in the memorandum or its incompleteness in detail" (4 Corbin on Contracts § 22.1, at 704).

In our view, the signed and unsigned writings proffered by plaintiffs, when read together and in light of defendant's admissions at trial (see *Crabtree*, 305 NY at 55; 4 Corbin on Contracts § 22.1, at

704), sufficiently satisfy the "memorandum" requirement of the statute of frauds. Here, plaintiffs presented two Letters of Intent from August 1999 and October 1999 that were prepared by defendant's attorney and signed by defendant as the "party to be charged" (*Crabtree*, 305 NY at 55). Those letters, prepared in the context of defendant's negotiations to purchase the assets of Aquavella, P.C., required, as a condition of closing the transaction, "a written termination of *the employment contract between [defendant] and Aquavella[, P.C.], together with a release of all covenants contained therein[]* and . . . proof satisfactory to [defendant] that Aquavella[, P.C.] is the sole unencumbered assignee of said contract (named party is Urban Oncology Services, P.C.[, doing business as] 'Eye Care of the Genesee Valley')" (emphasis added). Plaintiffs also presented an unsigned draft Asset Purchase Agreement (APA) from February 2000, which was prepared by defendant's attorney. The APA similarly provided that one of the conditions of the proposed purchase of the practice by defendant was "[a] written termination of *the employment contract between [defendant] and [Aquavella, P.C.]*, as assignee, *together with a release of all covenants contained therein*" (emphasis added).

Although the majority concludes that the aforementioned language in the Letters of Intent constitutes "an unequivocal attempt by defendant, as part of the due diligence process in the practice purchase transaction, to extinguish any lingering obligations or covenants arising from . . . the 1996 written agreement," defendant repeatedly testified at trial that "*the employment agreement*" referenced in the Letters of Intent and the APA is the 1998 oral agreement (emphasis added). Indeed, it is undisputed that the *only* employment agreement between plaintiffs and defendant is the 1998 oral agreement. Thus, our conclusion that paragraph 4 (e) refers to the 1998 oral agreement is supported by defendant's own testimony at trial. We therefore conclude that the reference in the Letters of Intent and the APA to "all covenants contained therein" sufficiently establishes that the oral agreement defendant admittedly made with Aquavella in 1998 incorporated the terms of the 1996 written agreement with Urban Oncology, including the restrictive covenant.

The majority heavily relies upon paragraph 4 (f) of each Letter of Intent, which requires "written releases executed by [defendant] and . . . Aquavella each releasing the other from any claims relating to the current employment of [defendant]." The majority concludes that "[p]aragraph 4 (f) thereby separately addresses the 1998 oral agreement under which the parties were operating in 1999" It is worth noting that defendant made no reference to paragraph 4 (f) at trial or in his post-trial motion and, indeed, defendant did not make that argument in his brief on appeal. In any event, paragraph 4 (f) relates to a mutual release of "claims" arising from defendant's employment, while paragraph 4 (e) specifically refers to "termination of *the employment contract between [defendant] and Aquavella[, P.C.]*" (emphasis added), as well as "a release of all covenants contained therein." Thus, the plain language of the Letters of Intent does not support the majority's conclusion that "paragraphs 4 (e) and (f) demonstrate that defendant did not agree to incorporate all of the

terms and conditions of the 1996 written agreement into the 1998 oral agreement." To the contrary, paragraph 4 (e) provides a clear acknowledgment by defendant that the covenant not to compete set forth in the 1996 written agreement survived the purported termination of his employment by PRG and/or Urban Oncology and that such covenant was incorporated into the 1998 oral agreement with plaintiffs.

In opposition to defendant's post-trial motion, plaintiffs submitted further evidence of the incorporation of the terms of the 1996 written agreement into the 1998 oral agreement by submitting a memorandum that defendant drafted in May 2000, during the course of the parties' negotiations concerning his proposed purchase of the practice. Specifically, defendant wrote that "[c]redited towards the purchase price are moneys owed me under my contract. *My contract stated that I was to be paid 30% of my collections*" (emphasis added). Defendant alleged at trial that he was referring to his 1998 oral agreement with plaintiffs therein. However, the only place where such a provision is "stated" is the 1996 written agreement with Urban Oncology, which provides that defendant's productivity compensation "shall equal 30% of [his] gross patient cash revenue less . . . [his] draw paid[] and . . . individual overhead."

Inasmuch as the Letters of Intent and the APA, together with defendant's testimony at trial, establish the existence of an oral agreement incorporating the terms of the 1996 written agreement, we must determine whether any document or memorandum "contains all of the essential terms of the contract" (*Crabtree*, 305 NY at 57). Here, the 1996 written agreement contains all of the essential terms of the 1998 oral agreement. We note that "[a] written memorandum of one contract ordinarily does not satisfy the statutory requirements with respect to a renewal or other contract made subsequently, although there seems to be nothing to prevent the parties from expressly adopting the old document as the memorandum and authentication of their renewal" (4 Corbin on Contracts § 22.11, at 753). In our view and as the jury determined, the parties orally adopted the 1996 written agreement as the memorandum of the terms of their 1998 oral agreement, and we may therefore look to the 1996 written agreement to supply all of the essential terms of the 1998 oral agreement (*cf. Steinberg v Universal Maschinenfabrik GMBH*, 24 AD2d 886, 887, *affd* 18 NY2d 943; *Kastner v Gover*, 19 AD2d 480, 483-484, *affd* 14 NY2d 821).

In sum, we note that " '[t]he [s]tatute of [f]rauds was not enacted to afford persons a means of evading just obligations; nor was it intended to supply a cloak of immunity to hedging litigants lacking integrity; nor was it adopted to enable [a] defendant[] to interpose the [s]tatute as a bar to a contract fairly, and admittedly, made" (*Morris, Cohon & Co.*, 23 NY2d at 574). Here, defendant admitted the existence of the 1998 oral agreement and, indeed, recovered \$20,000 in unpaid compensation from plaintiffs pursuant to that oral agreement when the court granted that part of its motion for summary judgment on the first counterclaim. Moreover, the parties' adoption of the terms of the 1996 written agreement, including the restrictive covenant, is evidenced in two Letters of Intent signed by defendant and a draft APA prepared by defendant's attorney. We thus cannot agree with the

majority that the statute of fraud bars enforcement of the 1998 oral agreement, which was fairly and admittedly made.

We therefore would reverse the order, deny defendant's post-trial motion and reinstate the jury verdict.

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

1159

CA 10-00565

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

TRUDI L. BRONSON, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ALLEN J. HANSEL, DEFENDANT-RESPONDENT.

CELLINO & BARNES, P.C., ROCHESTER (BRETT L. MANSKE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BROWN & KELLY, LLP, BUFFALO (PATRICIA S. CICCARELLI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered September 30, 2009 in a personal injury action. The order granted defendant's motion for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained in a motor vehicle accident. Prior to that time, however, plaintiff signed a "Release of All Claims" (release) in consideration of \$1,039.82, releasing all claims "growing out of any and all known and unknown, foreseen and unforeseen[,] bodily and personal injuries and property damage and the consequences thereof resulting from the accident" The release further provided that plaintiff "declare(s) and represent(s) that there may be unknown or unanticipated injuries resulting from the . . . accident . . . and[,] in making [the r]elease[,] it is understood and agreed that [it] is intended to include such injuries." Plaintiff thereafter had an MRI that revealed a herniated disc in her cervical spine.

Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint based on plaintiff's release. The record establishes that, prior to signing the release, plaintiff had complained of neck pain during an emergency room visit and to her primary care physician at a subsequent office visit. Plaintiff was thereafter referred to physical therapy for treatment of a "cervical strain." During another visit to her primary care physician five days prior to signing the release, plaintiff was scheduled to have an MRI of her cervical spine. Thus, it is undisputed that plaintiff knew of her neck injury before signing the release. It is well settled that "[t]he discovery of [a] herniated disc is 'a consequence, or sequela, of [that] known injury' " (*Finklea v Heim*, 262 AD2d 1056, 1057; see

generally *Mangini v McClurg*, 24 NY2d 556, 564). Here, it cannot be said that "the nature of the subsequently discovered [herniated disc in the cervical spine was], as a practical or medical matter, . . . distinguishable from unanticipated consequences of [the] known injury," i.e., the cervical strain (*Mangini*, 24 NY2d at 567). The injury site was the same, and "ordinary medical caution . . . suggested the possibility of the associated injury[, i.e., the herniated disc], at the site" (*id.*).

Further, plaintiff cannot avoid the release, the language of which was unambiguous, by now claiming that she did not understand its terms (see *Finklea*, 262 AD2d 1056; *DeQuatro v Zhen Yu Li*, 211 AD2d 609). Although plaintiff admitted that she did not read the release " 'word for word,' " it is well settled that "[a] party is under an obligation to read a document before executing it and cannot avoid its effect by asserting that he or she did not read it or know its contents" (*Pressley v Rochester City School Dist.*, 234 AD2d 998, 999).

All concur except GREEN and GORSKI, JJ., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent inasmuch as we conclude that Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint. Plaintiff raised a triable issue of fact whether the "Release of All Claims" (release) was unenforceable because she signed it under the mistaken belief that it was intended to settle only her claim for property damage (see *Haynes v Garez*, 304 AD2d 714, 716; see generally *Mangini v McClurg*, 24 NY2d 556, 562). "[A] release may not be read to cover matters [that] the parties did not desire or intend to dispose of" (*Cahill v Regan*, 5 NY2d 292, 299).

In opposition to the motion, plaintiff submitted a transcript of her telephone conversation with a claims representative for defendant's insurance company, wherein plaintiff informed the claims representative that, although she had visited the emergency room once as a result of the accident, she could not afford to seek further medical treatment. No further detailed discussion of plaintiff's injuries occurred. That transcript belies the assertion of the claims representative in his affidavit in support of the motion that plaintiff "spoke to [him] at length regarding . . . her alleged injuries" during that telephone conversation. Thus, plaintiff submitted evidence establishing that defendant knew that she was unaware of the extent of her injuries at the time she signed the release. Further, in her affidavit in opposition to the motion, plaintiff stated that, during two subsequent telephone calls with claims representatives for defendant's insurance company, she expressed dissatisfaction with the offer of approximately \$960 for the damage to her vehicle, inasmuch as the estimated value of the vehicle was approximately \$2,000. According to her affidavit, plaintiff was thereafter offered an additional \$1,039.82, at which time she was assured that the increased amount was unrelated to her bodily injury claim. Plaintiff also stated that she executed the release in exchange for two checks from defendant's insurance company totaling \$2,000, which is the same amount as the estimated value of plaintiff's

vehicle. Neither check contained any notation with respect to the claim for which it was issued, i.e., plaintiff's property damage claim or bodily injury claim. Thus, we conclude that plaintiff raised a triable issue of fact whether the parties intended to settle only the property damage claim (see *Cahill*, 5 NY2d at 299-300; *Haynes*, 304 AD2d at 715; see generally *Mangini*, 24 NY2d at 562).

We therefore would reverse the order, deny the motion and reinstate the complaint.

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

1164

CA 10-00777

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

ISKALO ELECTRIC TOWER LLC AND DOWNTOWN CBD
INVESTORS LLC, PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

STANTEC CONSULTING SERVICES, INC.,
DEFENDANT-RESPONDENT.

HOPKINS & SORGI, PLLC, WILLIAMSVILLE (SEAN W. HOPKINS OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

HARTER SECREST & EMERY LLP, ROCHESTER (F. PAUL GREENE OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered December 10, 2009. The order, insofar as appealed from, denied the motion of plaintiffs for partial summary judgment on their second cause of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion for partial summary judgment on the second cause of action to the extent that plaintiffs' compliance with the notice requirement of article 3.1 (f) of the East Huron Street lease is deemed a fact established for all purposes in the action pursuant to CPLR 3212 (g) and by granting those parts of the motion for summary judgment dismissing the first, fourth and seventh affirmative defenses, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs appeal from an order that, inter alia, denied those parts of their motion for partial summary judgment on the second cause of action and for summary judgment dismissing the 1st, 4th and 7th through 16th affirmative defenses.

In September 2005 plaintiff Iskalo Electric Tower LLC (Iskalo) and defendant entered into a commercial lease agreement whereby Iskalo would lease approximately 8,700 square feet of office space to defendant in plaintiffs' Electric Tower building in the City of Buffalo (hereafter, Electric Tower lease). Pursuant to a lease dated October 31, 2005, plaintiff Downtown CBD Investors LLC (CBD) purported to lease to defendant 2,300 square feet of warehouse and parking space at 5 East Huron Street in the City of Buffalo (hereafter, East Huron Street lease), which was to be managed by Iskalo, but CBD had not yet purchased the 5 East Huron Street premises at the time the lease was

executed. Article 3.1 (f) of the East Huron Street lease provided that, in the event that plaintiffs were not able to deliver possession of the 5 East Huron Street premises to defendant by December 1, 2005, plaintiffs would "provide notice to [defendant] on or before noon, October 31, 2005, so that [defendant] may extend the lease for its existing warehouse/parking facility to accommodate the delay in [d]elivery of [p]ossession." Defendant terminated both leases in March 2006 based on plaintiffs' failure to deliver possession of the 5 East Huron Street premises.

Plaintiffs commenced this action seeking damages for defendant's alleged breach of both leases. In its answer, defendant asserted 16 affirmative defenses, 6 of which were also labeled counterclaims, and defendant admitted the allegation in the complaint that, "[o]n or before October 31, 2005, CBD . . . gave notice to [defendant] that it would not be able to deliver possession of the 5 East Huron [Street premises] by December 1, 2005." Plaintiffs moved for partial summary judgment on the second cause of action, which alleged that defendant breached the Electric Tower lease by, inter alia, vacating the premises, failing to give notice of termination and failing to pay rent. Plaintiffs also sought summary judgment dismissing the affirmative defenses and counterclaims. In support of their motion, plaintiffs contended that defendant's answer contained a judicial admission that plaintiffs had provided notice of their inability to deliver the premises by December 1, 2005, in accordance with the terms of the East Huron Street lease. In opposition to the motion, defendant contended that its admission of that allegation in the complaint could not be deemed a judicial admission. In addition, defendant submitted the affirmation of its corporate counsel and several exhibits attached thereto, including a copy of the October 31, 2005 facsimile transmission from plaintiffs' counsel providing notice of plaintiffs' inability to deliver possession of the 5 East Huron Street premises by December 1, 2005. Defendant's corporate counsel affirmed that the document was a true and accurate copy of the October 31, 2005 correspondence received by him.

We agree with plaintiffs that Supreme Court erred in denying that part of their motion with respect to the second cause of action on the sole ground that they failed to meet their burden of establishing that defendant's answer contained a judicial admission of notice pursuant to the terms of the East Huron Street lease. Indeed, based on our examination of the answer and the affirmation of defendant's corporate counsel submitted in opposition to the motion, we conclude that plaintiffs delivered the requisite written notice to defendant of their inability to deliver possession of the 5 East Huron Street premises, and thus we deem such notice established for all purposes in the action (see CPLR 3212 [g]). We therefore modify the order accordingly. Although we note that plaintiffs provided such notice by facsimile transmission to defendant's corporate counsel and did not provide such notice to defendant's chief executive officer, we nevertheless conclude that strict compliance with the notice provision of the lease was not required inasmuch as defendant does not contend that it did not receive actual notice, nor does it contend that it was prejudiced by the deviation (see *Fortune Limousine Serv., Inc. v*

Nextel Communications, 35 AD3d 350, 353, *lv denied* 8 NY3d 816; *Suarez v Ingalls*, 282 AD2d 599; *Dellicarri v Hirschfeld*, 210 AD2d 584, 585).

We further agree with plaintiffs that the court erred in denying those parts of their motion seeking summary judgment dismissing the first, fourth and seventh affirmative defenses, and we therefore further modify the order accordingly. With respect to the first affirmative defense, alleging that the complaint fails to state a cause of action, we conclude that the complaint adequately states a cause of action for breach of contract (see *Furia v Furia*, 116 AD2d 694, 695). With respect to the fourth affirmative defense, alleging that defendant was excused from performance under both leases based on plaintiffs' breach of the leases, we conclude that the affirmative defense set forth only conclusions of law without the necessary supporting facts (see *170 W. Vil. Assoc. v G & E Realty, Inc.*, 56 AD3d 372; see generally *Morgenstern v Cohon*, 2 NY2d 302, 308). Finally, with respect to the seventh affirmative defense, based on promissory estoppel, we conclude that defendant does not allege that plaintiffs breached any duty independent of the leases and thus that promissory estoppel does not apply herein (see generally *Celle v Barclays Bank P.L.C.*, 48 AD3d 301, 303; *Brown v Brown*, 12 AD3d 176).

We decline the requests of plaintiffs and defendant, respectively, to search the record and grant summary judgment on the issues of the alleged scrivener's error or ambiguity in the East Huron Street lease, as well as with respect to defendant's right to terminate both leases pursuant to article 3.1 (f) of the East Huron Street lease. We have considered plaintiffs' remaining contentions and conclude that they are without merit.

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

1182

CA 09-02201

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

PAULA J. CURTIN, INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF THOMAS A.
CURTIN, DECEASED, PLAINTIFF-RESPONDENT,

V

ORDER

J.B. HUNT TRANSPORT, INC. AND JOHN R. MACGREGOR,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

RAWLE & HENDERSON, LLP, NEW YORK CITY (ROBERT A. FITCH OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

BAUM, HEDLUND, ARISTEI & GOLDMAN, P.C., LOS ANGELES, CALIFORNIA
(RONALD L. GOLDMAN, OF THE CALIFORNIA, ILLINOIS AND DISTRICT OF
COLUMBIA BARS, ADMITTED PRO HAC VICE, OF COUNSEL), AND RIVETTE &
RIVETTE, P.C., SYRACUSE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered August 5, 2009 in a wrongful death action. The order, among other things, denied defendants' cross motion to exclude from evidence the report and testimony of plaintiff's economic expert.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1183

CA 10-00540

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

PAULA J. CURTIN, INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF THOMAS A.
CURTIN, DECEASED, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

J.B. HUNT TRANSPORT, INC. AND JOHN R. MACGREGOR,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

RAWLE & HENDERSON, LLP, NEW YORK CITY (ROBERT A. FITCH OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

BAUM, HEDLUND, ARISTEI & GOLDMAN, P.C., LOS ANGELES, CALIFORNIA
(RONALD L. GOLDMAN, OF THE CALIFORNIA, ILLINOIS AND DISTRICT OF
COLUMBIA BARS, ADMITTED PRO HAC VICE, OF COUNSEL), AND RIVETTE &
RIVETTE, P.C., SYRACUSE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered November 19, 2009 in a wrongful death action. The order, upon consideration of the merits of defendants' motion for leave to renew and reargue their cross motion to exclude from evidence the report and testimony of plaintiff's economic expert, adhered to the court's prior decision.

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

Memorandum: Plaintiff commenced this action, individually and as personal representative of her husband's estate, alleging that decedent was killed when the pick-up truck that he was operating collided with a truck owned by defendant J.B. Hunt Transport, Inc. and negligently operated by defendant John R. MacGregor. Plaintiff is seeking, inter alia, damages for loss of inheritance with respect to the future value of decedent's interest in the family dairy business. We agree with defendants that Supreme Court erred in granting plaintiff's motion seeking to preclude the Cross-Purchase Redemption and Restrictive Sale Agreement (agreement) from being admitted in evidence at trial, and we therefore modify the order accordingly. The agreement addresses, inter alia, the monetary distribution that would be made to the heirs of one of the owners of the family-owned business in the event of his death. In granting plaintiff's motion, the court determined that the agreement was not relevant to plaintiff's loss of

inheritance claim and that the prejudicial effect of the agreement would outweigh any probative value. Although the agreement is not dispositive of the issue of plaintiff's loss of inheritance claim, we nevertheless conclude that it constitutes relevant and probative evidence of the value of that claim, given that the agreement expressly addresses the amount of money that the owner's heirs would receive in the event of the owner's death. " 'Evidence is relevant if it has any tendency in reason to prove the existence of any material fact [,] i.e., [if] it makes determination of the action more probable or less probable than it would be without the evidence' " (Prince, Richardson on Evidence § 4-101, at 136 [Farrell 11th ed]). The fact that the agreement contains references to life insurance does not, standing alone, constitute a basis for excluding the agreement. To the extent that references to life insurance in the agreement may be deemed prejudicial to plaintiff, such prejudice may be mitigated if not eliminated by limiting instructions to the jury or by redacting such references from the agreement.

With respect to defendants' remaining contention, however, we agree with plaintiff that the court properly denied defendants' cross motion seeking to preclude plaintiff's economic expert from testifying at trial. "The determination whether to permit expert testimony 'is a mixed question of law and fact addressed primarily to the discretion of the trial court' " (*Kettles v City of Rochester*, 21 AD3d 1424, 1426, quoting *Selkowitz v County of Nassau*, 45 NY2d 97, 101-102), and the court's determination should not be disturbed absent an abuse of discretion (see generally *B.D.G.S., Inc. v Balio*, 26 AD3d 730, 731, *affd* 8 NY3d 106; *Tojek v Root*, 34 AD3d 1210, 1211). Here, defendants failed to meet their burden of establishing that the court abused its discretion in refusing to preclude plaintiff's economic expert from testifying at trial, inasmuch as defendants' objections go to the weight of the testimony, not its admissibility (see generally *Parker v Mobil Oil Corp.*, 7 NY3d 434, 446-447, *rearg denied* 8 NY3d 828).

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

1222

KA 08-01551

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DANIEL N. DAWSON, DEFENDANT-APPELLANT.

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

DANIEL N. DAWSON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered July 18, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts), burglary in the second degree, assault in the second degree and attempted assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, two counts of burglary in the first degree (Penal Law § 140.30 [2], [3]), defendant contends that the prosecutor's summation and County Court's jury charge improperly altered the theory of the prosecution. We address that contention despite defendant's failure to preserve it for our review because "the 'right of an accused to be tried and convicted of only those crimes and upon only those theories charged in the indictment is fundamental and nonwaivable' " (*People v Burnett*, 306 AD2d 947, 948, quoting *People v Rubin*, 101 AD2d 71, 77, lv denied 63 NY2d 711; see *People v Greaves*, 1 AD3d 979, 980). Nevertheless, we reject that contention inasmuch as the record establishes that defendant received the requisite "fair notice of the accusations made against him, so that he [was] able to prepare a defense" (*People v Iannone*, 45 NY2d 589, 594; see *People v Grega*, 72 NY2d 489, 495). Although the indictment and the bill of particulars referred solely to a "pellet gun," the court's reference in the jury charge to a pellet gun or a BB gun "did not charge 'a substantive crime not appearing in the indictment or amend[] the indictment to charge additional criminal acts or crimes' " (*People v Rivera*, 84 NY2d 766, 769), nor did the prosecutor's reference thereto on summation change the theory of the prosecution. The

testimony of the witnesses referred only to one gun, and they used the terms "pellet gun" and "BB gun" interchangeably.

Contrary to defendant's further contention, the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not contrary to the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495), and we conclude that the sentence is not unduly harsh or severe. Finally, we have considered the remaining contentions of defendant, including those raised in his pro se supplemental brief, and conclude that they are without merit.

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

1234

CA 10-00090

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

AMY MCCABE AND THOMAS MCCABE,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

ARONBERG GOLDGEHN DAVIS & GARMISA, CHICAGO, ILLINOIS (CHRISTOPHER J. BANNON, OF THE ILLINOIS BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND GOLDBERG SEGALLA LLP, BUFFALO, FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (ANDREW O. MILLER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered August 26, 2009. The judgment declared defendant St. Paul Fire and Marine Insurance Company is obligated to indemnify defendant David E. Fretz, Esq. on a judgment obtained by plaintiffs.

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

Same Memorandum as in *McCabe v St. Paul Fire & Mar. Ins. Co.* ([appeal No. 2] ___ AD3d ___ [Dec. 30, 2010]).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1235

CA 10-00091

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

AMY MCCABE AND THOMAS MCCABE,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V

MEMORANDUM AND ORDER

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
DEFENDANT-APPELLANT-RESPONDENT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

ARONBERG GOLDGEHN DAVIS & GARMISA, CHICAGO, ILLINOIS (CHRISTOPHER J. BANNON, OF THE ILLINOIS BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND GOLDBERG SEGALLA LLP, BUFFALO, FOR DEFENDANT-APPELLANT-RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (ANDREW O. MILLER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from a judgment (denominated order) of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered November 9, 2009. The judgment, insofar as appealed from and cross-appealed from, granted the motion of defendant St. Paul Fire and Marine Insurance Company for leave to reargue and adhered to the court's decision that said defendant was obligated to indemnify defendant David E. Fretz, Esq. for an award of compensatory damages obtained by plaintiffs and not for an award of treble damages.

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

Memorandum: Plaintiffs commenced this action seeking, inter alia, a declaration that St. Paul Fire and Marine Insurance Company (defendant) is obligated to indemnify defendant David E. Fretz, Esq. in the underlying legal malpractice action brought by plaintiffs against Fretz. The "claims made" professional liability insurance policy issued to Fretz by defendant provided coverage for any claims made against Fretz that were reported to defendant within the policy period and extended reporting period, which expired on March 15, 2007. Defendant first learned of plaintiffs' claim against Fretz on June 22, 2007, and it promptly disclaimed coverage on the ground that the notification was untimely. Plaintiffs thereafter obtained a default judgment against Fretz in the underlying action and, following an inquest on damages, Supreme Court awarded \$226,000 to plaintiffs in compensatory damages, which the court then trebled to \$700,180.72 pursuant to Judiciary Law § 487.

Plaintiffs commenced the instant action after unsuccessfully attempting to collect on the judgment against Fretz in the underlying action. Plaintiffs thereafter moved for summary judgment on the complaint, and defendant cross-moved for summary judgment. In appeal No. 1, Supreme Court granted plaintiffs' motion in part and denied defendant's cross motion, declaring that defendant must indemnify Fretz "to the extent called for" in the insurance policy. Defendant moved for leave to reargue its cross motion and for clarification of the court's decision with respect to the phrase "must indemnify Fretz for the underlying liability to the extent called for by the policy." By the judgment in appeal No. 2, the court granted that part of the motion for leave to reargue and upon reargument the court adhered to its prior decision. However, the court also granted that part of the motion seeking clarification, and declared that defendant must indemnify Fretz for compensatory damages but "need not indemnify [Fretz] for treble damages" awarded pursuant to Judiciary Law § 487. We dismiss the appeal by defendant from the judgment in appeal No. 1, inasmuch as the judgment in appeal No. 2 superseded the judgment in appeal No. 1 (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985). Thus, we address only the appeal by defendant and the cross appeal by plaintiffs from the judgment in appeal No. 2.

As a preliminary matter, we reject plaintiffs' contention that defendant waived its right to contend that plaintiffs failed to notify Fretz of their claim against him within the policy period or extended reporting period. Defendant's initial letter of disclaimer did not disclaim coverage on that ground, and an insurer generally waives any defense to coverage that is not specified in the notice of disclaimer (*see Utica Mut. Ins. Co. v Gath*, 265 AD2d 805). Here, however, the issue before us is whether plaintiffs' claim against Fretz is covered under the claims-made insurance policy in question, and it is well settled that such a defense is not subject to waiver (*see Fogelson v Home Ins. Co.*, 129 AD2d 508, 510-511; *see generally Charlestowne Floors, Inc. v Fidelity & Guar. Ins. Underwriters, Inc.*, 16 AD3d 1026, 1027). "[W]here the issue is the existence or nonexistence of coverage (e.g., the insuring clause and exclusions), the doctrine of waiver is simply inapplicable" (*Albert J. Schiff Assoc. v Flack*, 51 NY2d 692, 698), inasmuch as that doctrine "may not operate to create . . . coverage" where it never existed (*Charlestowne Floors, Inc.*, 16 AD3d at 1027; *see Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188).

We nevertheless conclude that, although defendant did not waive its contention that plaintiffs failed to assert a timely claim against Fretz, the contention lacks merit. In our view, plaintiffs' January 2, 2007 letter to Fretz constitutes a claim against Fretz under the terms of the policy (*see generally Evanston Ins. Co. v GAB Bus. Servs.*, 132 AD2d 180, 185-186). Although plaintiffs did not specifically request monetary damages in that letter, they demanded that Fretz rectify their problem. The letter also makes clear that plaintiffs were alleging that Fretz was negligent, which falls within that part of the policy defining a claim as "alleging an error, omission or negligent act in the rendering of or failure to render 'professional legal services' for others by you."

We further conclude that plaintiffs gave defendant notice of their claim against Fretz as soon as was reasonably possible, and thus that their failure to give notice to defendant during the policy period or extended reporting period did not invalidate their claim (see Insurance Law § 3420 [a] [4]; *Wraight v Exchange Ins. Co.* [appeal No. 2], 234 AD2d 916, 917, *lv denied* 9 NY2d 813). Contrary to defendant's contention, Insurance Law § 3420 (a) (3) and (4) do not include exceptions for claims-made insurance policies.

We agree with defendant, however, that the court properly declared that it is not required to indemnify Fretz with respect to the award of treble damages under Judiciary Law § 487. Such an award of treble damages under section 487 is punitive in nature (see *Amalfitano v Rosenberg*, 12 NY3d 8, 12-15; *Jorgenson v Silverman*, 224 AD2d 665; see generally *Cox v Microsoft Corp.*, 290 AD2d 206, 207, *lv dismissed* 98 NY2d 728), and "New York public policy precludes insurance indemnification for punitive damage awards" (*Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196, 200), including awards of statutory treble damages (see *Rental & Mgt. Assoc. v Hartford Ins. Co.*, 206 AD2d 288). Moreover, under the terms of the insurance policy, defendant agreed to indemnify Fretz with respect to compensatory damages only, and treble damages awarded under section 487 "are not designed to compensate a plaintiff for injury to property or pecuniary interests" (*Jorgensen*, 224 AD2d at 666).

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

1250

KA 06-02317

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DARIUS L. HORTON, DEFENDANT-APPELLANT.

MARK D. FUNK, ROCHESTER, FOR DEFENDANT-APPELLANT.

DARIUS L. HORTON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered April 13, 2006. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that the verdict is against the weight of the evidence. We reject that contention. Defendant was identified at trial by the victim, who had observed defendant on two occasions prior to the assault. "[T]hose who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record" (*People v Lane*, 7 NY3d 888, 890), and it cannot be said in this case that the jury failed to give the evidence the weight it should be accorded (see *People v Hill*, 74 AD3d 1782, lv denied 15 NY3d 805). Thus, viewing the evidence in light of the elements of the crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contention that County Court erred in denying his challenge for cause to a prospective juror on the ground that she raised her hand when asked by defense counsel whether anyone on the panel would have "a problem" if defendant elected to exercise his right to remain silent and not testify at trial (see CPL 470.05 [2]). Defendant challenged that prospective juror for cause on another ground, i.e., based on comments that she made about defendant's custodial status, and we decline to

exercise our power to address defendant's contention concerning the prospective juror's "problem" in the event that defendant did not testify as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). We reject the further contention of defendant that the court erred in denying his challenge for cause to the prospective juror based upon the concerns that she expressed with regard to his custodial status. Even assuming, arguendo, that the prospective juror's concerns initially "cast serious doubt on [her] ability to render an impartial verdict" (*People v Arnold*, 96 NY2d 358, 363), we conclude that the record establishes that the court thereafter obtained from the prospective juror the requisite "unequivocal assurance that [she could] set aside any bias and render an impartial verdict based on the evidence" (*People v Johnson*, 94 NY2d 600, 614).

Defendant failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct (see *People v McMillan*, 234 AD2d 1006, lv denied 89 NY2d 1038) and, in any event, that contention lacks merit. Although we agree with defendant that certain of the prosecutor's remarks may have exceeded the bounds of legitimate advocacy, we conclude that they were not so egregious as to deprive defendant of a fair trial (see *id.*; *People v Pennington*, 217 AD2d 919, lv denied 87 NY2d 906).

We reject the contention of defendant in his main brief and pro se supplemental brief that he was denied effective assistance of counsel. Although defendant contends that defense counsel did not adequately impeach the victim on cross-examination with prior inconsistent statements, we note that he called as witnesses all of the individuals to whom the prior inconsistent statements were made, and those witnesses testified without objection to those statements. Thus, the jury was able to consider the victim's prior inconsistent statements in evaluating the credibility of the victim. The further contention of defendant that he was denied effective assistance of counsel based on the fact that his omnibus motion contained requests for relief that did not apply to this case also is lacking in merit. Defendant does not contend that the omnibus motion failed to include appropriate requests for relief, and it therefore cannot be said that defendant was denied effective assistance of counsel with respect to the omnibus motion. Moreover, defense counsel's failure to make a specific motion for a trial order of dismissal at the close of the People's case did not constitute ineffective assistance of counsel, inasmuch as any such motion would have had no chance of success (see generally *People v Stultz*, 2 NY3d 277, 287, rearg denied 3 NY3d 702). Indeed, we note that defendant does not contend on appeal that the evidence at trial is legally insufficient. We have reviewed the remaining alleged deficiencies in defense counsel's performance and conclude that defendant received meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147).

We have reviewed the remaining contentions raised in defendant's main brief and pro se supplemental brief and conclude that they are

without merit.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1258

CA 10-00640

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

THOMAS PALERMO, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ANTHONY TACCONE, DOING BUSINESS AS AT BELLA VISTA DEVELOPMENT, ET AL., DEFENDANTS, AND JAMES HENNING AND CHRISTINE HENNING, DOING BUSINESS AS JLH ENTERPRISE, DEFENDANTS-APPELLANTS.

MULDOON & GETZ, ROCHESTER (JON P. GETZ OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (LAURIE A. GIORDANO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered June 4, 2009 in a breach of contract action. The judgment awarded plaintiff a money judgment upon a nonjury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law and the facts by vacating the award of damages against defendants James Henning and Christine Henning, doing business as JLH Enterprise, for plaintiff's share of the 2007 and 2008 profits, vacating the award of attorneys' fees against those defendants and reducing the amount of the award of damages for conversion against those defendants to \$12,000, and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, damages based on defendants' conversion of certain equipment. After the City of Rochester (City) terminated its contract with plaintiff for lawn mowing services, plaintiff and defendant Anthony Taccone, doing business as AT Bella Vista Development (hereafter, Taccone), successfully re-bid for the contract under Taccone's business name. Pursuant to their oral agreement, plaintiff and Taccone were to perform the work of the contract together, using plaintiff's equipment and property allegedly leased by plaintiff, where the equipment was stored. According to plaintiff, Taccone withheld plaintiff's share of the profits from the contract. Plaintiff also alleged that Taccone, as well as defendants James Henning and Christine Henning, doing business as JLH Enterprise (collectively, Henning defendants), changed the locks and installed a new alarm system at the property, thus

preventing plaintiff from accessing his equipment. The Henning defendants appeal from a judgment following a nonjury trial that awarded plaintiff, inter alia, damages in the amount of \$286,110.61 plus interest against each Henning defendant.

We agree with the Henning defendants that Supreme Court erred in awarding plaintiff damages in the amount of \$169,536.09 against the Henning defendants for his share of the 2007 and 2008 profits of the contract, and we therefore modify the judgment accordingly. The court found that the conversion that prevented plaintiff from performing the work of the contract during 2007 and 2008 occurred when Taccone denied plaintiff the right of possession of certain equipment integral to the performance of the contract at the time the police came to the property in April 2008, when Taccone sold certain equipment without authorization and when the Henning defendants refused to return plaintiff's 72-inch lawn mower (lawn mower). Inasmuch as the lawn mower was unfit for the work of the contract and the conversion of the rest of the equipment occurred in April 2008, plaintiff would be entitled to recover damages for his share of the profits in 2007 only under the second cause of action, for breach of contract. That cause of action, however, is asserted only against Taccone, and plaintiff did not otherwise seek damages against the Henning defendants with respect to the 2007 profits (*see generally Douglass v Wolcott Stor. & Ice Co., Inc.*, 251 App Div 79, 80).

Contrary to plaintiff's contention, the Henning defendants preserved for our review their contention with respect to plaintiff's share of the 2008 profits of the contract (*cf. Ciesinski v Town of Aurora*, 202 AD2d 984, 985). We note that "[t]he usual measure of damages for conversion is the value of the property at the time and place of conversion, plus interest . . . Profits lost are generally disallowed . . . , [a]lthough they may be recoverable if they may reasonably be expected to follow from the conversion" (*Fantis Foods v Standard Importing Co.*, 49 NY2d 317, 326; *see Rajeev Sindhwani, M.D., PLLC v Coe Bus. Serv., Inc.*, 52 AD3d 674, 676). Damages from the loss of future profits must "be capable of measurement based upon known reliable factors without undue speculation" (*Ashland Mgt. v Janien*, 82 NY2d 395, 403), i.e., they must be "established with reasonable certainty" (*id.* at 405). Here, plaintiff failed to demonstrate that he would have earned any profits in 2008 under the contract in the event that the equipment in question had been returned to him prior to the 2008 mowing season (*cf. Ashland Mgt.*, 82 NY2d at 403, 405). Further, plaintiff admitted that he could not have re-bid the contract in his own name after his prior contract with the City was terminated (*see City of Rochester Code* § 8A-7 [G] [2] [h]).

We also conclude that the court erred in awarding plaintiff attorneys' fees against the Henning defendants in the amount of \$43,558.25, and we therefore further modify the judgment accordingly. "Under the general rule, attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the [losing parties] unless an award is authorized by agreement between the parties or by statute or court rule" (*Matter of A.G. Ship*

Maintenance Corp. v Lezak, 69 NY2d 1, 5; see *Baker v Health Mgt. Sys.*, 98 NY2d 80, 88, rearg denied 98 NY2d 728). An exception to that general rule exists when parties have "acted with 'disinterested malevolence' [and have] . . . 'intentionally [sought] to inflict economic injury on [another party] by forcing [him or her] to engage legal counsel' " (*Anniszkiewicz v Harrison*, 291 AD2d 829, 830, lv denied 98 NY2d 611; see *Rinaudo v City of Rochester*, 148 AD2d 984). Viewing the evidence in the light most favorable to plaintiff (see generally *Home Insulation & Supply, Inc. v Buchheit*, 59 AD3d 1078; *Treat v Wegmans Food Mkts., Inc.*, 46 AD3d 1403, 1404-1405), however, we conclude that the record does not establish that the exception is applicable here.

We agree with the Henning defendants that the court erred in awarding plaintiff damages in the amount of \$73,016.27 for conversion, based on its determination that they were jointly liable with Taccone for the full value of the converted property. "When two or more tort[]feasors act concurrently or in concert to produce a single injury, they may be held jointly and severally liable . . . On the other hand, where multiple tort[]feasors 'neither act in concert nor contribute concurrently to the same wrong, they are not joint tort[]feasors; rather, their wrongs are independent and successive' " (*Ravo v Rogatnick*, 70 NY2d 305, 309-310, quoting *Suria v Shiffman*, 67 NY2d 87, 98, rearg denied 67 NY2d 918; see *Said v Assaad*, 289 AD2d 924, 927, lv dismissed 99 NY2d 532).

Further, "[t]o establish a cause of action in conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant[s] exercised an unauthorized dominion over the thing in question . . . to the exclusion of the plaintiff's rights" (*Five Star Bank v CNH Capital Am., LLC*, 55 AD3d 1279, 1281 [internal quotation marks omitted]). "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession . . . Two key elements of conversion are (1) plaintiff's possessory right or interest in the property . . . and (2) defendant[s'] dominion over the property or interference with it, in derogation of plaintiff's rights" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50).

Viewing the evidence in the light most favorable to plaintiff (see generally *Home Insulation & Supply, Inc.*, 59 AD3d 1078; *Treat*, 46 AD3d at 1404-1405), we conclude that there is no fair interpretation of the evidence supporting the court's determination that the Henning defendants and Taccone are jointly liable for the full amount of plaintiff's converted property. The Henning defendants were not present when Taccone refused to return plaintiff's property, nor was a representative of the Henning defendants present at that time, and there is no evidence that the Henning defendants and Taccone acted in concert for any enterprise beyond changing the locks at the property, which James Henning also claimed to rent and for which plaintiff did not have a written lease at the time the locks were changed.

Finally, although the Henning defendants correctly concede that they are jointly liable with Taccone for the value of the lawn mower, they contend that the lawn mower had a value of \$11,000 and thus the award against them for conversion should be reduced to that amount. We reject that contention. Plaintiff testified that the lawn mower was worth "around [11,000, 12,000] dollars." The Henning defendants failed to present an adequate record to determine the accurate value of the lawn mower (see generally *de Vries v Metropolitan Tr. Auth.*, 11 AD3d 312, 313), and thus we conclude that the lawn mower should be valued at \$12,000 pursuant to plaintiff's testimony. We therefore further modify the judgment accordingly.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1259

CA 09-01756

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

IN THE MATTER OF THE ESTATE OF KEVIN W. STANLEY,
DECEASED.

DIANE R. STANLEY, AS EXECUTRIX,
PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

LAWRENCE J. MATTAR, ESQ., AS GUARDIAN AD LITEM
FOR ASHLEY STANLEY, A MINOR, AND ARCANGELO J.
PETRICCA, ESQ., AS GUARDIAN AD LITEM FOR KATHRYN
STANLEY, A MINOR, RESPONDENTS-RESPONDENTS.

IN THE MATTER OF THE ESTATE OF KATHLEEN A.
STANLEY, DECEASED.

RICHARD T. STANLEY, AS ADMINISTRATOR,
PETITIONER-APPELLANT;

LAWRENCE J. MATTAR, ESQ., AS GUARDIAN AD LITEM
FOR ASHLEY STANLEY, A MINOR, AND ARCANGELO J.
PETRICCA, ESQ., AS GUARDIAN AD LITEM FOR KATHRYN
STANLEY, A MINOR, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

HOGAN WILLIG, AMHERST (JOHN LICATA OF COUNSEL), FOR
PETITIONERS-APPELLANTS.

ARCANGELO J. PETRICCA, LACKAWANNA, RESPONDENT-RESPONDENT PRO SE FOR
ARCANGELO J. PETRICCA, ESQ., AS GUARDIAN AD LITEM FOR KATHRYN STANLEY,
A MINOR.

MATTAR, D'AGOSTINO & GOTTLIEB, LLP, BUFFALO (JONATHAN SCHAPP OF
COUNSEL), FOR RESPONDENT-RESPONDENT LAWRENCE J. MATTAR, ESQ., AS
GUARDIAN AD LITEM FOR ASHLEY STANLEY, A MINOR.

Appeals from an order of the Surrogate's Court, Erie County
(Barbara Howe, S.), entered July 7, 2009. The order, among other
things, directed that the applications filed by petitioners on June
11, 2009 shall go forward.

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

Memorandum: These proceedings arise out of the crash of a small
plane in Florida in which Kevin W. Stanley and his mother, Kathleen A.

Stanley (collectively, decedents), were killed. Decedents were both residents of New York State at the time of the plane crash. Kevin Stanley was survived by his wife, petitioner Diane R. Stanley, who was named executrix of his estate, and two minor children, Kathryn Stanley and Ashley Stanley. Kathleen Stanley was survived by her husband, petitioner Richard T. Stanley, who was named administrator of her estate. Petitioners commenced a wrongful death action in the Circuit Court, Seventh Judicial Circuit in and for Volusia County, Florida (hereafter, Florida Court) against, inter alia, the owner and lessor of the plane. The parties ultimately entered into a "Mediated Settlement Agreement" (Agreement), pursuant to which the defendants agreed to pay certain sums to petitioners "[s]ubject to and conditioned upon the approval of the Surrogate of Erie County, NY [and] . . . the approval of the [Florida Court]."

Petitioners thereafter filed wrongful death petitions in Surrogate's Court seeking, inter alia, to compromise the Florida wrongful death action, and respondents guardians ad litem were appointed for the minor children. While the petitions were pending, the Florida Court granted petitioners' motion to "Approve Wrongful Death Claim Involving the Interests of Minors." Petitioners subsequently contended that the Florida Court order was entitled to full faith and credit and that the only matter left for the Surrogate to determine was whether appropriate investment vehicles were in place for the settlement allocations to the minor children. The guardians ad litem, however, contended that the express terms of the Agreement required the Surrogate to approve the settlement and that the Surrogate must make her own determination regarding, inter alia, the adequacy of the settlement.

Addressing first the order in appeal No. 2, we conclude that the Surrogate properly denied petitioners' request to limit her role and that of the guardians ad litem in these proceedings. Contrary to petitioners' contention, the Full Faith and Credit Clause of the U.S. Constitution (US Const, art IV, § 1) does not bar the Surrogate's review of the settlement in accordance with the terms of the Agreement. Here, the parties to the wrongful death action, including petitioners, explicitly and unambiguously conditioned their settlement upon the approval of both the Florida Court and the Surrogate. Contrary to petitioners' further contention, the Agreement does not limit the Surrogate's role in approving the settlement or require the Surrogate to defer to the Florida Court's determination concerning the appropriateness of the settlement. Although petitioners correctly note that a contract cannot confer jurisdiction upon a court where such jurisdiction does not otherwise exist (*see Matter of Newham v Chile Exploration Co.*, 232 NY 37, 42, *rearg denied* 234 NY 537; *Matter of Hyatt Legal Servs.*, 97 AD2d 983), here the Surrogate has concurrent jurisdiction to approve the settlement (*see EPTL 5-4.6; see generally Pollicina v Misericordia Hosp. Med. Ctr.*, 82 NY2d 332, 339; *Matter of DeLong*, 89 AD2d 368, *lv denied* 58 NY2d 606; *Conejero v LaJam*, 190 Misc 2d 393, 395). Thus, the Agreement does not attempt to "confer" jurisdiction on the Surrogate but, rather, the parties requested, as a condition of their settlement, that the Surrogate exercise her concurrent authority to approve the settlement.

Moreover, we conclude that the Surrogate's independent review of the settlement does not fail to afford " 'credit, validity, and effect' " to the orders of the Florida Court (*Underwriters Natl. Assur. Co. v North Carolina Life & Acc. & Health Ins. Guar. Assn.*, 455 US 691, 704). That court approved the settlement in accordance with Florida law and the Agreement (see Fla Stat Ann, tit 43, § 744.387 [3] [a]; § 768.25). The Surrogate is reviewing the settlement pursuant to New York law as authorized by statute and required by the Agreement. We reject petitioners' contention that the Florida Court's approval of the settlement is "conclusive evidence" of the adequacy thereof (EPTL 5-4.6 [d]), inasmuch as the wrongful death action was not commenced in New York.

With respect to the order in appeal No. 1, we conclude that the Surrogate properly denied petitioners' requests to withdraw the wrongful death petitions and to discontinue the proceedings. Pursuant to CPLR 3217 (a), "[a]ny party asserting a claim may discontinue it without an order . . . by serving upon all parties to the action a notice of discontinuance" within a certain time period. Here, although petitioners' notices of discontinuance were timely, we agree with the Surrogate that an application to compromise a wrongful death action pursuant to EPTL 5-4.6 is not a "claim" subject to unilateral discontinuance under CPLR 3217 (a) (see generally *Matter of Flight [Monroe Community Hosp.]*, 296 AD2d 845; 7 Weinstein-Korn-Miller, NY Civ Prac ¶ 3217.05).

With respect to the order in appeal No. 3, we conclude that the Surrogate properly determined that petitioners' amended petitions were untimely. "A party may amend his [or her] pleading once without leave of court within [20] days after its service, or at any time before the period for responding to it expires, or within [20] days after service of a pleading responding to it" (CPLR 3025 [a]). Inasmuch as no responsive pleadings were required in this case (see generally SCPA 302 [1]; 404 [3]), the timeliness of the amended petitions is measured only by the 20-day time period following service of the original petitions (see CPLR 3025 [a]). Here, petitioners filed the amended petitions approximately 48 days after serving the original petitions, and thus the Surrogate properly concluded that petitioners were not entitled to amend the petitions as a matter of right.

With respect to the order in appeal No. 4, we conclude that, given the scope and nature of the settlement and the financial stakes involved, the Surrogate did not abuse her discretion in granting the application of the guardian ad litem for Ashley Stanley to approve "the [nunc pro tunc] appointment and authorization" for members of his law firm to assist him and perform various duties on his behalf as guardian ad litem. Pursuant to 22 NYCRR 36.1 [a] [10], a court may appoint "the following persons or entities performing services for guardians [ad litem]: (i) counsel; (ii) accountants; (iii) auctioneers; (iv) appraisers; (v) property managers; and (vi) real estate brokers" (see generally 22 NYCRR 36.2 [a]). We note that any question concerning the reasonableness of the fees paid to the guardians ad litem is premature at this time (see generally SCPA 405).

With respect to the order in appeal No. 5, we conclude that the Surrogate properly denied that part of petitioners' motion to vacate the order in appeal No. 3 for the reasons discussed with respect to that order. We further conclude that, under the circumstances of this case, the Surrogate did not abuse her discretion in denying that part of petitioners' motion for leave to file and serve amended petitions pursuant to CPLR 3025 (b) (see generally *Dionisio v Geo. De Rue Contrs., Inc.*, 38 AD3d 1172, 1174). Indeed, the "amended" petitions were not truly amended petitions, but rather they were new pleadings seeking entirely different relief in an attempt to circumvent the order in appeal No. 1, which denied petitioners' requests to withdraw the original petitions and discontinue the proceedings.

We have reviewed the remaining contentions of petitioners with respect to each order and conclude that they are without merit.

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

1260

CA 10-00043

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

IN THE MATTER OF THE ESTATE OF KEVIN W. STANLEY,
DECEASED.

DIANE R. STANLEY, AS EXECUTRIX,
PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

LAWRENCE J. MATTAR, ESQ., AS GUARDIAN AD LITEM
FOR ASHLEY STANLEY, A MINOR, AND ARCANGELO J.
PETRICCA, ESQ., AS GUARDIAN AD LITEM FOR KATHRYN
STANLEY, A MINOR, RESPONDENTS-RESPONDENTS.

IN THE MATTER OF THE ESTATE OF KATHLEEN A.
STANLEY, DECEASED.

RICHARD T. STANLEY, AS ADMINISTRATOR,
PETITIONER-APPELLANT;

LAWRENCE J. MATTAR, ESQ., AS GUARDIAN AD LITEM
FOR ASHLEY STANLEY, A MINOR, AND ARCANGELO J.
PETRICCA, ESQ., AS GUARDIAN AD LITEM FOR KATHRYN
STANLEY, A MINOR, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

HOGAN WILLIG, AMHERST (JOHN LICATA OF COUNSEL), FOR
PETITIONERS-APPELLANTS.

ARCANGELO J. PETRICCA, LACKAWANNA, RESPONDENT-RESPONDENT PRO SE FOR
ARCANGELO J. PETRICCA, ESQ., AS GUARDIAN AD LITEM FOR KATHRYN STANLEY,
A MINOR.

MATTAR, D'AGOSTINO & GOTTLIEB, LLP, BUFFALO (JONATHAN SCHAPP OF
COUNSEL), FOR RESPONDENT-RESPONDENT LAWRENCE J. MATTAR, ESQ., AS
GUARDIAN AD LITEM FOR ASHLEY STANLEY, A MINOR.

Appeals from an order of the Surrogate's Court, Erie County
(Barbara Howe, S.), entered July 1, 2009. The order, among other
things, denied petitioners' request that the court limit its review
with respect to proposed settlement agreements.

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

Same Memorandum as in *Matter of Stanley* ([appeal No. 1], ___ AD3d

___ [Dec. 30, 2010]).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1261

CA 10-00045

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

IN THE MATTER OF THE ESTATE OF KEVIN W. STANLEY,
DECEASED.

DIANE R. STANLEY, AS EXECUTRIX,
PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

LAWRENCE J. MATTAR, ESQ., AS GUARDIAN AD LITEM
FOR ASHLEY STANLEY, A MINOR, AND ARCANGELO J.
PETRICCA, ESQ., AS GUARDIAN AD LITEM FOR KATHRYN
STANLEY, A MINOR, RESPONDENTS-RESPONDENTS.

IN THE MATTER OF THE ESTATE OF KATHLEEN A.
STANLEY, DECEASED.

RICHARD T. STANLEY, AS ADMINISTRATOR,
PETITIONER-APPELLANT;

LAWRENCE J. MATTAR, ESQ., AS GUARDIAN AD LITEM
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PETRICCA, ESQ., AS GUARDIAN AD LITEM FOR KATHRYN
STANLEY, A MINOR, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 3.)

HOGAN WILLIG, AMHERST (JOHN LICATA OF COUNSEL), FOR
PETITIONERS-APPELLANTS.

ARCANGELO J. PETRICCA, LACKAWANNA, RESPONDENT-RESPONDENT PRO SE FOR
ARCANGELO J. PETRICCA, ESQ., AS GUARDIAN AD LITEM FOR KATHRYN STANLEY,
A MINOR.

MATTAR, D'AGOSTINO & GOTTLIEB, LLP, BUFFALO (JONATHAN SCHAPP OF
COUNSEL), FOR RESPONDENT-RESPONDENT LAWRENCE J. MATTAR, ESQ., AS
GUARDIAN AD LITEM FOR ASHLEY STANLEY, A MINOR.

Appeals from an order of the Surrogate's Court, Erie County
(Barbara Howe, S.), entered October 9, 2009. The order, among other
things, determined that petitioners' amended pleadings were untimely
filed.

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

Same Memorandum as in *Matter of Stanley* ([appeal No. 1], ___ AD3d

___ [Dec. 30, 2010]).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1262

CA 10-00046

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

IN THE MATTER OF THE ESTATE OF KEVIN W. STANLEY,
DECEASED.

DIANE R. STANLEY, AS EXECUTRIX,
PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

LAWRENCE J. MATTAR, ESQ., AS GUARDIAN AD LITEM
FOR ASHLEY STANLEY, A MINOR, AND ARCANGELO J.
PETRICCA, ESQ., AS GUARDIAN AD LITEM FOR KATHRYN
STANLEY, A MINOR, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 4.)

HOGAN WILLIG, AMHERST (JOHN LICATA OF COUNSEL), FOR
PETITIONER-APPELLANT.

ARCANGELO J. PETRICCA, LACKAWANNA, RESPONDENT-RESPONDENT PRO SE FOR
ARCANGELO J. PETRICCA, ESQ., AS GUARDIAN AD LITEM FOR KATHRYN STANLEY,
A MINOR.

MATTAR, D'AGOSTINO & GOTTLIEB, LLP, BUFFALO (JONATHAN SCHAPP OF
COUNSEL), FOR RESPONDENT-RESPONDENT LAWRENCE J. MATTAR, ESQ., AS
GUARDIAN AD LITEM FOR ASHLEY STANLEY, A MINOR.

Appeal from an order of the Surrogate's Court, Erie County
(Barbara Howe, S.), entered November 16, 2009. The order, granted a
petition by Lawrence J. Mattar, Esq., as guardian ad litem for Ashley
Stanley, a minor, for other attorneys to assist him in performing
duties relative to his appointment as guardian ad litem.

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

Same Memorandum as in *Matter of Stanley* ([appeal No. 1], ___ AD3d
___ [Dec. 30, 2010]).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1263

CA 10-00047

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

IN THE MATTER OF THE ESTATE OF KEVIN W. STANLEY,
DECEASED.

DIANE R. STANLEY, AS EXECUTRIX,
PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

LAWRENCE J. MATTAR, ESQ., AS GUARDIAN AD LITEM
FOR ASHLEY STANLEY, A MINOR, AND ARCANGELO J.
PETRICCA, ESQ., AS GUARDIAN AD LITEM FOR KATHRYN
STANLEY, A MINOR, RESPONDENTS-RESPONDENTS.

IN THE MATTER OF THE ESTATE OF KATHLEEN A.
STANLEY, DECEASED.

RICHARD T. STANLEY, AS ADMINISTRATOR,
PETITIONER-APPELLANT;

LAWRENCE J. MATTAR, ESQ., AS GUARDIAN AD LITEM
FOR ASHLEY STANLEY, A MINOR, AND ARCANGELO J.
PETRICCA, ESQ., AS GUARDIAN AD LITEM FOR KATHRYN
STANLEY, A MINOR, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 5.)

HOGAN WILLIG, AMHERST (JOHN LICATA OF COUNSEL), FOR
PETITIONERS-APPELLANTS.

ARCANGELO J. PETRICCA, LACKAWANNA, RESPONDENT-RESPONDENT PRO SE FOR
ARCANGELO J. PETRICCA, ESQ., AS GUARDIAN AD LITEM FOR KATHRYN STANLEY,
A MINOR.

MATTAR, D'AGOSTINO & GOTTLIEB, LLP, BUFFALO (JONATHAN SCHAPP OF
COUNSEL), FOR RESPONDENT-RESPONDENT LAWRENCE J. MATTAR, ESQ., AS
GUARDIAN AD LITEM FOR ASHLEY STANLEY, A MINOR.

Appeals from an order of the Surrogate's Court, Erie County
(Barbara Howe, S.), entered December 15, 2009. The order, among other
things, denied petitioners' motion to vacate the October 9, 2009
order.

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

Same Memorandum as in *Matter of Stanley* ([appeal No. 1], ___ AD3d

___ [Dec. 30, 2010]).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1283

CA 10-01234

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

DONALD CARDIFF, DIANA CARDIFF, PATRICIA A. MORSE,
ALBERTA M. ROSSI, DOUGLAS SINGLETON, JAN
SINGLETON, RICHARD TRIFICANA, MARTHA TRIFICANA,
ELLEN SUE SESTITO, AND GLORIA IZZO,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

ROBERT M. CARRIER, INDIVIDUALLY AND AS
OFFICER/AGENT OF LEGEND DEVELOPERS, LLC,
ET AL., DEFENDANTS,
VITO PIEMONTE, INDIVIDUALLY AND AS
OFFICER/AGENT OF TOWN OF LEE, AND HIS
AGENTS/SERVANTS/DESIGNEES EMPLOYED IN CODES
ENFORCEMENT OFFICE AND TOWN OF LEE,
DEFENDANTS-RESPONDENTS.

THE LONGERETTA LAW FIRM, UTICA (SIMONE M. SHAHEEN OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

SHANTZ & BELKIN, LATHAM (TODD C. ROBERTS OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Brian F. DeJoseph, J.), entered March 15, 2010. The order, among other things, granted the motion of defendants Vito Piemonte and Town of Lee to dismiss plaintiffs' complaints.

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

Memorandum: Plaintiffs commenced actions that were thereafter consolidated alleging, inter alia, that the Town of Lee and its Code Enforcement Officer, individually and in his official capacity (collectively, defendants), negligently issued certificates of occupancy and that plaintiffs reasonably relied on those certificates in purchasing their respective residences. The actions were commenced in December 2008, more than one year and 90 days after each plaintiff's certificate of occupancy was issued. Contrary to plaintiffs' contention, Supreme Court properly granted the motion of defendants to dismiss the consolidated actions against them as time-barred, pursuant to General Municipal Law § 50-i. The dates on which the respective certificates of occupancy were issued "is the event from which [each] claim against defendants arose," and it is

undisputed that plaintiffs failed to commence their actions within one year and 90 days after their claims arose (*Francis v Posa*, 21 AD3d 1335, 1336). “[C]ourts have uniformly concluded that the limitation period begins to run upon the happening of the event, irrespective of when the action accrued . . . [T]he plain language of the statute[, i.e., General Municipal Law § 50-i,] admits of no other interpretation” (*Klein v City of Yonkers*, 53 NY2d 1011, 1013). Also contrary to plaintiffs’ contention, the court properly granted that part of defendants’ motion with respect to the Code Enforcement Officer in his individual capacity, “inasmuch as all of the allegations against him relate to actions taken within the scope of his official duties” (*Francis*, 21 AD3d at 1336; see generally *Tango v Tulevech*, 61 NY2d 34, 41-42; *Teddy’s Dr. In v Cohen*, 47 NY2d 79, 82). We have considered plaintiffs’ remaining contentions and conclude that they are without merit.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1300

CA 10-00421

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

FAYE M. EATON, JACQUELINE SIWICKI, AND
MAUREEN M. DOYLE, PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

SYLVIA HUNGERFORD, INDIVIDUALLY AND AS SPECIAL
EDUCATION TEACHER OF THE WAYNE CENTRAL SCHOOL
DISTRICT, ET AL., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

EMMELYN LOGAN-BALDWIN, ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered January 16, 2009. The order, among other things, denied the motion of plaintiffs for judgment in their favor or an order of preclusion against defendants.

It is hereby ORDERED that said appeal is unanimously dismissed in part and the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for allegedly having been harassed based upon their sexual orientation and having been subjected to a hostile work environment. They thereafter made a motion seeking, inter alia, judgment in their favor as a discovery sanction and an interim order transferring defendant Sylvia Hungerford to a different work location pending the outcome of this litigation. By the order in appeal No. 1, Supreme Court granted their motion only to the extent of compelling defendants to respond to specified discovery demands. Plaintiffs subsequently moved for leave to renew and/or reargue parts of the prior motion and they also sought, inter alia, leave to amend the complaint. By the order in appeal No. 2, the court granted plaintiffs' "motion to renew/reargue . . . to the limited extent" of conforming the complaint to the proof in certain respects and by ordering defendant Middle School Principal of Wayne Central School District to provide certain information and to submit to a deposition as to the circumstances surrounding the transfer of a certain work colleague of plaintiffs to another work location. We dismiss the appeal from the order in appeal No. 1 to the "limited extent" that the motion for leave to renew/reargue was granted (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985), and we otherwise affirm the orders in appeal Nos. 1 and 2.

With respect to the order in appeal No. 1, we conclude that the court did not abuse its discretion in denying that part of plaintiffs' motion seeking judgment in their favor as a discovery sanction. "It is well settled that the court is vested with broad discretion to control discovery and that the court's determination of discovery issues should be disturbed only upon a showing of clear abuse of discretion" (*Roswell Park Cancer Inst. Corp. v Sodexo Am., LLC*, 68 AD3d 1720, 1721), which was not shown here. Moreover, "[t]he extreme sanction of dismissal is warranted only where there is a clear showing that [a party's] failure to comply with discovery demands was willful, contumacious or in bad faith" (*Fox v Eastman Kodak Co.*, 275 AD2d 921, 921). Although defendants concede that their responses to several of plaintiffs' discovery demands could have been more prompt, the record nevertheless establishes that all but two of the 26 witnesses noticed for deposition by plaintiffs had been deposed by the time the court entertained plaintiffs' motion. Furthermore, as the court properly determined, many of the discovery requests set forth in the letter from plaintiffs' attorney dated September 8, 2008 were improper.

Plaintiffs further contend that the court erred in denying that part of their motion seeking to compel discovery on the issue of the provision of a defense and possible indemnification by defendants' insurer to defendant Sylvia Hungerford. The court denied that part of plaintiffs' motion in appeal No. 1 and further addressed the issue in the context of its order in appeal No. 2. We agree with the court that such discovery is irrelevant to any issues in this action, and that it is not reasonably calculated to lead to evidence "material and necessary" to the prosecution of the action (CPLR 3101 [a]; see generally *Van Horn v Thompson & Johnson Equip. Co.*, 291 AD2d 885, 885-886). In any event, although plaintiffs argue that the insurer's defense of Hungerford demonstrates defendants' bias against them, we note that plaintiffs are not harmed by the insurer's possible indemnification of Hungerford in the event that they are ultimately awarded money damages against her, inasmuch as she may not be able to satisfy any such award herself.

Finally, we reject the contention of plaintiffs in appeal No. 1 that the court erred in denying that part of their motion for an interim order transferring Hungerford to another work location pending the outcome of this litigation. We note that plaintiffs cite no authority that would allow the court to order the transfer of Hungerford even in the event that plaintiffs ultimately prevail in this litigation. In any event, we conclude that plaintiffs are not entitled to such provisional relief because they failed to demonstrate a likelihood of success on the merits and the prospect of irreparable harm if the provisional relief is not granted (see generally *Doe v Axelrod*, 73 NY2d 748, 750; *Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216).

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

1301

CA 10-00422

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

FAYE M. EATON, JACQUELINE SIWICKI, AND
MAUREEN M. DOYLE, PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

SYLVIA HUNGERFORD, INDIVIDUALLY AND AS SPECIAL
EDUCATION TEACHER OF THE WAYNE CENTRAL SCHOOL
DISTRICT, ET AL., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

EMMELYN LOGAN-BALDWIN, ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered May 1, 2009. The order, among other things, denied in part the motion of plaintiffs for leave to renew or reargue and for leave to amend their complaint.

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

Same Memorandum as in *Eaton v Hungerford* ([appeal No. 1] ___ AD3d ___ [Dec. 30, 2010]).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1302

CA 10-01238

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

ROBERT G. BELSTADT, PLAINTIFF-RESPONDENT,

V

ORDER

LISA A. BELSTADT (ALSO KNOWN AS TRUNZO),
DEFENDANT-APPELLANT.

SHARON ANSCOMBE OSGOOD, BUFFALO, FOR DEFENDANT-APPELLANT.

SHAWN P. NICKERSON, ATTORNEY FOR THE CHILD, NORTH TONAWANDA, FOR
KEEGAN B.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered February 8, 2010 in a post judgment divorce action. The order, inter alia, provided that the subject child may attend St. Joseph's Collegiate Institute as a freshman in the fall of 2010.

Now, upon the order of Supreme Court, Erie County, entered September 10, 2010 vacating the order appealed from and upon reading and filing the statement of Sharon Anscombe Osgood, counsel for defendant-appellant, dated September 14, 2010 withdrawing said appeal,

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1304

CA 10-00879

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

NORMAN M. PERRY AND WANDA M. PERRY,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

JAMES EDWARDS AND DIANNE EDWARDS,
DEFENDANTS-RESPONDENTS.

UAW-GM LEGAL SERVICES PLAN, LOCKPORT (BOOKER T. WASHINGTON OF
COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAWRENCE A. SCHULZ, ORCHARD PARK, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered December 4, 2009 in an action pursuant to RPAPL article 15. The order, among other things, granted defendants' motion for summary judgment and dismissed plaintiffs' amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part, deeming the amended complaint further amended to assert a claim for adverse possession and reinstating the amended complaint to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action pursuant to RPAPL article 15 seeking a determination that they are the sole owners of a certain strip of property located between their property and defendants' adjacent property. Plaintiffs appeal from an order in which Supreme Court, inter alia, granted defendants' motion for summary judgment dismissing the amended complaint and denied plaintiffs' cross motion for summary judgment. Contrary to plaintiffs' contention, defendants met their burden of establishing as a matter of law that the deeds to the parties' parcels of property unambiguously conveyed the disputed strip of property to defendants (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We reject plaintiffs' contention that the court erred in concluding that those deeds were unambiguous and that, upon considering extrinsic evidence, the court should have concluded that the disputed strip of property belonged to them. The intent of the parties is "manifested by the language of the deed[s and] unless the deed[s are] ambiguous, evidence of unexpressed, subjective intentions of the parties is irrelevant" (*Modrzynski v Wolfer*, 234 AD2d 901, 902). Further, it is well established that, in the event that the disputed property line can "be located by surveys according to the calls of the deeds . . . ,

the location thus ascertained [is] the true one, and [cannot] be defeated" by extrinsic evidence (*Waugh v Waugh*, 28 NY 94, 98; see *Muldoon v Deline*, 135 NY 150, 153). Thus, the court properly refused to interpret the deeds to conform with the extrinsic evidence proffered by plaintiffs.

Nevertheless, we agree with plaintiffs that the court erred in granting defendants' motion insofar as it seeks dismissal of the amended complaint in its entirety. "Modern principles of procedure do not permit an unconditional grant of summary judgment against . . . plaintiff[s] who, despite defects in pleading, [have] in [their] submissions made out a cause of action" (*Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276, 279; see generally *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 182, rearg denied 57 NY2d 674; *J.R. Adirondack Enters. v Hartford Cas. Ins. Co.*, 292 AD2d 771, 772). Here, in opposing defendants' motion, plaintiffs contended that they gained title to the strip of property at issue by adverse possession (see generally *Walling v Przybylo*, 7 NY3d 228, 232), and we conclude that plaintiffs have thereby "made out a cause of action" for adverse possession (*Alvord & Swift*, 46 NY2d at 279). We note that the 2008 amendments to RPAPL article 5 are inapplicable here, inasmuch as plaintiffs contend that they gained title by adverse possession based on actions that they and the previous owners of their property took prior to those amendments (see generally *Franza v Olin*, 73 AD3d 44). Because plaintiffs set forth facts amounting to a cause of action for adverse possession in opposition to defendants' motion, it thus cannot be said that defendants would be surprised or prejudiced by deeming plaintiffs to have asserted such a cause of action (see generally *Board of Mgrs. of Park Regent Condominium v Park Regent Assoc.*, 71 AD3d 1070). We therefore modify the order by denying defendants' motion insofar as it seeks summary judgment dismissing the amended complaint in its entirety, we deem the amended complaint to be further amended to assert a claim for adverse possession and we reinstate the amended complaint insofar as it asserts that claim (see generally *Ramos v Jake Realty Co.*, 21 AD3d 744, 745-746; *Wooten v State of New York*, 302 AD2d 70, 75, lv denied 1 NY3d 501; *Nalezenc v Blue Cross of W. N.Y.*, 191 AD2d 982, 984).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1307

CA 10-00546

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

MICHAEL DAHAR, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

HOLLAND LADDER & MANUFACTURING COMPANY,
GREEN BULL, INC., HANES SUPPLY, INC.,
BECHTEL CORPORATION, BECHTEL NATIONAL, INC.,
WARNER G. MARTIN, AND SHIRLEY J. MARTIN,
DEFENDANTS-RESPONDENTS.

BECHTEL CORPORATION AND BECHTEL NATIONAL, INC.,
THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

WEST METAL WORKS, INC., THIRD-PARTY
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

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

LANDMAN CORSI BALLAINE & FORD P.C., NEW YORK CITY (WILLIAM G. BALLAINE
OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BECHTEL CORPORATION AND
BECHTEL NATIONAL, INC., AND THIRD-PARTY PLAINTIFFS-RESPONDENTS.

HODGSON RUSS LLP, BUFFALO (HEATHER ZIMMERMAN OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS WARNER G. MARTIN AND SHIRLEY J. MARTIN.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered November 17, 2009 in a personal injury action. The order, among other things, denied plaintiff's cross motion for partial summary judgment.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he allegedly sustained when he fell from a ladder at his employer's shop while readying a fabricated component for shipment to an off-site construction project. At the time of his accident, plaintiff was employed by third-party defendant West Metal Works, Inc. (West Metal) at its fabrication shop (shop) in Cheektowaga, New York. The shop was located in a building

that West Metal leased from defendants Warner G. Martin and Shirley J. Martin (collectively, Martins). The written lease between the Martins and West Metal limited the use of the leasehold premises to "manufacturing and industrial purposes." The primary business of West Metal is custom metal fabrication of steel and stainless steel products. At the time of his accident, plaintiff was engaged in the final phase of the fabrication of a component part of a nuclear waste treatment plant that was being constructed by the United States Department of Energy in Richmond, Virginia. Steel fabrication is the "customary occupational work" of plaintiff (*Jock v Fien*, 80 NY2d 965, 966), and it is the "customary business of his employer," West Metal (*Foster v Joseph Co.*, 216 AD2d 944, 944). Plaintiff's work at the shop the day of the accident involved cleaning grease and welding residue off of a wall module prior to its shipment from the shop to the construction site. The wall module was fabricated pursuant to a purchase order between West Metal and defendants-third-party plaintiffs Bechtel Corporation and Bechtel National, Inc. (collectively, Bechtel defendants). Plaintiff was injured during that process when he was descending a ladder and a rung broke.

At the time of his accident, plaintiff was not performing work on any part of the shop building where he was employed. Labor Law § 240 (1), contained within article 10 of the Labor Law, entitled "Building Construction, Demolition and Repair Work," applies to workers engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or a structure" Section 240 (1) does not apply to workers engaged in the fabrication of component parts that are to be shipped from the fabrication facility to an off-site construction location (see *Jock*, 80 NY2d at 968; *Davis v Wind-Sun Constr., Inc.*, 70 AD3d 1383; *Solly v Tam Ceramics*, 258 AD2d 914). Ignoring the context and nature of plaintiff's work, the dissent concludes, notwithstanding those well-settled principles, that plaintiff's work on a fabricated component part constituted the protected activity of "cleaning" a "structure" (§ 240 [1]). The cases relied upon by the dissent, however, are readily distinguishable from the fabrication situation at issue. In *Lewis-Moors v Contel of N.Y.* (78 NY2d 942, *affg* 167 AD2d 732), the plaintiff was employed on a project involving the removal and replacement of a network of telephone poles. The Court of Appeals agreed with the Third Department that "a telephone pole with attached hardware, cable and support systems constitutes a structure within the meaning of . . . section [240 (1)]" (*id.* at 943). In *Pino v Robert Martin Co.* (22 AD3d 549, 551), the plaintiff was removing shelving from a building wall that was to be demolished as part of a construction and renovation project. Neither of those cases addresses the issue whether a partially fabricated component part that is to be shipped to an off-site construction project constitutes a "structure" pursuant to section 240 (1).

Inasmuch as plaintiff was engaged in a "normal manufacturing process" at a factory building, we conclude that he was not engaged in a protected activity pursuant to Labor Law § 240 (1) (*Jock*, 80 NY2d at 968). Thus, with respect to the order in appeal No. 1, we conclude that Supreme Court properly granted those parts of the motions of the

Martins and the Bechtel defendants seeking summary judgment dismissing the Labor Law § 240 (1) claim against them and denied those parts of plaintiff's cross motion seeking partial summary judgment on liability with respect to the Labor Law § 240 (1) claim against the Martins and the Bechtel defendants. The Bechtel defendants also submitted evidence in support of their motion establishing that they are not subject to liability under section 240 (1) either as "owners" (see generally *Scaparo v Village of Ilion*, 13 NY3d 864, 866-867), or as "contractors" (see generally *Rauls v DirectTV, Inc.*, 60 AD3d 1337), and plaintiff failed to raise a triable issue of fact with respect thereto (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

The court also properly granted that part of the motion of the Martins seeking summary judgment dismissing the Labor Law § 200 claim and common-law negligence cause of action against them. The Martins established their entitlement to judgment as a matter of law by demonstrating that they did not exercise supervisory control over plaintiff's work and that they neither created nor had actual or constructive notice of the allegedly dangerous condition that caused the accident, and plaintiff failed to raise a triable issue of fact in opposition (see *Alnutt v J&E Elec.*, 28 AD3d 1214).

With respect to the order in appeal No. 2, we conclude that the court properly granted the motion of the Bechtel defendants seeking leave to reargue those parts of their motion for summary judgment dismissing, inter alia, the Labor Law § 200 claim and common-law negligence cause of action against it and, upon reargument, the court properly granted those parts of its motion. The Bechtel defendants "met [their] burden of establishing that [they] did not supervise or control the work resulting in plaintiff's injury, and plaintiff[] failed to raise a triable issue of fact" in opposition (*Cooper v Sonwil Distrib. Ctr., Inc.*, 15 AD3d 878, 878-879).

All concur except LINDLEY and GREEN, JJ., who dissent in part and vote to modify in accordance with the following Memorandum: We respectfully dissent in part. Contrary to the majority, we conclude in appeal No. 1 that Supreme Court erred in granting that part of the motion of defendants Warner G. Martin and Shirley J. Martin (collectively, Martins) seeking summary judgment dismissing the Labor Law § 240 (1) claim against them and in denying that part of plaintiff's cross motion seeking partial summary judgment on liability with respect to the Labor Law § 240 (1) claim against the Martins. Plaintiff established that the Martins are "owners" within the meaning of section 240 (1) (see generally *Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 339-340). In addition, "[u]nder Labor Law § 240 (1), a 'structure' is 'any production or piece of work artificially built up or composed of parts joined together in some definite manner,' " and thus the wall module that plaintiff was cleaning when he fell is a "structure" within the meaning of the statute (*Lewis-Moors v Contel of N.Y.*, 78 NY2d 942, 943; see *Pino v Robert Martin Co.*, 22 AD3d 549, 552). Plaintiff further established that he was engaged in a protected activity, i.e., "cleaning," at the time of the accident, despite the fact that his work was not related to building

construction, demolition or repair. "The crucial consideration under section 240 (1) is not whether the cleaning is taking place as part of a construction, demolition or repair project, or is incidental to another activity protected under section 240 (1) . . . Rather, liability turns on whether the particular [cleaning] task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against" (*Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681). Here, plaintiff met his burden of establishing that he was exposed to an elevation-related risk and that he was not provided with an adequate safety device (*see Swiderska v New York Univ.*, 10 NY3d 792). The Martins failed to raise a triable issue of fact sufficient to defeat the cross motion (*see Zuckerman v City of New York*, 49 NY2d 557, 562). We therefore would modify the order in appeal No. 1 accordingly.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1308

CA 10-00839

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

MICHAEL DAHAR, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

HOLLAND LADDER & MANUFACTURING COMPANY,
GREEN BULL, INC., HANES SUPPLY, INC.,
BECHTEL CORPORATION, BECHTEL NATIONAL, INC.,
WARNER G. MARTIN, AND SHIRLEY J. MARTIN,
DEFENDANTS-RESPONDENTS.

BECHTEL CORPORATION AND BECHTEL NATIONAL, INC.,
THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

WEST METAL WORKS, INC., THIRD-PARTY
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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

LANDMAN CORSI BALLAINE & FORD P.C., NEW YORK CITY (WILLIAM G. BALLAINE
OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BECHTEL CORPORATION AND
BECHTEL NATIONAL, INC., AND THIRD-PARTY PLAINTIFFS-RESPONDENTS.

HODGSON RUSS LLP, BUFFALO (HEATHER ZIMMERMAN OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS WARNER G. MARTIN AND SHIRLEY J. MARTIN.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered March 11, 2010 in a personal injury action. The order, among other things, granted in part the motion of defendants-third-party plaintiffs Bechtel Corporation and Bechtel National, Inc. for leave to reargue their motion for summary judgment.

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

Same Memorandum as in *Dahar v Holland Ladder & Mfg. Co.* ([appeal No. 1] ___ AD3d ___ [Dec. 30, 2010]).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1345

CA 10-00892

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

BRANDON WILLIAM GARDNER, INDIVIDUALLY AND
AS ADMINISTRATOR WITH WILL ANNEXED OF THE
ESTATE OF WILLIAM G. GARDNER, DECEASED,
CYNTHIA ANN GARDNER, AND RYAN J. GARDNER,
CLAIMANTS-APPELLANTS,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 109520.)

ANTHONY F. ENDIEVERI, CAMILLUS, FOR CLAIMANTS-APPELLANTS.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MICHAEL S. BUSKUS OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Diane L. Fitzpatrick, J.), entered November 5, 2009 in a wrongful death action. The judgment dismissed the claim after a trial.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the claim is reinstated, judgment on liability is granted in favor of claimants and the matter is remitted to the Court of Claims for a trial on the issue of damages only.

Memorandum: Claimants commenced this wrongful death action seeking damages for the fatal injuries sustained by decedent when the vehicle he was driving slid across the roadway while passing over a highway bridge (bridge), struck a snowbank packed against the concrete barrier guard at the edge of the bridge and vaulted off the bridge onto a roadway below. Another fatal accident had previously occurred in approximately the same manner and the same location 36 hours prior to decedent's accident. Defendant removed the snowbank from the bridge only after decedent's accident. According to claimants, defendant was negligent in, inter alia, creating the dangerous condition of the snowbank, which rendered the concrete barrier guard ineffective, failing to maintain the bridge in a safe condition, failing to warn of that dangerous condition, and failing to close the bridge in the event that it could not be made safe for travelers.

Following a trial, the Court of Claims determined that the snow piled against the highway's concrete barrier guard constituted a dangerous condition of which defendant had notice. Nevertheless, the

court concluded that, based on the continuing weather pattern, defendant did not have "resources and manpower" to remedy the dangerous condition between the time of the first fatal accident and decedent's accident, and the court therefore dismissed the claim. Viewing the evidence in the light most favorable to the prevailing party, we conclude that the court's decision could not have been reached under any fair interpretation of the evidence (*see generally Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170; *Farace v State of New York*, 266 AD2d 870).

Defendant has a duty to maintain its roadways "in a reasonably safe condition for foreseeable uses, including those uses resulting from a driver's negligence or an emergency" (*Stiuso v City of New York*, 87 NY2d 889, 890-891; *see Carollo v Town of Colden*, 27 AD3d 1077, 1078). That duty includes "an obligation to provide and maintain adequate and proper barriers along its highways" (*Gomez v New York State Thruway Auth.*, 73 NY2d 724, 725). Defendant argued at trial that its response to the first fatal accident, i.e., continuing its regular snow and ice removal operations on the bridge, was reasonable because it was in conformity with New York State Department of Transportation guidelines for snow and ice removal. We conclude, however, that those guidelines were "evolved without adequate study or lacked reasonable basis" (*Weiss v Fote*, 7 NY2d 579, 589, *rearg denied* 8 NY2d 934), inasmuch as they provide for the correction of a dangerous condition, such as a slippery roadway, before the correction of a *deadly* condition, such as the snowbank "ramp" at issue. Although defendant's expert witness testified that defendant had no option following the first fatal accident other than to continue regular snow and ice removal from the traveling lanes of the bridge, we conclude that his testimony is not supported by the meteorological evidence (*see generally Romano v Stanley*, 90 NY2d 444, 451-452; *Silverman v Sciartelli*, 26 AD3d 761, 762). Only 2.1 inches of snow fell between the two accidents, including 0.2 inches of snow that fell on the day of decedent's accident. There is no fair interpretation of the evidence that defendant's response to a *deadly* condition by removing minimal snow and ice accumulations while failing to remove the snowbank that had caused the fatality was reasonable (*cf. Hart v State of New York*, 43 AD3d 524, 525; *Farace*, 266 AD2d 870). Indeed, based on the record before us, we conclude that the relevant conditions and circumstances, including defendant's failure to remedy the snowbank once it had actual notice of that condition, establish that defendant was negligent and that its negligence was a proximate cause of decedent's accident (*see generally Hart*, 43 AD3d at 525).

We therefore reverse the judgment, reinstate the claim, grant judgment on liability in favor of claimants and remit the matter to the Court of Claims for a trial on the issue of damages only.

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

1353

CA 10-00406

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

NICHOLAS J. ROGERS, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

NIAGARA FALLS BRIDGE COMMISSION,
DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (PAUL D. MCCORMICK OF COUNSEL), FOR
DEFENDANT-APPELLANT.

JOHN J. DELMONTE, NIAGARA FALLS, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered August 18, 2009 in a personal injury action. The order denied the motion of defendant and cross motion of plaintiff.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he allegedly slipped and fell on black ice in a parking lot owned by defendant. Defendant contends that Supreme Court erred in denying its motion for summary judgment dismissing the complaint. We reject that contention inasmuch as defendant failed to meet its initial burden of establishing that it did not have constructive notice of the allegedly dangerous condition. In support of its motion, defendant submitted, inter alia, the deposition testimony of plaintiff, who testified that he slipped on black ice, and the deposition testimony of an employee of defendant, who testified that there were no procedures for regularly inspecting the premises and that he knew of no inspection that took place on the day of the accident. Thus, "[d]efendant submitted no evidence to establish 'that the ice formed so close in time to the accident that [it] could not reasonably have been expected to notice and remedy the condition' " (*Kimpland v Camillus Mall Assoc., L.P.*, 37 AD3d 1128, 1129). Even assuming, arguendo, that defendant met its initial burden, we conclude that plaintiff raised a triable issue of fact sufficient to defeat the motion. "Contrary to [defendant's] contention, the expert affidavit submitted by plaintiff[] was not speculative and was properly based on data from the National Climatic

Data Center" (*Zemotel v Jeld-Wen, Inc.*, 50 AD3d 1586, 1587).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1371

CA 10-00580

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

IN THE MATTER OF PETER E. BISSELL,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

TOWN OF AMHERST, ET AL., RESPONDENTS,
NEW YORK STATE INSURANCE FUND,
RESPONDENT-APPELLANT.

HAL FRIEDMAN, NEW YORK CITY, FOR RESPONDENT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Paula L. Ferroletto, J.), entered November 4, 2009. The judgment granted the application of petitioner to extinguish the lien of respondent New York State Insurance Fund.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying those parts of the petition seeking to extinguish a lien asserted by respondent New York State Insurance Fund against the proceeds that petitioner obtained in a third-party action and seeking to recover from that respondent its share of litigation costs related to future medical payments and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Petitioner sustained grave injuries while employed by respondent McGonigle & Hilger Roofing Company and working on property owned by respondent Town of Amherst (Town). Although petitioner began receiving workers' compensation benefits, he commenced an action against his employer and the Town seeking damages for his injuries. On a prior appeal in that action, we modified the judgment in favor of petitioner and his wife (hereafter, plaintiffs) by, inter alia, setting aside the award of damages for past and future pain and suffering and granting a new trial on those elements of damages unless plaintiffs stipulated to reduced awards (*Bissell v Town of Amherst*, 56 AD3d 1144, *lv dismissed in part and denied in part* 12 NY3d 878).

After an amended judgment was entered for \$23,400,000, respondent New York State Insurance Fund (NYSIF) asserted a lien against the proceeds of the judgment in the amount of \$219,760.34 for past payments of compensation and medical benefits. NYSIF recognized that

it was obligated to contribute toward the litigation costs incurred by petitioner "in effecting the third-party recovery based both on the lien to be recovered and on the present value of future workers' compensation [benefits] being saved as a result of its credit right." Using the equitable apportionment percentage (EAP) of 33.5%, which represents the percentage that litigation costs bore to the third-party recovery, NYSIF calculated that its share of litigation costs was \$171,840.37, and thus it sought to recover the difference of \$47,919.97 from petitioner. NYSIF also recognized that it was required to contribute toward litigation costs to the extent that it received a benefit from foregone future medical payments, but it refused to include the present value of those payments in calculating its share of litigation costs. According to NYSIF, the present value of those future payments was "purely speculative" pursuant to *Burns v Varriale* (9 NY3d 207). Rather, NYSIF proposed reimbursing petitioner "for any payment of compensable medical treatment that [he] makes from his own funds" based on the EAP of 33.5%.

Petitioner rejected that proposal and commenced this proceeding seeking to extinguish the NYSIF lien and to obtain a judgment against NYSIF in the amount of \$1,399,734.80 for its share of petitioner's litigation costs. We conclude that Supreme Court erred in granting the petition in its entirety inasmuch as the benefit received by NYSIF based on foregone future medical payments should not be included in calculating its share of litigation costs.

Pursuant to Workers' Compensation Law § 29 (1), an employee who is injured "by the negligence . . . of another not in the same employ" may collect workers' compensation benefits and may also pursue his or her "remedy" against the negligent party. If the employee elects to commence an action against the negligent party, the insurance fund or other carrier liable for the workers' compensation benefits "shall have a lien on the proceeds of any recovery . . . after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated by [the Workers' Compensation Law] for such case and the expenses for medical treatment paid or to be paid by it and to such extent such recovery shall be deemed for the benefit of such fund . . . or [other] carrier" (*id.*). The employee may thereafter apply "for an order apportioning the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery" (*id.*). It is well established that the apportionment is calculated "according to the relative benefit derived by each party from the recovery . . . The carrier's equitable share of the litigation costs [is] a pro rata share of the total amount of the recovery inuring to the benefit of the carrier" (*Matter of Kelly v State Ins. Fund*, 60 NY2d 131, 136). The purpose of such apportionment is "to stem the inequity to the [employee], arising when a carrier benefits from [the] employee's recovery while assuming none of the costs incurred in obtaining the recovery" (*id.* at 138). The benefit to the fund or carrier includes the past compensation paid, as well as "the value of estimated future compensation payments that, but for the employee's efforts, the carrier would have been obligated to make" (*id.*).

NYSIF concedes that its share of litigation costs must be based on the benefit resulting from past and future compensation benefits, as well as past medical benefits, but it contends that the value of foregone future medical payments should not be considered in calculating its share of litigation costs unless and until those payments are made. We agree. Petitioner correctly contends that the jury's award for future medical expenses cannot be deemed speculative inasmuch as we have already determined that the award was supported by the evidence (*Bissell*, 56 AD3d at 1148; see generally *Ellis v Emerson*, 57 AD3d 1435, 1437; *Faas v State of New York*, 249 AD2d 731, 732). That award, however, did not take into account the established rates of compensation for medical payments set by the Workers' Compensation Law (see § 13 [a]; 11 NYCRR part 68), and the only benefit received by NYSIF is the amount of foregone medical payments that would have been made under those rates. We thus conclude that the benefit received by NYSIF for foregone future medical payments has not been established and that any determination of NYSIF's share of litigation costs with respect to those payments would be speculative (see *Burns*, 9 NY3d at 215; *Matter of McKee v Sithe Independence Power Partners*, 281 AD2d 891; *Matter of Briggs v Kansas City Fire & Mar. Ins. Co.*, 121 AD2d 810, 811-812). We therefore modify the judgment by denying those parts of the petition seeking to extinguish NYSIF's lien and seeking to recover from NYSIF its share of litigation costs insofar as the benefit received by NYSIF with respect to foregone future medical payments is included in the calculation of its share of litigation costs, and we remit the matter to Supreme Court for recalculation of NYSIF's share of litigation costs.

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

1378

KA 09-00936

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TYMONN LEE, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered April 2, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree and robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for resentencing in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and robbery in the first degree (§ 160.15 [1]). We agree with defendant that County Court failed to set forth on the record its determination denying defendant's request for youthful offender treatment or the reasons for that determination (see CPL 720.20 [1]). Pursuant to CPL 720.20 (1), the court has a statutory obligation to determine, on the record, whether an eligible youth should be afforded youthful offender treatment where, as here, the defendant requests such treatment (see *People v Rivera*, 27 AD3d 491, *lv denied* 6 NY3d 897; *People v Martinez*, 301 AD2d 615, *lv denied* 99 NY2d 656). Despite defendant's eligibility for youthful offender treatment, the court did not articulate the reasons for its denial of defendant's request. We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing after a determination whether defendant should be sentenced as a youthful offender (see *People v Mattis*, 46 AD3d 929, 932; *Rivera*, 27 AD3d 491; *Martinez*, 301 AD2d 615). In light of our determination, we do not address defendant's remaining contentions.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1383

KA 08-02676

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SHAWN A. KELLY, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered July 27, 2007. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal contempt in the first degree (Penal Law § 215.51 [b] [iv]; [c]). Defendant contends that the evidence is legally insufficient to support the conviction under both counts. With respect to the first count, defendant contends that there was no evidence that he intended to harass, annoy, threaten or alarm the victim (see § 215.51 [b] [iv]). Viewing the evidence in the light most favorable to the prosecution, as we must (see *People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient with respect to that count (see § 215.51 [b] [iv]; *People v Alexander*, 50 AD3d 816, 817-818, lv denied 10 NY3d 955). It is well established that "[i]ntent may be inferred from conduct as well as the surrounding circumstances" (*People v Steinberg*, 79 NY2d 673, 682), and the evidence presented at trial established that defendant repeatedly and continuously telephoned the victim as well as her friends over a period of six hours despite being repeatedly told that the victim did not wish to speak with him. With respect to the second count, defendant contends that the People failed to present the evidence required by the statute, i.e., that the predicate conviction arose from the violation of a "stay away" provision of an order of protection (see § 215.51 [c]). Defendant failed to preserve that contention for our review, however, inasmuch as his motion for a trial order of dismissal was not specifically directed at that alleged deficiency in the evidence (see *People v Gray*, 86 NY2d 10, 19).

Contrary to defendant's further contention, County Court's "Sandoval compromise . . . reflects a proper exercise of the court's discretion" (*People v Thomas*, 305 AD2d 1099, lv denied 100 NY2d 600). In any event, any alleged error in the court's *Sandoval* compromise is harmless. The evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the alleged error (see *People v Singleton*, 66 AD3d 1444, 1445, lv denied 13 NY3d 862; see generally *People v Crimmins*, 36 NY2d 230, 241-242). The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1389

CA 10-01233

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

LEON MAKIN, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CAROL VANTREESE, ALSO KNOWN AS CAROL
MAKIN, ET AL., DEFENDANTS,
AND DCG PINE HILL, LLC, DEFENDANT-APPELLANT.

PHILLIPS LYTTLE LLP, BUFFALO (MARC W. BROWN OF COUNSEL), FOR
DEFENDANT-APPELLANT.

LAW OFFICE OF DANIEL PRATT GERWIG, CORNING (DANIEL PRATT GERWIG OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered August 4, 2009 in an action pursuant to RPAPL article 15. The order, insofar as appealed from, denied the motion of defendant DCG Pine Hill, LLC for summary judgment dismissing the second amended complaint.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, to enforce an agreement pursuant to which his deceased brother was to purchase real property from their sister-in-law, defendant Carol Vantreese, also known as Carol Makin (hereafter, Carol Makin). According to plaintiff, defendant DCG Pine Hill, LLC (DCG), the actual purchaser of the property in question, had notice of the agreement between plaintiff's deceased brother and Carol Makin that allowed plaintiff to assume the rights of his brother with respect to the agreement in the event of his death. We conclude that Supreme Court erred in denying the motion of DCG for summary judgment dismissing the second amended complaint against it. We agree with DCG that the description of the real property contained in the agreement was not sufficiently specific to satisfy the statute of frauds (*see generally* General Obligations Law § 5-703 [2]). It is unclear from that description how the property is to be divided into three sections pursuant to the agreement, and thus the agreement is unenforceable (*see Allegro v Youells*, 67 AD3d 1081, 1082-1083; *Sieger v Prehay*, 16

AD3d 575; *Duffy v Benjamin*, 280 App Div 993).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1390

CA 10-00615

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

SANDRA J. SMITH, PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

CHARLES D. SMITH, DEFENDANT-APPELLANT-RESPONDENT.

SIEGEL, KELLEHER & KAHN, BUFFALO (KENNETH A. OLENA OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

SACCA & SACCA, LOCKPORT (JAMES P. RENDA OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

ALVIN M. GREENE, ATTORNEY FOR THE CHILDREN, BUFFALO, FOR STEVEN S., LUCAS S. AND AARON S.

Appeal and cross appeal from a judgment of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered July 9, 2009 in a divorce action. The judgment, among other things, determined the issues of equitable distribution of the marital assets, support and attorney's fees.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the duration of maintenance to nine years from the date on which the action was commenced and as modified the judgment is affirmed without costs.

Memorandum: On appeal from the judgment in this divorce action, defendant contends that Supreme Court abused its discretion in awarding maintenance to plaintiff "in the sum of \$900 per week for a period of [16] years, or until [p]laintiff's death, remarriage, or upon her habitual co-habitation with an unrelated male . . . or upon the [d]efendant's retirement at or after age 64, whichever first occurs." We agree. Although the court has broad discretion in fixing the amount and duration of a maintenance award (*see Boughton v Boughton*, 239 AD2d 935), "the authority of this Court [in determining questions of maintenance] is as broad as that of the trial court" (*Marino v Marino*, 229 AD2d 971, 972). In view of the relevant statutory factors, i.e., the almost 23-year duration of the marriage, plaintiff's age, good health, high school education and limited work experience, the disparity in income between the parties and the ages of the children presently in plaintiff's home (*see Domestic Relations Law* § 236 [B] [6] [a]), we modify the judgment by reducing the duration of maintenance to nine years from the date on which the action was commenced (*see Burroughs v Burroughs*, 269 AD2d 765).

We reject defendant's further contention that the court abused its discretion in awarding exclusive use and occupancy of the marital residence to plaintiff until the youngest child turns 18, graduates high school or becomes emancipated. " 'Courts now express a preference for allowing a custodial parent to remain in the marital residence until the youngest child becomes 18 unless such parent can obtain comparable housing at a lower cost or is financially incapable of maintaining the marital residence, or either spouse is in immediate need of his or her share of the sale proceeds' " (*Stacey v Stacey*, 52 AD3d 1219, 1221; see *Nissen v Nissen*, 17 AD3d 819, 820; *Nolan v Nolan*, 215 AD2d 795). In light of the fact that the youngest child is now 14 years old, we see no reason to disturb the court's determination allowing plaintiff to remain in the marital residence for no longer than four additional years.

Contrary to defendant's contention, the award of attorney's fees to plaintiff was not "grossly excessive." The court properly "review[ed] the financial circumstances of both parties together with all the other circumstances of the case, . . . includ[ing] the relative merit of the parties' positions" (*DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881). Moreover, the court properly considered defendant's obstructionist conduct, which unnecessarily delayed the proceedings and increased the legal fees incurred by plaintiff (see *Johnson v Chapin*, 49 AD3d 348, 361, *mod on other grounds* 12 NY3d 461, *rearg denied* 13 NY3d 888). We have considered defendant's remaining contentions and conclude that they are without merit.

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

1391

OP 10-01251

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

IN THE MATTER OF FLORINE NELSON, WALTER NELSON,
JILL CERMAK AND BRUCE HENRY,
PETITIONERS-PLAINTIFFS,

V

MEMORANDUM AND ORDER

HONORABLE THOMAS A. STANDER, IN HIS OFFICIAL
CAPACITY AS JUSTICE OF SUPREME COURT, MONROE
COUNTY, CARLOS CARBALLADA, IN HIS OFFICIAL
CAPACITY AS COMMISSIONER OF COMMUNITY
DEVELOPMENT OF CITY OF ROCHESTER, AND CITY
OF ROCHESTER, RESPONDENTS-DEFENDANTS.

DAVIDSON FINK LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR
PETITIONERS-PLAINTIFFS.

THOMAS S. RICHARDS, CORPORATION COUNSEL, ROCHESTER (IGOR SHUKOFF OF
COUNSEL), FOR RESPONDENTS-DEFENDANTS CARLOS CARBALLADA, IN HIS
OFFICIAL CAPACITY AS COMMISSIONER OF COMMUNITY DEVELOPMENT OF CITY OF
ROCHESTER, AND CITY OF ROCHESTER.

Proceeding pursuant to CPLR article 78 (initiated in the
Appellate Division of the Supreme Court in the Fourth Judicial
Department pursuant to CPLR 506 [b] [1]) seeking, inter alia, to
vacate certain warrants of inspection.

It is hereby ORDERED that said petition is unanimously dismissed
without costs, and the declaratory judgment action is transferred to
Supreme Court for further proceedings.

Memorandum: Petitioners-plaintiffs (petitioners) commenced this
original hybrid CPLR article 78 proceeding and declaratory judgment
action seeking a writ of prohibition and challenging, inter alia, the
jurisdiction and authority of respondent Honorable Thomas A. Stander
to issue judicial warrants of inspection (inspection warrants)
pursuant to Local Law No. 3 of 2009 (hereafter, Local Law No. 3),
enacted by respondent City of Rochester (City) (see CPLR 506 [b] [1];
7804 [b]). We conclude that the proceeding and action are not
properly before us, and we therefore dismiss the petition and transfer
the declaratory judgment action to Supreme Court for further
proceedings (see *Donaldson v State of New York*, 156 AD2d 290, 292, *lv*
dismissed in part and denied in part 75 NY2d 1003).

The City requires rental properties to have valid Certificates of

Occupancy (Certificates) that must be renewed within a certain time period (see generally City of Rochester Code § 90-16). For many years, the City attempted to inspect the properties owned by or rented to petitioners in order to issue or to renew the properties' Certificates, but petitioners refused access to City inspectors. Local Law No. 3 added article 1, Part B to the Charter of the City of Rochester (City Charter) to provide a means for City inspectors to obtain inspection warrants permitting them access to properties where the owners or tenants refuse to consent to the inspection (see City Charter § 1-9).

After Local Law No. 3 was enacted, the City unsuccessfully attempted to obtain consent to inspect the properties at issue. The City then notified petitioners of its intent to seek inspection warrants for the properties. It is undisputed that "all involved in [the] inspection warrant application[s], the premise occupants . . . [,] owner[s] and the attorney[s], [had] notice of the application[s] to [Supreme] Court [and that] the [c]ourt [had] accepted opposition papers and oral argument on behalf of the occupants and owner of the premises."

By two separate orders issued in February 2010 (hereafter, February 2010 orders), Justice Stander denied petitioners' challenges to Local Law No. 3 that were "ripe for determination" and ordered hearings to determine whether there was probable cause to issue the inspection warrants. Following those hearings, Justice Stander issued inspection warrants with respect to the properties at issue.

Even assuming, arguendo, that the proceeding is not moot, we conclude that the petition must be dismissed "because other proceedings in law or equity could correct the alleged error" (*Matter of Garner v New York State Dept. of Correctional Servs.*, 10 NY3d 358, 362; see *Matter of Echevarria v Marks*, 57 AD3d 1479, *affd sub nom. People v William*, 14 NY3d 198, *cert denied* ___ US ___ [Oct 4, 2010]; *Matter of Rush v Mordue*, 68 NY2d 348, 352-353). "Use of the writ [of prohibition] is, and must be, restricted so as to prevent incessant interruption of pending judicial proceedings by those seeking collateral review of adverse determinations made during the course of those proceedings. Permitting liberal use of [that] extraordinary remedy so as to achieve, in effect, premature appellate review of issues properly reviewable in the regular appellate process would serve only to frustrate the speedy resolution of disputes and to undermine the statutory and constitutional schemes of ordinary appellate review" (*Rush*, 68 NY2d at 353). We conclude that the February 2010 orders were not *ex parte* orders (see generally *Kuriansky v Bed-Stuy Health Care Corp.*, 135 AD2d 160, 170, *affd* 73 NY2d 875; *Paris v Waterman S.S. Corp.*, 218 AD2d 561, 563, *lv dismissed* 96 NY2d 937), and they could have been reviewed through the regular appellate process.

With respect to petitioners' challenge to the constitutionality or legality of Local Law No. 3, we note that "[a] declaratory judgment action is the proper vehicle for [such a] challeng[e]" (*Matter of*

Velez v DiBella, ___ AD3d ___, ___ [Oct. 5, 2010]; see *New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194, 203-204, rearg denied 84 NY2d 865; *Matter of Overhill Bldg. Co. v Delany*, 28 NY2d 449, 457-458). Petitioners, however, "may not seek declaratory relief in this original proceeding pursuant to CPLR article 78 . . . [because] this Court 'lacks jurisdiction to consider a declaratory judgment action in the absence of a proper appeal from a court order or judgment' " (*Matter of Jefferson v Siegel*, 28 AD3d 1153, 1154; see *Matter of Levenson v Lippman*, 290 AD2d 211, appeal dismissed 98 NY2d 635; *Donaldson*, 156 AD2d at 292).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1393

CA 09-02534

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

ARTHUR J. SPRINGS, JR., PLAINTIFF-RESPONDENT,

V

ORDER

CITY OF BUFFALO, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

CITY OF BUFFALO, THIRD-PARTY PLAINTIFF-APPELLANT,

V

HARSCO CORPORATION AND PATENT CONSTRUCTION
SYSTEMS, THIRD-PARTY DEFENDANTS-APPELLANTS.

CONNORS & CORCORAN LLP, ROCHESTER, GOLDBERG SEGALLA LLP, ALBANY
(MATTHEW S. LERNER OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-
PARTY PLAINTIFF-APPELLANT.

LAW OFFICES OF DOUGLAS COPPOLA, BUFFALO (WILLIAM K. KENNEDY OF
COUNSEL), FOR THIRD-PARTY DEFENDANTS-APPELLANTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered February 25, 2009 in a personal injury action. The order granted the motion of plaintiff to set aside a jury verdict and ordered a new trial on damages.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1405

KA 10-00394

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

SANDRA SALVAGNI, DEFENDANT-APPELLANT.

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

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered January 12, 2010. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the third degree.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1406

KA 07-00903

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARCELLE E. WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (ELIZABETH CLIFFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered February 27, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree.

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

Same Memorandum as in *People v Williams* ([appeal No. 2] ___ AD3d ___ [Dec. 30, 2010]).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1407

KA 07-00077

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JUDSON WATKINS, DEFENDANT-APPELLANT.

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

JUDSON WATKINS, DEFENDANT-APPELLANT PRO SE.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Joseph E. Fahey, J.), entered November 29, 2006. The order denied defendant's CPL article 440 motion.

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

Memorandum: Defendant appeals from an order denying his motion pursuant to CPL article 440 seeking to vacate the judgment convicting him, inter alia, of rape in the first degree (Penal Law § 130.35 [3]) and to set aside his sentence of incarceration of 25 years to life. In denying the motion, County Court properly concluded that the contention of defendant that he was denied effective assistance of counsel could have been raised on his direct appeal from the judgment of conviction (see CPL 440.10 [2] [c]; *People v Mastowski*, 63 AD3d 1589, lv denied 12 NY3d 927, 13 NY3d 837; *People v Hall*, 28 AD3d 678, lv denied 7 NY3d 867). The court also properly concluded that the challenge by defendant to the finding that he is a persistent felony offender was previously determined on the merits in the context of his direct appeal (*People v Watkins*, 17 AD3d 1083, 1084, lv denied 5 NY3d 771), and we note that there has been no "retroactively effective change in the law controlling such issue" (CPL 440.10 [2] [a]). Contrary to the contentions of defendant in his pro se supplemental brief, the court was required to deny the motion summarily (see CPL 440.30 [2]; *Hall*, 28 AD3d at 679), and the court properly "set forth on the record its findings of fact, its conclusions of law and the

reasons for its determination" (CPL 440.30 [7]).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1408

KA 07-01506

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CARLOS PICHARDO, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Dennis M. Kehoe, A.J.), rendered June 4, 2007. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant previously was convicted after a jury trial of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), and we reversed that judgment of conviction based on a *Bruton* violation (*People v Pichardo*, 34 AD3d 1223, lv denied 8 NY3d 926). Defendant now appeals from a judgment convicting him of the same crimes following a second jury trial.

We reject defendant's contention that Supreme Court erred in allowing court personnel to communicate with the jury outside defendant's presence in two instances. The first instance occurred following the opening statements of the People and defense counsel. A court officer informed the court that a juror had asked the court officer whether the court "could give the applicable law prior to the trial beginning." In the presence of the attorneys and defendant, the court stated that it did not intend to do so, but invited comments from the attorneys before informing the jury of its decision. Defense counsel stated that he had no objections to the court's intended response and declined the court's offer to address the court officer to whom the juror had spoken. Even assuming, arguendo, that defendant was not required to preserve for our review his present challenge to that communication between the court officer and the juror (*cf. People*

v Kadarko, 14 NY3d 426, 429-430; *People v Starling*, 85 NY2d 509, 516; *People v Donoso*, ___ AD3d ___, ___ [Oct. 12, 2010]), and further assuming, arguendo, that CPL 310.30 applies under such circumstances (*cf. People v Hameed*, 88 NY2d 232, 239-241, *cert denied* 519 US 1065), we discern no error in the court's handling of this matter. Although defendant contends that the court officer improperly "spoke" to the juror, nothing in CPL 310.30 requires that the juror's request or the court's response to that request be in writing (see *People v O'Rama*, 78 NY2d 270, 277-278). The court officer did not respond to the juror but, rather, simply informed the court of the juror's request. The court then properly notified defendant of the juror's request and gave defendant and his attorney the requisite opportunity to be heard before responding to the juror's request (see *id.* at 276-277).

The second instance in which court personnel communicated with the jury outside defendant's presence occurred during jury deliberations, when the jury handed a court officer a written note requesting, *inter alia*, "interpret notes written in Spanish." The court officer, without notifying the court, told the jury that he "wasn't exactly sure what that meant." The jury then sent out a second note, requesting that two notes attached to the jury's note be translated. The court discussed that request with the attorneys in defendant's presence and indicated that it intended to deny the request. Defendant did not object to the court officer's initial response to the jury or to the court's intended response to the second note. Defendant now contends (hereafter, the *O'Rama* contention) that reversal is required because neither he nor his attorney was notified of the contents of the first note or was permitted to respond to it before the court officer sought clarification from the jury (see *id.*). Defendant also contends (hereafter, the *Ahmed* contention) that reversal is required because the court officer engaged in a judicial function outside defendant's presence (see *People v Ahmed*, 66 NY2d 307, *rearg denied* 67 NY2d 647).

Although defendant concedes that he failed to preserve either of those contentions for our review, he nevertheless contends that preservation is not required because the alleged errors implicate the organization of the court or the mode of proceedings prescribed by law. We reject that contention. With respect to defendant's *O'Rama* contention, we note that, "[i]n *O'Rama* and its progeny, the Court of Appeals has made it abundantly clear that it was not the [C]ourt's intention 'to mandate adherence to a rigid set of procedures, but rather [the Court intended] to delineate a set of guidelines calculated to maximize participation by counsel at a time when counsel's input is most meaningful, i.e., before the court gives its formal response' " (*Donoso*, ___ AD3d at ___, quoting *O'Rama*, 78 NY2d at 278). It is well established that "a defendant need not object to the trial court's improper handling of a jury note in order to challenge the court's procedure on appeal if the court's actions had the effect of 'preventing defense counsel from participating meaningfully in this critical stage of the trial' " (*id.* at ___). "[T]he Court of Appeals has held[, however,] that when defense counsel is given notice of the substance of the contents of a jury note and

has knowledge of the substance of the court's intended response, counsel must object in order to preserve the claim for appellate review" (*id.* at ___; see *Kadarko*, 14 NY3d at 429-430; *Starling*, 85 NY2d at 516; *cf.* *People v Kisoan*, 8 NY3d 129, 135). Here, defense counsel was notified of the contents of both notes and was given an opportunity to participate meaningfully before the court gave its formal response to the jury. We thus conclude that defendant was required to preserve the *O'Rama* contention.

We likewise conclude that defendant was required to preserve the *Ahmed* contention for our review. In *People v Kelly* (5 NY3d 116, 118), a court officer, without the knowledge of or permission from the court, "agreed to the jury's request that he place the bayonet [in question] in his waistband (as the defendant had worn it) and draw it from its sheath." The jurors then asked whether the bayonet had slid easily out of the sheath, and he replied in the affirmative (*id.*). Defendant and his attorney were subsequently notified of that event, and the court instructed the jury to disregard the demonstration and the court officer's answer to the jury's question (*see id.*). No further objections were made at that time, but the court thereafter denied defendant's motion pursuant to CPL 440.40 based on an *Ahmed* contention (*see id.* at 118-119). Defendant then appealed both from the order denying his CPL article 440 motion and the judgment, and this Court affirmed both the order and judgment (11 AD3d 133). Upon granting leave to appeal (3 NY3d 758), the Court of Appeals determined that preservation of defendant's contention was required inasmuch as the contention did not raise a "mode of the proceedings error [because] the judge delegated nothing" (*Kelly*, 5 NY3d at 120). Rather, "[t]he very opposite took place. The court officer's demonstration to the jury was unauthorized, and when learning of it, the court took hold of the proceedings and summoned the lawyers to discuss the options" (*id.*). Here, as in *Kelly*, the court officer acted without delegation from the court; the court informed defendant of the event upon learning of it; and the court gave defendant an opportunity to respond. We thus conclude that, as in *Kelly*, preservation of defendant's *Ahmed* contention is required (*cf.* *People v Khalek*, 91 NY2d 838).

In any event, we conclude that both the *O'Rama* and *Ahmed* contentions are lacking in merit. As the Court of Appeals has recognized, "not every communication with a deliberating jury requires the participation of the court or the presence of the defendant" (*People v Bonaparte*, 78 NY2d 26, 30). Here, the communications by the court officer with the jury were merely ministerial communications (*see generally id.* at 30-31), requiring neither defendant's presence (*see e.g. People v Lykes*, 81 NY2d 767, 769; *People v Harris*, 76 NY2d 810, 812), nor the court's involvement (*see CPL 310.10; see e.g. People v Alicea*, 272 AD2d 241, *lv denied* 95 NY2d 863; *People v Hodges*, 173 AD2d 644, *lv denied* 78 NY2d 1011; *cf. People v Torres*, 72 NY2d 1007).

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

severe.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1409

KA 10-01349

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GORDON GROSS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LINDA C. LAVERY, SKANEATELES, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered April 1, 2009. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child, rape in the first degree, attempted sexual abuse in the first degree and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of, inter alia, predatory sexual assault against a child (Penal Law § 130.96), rape in the first degree (§ 130.35 [1]), and attempted sexual abuse in the first degree (§§ 110.00, 130.65 [3]). Contrary to the contention of defendant, County Court did not abuse its discretion in denying his motion to present surrebuttal evidence, inasmuch as the proposed evidence would have been "cumulative to, and duplicative of, evidence already presented on defendant's direct case" (*People v Harris*, 98 NY2d 452, 490; see generally CPL 260.30 [7]). We also reject the contention of defendant that the court abused its discretion in denying his motion for a mistrial (see generally *People v Ortiz*, 54 NY2d 288, 292; *People v Samuels*, 251 AD2d 1038, lv denied 92 NY2d 905). Although the court erred in permitting two witnesses to refer to conversations that they each had with the victim about defendant because such testimony violated the court's pretrial ruling excluding prompt outcry testimony (see generally *People v Workman*, 56 AD3d 1155, 1157, lv denied 12 NY3d 789), we conclude under the circumstances of this case that the court's curative instruction with respect to that testimony was sufficient to alleviate any prejudice to defendant (see generally *People v Young*, 48 NY2d 995, rearg dismissed 60 NY2d 644; *People v Hawkes*, 39 AD3d 1209, 1210, lv denied 9 NY3d 844, 845). Viewing the evidence in light of the elements of the crimes as charged to the jury

(see *People v Danielson*, 9 NY3d 342, 349), and according great deference to the jury's resolution of credibility issues (see generally *People v Bleakley*, 69 NY2d 490, 495), we conclude that the verdict is not against the weight of the evidence (see generally *id.*). We further conclude that the sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that they are without merit.

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

1410

KA 07-00962

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

FRANK J. POVOSKI, JR., DEFENDANT-APPELLANT.

MATTHEW D. NAFUS, SCOTTSVILLE, 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 (John J. Ark, J.), rendered July 26, 2006. The judgment convicted defendant, upon his plea of guilty, of conspiracy in the second degree (four counts), conspiracy in the fifth degree (three counts), attempted escape in the second degree and promoting prison contraband in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed for reasons stated in *People v Povoski* (___ AD3d ___ [Nov. 12, 2010]).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1411

KA 08-02409

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARCELLE E. WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (ELIZABETH CLIFFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered September 26, 2006. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law, that part of the motion seeking to suppress physical evidence is granted and a new trial is granted.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]) and, in appeal No. 2, he appeals from a prior judgment convicting him upon a jury verdict of burglary in the second degree (§ 140.25 [2]). Addressing first the judgment in appeal No. 2, we agree with defendant that money seized from his pocket by a police officer should have been suppressed as the fruit of an unlawful arrest. The record of the suppression hearing establishes that the police were justified in stopping defendant's vehicle for a speeding violation, and in thereafter asking defendant to produce his license and registration and to exit the vehicle (see generally *People v Banks*, 85 NY2d 558, 562, cert denied 516 US 868; *People v Johnson*, 102 AD2d 616, 625, lv denied 63 NY2d 776). The officers who conducted the traffic stop, however, "went beyond merely ordering defendant from his car. [They] took the additional 'protective measures' of frisking defendant, handcuffing him and placing him in a police car . . . [S]uch an intrusion amounts to an arrest[,] which must be supported by probable cause" (*Johnson*, 102 AD2d at 626; see *People v Brnja*, 50 NY2d 366, 372). At the time of the stop and arrest of defendant, "[n]o probable cause yet existed to arrest him on burglary charges for[,] although the police had reports of possibly suspicious behavior, they had no knowledge [that] a

burglary had even been committed" (*People v Randall*, 85 AD2d 754, 754-755; *cf. People v Hicks*, 68 NY2d 234, 241). The officers were not at liberty to detain defendant while other officers attempted to determine whether a burglary had in fact been committed, i.e., "until evidence establishing probable cause could be found" (*People v Battaglia*, 82 AD2d 389, 396 [Hancock, J., dissenting], *revd on dissent of Hancock, J.* 56 NY2d 558; see *People v Nicodemus*, 247 AD2d 833, 836, *lv denied* 92 NY2d 858).

Because the arrest of defendant was illegal, the money seized from his pocket must be suppressed as flowing directly from the illegal arrest. Further, "[i]t cannot be said that the money found on defendant . . . [was] the product of a source independent of the defendant's detention or that the illegal activity was attenuated by a significant intervening event which justified the conclusion that [such] evidence was not the product of the illegal activity" (*Battaglia*, 82 AD2d at 397 [internal quotation marks omitted]). Nor can it be said that the error in refusing to suppress the evidence did not contribute to the conviction and thus that it is harmless beyond a reasonable doubt (see *People v Evans*, 43 NY2d 160, 167; see generally *People v Crimmins*, 36 NY2d 230, 237). The money, which was the only evidence directly linking defendant to the burglary, was divided into four packets in defendant's pocket, and corresponded exactly in amounts and denominations to money taken from four separate locations in the burglarized home. We thus conclude that there is a reasonable possibility that the admission of the tainted evidence influenced the verdict (see *Crimmins*, 36 NY2d at 237; *People v Terrell*, 185 AD2d 906, 908).

With respect to appeal No. 1, we further agree with defendant that the plea was induced by the promise that the sentence would run concurrently with the sentence imposed upon the prior conviction in appeal No. 2. Because we are reversing that prior judgment of conviction, the judgment in appeal No. 1 must be reversed, the plea vacated and the matter remitted to Supreme Court for further proceedings on the indictment (see *People v Fuggazzatto*, 62 NY2d 862).

All concur except SCUDDER, P.J., and MARTOCHE, J., who dissent and vote to affirm in separate Memorandum.

Dissenting Memorandum by SCUDDER, P.J.: I respectfully dissent in both appeals. In my view, the money seized from defendant is not the product of an unlawful arrest and thus I would affirm the judgment in appeal No. 2. In that event, I would also affirm the judgment in appeal No. 1 inasmuch as there is no issue pursuant to *People v Fuggazzatto* (62 NY2d 862).

With respect to appeal No. 2, under the facts established at the suppression hearing, it is clear that the police had the authority to forcibly detain defendant for a brief period for investigative purposes because they had reasonable suspicion that defendant had been involved in a burglary (see *People v Hicks*, 68 NY2d 234, 238; *People v Mabeus*, 68 AD3d 1557, 1562, *lv denied* 14 NY3d 842; *People v Medina*, 37

AD3d 240, 242, *lv denied* 9 NY3d 847; *cf. People v Ryan*, 12 NY3d 28, 30-31). Furthermore, at the time of the search, the police had probable cause to arrest defendant.

Defendant had been suspected of a number of residential burglaries occurring during the night, and the police had therefore obtained a warrant to install a GPS system on defendant's vehicle in order to track defendant's movements. At approximately 3:00 A.M. on the date of the burglary at issue, defendant's vehicle was detected leaving defendant's residence in the City of Rochester and traveling eastbound on I-490, where it exited at Bushnell's Basin. Defendant drove the vehicle more than once around the area of a particular neighborhood, which had only one road for ingress and egress, and he then parked the vehicle for approximately 30 minutes. At 4:10 A.M. the vehicle left the neighborhood and entered the westbound lane of I-490. Police officers were notified by radio that defendant was driving westbound on I-490, and defendant was stopped by the police for speeding at 4:17 A.M. The officer who stopped defendant's vehicle was joined by another officer, who was aware of the foregoing information and of the fact that, within one minute after defendant had left the neighborhood, other officers had discovered the contents of a purse strewn in the street in proximity to the location where defendant's vehicle had been parked. That officer approached defendant's vehicle, whereupon defendant was handcuffed and placed in the patrol car. Another officer arrived at the scene of the stop, and he permitted defendant to exit the patrol vehicle in order to speak to him. When the officer asked defendant where he had been and where he was going, defendant responded that he was en route to Binghamton, but that he needed to return to his home in Rochester to obtain money. At that time, although the burglary had been confirmed, the officer was not yet aware of the denominations of the money taken in the course of the burglary. Defendant gave the officer permission to conduct a pat-down frisk to check for weapons, and the officer felt a bulge in the front pocket of defendant's pants that felt like paper. The money was removed from defendant's pocket, and the officer obtained information regarding the denominations of the stolen money "within a minute or two" of the pat-down frisk. The officer testified that defendant was detained for approximately 15 to 20 minutes.

It is axiomatic that "not every seizure is an arrest" (*Hicks*, 68 NY2d at 239), and that the use of handcuffs is not "dispositive of whether the detention of a suspect on a reasonable suspicion has been elevated into a full-blown arrest" (*People v Allen*, 73 NY2d 378, 380). I submit that the facts here fit squarely within the conclusion of the Court of Appeals in *Hicks* that, " '[i]f the purpose underlying a *Terry* [*v Ohio*, 392 US 1] stop - investigating possible criminal activity - is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry*' " (*id.* at 241). As the Court in *Hicks* so aptly explained, when evaluating "whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria. [Further], in this examination it is appropriate to consider that the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions

quickly, during which time it was necessary to detain the defendant. Finally, [a] court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing" (*id.* at 241-242 [internal quotation marks omitted]). In my view, these factors have been met here (*see Medina*, 37 AD3d at 242), and we should not engage in "unrealistic second-guessing" (*Hicks*, 68 NY2d at 242 [internal quotation marks omitted]).

When the police officers who were detaining defendant learned that the burglary was confirmed, they then had the requisite probable cause to arrest defendant (*see* CPL 140.10 [1] [b]), and the ensuing search was therefore conducted pursuant to the lawful arrest. I note that, in any event, the police knew that defendant was lying when he stated that he was en route to Binghamton but needed to return home to obtain money, and thus his "response raised the level of the encounter [from reasonable suspicion] to probable cause to believe that the defendant [had committed a burglary], justifying the search and arrest" of defendant (*People v Febus*, 11 AD3d 554, 556, *lv dismissed* 4 NY3d 743; *see People v Abad*, 279 AD2d 358, *lv denied* 96 NY2d 796; *People v Babarcich*, 166 AD2d 655, *lv denied* 76 NY2d 1019).

I would therefore affirm the judgment in appeal No. 2, and thus I would also affirm the judgment in appeal No. 1.

Dissenting Memorandum by MARTOCHE, J.: I respectfully dissent in both appeals. I agree with the majority's conclusion in appeal No. 2 that the evidence seized from defendant should have been suppressed as the fruit of an unlawful arrest, for the same reasons stated by the majority. I disagree with the majority's conclusion, however, that the error is not harmless beyond a reasonable doubt. Aside from the money seized from defendant, the jury was presented with significant circumstantial evidence of defendant's guilt regarding the burglary, including a precise tracking by the police of defendant's movements in the early morning hours on the date of the burglary. According to that evidence, defendant drove to the neighborhood where the burglary was committed and circled around and parked for approximately 25 to 30 minutes near the home that was burglarized; items from a purse were found strewn in the vicinity where defendant parked, within minutes after defendant left the area; the purse and items found were missing from a home in the neighborhood where the burglary occurred; partial tread marks on the kitchen floor at the burglarized home matched the sneakers that defendant was wearing when he was apprehended, and did not match shoes owned by the owners of the burglarized home; canine tracking behind and up to the back of the homes in the neighborhood eventually stopped at the burglarized home; and defendant made inconsistent statements to the police when discussing his activities that evening and his behavior was of a suspicious nature. In light of that evidence of defendant's guilt, in my view there is no reasonable possibility that the error might have contributed to the conviction and thus the error "is harmless beyond a reasonable doubt" (*People v Crimmins*, 36 NY2d 230, 237). Therefore, I conclude that the judgment of conviction in appeal No. 2 should be affirmed and that the judgment in appeal No. 1 also should be affirmed.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1412

KA 10-00774

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TOBIAS BOYLAND, DEFENDANT-APPELLANT.

ANTHONY J. LANA, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered April 1, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (three counts) and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and one count of criminal possession of a weapon in the fourth degree (§ 265.01 [4]). Supreme Court properly refused to suppress weapons seized by the police from the walk-in closet on the second floor of defendant's residence. The evidence at the suppression hearing established that the original search warrant identified the place to be searched as a "lower floor apartment" but that, during the execution of the initial search warrant, the officers discovered that the residence had been converted from a two-family to a single-family dwelling. When the police officers heard voices upstairs, they properly conducted a protective sweep of the second floor based upon "articulable facts that warranted a reasonably prudent officer's belief that the [second floor] might harbor an individual posing a danger to those on the scene" (*People v Eddo*, 55 AD3d 922, 923, *lv denied* 11 NY3d 897; see *People v Rivera*, 172 AD2d 1059). The protective sweep properly encompassed the walk-in closet, which was described at the suppression hearing as being large enough to conceal five or six individuals (see *People v Febus*, 157 AD2d 380, 385, *appeal dismissed* 77 NY2d 835), and the rifle found in plain view therein was properly seized by the police (see *Eddo*, 55 AD3d at 923; *Rivera*, 172 AD2d at 1059). The remaining weapons were properly seized subsequent to the issuance of

an amended warrant identifying the place to be searched as the entire residence (see *People v Aguirre*, 220 AD2d 438, 439-440; *People v Martinez* [appeal No. 2], 187 AD2d 992, 993, *lv denied* 81 NY2d 889).

Defendant failed to preserve for our review his contention that the jury instruction regarding constructive possession altered the theory of the prosecution (see CPL 470.05 [2]; *People v Said*, 174 AD2d 1010, 1011, *lv denied* 78 NY2d 1130), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). The evidence, viewed in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish defendant's constructive possession of the weapons (see *People v Torres*, 68 NY2d 677, 679; *People v Skyles*, 266 AD2d 321, 322, *lv denied* 94 NY2d 867). Further, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). Finally, the sentence is not unduly harsh or severe.

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

1413

KA 07-01560

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER A. GIFFORD, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT 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 July 10, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), and rape in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of two counts of murder in the second degree (Penal Law § 125.25 [1], [3]) and one count of rape in the first degree (§ 130.35 [1]), defendant contends that the conviction is not supported by legally sufficient evidence because the jury would have had to draw inferences from other inferences rather than from the requisite established facts in order to convict him (*see People v Rzezicz*, 206 NY 249, 269-270; *see also People v Kennedy*, 32 NY 141, 145-146). We reject that contention.

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that "there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime[s] proved beyond a reasonable doubt" (*People v Steinberg*, 79 NY2d 673, 682; *see generally People v Bleakley*, 69 NY2d 490, 495). "In the end, it is a question whether common human experience would lead a reasonable [person], putting his [or her] mind to it, to reject or accept the inferences asserted for the established facts" (*People v Wachowicz*, 22 NY2d 369, 372). Here, contrary to defendant's contention, there were sufficient established facts from which permissible inferences could be drawn to lead a reasonable person to conclude that defendant raped the first victim and that either defendant or his accomplice killed that victim "in the course of and in furtherance of such crime or of

immediate flight therefrom" (§ 125.25 [3]). Permissible inferences also could be drawn to lead a reasonable person to conclude that defendant killed the second victim, who was also killed in a similar manner shortly after having sexual relations with defendant.

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

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

1414

KA 10-01570

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GORDON GROSS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (MELVIN BRESSLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered April 16, 2009. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and endangering the welfare of a child (§ 260.10 [1]). Contrary to the contention of defendant, County Court properly denied his motion to dismiss the indictment on the ground that the time frame alleged therein was unreasonably excessive (*see People v Furlong*, 4 AD3d 839, 840-841, *lv denied* 2 NY3d 739). The time frames alleged in the indictment were sufficiently specific for the crime of course of sexual conduct against a child as well as the continuing crime of endangering the welfare of a child (*see People v Green*, 17 AD3d 1076, *lv denied* 5 NY3d 789; *Furlong*, 4 AD3d at 841). We reject the contention of defendant that the People violated Penal Law § 130.75 (2) by prosecuting him on the course of conduct count and that the count therefore should be dismissed. Pursuant to Penal Law § 130.75 (2), “[a] person may not be *subsequently* prosecuted for any other sexual offense involving the same victim unless the other charged offense occurred outside the time period charged under this section” (emphasis added). Further, Penal Law § 70.25 (2-e) requires that concurrent sentences be imposed “[w]henver a person is convicted of course of sexual conduct against a child in the first degree as defined in section 130.75 . . . and any other crime under article one hundred thirty committed against the same child *and within the period charged* under section 130.75” (emphasis added). Here, although defendant was previously convicted

of attempted sexual abuse in the first degree against the same child at issue in this case (*People v Gross*, ___ AD3d ___ [Dec. 30, 2010]), evidence underlying that conviction was not offered in support of the People's case against defendant on the course of conduct count in this case. As we have held previously with respect to contemporaneously charged sexual offenses, to interpret section 130.75 (2) as prohibiting course of conduct charges based on new allegations where a defendant was previously prosecuted for a crime under Penal Law article 130 against the same child and within the period charged under section 130.75 "would render meaningless the word 'subsequently,' as well as section 70.25 (2-e)" (*People v Vanlare*, 77 AD3d 1313, 1314).

Defendant failed to preserve his remaining contentions for our review (CPL 470.05 [2]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

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

1415

KA 09-00871

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MAURICE L. THURMAN, 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 (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered December 10, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Supreme Court did not err in refusing to suppress the handgun seized as the result of frisking defendant's person. The handgun was found in the pocket of the coat that defendant was wearing. According to the evidence presented at the suppression hearing, two police officers went to 183 Edison Street, a location personally known to them as a drug-prone area, in response to community requests to investigate the area. Upon arriving at the scene, the officers, one of whom was experienced in narcotics trafficking, observed defendant and a codefendant leaning into a van parked in front of that address with their hands inside the front passenger compartment of the vehicle. Both officers saw either defendant or the codefendant give the front seat passenger something in exchange for money. Each officer then approached defendant and the codefendant, respectively. Upon questioning by the officer who approached him, the codefendant admitted that he was in possession of a weapon, whereupon the officer found and seized a handgun from the codefendant's back waistband, handcuffed the codefendant, and placed him in the patrol car. Upon learning that a weapon had been found on the codefendant, the officer who had approached defendant conducted a pat down of defendant's pants for weapons, resulting in the seizure of marihuana from defendant's pocket. However, defendant was belligerent throughout the pat down, almost to the point of physically confronting

the officer. In addition, two bystanders became belligerent and began to yell at the officers. Because the situation was escalating out of control, the officers placed defendant in the patrol car with the codefendant. When it was discovered that the officer who had approached defendant had never conducted a complete frisk of defendant's person, defendant was removed from the patrol car and was frisked for weapons, resulting in the discovery of the handgun in his coat pocket.

The suppression court determined that the officers' initial approach of defendant and the codefendant was justified by a founded suspicion of criminality, and that the discovery of the handgun on the codefendant established a reasonable suspicion to justify the pat down of defendant for weapons. The court determined, however, that the officer illegally searched the inside of defendant's pocket during the pat down and that his seizure of the marihuana therefrom was illegal because there was no evidence that the officer believed that there was a weapon in that pocket. The court nevertheless determined that the handgun discovered during the later frisk was admissible because it would inevitably have been discovered even in the event that the officer never found the marihuana, given the deteriorating situation at the scene, the need to remove defendant from the gathering bystanders, and the frisk for weapons that would have occurred prior to placing him in the patrol car to diffuse the situation.

We agree with the court that inevitable discovery doctrine applies (*see generally People v Turriago*, 90 NY2d 77, 85, *rearg denied* 90 NY2d 936; *People v Stith*, 69 NY2d 313, 318; *People v Fitzpatrick*, 32 NY2d 499, 506-507, *cert denied* 414 US 1033, 1050). Given the evidence of narcotics trafficking observed by the police upon their arrival at the scene and the subsequent discovery of the weapon on the codefendant, we conclude that neither the approach to investigate nor the pat down of defendant's person was illegal (*see generally People v Rios*, 34 AD3d 375, *lv denied* 8 NY3d 848; *People v Antegua*, 7 AD3d 466, 466-467, *lv denied* 3 NY3d 670; *People v Dukes*, 254 AD2d 149, *lv denied* 93 NY2d 898). With respect to the application of the inevitable discovery doctrine, we reject defendant's contention that the handgun seized during the frisk, rather than the marihuana seized during the pat down, was the primary evidence obtained as a result of the illegal police conduct and thus should have been suppressed (*see generally People v Stith*, 69 NY2d 313, 318-319; *People v Hancock*, 71 AD3d 566; *People v Lindsey*, 13 AD3d 651, 652; *People v James*, 256 AD2d 1149, *lv denied* 93 NY2d 875). Although defendant is correct that the inevitable discovery doctrine "applies only to secondary evidence and does not justify admission of the very evidence that was obtained as the immediate consequence of the illegal police conduct" (*James*, 256 AD2d at 1149), here the court properly determined that the primary evidence of the illegal police conduct in this case, i.e., the officer's improper search of defendant's pants pocket, was the marihuana and not the handgun.

Finally, the bargained-for sentence is not duly unduly harsh or

severe.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1416

KA 07-01179

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MAURICE DELEE, 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 Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered January 25, 2007. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, attempted robbery in the second degree and assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of various crimes arising out of a home invasion robbery, defendant contends that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence. Defendant failed to preserve for our review his contention with respect to the alleged insufficiency of the evidence because he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct (*see CPL 470.05 [2]; see generally People v Romero*, 7 NY3d 911, 912), and we decline to exercise our power to address that contention as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1417

KA 09-02370

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

NAKIESHA JONES, DEFENDANT-APPELLANT.

LOUIS ROSADO, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered November 5, 2009. The judgment convicted defendant, upon a jury verdict, of petit larceny and criminal possession of stolen property in the fifth degree.

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

Memorandum: On appeal from a judgment convicting her upon a jury verdict of petit larceny (Penal Law § 155.25) and criminal possession of stolen property in the fifth degree (§ 165.40), defendant contends that her right to counsel was impaired by County Court's denial of her requests for substitution of counsel. The record establishes that defendant withdrew those requests and agreed to proceed with assigned counsel, and we thus conclude that she waived her present contention (see *People v Hernandez*, 62 AD3d 401, lv denied 13 NY3d 797). Defendant also waived her present contention that the court erred in denying her the right to proceed pro se, inasmuch as the record establishes that she withdrew her request to represent herself (see *People v McRae*, 284 AD2d 657, lv denied 96 NY2d 921). We reject the further contention of defendant that defense counsel was ineffective in requesting that the court submit lesser included offenses to the jury (see *People v Taylor*, 2 AD3d 1306, 1308; see generally *People v Colville*, ___ AD3d ___, ___ [Oct. 5, 2010]), and in failing to seek dismissal of the indictment pursuant to CPL 190.50 and 210.40 (see generally *People v Marcial*, 41 AD3d 1308, lv denied 9 NY3d 878). Finally, under the circumstances of this case, the court did not abuse its discretion in denying defendant's request for a missing evidence charge based upon the failure of the People to preserve the stolen

merchandise (see *People v Pfahler*, 179 AD2d 1062, 1063).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1418

CA 09-02580

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

WILLIAM T. MEYER, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

DONALD L. STOUT, DEFENDANT-APPELLANT.

MICHAEL J. KELLY, PERRY, FOR DEFENDANT-APPELLANT.

WATSON BENNETT COLLIGAN & SCHECHTER LLP, BUFFALO (A. NICHOLAS FALKIDES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered December 10, 2009. The order and judgment, among other things, permanently restrained and enjoined defendant from blocking, obstructing or interfering with plaintiff's express easement.

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

Memorandum: Plaintiff previously owned over 40 acres of property in the Towns of Pike and Genesee Falls in Wyoming County. During the 1970s, plaintiff built a house and a garage on the property immediately adjacent to Route 39. He also constructed a driveway that was approximately 150 feet in length and 30 feet in width, which ran between the house and garage. At the end of the driveway is a 38-acre timber parcel owned by plaintiff. In 1986, plaintiff sold 4.8 acres of his property immediately adjacent to the roadway to defendant, thus leaving plaintiff's remaining property landlocked with the exception of the driveway, which was the sole entrance to plaintiff's property. In the deed of sale to defendant, plaintiff excepted and reserved "a right-of-way from Allegany Rd. to a 38-acre (more or less) parcel of land . . . immediately adjacent and southwest of the parcel [conveyed to defendant]. Said right-of-way to follow the course of the existing driveway and logging roads across the above described premises" (emphasis added). Some time after purchasing the property, however, defendant began blocking the driveway. The easement allegedly granted by the deed became relevant in 2004, because plaintiff sought to sell 50% of the timber on his property and thus required access to the easement. He hired a company to administer the bidding process, sale and harvesting of the timber. Although bid notices were sent to over 70 lumber businesses, that company canceled the sale, allegedly because defendant refused to remove trucks and trailers that were blocking the driveway. Plaintiff commenced this action seeking, inter

alia, to enjoin defendant from blocking the easement and to recover damages for defendant's tortious interference with prospective contracts. On a prior appeal, we affirmed an order denying those parts of defendant's motion seeking dismissal of the first, third and fourth causes of action based on our determination that, inter alia, plaintiff had stated a cause of action for an easement by necessity (*Meyer v Stout*, 45 AD3d 1445).

The matter proceeded to a jury trial but, before the jury began its deliberations, Supreme Court directed a verdict in favor of plaintiff, finding that plaintiff had an express easement across defendant's property from Route 39 to plaintiff's property by virtue of the deed. In addition, the court granted plaintiff an easement by necessity only in the event that the express easement in the deed was invalidated or became unusable, and the court permanently enjoined defendant from blocking the easement. The jury found that the location of the easement over defendant's property was the driveway between defendant's house and garage extending from Route 39 to plaintiff's property, as described in the deed. The jury also found that plaintiff had established his cause of action for tortious interference with prospective contracts, and it awarded plaintiff damages in the amount of \$110,000. We affirm.

Contrary to defendant's contention, the court properly directed a verdict in favor of plaintiff with respect to the location of the easement as set forth in the deed. As previously noted, however, the deed granted plaintiff an easement that extended "immediately adjacent and southwest of the parcel [conveyed to defendant]," but plaintiff did not own any property southwest of the parcel conveyed to defendant. Rather, plaintiff owned only a 38-acre parcel to the north or northwest of the property conveyed to defendant. In addition, although defendant contended that the driveway referenced in the deed was a dirt logging trail and not the driveway that ran between the house and the garage, the precise language in the deed was that "[s]aid right-of-way [was] to follow the course of the existing driveway and logging roads across the above described premises" (emphasis added).

"When ambiguity or imperfection exists in the description of land contained in a conveyance, it is competent to refer to general language, as well as to all parts of the deed, to locate and identify the property intended to be conveyed . . . So, too, where by proof *aliunde* the deed, it is shown that no property answering the description belongs to the grantor at the place indicated, but other lands in the vicinity, corresponding in some particulars to such description, did belong to him [or her], a latent ambiguity is created, which may be solved by the further indications afforded by the deed or by extraneous evidence" (*Thayer v Finton*, 108 NY 394, 399; see *Schweitzer v Heppner*, 212 AD2d 835, 838; *Hess v Baccarat*, 210 AD2d 544, 545; *Malin v Ward*, 21 AD2d 926; see generally *Cordua v Guggenheim*, 274 NY 51, 57). In addition, "courts may as a matter of interpretation carry out the intention of a contract by transposing, rejecting, or supplying words to make the meaning of the contract more clear . . . However, such an approach is appropriate only in those

limited instances where some absurdity has been identified or the contract would otherwise be unenforceable either in whole or in part" (*Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 547-548; see *Castellano v State of New York*, 43 NY2d 909, 911-912; *Hickman v Saunders*, 228 AD2d 559, 560).

We conclude that in this case there was such a latent ambiguity as described in *Thayer* (108 NY at 399). Moreover, were we to interpret the deed such that the easement proceeded from Route 39 to the southwest, then the easement would follow the course of Route 39, which itself goes to the southwest. There was no existing driveway in such a location, and to interpret the deed in such a manner would create the absurd result that the easement would commence on property that plaintiff did not own and would continue onto property that he also did not own. We therefore conclude that, in interpreting the deed, the court properly disregarded the phrase, "and southwest of the parcel herein conveyed." Contrary to defendant's contention, the court did not reform the deed but, rather, "carr[ie]d out the intention of [the deed] by . . . rejecting . . . words to make the meaning of the contract more clear" (*Wallace*, 86 NY2d at 547). Thus, the relief granted by the court was not time-barred (see CPLR 213 [6]).

Contrary to defendant's further contention, plaintiff established all the necessary elements of a cause of action for tortious interference with prospective contracts (see generally *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621-624), including the necessary culpable conduct on the part of defendant (see *Carvel Corp. v Noonan*, 3 NY3d 182, 190; *Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 196; *Snyder v Sony Music Entertainment*, 252 AD2d 294, 299-300), as well as the pecuniary loss sustained by plaintiff (see *Guard-Life Corp.*, 50 NY2d at 197; *International Minerals & Resources, S.A. v Pappas*, 96 F3d 586, 597).

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

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

1419

CA 10-00444

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

DIANE FLOOD, AS GUARDIAN OF THE PERSON AND
PROPERTY OF ANNE MARIE FLOOD, AN INCAPACITATED
PERSON, PLAINTIFF-APPELLANT,

V

ORDER

CSX TRANSPORTATION, INC. AND TOWN OF HAMBURG,
DEFENDANTS-RESPONDENTS.

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

LEWIS & LEWIS, P.C., BUFFALO (EMILY DOWNING OF COUNSEL), FOR
DEFENDANT-RESPONDENT TOWN OF HAMBURG.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered January 20, 2010. The order granted the motion of defendant Town of Hamburg for summary judgment.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1420

CA 10-00669

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

IN THE MATTER OF ANDREW PRATT,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

MICHAEL HOGAN, COMMISSIONER, NEW YORK STATE
OFFICE OF MENTAL HEALTH, AND DONALD SAWYER,
DIRECTOR, CENTRAL NEW YORK PSYCHIATRIC CENTER,
RESPONDENTS-RESPONDENTS.

ANDREW PRATT, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered January 7, 2010 in a proceeding pursuant to CPLR article 78. The judgment denied and dismissed the petition.

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

Memorandum: Petitioner, who is civilly confined at Central New York Psychiatric Center (CNYPC) pursuant to article 10 of the Mental Hygiene Law, commenced this CPLR article 78 proceeding seeking a judgment "vacating [CNYPC's] sex offender treatment program" and "directing respondents to cease and desist all programming with any religious foundation, belief, ritualism, connotation or suggestion of religious affiliation" on the ground that such programming violates his constitutional right to freedom of religion. Supreme Court properly dismissed the petition inasmuch as a government facility does not violate the constitutional right to freedom of religion merely by offering religion-based sex offender treatment (see *Matter of Griffin v Coughlin*, 88 NY2d 674, 677, cert denied 519 US 1054; *Alexander v Schenk*, 118 F Supp 2d 298, 302). That right is violated only when an individual is coerced into participating in such programming (see *Griffin*, 88 NY2d at 677; *Warner v Orange County Dept. of Probation*, 115 F3d 1068, 1074-1075). To the extent that petitioner contends that he and others similarly situated "are being told that they have to participate in these religious based groups in order to advance in the program so that one day they 'may' be allowed to go home and move on with their lives," the record does not support that contention. Petitioner, who is an atheist, failed to establish that he was

required to participate in any religion-based treatment programs offered by CNYPC and, indeed, the documents submitted by petitioner demonstrate that most of the programs cited by petitioner as being religion-based provide nothing more than relaxation, meditation or introspection techniques. The record further establishes that petitioner was free to choose the programs in which he would participate and that there were several secular programs from which he could choose to satisfy his sex offender treatment requirement (see *Griffin*, 88 NY2d at 677; *Warner*, 115 F3d at 1075).

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

1421

CA 10-01310

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

MALIKA F. NELSON, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS NOH, PETCHARAT NILSWANKOSIT, DAMARIS
SERRANO, DEFENDANTS-RESPONDENTS,
AND MICHAEL J. SANTINI, DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (ALISON
M.K. LEE OF COUNSEL), FOR DEFENDANT-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (L. DAMIEN COSTANZA OF COUNSEL),
FOR DEFENDANT-RESPONDENT DAMARIS SERRANO.

CELLINO & BARNES, P.C., ROCHESTER (TIMOTHY R. HEDGES OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered February 11, 2010 in personal injury actions. The order denied the motion of defendant Michael J. Santini for bifurcation and granted the cross motions of plaintiff and defendant Damaris Serrano for consolidation.

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

Memorandum: Defendant Michael J. Santini appeals from an order denying his motion for bifurcation and granting the cross motions of plaintiff and defendant Damaris Serrano to consolidate the instant two actions. The first action concerns two motor vehicle accidents, one in July 2003 between plaintiff and defendants Thomas Noh and Petcharat Nilswankosit and the other in March 2004 between plaintiff and Serrano. The second action concerns a third motor vehicle accident that occurred in January 2006, between plaintiff and Santini. Addressing first the cross motions, we conclude that Supreme Court properly granted the cross motions inasmuch as "consolidation is favored by the courts . . . , and should be granted unless the party resisting consolidation demonstrates prejudice to a substantial right" (*Humiston v Grose*, 144 AD2d 907, 907-908; see *Shanley v Callahan Indus., Inc.*, 54 NY2d 52, 57). Here, we conclude that Santini failed to establish the requisite prejudice to a substantial right (see *Matter of Vigo S. S. Corp. [Marship Corp. of Monrovia]*, 26 NY2d 157, 161-162, cert denied 400 US 819). In addition, we note that plaintiff allegedly sustained injuries to a common part of her body in all three

accidents, and we conclude that " '[o]ne jury hearing all the evidence can better determine the extent to which each defendant caused plaintiff's injuries and [that consolidation] should eliminate the possibility of inconsistent verdicts which might result from separate trials' " (*Gage v Travel Time & Tide*, 161 AD2d 276, 277). Finally, we conclude that the court did not abuse its discretion in denying Santini's motion for bifurcation (see *Iszkiewicz v Town of Lancaster*, 16 AD3d 1163).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1422

CA 10-01606

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

JOSEPH B. GILFUS, PLAINTIFF,

V

MEMORANDUM AND ORDER

CSX TRANSPORTATION, INC., DEFENDANT.

CSX TRANSPORTATION, INC., THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

CLIFTON SPRINGS HOSPITAL, ELIZABETH
ROMERO, M.D., AUBURN MEMORIAL HOSPITAL,
DAVID AVNER, M.D., KATHI TEIXEIRA, M.D.,
AND KATHI F. TEIXEIRA, M.D., P.C.,
THIRD-PARTY DEFENDANTS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (MICHAEL PAUL RINGWOOD
OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-APPELLANTS AUBURN MEMORIAL
HOSPITAL AND DAVID AVNER, M.D.

BROWN & TARANTINO, LLC, BUFFALO (THOMAS BERNACKI OF COUNSEL), FOR
THIRD-PARTY DEFENDANTS-APPELLANTS CLIFTON SPRINGS HOSPITAL AND
ELIZABETH ROMERO, M.D.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (BRIAN GARGANO OF
COUNSEL), FOR THIRD-PARTY DEFENDANTS-APPELLANTS KATHI TEIXEIRA, M.D.
AND KATHI F. TEIXEIRA, M.D., P.C.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (ROBERT M. ANSPACH OF COUNSEL),
FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Cayuga County (Mark
H. Fandrich, A.J.), entered April 26, 2010. The order, insofar as
appealed from, denied the motions of third-party defendants for
summary judgment dismissing the third-party complaint.

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

Memorandum: Plaintiff commenced this action pursuant to the
Federal Employers' Liability Act (45 USC § 51 *et seq.*) seeking damages
for injuries he sustained during the course of his employment with
defendant-third-party plaintiff, CSX Transportation, Inc. (CSXT).

Tree limbs and other debris had accumulated on CSXT tracks during an ice storm, and plaintiff sustained fractures to his right leg when a tree that he was attempting to clear from the tracks fell on him. Ten days after the accident, plaintiff's right leg was amputated above the knee by a nonparty surgeon at a nonparty hospital. CSXT commenced a third-party action against the physicians and hospitals that provided medical services to plaintiff during the two days following the accident. Plaintiff was first seen by Elizabeth Romero, M.D. at Clifton Springs Hospital (collectively, Romero third-party defendants). As the result of the ice storm, however, that hospital lost its main power and did not have an operating room or surgeon available to treat plaintiff. Arrangements were therefore made for plaintiff to be transferred to Auburn Memorial Hospital, where he was examined by David Avner, M.D. (collectively, Avner third-party defendants). Avner diagnosed compartment syndrome and concluded that a fasciotomy was necessary to treat that condition. He contacted third-party defendant Kathi Teixeira, M.D., the orthopedic surgeon who was on call. Dr. Teixeira traveled to the hospital, examined plaintiff, assembled a surgical team, and performed the fasciotomy. Following that procedure, plaintiff was transferred to another hospital. His leg developed muscular necrosis and was amputated.

Supreme Court properly denied the motion of Kathi Teixeira, M.D. and Kathi F. Teixeira, M.D., P.C. (collectively, Teixeira third-party defendants) and the cross motion of the Romero third-party defendants seeking summary judgment dismissing the third-party complaint against them. In addition, we note that CSXT consented to the dismissal of four specific claims against Dr. Avner, and we conclude that the court also properly denied the motion of the Avner third-party defendants seeking summary judgment dismissing the remaining claims against them. Even assuming, arguendo, that each set of third-party defendants met its initial burden on the motions and cross motion, we conclude that CSXT raised issues of fact by submitting the affidavit of its medical expert (see *Brown v Arnot Med. Ctr.*, ___ AD3d ___ [Oct. 1, 2010]; *Selmensberger v Kaleida Health*, 45 AD3d 1435, 1436). "The conflicting opinions of the experts for [CSXT] and [third-party] defendant[s] with respect to causation and [third-party] defendant[s'] alleged deviation[s] from the accepted standard of medical care present credibility issues" that preclude summary judgment (*Ferlito v Dara*, 306 AD2d 874). The Avner third-party defendants contend that CSXT raised new theories of liability for the first time in opposition to their motion and that the court erred in permitting them to do so. Contrary to the contention of the Avner third-party defendants, however, CSXT did not in fact raise new theories of liability in opposition to their motion (see *Cannon v Amarante*, 19 AD3d 1144). Contrary to the further contention of the Avner third-party defendants, they failed to establish as a matter of law that Auburn Memorial Hospital is not vicariously liable for the alleged malpractice of the Teixeira third-party defendants (see generally *Noble v Porter*, 188 AD2d 1066).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1423

CA 10-00611

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

DANIEL C. BRYNDLE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

SAFETY-KLEEN SYSTEMS, INC.,
DEFENDANT-RESPONDENT.

HOGAN WILLIG, AMHERST (JOHN LICATA OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

RICOTTA & VISCO, BUFFALO (K. JOHN BLAND OF COUNSEL), AND OBERMAYER
REBMAN MAXWELL & HIPPEL LLP, PHILADELPHIA, PENNSYLVANIA, FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered December 3, 2009 in a breach of contract action. The order, among other things, granted defendant's cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of defendant's cross motion for summary judgment dismissing the breach of contract claim insofar as it concerns the 2002 compensation plan and granting that part of plaintiff's motion for leave to amend the complaint with respect to the breach of contract claim and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover unpaid commissions and bonuses that he allegedly earned during his employment with defendant and that were owed to him under his 2002 and 2003 compensation plans with defendant. Plaintiff thereafter moved for leave to amend his complaint, and defendant cross-moved for summary judgment dismissing the complaint, alleging that, even as amended, plaintiff is not entitled to the relief sought therein.

Addressing first defendant's cross motion for summary judgment dismissing the complaint, we conclude that Supreme Court properly granted that part of the motion with respect to any claims of fraud. " 'The addition of an allegation of scienter will not transform a breach of contract action into one to recover damages for fraud' " (*Ellis v Whippo*, 262 AD2d 1055). The court erred, however, in granting that part of defendant's cross motion with respect to the breach of contract claim insofar as it concerns the 2002 compensation plan, and we therefore modify the order accordingly. Defendant failed

to meet its initial burden with respect to that part of the breach of contract claim, inasmuch as it submitted no evidence of plaintiff's 2002 compensation (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Defendant thus failed to establish either that plaintiff was paid in accordance with the 2002 compensation plan or that his right to payment never accrued under the plan. The court properly granted that part of defendant's cross motion with respect to the breach of contract claim concerning the 2003 compensation plan, however. In particular, the 2003 compensation plan provided that plaintiff would be paid a bonus upon meeting a sales quota, but the uncontroverted charts in the record reflecting plaintiff's 2003 sales quota establish that, with the exception of one sales period, plaintiff never met his sales quota and thus failed to qualify for a bonus under the compensation plan. Furthermore, under the 2003 plan, commissions were paid only for technical field services project work and new sales. Inasmuch as plaintiff admits that another employee made the sales, plaintiff was not entitled to commissions under that plan.

Contrary to the contention of plaintiff, the court properly denied those parts of his motion for leave to amend the complaint seeking to add a cause of action for intentional tort as well as further allegations with respect to the existing cause of action for fraud, inasmuch as that proposed cause of action and the further allegations were "patently lacking in merit" (*Green v Passenger Bus Corp.* [appeal No. 2], 61 AD3d 1377, 1378; see *Anderson v Nottingham Vil. Homeowner's Assn., Inc.*, 37 AD3d 1195, 1198, rearg granted 41 AD3d 1324). We conclude, however, that the court abused its discretion in denying that part of plaintiff's motion for leave to amend the complaint with respect to the breach of contract claim, and we therefore further modify the order accordingly. The additional allegations asserted in the proposed amendment have long been known to defendant, and thus defendant cannot be said to be prejudiced by the delay (see *Anderson*, 37 AD3d at 1198).

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

1424

CA 10-00671

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

GREGG A. MALBURG, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JOSEPH G. KELLER, AS TEMPORARY ADMINISTRATOR
OF THE ESTATE OF PAUL MURPHY, DECEASED,
DEFENDANT-RESPONDENT.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (JEFFREY F.
BAASE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered December 7, 2009 in a personal injury action. The order granted the motion of defendant for summary judgment and dismissed the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the amended complaint, as amplified by the bill of particulars, with respect to the significant limitation of use of a body function or system category of serious injury within the meaning of Insurance Law § 5102 (d) as it relates to plaintiff's cervical spine injury and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained in a motor vehicle accident when the vehicle he was driving was struck by a vehicle driven by defendant's decedent. Defendant thereafter moved for summary judgment dismissing the amended complaint on the ground that plaintiff did not sustain a serious injury in the accident within the meaning of Insurance Law § 5102 (d), and Supreme Court granted the motion. We agree with plaintiff that the court erred in granting that part of the motion with respect to the significant limitation of use category of serious injury, and we therefore modify the order accordingly. Although defendant met his initial burden, plaintiff raised a triable issue of fact by submitting the affirmed report of the physician who conducted an independent medical examination (IME) of plaintiff at the request of his workers' compensation carrier. According to the IME physician, plaintiff suffered from a temporary moderate partial disability, including a 50% loss of range of motion of his cervical spine in certain directions, and the disability was causally related to the

motor vehicle accident (see *Casiano v Zedan*, 66 AD3d 730, 730-731).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1425

KA 08-00028

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

MARK DAVIS-WRIGHT, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered November 2, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree and attempted robbery in the first degree.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1426

KA 07-02653

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

GARY C. STUART, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Thomas R. Morse, A.J.), rendered October 29, 2007. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1427

KA 05-00922

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PATRICK D. LOWE, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), rendered January 24, 2005. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree and speeding.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [former (1)]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Defendant contends that Supreme Court erred in refusing to suppress evidence seized by the police from the vehicle defendant was driving. We reject that contention. The police officer who stopped the vehicle testified at the suppression hearing that he did so based on his observation that defendant was driving in excess of the posted speed limit. "The court's determination to credit the testimony that the stop was based on a traffic violation is entitled to great deference" (*People v Frazier*, 52 AD3d 1317, *lv denied* 11 NY3d 788). The record of the suppression hearing establishes that the police officer had a founded suspicion that criminal activity was afoot, and thus he was justified in asking defendant if there was anything in the vehicle that was illegal and in asking for defendant's consent to search the vehicle (*see People v Ponder*, 43 AD3d 1398, 1399, *lv denied* 10 NY3d 770; *see also People v Edwards*, 14 NY3d 741, 742, *rearg denied* 14 NY3d 794). At the time the police officer asked defendant those questions, he was aware that he was assisting in a narcotics investigation where defendant was seen leaving in the stopped vehicle from a known drug location. Further, defendant appeared very nervous and lied about the location from where he was

driving. The record also establishes that defendant voluntarily consented to the search of the vehicle (see *Ponder*, 43 AD3d at 1399). "That search properly encompassed containers within the vehicle" (*People v Forte*, 234 AD2d 891, 892, *lv denied* 90 NY2d 939), including the box in which the drugs were found.

We have considered defendant's remaining contentions and conclude that they are without merit.

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

1428

KA 10-00180

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOHN CULLEN, ALSO KNOWN AS JOHN MCCARTHY,
DEFENDANT-APPELLANT.

ADAM H. VAN BUSKIRK, AURORA, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered October 27, 2009. The order denied the petition of defendant for a modification of his Sex Offender Registration Act classification.

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

Memorandum: Defendant appeals from an order denying his petition pursuant to Correction Law § 168-o (2) seeking to modify the determination that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] § 168 *et seq.*). We note that many of the factors upon which defendant relies in support of his modification petition were previously considered by this Court in his prior appeal from the order determining that he is a level three risk (*People v Cullen*, 60 AD3d 1466, *lv denied* 12 NY3d 712). With respect to any additional factors set forth by defendant in support of his modification petition, we conclude that defendant failed to meet his "burden of proving the facts supporting the requested modification by clear and convincing evidence" (§ 168-o [2]; *see People v Higgins*, 55 AD3d 1303).

The further contention of defendant that County Court erred in assessing 20 points against him under the risk factor for his relationship with the victims is unreserved for our review inasmuch as defendant failed to raise that contention in either of his prior appeals or in support of his modification petition (*see generally People v Smith*, 17 AD3d 1045, *lv denied* 5 NY3d 705). Defendant also failed to preserve for our review his contention that he is not subject to SORA (*see People v Windham*, 10 NY3d 801). In any event,

those contentions are without merit.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1429

KA 08-01266

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

NACHE AFRIKA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered May 2, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, rape in the first degree and sodomy in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, rape in the first degree (Penal Law § 130.35 [1]). We previously reversed the judgment convicting defendant of the same offenses and granted defendant a new trial (*People v Afrika*, 9 AD3d 876, amended on rearg 11 AD3d 1046), and the judgment now on appeal is the result of the retrial. Defendant contends that he was denied his right to a speedy trial pursuant to CPL 30.30 based on prereadiness and postreadiness delay following our remittal. We reject that contention. Based on our review of the record, we conclude that most of the prereadiness delay was excludeable (see CPL 30.30 [4] [a], [b], [f]). Contrary to the defendant's contentions, the People's announcement of readiness for trial was not illusory (see generally *People v Kendzia*, 64 NY2d 331, 337), and any postreadiness delay did not impact the People's ability to proceed to trial (see *People v Carter*, 91 NY2d 795, 799). The further contentions of defendant concerning delays occurring after County Court denied his speedy trial motion are not preserved for our review (see *People v Goode*, 87 NY2d 1045, 1047), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Contrary to defendant's contention, the evidence is legally sufficient to support the conviction (see generally *People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of

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

Following remittal, defendant moved to dismiss the original indictment on the ground that the evidence presented to the grand jury, excluding the DNA evidence suppressed by our decision in the prior appeal (*Afrika*, 9 AD3d at 876), was legally insufficient to support a conviction. It is well established that "[t]he validity of an order denying any motion [to dismiss an indictment for legal insufficiency of the grand jury evidence] is not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence" (CPL 210.30 [6]). Nevertheless, defendant contends that, despite his characterization of the motion to dismiss as one based on the legal sufficiency of the grand jury evidence, the motion was actually a motion to dismiss based on a legal impediment to the conviction pursuant to CPL 210.20 (1) (h) and that the court erred in denying that motion. Even assuming, arguendo, that defendant's contention is preserved for our review and is properly before us, we conclude that it lacks merit. There is "a distinction between evidence subject to a per se exclusionary rule that is never sufficient to support an indictment and evidence that is sufficient to support a prima facie case before the [g]rand [j]ury but is later proven unreliable" (*People v Gordon*, 88 NY2d 92, 96; see *People v Swamp*, 84 NY2d 725, 731-732). The fact that the DNA evidence was later determined to be inadmissible does not create a legal impediment to defendant's conviction (*cf. Swamp*, 84 NY2d at 732).

Defendant further contends that the court lacked jurisdiction to try him on the original indictment because, once he was arraigned on the superseding indictment, the original indictment was automatically dismissed and could not be reinstated. We reject that contention. Because the People improperly filed a superseding indictment (see CPL 40.30 [3]), that indictment must be deemed a nullity and "any action or consequence that flowed from its filing—here, the dismissal of the original indictment—was necessarily a nullity as well. In the absence of any constitutional or statutory double jeopardy bar, the . . . court possessed inherent authority to reinstate the original indictment after dismissing the superseding indictment" (*People v Frederick*, 14 NY3d 913, 916-917; see also *People v Clarke*, 55 AD3d 1447, 1448, *lv denied* 11 NY3d 923).

As in the prior appeal, defendant challenges the People's use of DNA evidence obtained from a sample taken from defendant before trial. Here, however, we conclude that there was no basis to suppress that DNA evidence obtained prior to the retrial. The People's application for a buccal swab was supported by probable cause (see *Matter of Abe A.*, 56 NY2d 288, 291) and, contrary to defendant's contention, that application did not rely on previously suppressed evidence. Contrary to defendant's further contention, there was no *Crawford* violation because *Crawford* applies only to testimonial evidence that is presented at trial (see *People v Leon*, 10 NY3d 122, 125, *cert denied* ___ US ___, 128 S Ct 2976; see generally *Melendez-Diaz v*

Massachusetts, ___ US ___, 129 S Ct 2527; *Crawford v Washington*, 541 US 36).

Defendant was not entitled to a hearing to challenge his predicate felon status (see *People v Wallace*, 298 AD2d 130, lv denied 99 NY2d 565), and he was properly sentenced to consecutive sentences (see Penal Law § 70.25 [2]; *People v Laureano*, 87 NY2d 640, 643; *People v Bailey*, 17 AD3d 1022, lv denied 5 NY3d 803). The sentence is not unduly harsh or severe. We note, however, that the certificate of conviction incorrectly reflects that defendant was sentenced as a second felony offender, and it must therefore be amended to reflect that he was sentenced as a second violent felony offender (see *People v Martinez*, 37 AD3d 1099, 1100, lv denied 8 NY3d 947).

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1430

KA 09-01964

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOE A. MACKEY, JR., DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH (MICHAEL D. MCCARTNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered June 23, 2008. The judgment convicted defendant, upon his plea of guilty, of falsifying business records in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of falsifying business records in the first degree (Penal Law § 175.10). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve for our review his contention that the plea was not knowingly, voluntarily and intelligently entered (*see People v Nagel*, 60 AD3d 1485, *lv denied* 12 NY3d 918; *People v Collins*, 45 AD3d 1472, *lv denied* 10 NY3d 861). Contrary to defendant's further contention, this case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666). To the extent that the contention of defendant that he was denied effective assistance of counsel is not forfeited by the plea (*see People v Santos*, 37 AD3d 1141, *lv denied* 8 NY3d 950), it is lacking in merit (*see generally People v Ford*, 86 NY2d 397, 404).

We dismiss the appeal to the extent that defendant challenges the severity of the sentence inasmuch as he has completed serving his sentence and that part of the appeal therefore is moot (*see People v Griffin*, 239 AD2d 936). We have considered defendant's remaining

contentions and conclude that they are without merit.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1431

KA 08-00029

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIE HOLMES, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered September 25, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [former (3)]), defendant contends that Supreme Court erred in refusing to suppress the weapon and his statements to the police. We reject that contention. The police found the weapon in a duffel bag in the bedroom closet of defendant's girlfriend during a search of the house co-leased by defendant's girlfriend and her mother. Defendant resided in the bedroom part of the time and kept personal items there. We note at the outset that, "[b]ecause defendant has the burden to allege facts sufficient to warrant suppression, the People are not precluded from raising the issue of standing for the first time on appeal" (*People v Hooper*, 245 AD2d 1020, 1021; see *People v McCall*, 51 AD3d 822, lv denied 11 NY3d 856). The People contest the standing of defendant to challenge the search of the duffel bag only, thereby conceding that he had a legitimate expectation of privacy in the bedroom (see generally *People v Gonzalez*, 88 NY2d 289, 292-293). We agree with the People that defendant failed to establish a legitimate expectation of privacy in the duffel bag or its contents inasmuch as no evidence was presented establishing his ownership of the bag (see generally *People v Whitfield*, 81 NY2d 904, 905-906; *People v Clark*, 28 AD3d 1231, 1232; *People v Gatti*, 277 AD2d 1041, 1042, lv denied 96 NY2d 783). We therefore consider the propriety of the search of the bedroom only.

Affording deference to the factual findings and credibility determinations of the court (see generally *People v Prochilo*, 41 NY2d 759, 761), we conclude that the mother of defendant's girlfriend had actual authority to consent to the search of the bedroom. Because the mother was a co-lessee of the residence and paid the rent, she " `share[d] a common right of access to or control of the property to be searched' " (*People v Madill*, 26 AD3d 811, 811, *lv denied* 6 NY3d 850, quoting *People v Cosme*, 48 NY2d 286, 290). She therefore had authority to consent to a warrantless search of the bedroom in the absence of defendant or his girlfriend (see *People v Pugh*, 246 AD2d 679, 681, *lv denied* 91 NY2d 976, 92 NY2d 882; *People v Adams*, 244 AD2d 897, 898, *lv denied* 91 NY2d 887, 888; *People v Moorer*, 58 AD2d 878, 879). Even assuming, arguendo, that the mother lacked actual authority to consent to that search, we conclude that the police "relied in good faith on [her] apparent authority . . . to consent to the search, and the circumstances reasonably indicated that [she] had the requisite authority to consent to the search" (*People v Fontaine*, 27 AD3d 1144, 1145, *lv denied* 6 NY3d 847; see *People v Cruz*, 272 AD2d 922, 924, *affd* 96 NY2d 857; *People v Gates* [appeal No. 2], 168 AD2d 995, *lv denied* 77 NY2d 906). We further conclude that the mother's consent was voluntary (see *People v Caldwell*, 221 AD2d 972, *lv denied* 87 NY2d 920; see generally *People v Gonzalez*, 39 NY2d 122, 128-129). Based on our determination that the warrantless search of the bedroom was valid, we conclude that the court properly refused to suppress the weapon and defendant's statements to the police as fruit of the poisonous tree (see *People v Carter*, 39 AD3d 1226, 1226-1227, *lv denied* 9 NY3d 863; *cf. People v Riddick*, 70 AD3d 1421, 1424, *lv denied* 14 NY3d 844).

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

1432

KA 08-00378

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROSA Y. RESTO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (GRAZINA MYERS 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 (Stephen K. Lindley, J.), rendered September 13, 2007. The judgment convicted defendant, upon a nonjury verdict, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a nonjury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]). Defendant failed to preserve for our review her challenge to the legal sufficiency of the evidence (*see People v Gray*, 86 NY2d 10, 19). We reject the further contention of defendant that she was denied effective assistance of counsel (*see People v McDaniel*, 13 NY3d 751; *People v Forsythe*, 59 AD3d 1121, 1123, lv denied 12 NY3d 816; *see generally People v Baldi*, 54 NY2d 137, 147). Finally, the sentence is not unduly harsh or severe.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1433

KA 08-00336

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DANNY HERNANDEZ, DEFENDANT-APPELLANT.

DAVID M. GIGLIO, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered February 4, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (three counts) and robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts of murder in the second degree (Penal Law § 125.25 [1], [3]) and one count of robbery in the first degree (§ 160.15 [1]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction of robbery in the first degree (*see People v Gray*, 86 NY2d 10, 19). We reject defendant's further contention that the evidence is legally insufficient to support the conviction of three counts of murder in the second degree. "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is 'whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Hines*, 97 NY2d 56, 62, *rearg denied* 97 NY2d 678; *see People v Pichardo*, 34 AD3d 1223, 1224, *lv denied* 8 NY3d 926) and, here, we conclude that the evidence at trial could lead a rational person to the conclusion reached by the jury (*see People v Daniels*, 75 AD3d 1169, 1170; *Pichardo*, 34 AD3d at 1224; *see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We further conclude that County Court did not abuse its

discretion in admitting in evidence certain autopsy photographs and photographs of the crime scene (*see generally People v Poblimer*, 32 NY2d 356, 369-370, *rearg denied* 33 NY2d 657, *cert denied* 416 US 905). The autopsy photographs were relevant to illustrate and corroborate the testimony of the pathologist with respect to the victim's injuries and the cause of death (*see id.* at 370; *see People v Simon*, 71 AD3d 1574, 1575-1576, *lv denied* 15 NY3d 753, 757, 853, 856; *People v Hayes*, 71 AD3d 1477, *lv denied* 15 NY3d 751), and the photographs of the crime scene were relevant to demonstrate defendant's intent and to corroborate the statements that defendant made to a witness concerning the commission of the crime (*see Simon*, 71 AD3d at 1575-1576; *People v Camacho*, 70 AD3d 1393, *lv denied* 14 NY3d 886, 887; *People v McCullough*, 278 AD2d 915, 916, *lv denied* 96 NY2d 803).

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

1434

KA 09-01002

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ATOO V. COOPER, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (FRANK A. SEMINERIO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered October 31, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [7]). As the People correctly concede, the record fails to establish that defendant's waiver of the right to appeal is valid because there is no indication that County Court explained "that the waiver of the right to appeal is separate and distinct from the other rights that are forfeited by the plea" (*People v Hernandez*, 63 AD3d 1615, 1615, lv denied 13 NY3d 745). Although the contention of defendant that the plea was not voluntarily, knowingly and intelligently entered survives even a valid waiver of the right to appeal, we conclude that defendant 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 Secrist*, 74 AD3d 1853). This case does not fall within the rare exception to the preservation requirement because nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the plea (see *People v Lopez*, 71 NY2d 662, 666).

Defendant further contends that he was denied effective assistance of counsel based on an alleged conflict of interest with respect to defense counsel assigned to represent him during sentencing. To the extent that defendant's contention is not forfeited by the plea (see *People v Santos*, 37 AD3d 1141, lv denied 8 NY3d 950), it is lacking in merit (see generally *People v Ford*, 86

NY2d 397, 404). Defendant failed to "demonstrate that the conduct of his defense was in fact affected by the operation of the conflict of interest" (*People v Alicea*, 61 NY2d 23, 31; see *People v Knight*, 280 AD2d 937, 939-940). Thus, contrary to the contention of defendant, we conclude that he received meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1435

KA 09-02415

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

COLLEN T. POOLE, DEFENDANT-APPELLANT.

TIMOTHY PATRICK MURPHY, WILLIAMSVILLE, 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 16, 2009. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him after a jury trial of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), defendant contends that County Court's *Sandoval* ruling constitutes an abuse of discretion. By failing to object to the court's ultimate *Sandoval* ruling, defendant failed to preserve that contention for our review (see *People v Anthony*, 74 AD3d 1795, lv denied 15 NY3d 849; *People v Goodrum*, 72 AD3d 1639, lv denied 15 NY3d 773; *People v Walker*, 66 AD3d 1331, lv denied 13 NY3d 942). In any event, we reject that contention. " 'The extent to which prior convictions bear on the issue of a defendant's credibility is a question entrusted to the sound discretion of the court, reviewable only for clear abuse of discretion' " (*People v Nichols*, 302 AD2d 953, 953, lv denied 99 NY2d 657; see *People v Hayes*, 97 NY2d 203, 207-208). Here, we conclude that the court's ruling was " 'a considered decision [that] took into account all relevant factors and further struck a proper balance between the probative value of the[] convictions on defendant's credibility and the possible prejudice to him' " (*People v Mitchell*, 57 AD3d 1308, 1311). "The fact that the prior conviction[] of attempted [criminal possession of a controlled substance in the fifth degree is] similar to the [crimes] charged herein does not preclude [its] use on cross-examination" (*People v Montgomery*, 288 AD2d 909, 910, lv denied 97 NY2d 685; see *People v Walker*, 83 NY2d 455, 457-

459).

Defendant further contends that the evidence is not legally sufficient to support the conviction because the People failed to disprove his agency defense beyond a reasonable doubt. "As a preliminary matter, we reject the People's contention that defendant failed to preserve his contention for our review. Defendant's motion [for a trial order of dismissal] at the close of the People's case was specifically directed at the alleged error now raised on appeal" (*People v Daniels*, 8 AD3d 1022, 1023, *lv denied* 3 NY3d 705 [internal quotation marks omitted]). Contrary to defendant's contention, however, the conviction is supported by legally sufficient evidence. "The determination . . . whether the defendant was a seller, or merely a purchaser doing a favor for a friend, is generally a factual question for the jury to resolve on the circumstances of the particular case" (*People v Lam Lek Chong*, 45 NY2d 64, 74, *cert denied* 439 US 935; *see People v Brown*, 50 AD3d 1596, 1597). The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is "legally sufficient . . . to establish that defendant was the seller of a controlled substance and not an agent of the buyer" (*People v Burden*, 288 AD2d 821, 821, *lv denied* 97 NY2d 751). Further, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "It cannot be said that, in rejecting the agency defense, the jury failed to give the evidence the weight it should be accorded" (*People v Watkins*, 284 AD2d 905, 906, *lv denied* 96 NY2d 943).

Defendant contends that he was denied effective assistance of counsel based on, *inter alia*, defense counsel's failure to object to the introduction of evidence of his other drug sales. We reject that contention. "There can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). "[T]he fact that [defendant] interposed an agency defense permitted the People to introduce evidence of [the other] drug sales" (*People v Massey*, 49 AD3d 462, 462, *lv denied* 10 NY3d 866; *see also People v Chaires*, 171 AD2d 955, 956, *lv denied* 78 NY2d 963). Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, the sentence is not unduly harsh or severe.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1436

CA 09-02318

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

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

V

MEMORANDUM AND ORDER

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

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO
(KEVIN S. DOYLE OF COUNSEL), FOR RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County
(Richard C. Kloch, Sr., A.J.), entered October 19, 2009 in a
proceeding pursuant to Mental Hygiene Law article 10. The order,
inter alia, determined that respondent is a dangerous sex offender
requiring confinement.

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

Memorandum: Respondent appeals from an order determining that he
is a dangerous sex offender requiring confinement pursuant to Mental
Hygiene Law § 10.11 (d) and committing him to a secure treatment
facility. Respondent previously consented to a finding that he is a
sex offender who suffers from a mental abnormality requiring strict
and intensive supervision and treatment (SIST) pursuant to Mental
Hygiene Law § 10.11. Less than a month after his release into the
community under the SIST conditions, respondent was arrested upon his
parole officer's report that he had violated certain SIST conditions.

Contrary to respondent's contention, petitioner established by
clear and convincing evidence at the hearing that respondent is a
dangerous sex offender requiring confinement (see Mental Hygiene Law §
10.07 [f]; § 10.11 [d] [4]). Petitioner presented the testimony of
respondent's parole officer, as well as an expert psychologist who
evaluated respondent. Contrary to respondent's contention, Supreme
Court was not limited to considering only the facts of the SIST
violations; rather, the court could rely on all the relevant facts and
circumstances tending to establish that respondent was a dangerous sex
offender requiring confinement (see generally *Matter of State of New*

York v Timothy JJ., 70 AD3d 1138, 1142-1143). Further, although respondent presented the testimony of his own expert psychologist whose opinion differed from that of petitioner's expert, the court was in the best position to evaluate the weight and credibility of that conflicting testimony (see *Matter of State of New York v Donald N.*, 63 AD3d 1391, 1394).

Respondent contends that the court erred in allowing petitioner's expert psychologist to offer an opinion because that opinion was based in part on interviews with collateral sources who did not testify at trial, i.e., respondent's treatment providers at the psychiatric hospital. We reject that contention. The professional reliability exception to the hearsay rule "enables an expert witness to provide opinion evidence based on otherwise inadmissible hearsay, provided it is demonstrated to be the type of material commonly relied on in the profession" (*Hinlicky v Dreyfuss*, 6 NY3d 636, 648; see *Hamsch v New York City Tr. Auth.*, 63 NY2d 723, 725-726; *Matter of Murphy v Woods*, 63 AD3d 1526). Here, the expert testified that the statements of a respondent's treatment providers are commonly relied upon by the profession when conducting a psychological examination to determine whether a respondent is a dangerous sex offender requiring confinement (see generally *People v Goldstein*, 6 NY3d 119, 124-125, cert denied 547 US 1159).

We reject respondent's further contention that the court erred in allowing petitioner's expert psychologist to give hearsay testimony regarding her conversations with respondent's treatment providers. "[H]earsay testimony given by [an] expert[] is admissible for the limited purpose of informing the jury of the basis of the expert['s] opinion[] and not for the truth of the matters related' " (*Matter of State of New York v Wilkes* [appeal No. 2], 77 AD3d 1451, 1453). The expert gave limited hearsay testimony on direct examination with respect to a conversation she had with one of respondent's treatment providers, and she testified that she relied on the hearsay information to form her opinion on the case. We thus conclude that the limited amount of hearsay information was "properly admitted after the court determined that its purpose was to explain the basis for the expert['s] opinion[], not to establish the truth of the hearsay material, and that any prejudice to respondent from that testimony was outweighed by its probative value in assisting the [court] in understanding the basis for [the] expert's opinion" (*id.* at 1453).

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

1437

CA 09-01927

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

IN THE MATTER OF THE ESTATE OF SIAMAK HAMZAVI,
DECEASED, BY TIMOTHY P. FARRELL, ADMINISTRATOR,
CLAIMANT-APPELLANT,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 106918.)

ROBERT S. BEEHM, BINGHAMTON, FOR CLAIMANT-APPELLANT.

SASSANI & SCHENCK, P.C., LIVERPOOL (MITCHELL P. LENCZEWSKI OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Diane L. Fitzpatrick, J.), entered August 26, 2009 in a personal injury action. The judgment dismissed the claim.

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

Memorandum: Claimant commenced this wrongful death action as administrator of the estate of Siamak Hamzavi (decedent), seeking damages for the fatal injuries sustained by decedent when the vehicle he was driving left the highway, struck a guiderail and collided with a concrete bridge pier on Interstate 81 near Syracuse. On a prior appeal, we affirmed the order granting that part of defendant's motion for summary judgment dismissing the claim insofar as it alleges that defendant failed to maintain the roadway and failed to warn of a dangerous condition and denying that part of the motion with respect to the claim insofar as it alleges defendant's negligent design and construction of the roadway (*Matter of Estate of Hamzavi v State of New York*, 43 AD3d 1430). Following a trial, the Court of Claims determined, inter alia, that a normal longitudinal drainage ditch did not exist near the guiderail at issue and thus that section 10.01.04 of the New York State Department of Transportation Highway Design Manual (Highway Design Manual) did not apply. The court further concluded that defendant did not breach its duty to decedent to adequately design and construct its roadways in a reasonably safe condition, and the court therefore dismissed the claim. We affirm.

Viewing the evidence in the light most favorable to the prevailing party, we conclude that the court's determination is supported by a fair interpretation of the evidence (*see Farace v State*

of New York, 266 AD2d 870; see generally *Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170). Section 10.01.04 of the Highway Design Manual provides, in relevant part, that, "[w]here [a] guide[rail] terminates near a normal longitudinal drainage ditch in cut," the guiderail should be "extend[ed] . . . into the cut slope." The parties presented expert testimony concerning whether the drainage area near the guiderail was a normal longitudinal drainage ditch and thus would be subject to the guiderail termination methodology embodied in section 10.01.04. Inasmuch as "resolution of the disputed factual issues here depended upon a thorough and thoughtful assessment of the competing testimony offered by the various experts, and given that the record as a whole supports the [court's] findings," we perceive no basis to disturb the judgment (*Krafchuk v State of New York*, 250 AD2d 962, 964).

In view of our determination, we do not address claimant's remaining contentions.

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

1438

CA 10-01377

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

DEBORAH NICHOLS, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

BDS LANDSCAPE DESIGN, WILLIAM DOBSON, III,
AND NATIONAL GRANGE MUTUAL INSURANCE,
DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AARON MICHAEL STREIT OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

THOMAS C. PARES, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 4, 2010 in a personal injury action. The order granted the relief requested in plaintiff's petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the special proceeding is converted to an action.

Memorandum: Deborah Nichols was injured in November 2005 when she slipped and fell on ice in an area maintained by BDS Landscape Design (BDS) and William Dobson, III. National Grange Mutual Insurance (National Grange) is the insurance carrier for BDS and Dobson. Nichols successfully filed a workers' compensation claim and, beginning in February 2007, she entered into settlement negotiations with National Grange with respect to her negligence claim. The parties thereafter reached an oral settlement of the negligence claim. In a confirming letter from her attorney in May 2008, Nichols stated that the settlement was "subject to the consent and waiver of the lien" by nonparty Sedgwick Claims Management Services (Sedgwick), the insurance carrier for the Workers' Compensation Board. On July 30, 2008, Nichols sent a proposed general release to National Grange that improperly named an unrelated entity as the released party and, the following day, National Grange faxed a release to Nichols containing the same terms as her proposed release but naming the correct released parties. Nichols did not receive Sedgwick's consent to the settlement until April 2009, whereupon she executed the release prepared by National Grange. By letter dated May 29, 2009, however, National Grange advised Nichols that its position was that the case was not settled and that the claim by Nichols therefore was time-barred.

Nichols thereafter commenced this "special proceeding" by order

to show cause and petition, seeking a determination "that a judgment be entered against [National Grange, BDS and Dobson] . . . tolling the running of the [s]tatute of [l]imitations[] and compelling payment of the agreed settlement to [Nichols]" According to Nichols, National Grange "breached its settlement agreement" and "acted in a deceptive manner that tolls the running of the [s]tatute of [l]imitations as intended by the CPLR." Supreme Court granted the relief requested by Nichols, resulting in this appeal by BDS, Dobson and National Grange.

Inasmuch as a special proceeding is not the proper procedural vehicle for Nichols' claims (*see generally* CPLR 103 [b]), which sound in breach of contract (*see Insurance Co. of N. Am. v New York Cas. Ins. Co.*, 156 AD2d 1018-1019, *lv denied* 75 NY2d 708; *see also Kowalchuk v Stroup*, 61 AD3d 118, 119-121), we exercise our power to convert this "special proceeding" to an action (*see* CPLR 103 [c]; *see generally Jones v Town of Carroll*, 32 AD3d 1216, 1218, *appeal dismissed* 12 NY3d 880). We thus deem the order to show cause to be a summons and the petition to be a complaint (*see Matter of Bart-Rich Enters., Inc. v Boyce-Canandaigua, Inc.*, 8 AD3d 1119), and we note that Nichols is properly denominated as a plaintiff while BDS, Dobson and National Grange are properly denominated as defendants.

With respect to the merits of this action, we conclude that the court erred in effectively granting summary judgment to plaintiff (*see generally Taskiran v Murphy*, 8 AD3d 360), inasmuch as plaintiff failed to establish the existence and terms of the settlement agreement as a matter of law (*see generally Pyramid Brokerage Co., Inc. v Zurich Am. Ins. Co.*, 71 AD3d 1386, 1387; *Easton Telecom Servs., LLC v Global Crossing Bandwidth, Inc.*, 62 AD3d 1235, 1237). We therefore reverse the order.

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

1439

CA 09-02565

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

IN THE MATTER OF JERROLD FERRARO, JUDITH
FERRARO, WILLIAM FLEMING, LORETTA C. AQUILINA,
KATHLEEN AQUILINA, JUDITH HYATT, GWEN
RICHTHAMMER, MONICA C. WATERS, ARLENE MEROWITZ,
AND DANIEL WARD, INDIVIDUALLY AND AS A MEMBER OF
TOWN BOARD OF TOWN OF AMHERST,
PETITIONERS-PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

TOWN BOARD OF TOWN OF AMHERST, BENDERSON
DEVELOPMENT COMPANY, LLC, BUFFALO-MAPLE ROAD LLC,
AND BUFFALO-ANDERSON ASSOCIATES, LLC,
RESPONDENTS-DEFENDANTS-RESPONDENTS.

RICHARD G. BERGER, BUFFALO, FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

E. THOMAS JONES, TOWN ATTORNEY, WILLIAMSVILLE (ALAN P. MCCrackEN OF
COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT TOWN BOARD OF TOWN OF
AMHERST.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (JOHN J. HENRY OF COUNSEL), FOR
RESPONDENTS-DEFENDANTS-RESPONDENTS BENDERSON DEVELOPMENT COMPANY, LLC,
BUFFALO-MAPLE ROAD LLC, AND BUFFALO-ANDERSON ASSOCIATES, LLC.

Appeal from a judgment of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered September 15, 2009 in a hybrid CPLR article 78 proceeding and declaratory judgment action. The judgment declared that Local Law No. 8 of the Town of Amherst is valid and lawful and otherwise dismissed the petition and complaint.

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

Memorandum: Petitioners-plaintiffs (petitioners) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul the determination of respondent-defendant Town Board of Town of Amherst (Town Board) in favor of rezoning two adjacent parcels of property north of Maple Road in the Town of Amherst (Town). The property at issue is owned by respondents-defendants Buffalo-Maple Road LLC and Buffalo-Anderson Associates, LLC, and respondent-defendant Benderson Development Company, LLC is their agent (collectively, Benderson respondents). The property (hereafter, Benderson property) is situated to the east

of a sports arena, to the south of the University at Buffalo North Campus (University) and to the south and west of the Audubon Golf Course (golf course). Most of the petitioners reside on the south side of Maple Road, which is a residential area. The Benderson respondents sought to have their property rezoned in order to construct various commercial buildings, condominiums and a hotel. After petitioners protested the proposed rezoning, the Benderson respondents amended the petition for rezoning to include a 101-foot buffer zone immediately adjacent to Maple Road, which would retain the same zoning classification. The Town Board approved the amended petition for rezoning by a vote of 4 to 3, concluding that the proposed rezoning was "generally consistent" with the Town's Bicentennial Comprehensive Plan (Plan). Supreme Court determined, inter alia, that the resolution approving the proposed rezoning passed by the Town Board's majority vote and that a three-fourths majority vote was not required, and the court otherwise dismissed the petition and complaint.

Petitioners contend that reversal is required because the owners of more than 20% of the property lying directly opposite the Benderson property had protested the rezoning and thus the petition for rezoning required the approval of at least three-fourths of the Town Board members (see Town Law § 265 [1] [c]). We reject that contention. Pursuant to Town Law § 265 (1) (c), the approval of at least three-fourths of the members of a town board is required in the event that an amendment is protested by "the owners of [20%] or more of the area of land directly opposite thereto, extending [100] feet from the street frontage of such opposite land." Petitioners contend that their properties were "directly opposite" the Benderson property and within 100 feet from the south side of Maple Road. Respondents, however, contend that petitioners' properties were required to be within 100 feet of the portion of the Benderson property to be rezoned in order for section 265 (1) (c) to apply. We agree with respondents.

Here, we must determine what area of property is referred to by the word "thereto" in Town Law § 265 (1) (c). The legislative history of that section establishes that subdivision (1) (c) was intended to apply to property directly opposite the property included in the proposed rezoning. The original proposed language of the statute provided that a three-fourths vote was required if written protests were filed by "the owners of [20%] or more of the area of land directly opposite to that land included in such proposed change, extending [100] feet from the street frontage of such opposite land" (Recommendation of Law Rev Commn, 1990 McKinney's Session Laws of NY, at 2311 [emphasis added]). The word "thereto" in the statute as enacted was substituted for the emphasized language in the proposed statute. Inasmuch as there would be a 101-foot buffer zone between petitioners' properties and the rezoned portion of the Benderson property, we conclude that petitioners' properties are not directly opposite the property to be rezoned and that the property to be rezoned is not within 100 feet of the street frontage of petitioners' properties. Indeed, the buffer zone created by the Benderson respondents renders Town Law § 265 (1) (c) inapplicable (see e.g.

Matter of Eadie v Town Bd. of Town of N. Greenbush, 7 NY3d 306, 314-315; *Ryan Homes, Inc. v Town Bd. of Town of Mendon*, 7 Misc 3d 709, 712-714).

Petitioners further contend that the driveways to the proposed development on the Benderson property should have been rezoned and that petitioners' properties would be within 100 feet of that rezoned property. The Commissioner of Building for the Town determined in a memorandum to the Town Board that the driveways would serve a dual purpose and thus were not required to be rezoned, and petitioners did not appeal that determination to the Zoning Board of Appeals. Even assuming, arguendo, that petitioners were not required to exhaust their administrative remedies with respect to the determination of the Commissioner of Building, we conclude that petitioners' contention lacks merit (see *Matter of Hampton Hill Villas Condominium Bd. of Mgrs. v Town of Amherst Zoning Bd. of Appeals*, 13 AD3d 1079).

We reject petitioners' contention that the proposed rezoning violated the Town's Plan. "If the validity of the legislative classification for zoning purposes [is] fairly debatable, the legislative judgment must be allowed to control . . . Thus, where the [challenging parties] fail[] to establish a clear conflict with the comprehensive plan, the zoning classification must be upheld" (*Bergstol v Town of Monroe*, 15 AD3d 324, 325, *lv denied* 5 NY3d 701 [internal quotation marks omitted]; see *Matter of Meteor Enters., LLC v Bylewski*, 38 AD3d 1356, 1358). By its terms, the Plan was not "meant to dictate land use . . . [Rather, it] was intended to communicate the overall direction and concept of future development." It was "designed to be flexible . . . [and] to provide a generalized guide for future development" Pursuant to the Plan, property to the north of the golf course was set aside for a mixed-use center. The Plan also set aside the area of the Benderson property for park areas and green space, and residential areas along Maple Road were to be protected "from further encroachments by new commercial development or redevelopment." In addition, however, the Plan sought to encourage commercial development near the University and permitted commercial development in specific corridors, including a section of Maple Road close to the location of the Benderson property. The Town Board concluded that the proposed rezoning was consistent with the Plan because of the Benderson property's proximity to the University, the fact that Maple Road was a major arterial road and the unlikely use of the Benderson property for any other development, based on its contamination and proximity to the sports arena and the University's stadium. Although the Benderson property is not adjacent to the University's campus loop or accessible by Millersport Highway, the Benderson property is still in proximity to the University and is close to the Plan's proposed location of a mixed-use center. Further, the Plan's proposed location for a mixed-use center is also across the street from a residential area and is buffered by green area in much the same way as the Benderson respondents' proposed development. Although the recreation space on the north side of Maple Road, as proposed in the Plan, will give way to commercial development, there will be a large recreational area preserved to the east of petitioners' properties. Keeping in mind that the Plan was intended

to be flexible and was meant to provide a generalized guide to future development, we conclude that it is "fairly debatable" whether the proposed rezoning is consistent with the overall Plan (*Bergstol*, 15 AD3d at 325 [internal quotation marks omitted]). It is undisputed that the proposed rezoning of the Benderson property conflicts with the Plan's intended use of that property, but our review must be based on the Plan as a whole. Thus, because petitioners failed "to establish a clear conflict" with the overall Plan, the Town Board's zoning determination must be upheld (*id.*).

In view of our determination, we see no need to address petitioners' remaining contentions.

All concur except FAHEY, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent inasmuch as I conclude that Supreme Court erred in dismissing the petition and complaint seeking, inter alia, to annul the determination that approved the rezoning petition and amended the Bicentennial Comprehensive Plan (Plan) of the Town of Amherst (Town) and in declaring that Local Law No. 8 of 2008 was valid.

I

This appeal arises from the efforts of respondents-defendants Benderson Development Company, LLC, Buffalo-Maple Road LLC and Buffalo-Anderson Associates, LLC (collectively, Benderson respondents) to develop two adjacent parcels of property (collectively, Benderson property) located on Maple Road in the Town. The larger of the parcels, which was the former home of the Buffalo Shooting Club, consists of approximately 31.589 acres and had been zoned Community Facilities (CF). The smaller of the parcels consists of approximately 1.737 acres and had been zoned Residential 3 (R-3).

The Benderson property sits on the north side of Maple Road and is bordered on its west side by a residential area and on its north and east sides by the Audubon Golf Course (golf course). Both parcels of the Benderson property consist of primarily open, cleared space across Maple Road from a residential area. The Plan, which is intended, inter alia, "to communicate the overall direction and concept of future development . . . [and] to present a composite picture of the Town at full development," alternatively designates the Benderson property as a "Private Recreation Area[]," an area of "Recreation, Open Space & Greenways" and "Park/green space."

The Benderson property is within the "University of Buffalo Focal Planning Area" (FPA) set forth in the Plan, and the FPA also includes the University at Buffalo North Campus (University), the Pepsi Center sports arena and an area designated for the development of a mixed-use center (mixed-use area). The mixed-use area is situated to the north of the golf course, to the south and east of Millersport Highway, a divided highway that forms part of the University's campus loop, and to the south and west of Ellicott Creek. The mixed-use area is also located directly across Millersport Highway from the University.

The Benderson respondents seek to construct on the Benderson property a mixed-use development (hereafter, project) consisting of one- to three-story condominiums and townhouses, a five-story hotel and additional buildings housing retail and restaurant tenants. The proposed retail and restaurant buildings would be one- and two-story masonry and wood clapboard buildings, reminiscent of late nineteenth and early twentieth century buildings that would have been typical of "Main Street" towns in Western New York. Nevertheless, the size of the project is much more modern in scale. Indeed, plans for the project required four driveways to service traffic to and from Maple Road, and one of the traffic studies prepared in conjunction with the project indicates that those driveways will accommodate average weekday traffic of approximately 17,000 vehicles. Moreover, plans for the retail component of the project call for over 200,000 square feet of space and development of that nature is, as one resident who spoke against the project accurately noted, equivalent in size to a Wal-Mart.

In any event, in February 2007 the Benderson respondents filed a petition for rezoning with respect to the Benderson property and proposed to rezone that property from CF and R-3 to General Business (GB) and Multi-Family Residential 67 (MFR-67) in order to construct the project. The Town of Amherst Planning Board (Planning Board) held a public hearing on the petition and, in a resolution reached on the same date as the public hearing, made various findings "outlining the project's consistency with the . . . Plan."

Shortly thereafter, several Maple Road residents signed petitions protesting the proposed rezoning, and respondent-defendant Town Board of Town of Amherst (Town Board) held a public hearing on the rezoning petition. From that point forward, the project changed slightly in scope, inasmuch as the Benderson respondents reduced the area to be rezoned to accommodate a 4.5-acre conservation project or buffer area extending 101 feet north of Maple Road. Thereafter, the Town Assessor concluded that a supermajority vote of the Town Board would not be required to enact the proposed rezoning, and the Commissioner of Building (Building Commissioner) concluded that the driveways providing access to the retail areas of the project would serve a "dual purpose" and thus would not need to be rezoned.

The Town was not the only municipal entity to review the proposed rezoning. By letter dated May 2, 2008, the Commissioner of the County of Erie Department of Environment and Planning (County) commented that, inter alia, the project "does not comply with the intent and objectives of the . . . Plan" because the Plan refers to the intended use of the parcels in question as a recreation or "green" area; the project would cause commercial development to encroach upon areas of Maple Road that were intended to be protected from encroachments of new commercial development or redevelopment; and the Plan called for mixed-use development in the mixed-use area. Nevertheless, that letter concluded with the statement that, "[o]ther than the foregoing comments, the County has no recommendation concerning the [p]roject." One month later, the Deputy Commissioner of the Erie County Division

of Planning signed a General Municipal Law reply form indicating that it had no recommendation with respect to the proposed rezoning and that the proposed rezoning was deemed to be of local concern.

On June 2, 2008 the Town Board held a public hearing with respect to the proposed rezoning and, at the conclusion of the hearing, it narrowly voted, inter alia, to "accept[] the recommendation of the . . . Planning Board that the proposed project and rezoning are consistent with the . . . Plan" and to "amend[] the . . . Plan to the extent the rezoning is inconsistent with the Plan and adopt[] the attached Statement of Findings and approve[] the rezoning of the [Benderson] property." The Town Board also enacted Local Law No. 8, which amended the Town's Code and Zoning Map to reflect the rezoning.

After that vote, petitioners-plaintiffs (petitioners) pursued judicial recourse. In a petition and complaint dated June 30, 2008, petitioners sought, inter alia, to annul the determination of the Town Board to rezone the Benderson property and to amend the Plan. The court declared, inter alia, that Local Law No. 8 is in all respects valid and lawful and otherwise dismissed the petition and complaint. This appeal ensued.

II

Turning to the merits, I first consider the issue whether the rezoning violated the Plan. On that question, I agree with the majority's statement of the controlling principles of law. "If the validity of the legislative classification for zoning purposes [is] fairly debatable, the legislative judgment must be allowed to control . . . Thus, where the [challenging parties] fail[] to establish a clear conflict with the comprehensive plan, the zoning classification must be upheld" (*Bergstol v Town of Monroe*, 15 AD3d 324, 325, lv denied 5 NY3d 701 [internal quotation marks omitted]; see *Matter of Meteor Enters., LLC v Bylewski*, 38 AD3d 1356, 1358). I further note that the core of this appeal requires a two-part analysis, i.e., whether there was a clear conflict between the Plan and the rezoning and, if so, whether the Town Board properly amended the Plan to account for that inconsistency.

With respect to the first prong of that analysis, I conclude that petitioners established a "clear conflict" between the rezoning and the Plan (*Bergstol*, 15 AD3d at 325), and I begin with an examination of the nature of the Benderson property. The Plan characterizes the intended use of that property as recreation or "green" space. In sum and substance, at the heart of this case is the effort of the Benderson respondents to make the drastic conversion of the Benderson property from green space to a large plaza. The Benderson respondents characterize the project as a "mixed[-]use development," but the true character of the project is retail-oriented inasmuch as the plans call for the development of an extraordinary amount of retail space designed to attract an equally extraordinary amount of traffic to what is basically a "green" and residential area. Even the environmental attorney for Benderson Development Company, LLC acknowledged that the project is intended to house "higher[-]end stores" in what is an

affluent and densely populated area. Put bluntly, the question before us is whether retail development on the Benderson property equivalent in scale to a Wal-Mart clearly conflicts with the Plan's intent to protect the "green" nature of that property and the residential fabric of the surrounding area, and I cannot agree with the Town Board and the Benderson respondents that the question is even remotely debatable.

I further conclude that the rezoning is in clear conflict with the Plan inasmuch as the project will result in the encroachment of commercial development into "green" residential areas of Maple Road. The figures included in the Plan demonstrate that commercial development within the Town has largely been clustered around major thoroughfares and interchanges that are removed in distance from the project. The development of the project on the Benderson property would be an obvious departure from that strategy and pattern.

I also conclude that the placement of the project on Maple Road conflicts with the Plan's intent for development on the periphery of the University. The "Concept Plan" for the Maple Road area included within the Plan establishes why the part of that area designated for a mixed-use center is on the east side of Millersport Highway. That location is accessible by a portion of the University's campus loop that is a divided highway with two lanes of travel in each direction and, more importantly, it is isolated from nearby residential areas by the golf course on the south, Millersport Highway and the University campus on the west and a creek on the east. A mixed-use facility in that location would not interfere with residential areas and would be accessible to University students. By contrast, the project proposed by the Benderson respondents does exactly the opposite inasmuch as it interferes with residential areas and is reasonably accessible from the University only by vehicle.

Finally, with respect to the question of the conflict between the rezoning and the Plan, I conclude that the logic underpinning the determination of the Town Board that the proposed rezoning was consistent with the Plan is specious. The majority explains that "[t]he Town Board concluded that the proposed rezoning was consistent with the Plan because of the . . . proximity [of the Benderson property] to the University, the fact that Maple Road was a major arterial road and the unlikely use of the Benderson property for any other development, based on its contamination and proximity to the sports arena and the University's stadium." Although the Benderson property has some degree of proximity to the University, it is significantly further from campus than the area designated for mixed-use development by the Plan. Contrary to the conclusion of the Town Board, the Plan does not designate Maple Road as a major arterial, and the alleged impediment to development presented by the nearby sports arena and stadium is simply not supported by the record. To reach the Benderson property from either of those venues, one would in all likelihood either travel in a circuitous route by vehicle or traverse on foot a four-lane highway, part of the area designated for mixed-use development by the Plan and a large part of the golf course. In any event, even assuming, arguendo, that those venues impede development

of the Benderson property, I conclude that such an outcome is more consistent with the Plan's intent that the Benderson property constitute "green" space at the Town's full development.

III

In view of my determination that there is a "clear conflict" between the rezoning and the Plan (*Bergstol*, 15 AD3d at 325), it is necessary for me to address the question whether the Town Board properly amended the Plan to reconcile that conflict. Before reaching the merits of that question, however, I note one of the fundamental problems with this case. On June 2, 2008, and as noted above, the Town Board resolved to accept the Planning Board's recommendation that the project and rezoning are consistent with the Plan and at the same time voted to amend the Plan to the extent that the rezoning is inconsistent with the Plan. That resolution is obviously inconsistent and, in layman's terms, the issue of the amendment of the Plan is not one that the Town Board can have "both ways." The Plan either did not require amendment for the rezoning to be lawful or it did require such amendment.

In any event, I conclude that the Town Board did not lawfully amend the Plan because the Town Board did not give proper notice of the proposed amendment and the Planning Board did not make a recommendation on the proposed amendment before the Town Board resolved to amend the Plan. With respect to the issue of notice, Town Law § 272-a (6) (a) provides that an amendment to a comprehensive town plan shall be preceded by at least one public hearing "to assure full opportunity for citizen participation in the preparation of such proposed . . . amendment" Notice of that hearing "shall be published in a newspaper of general circulation in the town at least [10] calendar days in advance of the hearing," and the amendment shall be made available for public review during that period (§ 272-a [6] [c]).

Here, the record establishes that the Town Board resolved to amend the Plan at its June 2, 2008 meeting, and there is no indication of any public notice given with respect to that meeting. Indeed, the notices that actually appear in the record are deficient both in terms of their timing and content. Those notices pertain only to the September 4, 2007 meeting that commenced with the statement of the Town Supervisor that the Town Board would consider "the rezoning of Maple Road" and concluded with the Town Supervisor's indication that the Town Board would await the final draft environmental impact statement and another public hearing before acting on the issue. Moreover, the content of those notices is deficient inasmuch as they made no reference to an amendment to the Plan and, at some points, grossly understated the amount of retail space the project was expected to include.

Further, with respect to the input of the Planning Board on the proposed amendment to the Plan, I note that, according to the "Opportunity Review" part of the Plan's "Amendment Process," amendment

of the Plan by the Town Board may be accomplished after the required public hearing on the action but not before the Planning Board has made a recommendation on the proposed amendment. Here, although the Planning Board resolved on June 28, 2007 that the project is consistent with the Plan, it did not adopt recommendations regarding the amendment to the Plan until October 16, 2008, four months after the June 2, 2008 hearing. Even at that time, the Planning Board's recommendation was unclear inasmuch as the Planning Board simply agreed to "[c]onsider [the] issue as part of the next annual review" and stated that "[n]o change to the Plan is recommended."

IV

I next address petitioners' contention that the driveways to the proposed development should have been rezoned, and I reluctantly agree with the majority that petitioners are not entitled to relief with respect to that contention. The majority relies on *Matter of Hampton Hill Villas Condominium Bd. of Mgrs. v Town of Amherst Zoning Bd. of Appeals* (13 AD3d 1079) in rejecting petitioners' contention, but, in my view, that case is inapposite to the facts of this case. The determination of the respondent zoning board of appeals in *Hampton Hill Villas Condominium Bd. of Mgrs.* that the driveway at issue did not require rezoning appears to have been based on the desire of the town's building commissioner to avoid harm to an existing business that used the driveway. The rezoning of the property around the driveway was intended to facilitate the construction of an office building that would be accessible by the driveway, and the rezoning of the driveway to the office building classification would have rendered the use thereof by the existing business nonconforming (*id.*). There is no similar existing business to protect here and, for that reason, *Hampton Hill Villas Condominium Bd. of Mgrs.* is irrelevant. Nevertheless, because they did not challenge the determination of the Building Commissioner with respect to the driveways to the proposed development before the Zoning Board of Appeals, petitioners "failed to exhaust [their] administrative remedies with respect to [that] issue" (*Matter of Peek v Dennison*, 39 AD3d 1239, 1240, *appeal dismissed* 9 NY3d 860), and their contention that the driveways should have been rezoned is not properly before us.

V

For the foregoing reasons, I would reverse the judgment, grant the petition, annul the determination that, inter alia, approved the rezoning petition and amended the Plan, and declare that Local Law No. 8 is invalid.

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

1440

CA 10-00847

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

IN THE MATTER OF COUNTY OF NIAGARA,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

RICHARD F. DAINES, COMMISSIONER, NEW YORK
STATE DEPARTMENT OF HEALTH AND NEW YORK STATE
DEPARTMENT OF HEALTH, RESPONDENTS-APPELLANTS.

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

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (CHRISTOPHER E. BUCKEY OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered February 22, 2010 in a proceeding pursuant to CPLR article 78. The judgment, among other things, granted the amended petition and directed respondents to pay petitioner \$778,212.59.

It is hereby ORDERED that the judgment so appealed from is unanimously modified in the interest of justice by vacating subparagraph (B) of the second decretal paragraph and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondents to reimburse it for certain Medicaid expenditures known as overburden expenses. According to petitioner, respondents incorrectly billed it for those expenses. Petitioner further alleged that, inasmuch as the expenditures were made prior to April 2005, respondents were required to reimburse petitioner for them (see Social Services Law § 368-a [1] [h]; *Matter of Spano v Novello*, 13 AD3d 1006, 1007-1008, lv denied 4 NY3d 819). After the expenditures were made but before petitioner submitted claims for reimbursement, the Legislature enacted a law capping the Medicaid expenditures for which counties could seek reimbursement ([Medicaid Cap Statute] L 2005, ch 58, part C, § 1, as amended by L 2006, ch 57, part A, § 60). In January and February 2009, petitioner submitted six claims for the expenditures made prior to the enactment of the statute. Respondents denied those claims based on the Medicaid Cap Statute.

In two appeals thereafter, this Court affirmed judgments

compelling the same respondents to reimburse overburden expenditures to petitioner and another county, and we concluded that respondents improperly applied the Medicaid Cap Statute retroactively to the claims for reimbursement for services rendered prior to the effective date of the statute (*see Matter of County of Herkimer v Daines*, 60 AD3d 1456, *lv denied* 13 NY3d 707; *Matter of County of Niagara v Daines*, 60 AD3d 1460, *lv denied* 13 NY3d 708). Following our decisions in those cases, respondents "supplemented" their denial of the January and February 2009 claims by adding, as an additional ground for denying those claims, petitioner's failure to submit the claims within 12 months after the expenditures were made, pursuant to 18 NYCRR 601.3 (c). Petitioner thereafter submitted two additional claims in March and August 2009, which respondents denied on the grounds that the Medicaid Cap Statute prohibited payment of such claims and that the claims were time-barred pursuant to 18 NYCRR 601.3 (c).

Respondents appeal from the judgment granting the amended petition and ordering them to "examine and determine all subsequent claims for [o]verburden reimbursement in accordance with the procedures and time limits set forth in 18 NYCRR § 601.4 without asserting or otherwise relying on the Medicaid Cap [Statute] or 18 NYCRR § 601.3 as a basis to disallow any such subsequent claims" We agree with petitioner that respondents failed to preserve for our review their contention that they properly "supplemented" their denial of the January and February 2009 claims by adding a different ground for the denial inasmuch as they failed to raise that ground in their answer. Respondents' contention may be raised for the first time on appeal, however, because petitioner "suggests no factual showing or legal counterstep that might have been made if the [contention] had been tendered below" (*People ex rel. Roides v Smith*, 67 NY2d 899, 901; *see Matter of Persing v Coughlin*, 214 AD2d 145, 148-149).

We conclude that respondents were prohibited from "supplementing" their final determination denying the January and February 2009 claims. In order to determine whether an agency determination is final, a two-part test is applied. "First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and[,] second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party" (*Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34, *rearg denied* 5 NY3d 824). Inasmuch as the denial of the claims inflicted actual harm on petitioner, and petitioner had no steps available to ameliorate or prevent it, we conclude that respondents' determination was final. As respondents correctly concede, "[p]ublic officers or agents who exercise judgment and discretion in the performance of their duties may not revoke their determinations nor review their own orders once properly and finally made, however much they may have erred in judgment on the facts, even though injustice is the result. A mere change of mind is insufficient" (*People ex rel. Finnegan v McBride*, 226 NY 252, 259). Thus, where, as here, no statutory authority exists to permit the respondents to "supplement" their denial of a claim (*see* 18 NYCRR

601.4), their determination is final and not subject to amendment. Contrary to the contention of respondents, barring them from revisiting their final determination "would [not] impermissibly estop [them] from enforcing [their] statutory mandate when [they have] erred in making an initial assessment" (*Matter of Jason B. v Novello*, 12 NY3d 107, 114).

We reject respondents' further contention that all of the claims were time-barred pursuant to 18 NYCRR 601.3 (c). It is well settled that "the interpretation given to a regulation by the agency [that] promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549). Where, however, the agency's "interpretation runs counter to the clear wording of the regulatory provisions, it should not be given any weight" (*Matter of Hickey v Sinnott*, 277 AD2d 572, 575 [internal quotation marks omitted]; see *Matter of Air Cargo-Buffalo v Niagara Frontier Transp. Auth.*, 224 AD2d 1018). The regulation upon which respondents rely governs repayment of "expenditures made by a social services district" (18 NYCRR 601.3 [c]). Here, it is undisputed that the expenditures were not made by a social services district. Rather, they were made by respondents or by other agencies at the direction of respondents. Consequently, we conclude that the time limit set forth in that regulation does not apply. In light of that conclusion, respondents' remaining contentions concerning the applicability of the regulation are moot.

We agree with respondents, however, that Supreme Court erred in directing them to examine and determine all future claims for overburden reimbursement without relying upon 18 NYCRR 601.3 (c) or the Medicaid Cap Statute as a basis for denying the claims. We therefore modify the order accordingly. Although respondents failed to oppose petitioner's request for such an order, and thus they failed to preserve that contention for our review (see generally *Frank Parlamis, Inc. v Piccola Pizza Café-Times Sq.*, 259 AD2d 334), we nevertheless exercise our discretion to review respondents' contention in the interest of justice under the limited circumstances of this case (see generally *White v Weiler*, 255 AD2d 952). We note in particular that our modification concerns only the decision of the court, which is independent of the administrative determination that prompted this litigation.

We conclude that the court's determination with respect to future claims for overburden reimbursement constituted an improper advisory opinion because it "will become effective only upon the occurrence of a future event that may or may not come to pass," i.e., respondents' denial of future claims for reimbursement of overburden expenses based on 18 NYCRR 601.3 (c) or the Medicaid Cap Statute (*New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531). Further, "[a]s a general rule, parties are allowed to take any position they like in litigation, as long as they can make a good faith argument for it, and we see no reason to make an exception to that rule here. It may well be that our decision . . . will preclude [respondents] from relitigating the issue we decide, in the sense that any attempt to

relitigate it should be rejected; but [respondents] should not be enjoined from arguing otherwise" (*American Std., Inc. v OakFabco, Inc.*, 14 NY3d 399, 404).

We have considered respondents' remaining contention that is not moot and conclude that it is without merit.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1441

CA 10-01396

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

DAVID SHUMWAY AND CATHY SHUMWAY,
PLAINTIFFS-APPELLANTS,

V

ORDER

JUSTIN KELLEY, DEFENDANT-RESPONDENT.

E. ROBERT FUSSELL P.C., LEROY (E. ROBERT FUSSELL OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, ROCHESTER (RICHARD C. BRISTER OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered September 21, 2009 in a personal injury action. The order denied plaintiffs' motion for leave to renew their cross motion for partial summary judgment.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1442

CA 10-01075

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

IN THE MATTER OF OTTO HARNISCHFEGER, FRANK ALVARADO, EDMOND BERNABEI, JOHN BRENNAN, JOSEPH BRIGANTI, WESLEY S. BROWN, WILFREDO CARBONEL, JR., JOSE CELORIO, MICHAEL CLARK, TIMOTHY S. FINGLAND, DAVID FRANKLIN, DENNIS GONZALEZ, JUSTIN HAVILL, SCOTT HILL, MURRY E. HOOPER, MICHAEL HOULIHAN, MARTIN LOGAN, JENNIFER L. MORALES, MYRON MOSES, RUBEN PADILLA, JR., DALE L. PASCOE, TIMOTHY M. PEARCE, VINCENT POST, ANDREW W. SANTELL, DAVID SIMPSON, PHILIP SINDONI, DAVID SWAIN, THOMAS TASICK, EDEN TORRES, IGNACIO A. TORRES, NORBERTO TORRES, CHRISTOPHER TUTTLE AND DANIEL J. ZIMMERMAN, PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

DAVID MOORE, CHIEF OF POLICE OF ROCHESTER POLICE DEPARTMENT, ROCHESTER POLICE DEPARTMENT, AND CITY OF ROCHESTER, RESPONDENTS-RESPONDENTS.

MULDOON & GETZ, ROCHESTER (JON P. GETZ OF COUNSEL), FOR PETITIONERS-APPELLANTS.

THOMAS S. RICHARDS, CORPORATION COUNSEL, ROCHESTER (MICHELE DI GAETANO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered September 11, 2009 in a proceeding pursuant to CPLR article 78. The judgment declared that petitioners are not entitled to permanent appointments to the position of investigator pursuant to Civil Service Law § 58 (4) (c) (ii).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition is granted and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking designation as police investigators pursuant to Civil Service Law § 58 (4) (c) (ii). Petitioners are 33 members of the Special Investigation Section (SIS) of respondent Rochester Police Department (hereafter, RPD). In a prior appeal, we concluded that the "merit and fitness test" used by respondents to determine civil service promotions "is not the equivalent of the 'examinations for designation to detective

or investigator' required in order to be exempt from the requirements set forth in Civil Service Law § 58 (4) (c) (ii)" (*Matter of Harnischfeger v Moore*, 56 AD3d 1131, 1132). We further concluded that Supreme Court "should have conducted a hearing to determine whether petitioners were 'temporarily assigned to perform the duties of detective or investigator' for a period exceeding 18 months" (*id.*, quoting § 58 [4] [c] [ii]). We therefore reversed the judgment, reinstated the petition and remitted the matter for such a hearing (*see id.*).

Upon remittal, the court conducted the hearing and concluded that, *inter alia*, petitioners were not temporarily assigned to the same duties as investigators in the RPD (*see* Civil Service Law § 58 [4] [c] [ii]), and that, because of differences in the work responsibilities of petitioners and investigators, petitioners failed to establish that their assignment to the SIS constituted their assignment to the duties of an investigator. We reverse.

We conclude that the court erred in determining that petitioners are not entitled to relief pursuant to Civil Service Law § 58 (4) (c) (ii) on the ground that their assignments to SIS were longstanding rather than temporary. The legislative findings embodied in Civil Service Law § 58 (4) (c) (i) evince an intent to protect those called upon to serve in a detective or investigative capacity for a period exceeding 18 months. Thus, an officer asked to serve in such a capacity for either a term beyond the 18-month period set forth in section 58 (4) (c) (ii) or on a permanent basis is entitled to the protections of that section (*cf. Matter of Calabrese v Commissioner of Police of City of Yonkers*, 282 AD2d 457, *lv denied* 96 NY2d 717).

With respect to the issue whether petitioners performed the work of investigators, we note at the outset that petitioners' union refused to grieve that issue and that petitioners therefore had no administrative remedy (*see generally Harnischfeger*, 56 AD3d 1131). Thus, in the prior appeal, we remitted the matter for a framed-issue hearing with respect to whether petitioners were temporarily assigned to perform the duties of detective or investigator for the relevant time period. Consequently, this is not a case in which we consider whether the respondents' determination was arbitrary and capricious (*cf. Matter of Finelli v Bratton*, 298 AD2d 197, 198, *lv denied* 100 NY2d 505). Rather, it is our task to "evaluate 'the weight of the evidence presented [at the framed-issue hearing] and grant judgment warranted by the record, giving due deference to the . . . court's determinations regarding witness credibility, so long as those findings could have been reached upon a fair interpretation of the evidence' " (*Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170; *see State Farm Mut. Auto. Ins. Co. v Taveras*, 71 AD3d 606).

Viewing the evidence in the light most favorable to respondents, the prevailing parties (*see Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d at 170), we conclude that the court's decision could not have been reached under any fair interpretation of

the evidence. In determining that petitioners were not temporarily assigned to the same duties as investigators, the court mistakenly relies on the artificial distinction between the types of crimes investigated by petitioners and investigators. Petitioners, as SIS officers, investigate crimes such as narcotic sales, gambling, prostitution and related crimes. Investigators attempt to solve crimes such as murder, arson, robbery and assault. We conclude, however, that the record establishes that the work performed by petitioners and investigators is substantively identical.

Inasmuch as there is no explicit definition of "investigator" contained in the record, respondents presented the testimony of the RPD Deputy Chief to distinguish the work of petitioners from that of investigators. To the extent that the testimony of the RPD Deputy Chief was the functional equivalent of expert testimony, we conclude that it was bereft of probative value (*see generally Romano v Stanley*, 90 NY2d 444, 451-452; *Silverman v Sciartelli*, 26 AD3d 761, 762). That testimony was contradicted by documentary evidence in the record establishing that SIS officers and investigators both worked in the Investigations Division of the Operations Bureau and were on the same level in the RPD's chain of command.

We therefore reverse the judgment, grant the petition and remit the matter to Supreme Court to determine the amount of compensation to which each petitioner is entitled. In view of our determination, we do not address petitioners' remaining contention.

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

1443

CA 10-00945

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

DONNA PRINCE LYNCH, INDIVIDUALLY AND AS PARENT
AND NATURAL GUARDIAN OF PHILIP LAWRENCE LYNCH,
AND AS ADMINISTRATRIX OF THE ESTATE OF TIMOTHY
JOHN LYNCH, DECEASED,
PLAINTIFF-RESPONDENT-APPELLANT,

V

ORDER

MIKE WATERS, AS FIRE CONTROL COORDINATOR OF
COUNTY OF ONONDAGA, AND COUNTY OF ONONDAGA,
DEFENDANTS-APPELLANTS-RESPONDENTS.

MIKE WATERS, AS FIRE CONTROL COORDINATOR OF
COUNTY OF ONONDAGA, AND COUNTY OF ONONDAGA,
THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

THE POMPEY HILL FIRE DISTRICT, THE POMPEY HILL
FIRE DEPARTMENT, RICHARD ABBOTT, IN HIS OFFICIAL
CAPACITY AS AN ASSISTANT CHIEF OF THE POMPEY HILL
FIRE DEPARTMENT, MARK KOVALEWSKI, IN HIS OFFICIAL
CAPACITY AS AN ASSISTANT CHIEF OF THE POMPEY HILL
FIRE DEPARTMENT, THE VILLAGE OF MANLIUS, THE
MANLIUS FIRE DEPARTMENT, RAYMOND DILL, IN HIS
OFFICIAL CAPACITY AS DEPUTY CHIEF OF THE MANLIUS
FIRE DEPARTMENT, THIRD-PARTY DEFENDANTS-RESPONDENTS,
AND JOSEPH MESSINA, THIRD-PARTY DEFENDANT.
(APPEAL NO. 1.)

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (MARY J. FAHEY OF COUNSEL),
FOR DEFENDANTS-APPELLANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS-
APPELLANTS.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR
PLAINTIFF-RESPONDENT-APPELLANT.

TADDEO & SHAHAN, LLP, SYRACUSE (STEVEN C. SHAHAN OF COUNSEL), FOR
THIRD-PARTY DEFENDANTS-RESPONDENTS THE POMPEY HILL FIRE DISTRICT, THE
POMPEY HILL FIRE DEPARTMENT, RICHARD ABBOTT, IN HIS OFFICIAL CAPACITY
AS AN ASSISTANT CHIEF OF THE POMPEY HILL FIRE DEPARTMENT, AND MARK
KOVALEWSKI, IN HIS OFFICIAL CAPACITY AS AN ASSISTANT CHIEF OF THE
POMPEY HILL FIRE DEPARTMENT.

MAYNARD, O'CONNOR, SMITH & CATALINOTTO, LLP, ALBANY (ROBERT A. RAUSCH

OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-RESPONDENTS THE VILLAGE OF MANLIUS AND THE MANLIUS FIRE DEPARTMENT.

UNDERBERG & KESSLER LLP, ROCHESTER (DAVID H. FITCH OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT RAYMOND DILL, IN HIS OFFICIAL CAPACITY AS DEPUTY CHIEF OF THE MANLIUS FIRE DEPARTMENT.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered July 22, 2009. The order, among other things, granted the motions of third-party defendants the Pompey Hill Fire District, the Pompey Hill Fire Department, Richard Abbott, in his Official Capacity as an Assistant Chief of the Pompey Hill Fire Department, and Mark Kovalewski, in his Official Capacity as an Assistant Chief of the Pompey Hill Fire Department, the Village of Manlius, the Manlius Fire Department, Raymond Dill, in his Official Capacity as Deputy Chief of the Manlius Fire Department, for summary judgment dismissing the third-party complaint against them.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1444

CA 10-00947

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

DONNA PRINCE LYNCH, INDIVIDUALLY AND AS PARENT
AND NATURAL GUARDIAN OF PHILIP LAWRENCE LYNCH,
AND AS ADMINISTRATRIX OF THE ESTATE OF TIMOTHY
JOHN LYNCH, DECEASED,
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

MIKE WATERS, AS FIRE CONTROL COORDINATOR OF
COUNTY OF ONONDAGA, AND COUNTY OF ONONDAGA,
DEFENDANTS-APPELLANTS-RESPONDENTS.

MIKE WATERS, AS FIRE CONTROL COORDINATOR OF
COUNTY OF ONONDAGA, AND COUNTY OF ONONDAGA,
THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

THE POMPEY HILL FIRE DISTRICT, THE POMPEY HILL
FIRE DEPARTMENT, RICHARD ABBOTT, IN HIS OFFICIAL
CAPACITY AS AN ASSISTANT CHIEF OF THE POMPEY HILL
FIRE DEPARTMENT, MARK KOVALEWSKI, IN HIS OFFICIAL
CAPACITY AS AN ASSISTANT CHIEF OF THE POMPEY HILL
FIRE DEPARTMENT, THE VILLAGE OF MANLIUS, THE
MANLIUS FIRE DEPARTMENT, RAYMOND DILL, IN HIS
OFFICIAL CAPACITY AS DEPUTY CHIEF OF THE MANLIUS
FIRE DEPARTMENT, THIRD-PARTY DEFENDANTS-RESPONDENTS,
AND JOSEPH MESSINA, THIRD-PARTY DEFENDANT.
(APPEAL NO. 2.)

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (MARY J. FAHEY OF COUNSEL),
FOR DEFENDANTS-APPELLANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS-
APPELLANTS.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR
PLAINTIFF-RESPONDENT-APPELLANT.

TADDEO & SHAHAN, LLP, SYRACUSE (STEVEN C. SHAHAN OF COUNSEL), FOR
THIRD-PARTY DEFENDANTS-RESPONDENTS THE POMPEY HILL FIRE DISTRICT, THE
POMPEY HILL FIRE DEPARTMENT, RICHARD ABBOTT, IN HIS OFFICIAL CAPACITY
AS AN ASSISTANT CHIEF OF THE POMPEY HILL FIRE DEPARTMENT, AND MARK
KOVALEWSKI, IN HIS OFFICIAL CAPACITY AS AN ASSISTANT CHIEF OF THE
POMPEY HILL FIRE DEPARTMENT.

MAYNARD, O'CONNOR, SMITH & CATALINOTTO, LLP, ALBANY (ROBERT A. RAUSCH

OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-RESPONDENTS THE VILLAGE OF MANLIUS AND THE MANLIUS FIRE DEPARTMENT.

UNDERBERG & KESSLER LLP, ROCHESTER (DAVID H. FITCH OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT RAYMOND DILL, IN HIS OFFICIAL CAPACITY AS DEPUTY CHIEF OF THE MANLIUS FIRE DEPARTMENT.

Appeal and cross appeal from an amended order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered September 1, 2009. The amended order, among other things, sua sponte dismissed the third-party complaint as it relates to third-party defendant Raymond Dill, in his official capacity as Deputy Chief of the Manlius Fire Department.

It is hereby ORDERED that the amended order so appealed from is modified on the law by denying the motion of third-party defendants the Pompey Hill Fire District, the Pompey Hill Fire Department, Richard Abbott, in his Official Capacity as an Assistant Chief of the Pompey Hill Fire Department and Mark Kovalewski, in his Official Capacity as an Assistant Chief of the Pompey Hill Fire Department and the motion of third-party defendants the Village of Manlius and the Manlius Fire Department, reinstating the third-party complaint against them and granting those parts of plaintiff's cross motion to dismiss the affirmative defenses of those third-party defendants pursuant to General Municipal Law § 205-b and as modified the amended order is affirmed without costs, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following Memorandum: Plaintiff commenced this action, individually and as the parent and natural guardian of her son and the administratrix of the estate of her husband (decedent), seeking damages for, inter alia, the wrongful death of decedent. Decedent, a volunteer firefighter, was killed while fighting a fire that started in the basement of a house located in the Town of Pompey. According to plaintiff, defendants-third-party plaintiffs (hereafter, defendants) are liable pursuant to General Municipal Law § 205-a. Defendants thereafter commenced a third-party action for common-law contribution "and/or" indemnification. Supreme Court granted the motion of third-party defendants the Pompey Hill Fire District, the Pompey Hill Fire Department and Richard Abbott and Mark Kovalewski, in their Official Capacities as Assistant Chiefs of the Pompey Hill Fire Department (collectively, Pompey Hill defendants), as well as the motion of third-party defendants the Village of Manlius and the Manlius Fire Department (collectively, Manlius defendants), for summary judgment dismissing the third-party complaint against them. The court also denied defendants' cross motion for leave to amend the third-party complaint to include, inter alia, allegations of willful negligence on the part of third-party defendant Raymond Dill, in his Official Capacity as Deputy Chief of the Manlius Fire Department, the Pompey Hill defendants and the Manlius defendants and denied as moot plaintiff's cross motion to dismiss "any [and] all affirmative defense[s] brought by any parties under Firefighters' Benefit Law [§] 19 and General Municipal Law [§] 205-b . . ." In addition, the court sua sponte dismissed the third-party complaint against Dill.

We note at the outset that this Court improperly deemed plaintiff's cross appeal from the amended order abandoned and dismissed for failure to perfect within nine months of service of the notice of appeal (see 22 NYCRR 1000.12 [b]). The cross motion of plaintiff for permission for an extension of time to file her brief encompassed both the court's original order and the amended order, and this Court incorrectly granted that cross motion only with respect to the original order. In view of our error, we exercise our discretion to treat the cross appeal from the amended order as properly perfected (see generally CPLR 5520 [c]; *Crane-Hogan Structural Sys., Inc. v ESLS Dev., LLC*, 77 AD3d 1302).

We agree with defendants on their appeal and with plaintiff on her cross appeal that the Pompey Hill defendants and the Manlius defendants are not immune from liability pursuant to General Municipal Law § 205-b. We thus conclude that the court erred in granting the respective motions of the Pompey Hill defendants and the Manlius defendants and in denying those parts of plaintiff's cross motion seeking to dismiss the affirmative defenses of the Pompey Hill defendants and the Manlius defendants pursuant to section 205-b, and we therefore modify the amended order accordingly. "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208). Inasmuch as "the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583; see *Feher Rubbish Removal, Inc. v New York State Dept. of Labor, Bur. of Pub. Works*, 28 AD3d 1, 3-4, lv denied 6 NY3d 711). "If the 'language . . . is clear and unambiguous, courts must give effect to its plain meaning' " (*Matter of M.B.*, 6 NY3d 437, 447, quoting *State of New York v Patricia II.*, 6 NY3d 160, 162).

Pursuant to General Municipal Law § 205-b, "[m]embers of duly organized volunteer fire companies . . . shall not be liable civilly for any act or acts done by them in the performance of their duty as volunteer firefighters, except for wilful negligence or malfeasance" (emphasis added). Thus, under the plain language of the statute, the immunity conferred by section 205-b applies only to individual volunteer firefighters, not their municipal employers (see *Rosenberg v Fuller Rd. Fire Dept.*, 34 AD2d 653, 654, *affd* 28 NY2d 816; *Sawyer v Town of Lewis*, 6 Misc 3d 1024[A], 2003 NY Slip Op 51751[U], *6, *mod on other grounds* 11 AD3d 938; see *Tobacco v North Babylon Volunteer Fire Dept.*, 182 Misc 2d 480, 483-484, *affd* 276 AD2d 551; *Ryan v Town of Riverhead*, 2010 NY Slip Op 30661[U]). There is nothing in the statute that similarly confers immunity upon fire districts or other municipal entities. To the contrary, the second sentence of section 205-b provides that "fire districts created pursuant to law shall be liable for the negligence of volunteer firefighters duly appointed to serve therein in the operation of vehicles owned by the fire district upon the public streets and highways of the fire district" (emphasis added). Indeed, General Municipal Law § 205-b is entitled "Relief of volunteer firefighters engaged in the performance of duty as such

firefighters from civil liability and liability of fire districts for the acts of volunteer firefighters." The plain language of the statute thus reflects the Legislature's dual purposes in enacting section 205-b: first, to immunize volunteer firefighters from civil liability for ordinary negligence and, second, to shift liability for such negligence to the fire districts that employ them (see *Sikora v Keillor*, 17 AD2d 6, 8, *affd* 13 NY2d 610).

The Pompey Hill defendants and the Manlius defendants contend that the Legislature intended that fire departments and municipalities be subject to vicarious liability only for firefighters' negligent operation of vehicles. Their reliance on the second sentence of General Municipal Law § 205-b in support of that contention is misplaced. In *Thomas v Consolidated Fire Dist. No. 1 of Town of Niskayuna* (50 NY2d 143), the Court of Appeals rejected a similar contention, namely, that section 205-b impliedly exempts fire districts from liability except as specifically provided by that section. The Court explained the historical context of section 205-b: "Although the State waived its immunity from liability in 1929 with the enactment of section 8 of the Court of Claims Act, this waiver of immunity was not found to be applicable to the local subdivisions of the State until 1945, when [the Court of Appeals] issued its decision in *Bernardine v City of New York* (294 NY 361). It thus appears that in 1934, the year [General Municipal Law §] 205-b was enacted, the Legislature had intended to expand, not restrict, the liability of fire districts . . . In other words, the Legislature sought to assure that there would be some liability on the part of the fire districts where previously there had been some doubt. To now read section 205-b as restricting liability--as exempting a fire district from liability in all situations other than that prescribed in the section--would be error" (*id.* at 146 [emphasis added]).

The Pompey Hill defendants and the Manlius defendants further contend that, because individual firefighters are immune from liability pursuant to General Municipal Law § 205-b, they cannot be held vicariously liable for the alleged negligence of those firefighters. We reject that contention. The Court of Appeals rejected a similar argument in *Tikhonova v Ford Motor Co.* (4 NY3d 621, 623), concluding that a vehicle owner may be held vicariously liable pursuant to Vehicle and Traffic Law § 388 for the negligence of a diplomat driver who is immune from suit under 22 USC § 254d. The Court distinguished *Sikora* (13 NY2d 610, *affg* 17 AD2d 6), in which it "affirmed, without opinion, the Appellate Division's determination that no liability attaches to a vehicle owner where the negligent driver (a volunteer firefighter) was immune from suit under General Municipal Law § 205-b" (*Tikhonova*, 4 NY3d at 625). The Court noted that a contrary result in *Sikora* "would have discouraged volunteers from responding to emergencies by reducing the number of people willing to lend vehicles to those volunteers" (*id.*). Here, the policy reasons underlying the immunity afforded to volunteer firefighters individually, i.e., to encourage individuals to volunteer for public service and to protect their personal assets from liability for ordinary negligence (see *id.*; *Sikora*, 17 AD2d at 7-8; see also

Sponsor's Mem, Bill Jacket, L 1934, ch 489; Letter from Firemen's Assn of State of NY, April 28, 1934, at 1, Bill Jacket, L 1934, ch 489), do not apply to the entities that employ them.

With respect to the contention of plaintiff that the court erred in denying that part of her cross motion to dismiss the Pompey Hill defendants' affirmative defense based upon Volunteer Firefighters' Benefit Law § 19, we note that the court did not address the merits of that issue because it denied plaintiff's cross motion as moot. In view of our determination, we conclude that plaintiff's cross motion with respect to that issue is no longer moot, and we therefore remit the matter to Supreme Court to determine that part of plaintiff's cross motion.

Finally, we note that neither defendants on their appeal nor plaintiff on her cross appeal raised any issue concerning the court's sua sponte dismissal of the third-party complaint against Dill, and they therefore have abandoned any issues with respect thereto (see *Ciesinski v Town of Aurora*, 202 AD2d 984).

All concur except FAHEY, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent. In my view, Supreme Court properly granted the motion of third-party defendants the Pompey Hill Fire District, the Pompey Hill Fire Department and Richard Abbott and Mark Kovalewski, in their Official Capacities as Assistant Chiefs of the Pompey Hill Fire Department (collectively, Pompey Hill defendants), as well as the motion of third-party defendants the Village of Manlius and the Manlius Fire Department (collectively, Manlius defendants), for summary judgment dismissing the third-party complaint against them. I further conclude that the court properly sua sponte dismissed the third-party complaint against third-party defendant Raymond Dill, in his Official Capacity as Deputy Chief of the Manlius Fire Department. I therefore would affirm the amended order.

The crux of this appeal is whether third-party defendants are entitled to immunity from liability under General Municipal Law § 205-b, which is entitled "Relief of volunteer firefighters engaged in the performance of duty as such firefighters from civil liability and liability of fire districts for the acts of volunteer firefighters." That statute provides, in relevant part, that

"[m]embers of duly organized volunteer fire companies . . . shall not be liable civilly for any act or acts done by them in the performance of their duty as volunteer firefighters, except for wilful negligence or malfeasance. Nothing in this section . . . shall in any manner affect the liability imposed upon cities, towns and villages by [General Municipal Law §§ 50-a and 50-b], but fire districts created pursuant to law shall be liable for the negligence of volunteer firefighters duly appointed to serve therein in the operation of vehicles owned by the fire

district upon the public streets and highways of the fire district, provided such volunteer firefighters, at the time of any accident or injury, were acting in the discharge of their duties."

The second of the sentences quoted above contemplates an instance in which a fire district may be held liable for the negligence of its volunteer firefighters in the operation of vehicles owned by the fire district while those firefighters were acting in the discharge of their duties. In my view, that sentence amounts to an exception to the prevailing rule that a fire district is not liable for the negligent acts of its volunteer firefighters, inasmuch as there would be no reason to establish the circumstances in which a fire district may be liable for the negligent acts of its volunteer firefighters unless a fire district could not be held liable for those acts in the first instance. Consequently, I conclude that the Pompey Hill defendants and the Manlius defendants are immune from liability under General Municipal Law § 205-b (see *Howell v Massapequa Fire Dist.*, 306 AD2d 317; see generally *Matter of Crucible Materials Corp. v New York Power Auth.*, 13 NY3d 223, 229, rearg denied 13 NY3d 927; *Feher Rubbish Removal, Inc. v New York State Dept. of Labor, Bur. of Pub. Works*, 28 AD3d 1, 3-4, lv denied 6 NY3d 711).

The majority's reliance upon *Rosenberg v Fuller Rd. Fire Dept.* (34 AD2d 653, *affd* 28 NY2d 816) is misplaced. In *Rosenberg*, the Second Department concluded, and the Court of Appeals agreed, that General Municipal Law § 205-b did not exempt volunteer fire companies from liability but, in that case, the alleged negligence arose from the collapse of a scaffold owned by a defendant fire department, rather than the actions of a volunteer firefighter (*id.* at 654). In other words, *Rosenberg* involved an allegation of *actual* negligence, while in this case plaintiff seeks damages for alleged *vicarious* liability on the part of the Pompey Hill and Manlius defendants based upon the actions of a firefighter. That reasoning was specifically rejected by this Court in *Green v Peterson* (13 AD3d 1157, 1159).

I also cannot agree with the majority that the decision of the Court of Appeals in *Thomas v Consolidated Fire Dist. No. 1 of Town of Niskayuna* (50 NY2d 143) controls in this case. In *Thomas*, the Court of Appeals concluded that a fire district may be held liable for the negligent acts of one of its firefighters committed in the course of duty while operating a vehicle outside the borders of a fire district (*id.* at 147-148). At the core of that case was the intersection of General Municipal Law § 50-b, pursuant to which a municipality will be liable for the negligent operation of municipally owned vehicles, and General Municipal Law § 205-b. Section 205-b expanded liability by explicitly declaring the liability of a fire district for the actions of volunteer firefighters who negligently drive fire district vehicles *inside* that fire district, while section 50-b allowed for municipal liability for the negligent operation of such vehicles *outside* that fire district. Consequently, the Court in *Thomas* did not expand section 205-b to allow for liability on the part of a fire district

for a volunteer firefighter's negligent operation of a motor vehicle outside that fire district. Rather, the Court in *Thomas* recognized that General Municipal Law § 50-b already considered that liability and properly declined to conclude that the limitations included in General Municipal Law § 205-b impaired or reduced the scope of General Municipal Law § 50-b.

Finally, in view of my determination, I do not address the remaining contention of plaintiff on her cross appeal.

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

1445

CA 10-01118

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

BRIGID POMMERENCK, AS ADMINISTRATRIX OF THE
ESTATE OF ERIC POMMERENCK, DECEASED,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

GERALD R. NASON, JR., DEFENDANT,
GERALD R. NASON, SR., AND ROSEMARY NASON,
DEFENDANTS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (MICHAEL F. PERLEY OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered February 16, 2010 in a wrongful death action. The order denied the motion of defendants Gerald R. Nason, Sr. and Rosemary Nason for summary judgment dismissing plaintiff's complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the complaint against defendants Gerald R. Nason, Sr. and Rosemary Nason is dismissed.

Memorandum: Plaintiff commenced this wrongful death action, as administratrix of the estate of her husband (decedent), seeking damages for the fatal injuries decedent sustained when a hay elevator collapsed on him. Gerald R. Nason, Sr. and Rosemary Nason (collectively, defendants) owned but did not reside on the property where the accident occurred (property). Their son, defendant Gerald R. Nason, Jr., used the property on occasion to store junk equipment, including the hay elevator. Decedent and a friend went to the property to inspect the hay elevator with the intent of purchasing it.

We agree with defendants that Supreme Court erred in denying their motion for summary judgment dismissing the complaint against them. It is well established that "[a] landowner is liable for a dangerous or defective condition on his or her property when the landowner 'created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it' " (*Anderson v Weinberg*, 70 AD3d 1438, 1439). Here, defendants met their initial

burden of establishing that they did not create the allegedly defective condition on the property and that they did not have actual notice of it, and plaintiffs failed to raise a triable issue of fact in opposition (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Gerald Nason, Sr. testified at his deposition that the property consists of approximately 38 to 40 acres of largely undeveloped farmland, which he uses in the summer months to grow hay for his dairy farm. Prior to the accident in December 2005, Gerald Nason, Sr. last visited the property in September 2005 when he finished baling hay for the season. In addition, Rosemary Nason testified that she never visited the property and that she had nothing to do with the property apart from her ownership thereof.

We further conclude that defendants met their initial burden of establishing that they did not have constructive notice of the allegedly defective condition, and plaintiff failed to raise a triable issue of fact in opposition (see *Pueng Fung v 20 W. 37th St. Owners, LLC*, 74 AD3d 635; see generally *Zuckerman*, 49 NY2d at 562). Although defendants submitted evidence establishing that the hay elevator had been located on the property for at least 2½ months and that they may have driven by the property "four or five times" during that period, there was no evidence that the hay elevator was visible from the road. In any event, even assuming, arguendo, that defendants were aware of the existence of the hay elevator on the property, we conclude that such awareness does not establish that they had constructive notice of any alleged defect in the hay elevator (see *Moore v Ortolano*, ___ AD3d ___ [Nov. 19, 2010]). Indeed, Gerald Nason, Jr. testified at his deposition that the condition of the hay elevator could not be observed without coming onto the property.

Nevertheless, "landowner[s] may be under an affirmative duty to conduct reasonable inspections of the premises, despite the general notion that notice is a prerequisite to recovery for injuries caused by a dangerous condition" (3 Warren's *Negligence in New York Courts* § 56.02, at 56-10 [2d ed]; see *Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500, 501; *Weller v Colleges of the Senecas*, 217 AD2d 280, 285). The duty of landowners to inspect their property is measured by a standard of reasonableness under the circumstances (see *Hayes*, 40 AD3d at 501; *Weller*, 217 AD2d at 285; see generally *Basso v Miller*, 40 NY2d 233, 241). Under the unique circumstances of this case, we conclude that defendants' alleged awareness of the existence of the hay elevator on the property did not trigger a duty to enter the property and conduct an inspection of the hay elevator (see generally *Singh v United Cerebral Palsy of N.Y. City, Inc.*, 72 AD3d 272, 276). "Where . . . there is nothing to arouse the [landowners'] suspicion, [they have] no duty to inspect" (*Appleby v Webb*, 186 AD2d 1078, 1079; see *Scoppettone v ADJ Holding Corp.*, 41 AD3d 693, 695). Here, there was nothing unlawful or unusual about the presence of a piece of farm equipment on a large parcel of farmland, nor was there anything about the mere presence of a hay elevator that should have aroused defendants' suspicions that the hay elevator was defective (see *Scoppettone*, 41 AD3d at 695). Further, there is no evidence of any prior complaints, incidents or accidents involving the hay elevator.

We therefore reverse the order, grant the motion and dismiss the complaint against defendants.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1446

KA 09-01192

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JONATHAN SMITH, 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 (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered April 21, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree (two counts).

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1447

KA 10-00471

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

TREMELL R. JORDAN, DEFENDANT-APPELLANT.

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

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered January 20, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1448

KA 08-01800

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAMADHAN RAJAB, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

RAMADHAN RAJAB, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered October 2, 2007. 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 reversed on the law, the plea is vacated and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the first degree (Penal Law § 130.35 [4]). As the People correctly concede, the judgment must be reversed and the plea vacated. County Court failed to advise defendant prior to the entry of the plea that his sentence would include a period of postrelease supervision, and thus his plea was not knowingly, voluntarily and intelligently entered (*see People v Hill*, 9 NY3d 189, 191-192, *cert denied* 553 US 1048; *People v Catu*, 4 NY3d 242, 245). We have reviewed the remaining contentions of defendant in his main and pro se supplemental briefs and conclude that none warrants dismissal of the indictment.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1449

KA 10-01605

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

ORDER

MARY WALTER (SCHOONMAKER), DEFENDANT-RESPONDENT.

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

GEORGE F. HILDEBRANDT, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered January 13, 2010. The order determined that defendant is a level one risk pursuant to the Sex Offender Registration Act.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1450

KA 09-00745

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ENRICO ALVARADO, DEFENDANT-APPELLANT.

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

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

Appeal from an amended order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered March 11, 2009. The amended order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by replacing the phrase "sexual predator" at page four of the order with the phrase "predicate sex offender" and as modified the amended order is affirmed without costs.

Memorandum: Defendant appeals from an amended order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, Supreme Court properly considered the case summary and the presentence report, which constitute reliable hearsay, in determining that defendant had a prior out-of-state conviction (*see People v Mingo*, 12 NY3d 563, 573; *People v Lewis*, 45 AD3d 1381, *lv denied* 10 NY3d 703). Thus, the court properly assessed 30 points for a prior out-of-state felony conviction for a sex offense (*see People v Johnson*, 46 AD3d 1032), and defendant's classification as a level three risk is supported by the requisite clear and convincing evidence (*see* § 168-n [3]). As the People correctly concede, however, the court improperly classified defendant as a sexual predator in its amended order rather than as a predicate sex offender, and we therefore modify the amended order accordingly.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1451

CAF 10-01565

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

IN THE MATTER OF JERMAINE H.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

LISA H., RESPONDENT.

KIMBERLY WEISBECK, ATTORNEY FOR THE CHILD,
RESPONDENT.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (PETER A. ESSLEY OF
COUNSEL), FOR PETITIONER-APPELLANT.

KIMBERLY W. WEISBECK, ATTORNEY FOR THE CHILD, ROCHESTER, RESPONDENT
PRO SE.

CHARLES D. HALVORSEN, BUFFALO, FOR THE LEGAL AID BUREAU OF BUFFALO,
INC., AMICUS CURIAE.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered November 27, 2009 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, granted the motion of the Attorney for the Child to designate the foster parent of the subject child a kinship foster care parent.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the motion of the Attorney for the Child is denied.

Memorandum: Petitioner, Monroe County Department of Human Services (DHS), initially moved by order to show cause to place the subject child in the care of a family friend who had custody of the child's half-siblings. The subject child was to remain under the supervision of DHS pursuant to Family Court Act § 1017 (2) (a) (ii) and (3). Thereafter, however, Family Court granted the motion of the Attorney for the Child seeking an order directing, inter alia, DHS to certify the child's caregiver as an emergency foster care provider. In granting the motion, the court stated that section 1017 (2) (a) (iii) required that, if the caregiver "is qualified to take care of the child, that person shall be certified as an emergency foster parent," and the court further stated that it "can direct that [DHS] . . . certify emergency kinship foster care homes generally." We conclude that the court did not correctly interpret the statute, and we therefore reverse the order and deny the motion.

It is axiomatic that "[a] court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent, and, where possible, should harmonize all parts of a statute with each other and give effect and meaning to the entire statute and every part and word thereof' . . . Moreover, clear and unambiguous statutory language should be construed so as to give effect to the plain meaning of the words used" (*Matter of Brian L.*, 51 AD3d 488, 493, *lv denied* 11 NY3d 703). Here, Family Court Act § 1017 (2) (a) (iii) provides in relevant part that, "where the court determines that the child may reside with a . . . relative or other suitable person, . . . [the court shall] remand or place the child, as applicable, with the local commissioner of social services and direct such commissioner to have the child reside with such relative or other suitable person and . . . to commence an investigation of the home of such relative or other suitable person within twenty-four hours and thereafter approve such relative or other suitable person, if qualified, as a foster parent." Pursuant to 18 NYCRR 443.7 (a), "[a] potential foster home or the home of a relative of a foster child may be certified or approved as an emergency foster home" if the child is removed from his or her own home, as was the case here. We agree with DHS that neither the statute nor the regulation requires that it certify the person with whom the child is placed as an *emergency* foster parent (*see* 18 NYCRR 443.7 *et seq.*) but, rather, DHS is required only to certify the person with whom the child is placed as a foster parent, upon determining that the person is so qualified (*see generally* 18 NYCRR 443.2 *et seq.*).

Furthermore, we agree with DHS that the court impermissibly "encroached upon powers granted by section 398 of the Social Services Law to [DHS]" (*Matter of Lorie C.*, 49 NY2d 161, 166; *see Matter of Ronald W.*, 25 AD3d 4, 11). Social Services Law § 398 (2) (b) authorizes the Commissioner of DHS to "receive and care for any child alleged to be neglected, . . . including the authori[zation] to establish, operate, maintain and approve facilities for such purpose in accordance with the regulations of [DHS]." Family Court Act § 255, in turn, "gives the Family Court flexibility and potency when dealing with government agencies. However, that power is not unlimited . . . [and] does not extend to the issuance of an order directing executive agencies to take specific discretionary action" (*Ronald W.*, 25 AD3d at 10). We therefore reverse the order and deny the motion of the Attorney for the Child.

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

1452

CAF 09-01798

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

IN THE MATTER OF IMANI D.W.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

ORDER

CHRISTINE W., RESPONDENT-APPELLANT.

EFTIHIA BOURTIS, ROCHESTER, FOR RESPONDENT-APPELLANT.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF
COUNSEL), FOR PETITIONER-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER, FOR IMANI D.W.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered July 31, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1453

CAF 09-01953

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

IN THE MATTER OF CHARITY W.

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

SHARON P., RESPONDENT-APPELLANT.

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

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (SARA J. LANGAN OF
COUNSEL), FOR PETITIONER-RESPONDENT.

KELLY M. CORBETT, ATTORNEY FOR THE CHILD, FAYETTEVILLE, FOR CHARITY W.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered September 8, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, denied respondent's motion to vacate an order of fact-finding and disposition dated April 27, 2009.

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

Memorandum: In this proceeding to terminate her parental rights on the ground of permanent neglect, respondent mother failed to appear at the second day of the fact-finding hearing. Family Court proceeded with the fact-finding hearing in the absence of the mother and concluded that she had permanently neglected the subject child. Immediately following the fact-finding hearing, the court conducted a dispositional hearing and determined that it was in the child's best interests to award custody and guardianship of the child to petitioner. The mother thereafter moved to vacate the order entered upon her default, asserting that she had misunderstood the court's statement concerning the continuation date of the fact-finding hearing. The court denied that part of the mother's motion with respect to the finding of permanent neglect, but the court in effect granted that part of the motion with respect to the dispositional phase of the proceedings by reopening the dispositional hearing "in the interests of justice" in order to afford the mother the opportunity to testify and present evidence. The mother testified at the reopened dispositional hearing, whereupon the court adhered to its prior determination to terminate her parental rights.

On appeal, the mother contends that she was deprived of effective assistance of counsel because her assigned attorney failed to ensure that she knew when to appear in court for the continuation of the fact-finding hearing, and failed to provide a meritorious defense in support of the motion to vacate the order entered upon her default. We reject that contention. The record establishes that both the mother and her attorney were notified of the continuation date of the fact-finding hearing and, under the circumstances, it cannot be said that the mother's attorney was ineffective for failing to do more to ensure that the mother would be present on that date (*see generally Matter of Michael F.*, 16 AD3d 1116). Indeed, the mother merely states generally that her attorney "may not have clearly informed her" of the date of the continuation of the fact-finding hearing, but she does not dispute that she was present in court when the date was designated. Contrary to the further contention of the mother, the record establishes that her attorney did in fact attempt to provide the requisite meritorious defense in support of the motion. Although the court determined that the proffered defense lacked merit, that determination does not establish that the mother's attorney was ineffective.

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

1454

CAF 09-01672

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

IN THE MATTER OF DEBORAH J. BARNES,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

JIMMIE L. EVANS, RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID ABBATOY OF
COUNSEL), FOR RESPONDENT-APPELLANT.

ANJAN K. GANGULY, ROCHESTER, FOR PETITIONER-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILDREN, ROCHESTER, FOR ANTHONY E.
AND BRIANNA E.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered April 23, 2009 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that petitioner shall have sole custody and primary physical residence of the subject children.

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

Memorandum: Respondent father appeals from an order awarding sole custody of his children to petitioner, the children's maternal aunt. The aunt sought custody of the children following the death of their mother, the father's wife. When proceedings involving the instant parties previously were before us, we reversed the order granting the amended petition of the aunt, and we reinstated the father's cross petition on the ground that the father did not receive adequate notice of the hearing on extraordinary circumstances and best interests (*Matter of Deborah J.B. v Jimmie Lee E.*, 31 AD3d 1146). We remitted the matter to Family Court for a new hearing on the amended petition and cross petition, and we directed that the aunt shall retain legal and physical custody of the children pending the new hearing (*id.* at 1149).

Contrary to the father's contention, we conclude that Family Court properly determined that extraordinary circumstances existed based upon the abdication by the father of his parental responsibilities and his "persistent neglect of the child[ren]'s health and well-being" (*Matter of Penny K. v Alesha T.*, 39 AD3d 1232, 1233; see *Matter of Eleanore B.R. v Shandy S.*, 12 AD3d 1101, *lv denied*

4 NY3d 705; *Matter of McDevitt v Stimpson*, 1 AD3d 811, *lv denied* 1 NY3d 509). The court's finding of extraordinary circumstances was further supported by the history of the father of domestic violence, including one incident that occurred in front of his daughter (see *Matter of Jodoin v Billings*, 44 AD3d 1244, 1245-1246; *Matter of Commissioner of Social Servs. of City of N.Y.*, 216 AD2d 387, 388), and by his failure to comply with prior court orders, including an order requiring him to obtain anger management counseling (see *Matter of Vincent A.B. v Karen T.*, 30 AD3d 1100, 1101, *lv denied* 7 NY3d 711). The father does not contend on appeal that the award of custody to the aunt was not in the children's best interests, and we therefore do not address that issue.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1455

CAF 10-00105

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

IN THE MATTER OF ALFONZO T.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, MEMORANDUM AND ORDER
PETITIONER-APPELLANT;

CASSIE L. AND ALFONZO H.,
RESPONDENTS-RESPONDENTS.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (SARA J. LANGAN OF
COUNSEL), FOR PETITIONER-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF
COUNSEL), FOR RESPONDENT-RESPONDENT CASSIE L.

Appeal from an order of the Family Court, Onondaga County (Bryan R. Hedges, J.), entered December 9, 2009 in a proceeding pursuant to Family Court Act article 10. The order dismissed the petition with prejudice.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the petition against respondent Alfonso H. with respect to the May 2009 altercation and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Onondaga County, to reopen the fact-finding hearing on that part of the petition.

Memorandum: Petitioner appeals from an order that granted the motion of respondent parents to dismiss the instant neglect petition against them, with prejudice, at the close of petitioner's case. According to the allegations in the petition, the subject child has been neglected by his parents based upon, inter alia, his exposure to a series of domestic violence incidents that occurred between his parents between May 2008 and January 2009. Contrary to petitioner's contention, Family Court did not err in refusing to admit evidence of those domestic violence incidents at the hearing on the petition. As the court properly determined, any allegations concerning those incidents were raised or could have been raised in a separate petition previously filed by petitioner against both parents in January 2009, in which petitioner previously had alleged that they neglected the subject child. We determined in petitioner's appeal from the order dismissing that petition that Family Court properly granted that part of the motion of the parents seeking dismissal of the petition against the mother with prejudice on the ground petitioner failed to establish a prima facie case against her, but we agreed with petitioner that the

court erred in dismissing the petition against the father " 'insofar as the petition alleges that his 'alcohol abuse impairs his ability to safely care for [the child]' " (*Matter of Alfonzo H.*, 77 AD3d 1410, 1411). Both the previous petition and the instant petition involve the same parties, and both petitions alleged the same theory of neglect, i.e., imminent danger to the subject child due to his exposure to a series of domestic violence incidents that required police intervention occurring between May 2008 and January 2009. Thus, petitioner's present claim that the child was neglected "is grounded on the same . . . series of transactions as the prior action," and the court properly excluded on the ground of *res judicata* not only those discrete incidents of domestic violence that occurred between May 2008 and January 2009 that were previously raised, but also evidence of all such incidents occurring in that time frame (*Fogel v Oelmann*, 7 AD3d 485, 486; see generally *Smith v Russell Sage Coll.*, 54 NY2d 185, 192-193, *rearg denied* 55 NY2d 878; *Matter of Reilly v Reid*, 45 NY2d 24, 27). In so concluding, we note that petitioner could have discovered all of these domestic violence incidents that had occurred during that time frame prior to the filing of the previous petition with the reasonable exercise of due diligence, and we therefore conclude that petitioner had a full and fair opportunity to litigate the instant theory of neglect in connection with the prior petition. To hold otherwise under the circumstances of this case would allow government agencies such as petitioner to bring successive proceedings alleging the same theory of neglect until the desired result was obtained, with the status of the child remaining undetermined throughout (see *Matter of Yan Ping Z.*, 190 Misc 2d 151, 157).

We agree with petitioner, however, that the court erred in granting that part of the parents' motion to dismiss the petition against the father at the close of petitioner's case. Petitioner presented evidence that, during a May 2009 altercation between the parents, the father was wielding a knife and pushed the mother onto the bed where the six-month old child was lying. Viewing the evidence in the light most favorable to petitioner, and resolving all questions of credibility in petitioner's favor, we conclude that a trier of fact could find by a preponderance of the evidence, based on that single incident, that the child was in imminent risk of being physically injured by the father's actions (see *Matter of Pedro C.*, 1 AD3d 267; see generally *Wayne County Dept. of Social Servs. v Titcomb*, 124 AD2d 989). We therefore modify the order accordingly.

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

1456

CAF 09-01668

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

IN THE MATTER OF DANIEL H. ROSSO,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

ANDREA M. GEROUW-ROSSO, RESPONDENT-APPELLANT,
AND JASON S. ROSSO, RESPONDENT.

IN THE MATTER OF ANDREA M. GEROUW-ROSSO,
PETITIONER-APPELLANT,

V

DANIEL H. ROSSO, RESPONDENT-RESPONDENT.

LINDA GEHRON, SYRACUSE, FOR RESPONDENT-APPELLANT AND PETITIONER-
APPELLANT.

LAW OFFICES OF MERKEL AND MERKEL, ROCHESTER (DAVID A. MERKEL OF
COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

ALEXANDRA BURKETT, ATTORNEY FOR THE CHILD, CANANDAIGUA, FOR DEZMOND
J.R.

Appeal from an order of the Family Court, Ontario County (Maurice E. Strobridge, J.H.O.), entered July 8, 2009 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, continued sole custody of the subject child with Daniel H. Rosso.

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

Memorandum: Respondent-petitioner mother appeals from an order that, inter alia, denied her petition seeking sole custody of her son, who was born in June 2000. Petitioner-respondent paternal grandfather had been awarded sole custody of the child in 2004 and, prior thereto, the paternal grandmother had custody of the child. The grandfather obtained custody when the grandmother became ill, and the child has not lived with his parents since the age of eight months. Nevertheless, it is axiomatic 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; see *Matter of Howard v McLoughlin*, 64 AD3d 1147). Here, Family Court failed to determine whether the grandfather met his burden of establishing the existence of extraordinary circumstances, nor is there any indication in the record whether there was such a prior determination of extraordinary circumstances (see generally *Matter of Guinta v Doxtator*, 20 AD3d 47, 54). Nevertheless, the record is sufficient to enable this Court to make that determination in the interest of judicial economy (see *Matter of Michael G.B. v Angela L.B.*, 219 AD2d 289, 292; cf. *Howard*, 64 AD3d at 1148), and we conclude that the grandfather has established the existence of extraordinary circumstances (see *Matter of Brault v Smugorzewski*, 68 AD3d 1819; *Michael G.B.*, 219 AD2d at 292-293). Even crediting the testimony of the mother that she has not used illegal drugs since 2005, the record nevertheless establishes that the mother's life has been unstable. The mother has never been steadily employed; she has moved several times; she admitted that she lived with the father while he was using drugs and it is undisputed that a drug dealer once entered the home and struck both parents seeking payment for drugs; the father testified that he believed that the mother had obtained employment with an escort service; and it is undisputed that the mother posed in the nude for a publication. Furthermore, there has been a prolonged separation between the mother and child, and the record establishes that there is a psychological bond between the child and the grandfather.

Having found that there are extraordinary circumstances, we further conclude that the court properly determined that it is in the best interests of the child to remain in the custody of the grandfather (see generally *Gary G.*, 248 AD2d at 981). The record establishes that the grandfather is better able to provide for the child both financially and with respect to his emotional and intellectual development (see *Fox v Fox*, 177 AD2d 209, 210). Moreover, the grandfather is more fit to care for the child, and the continuity and stability of the existing custodial arrangement is in the child's best interests (see *id.*). We note in addition that the expressed wish of the nine-year-old child to live with his mother is not controlling (see *id.* at 211; cf. *Matter of Stevenson v Stevenson*, 70 AD3d 1515, 1516, *lv denied* 14 NY3d 712).

We further conclude that the court properly determined that the mother failed to meet the heavy burden of establishing a change of circumstances warranting a change of the established custody arrangement to ensure the best interests of the child (see generally *Guinta*, 20 AD3d at 54; cf. *Matter of Kristi L.T. v Andrew R.V.*, 48 AD3d 1202, 1204, *lv denied* 10 NY3d 716). Although the mother was residing with her parents and had separated from the father, who was serving a prison sentence, she did not have steady employment and there was conflicting evidence whether she had used illegal drugs since the latest order regarding visitation was entered in March 2007. Furthermore, the mother admitted that she was charged with shoplifting while the child was with her.

We reject the further contention of the mother that she was denied effective representation (see *Matter of Nagi T. v Magdia T.*, 48 AD3d 1061). Also contrary to the mother's contention, the Attorney for the Child properly advised the court that the child had expressed the wish to live with his mother. Nevertheless, the Attorney for the Child advocated that he remain in the grandfather's custody based upon her determination, in accordance with the Rules of the Chief Judge, that the child "lacks the capacity for knowing, voluntary and considered judgment" (22 NYCRR 7.2 [d] [3]).

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

1457

CA 10-01417

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

MCKENZIE BANKING COMPANY, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CRAIG J. BILLINSON, INDIVIDUALLY AND DOING
BUSINESS AS CRAIG J. BILLINSON & ASSOCIATES,
DEFENDANT-RESPONDENT.

JOEL N. MELNICOFF, SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A.
CIRANDO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CRAIG J. BILLINSON & ASSOCIATES, SYRACUSE (PETER M. HARTNETT OF
COUNSEL), DEFENDANT-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered January 19, 2010. The order denied the motion of plaintiff and granted the motion of defendant to dismiss the complaint.

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

Memorandum: In this action to recover on a promissory note, we agree with plaintiff that Supreme Court erred in granting the cross motion of defendant to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, based on plaintiff's failure to comply with section 1312 of the Business Corporation Law. That section prohibits a foreign corporation that is doing business in New York without authority from maintaining an action in New York "unless and until such corporation has been authorized to do business in this state and it has paid to the state" all required fees, taxes, penalties and interest charges (§ 1312 [a]; see *Great White Whale Adv. v First Festival Prods.*, 81 AD2d 704, 706). "However, the application of this statutory bar may only be effected when it has been raised as an affirmative defense . . . , and the burden of proof is placed upon the party asserting [the bar]" (*Great White Whale Adv.*, 81 AD2d at 706; see *Paper Manufacturers Co. v Ris Paper Co.*, 86 Misc 2d 95). "Whether a foreign corporation is 'doing business' within the purview of section 1312 of the Business Corporation Law so as to foreclose access to our courts depends upon the particular facts of each case with inquiry into the type of business activities being conducted" (*Von Arx, A.G. v Breitenstein*, 52 AD2d 1049, 1049-1050, *affd* 41 NY2d

958). Here, while defendant established that plaintiff is a foreign corporation that has not been authorized to do business in this state, defendant presented no evidence that plaintiff is in fact doing business in this state, and the court therefore erred in granting defendant's cross motion. We therefore modify the order accordingly.

Contrary to the further contention of plaintiff, however, the court properly denied its motion for summary judgment. Even assuming, *arguendo*, that plaintiff met its initial burden of proof on the motion, we conclude that defendant raised an issue of fact to defeat the motion by presenting evidence of a meritorious defense (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1458

CA 10-01530

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

THE PENN TRAFFIC COMPANY,
PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

NATIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, PA, DEFENDANT-RESPONDENT-APPELLANT.

MCCARTER & ENGLISH, LLP, NEW YORK CITY (ANTHONY BARTELL, OF THE NEW
JERSEY BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR
PLAINTIFF-APPELLANT-RESPONDENT.

BROWN & PALUMBO, PLLC, SYRACUSE (GREGORY M. BROWN OF COUNSEL), FOR
DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered March 4, 2010 in a breach of contract action. The order denied the motion of plaintiff for partial summary judgment and granted in part and denied in part the cross motion of defendant 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 in its entirety and dismissing the complaint and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this breach of contract action seeking, inter alia, all costs incurred by it in connection with two investigations conducted by the federal government against several of its employees, pursuant to an "Executive and Organization Liability Insurance Policy" issued to plaintiff by defendant. Plaintiff is a Delaware corporation that operates a chain of supermarkets in three states, including New York, and it is undisputed that the policy at issue provided coverage to plaintiff for, inter alia, the costs associated with defending certain of its employees who commit wrongful acts, as defined in the policy. The policy was a two-year claims made policy, effective June 29, 2002. Thus, coverage was limited to claims made and reported during the policy period, with a 60-day extension for a "Discovery Period," extending the coverage period to the end of August 2004. In August 2002, plaintiff learned that an employee at Penny Curtiss, its wholly-owned subsidiary, was being investigated by federal authorities for making false accounting entries (hereafter, Penny Curtiss investigation). The employee had overstated inventory and, as a result, plaintiff was required to issue revised financial

statements for the years 1999 to 2002. By letter dated October 7, 2002, plaintiff provided defendant with notice of "circumstances which may reasonably be expected to give rise to a claim being made against" plaintiff and its named insureds. Plaintiff did not, however, request coverage at that time for the costs relating to the defense and investigation of the employee in question or Penny Curtiss.

Approximately two years later, federal authorities began investigating the misuse of promotional allowances by two high-level executives employed by plaintiff, based on allegations they submitted false financial statements that prematurely recognized the promotional allowances and thereby inflated stated earnings (hereafter, promotional allowances investigation). The executives in question worked directly for plaintiff but not Penny Curtiss. In August 2004, several months after the Securities and Exchange Commission (SEC) had issued subpoenas to two of plaintiff's employees in connection with the promotional allowances investigation, plaintiff sent a letter to defendant advising that it was cooperating with the investigation, "which [t]he Company believes . . . is currently focused on gathering information involving industry-wide accounting practices." The letter further stated that "[a]t this time [plaintiff] is not aware of any claims against the Company as a result of this matter." The SEC thereafter issued subpoenas to several other of plaintiff's employees. On April 27, 2006, almost two years after the policy expired, plaintiff for the first time requested reimbursement for the defense costs associated with the two investigations, and defendant disclaimed coverage on the ground that plaintiff failed to make a claim within the policy period, as extended by the 60-day discovery period. This action by plaintiff ensued. Prior to discovery, Supreme Court denied plaintiff's motion for summary judgment and granted in part defendant's cross motion for partial summary judgment, dismissing the complaint with respect to the defense costs incurred in connection with the promotional allowances investigation. All that remained of the complaint thus concerned the defense costs associated with the Penny Curtiss investigation. Upon this appeal by plaintiff and cross appeal by defendant, we agree with defendant that the court should have granted its cross motion in its entirety and dismissed the complaint.

As plaintiff acknowledges, it did not make a claim for any defense costs within the two-year policy period, and thus the issue of coverage turns on whether the relation-back provision of the policy applies. Pursuant to that provision, a claim made after the policy period will be honored if the insured provided written notice during the policy period of circumstances that could "reasonably be expected to give rise to a Claim being made against an Insured, . . . with full particulars as to dates, person and entities involved." We reject the contention of plaintiff in support of its appeal that its letter of October 7, 2002 provided sufficient notice of the circumstances relating to the promotional allowances investigation, inasmuch as that investigation did not commence until approximately two years later. The letter in question provided defendant with notice of the Penny Curtiss investigation only, and, as the court properly determined, that investigation was separate and distinct from the promotional

allowances investigation. The two investigations involved different employees, different accounting irregularities, and different time periods, and it therefore cannot be said that notice of the Penny Curtiss investigation constitutes notice of promotional allowances investigation as well. Thus, contrary to the contention of plaintiff on its appeal, the court properly granted those parts of defendant's cross motion with respect to the promotional allowances investigation.

We agree with defendant on its cross appeal, however, that the court erred in failing to grant its cross motion in its entirety, and we therefore modify the order accordingly. Although the SEC subpoenas of March 31, 2004 concerning the Penny Curtiss investigation were issued to plaintiff's employees within the policy period, it is undisputed that plaintiff failed to provide notice of the claim to defendant with respect to the two subpoenas until late April 2006, almost two years after the policy expired. Indeed, as previously noted, by letter to defendant in August 2004 plaintiff affirmatively represented that it had no claims to date. "The insured's failure to satisfy the notice requirement constitutes 'a failure to comply with a condition precedent which, as a matter of law, vitiates the contract' " (*Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743, quoting *Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 339). In determining that an issue of fact exists whether plaintiff provided timely notice of the March 2004 subpoenas to defendant, the court erred in relying on cases involving policies that required the insured to provide notice of claims "as soon as practicable" (see e.g. *Matter of Allstate Ins. Co. [Earl]*, 284 AD2d 1002, 1003-1004). Here, the policy contains different notice requirements. It provides that notice must be given "as soon as practicable . . . , but in no event later than . . . the end of the Policy Period or Discovery Period," which, as noted, ended in August 2004, well before plaintiff notified defendant of the subpoenas. We thus conclude that plaintiff's failure to comply with that requirement vitiates the contract with respect to the subpoenas issued by the SEC on March 31, 2004 (see generally *Rochwarger v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 192 AD2d 305).

Finally, we reject the contention of plaintiff that its failure to give timely notice of the claim arising out of the March 2004 subpoenas should be excused because it did not realize that the subpoenas were covered under the policy until after the deadline date. The policy unambiguously includes the subject subpoenas within the definition of potential claims, and plaintiff's unilateral mistake in reading the policy cannot serve as a basis for expanding coverage. "[O]ne who executes a plain and unambiguous [contract] cannot avoid its effect by merely stating that [he or] she misinterpreted its terms" (*Koster v Ketchum Communications*, 204 AD2d 280, lv dismissed 85 NY2d 857).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1459

CA 10-01569

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

ARK PATENT INTERNATIONAL, L.L.C., STONE CLIFF
HOLDINGS, L.L.C., TARKSOL, INC., AND A. RICHARD
KOETZLE, PLAINTIFFS-APPELLANTS,

V

ORDER

TARKSOL INTERNATIONAL, L.L.C., PMK
INTERNATIONAL, L.L.C., REXER, LLC, EMMET
COTTER, WILLIAM F. REXER, JR. AND AMREX
CHEMICAL COMPANY, INC., DEFENDANTS-RESPONDENTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (THOMAS B. CRONMILLER OF COUNSEL),
FOR PLAINTIFFS-APPELLANTS.

ASWAD & INGRAHAM, BINGHAMTON (RICHARD N. ASWAD OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered December 14, 2009. The order, among other things, denied plaintiffs' cross motion for partial summary judgment.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1460

CA 10-01341

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

IN THE MATTER OF THE JUDICIAL SETTLEMENT
OF MICHAEL J. DUFFY, AS EXECUTOR OF THE ESTATE
OF ELEANOR G. KOPEC, DECEASED,
PETITIONER-RESPONDENT.

ORDER

GILBERT H. STONE, OBJECTANT-APPELLANT.

GREEN & SEIFTER, ATTORNEYS, PLLC, SYRACUSE (JAMES L. SONNEBORN OF
COUNSEL), FOR OBJECTANT-APPELLANT.

GOLDBERG SEGALLA LLP, ROCHESTER (TIMOTHY WELCH OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Monroe County
(Edmund A. Calvaruso, S.), entered September 8, 2009. The order
dismissed the objection of Gilbert H. Stone seeking to surcharge
Michael J. Duffy and granted Michael J. Duffy his commissions and
attorney's fees.

It is hereby ORDERED that the order so appealed from is
unanimously affirmed without costs for reasons stated in the decision
by the Surrogate (*Matter of Kopec*, 25 Misc 3d 901).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1461

CA 09-01443

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

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

V

ORDER

DUANE SHAW, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER
(KRISTIN D. HENDERSON OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Livingston County (Ann Marie Taddeo, J.), entered June 9, 2009 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, committed respondent to a secure treatment facility.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1462

CA 09-02198

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

JAMES BURGIO, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

MONROE COUNTY DEPUTY SHERIFF BRANDON INCE,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

THE PALMIERE LAW FIRM, ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (HOWARD STARK OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an amended judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered October 7, 2009. The amended judgment and order, insofar as appealed from, granted the motion of defendant Monroe County Deputy Sheriff Brandon Ince for summary judgment on plaintiff's cause of action for false arrest.

It is hereby ORDERED that the amended judgment and order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant Monroe County Deputy Sheriff Brandon Ince is denied, and the claim for false arrest against that defendant is reinstated.

Memorandum: Plaintiff, an employee at the Greater Rochester International Airport, was arrested on a charge of petit larceny by Monroe County Deputy Sheriff Brandon Ince (defendant) and commenced this action alleging, inter alia, false arrest on the part of defendant. Defendants moved for summary judgment dismissing the complaint and, with respect to defendant, Supreme Court initially granted only that part of the motion with respect to the claim for false arrest against him. The court, however, thereafter issued an amended judgment and order granting that part of the motion with respect to defendant in its entirety, thus dismissing the complaint against him. In the exercise of our discretion, we treat the notice of appeal as valid, and we deem the appeal as taken from the amended judgment and order (*see Matter of Nico S.C.*, 70 AD3d 1474; *see also* CPLR 5520 [c]). We reverse the amended judgment and order insofar as appealed from.

In support of the motion with respect to the claim against

defendant for false arrest, defendant contended that the arrest was privileged, while plaintiff contended in opposition that the arrest was not supported by probable cause.

With respect to a cause of action for false arrest or false imprisonment (see generally *Guntlow v Barbera*, 76 AD3d 760, appeal dismissed 15 NY3d 906), the elements are that "the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to the confinement, and that the confinement was not otherwise privileged. The existence of probable cause serves as a legal justification for the arrest and an affirmative defense to the claim" (*Martinez v City of Schenectady*, 97 NY2d 78, 85, citing *Broughton v State of New York*, 37 NY2d 451, 458). Where, as here, an arrest is made without a warrant, it is presumed that the arrest was unlawful and defendant is required to establish the affirmative defense of probable cause (see *Lynn v State of New York*, 33 AD3d 673, 674; *Wallace v City of Albany*, 283 AD2d 872, 873). Thus, in order to prevail on that part of the motion with respect to false arrest, defendant was required to show that there was probable cause for the arrest in order to meet his initial burden. "[T]he issue of probable cause is a question of law to be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn from such facts. Where there is 'conflicting evidence, from which reasonable persons might draw different inferences[,] . . . the question [is] for the jury' " (*Parkin v Cornell Univ.*, 78 NY2d 523, 529, quoting *Veras v Truth Verification Corp.*, 87 AD2d 381, 384, *affd* 57 NY2d 947). Here, there are issues of fact concerning the existence of probable cause that preclude defendant's entitlement to summary judgment as a matter of law.

Initially, we reject plaintiff's contention that the *Aguilar-Spinelli* test to determine the knowledge and reliability of witnesses applies to this case (*cf. Guntlow*, 76 AD3d 760). Although the record does not unequivocally establish the identity of an airport communications employee who provided defendant with information pertaining to the surveillance footage, the record does establish that such person was neither a confidential informant nor an anonymous source. Therefore, because defendant's information was provided by a private identifiable citizen, we conclude that the *Aguilar-Spinelli* test does not apply (see *People v Hicks*, 38 NY2d 90, 94). We agree with plaintiff, however, that defendant failed to establish the affirmative defense of probable cause as a matter of law. As the Court of Appeals wrote in *Smith v County of Nassau* (34 NY2d 18, 24), "[w]here an officer, in good faith, believes that a person is guilty of a felony, and his [or her] belief rests on such grounds as would induce an ordinarily prudent and cautious [person], under the circumstances, to believe likewise, [the officer] has such probable cause for [that] belief as would justify him [or her] in arresting without a warrant" (internal quotation marks omitted).

Here, although it is undisputed that video surveillance footage shows plaintiff reaching into the area of a tip jar from which money

was stolen, defendant concedes that it is impossible to discern whether plaintiff took anything from the jar, and it cannot be said as a matter of law that plaintiff's routine gesture in reaching into that area itself provides sufficient probable cause (see *People v Russell*, 34 NY2d 261, 263-264).

Moreover, the deposition testimony of various witnesses contradicts the version provided by defendant of his investigation, raising issues of credibility that preclude summary judgment. Notably, although defendant testified at his deposition that a certain employee told him that she had "no interaction" with the man later discovered to be plaintiff, that employee testified that she could not recall having such a conversation with defendant. She further testified that, before she had noticed that the money was missing from the tip jar, she had handed a plastic utensil to a man, and that man's hand necessarily would have passed by the tip jar. In addition, the deposition testimony of defendant that he was informed by a manager of the kiosk that the video surveillance footage showed a person taking the money is contradicted by the deposition testimony of the manager, wherein he testified that he did not in fact observe anyone taking the money in the video. Finally, the record establishes that the surveillance footage itself, which was "time lapsed" to show a few moments before and after plaintiff's reach, contains multiple gaps of several seconds and shows other people in the vicinity of the tip jar. For the foregoing reasons, we conclude that triable issues of fact preclude summary judgment in defendant's favor on the issue of probable cause (see *Parkin*, 78 NY2d at 529).

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

1463

CA 10-01412

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

ALEXANDRA BENSHOFF, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ADAM R. RAKOCZY, ET AL., DEFENDANTS,
AND NIAGARA MOHAWK POWER CORPORATION,
DEFENDANT-RESPONDENT.

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

HISCOCK & BARCLAY, LLP, SYRACUSE (MATTHEW J. LARKIN OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered November 6, 2009 in a personal injury action. The order, insofar as appealed from, granted the motion of defendant Niagara Mohawk Power Corporation for summary judgment and dismissed the amended complaint against it.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part and the negligence claim against defendant Niagara Mohawk Power Corporation is reinstated.

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she sustained when the vehicle in which she was a passenger struck a backhoe owned by Niagara Mohawk Power Corporation (defendant). It is undisputed that, at the time of the accident, the backhoe was parked on the side of the road, but the record does not establish whether the backhoe was parked entirely on the grass or whether it remained partially on the paved shoulder of the road, to the right of the white fog line. Plaintiff asserted causes of action against defendants for negligence and against defendant for the violation of Labor Law § 241 (6), and the remaining two defendants asserted a cross claim against defendant seeking contribution "and/or" indemnification. Supreme Court granted the motion of defendant for summary judgment dismissing the amended complaint and cross claim against it. We note at the outset that on appeal plaintiff contends only that the court erred in granting that part of the motion with respect to the negligence claim against defendant, and thus has abandoned any contention concerning the dismissal of the Labor Law § 241 (6) cause of action against defendant (*see Ciesinski v Town of Aurora*, 202 AD2d 984). In addition, we note that the remaining two

defendants have not taken a cross appeal from that part of the order with respect to their cross claim against defendant. Thus, the only issue before us is whether the court erred in granting that part of the motion of defendant for summary judgment dismissing the negligence claim against it, and we agree with plaintiff that the court so erred.

In her bill of particulars, plaintiff alleged, inter alia, that defendant violated Vehicle and Traffic Law § 1201 (a) by parking its backhoe on the paved shoulder of the road. Pursuant to section 1201 (a), it is unlawful to leave a vehicle "upon the paved or main-traveled part of the highway when it is practicable to stop, park, or so leave such vehicle off such part of said highway" Although the statute does not apply in business or residential districts, in support of its motion defendant failed to meet its initial burden of establishing as a matter of law that the accident occurred inside of such districts. In addition, an issue of fact exists whether the backhoe was partially on the paved portion of the road when the accident occurred.

We further conclude that, even if section 1201 (a) does not apply, defendant owed plaintiff a duty of care if in fact it left its backhoe on any portion of the paved roadway, including the paved shoulder to the right of the white fog line. Defendant's reliance on certain prior decisions of this Court, i.e., *Cave v Town of Galen* (23 AD3d 1108), *Clark v City of Rochester* (280 AD2d 901, lv dismissed in part and denied in part 96 NY2d 932) and *Guy v Rochester Gas & Elec. Corp.* (168 AD2d 965, lv denied 77 NY2d 808), is misplaced because, in each of those cases, the vehicles in question struck fixed objects on property that was merely adjacent to but was undisputedly not on any paved roadway. In *Cave*, for example, the object was in the yard of a landowner, adjacent to the roadway. Here, as noted, there is an issue of fact whether the backhoe was at least partially on the paved shoulder of the road.

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

1464

CA 10-01450

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

IN THE MATTER OF THE ARBITRATION BETWEEN
BUFFALO PROFESSIONAL FIREFIGHTERS
ASSOCIATION, INC., IAFF LOCAL 282,
PETITIONER-RESPONDENT,

ORDER

AND

CITY OF BUFFALO, RESPONDENT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (JOSHUA FEINSTEIN OF COUNSEL), FOR
RESPONDENT-APPELLANT.

CREIGHTON PEARCE JOHNSEN & GIROUX, BUFFALO (JONATHAN G. JOHNSEN OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered September 25, 2009 in a proceeding pursuant to CPLR article 75. The order and judgment granted the petition to vacate an arbitration award.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1465

CA 10-01464

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

MARK L. BENESH AND KATHLEEN B. BENESH,
PLAINTIFFS-APPELLANTS,

V

ORDER

KAREN A. COURTNEY AND ROBERT VERRONE,
DEFENDANTS-RESPONDENTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (SCOTT ROGOFF OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (BRIAN A. MACDONALD OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered September 11, 2009. The order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1466

KA 09-01956

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

CHRISTOPHER GAMBLE, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 4, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Milczakowskyj*, 286 AD2d 928, *lv denied* 97 NY2d 657).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1467

KA 09-02283

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JOHN W. SHAW, 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 August 31, 2009. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1468

KA 09-01468

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEVIN ANDERSON, ALSO KNOWN AS AKIM NELSON,
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 (JOHN PATRICK
FEROLETO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered June 22, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), attempted robbery in the first degree (two counts) and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1], [3]). Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19; *People v Townsley*, 50 AD3d 1610, lv denied 11 NY3d 742). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to the contention of defendant, we conclude that he received effective assistance of counsel (*see People v McDaniel*, 13 NY3d 751; *People v Forsythe*, 59 AD3d 1121, 1123-1124, lv denied 12 NY3d 816; *see generally People v Baldi*, 54 NY2d 137, 147).

The sentence is not unduly harsh or severe. We note, however, that the certificate of conviction incorrectly reflects that defendant was convicted of two counts of attempted robbery in the first degree under Penal Law §§ 110.00, 160.15 (4), and it must therefore be amended to reflect that he was convicted of one count of attempted robbery in the first degree under Penal Law §§ 110.00, 160.15 (1) and one count of attempted robbery in the first degree under Penal Law §§

110.00, 160.15 (4) (*see People v Martinez*, 37 AD3d 1099, *lv denied* 8 NY3d 947; *People v Benson*, 265 AD2d 814, 816, *lv denied* 94 NY2d 860, *cert denied* 529 US 1076).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1469

KA 08-02362

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RANDY WILLIS, DEFENDANT-APPELLANT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., CONFLICT DEFENDERS,
WARSAW (ANNA JOST OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered October 24, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, failure to register and/or to verify his status as a sex offender and forcible touching.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]), failure to register as a sex offender and/or to verify his status as such (Correction Law § 168-f [4]), and forcible touching (Penal Law § 130.52). Defendant contends that the evidence is legally insufficient to support the forcible touching conviction inasmuch as the People failed to establish the victim's lack of consent. That contention is not preserved for our review inasmuch as defendant failed to raise that ground in his motion for a trial order of dismissal with respect to the forcible touching conviction (*see People v Gray*, 86 NY2d 10, 19; *People v Jacobson*, 60 AD3d 1326, 1327-1328, *lv denied* 12 NY3d 916) and, in any event, that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant further contends that the evidence is legally insufficient to support the forcible touching conviction because the People failed to establish that he acted "for the purpose of degrading or abusing" the victim "or for the purpose of gratifying [his] sexual desire" (§ 130.52). We reject that contention. "Because the question of whether a person was seeking sexual gratification is generally a subjective inquiry, it can be inferred from the conduct of the perpetrator" (*People v Beecher*, 225 AD2d 943, 944). Here, it can be inferred that defendant grabbed the victim's breast for the purpose of sexual gratification from, inter alia, the fact that he placed his hands on

his crotch prior to touching the victim and the fact that he touched the victim's buttocks on a prior occasion (see generally *People v Fuller*, 50 AD3d 1171, 1174-1175, lv denied 11 NY3d 788; *People v Watson*, 281 AD2d 691, 697, lv denied 96 NY2d 925).

We conclude that the evidence, viewed in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction of burglary and failure to register as a sex offender and/or to verify defendant's status as such (see generally *Bleakley*, 69 NY2d at 495). Even assuming, arguendo, that the People were required to establish that defendant knowingly or intentionally failed to comply with the requirements of the Sex Offender Registration Act ([SORA] Correction Law § 168 et seq.; *People v Haddock*, 48 AD3d 969, 970-971, lv dismissed 12 NY3d 854), we conclude that there is sufficient evidence in the record from which a rational jury could reasonably conclude that defendant knowingly failed to register and/or verify pursuant to SORA. Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495).

Contrary to the contention of defendant, we conclude that County Court properly denied his request for an expanded identification charge inasmuch as this case did not involve a " 'close question of identity' " (*People v Perez*, 77 NY2d 928, 929; see *People v Singleton*, 286 AD2d 877, lv denied 97 NY2d 658; *People v Rogers*, 245 AD2d 1041). Defendant admitted in a statement to the police that he was inside the victim's home on the date in question and that he returned to the victim's home the following day, shortly after which he was apprehended by the police. In any event, the court "properly charged the jury that the People were required to prove every element of the crime beyond a reasonable doubt, 'including that the defendant is the person who committed the crime' " (*People v Gerena*, 49 AD3d 1204, 1205, lv denied 10 NY3d 958; see *People v Whalen*, 59 NY2d 273, 279; *People v Barton*, 301 AD2d 747, lv denied 99 NY2d 625, 1 NY3d 539).

Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147; *People v Williams*, 300 AD2d 1059, lv denied 99 NY2d 634). To the extent that defendant contends that he was deprived of a fair trial by prosecutorial misconduct during summation, we note that defense counsel objected to the allegedly improper comments and that those objections were sustained. In any event, we conclude that "[a]ny 'improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Johnson*, 303 AD2d 967, 968, lv denied 100 NY2d 583).

Finally, the sentence is not unduly harsh or severe.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1470

KA 09-00832

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROY HIGHSMITH, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Erie County Court (Thomas P. Franczyk, J.), entered December 15, 2008 pursuant to the 2004 and 2005 Drug Law Reform Act. The order granted defendant's application for resentencing upon defendant's conviction of criminal possession of a controlled substance in the first degree and criminal sale of a controlled substance in the second degree (two counts) and specified the sentence that would be imposed.

It is hereby ORDERED that the order so appealed from is unanimously affirmed and the matter is remitted to Erie County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order granting his application for resentencing upon his conviction of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [former (1)]), pursuant to the 2004 Drug Law Reform Act ([DLRA-1] L 2004, ch 738, § 23), and for resentencing upon his conviction of two counts of criminal sale of a controlled substance in the second degree (§ 220.41 [1]), pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1). The order also specified that, for each of the three counts, County Court would impose a determinate sentence of eight years plus a period of postrelease supervision of five years. Defendant failed to preserve for our review his contention that County Court failed to "offer an opportunity for a hearing and bring [him] before it" (L 2005, ch 643, § 1; L 2004, ch 738, § 23; see CPL 470.05 [2]). Contrary to defendant's contention, "[t]here was no mode of proceedings error in this matter and, thus, any alleged error required preservation" (*People v Rosen*, 96 NY2d 329, 335, cert denied 534 US 899). In any event, we conclude that "the critical facts here were uncontested, making it unnecessary for the court to [conduct] an evidentiary hearing" (*People v Burgos*, 44 AD3d 387, 387, lv dismissed 9 NY3d 990).

Defendant contends that the court had authority to reduce the conviction of criminal possession of a controlled substance in the first degree, an A-I drug felony, to criminal possession of a controlled substance in the second degree, an A-II drug felony, on the ground that defendant was convicted of possessing an amount of cocaine that does not meet the weight requirement for the A-I drug felony set forth in the statute as amended by DLRA-1. We reject that contention inasmuch as DLRA-1 "does not permit the court to disturb the underlying class A-I felony conviction" (*People v Watts*, 58 AD3d 648, 649, lv dismissed 12 NY3d 763; see *People v Quinones*, 22 AD3d 218, 219, lv denied 6 NY3d 817; see generally *People v Utsey*, 7 NY3d 398, 404). Further, the court properly concluded that, in resentencing defendant pursuant to DLRA-1 and DLRA-2, it lacked authority " 'to determine whether the sentence[s are] to be served concurrently or consecutively with respect to other sentences' " (*People v Acevedo*, 14 NY3d 828, 831). Finally, we reject defendant's contention that the proposed new sentence is harsh and excessive.

We therefore affirm the order and remit the matter to County Court to afford defendant an opportunity to withdraw his application for resentencing before the proposed new sentence is imposed, as required by DLRA-1 and DLRA-2.

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

1471

CAF 09-02459

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

IN THE MATTER OF MARK S. THREET,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

REGINA M. THREET, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered October 26, 2009 in a proceeding pursuant to Family Court Act article 8. The order of protection directed respondent to refrain from offensive conduct against petitioner and the parties' child.

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

Memorandum: Respondent contends in this proceeding pursuant to Family Court Act article 8 that Family Court erred in determining that respondent committed a family offense against petitioner. We reject that contention. Although respondent appeals from the fact-finding order rather than from the order of protection issued following the dispositional hearing, we nevertheless exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the order of protection, which constitutes an order of disposition pursuant to Family Court Act § 841 (d) (*see Matter of Danielle S. v Larry R.S.*, 41 AD3d 1188; *see also* CPLR 5520 [c]). The court's "assessment of the credibility of the witnesses is entitled to great weight, and the record supports the court's finding that petitioner was a more credible witness than respondent" (*Danielle S.*, 41 AD3d at 1189). The record also supports the court's determination that petitioner met his burden of establishing by a preponderance of the evidence that respondent committed the family offense of harassment in the second degree (*see* Penal Law § 240.26 [1]) and thus that an order of protection in favor of petitioner was warranted (*see* Family Ct Act § 812 [1]).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1472

CAF 09-02262

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

IN THE MATTER OF STEVEN DUBUQUE,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

SHAWNA M. BREMILLER, RESPONDENT-APPELLANT.

TIMOTHY R. LOVALLO, BUFFALO, FOR RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-RESPONDENT.

ALVIN M. GREENE, ATTORNEY FOR THE CHILD, BUFFALO, FOR ROSE M.D.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered June 22, 2009 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole custody of the parties' child.

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

Memorandum: Respondent mother appeals from an order that, following a hearing, granted the petition seeking to modify a prior order of custody and visitation by granting sole custody of the parties' daughter to petitioner father and visitation to the mother. Inasmuch as the mother does not challenge Family Court's finding that a change in circumstances existed, we need only address whether it was in the child's best interests to award sole custody to the father (see *Matter of Bush v Bush*, 74 AD3d 1448, 1449, lv denied ___ NY3d ___).

We note at the outset "that, although the court failed to comply with CPLR 4213 (b) by stating 'the facts it deem[ed] essential' in [awarding sole custody to the father], the record is sufficient to permit us to make such findings" (*Matter of Chapman v Tucker*, 74 AD3d 1905, 1906; see *Matter of Vezina v Vezina*, 8 AD3d 1047). "Contrary to the mother's contention, the court did not abuse its discretion in awarding the father [sole custody of the child]. Generally, a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record . . . We see no basis to disturb the court's determination inasmuch as it was based on the court's credibility assessments of the witnesses and is supported by a sound and substantial basis in the record" (*Matter of*

Krug v Krug, 55 AD3d 1373, 1374 [internal quotation marks omitted];
see *Matter of Thayer v Thayer*, 67 AD3d 1358).

We have considered the mother's remaining contentions and
conclude that they are without merit.

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

1473

CAF 09-02270

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

IN THE MATTER OF YASIEL P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LISUAN P., RESPONDENT-APPELLANT.

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

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

AYOKA A. TUCKER, ATTORNEY FOR THE CHILD, BUFFALO, FOR YASIEL P.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered October 22, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: On appeal from an order terminating her parental rights on the ground of permanent neglect, respondent mother contends that reversal is required because of recent amendments to Social Services Law § 384-b (see L 2010, ch 113, §§ 2-4). We reject that contention. "[A]mendments to statutes are presumed to have prospective application only, unless the Legislature's preference for retroactivity is explicitly stated or otherwise indicated" (*People ex rel. Forshey v John*, 75 AD3d 1100, 1101). Nevertheless, "it is also the case that 'remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose' " (*id.*, quoting *Matter of Gleason [Michael Vee, Ltd.]*, 96 NY2d 117, 122). When the amendments upon which the mother relies became effective on June 15, 2010, the mother's parental rights had been terminated by the order entered October 22, 2009. Although the language of the legislation providing that it "shall take effect immediately" evinces a sense of urgency (L 2010, ch 113, § 6), there is no indication that the purpose of the amendments was remedial in nature (*cf. People ex rel. Forshey*, 75 AD3d at 1101), and we therefore conclude that they should not be given retroactive effect.

We reject the further contention of the mother that petitioner failed to use diligent efforts to reunite the family. "When a child-care agency has custody of a child and brings a proceeding to

terminate parental rights on the ground of permanent neglect, it must affirmatively plead in detail and prove by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to strengthen the parent-child relationship and to reunite the family" (*Matter of Sheila G.*, 61 NY2d 368, 373). " '[D]iligent efforts' . . . mean reasonable attempts . . . to assist, develop and encourage a meaningful relationship between the parent and the child" (Social Services Law § 384-b [7] [f]), and they " 'include reasonable attempts at providing counseling, scheduling regular visitation with the child[], providing services to the parent[] to overcome problems that prevent the discharge of the child[] into [his or her] care, and informing the parent[] of [the child's] progress' " (*Matter of Whytnei B.*, 77 AD3d 1340, ___). The "[p]etitioner is not required, however, to guarantee that the parent succeed in overcoming his or her predicaments . . . but, rather, the parent must assume a measure of initiative and responsibility" (*id.* at ___ [internal quotation marks omitted]). Here, petitioner established, by the requisite clear and convincing evidence (see § 384-b [3] [g] [i]), that it fulfilled its duty to exercise diligent efforts to encourage and strengthen the mother's relationship with the child during the relevant time period and to reunite the family (see generally *Matter of Star Leslie W.*, 63 NY2d 136, 142).

We conclude that petitioner met its burden of establishing by a preponderance of the evidence that termination of the mother's parental rights is in the best interests of the child (see *Matter of Toyie Fannie J.*, 77 AD3d 449; *Matter of Brian C.*, 32 AD3d 1224, 1225-1226, *lv denied* 7 NY3d 717). Here, the record establishes that the mother failed to complete her service plan despite ample opportunity to do so, made minimal efforts to visit the child, had no viable plan for the child's future and was generally indifferent toward the child (see generally *Matter of Emmeran M.*, 66 AD3d 1490). Even assuming, arguendo, that the mother's contention that custody should have been awarded to the maternal grandmother is properly before us (*cf. Matter of Brian JJ. v Heather KK.*, 61 AD3d 1285, 1287), we conclude that it is without merit (see *Matter of Donald W.*, 17 AD3d 728, 729-730, *lv denied* 5 NY3d 705).

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

1474

CAF 10-00254

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

IN THE MATTER OF JULIANI B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

DENISE M., RESPONDENT,
AND WALTER R., RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Erie County (Margaret
O. Szczur, J.), entered December 30, 2009 in a proceeding pursuant to
Family Court Act article 10. The order determined the subject child
to be a neglected child by the acts and omissions of both respondents.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1475

CAF 09-02182

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

IN THE MATTER OF WILLIAM F. FRAZIER,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

KIMBERLY A. FRAZIER, RESPONDENT-RESPONDENT.

DEBRA D. WILSON, LOCKPORT, FOR PETITIONER-APPELLANT.

LOTEMPPIO & BROWN, P.C., BUFFALO (TERRI L. LOTEMPPIO OF COUNSEL), FOR
RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Niagara County (David E. Seaman, J.), entered August 27, 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 unanimously affirmed without costs.

Memorandum: Family Court properly granted respondent mother's motion to dismiss the petition seeking to modify the visitation provision of the parties' divorce judgment by awarding petitioner father visitation with the parties' daughter at the correctional facility where he is currently incarcerated. The court properly determined that the father's relocation from a federal prison to a state prison did not constitute a sufficient change in circumstances warranting modification of the judgment (*see generally Matter of Jason A.C. v Lisa A.C.*, 30 AD3d 1110). Contrary to the contention of the father, his allegations in support of the petition were insufficient to warrant an evidentiary hearing (*see Matter of Dann v Dann*, 51 AD3d 1345, 1347). We reject the further contentions of the father that the court erred in failing to appoint an attorney for the child and that he was denied effective assistance of counsel (*see Moor v Moor*, 75 AD3d 675, 678-679; *Matter of Perry v Perry*, 52 AD3d 906, 907, *lv denied* 11 NY3d 707).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1476

CAF 09-02371

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

IN THE MATTER OF REGINA M. THREET,
PETITIONER-APPELLANT,

V

ORDER

MARK S. THREET, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered October 26, 2009 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for a modification of custody and visitation.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1477

CA 10-01487

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

CHARLES GEORGE AND CMG PHARMACEUTICALS, INC.,
DOING BUSINESS AS AKRON PHARMACY,
PLAINTIFFS-APPELLANTS,

V

ORDER

HEALTHNOW NEW YORK INC., DOING BUSINESS AS
BLUE CROSS & BLUE SHIELD OF WESTERN NEW YORK
AND/OR BLUE CROSS BLUE SHIELD OF WESTERN NEW
YORK AND COMMUNITY BLUE, DEFENDANT-RESPONDENT.

MARK R. UBA, WILLIAMSVILLE, AND JOEL L. DANIELS, BUFFALO, FOR
PLAINTIFFS-APPELLANTS.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (MITCHELL J. BANAS, JR., OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John M. Curran, J.), entered September 11, 2009. The order and judgment granted defendant's motion to dismiss the complaint.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1478

CA 10-01295

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

ANTHONY P. KEMPA, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

TOWN OF BOSTON, DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (MARK DAVIS OF COUNSEL), FOR
DEFENDANT-APPELLANT.

UAW-GM LEGAL SERVICES PLAN, LOCKPORT (BOOKER T. WASHINGTON OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered September 10, 2009. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff owns land adjacent to a town highway known as Eddy Road in defendant, Town of Boston (hereafter, Town). In 2007, plaintiff commenced this action asserting claims for trespass, negligence, and the violation of RPAPL 861, alleging that the Town entered his land without permission and damaged his property by, *inter alia*, cutting down trees and removing soil both inside and outside the Town's right-of-way on Eddy Road. Supreme Court initially granted the Town's motion for summary judgment dismissing the complaint without prejudice, allowing plaintiff to submit an updated survey regarding the width of Eddy Road. Plaintiff did so, and the court then denied the Town's motion. We affirm.

As the Court of Appeals wrote in *Schillawski v State of New York* (9 NY2d 235) with respect to determining the width of a highway, "[w]here a road has obtained its character as a public highway by user, its width is determined by the width of the improvement But where the road has been laid out under a statute, it is the statute and not the user that determines the width" (*id.* at 238; see *Matter of Hill v Town of Horicon*, 176 AD2d 1169, 1170, *lv denied* 80 NY2d 752; *Snow v State of New York*, 48 AD2d 582, 584-585). The Town failed to identify a statute "laying out" Eddy Road (see *Snow*, 48 AD2d at 585; *Kenyon v State of New York*, 28 AD2d 1182, 1182-1183), and thus was required in support of its motion for summary judgment to establish the width of the highway by use (see *Schillawski*, 9 NY2d at 238; *Snow*, 48 AD2d at 585). The Town submitted evidence establishing

that Eddy Road is 66 feet in width by use adjacent to plaintiff's property and that the work performed by the Town was completed within a 66-foot-wide right-of-way. The Town therefore met its initial burden on the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

In opposition to the motion for summary judgment, however, upon receiving the court's permission to submit an updated survey, plaintiff submitted an affidavit and survey of a professional land surveyor who concluded that Eddy Road is 49.5 feet in width adjacent to plaintiff's property. The Town's contention that the court erred in allowing plaintiff to submit the surveyor's affidavit and survey after granting the Town's motion for summary judgment without prejudice is advanced for the first time on appeal and therefore is not properly before this Court (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). Contrary to the Town's further contention, the subject survey is admissible (*see generally Raab v Lefkowitz*, 76 AD3d 619; *Sloninski v Weston*, 232 AD2d 913, 914, *lv denied* 89 NY2d 809, *rearg denied* 89 NY2d 1086; *Town of Ulster v Massa*, 144 AD2d 726, 728, *lv denied* 75 NY2d 707).

Even assuming, arguendo, that the court erred in considering the additional evidence submitted by plaintiff, we note that in his initial opposition to the motion plaintiff submitted his deed, which indicates that Eddy Road is 49.5 feet in width and does not provide for easement rights beyond that width. Plaintiff also initially submitted evidence showing tree and soil removal by the Town that extended beyond a width of 49.5 feet. Plaintiff therefore established the existence of triable issues of fact regarding his trespass, negligence, and RPAPL 861 claims against the Town (*see Ketchuck v Town of Owego*, 72 AD3d 1173; *Curtis v Town of Galway*, 24 Misc 3d 1240[A], 2007 NY Slip Op 52624[U], *4, *affd* 50 AD3d 1370; *Jung v Town of Franklinville*, 299 AD2d 904, 905; *Fletcher v Town of Indian Lake*, 73 AD2d 783). Consequently, the court did not err in denying the Town's motion for summary judgment dismissing the complaint.

We have considered the Town's remaining contentions and conclude that they are without merit.

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

1479

CA 10-01290

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

ACTIVE WORKFORCE, INC., PLAINTIFF-RESPONDENT,

V

ORDER

MICHAEL CRYAN, DEFENDANT-APPELLANT,
LAWLEY SERVICES, INC., DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

GOLDBERG SEGALLA LLP, BUFFALO (SARAH J. DELANEY OF COUNSEL), FOR
DEFENDANT-APPELLANT.

FRANCIS W. TESSEYMAN, JR., BUFFALO, FOR PLAINTIFF-RESPONDENT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (R. SCOTT ATWATER OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered September 17, 2009. The order, insofar as appealed from, denied the motion of defendant Michael Cryan for summary judgment and granted the cross motion of defendant Lawley Services, Inc. for a conditional order of indemnification against Michael Cryan.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1480

CA 10-01568

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

WAYNE A. BOIVIN, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

THE MARRANO/MARC EQUITY CORP.,
DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered December 8, 2009 in a personal injury action. The order denied defendant's motion for summary judgment and granted plaintiff's cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the Labor Law § 200 and common-law negligence causes of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he allegedly sustained when he fell while installing a roof on a home that was under construction. Supreme Court properly denied that part of defendant's motion seeking summary judgment dismissing the Labor Law § 240 (1) claim and properly granted plaintiff's cross motion seeking partial summary judgment on liability with respect to that claim. Plaintiff established his entitlement to judgment as a matter of law (*see Cherry v Time Warner, Inc.*, 66 AD3d 233, 236), and "[t]he mere fact that a fall is unwitnessed does not require denial of a [cross] motion for partial summary judgment [on liability] under Labor Law § 240 (1)" (*Abramo v Pepsi-Cola Bottling Co.*, 224 AD2d 980, 981). Plaintiff's conflicting statements concerning the precise address of the accident are insufficient to raise a triable issue of fact inasmuch as it is undisputed that defendant was the general contractor for all of the homes under construction in the development where the accident occurred. Moreover, "all of plaintiff's statements relate a consistent and coherent version of the occurrence of the accident" (*Morris v Mark IV Constr. Co.*, 203 AD2d 922, 923).

We agree with defendant, however, that the court erred in denying

those parts of its motion seeking summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action. Defendant "established its entitlement to judgment as a matter of law by demonstrating that it did not exercise supervisory control over . . . plaintiff's work[] and that it neither created nor had actual or constructive knowledge of the allegedly dangerous condition on the premises . . . , and plaintiff[] failed to raise a triable issue of fact" (*Handville v MJP Contractors, Inc.*, 77 AD3d 1471, ___ [internal quotation marks omitted]). We therefore modify the order accordingly.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1481

CA 09-02377

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

RONALD VANYO, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ANN VANYO, DEFENDANT-APPELLANT.

HOGAN WILLIG, GETZVILLE (STEVEN M. COHEN OF COUNSEL), FOR
DEFENDANT-APPELLANT.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (ROBERT R. VARIO OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

PAMELA THIBODEAU, ATTORNEY FOR THE CHILDREN, WILLIAMSVILLE, FOR
MICHAEL V. AND MATTHEW V.

Appeal from a judgment of the Supreme Court, Erie County (John F. O'Donnell, J.), entered September 14, 2009 in a divorce action. The judgment, inter alia, equitably distributed the marital property of the parties.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating decretal paragraphs 5, 7 and 14 and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Defendant wife appeals from a judgment that inter alia, granted plaintiff husband sole custody of the parties' two children, provided for child support, and distributed the marital property and debt. Preliminarily, we reject the wife's contention that there was a conflict between Supreme Court's decisions and the judgment that was entered. The judgment merely clarified the decisions (see *DeSantis v DeSantis*, 205 AD2d 928, 930), and otherwise sought to address the parties' contentions in their entirety. Moreover, the wife failed to preserve for our review her contention that the court failed to credit her separate property contribution to the marital home inasmuch as she previously contended that the appreciation on her separate property, which was the only portion of the sale of that property applied to the purchase of the marital home, was in fact marital property (see generally *Hurley v Hurley*, 71 AD3d 1470). In any event, the wife's contention lacks merit, because the evidence establishes that the appreciation on that separate property resulted from the combined efforts of both parties to improve that property (see *Price v Price*, 69 NY2d 8, 11; see also *Smith v Winter*, 64 AD3d 1218, lv denied 13 NY3d 709). The court also properly concluded that property purchased

by the husband prior to the marriage remained his separate property. Although the wife presented evidence establishing that she did in fact contribute to the property, she failed to present the requisite evidence establishing that the property appreciated in value as a result of her contributions (*see generally Embury v Embury*, 49 AD3d 802, 804).

Contrary to the wife's further contention, the court properly awarded sole custody of the parties' two children to the husband. The parties here were " 'so embattled and embittered as to effectively preclude joint decision making' " (*Capodiferro v Capodiferro*, 77 AD3d 1449, 1450). Moreover, there is a sound and substantial basis in the record supporting the court's determination, i.e., that the award of sole custody to the father was in the children's best interests (*see generally Wideman v Wideman*, 38 AD3d 1318, 1319).

We agree with the wife, however, that certain portions of the judgment must be vacated, and we modify the judgment accordingly and remit the matter for a further hearing with respect thereto. As the wife correctly contends, the court erred in calculating child support by applying a combined parental income cap of \$130,000 to its calculations before the effective date of the legislation amending the amount of the income cap from \$80,000 to \$130,000 (*see Domestic Relations Law* § 240 [1-b] [c] [3]). Rather, the court should have applied the \$80,000 combined parental income cap that was in effect at the time judgment was rendered (*see* § 240 [1-b] [c] [2]). Moreover, to the extent that the court awarded child support on the parties' income in excess of the \$80,000 cap, the court was required to articulate its reasons for doing so (*see* § 240 [1-b] [c] [3]; [f]; *Matter of Cassano v Cassano*, 85 NY2d 649, 655). We therefore modify the judgment by vacating the amount awarded for child support, and we remit the matter to Supreme Court to determine the amount of child support to be paid by the wife to the husband in compliance with the Child Support Standards Act, following a hearing if necessary (*see Irene v Irene* [appeal No. 2], 41 AD3d 1179, 1181).

Two further modifications of the judgment are required, both of which also require remittal to Supreme Court. First, the court failed to make a finding concerning the fair market value of the marital residence at the time of trial (*see generally Wittig v Wittig*, 258 AD2d 883, 884), despite having distributed that property based on a calculation that required the court to make a finding of the property's fair market value. The lack of such a finding, and the lack of reliable evidence adduced on the issue at trial to enable this Court to make its own finding, requires vacatur of the judgment in that respect, as well as remittal to Supreme Court for a finding on that issue, following a hearing if necessary (*see Hoffman v Hoffman*, 31 AD3d 1125, 1126, 884). Second, the court erred in allocating credit card debt to the wife without articulating its reasons for doing so. In distributing debt, a court is required to consider the factors set forth in Domestic Relations Law § 236 (B) (5) (d) and to state the factors that influenced its decision in accordance with section 236 (B) (5) (g) (*see Burns v Burns*, 70 AD3d 1501, 1503). We

thus further modify the judgment accordingly, and we remit the matter to Supreme Court for further consideration of that issue, following a hearing if necessary (see *Capasso v Capasso*, 119 AD2d 268, 272).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1482

CA 10-00938

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

JERALYN SCHLEY, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

RYEN STEFFANS AND RONALD LARABA,
DEFENDANTS-RESPONDENTS.

STEINER & BLOTNIK, BUFFALO (M. KREAG FERULLO OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered July 22, 2009 in a personal injury action. The order denied the motion of plaintiff to set aside a verdict pursuant to CPLR 4404 (a).

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when the motor vehicle driven by her daughter, defendant Ryen Steffans, and in which plaintiff was a passenger, collided with a vehicle driven by defendant Ronald Laraba. Following a trial on liability, the jury concluded that Steffans' negligence was a proximate cause of the accident and that, although Laraba was negligent, such negligence was not a proximate cause of the accident. Plaintiff appeals from an order denying her post-trial motion to set aside the verdict as inconsistent and against the weight of the evidence and for a new trial. We affirm.

Plaintiff contends that the verdict is inconsistent and against the weight of the evidence because it was logically impossible to find that Laraba was negligent without also finding that such negligence was a proximate cause of the accident. "Plaintiff failed to preserve for our review [her] contention that the verdict is inconsistent because [she] did not object to the verdict on that ground before the jury was discharged" (*DeLong v County of Chautauqua* [appeal No. 2], 71 AD3d 1580, 1581). In any event, we conclude that the verdict is neither inconsistent nor against the weight of the evidence. "A jury finding that a party was negligent but that such negligence was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as

to make it logically impossible to find negligence without also finding proximate cause" (*Skowronski v Mordino*, 4 AD3d 782, 783 [internal quotation marks omitted]; see *Potter v Jay E. Potter Lbr. Co., Inc.*, 71 AD3d 1565, 1567). A driver " 'who has the right of way[, such as Laraba,] is entitled to anticipate that other vehicles will obey the traffic laws that require them to yield' . . . In addition, [he] has 'no duty to watch for and avoid a driver who might fail to stop or to proceed with due caution at a stop sign' " (*Doxtader v Janczuk*, 294 AD2d 859, 859-860, *lv denied* 99 NY2d 505). Thus, we conclude that "the evidence on the issue of causation [with respect to Laraba] did not so preponderate in favor of plaintiff that the jury's finding of no proximate cause could not have been reached on any fair interpretation of the evidence" (*Waild v Boulos* [appeal No. 2], 2 AD3d 1284, 1286, *lv denied* 2 NY3d 703; see *Lolik v Big V Supermarkets*, 86 NY2d 744, 746).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1485

CA 10-01624

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

VICTOR DEMJANENKO, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

VIRGINIA L. DEMJANENKO, DEFENDANT-APPELLANT.

PALMER, MURPHY & TRIPI, BUFFALO (THOMAS A. PALMER OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHARLES A. MESSINA, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered October 19, 2009. The order, insofar as appealed from, denied the motion of defendant to compel plaintiff to pay her \$243,196.50.

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

Memorandum: Supreme Court properly denied that part of defendant's motion seeking an order directing plaintiff to transfer to defendant the sum of \$243,196.50 from his individual retirement accounts (IRAs) pursuant to the parties' separation agreement (agreement), as incorporated but not merged into the judgment of divorce. The agreement expressly provided that the value of the parties' IRAs would be "equalized" as part of the equitable distribution of marital property. Thus, the court properly concluded that the parties intended that they would share equally in the appreciation or depreciation of their IRAs that occurred between the date of the agreement, when the value of the IRAs was initially determined, and the date of distribution (*see generally McCarthy v McCarthy*, 298 AD2d 977).

All concur except MARTOCHE, J.P., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent. The agreement provides in Article Five that, during the course of the marriage, the parties acquired individual retirement accounts in specific amounts. The agreement further provides that the parties were to retain the identified retirement accounts in their respective names as their sole and separate property upon completion of equalization of the accounts, but recognized that the value of plaintiff's account exceeded defendant's account by \$486,393, "which sum shall be equalized as part of the equitable distribution" of plaintiff's TIAA-CREF account. The agreement further noted that, in

order to equalize the accounts, defendant was entitled to a tax-free transfer or rollover of funds from plaintiff's TIAA-CREF account "in the amount of \$243,196.50, together with any interest earned or appreciation of the said balance, but not to include any new contributions to the said account or interest earned or appreciation upon said new contributions, related to any time period after May 7, 2007." The agreement recognized that, if there were insufficient funds in the TIAA-CREF account to "effectuate the transfer as set forth above," any difference "due and owing" to defendant was to be transferred from plaintiff's "ING account in the same manner."

I cannot agree with the majority that Supreme Court properly denied that part of defendant's motion seeking to direct plaintiff to transfer the sum of \$243,196.50 from his individual retirement accounts, in accordance with the terms of the agreement. First, I believe that this case is distinguishable from our decision in *McCarthy v McCarthy* (298 AD2d 977), the case upon which the majority relies for its decision. We held therein that, inter alia, the court erred "in effect" making a cash distribution of the husband's stock purchase plan (*id.*), but there the agreement between the parties expressly provided that the wife was entitled to a 40% share of the husband's pension and to 50% of his savings and stock purchase plan. That agreement referenced only percentages, and did not discuss a specific monetary amount, as does the agreement here. Additionally, the agreement here provides for a mechanism by which defendant would receive the specific amount of money in the event that the TIAA-CREF account had insufficient funds in it to effectuate the transfer of the specific monetary amount, namely, \$243,196.50.

Second, I am troubled by plaintiff's dilatory tactics in the preparation of the qualified domestic relations order (QDRO). The record establishes that the attorney representing defendant contacted plaintiff's attorney on several occasions requesting information in order to prepare the QDRO. The attorney received no response to the request from an attorney for plaintiff, and plaintiff himself ultimately informed defendant's attorney that he was not represented by counsel in the preparation of the QDRO documents and that he was enclosing a copy of correspondence, which is not included in the record, "for settlement purposes." However, plaintiff does not dispute the statement of defendant's attorney that plaintiff in fact was represented by counsel throughout the period in which defendant's attorney did not receive a response to the request for assistance in the preparation of the QDRO.

In my view, the agreement unequivocally establishes that defendant is entitled to a specific dollar amount, i.e., \$243,196.50. I therefore would reverse the order insofar as appealed from and grant that part of defendant's motion seeking the relief requested with respect to the issue addressed herein.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1486

KA 08-02123

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DARCY MCPHERSON, DEFENDANT-APPELLANT.

THEODORE W. STENUF, MINOA, FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH, FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered August 6, 2007. The judgment convicted defendant, upon a jury verdict, of criminal possession of a forged instrument in the second degree and grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and grand larceny in the fourth degree (§ 155.30 [1]). As we previously determined on the appeal of the codefendant, the People laid a proper foundation for the admission in evidence of an audiotape of a conversation between defendant and a prosecution witness, and thus County Court properly admitted the audiotape in evidence (*People v McPherson*, 70 AD3d 1353, 1354, *lv denied* 14 NY3d 890). Defendant's remaining contentions regarding the audiotape are not preserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Additionally, as we previously determined on the appeal of the codefendant, the court properly determined that the prosecution witness in question was not an accomplice as a matter of law and thus properly refused to submit to the jury the issue whether that witness was an accomplice (*McPherson*, 70 AD3d at 1354). Defendant failed to preserve for our review his contention that an additional prosecution witness was an accomplice as well (*see People v Weeks*, 15 AD3d 845, 846, *lv denied* 4 NY3d 892; *see also People v Lipton*, 54 NY2d 340, 351), and in any event we conclude that the additional prosecution witness also was not an accomplice as a matter of law (*see People v Washington*, 50 AD3d 1616, *lv denied* 11 NY3d 796; *Weeks*, 15 AD3d at 846). Because neither of those prosecution witnesses was an accomplice, the People were not required to corroborate their

testimony (*see generally* CPL 60.22 [1]). We therefore conclude that defendant's contention that the evidence is legally insufficient to support the conviction because the testimony of those witnesses was not corroborated is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant's further contention that the evidence is legally insufficient because there was no direct evidence connecting defendant to the forged check is without merit. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences that could lead a rational juror to convict defendant of both crimes (*see People v Santi*, 3 NY3d 234, 246; *Bleakley*, 69 NY2d 490, 495). Finally, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1488

KA 06-03491

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTONIO HILLARD, ALSO KNOWN AS ANTONIO HILLIARD,
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF
COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (ELIZABETH CLIFFORD OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered August 30, 2006. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree and unlawful possession of marihuana.

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 third degree (Penal Law § 220.16 [1]), criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]) and unlawful possession of marihuana (§ 221.05). Defendant contends that the police lacked the requisite reasonable suspicion to pursue him because the pursuit was improperly based on information from an anonymous source. We reject that contention. It is well settled that " '[a]n identified citizen informant is presumed to be reliable' " (*People v Van Every*, 1 AD3d 977, 978, lv denied 1 NY3d 602). In this case, the 911 caller who reported that two males were selling drugs at a specified location gave the police his first name, his telephone number, and the address from which he was calling. "Because the caller identified himself by [his first] name and provided information about his location, the call was not a truly anonymous one, and the police were justified in acting on such information" (*People v Dixon*, 289 AD2d 937, 937-938, lv denied 98 NY2d 637; see *Van Every*, 1 AD3d at 978). When defendant fled from a responding officer and the officer observed that defendant matched the description given by the 911 caller, the officer "had reasonable suspicion to pursue defendant, [and] defendant's [ensuing] abandonment . . . of a [jacket] containing drugs was not precipitated by illegal police conduct" (*People v*

Sierra, 83 NY2d 928, 930). Contrary to the further contention of defendant, the testimony of a police officer concerning the geographic area where he was arrested did not constitute *Molineux* evidence because it did not implicate him in the commission of any crimes, and thus there is no need to determine whether such testimony falls within a *Molineux* exception (see generally *People v Arafet*, 13 NY3d 460, 465).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1489

TP 10-01576

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

IN THE MATTER OF EON SHEPHERD, PETITIONER,

V

ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT.

EON SHEPHERD, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered July 23, 2010) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (see *Matter of Free v Coombe*, 234 AD2d 996).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1490

TP 10-01553

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

IN THE MATTER OF ROBERT TUMMINIA, PETITIONER,

V

ORDER

JOHN B. LEMKE, SUPERINTENDENT AND HEARING
OFFICER LT. GIANNINO, FIVE POINTS CORRECTIONAL
FACILITY, RESPONDENTS.

ROBERT TUMMINIA, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL),
FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered May 21, 2010) to review a determination of respondents. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (see *Matter of Free v Coombe*, 234 AD2d 996).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1493

KA 07-00917

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PATRICK R. NILSEN, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered March 15, 2007. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the second degree, sexual abuse in the third degree and endangering the welfare of a child (four counts).

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

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, sexual abuse in the second degree (Penal Law § 130.60 [2]) and four counts of endangering the welfare of a child (§ 260.10 [1]), defendant's sole contention is that the verdict is against the weight of the evidence. We reject that contention. We note that the reasons proffered by defendant concerning the motivations of the three victims to fabricate their accusations against him are plausible, and that a different verdict therefore would not have been unreasonable (*see generally People v Bleakley*, 69 NY2d 490, 495). Nevertheless, issues relating to the credibility of witnesses are best resolved by the jury, which is able to see and hear the witnesses (*see generally People v Lane*, 7 NY3d 888, 890; *People v Ange*, 37 AD3d 1143, *lv denied* 9 NY3d 839), and it cannot be said in this case that the jury failed to give the evidence the weight it should be accorded (*see Bleakley*, 69 NY2d at 495; *People v Kalen*, 68 AD3d 1666, *lv denied* 14 NY3d 842). Although defendant was acquitted of the only felony offense charged in the indictment, the jury was entitled to reject certain portions of the testimony of the victim who was the subject of that offense while crediting other portions (*see People v Reed*, 40 NY2d 204, 208; *Kalen*, 68 AD3d at 1667). Neither the lack of corroboration of the testimony of the witnesses nor the minor inconsistencies in their testimony that are addressed by defendant on appeal render their testimony incredible as a matter of law (*see*

People v Smith, 73 AD3d 1469, lv denied 15 NY3d 778). Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), and upon weighing the conflicting testimony and evaluating the strength of the various conclusions to be drawn therefrom, we conclude that "the jury was justified in finding the defendant guilty beyond a reasonable doubt" (*id.* at 348).

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

1495

CAF 09-02434

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

IN THE MATTER OF SEAN S.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TINA S., ALSO KNOWN AS TINA G.,
RESPONDENT-APPELLANT.

MARY R. HUMPHREY, NEW HARTFORD, FOR RESPONDENT-APPELLANT.

DENISE J. MORGAN, UTICA, FOR PETITIONER-RESPONDENT.

JOHN G. KOSLOSKY, ATTORNEY FOR THE CHILD, UTICA, FOR SEAN S.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered October 27, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order terminated respondent's parental rights.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to her son on the ground of mental illness. Contrary to the contention of the mother, we conclude that petitioner met its burden of demonstrating by clear and convincing evidence that she is "presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for [the] child" (Social Services Law § 384-b [4] [c]; see *Matter of Deondre M.*, ___ AD3d ___ [Oct. 1, 2010]; *Matter of Michael WW.*, 29 AD3d 1105, 1106). We reject the further contention of the mother that Family Court erred in denying her request for post-termination visitation inasmuch as the evidence presented at the hearing on the petition established that such contact would be contrary to the best interests of the child (see *Matter of Diana M.T.*, 57 AD3d 1492, 1493, lv denied 12 NY3d 708).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1496

CAF 09-02264

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

IN THE MATTER OF SUMMER GILLETTE,
PETITIONER-RESPONDENT,

V

ORDER

JEREMY GEDNEY, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

LINDA GEHRON, SYRACUSE, FOR PETITIONER-RESPONDENT.

ALEXANDRA BURKETT, ATTORNEY FOR THE CHILDREN, CANANDAIGUA, FOR DOMANIK
G. AND ALYSSA G.

Appeal from an order of the Family Court, Ontario County
(Frederic T. Henry, Jr., J.H.O.), entered October 7, 2009 in a
proceeding pursuant to Family Court Act article 6. The order, among
other things, adjudged that petitioner shall have sole custody of the
subject children.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1497

CAF 09-02265

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

IN THE MATTER OF TRISHIA OSBORN,
PETITIONER-RESPONDENT,

V

ORDER

JEREMY GEDNEY, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

ALEXANDRA BURKETT, ATTORNEY FOR THE CHILD, CANANDAIGUA, FOR ALEXIS G.

Appeal from an order of the Family Court, Ontario County (Frederic T. Henry, Jr., J.H.O.), entered October 7, 2009 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that petitioner shall have sole custody of the subject child.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1498

CAF 10-01424

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

IN THE MATTER OF DELORES M. WEBB,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

MAURICE AARON, RESPONDENT-RESPONDENT.

FEUERSTEIN AND SMITH, L.L.P., BUFFALO (JAMIE L. CODJOVI OF COUNSEL),
FOR PETITIONER-APPELLANT.

JOSEPH C. BANIA, ATTORNEY FOR THE CHILD, BUFFALO, FOR SOLVEIG A.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, A.J.), entered February 10, 2010 in a proceeding pursuant to Family Court Act article 6. The order denied the petition for leave to relocate with the parties' child.

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

Memorandum: Petitioner mother appeals from an order that, *inter alia*, denied her petition seeking to modify a prior order of custody and visitation by granting permission for the parties' daughter to relocate with her to California. We affirm. In seeking such permission, the mother was required to establish by a preponderance of the evidence that the proposed relocation would be in the daughter's best interests (*see Matter of Tropea v Tropea*, 87 NY2d 727, 741) and, as Family Court properly determined, the mother failed to meet that burden. In considering the factors set forth in *Tropea*, the court properly determined that the mother failed to establish that her daughter's life and her own life would "be enhanced economically, emotionally and educationally by the [relocation]" (*id.*; *see Matter of Murphy v Peace*, 72 AD3d 1626, 1626-1627; *Matter of Jones v Tarnawa*, 26 AD3d 870, 871, *lv denied* 6 NY3d 714). The court also properly determined that the relationship of the daughter with respondent father and other relatives, particularly those who provided frequent and meaningful support in the Buffalo area, would be adversely affected by the proposed relocation (*see Matter of Chancer v Stowell*, 5 AD3d 1082; *Matter of Guiffrida v Adams*, 277 AD2d 948; *see generally Tropea*, 87 NY2d at 740). Furthermore, the mother failed to establish that there was a visitation arrangement that would be conducive to the maintenance of a close relationship between the daughter and the father (*cf. Matter of Parish A. v Jamie T.*, 49 AD3d 1322, 1323; *see*

generally Tropea, 87 NY2d at 738).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1501

CA 10-01525

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

ARKPORT STAFF UNITED AND RONNI PORCARO, IN
HER CAPACITY AS PRESIDENT OF ARKPORT STAFF
UNITED, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

ARKPORT CENTRAL SCHOOL DISTRICT, BOARD OF
EDUCATION OF ARKPORT CENTRAL SCHOOL DISTRICT
AND WILLIAM S. LOCKE, IN HIS CAPACITY AS
SUPERINTENDENT OF ARKPORT CENTRAL SCHOOL
DISTRICT, DEFENDANTS-APPELLANTS.

HOGAN, SARZYNSKI, LYNCH, SUROWKA & DEWIND, LLP, JOHNSON CITY (AMY J.
LUCENTI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JAMES R. SANDNER, LATHAM (ROBERT T. REILLY OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered March 25, 2010. The order denied the motion of defendants to dismiss the complaint.

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

Memorandum: Supreme Court properly denied defendants' motion to dismiss the complaint in this action seeking, inter alia, a declaration that the members of plaintiff Arkport Staff United (hereafter, Union) are entitled to longevity increases under article 27 of the collective bargaining agreement (CBA) between the Union and defendant Arkport Central School District. Contrary to defendants' contention, the instant action is subject to the six-year statute of limitations applicable to breach of contract actions (see CPLR 213 [2]), rather than the four-month statute of limitations applicable to CPLR article 78 proceedings (see CPLR 217 [1]; *Nassau Ch. Civ. Serv. Empls. Assn., Local 830, AFSCME, Local 1000, AFL-CIO v County of Nassau*, 154 Misc 2d 545, 548, *affd* 203 AD2d 267; *Aloi v Board of Educ. of W. Babylon Union Free School Dist.*, 81 AD2d 874, 875). The statute of limitations "applicable to a declaratory judgment action depends upon the nature of the substance of the underlying claim . . . Since the plaintiffs' underlying claim is an action on the contract," i.e., the CBA, CPLR 213 (2) applies (*Aloi*, 81 AD2d at 875). The instant action was commenced within six years of the alleged breach of the CBA and thus is timely. The court also properly determined that dismissal

of the complaint was not warranted based upon plaintiffs' alleged failure to "fully utilize" the grievance procedure within the meaning of section 11.3 (b) of the CBA.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1503

CA 10-01609

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

THOMAS G. MOTT, JR., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

STRONGBUILT, INC., DEFENDANT,
AND BASS PRO OUTDOOR WORLD, LLC,
DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG A. LESLIE OF COUNSEL), FOR
DEFENDANT-APPELLANT.

BROWN CHIARI LLP, LANCASTER (SAMUEL J. CAPIZZI OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered December 10, 2009 in a personal injury action. The order granted the motion of plaintiff for severance and denied the cross motion of defendant Bass Pro Outdoor World, LLC for a stay of all proceedings.

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

Memorandum: Defendant Bass Pro Outdoor World, LLC (Bass Pro) appeals from an order that, inter alia, granted the motion of plaintiff to sever the instant action against defendant Strongbuilt, Inc. pursuant to CPLR 603. The sole contention of Bass Pro on appeal is that the order eviscerated its rights under CPLR article 16 to apportionment of liability because Supreme Court imposed no conditions in granting the severance motion. Bass Pro therefore contends that the order should be reversed or, in the alternative, modified to preserve its rights under CPLR article 16 (*see generally Kharmah v Metropolitan Chiropractic Ctr.*, 288 AD2d 94). Bass Pro raises that contention for the first time on appeal, however, and "[i]t is well settled that '[a]n appellate court should not, and will not, consider different theories or new questions [where, as here], . . . proof might have been offered to refute or overcome them had those theories or questions been presented in the court of first instance' " (*Ciesinski v Town of Aurora*, 202 AD2d 984, 985; *see Lowe's Home Ctrs., Inc. v Beachy's Equip. Co., Inc.*, 49 AD3d 1213, 1214-1215, *lv denied* 10 NY3d 715). Bass Pro has not raised any of the issues set forth in its papers before the court in opposition to plaintiff's motion for severance, and we therefore deem those issues abandoned (*see*

Ciesinski, 202 AD2d at 984).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1506

CA 10-01552

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

ROBERT AROESTY, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

FARASH CORPORATION, MARK ZUPAN, MARK FOERSTER
AND ERLAND E. KAILBOURNE, DEFENDANTS-RESPONDENTS.

LAW OFFICES OF JAMES MORRIS, BUFFALO (WILLARD M. POTTLE, JR., OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

HARTER SECREST & EMERY LLP, ROCHESTER (F. PAUL GREENE OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered October 1, 2009 in an action for wrongful termination of employment. The order, among other things, denied plaintiff's motion to strike defendant Farash Corporation's counterclaims.

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

Memorandum: Plaintiff commenced this action alleging, *inter alia*, that he was unlawfully terminated from his employment with defendants, and defendants asserted six counterclaims in their answer, including breach of fiduciary duty and unjust enrichment. Supreme Court properly denied that part of plaintiff's motion seeking dismissal of the counterclaims pursuant to CPLR 3211 (a) (5) inasmuch as plaintiff failed to meet his initial burden of establishing that any of the counterclaims is time-barred (*see generally Morris v Gianelli*, 71 AD3d 965, 967). The court also properly denied that part of plaintiff's motion seeking dismissal of the counterclaims pursuant to CPLR 3211 (a) (7). Accepting as true the facts alleged in the counterclaims and in opposition to the motion, and according defendants the benefit of every possible favorable inference, we conclude that each counterclaim states a cause of action (*see generally CPLR 3013; Jackal Holdings, LLC v JSS Holding Corp.*, 23 AD3d 435).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1507

CA 10-01188

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

CAROL H. GRIECO, AS EXECUTRIX OF THE ESTATE OF
JOHN P. GRIECO, DECEASED, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

KALEIDA HEALTH, ET AL., DEFENDANTS,
JANERIO D. ALDRIDGE, M.D., BUFFALO
THORACIC SURGICAL ASSOCIATES, P.C., IAN M.
BROWN, R.P.A.C., TAMMY B. ERVOLINA, R.P.A.C.,
AND ROBERT J. GAMBINO, R.P.A.C.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (JENNIFER L. NOAH OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

SMITH, MINER, O'SHEA & SMITH, LLP, BUFFALO (CARRIE L. SMITH OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glowonia, J.), entered September 30, 2009 in a medical malpractice action. The order denied the motion for a protective order.

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

Same Memorandum as in *Grieco v Kaleida Health* ([appeal No. 2],
___ AD3d ___ [Dec. 30, 2010]).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1508

CA 10-01071

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

CAROL H. GRIECO, AS EXECUTRIX OF THE ESTATE OF
JOHN P. GRIECO, DECEASED, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

KALEIDA HEALTH, ET AL., DEFENDANTS,
JANERIO D. ALDRIDGE, M.D., BUFFALO
THORACIC SURGICAL ASSOCIATES, P.C., IAN M.
BROWN, R.P.A.C., TAMMY B. ERVOLINA, R.P.A.C.,
AND ROBERT J. GAMBINO, R.P.A.C.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (JENNIFER L. NOAH OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

SMITH, MINER, O'SHEA & SMITH, LLP, BUFFALO (CARRIE L. SMITH OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glowonia, J.), entered February 3, 2010 in a medical malpractice action. The order granted the cross motion of plaintiff to compel discovery.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the directive that defendants are not permitted to redact "the categories 'type' and 'notes' " for the appointment schedule for defendant Buffalo Thoracic Surgical Associates, P.C. and the surgery schedule for defendant Janerio D. Aldridge, M.D. and as modified the order is affirmed without costs.

Memorandum: Plaintiff, as executrix of the estate of her husband (decedent), commenced this action seeking damages for, inter alia, the alleged medical malpractice on the part of defendants in the care and treatment of decedent. In appeal No. 1, defendants appeal from an order denying their motion for an order of protection and directing them to disclose the employee handbook for defendant Buffalo Thoracic Surgical Associates, P.C. (BTSA) as well as the performance evaluation for defendant Robert J. Gambino, R.P.A.C., and to submit to Supreme Court for an in camera review any performance evaluations of defendants Tammy B. Ervolina, R.P.A.C. and Ian M. Brown, R.P.A.C. that are maintained for them by BTSA. In appeal No. 2, defendants appeal from an order that, inter alia, granted plaintiff's motion to compel

the production of the Ervolina and Brown performance evaluations and, following an in camera review, directed defendants to produce the BTSA appointment schedule and the surgery schedule for defendant Janerio D. Aldridge, M.D. without redaction of the "categories 'types' and 'notes' " with respect to both schedules. Contrary to the contention of defendants in both appeals, the court did not abuse its discretion in compelling the production of the performance evaluations (see generally *Learned v Faxton-St. Luke's Healthcare*, 70 AD3d 1398). Defendants specifically disclaimed any reliance on the protections afforded to medical assurance review functions found in both the Education Law and the Public Health Law (see *Orner v Mount Sinai Hosp.*, 305 AD2d 307, 310-311; see generally Education Law § 6527 [3]; Public Health Law § 2805-j; *Logue v Velez*, 92 NY2d 13, 16-17). Moreover, under the facts of this case, disclosure of the performance evaluations is reasonably calculated to lead to relevant evidence (see *Bryant v Bui*, 265 AD2d 848, 849; cf. *Reynolds v Vin Dac Pham*, 212 AD2d 991). Similarly, we conclude in appeal No. 1 that defendants failed to meet their burden of establishing that the BTSA employee handbook was immune from disclosure (see generally *Koump v Smith*, 25 NY2d 287, 294; *Learned*, 70 AD3d at 1399).

We agree with defendants in appeal No. 2, however, that the court abused its discretion, following its in camera review, in directing them to disclose the information under the "types" and "notes" categories previously redacted from the appointment schedule for BTSA and the surgery schedule for Dr. Aldridge. The redacted information in those columns includes personal information regarding nonparty patients, such as medical and surgical procedures, and plaintiff is not entitled to that information (see *Brandes v North Shore Univ. Hosp.*, 1 AD3d 551, 552; *Gourdine v Phelps Mem. Hosp.*, 40 AD2d 694, 695). We therefore modify the order in appeal No. 2 accordingly.

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

1510

KA 10-00506

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

WILLIE TARVER, ALSO KNOWN AS WILLIE LEE GRIFFIN,
ALSO KNOWN AS LITTLE RED, DEFENDANT-APPELLANT.

ROBERT TUCKER, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (CHRISTOPHER BOKELMAN OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered January 28, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1512

KA 09-02095

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DARIUS BROWN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

RONALD C. VALENTINE, PUBLIC DEFENDER, LYONS (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (DAVID V. SHAW OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered June 25, 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.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1513

KA 09-02098

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DARIUS BROWN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

RONALD C. VALENTINE, PUBLIC DEFENDER, LYONS (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (DAVID V. SHAW OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered June 25, 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.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1514

KA 09-02099

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DARIUS BROWN, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

RONALD C. VALENTINE, PUBLIC DEFENDER, LYONS (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (DAVID V. SHAW OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered June 25, 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.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1517

KA 09-01367

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TERRY JENKINS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered May 27, 2009. The judgment convicted defendant, upon a nonjury verdict, of predatory sexual assault against a child, sexual abuse in the second degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of, *inter alia*, predatory sexual assault against a child (Penal Law § 130.96). Defendant contends that the People unconstitutionally burdened his right to go to trial by charging him with both predatory sexual assault against a child and rape in the first degree (§ 130.35 [4]) and then seeking dismissal of the rape count based on his rejection of the plea offer with respect to that count, which has a less severe sentencing range than the predatory sexual assault count. That contention is not preserved for our review (*see* CPL 470.05 [2]). In any event, it is without merit, and we thus conclude that defense counsel's failure to object to the dismissal of the rape count on that ground did not constitute ineffective assistance of counsel (*see generally* *People v Caban*, 5 NY3d 143, 152).

Finally, the sentence is not unduly harsh or severe.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1518

CAF 10-00255

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

IN THE MATTER OF CLIFTON J. WILSON,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

TAMERA K. LINN, RESPONDENT-RESPONDENT.

EMILY A. VELLA, SPRINGVILLE, FOR PETITIONER-APPELLANT.

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

GERALD M. DRISCOLL, ATTORNEY FOR THE CHILD, OLEAN, FOR MARCUS W.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered January 14, 2010 in a proceeding pursuant to Family Court Act article 6. The order granted the motion of respondent to transfer the proceeding to Montgomery, Alabama.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Cattaraugus County, for further proceedings in accordance with the following Memorandum: Petitioner father appeals from an order granting respondent mother's motion to transfer "[j]urisdiction" of this proceeding pursuant to Family Court Act article 6 to Montgomery, Alabama. On a prior appeal, we affirmed the order granting the mother's petition to modify a prior order of custody and visitation by granting the mother permission for the parties' child to relocate with her to Alabama (*Matter of Linn v Wilson*, 68 AD3d 1767). We reject the father's contention that the Referee lacked the requisite jurisdiction to hear and determine this matter. Although the father did not personally sign the stipulation granting jurisdiction to the Referee, the record establishes that his attorney did so (*see Matter of Foster v Bartlett*, 59 AD3d 976, *lv denied* 12 NY3d 710).

We agree with the father, however, "that the record fails to establish that [Family Court] considered all of the requisite . . . factors" pursuant to Domestic Relations Law § 76-f (2) in determining that New York was an inconvenient forum (*Matter of Berg v Narolis*, 64 AD3d 1188, 1189; *see Matter of Michael McC. v Manuela A.*, 48 AD3d 91, 98, *lv dismissed* 10 NY3d 836; *Matter of Blerim M. v Racquel M.*, 41 AD3d 306, 310-311). Moreover, although the parties dispute whether the court lacked jurisdiction pursuant to Domestic Relations Law § 76-

a, there is no indication in the record that the court based its decision on that ground (see generally *Matter of Recard v Polite*, 21 AD3d 379; *Matter of Greenidge v Greenidge*, 16 AD3d 583, 584). We therefore reverse the order and remit the matter to Family Court to determine whether it has jurisdiction over the proceeding pursuant to section 76-a and, if so, whether New York would be an inconvenient forum based on the factors set forth in section 76-f.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1519

CAF 09-01955

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

IN THE MATTER OF THE ADOPTION OF ADREONA C.

ANDREW C. AND MARY C., PETITIONERS-RESPONDENTS; MEMORANDUM AND ORDER

ANDREW R., RESPONDENT-APPELLANT.

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

JOHN W. GRAHAM, WATERTOWN, FOR PETITIONERS-RESPONDENTS.

LISA A. PROVEN, ATTORNEY FOR THE CHILD, WATERTOWN, FOR ADREONA C.

Appeal from an amended order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered August 28, 2009 in an adoption proceeding. The amended order permitted the adoption of the subject child to proceed without respondent's consent.

It is hereby ORDERED that the amended order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Jefferson County, for further proceedings on the petition in accordance with the following Memorandum: Respondent, the biological father of the child in question, appeals from an amended order granting the petition in this adoption proceeding. Family Court determined, following an evidentiary hearing, that the biological father forfeited his right to consent to the adoption by failing "for a period of six months to visit the child and communicate with the child or person[s] having legal custody of the child, although able to do so" (Domestic Relations Law § 111 [2] [a]). In its decision, the court stated that the relevant time period was from May 2007 to March 2008, despite the fact that the adoption petition was filed in August 2008. We agree with the biological father that, in determining whether he forfeited his right to consent to the adoption pursuant to section 111 (2) (a), the court should have considered his contact with the child during the period of time, whether six months or longer, immediately preceding the filing of the adoption petition (see *Matter of Vanessa Ann G.-L.*, 50 AD3d 1036, 1038, *lv dismissed* 11 NY3d 893; *Matter of Baby Girl W.D.*, 251 AD2d 501; *Matter of Joseph*, 227 AD2d 974). We therefore remit the matter to Family Court for further proceedings on the petition. We note that, upon remittal, the court must also determine as a threshold issue whether the consent of the biological father is required, i.e., whether he "maintained substantial and continuous or repeated contact with the child as manifested by" paying support for the child and either visiting the child at least monthly or regularly communicating

with the child or petitioners, the maternal grandparents and legal custodians of the child (§ 111 [1] [d]; see *Matter of Jayquan J.*, 77 AD3d 947, 948; *Matter of Antonio J.M.*, 32 AD3d 1180).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1520

CAF 09-01728

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

IN THE MATTER OF ROBERT E. JONES,
PETITIONER-APPELLANT,

V

ORDER

THERESA LAIRD, RESPONDENT-RESPONDENT.

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

ROBERT L. GOSPER, ATTORNEY FOR THE CHILDREN, CANANDAIGUA, FOR ZACHARY
J., ZADA J. AND AURORA J.

Appeal from an amended order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered June 30, 2009. The amended order, among other things, dismissed the petitions requesting modification of a prior order and alleging respondent violated a court order.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Kelly F. v Gregory A.F.*, 34 AD3d 1277).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1521

CAF 10-00003

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

IN THE MATTER OF DOMINIC CAPPIELLO,
PETITIONER-RESPONDENT,

V

ORDER

LAURIE CAPPIELLO, RESPONDENT-APPELLANT.

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

EMILY A. VELLA, SPRINGVILLE, FOR PETITIONER-RESPONDENT.

STEVEN J. LORD, ATTORNEY FOR THE CHILDREN, ARCADE, FOR ASHLEA C.,
AYRIANNA C. AND STAR C.

Appeal from an order of the Family Court, Cattaraugus County (Judith E. Samber, R.), entered November 20, 2009 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole legal and physical custody of the parties' children to petitioner.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1522

CAF 10-00198

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

IN THE MATTER OF NORMA WARRIOR,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

ROBERT E. BEATMAN, SR., RESPONDENT-RESPONDENT.

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

TIMOTHY PATRICK MURPHY, WILLIAMSVILLE, FOR RESPONDENT-RESPONDENT.

STEVEN J. LORD, ATTORNEY FOR THE CHILD, ARCADE, FOR ROBERT B., JR.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered December 21, 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 unanimously reversed on the law without costs, the petition is reinstated and the matter is remitted to Family Court, Cattaraugus County, for a hearing on the petition.

Memorandum: Petitioner mother appeals from an order dismissing her petition alleging that respondent father had violated a prior order that, inter alia, awarded custody of the parties' child to the father and established a visitation schedule for the mother. The mother contends that Family Court was biased against her, as evidenced by certain statements made by the court. We reject that contention. The statement of the court that the violation petition in question was the 11th petition filed by the mother during a 7-year period and its observation that the mother's latest modification petition was then pending on appeal does not reflect bias on the part of the court (see generally *Matter of Roystar T.*, 72 AD3d 1569, lv denied 15 NY3d 707). We agree with the mother, however, that the court erred in dismissing the petition without conducting a hearing inasmuch as the petition alleges sufficient factual and legal grounds to establish a violation of the prior order (see *Matter of Lisa B.I. v Carl D.I.*, 46 AD3d 1451). We therefore reverse the order, reinstate the petition and remit the matter to Family Court for a hearing on the petition.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1524

CA 10-01339

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

MICHAEL ANDERSON, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

JOSEPH LADUE, SUSAN JAMES AND CENTER FOR
COMMUNITY ALTERNATIVES, DEFENDANTS-APPELLANTS.

TAYLOR & ASSOCIATES, ALBANY (KEITH M. FRARY OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered February 24, 2010. The order, insofar as appealed from, denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Defendants appeal from an order that, inter alia, denied their motion for summary judgment dismissing the pro se complaint and granted plaintiff's cross motion for leave to amend the complaint. We affirm. In support of their motion, defendants submitted documentary evidence tending to show that the allegedly improper disclosure of confidential information could not have occurred on the date set forth in the complaint. In response to the motion, which was filed before any discovery had been conducted, plaintiff acknowledged that the disclosure occurred the day after that alleged in the complaint, and he therefore cross-moved for leave to amend the complaint to correct that date. Defendants failed to submit any evidence with respect to the merits of the causes of action asserted in the complaint, and thus they failed to establish their entitlement to judgment as a matter of law dismissing the complaint (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to the contention of defendants, Supreme Court properly granted the cross motion inasmuch as they are not prejudiced by the proposed amendment to the complaint (*see generally CPLR 3025 [b]; First Sealord Sur., Inc. v Vesta 24 LLC*, 55 AD3d 423).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1536

KA 09-01751

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

KENNETH LEIER, DEFENDANT-APPELLANT.

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

SCOTT D. MCNAMARA, SPECIAL PROSECUTOR, UTICA (JOHN J. RASPANTE OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), entered June 2, 2009. 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 for reasons stated in the decision at Supreme Court.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1537

KA 09-00188

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JACK Z. SWEET, DEFENDANT-APPELLANT.

KATHLEEN E. CASEY, BARKER, FOR DEFENDANT-APPELLANT.

JACK Z. SWEET, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered October 31, 2008. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following Memorandum: Defendant appeals from an order denying his motion pursuant to CPL 440.10 to vacate the judgment convicting him after a jury trial of one count of robbery in the first degree (Penal Law § 160.15 [3]), and two counts each of burglary in the first degree (§ 140.30 [2], [3]) and robbery in the second degree (§ 160.10 [2] [a]). Defendant contends, inter alia, that Supreme Court erred in denying the motion without conducting a hearing on the issue whether trial counsel was ineffective in failing to move to dismiss the indictment based on the alleged violation of defendant's statutory right to a speedy trial (see CPL 30.30 [1] [a]). We agree. In support of the motion, defendant submitted evidence that the felony complaint was filed on December 5, 2001 and that the People announced their readiness for trial on the record on June 17, 2002. Because defendant made a prima facie showing that the People failed to comply with CPL 30.30 (1) (a), the burden shifted to the People to demonstrate "sufficient excludable time" (*People v Kendzia*, 64 NY2d 331, 338; see *People v Manning*, 52 AD3d 1295, 1295-1296). The court erred in relieving the People of that burden and in implicitly imposing the burden on defendant to show the absence of excludable time by failing to conduct a hearing at which the People would have had the burden of proof on the issue of "sufficient excludable time" (*Kendzia*, 64 NY2d at 338). Moreover, "[i]t is well settled that a failure of counsel to assert a

meritorious speedy trial claim is, by itself, a sufficiently egregious error to render a defendant's representation ineffective" (*People v St. Louis*, 41 AD3d 897, 898). We therefore hold the case, reserve decision and remit the matter to Supreme Court for a hearing on that issue.

We have examined the remaining contentions of defendant, including those raised in his pro se supplemental brief, and conclude that they are lacking in merit.

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

1538

KA 09-00287

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

TRAVIS E. HANSEN, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (CATHERINE WALSH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered December 9, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts), criminal possession of a weapon in the third degree, grand larceny in the fourth degree, criminal possession of stolen property in the fourth degree, obstructing governmental administration in the second degree, driving while intoxicated, driving while ability impaired by the combined influence of drugs or alcohol and any drug or drugs and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1540

KA 08-02414

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

ALLEN BRISSON, 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 (William D. Walsh, J.), rendered January 15, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree and robbery in the third degree.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1542

KA 09-01050

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KUMAR S. JONES, ALSO KNOWN AS QUMAR JONES, ALSO
KNOWN AS JESUS, DEFENDANT-APPELLANT.

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

KUMAR S. JONES, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered March 11, 2009. The judgment convicted defendant, upon a jury verdict, of assault in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of assault in the first degree (Penal Law § 120.10 [1]). Defendant failed to preserve for our review his contention that County Court was biased against him (*see* CPL 470.05 [2]; *People v Prado*, 4 NY3d 725, *rearg denied* 4 NY3d 795), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to the further contentions of defendant, we conclude that the court did not abuse its discretion in denying his requests for adjournments (*see People v Green*, 74 AD3d 1899, 1900-1901, *lv denied* 15 NY3d 852), and that the court did not penalize him for exercising his right to a trial when it imposed a longer term of incarceration than that offered during plea negotiations. "The mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial . . . , and there is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to a trial" (*People v Brink*, ___ AD3d ___, ___ [Nov. 12, 2010] [internal quotation marks omitted]). Indeed, " '[w]here, as here, separate acts are committed against different victims during the same criminal transaction, the court may properly impose consecutive sentences in the exercise of its discretion' " (*People v Peterson*, 71 AD3d 1419,

1420, *lv denied* 14 NY3d 891), and the sentence imposed in this case is not unduly harsh or severe.

Defendant contends in his pro se supplemental brief that the prosecutor failed to correct the testimony of three witnesses that was allegedly inconsistent with their prior statements to the police (*see People v Hendricks*, 2 AD3d 1450, 1451, *lv denied* 2 NY3d 762), and that he was denied a fair trial by prosecutorial misconduct on summation (*see People v Bork*, 77 AD3d 1278). Defendant failed to preserve those contentions for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, the contention of defendant in his pro se supplemental brief that he was denied effective assistance of counsel is based upon matters outside the record and is thus properly raised by way of a motion pursuant to CPL article 440 (*see People v Jones*, 63 AD3d 1582, 1583, *lv denied* 13 NY3d 797).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1543

KA 09-00548

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRIS ERON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered November 21, 2008. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony, and aggravated unlicensed operation of a motor vehicle in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: On appeal from a judgment convicting him upon his plea of guilty of driving while intoxicated as a felony ([DWI] Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (i)]) and aggravated unlicensed operation of a motor vehicle in the first degree ([AUO] § 511 [3] [a] [i]), defendant contends that his waiver of the right to appeal is invalid because Supreme Court failed to explain the rights that were being foreclosed by that waiver and to inform defendant of the full range of sentencing options. We reject that contention. The record establishes that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" and that his waiver of the right to appeal was knowingly, voluntarily, and intelligently entered (*People v Lopez*, 6 NY3d 248, 256). Any failure by the court to inform defendant of the full range of sentencing options before he waived the right to appeal does not negate the validity of his waiver but, rather, the consequence of the court's failure is that the waiver does not preclude defendant from challenging the severity of the sentence (*see e.g. People v Boyzuck*, 72 AD3d 1530; *People v Fehr*, 303 AD2d 1039, *lv denied* 100 NY2d 538; *People v McLean*, 302 AD2d 934).

Defendant contends that the sentence is unduly harsh and severe based on the court's failure to impose the minimum period of

incarceration for the DWI conviction, and he further contends that the court improperly enhanced the sentence by imposing fines that were not discussed during plea negotiations. Although we reject defendant's former contention with respect to the severity of the sentence, we nevertheless vacate the sentences imposed on both counts based on the latter contention because the court "erred in enhancing the promised sentence by imposing a fine [for each count] . . . without affording [defendant] an opportunity to withdraw the plea" (*People v Barber*, 31 AD3d 1145, 1146). We also note that the sentence imposed on the AUO count is illegal. Vehicle and Traffic Law § 511 (3) (b) requires that a defendant convicted of that crime be sentenced to a fine, as well as either a term of imprisonment or a sentence of probation (see generally *People v Prescott*, 95 NY2d 655, 664), and here the court sentenced defendant to a fine only.

We therefore modify the judgment by vacating the sentences on both counts, and we remit the matter to Supreme Court to sentence defendant to the agreed-upon sentence with respect to the DWI count or to afford defendant the opportunity to withdraw the plea on that count (see *People v Rodney E.*, 77 NY2d 672, 676). With respect to the AUO count, the court upon remittal must afford defendant the opportunity to accept an amended lawful sentence or to withdraw his plea of guilty with respect to the AUO count, and the DWI count if he is so advised, and thus be restored to his pre-plea status with respect to one or both counts (see *People v Hollis*, 309 AD2d 764, 765, lv dismissed 1 NY3d 597).

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

1544

KA 09-01364

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

FRANK WISNIEWSKI, DEFENDANT-APPELLANT.

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

GERALD L. STOUT, DISTRICT ATTORNEY, WARSAW, FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael F. Griffith, J.), rendered February 24, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fifth degree.

Now, upon reading and filing the stipulation discontinuing appeal signed by defendant on September 14, 2010 and by the attorneys for the parties on September 14 and 23, 2010,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1545

KA 09-01844

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

SHAWN WOODWARD, DEFENDANT-APPELLANT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

GERALD L. STOUT, DISTRICT ATTORNEY, WARSAW (MARSHALL KELLY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael F. Griffith, J.), rendered May 5, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted promoting prison contraband in the first degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on November 9, 2010 and by the attorneys for the parties on November 4, 2010,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1546

KA 07-02343

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

AARON J. DEMPSEY, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered September 19, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, illegal signal from parked position and no head lamps.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, *inter alia*, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in refusing to suppress the weapon that the police seized from his person. According great deference to the court's determination (*see generally People v Prochilo*, 41 NY2d 759, 761), we reject that contention. It is well settled that the police may lawfully stop a vehicle where, as here, they have "probable cause to believe that the driver of [the vehicle] has committed a traffic violation" (*People v Robinson*, 97 NY2d 341, 349). Contrary to defendant's contention, "[i]n making [a] determination of probable cause, neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant" (*Robinson*, 97 NY2d at 349). Furthermore, "out of a concern for safety, 'officers may . . . exercise their discretion to require a driver who commits a traffic violation [as well as the passengers in the vehicle] to exit the vehicle even though they lack any particularized reason for believing the driver [or a passenger] possesses a weapon' " (*People v Robinson*, 74 NY2d 773, 774, *cert denied* 493 US 966, quoting *New York v Class*, 475 US 106, 115). Here, a handgun was recovered from a passenger in the vehicle and, "[t]hus, the police had the requisite reasonable suspicion to believe that at least one of the occupants of the vehicle

was armed prior to conducting the pat-down search[]" of defendant
(*People v Edwards*, 52 AD3d 1266, 1267, lv denied 11 NY3d 736).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1547

KA 09-00200

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HILLERY M. DUPLASIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered January 7, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree, burglary in the first degree (two counts) and robbery in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on counts two through seven of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [3]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We agree with defendant, however, that reversal is required because Supreme Court failed to comply with CPL 310.30 during jury deliberations. Indeed, the court failed to fulfill its "core responsibility under the statute" in responding to a note from the jury at that time (*People v Kisson*, 8 NY3d 129, 134). "It is well settled that a 'substantive written jury communication . . . should be . . . read into the record in the presence of counsel' before the jury is summoned to the courtroom in response thereto" (*People v Piccione*, ___ AD3d ___, ___ [Nov. 12, 2010], quoting *People v O'Rama*, 78 NY2d 270, 277-278), and here the court responded to the jury's note in writing without providing notice thereof to the prosecutor or defense counsel. In light of our decision, we do not address defendant's remaining contentions except to note that, in view of the date on which the crimes were committed, the court erred in imposing the DNA databank fee (*see People v McCullen*, 63 AD3d 1708, 1710, lv denied 13

NY3d 747).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1548

KA 04-02941

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HOWARD HARRIS, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (ANNEMARIE DILS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered July 9, 2004. The judgment convicted defendant, upon a jury verdict, of rape in the first degree (three counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of three counts of rape in the first degree (Penal Law § 130.35 [3]), defendant contends that County Court erred in denying his motion to dismiss the indictment pursuant to CPL 30.10 because the People failed to charge him before the statute of limitations had expired. We reject that contention. The record supports the court's determination that the crimes charged in the indictment were not reported by the victim until 2003, and thus the limitations period did not commence until then (*see* CPL 30.10 [3] [f]). Contrary to the further contentions of defendant, he received meaningful representation (*see generally* *People v Baldi*, 54 NY2d 137, 147), and the sentence is not unduly harsh or severe.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1549

CAF 09-01565, CAF 09-01674

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

IN THE MATTER OF KHALIL O.F.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL
SERVICES, PETITIONER-RESPONDENT;

ORDER

THARRON F. AND LATONYA G.,
RESPONDENTS-APPELLANTS.

STEPHEN LANCE CIMINO, SYRACUSE, FOR RESPONDENT-APPELLANT THARRON F.

RICHARD P. FERRIS, UTICA, FOR RESPONDENT-APPELLANT LATONYA G.

CARACCIOLI & NELSON, PLLC, WATERTOWN (ANNALISE M. DYKAS OF COUNSEL),
FOR PETITIONER-RESPONDENT.

KIMBERLY A. WOOD, ATTORNEY FOR THE CHILD, WATERTOWN, FOR KHALIL O.F.

Appeals from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered July 8, 2009 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents had neglected the subject child.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1550

CA 09-00466

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

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

V

MEMORANDUM AND ORDER

MICHAEL PIERCE, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Lewis County (Joseph D. McGuire, J.), entered January 14, 2009 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, adjudged that respondent is a dangerous sex offender requiring confinement, and committed respondent to the care and custody of the Commissioner of Mental Health for placement in 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 determining that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10. The jury found that he suffers from a mental abnormality that predisposes him to commit sex offenses and makes it unlikely that he will be able to control his behavior. We reject the contention of respondent that petitioner failed to prove by clear and convincing evidence that he suffers from a mental abnormality within the meaning of Mental Hygiene Law § 10.03 (i). Rather, we conclude that the evidence of respondent's past convictions presented by petitioner established that respondent suffers from pedophilia, as that term is defined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). According to DSM-IV, respondent falls within the definition of a pedophile if he, over a period of six months, has experienced recurrent and intense sexually arousing fantasies, sexual urges or behaviors involving children under the age of 13; if the fantasies, sexual urges or behaviors cause clinically significant distress or impairment in social, occupational or other important areas of functioning; and if he is at least 16 years old and five years older than his victims (*see Matter of State of New York v Shawn X.*, 69 AD3d 165, 170 n 3, *lv denied* 14 NY3d 702). As respondent correctly

contends, one of the experts for petitioner testified during the jury phase of the trial that pedophilia occurs with a "prepubescent child, meaning someone [13] years old or younger." According to respondent, there was no evidence that the 13-year-old victim who was the subject of respondent's 1980 conviction was prepubescent, and thus petitioner failed to establish that respondent was a pedophile. Contrary to respondent's contention, however, the fact that the expert was unable to state definitively that the 13-year-old was prepubescent does not compel the conclusion that the jury's determination was not supported by a fair interpretation of the evidence (see *id.* at 168-169; *Matter of Daniel XX.*, 53 AD3d 819, 820).

Respondent further contends that Supreme Court erred in allowing petitioner's two experts to testify concerning their opinions that he was a pedophile because those opinions were based on documents that were not shown to be reliable. Respondent failed to preserve that contention for our review, however, because in his motion in limine he did not seek to preclude the experts from testifying with respect to their opinions on that ground. Rather, respondent agreed that the experts could base their opinions on hearsay contained in the documentary evidence, and he sought only to preclude petitioner from disclosing to the jury any information not admitted in evidence. In any event, we note that most of the documents relied upon by the experts in forming their opinions were documents of the kind found to be reliable in *People v Mingo* (12 NY3d 563), i.e., parole board documents, presentence reports, accusatory instruments, certificates of conviction, police reports and respondent's criminal records. Those documents supported the diagnoses of pedophilia, even without consideration of the remaining documents not of the kind set forth in *Mingo*, and thus any error in the admission of the experts' opinions to the extent that they were based on such remaining documents is harmless.

In addition, respondent contends that he was denied his right to effective assistance of counsel based on his attorney's failure to attend his interviews with petitioner's two experts (see generally *Matter of State of New York v Company*, 77 AD3d 92, *lv denied* 15 NY3d 713). We note that the record establishes that his interview with one of the two experts occurred before the petition was filed, and thus respondent's right to counsel had not yet attached (see Mental Hygiene Law § 10.08 [g]; *Matter of State of New York v Bernard D.*, 61 AD3d 567). Respondent's contention therefore is lacking in merit insofar as it concerns that expert. Respondent's contention with respect to the second of the two experts concerns matters that are outside the record on appeal, and we therefore are unable to review that part of the contention. Moreover, in view of our prior conclusion that the experts' opinions were supported by documents of the kind found to be reliable in *People v Mingo* (12 NY3d 563), we further conclude that the failure of respondent's attorney to object to the admission of the opinions to the extent that they were based on documents that were not of the kind found to be reliable in *Mingo* (12 NY3d 563) did not deprive respondent of meaningful assistance of counsel.

Respondent has failed to preserve for our review his contention

that the court erred in advising the jury during its preliminary instructions that, if the jury found that respondent suffered from a mental abnormality, the court would then determine whether he would be released on strict and intensive supervision or confined in a secured treatment facility. In any event, we note that the court's jury instruction is consistent with PJI 8:8.3.

Respondent next contends that the court erred in denying his motion to require employees of the Office of Mental Health (OMH) to wear civilian shirts while in the courtroom. We note, however, that the jury necessarily was aware that respondent had been convicted of sex offenses and that the jury was aware that its task was to determine whether respondent suffers from a mental abnormality. We therefore conclude that it was not inherently prejudicial to defendant that OMH employees wore uniforms while in the courtroom (*see generally Holbrook v Flynn*, 475 US 560, 567-569).

We reject respondent's contention that petitioner failed to prove by the requisite clear and convincing evidence that he is a dangerous sex offender requiring confinement, as determined by the court following the dispositional phase of the proceedings. "Mindful that 'Supreme Court was in the best position to evaluate the weight and credibility of the conflicting psychiatric testimony presented' . . . , we defer to the court's decision to credit [the testimony of petitioner's] expert" (*Matter of State of New York v Craig T.*, 77 AD3d 1062, 1064; *see Matter of State of New York v Timothy JJ.*, 70 AD3d 1138, 1144-1145).

Finally, respondent contends that he was denied his right to equal protection of the law because respondents in proceedings pursuant to Mental Hygiene Law article 9 are entitled to a jury trial throughout the proceedings, while respondents in article 10 proceedings are not entitled to a jury trial at the dispositional phase of the proceedings. Respondent failed to preserve that contention for our review and, in any event, it lacks merit. Respondent has failed to show that he was similarly situated to respondents in article 9 proceedings, or that the difference in the legislation between article 9 and article 10 was "based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person" (*Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 631; *see generally Matter of 303 W. 42nd St. Corp. v Klein*, 46 NY2d 686, 693).

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

1551

CA 09-02470

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

WESLEY A. BOURCY, PLAINTIFF-APPELLANT,

V

ORDER

MARY LOU BOURCY, DEFENDANT-APPELLANT.

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (FLOYD J. CHANDLER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MARY LOU BOURCY, DEFENDANT-APPELLANT PRO SE.

Appeal from an order of the Supreme Court, Jefferson County (Richard V. Hunt, A.J.), entered November 5, 2009. The order, among other things, determined the distribution and assignment of wind power leases between the parties.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1552

CA 10-01322

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

MARK P. ZILLIOX, PLAINTIFF-APPELLANT,

V

ORDER

WESTERN NEW YORK SNOWMOBILE CLUB OF
BOSTON, INC., DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

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

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

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered September 9, 2009 in a personal injury action. The order, insofar as appealed from, granted the motion of defendant Western New York Snowmobile Club of Boston, Inc. for summary judgment dismissing the complaint.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1553

CA 09-02057

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

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

V

MEMORANDUM AND ORDER

ERSKINE FOX, A PATIENT IN THE CUSTODY OF
NEW YORK STATE OFFICE OF MENTAL HEALTH AT
CENTRAL NEW YORK PSYCHIATRIC CENTER,
RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER
(NEIL J. ROWE OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, J.), entered September 10, 2009 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, determined that respondent is a dangerous sex offender requiring confinement and committed respondent 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, entered following a jury trial determining that he has a mental abnormality within the meaning of Mental Hygiene Law § 10.03 (i) and is a dangerous sex offender requiring confinement in a secure treatment facility. Contrary to the contention of respondent, Supreme Court properly allowed petitioner's expert to testify concerning hearsay statements regarding uncharged and unproven acts of sexual abuse committed by respondent. According to respondent, those statements failed to meet the requirements of the professional reliability exception to the hearsay rule. We reject that contention. It is well settled that an expert witness may "provide opinion evidence based on otherwise inadmissible hearsay, provided [that] it is demonstrated to be the type of material commonly relied on in the profession" (*Hinlicky v Dreyfuss*, 6 NY3d 636, 648; see generally *People v Sugden*, 35 NY2d 453, 460), and provided that it does not constitute the sole or principal basis for the expert's opinion (see *Anderson v Dainack*, 39 AD3d 1065, 1066-1067; *People v Wlasiuk*, 32 AD3d 674, 680-681, lv dismissed 7 NY3d 871). However, "whether evidence may become admissible solely because of its use as a

basis for expert testimony remains an open question in New York" (*Hinlicky*, 6 NY3d at 648), inasmuch as there is a "distinction between the admissibility of an expert's opinion and the admissibility of the information underlying it" (*People v Goldstein*, 6 NY3d 119, 126, cert denied 547 US 1159). If that distinction were not recognized, "a party might effectively nullify the hearsay rule by making that party's expert a 'conduit for hearsay' " (*id.*).

Here, petitioner's expert testified that he relied on documents specifically deemed reliable by Mental Hygiene Law § 10.08, and thus we reject the contention of respondent that petitioner's expert was required to state on the record that the documents were deemed reliable in his profession. In *Matter of State of New York v Wilkes* ([appeal No. 2], 77 AD3d 1451, 1453), we held that two of the petitioner's experts were properly allowed to testify concerning incidents for which the respondent was not convicted because "the court determined that [the testimony's] purpose was to explain the basis for the experts' opinions, not to establish the truth of the hearsay material, and that any prejudice to respondent from the testimony was outweighed by its probative value in assisting the jury in understanding the basis for each expert's opinion" (*cf. Matter of Jamie R. v Consilvio*, 17 AD3d 52, 60, *affd on other grounds* 6 NY3d 138; *Wagman v Bradshaw*, 292 AD2d 84). We see no basis to distinguish this case from our decision in *Wilkes*.

Even assuming, *arguendo*, that the court erred in permitting petitioner's expert to testify concerning the underlying facts of the uncharged and unproven offenses, we conclude that any error is harmless. The expert testified that he relied primarily upon the three convictions in formulating his opinion that respondent suffered from pedophilia.

Finally, we conclude that the court did not err in denying respondent's motion seeking to preclude petitioner from presenting any testimony based on actuarial risk assessment instruments at the dispositional hearing (*see e.g. Matter of State of New York v Richard VV.*, 74 AD3d 1402, 1405; *Matter of State of New York v Timothy JJ.*, 70 AD3d 1138, 1144). Respondent's challenges to such testimony, to the extent that they are preserved, go to the weight of the testimony rather than its admissibility (*see e.g. People v Dailey*, 260 AD2d 81, 82, *lv denied* 94 NY2d 821).

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

1554

CA 10-01287

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

THOMAS C. RYAN, PLAINTIFF-APPELLANT-RESPONDENT,

V

ORDER

PORT OF OSWEGO AUTHORITY, ALSO KNOWN AS OSWEGO
PORT AUTHORITY, DEFENDANT-RESPONDENT-APPELLANT.

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

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (JAMES W. CUNNINGHAM
OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court,
Oswego County (Norman W. Seiter, Jr., J.), entered October 20, 2009 in
a personal injury action. The order denied the motion of plaintiff
for partial summary judgment on liability on the Labor Law § 240 (1)
cause of action and denied defendant's cross motion to dismiss the
complaint.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1556

CA 10-01065

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

ALIX MARTINSEN, PLAINTIFF-RESPONDENT,

V

OPINION AND ORDER

W. JAMES CAMPERLINO, DEFENDANT-APPELLANT.

LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL J. LONGSTREET OF COUNSEL),
FOR DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (SUZANNE O. GALBATO OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered March 1, 2010 in an action pursuant to RPAPL article 15. The judgment, among other things, granted plaintiff's motion for summary judgment.

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

Opinion by SMITH, J.: At issue in this appeal is the New York Rule Against Perpetuities (EPTL 9-1.1 [b]), and the exception to it that is set forth in *Metropolitan Transp. Auth. v Bruken Realty Corp.* (67 NY2d 156). This litigation arises from an agreement regarding the subject parcel of property between Marie-Louise Chase Tiffany, who was plaintiff's aunt and predecessor in interest, and defendant, who is a real estate developer. Tiffany owned¹ property consisting of the subject parcel and approximately 115 acres of undeveloped land surrounding the subject parcel. In a 1981 transaction, Tiffany sold the surrounding undeveloped land to defendant but did not sell the subject parcel, which consists of approximately 8.5 acres and a house in which Tiffany resided. Defendant then subdivided the surrounding land that he purchased and began constructing homes there.

Contemporaneously with the 1981 transaction, Tiffany provided defendant with a "Right of First Refusal" providing that, if Tiffany

¹ Plaintiff contends that Tiffany could not transfer any rights to the property as a whole because she merely owned an undivided one-half interest in the property at the time of the transactions discussed *infra*, while defendant contends that Tiffany obtained absolute title to the property and thus could transfer it. Inasmuch as those contentions are moot in view of the resolution of the perpetuities issue, we assume, for the purposes of this appeal, that Tiffany had the power to transfer all rights to the subject parcel.

or her heirs, assigns, administrators, executors, successors or other distributees ever attempted to sell the subject parcel, then defendant could match any offer to purchase it for up to \$250,000 or he could purchase the property at that price even if a prospective purchaser offered a larger sum. The Right of First Refusal also provided that there could be no alteration of the subject parcel, nor could it be sold for any purpose other than as a personal residence. After Tiffany's death, ownership of the subject parcel passed to plaintiff, who commenced this action seeking, inter alia, a declaration that the Right of First Refusal was invalid. Defendant appeals from a judgment that, among other things, declared that "the Right of First Refusal . . . is invalid, ineffective and a nullity because it violates the rule against perpetuities/rule against remote vesting codified in [EPTL] 9-1.1 (b)." We conclude that Supreme Court properly declared that the Right of First Refusal is invalid.

"The New York Rule against Perpetuities, codified at EPTL 9-1.1, provides that (1) any present or future estate is void if it suspends the absolute power of alienation for a period beyond lives in being at the creation of the estate plus 21 years (EPTL 9-1.1 [a] [2]), and (2) any estate in property is invalid unless it must vest, if at all, within the same period (EPTL 9-1.1 [b]). The statutory rule against remote vesting (EPTL 9-1.1 [b]) is thus a rigid formula that invalidates any interest that may not vest within the prescribed time period" (*Wildenstein & Co. v Wallis*, 79 NY2d 641, 647).

The Court of Appeals "has recognized that the broad prohibition against remote vesting contained in the 1965 enactment of the rule [against perpetuities] covers independent options to purchase real property" (*Morrison v Piper*, 77 NY2d 165, 169), and it is well settled that the rule also applies to rights of first refusal such as the one at issue in this case (see *id.* at 169-170; *Adler v Simpson*, 203 AD2d 691, 693). This Right of First Refusal violates the rule against remote vesting because it purports to bind Tiffany's heirs and assigns without temporal limitation, and thus defendant's interest under the Right of First Refusal could vest against those unknown possible owners more than 21 years after Tiffany and defendant had died (see *Adler*, 203 AD2d at 693). Contrary to defendant's contention, there is nothing in the Right of First Refusal indicating that it may only be exercised by him personally (*cf. Morrison*, 77 NY2d at 171-172). Indeed, the Right of First Refusal indicates that it is a "covenant running with the land," which shall be binding on, inter alia, Tiffany's heirs, assigns, distributees and successors, and parts of which shall continue to encumber the subject property even in the event that defendant declines to exercise the Right of First Refusal.

Defendant contends that the Right of First Refusal should nevertheless be exempt from the rule because it involves a commercial transaction. That contention is without merit. As noted in *Morrison* (77 NY2d at 171), the Court of Appeals held in *Bruken Realty Corp.* (67

NY2d at 168) that EPTL 9-1.1 (b) did not apply to preemptive rights in commercial and governmental transactions that lasted beyond the statutory perpetuities period. The Court of Appeals further stated in *Morrison*, however, that there is no reason

“for extending the *Bruken* exception to private, noncommercial transactions between individuals in which there is no governmental or public interest. Where the parties to the transactions are individuals the time limitations on vesting in EPTL 9-1.1 (b) -- i.e., ‘twenty-one years’ and ‘lives in being’ -- have obvious relevance and no reason is suggested why they should not be fully applicable. To hold that the *Bruken* exception extends to the type of first refusal option employed in this residential transaction would transform the exception into the rule” (*id.* at 171).

Here, as in *Morrison*, the transfer contemplated by the Right of First Refusal was not a commercial transaction but, rather, it was a simple right of first refusal regarding a single-family residence. Indeed, pursuant to the express terms of the Right of First Refusal, any commercial use of the subject parcel is prohibited, and the parcel must be maintained as a residence. By structuring the transaction in that manner, the parties to the agreement created an estate that could vest well beyond the limit in EPTL 9-1.1 (b), and thereby violated the rule against remote vesting.

We reject defendant’s remaining contentions for reasons stated in the decision at Supreme Court. Accordingly, we conclude that the judgment should be affirmed.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1557

CA 10-00370

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

DIANE MARTINEZ, PLAINTIFF-RESPONDENT,

V

ORDER

CHARLES D. DUNKEL, DEFENDANT-APPELLANT.

COHEN & LOMBARDO, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR
DEFENDANT-APPELLANT.

PAUL R. DIDIO, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered January 5, 2010. The order granted the motion of plaintiff to vacate an order of dismissal.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1558

TP 10-01593

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

IN THE MATTER OF DEBORAH BURNS AND BRUCE HENRY,
PETITIONERS,

V

MEMORANDUM AND ORDER

CARLOS CARBALLADA, AS COMMISSIONER OF
NEIGHBORHOOD AND BUSINESS DEVELOPMENT OF CITY
OF ROCHESTER AND CITY OF ROCHESTER, RESPONDENTS.

DAVIDSON FINK LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR
PETITIONERS.

THOMAS S. RICHARDS, CORPORATION COUNSEL, ROCHESTER (IGOR SHUKOFF 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, Monroe County [Thomas A. Stander, J.], entered July 22, 2010) to review a determination of respondents. The determination found petitioners guilty of violating the Code of the City of Rochester.

It is hereby ORDERED that the order so appealed from is unanimously vacated without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: Supreme Court erred in transferring this CPLR article 78 proceeding to this Court pursuant to CPLR 7804 (g) because, contrary to the court's determination, the petition does not raise a substantial evidence issue (*see id.; Matter of Cram v Town of Geneva*, 182 AD2d 1102), and we decline to review the merits of the petition in the interest of judicial economy (*see e.g. Matter of Wearen v Deputy Supt. Bish*, 2 AD3d 1361; *Matter of Nieves v Goord*, 262 AD2d 1042). In their petition, petitioners sought to annul the determination "on the grounds that [their] convictions [under the Municipal Code of the City of Rochester] violate the Fourth Amendment and Article 1 section 12 of the New York Constitution, unlawfully deprive [p]etitioners of the beneficial enjoyment of their property and the right to derive income therefrom, and are therefore in violation of lawful procedure, affected by an error of law and were arbitrary and capricious." Furthermore, in their reply brief to this Court, petitioners state that a substantial evidence issue was "not advanced below" and was "irrelevant." Under these circumstances, we conclude that Supreme Court should have addressed the issues raised in the petition in the first instance rather than transferring the matter

to this Court.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1559

CA 10-00910

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

DAVID SCHERR, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF LACKAWANNA, DEFENDANT-RESPONDENT.

RICHARD J. SHERWOOD, LANCASTER, FOR PLAINTIFF-APPELLANT.

ANTONIO M. SAVAGLIO, LACKAWANNA, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered June 17, 2009. The order granted the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: On appeal from an order granting defendant's motion for summary judgment dismissing the complaint in this action for, inter alia, false arrest and malicious prosecution, plaintiff contends that his acceptance of an adjournment in contemplation of dismissal (ACD) with respect to the underlying charge of criminal possession of stolen property does not constitute a waiver of the right to contend herein that there was no probable cause to arrest him. We agree with plaintiff that, although his acceptance of an ACD bars his cause of action for malicious prosecution, it "does not interdict an action for false imprisonment" (*Hollender v Trump Vil. Coop.*, 58 NY2d 420, 423; cf. *Molina v City of New York*, 28 AD3d 372). Contrary to the further contention of plaintiff, however, the record establishes that there was probable cause for his arrest, and thus Supreme Court properly granted defendant's motion (see generally *Fortunato v City of New York*, 63 AD3d 880).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1560

KA 09-02051

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DONALD SHEPHERD, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered August 24, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1561

KA 09-01193

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

EUGENE TODIE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered May 11, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1562

KA 10-00335

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

LAMAR SCOTT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered May 14, 2009. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1563

KA 08-02673

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MELISSA J. ALVERSON, DEFENDANT-APPELLANT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., CONFLICT DEFENDERS,
WARSAW (ANNA JOST OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered October 9, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree and endangering the welfare of a child (four counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence to a determinate term of imprisonment of three years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). Defendant contends that County Court erred in failing to charge criminal possession of a controlled substance in the fourth degree as a lesser included offense of criminal possession of a controlled substance in the third degree. That contention is not preserved for our review because defendant failed to request such a charge (*see People v Buckley*, 75 NY2d 843, 846). In any event, defendant's contention lacks merit inasmuch as criminal possession of a controlled substance in the fourth degree pursuant to section 220.09 (1) contains an element based on the weight of the drugs possessed by defendant that is not an element of criminal possession of a controlled substance in the third degree pursuant to section 220.16 (1) (*see People v Lee*, 196 AD2d 509, *lv denied* 82 NY2d 851).

Defendant also failed to preserve for our review her contention that the court erred in charging the jury with respect to the drug factory presumption pursuant to Penal Law § 220.25 (2), and we decline

to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). We reject the further contention of defendant that the evidence is legally insufficient to establish her possession of the cocaine found in her apartment by the police during the execution of a search warrant (see generally *People v Bleakley*, 69 NY2d 490, 495). A large bag containing 36 smaller bags of cocaine was found on the dresser in defendant's bedroom, and a neighbor testified that he purchased cocaine at the residence from defendant, as well as from her boyfriend. In addition, defendant was on the front porch of the apartment when the police executed the warrant, and she acknowledged that she resided in the apartment. Thus, even without taking into consideration the drug factory presumption, we conclude that the People established that "defendant exercised 'dominion or control' over the property by a sufficient level of control over the area in which the [drugs were] found" (*People v Manini*, 79 NY2d 561, 573; see *People v Forsythe*, 59 AD3d 1121, 1121-1122, lv denied 12 NY3d 816).

Contrary to the contention of defendant, the evidence is legally sufficient to establish her intent to sell the drugs (see generally *Bleakley*, 69 NY2d at 495). Defendant's further contention that the evidence is legally insufficient to support the conviction of four counts of endangering the welfare of a child (Penal Law § 260.10 [1]) is not preserved for our review (see *People v Gray*, 86 NY2d 10, 19). Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that the sentence of a five-year term of imprisonment is unduly harsh and severe. It is true, as the People point out, that defendant allowed cocaine to be sold out of her apartment, where she lived with her four young children, and she refused to accept responsibility for her actions. Nevertheless, defendant had no criminal record and, prior to trial, she was offered the opportunity to plead guilty to attempted criminal possession of a controlled substance in the third degree in exchange for a sentence promise of shock probation. Also, as the People correctly conceded at sentencing, defendant was less culpable than her boyfriend, who was the primary target of the drug investigation. Defendant's boyfriend pleaded guilty to a felony drug charge and was sentenced to a term of imprisonment of three years. Thus, as a matter of discretion in the interest of justice (see CPL 470.15 [6] [b]), we modify the judgment by reducing the sentence to a determinate term of imprisonment of three years.

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

1564

KA 09-01051

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

LAVERN STROUD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered April 7, 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.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1565

KA 09-01884

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL J. SWEENEY, 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 (Michael L. D'Amico, J.), rendered June 25, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that his waiver of the right to appeal is invalid. We reject that contention inasmuch as "County Court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v James*, 71 AD3d 1465, 1465 [internal quotation marks omitted]). The further contention of defendant that the court erred in ordering him to pay restitution is encompassed by his valid waiver of the right to appeal inasmuch as the court informed defendant that it may impose restitution (*cf. People v Kistner*, 34 AD3d 1316). In any event, defendant failed to preserve that contention for our review because, although he objected to the amount of restitution at sentencing, he did not object to the imposition of restitution at the plea proceeding, at sentencing or before signing the confession of judgment (*see generally People v Hunter*, 72 AD3d 1536; *People v Therrien*, 12 AD3d 1045). Defendant's challenge to the severity of the sentence is also encompassed by the valid waiver of the right to appeal (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1566

KA 09-02175

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER WRIGHT, DEFENDANT-APPELLANT.

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (JACQUELINE MCCORMICK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered August 27, 2009. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of grand larceny in the third degree (Penal Law former § 155.35), defendant contends that County Court erred in failing to conduct a restitution hearing. Defendant failed to preserve that contention for our review "inasmuch as he failed to object to the amount of restitution at sentencing or to request a hearing with respect thereto" (*People v Jorge N.T.*, 70 AD3d 1456, 1457, *lv denied* 14 NY3d 889; *see People v Marvin*, 68 AD3d 1729, *lv denied* 14 NY3d 842). Furthermore, defendant waived that contention because he expressly consented to the amount of restitution imposed (*see People v Brown*, 70 AD3d 1378; *People v Vogel*, 20 AD3d 865, *appeal dismissed* 6 NY3d 728). The sentence is not unduly harsh or severe.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1567

KA 09-02048

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DARIN BONNER, JR., DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered July 13, 2009. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of robbery in the first degree (Penal Law § 160.15 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that Supreme Court failed to comply with CPL 310.30 and the procedures outlined in *People v O’Rama* (78 NY2d 270, 277-278) in responding to a second note from the jury during its deliberations. Although defendant correctly concedes that he failed to preserve that contention for our review (*see* CPL 470.05 [2]), he nevertheless contends that the court’s alleged error, which involved failing to advise the attorneys of the contents of the note before summoning the jurors to the courtroom so as to respond to the note, is a mode of proceedings error for which preservation is not required (*see generally* *People v Patterson*, 39 NY2d 288, 295, *affd* 432 US 197). We reject that contention. Where, as here, the court fulfills its “core responsibility” under CPL 310.30 by marking the note as a court exhibit and summarizing its contents on the record in open court before responding to it, preservation is required (*People v Kisoan*, 8 NY3d 129, 135; *see* *People v Starling*, 85 NY2d 509, 516; *People v Samuels*, 24 AD3d 1287, *lv denied* 7 NY3d 817). Under the circumstances of this case, we decline to exercise our power to address defendant’s contention concerning the court’s response to the second jury note as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). Although defendant was not in possession of the victim's stolen property when he was arrested shortly after the robbery, the victim testified that her purse was taken by the other robber, who was not apprehended, and defendant possessed an unusual knife that matched the description of the knife used in the robbery. The victim also identified defendant in a showup identification procedure and at trial as the person who put the knife to her throat, and defendant admitted that he lived on the same street where the robbery occurred, within approximately 500 feet thereof. Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that the jury did not "fail[] to give the evidence the weight it should be accorded" (*id.*; see *People v VanDyne*, 63 AD3d 1681, lv denied 14 NY3d 845).

Finally, in view of defendant's prior felony conviction and the fact that defendant could have been sentenced to a term of imprisonment of up to 25 years, we conclude that the term of imprisonment of 10 years imposed by the court is not unduly harsh or severe.

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

1568

KA 07-01269

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOYCE POWELL, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOYCE POWELL, DEFENDANT-APPELLANT PRO SE.

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 June 12, 2007. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts) and assault in the second degree.

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

Memorandum: On appeal from a judgment convicting her upon a jury verdict of two counts of burglary in the first degree (Penal Law § 140.30 [2], [3]) and one count of assault in the second degree (§ 120.05 [2]), defendant contends that the verdict is against the weight of the evidence. We reject that contention. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), and according great deference to the jury's resolution of credibility issues, we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review her further contention that Supreme Court erred in discharging a sworn juror (*see People v Ballard*, 51 AD3d 1034, 1035-1036, *lv denied* 11 NY3d 734; *People v Coleman*, 32 AD3d 1239, 1240, *lv denied* 8 NY3d 844), and we reject her contention that preservation is not required inasmuch as the court's allegedly erroneous determination to discharge the juror did not constitute a mode of proceedings error (*see People v Kelly*, 5 NY3d 116, 119-120). In any event, defendant's contention concerning the court's alleged error in discharging the sworn juror is without merit. Under the circumstances of this case, we conclude that the court properly discharged the juror from service pursuant to CPL

270.35 (see *People v Holloway*, 57 AD3d 404, 405, *lv denied* 12 NY3d 784; *People v Rosado*, 53 AD3d 455, 457, *lv denied* 11 NY3d 835, *cert denied* ___ US ___, 129 S Ct 2161; see generally *People v Buford*, 69 NY2d 290, 298-299). Also contrary to defendant's contention, the sentence is not unduly harsh or severe.

In her pro se supplemental brief, defendant further contends that the court erred in failing to dismiss the indictment based on prosecutorial misconduct during the grand jury proceedings. We are unable to review that contention because it involves matters that are outside the record on appeal, and thus that contention is not properly before us (see generally *People v Donald*, 6 AD3d 1177, *lv denied* 3 NY3d 639; *People v Marvin*, 216 AD2d 930, *lv denied* 86 NY2d 844). The further contention of defendant in her pro se supplemental brief that she was denied a fair trial by prosecutorial misconduct is based primarily on alleged instances of misconduct that are unpreserved for our review (see *People v Jones*, 63 AD3d 1582, 1583, *lv denied* 13 NY3d 797; *People v Scission*, 60 AD3d 1391, *lv denied* 12 NY3d 859, 13 NY3d 749). In any event, we conclude that "any alleged misconduct was not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Pruchnicki*, 74 AD3d 1820, 1822, *lv denied* 15 NY3d 855; see *People v Milczakowskyj*, 73 AD3d 1453, 1454, *lv denied* 15 NY3d 754).

Finally, we are unable to review the further contention of defendant in her pro se supplemental brief that she received ineffective assistance of counsel insofar as that contention is based on matters outside the record (see *People v Hernandez*, 74 AD3d 839, *lv denied* 15 NY3d 805; *People v Slater*, 61 AD3d 1328, 1329-1330, *lv denied* 13 NY3d 749), and we conclude on the record before us that defendant's contention is otherwise without merit (see generally *People v Baldi*, 54 NY2d 137, 147).

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

1569

KA 09-02313

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

NATHANIEL MARTIN, DEFENDANT-APPELLANT.

FRANKLIN & GABRIEL, OVID (STEVEN J. GETMAN OF COUNSEL), FOR
DEFENDANT-APPELLANT.

BARRY L. PORSCHE, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered September 21, 2009. The judgment convicted defendant, upon a nonjury verdict, of promoting prison contraband in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a bench verdict of promoting prison contraband in the first degree (Penal Law § 205.25) and criminal possession of a weapon in the third degree (§ 265.02). We reject the contention of defendant that he was denied effective assistance of counsel. The alleged errors in defense counsel's representation set forth by defendant in support of his contention are mere disagreements with defense counsel's trial tactics, and defendant has failed to establish "the absence of strategic or other legitimate explanations" for defense counsel's alleged shortcomings (*People v Rivera*, 71 NY2d 705, 709). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1570

CAF 10-01342

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

IN THE MATTER OF LISA KRAMER,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

KEN BERARDICURTI, RESPONDENT-RESPONDENT.

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

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

LORI ROBB MONAGHAN, ATTORNEY FOR THE CHILDREN, ROCHESTER, FOR GABRIELLA B. AND GIANNA B.

Appeal from an amended order of the Family Court, Monroe County (Thomas W. Polito, R.), entered June 25, 2009 in a proceeding pursuant to Family Court Act article 6. The amended order, insofar as appealed from, denied the petition for sole custody.

It is hereby ORDERED that the amended order insofar as appealed from is unanimously reversed on the law without costs, the petition seeking sole custody of the children is granted, and the sanction imposed upon petitioner is vacated.

Memorandum: We agree with petitioner mother that Family Court erred in denying her petition seeking to modify a prior order of custody and visitation by granting her sole custody of the parties' children. It is well settled that "modification of an existing joint custody [arrangement] is warranted where the relationship between joint custodial parents so deteriorates that they are wholly unable to cooperate in making decisions affecting their child[ren]" (*Matter of Lynch v Tambascio*, 1 AD3d 816, 817), and that is the case here. In addition, we agree with the mother that the court abused its discretion in sua sponte sanctioning her upon determining that she filed her petition frivolously, "inasmuch as the court failed to afford [her] a reasonable opportunity to be heard before doing so" (*Matter of Chapman v Tucker*, 74 AD3d 1905; see 22 NYCRR 130-1.1 [a], [d]; *Matter of Ariola v DeLaura*, 51 AD3d 1389, lv denied 11 NY3d 701). We note that the father did not take a cross appeal from the order, and we therefore do not address any issue concerning the sanction imposed upon him. We also note that we do not disturb the order

insofar as it sets forth a detailed visitation schedule.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1571

CAF 09-01905

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

IN THE MATTER OF THE ADOPTION OF
MYA V.P.

AMBER R., PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

LAURA P. AND STEVEN P.,
RESPONDENTS-RESPONDENTS.

DEBRA D. WILSON, LOCKPORT, FOR PETITIONER-APPELLANT.

THOMAS J. CASERTA, JR., NIAGARA FALLS, FOR RESPONDENTS-RESPONDENTS.

DAVID J. STARKEY, ATTORNEY FOR THE CHILD, LOCKPORT, FOR MYA V.P.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered August 13, 2009 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition to enforce a post-adoption contact agreement.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated, and the matter is remitted to Family Court, Niagara County, for further proceedings in accordance with the following Memorandum: Petitioner, the biological mother of the child in question, appeals from an order granting the motion of respondents, the child's adoptive parents, to dismiss the petition seeking to enforce a post-adoption contact agreement (agreement). That agreement was incorporated into the conditional surrender order with respect to the child. Contrary to the biological mother's contention, Family Court properly applied principles of contract law in making its determination. "[I]t is axiomatic that[,] in order to be entitled to specific performance of a contract, a [petitioner] must demonstrate that he [or she] was ready, willing and able to perform his [or her] obligations under the contract regardless of the [respondents'] anticipatory breach" (*Bainbridge-Wythe Partnership v Niagara Falls Urban Renewal Agency*, 294 AD2d 806, 807, *lv denied* 98 NY2d 613, quoting *Zev v Merman*, 134 AD2d 555, 557, *affd* 73 NY2d 781). The agreement provided that it would be voided if the biological mother missed two visits within any 12-month time period. The biological mother testified at the hearing on the petition that she missed the June 2008 visit because she was incarcerated and that, although the adoptive parents ceased visitation after August 2008, she would have missed the December 2008 visit as a result of her incarceration in connection with the same crime for which she was incarcerated in June

2008. The biological mother therefore failed to demonstrate that she was ready, willing and able to perform her obligations under the agreement (see *Dixon v Malouf*, 70 AD3d 763).

The biological mother further contends that her absence from the June 2008 visit should be excused because it resulted from an unanticipated incarceration that made it impossible for her to attend the visit. We reject that contention. The incarceration of the biological mother resulted from her own conduct, and she therefore remained obligated to perform under the agreement (see *AMF, Inc. v Cattalani*, 77 AD2d 779).

The court erred, however, in failing to determine whether enforcement of the agreement was in the best interests of the child. A post-adoption contact agreement incorporated into a written court order "may be enforced by any party to the agreement . . .[, but t]he court shall not enforce [such an agreement] unless it finds that the enforcement is in the child's best interests" (Domestic Relations Law § 112-b [4]; see *Matter of Rebecca O.*, 46 AD3d 687). Here, the court dismissed the petition with prejudice and thereby enforced the agreement by voiding it based on the biological mother's inability to comply with the agreement. The record is insufficient to enable this Court to make the required findings with respect to the best interests of the child, and we therefore reverse the order, deny the motion, reinstate the petition and remit the matter to Family Court for a new hearing on the best interests of the child (see *Matter of Heidi E.*, 68 AD3d 1174; see generally § 112-b [4]; *Matter of Bradbury v Monaghan* [appeal No. 1], 77 AD3d 1424).

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

1572

CAF 09-02391

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

IN THE MATTER OF TIMOTHY E. LANDO, JR.,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

JESSICA J. LANDO, RESPONDENT-RESPONDENT.

DAVIS LAW OFFICE, OSWEGO (STEPHANIE N. DAVIS OF COUNSEL), FOR
PETITIONER-APPELLANT.

GERMAIN & GERMAIN, LLP, SYRACUSE (GALEN F. HAAB OF COUNSEL), FOR
RESPONDENT-RESPONDENT.

PAMELA A. MUNSON, ATTORNEY FOR THE CHILDREN, FULTON, FOR TIMOTHY E.L.,
III AND CAITLYN M.L.

Appeal from an order of the Family Court, Oswego County (Bobette J. Morin, R.), entered September 24, 2009 in a proceeding pursuant to Family Court Act article 6. The order denied the petition for visitation.

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

Memorandum: Petitioner father, who is incarcerated, appeals from an order denying his petition seeking visitation with the parties' children. We conclude that Family Court properly determined, following a hearing, that it was in the best interests of the children to deny the father visitation (*see generally Matter of Lonobile v Betkowski*, 295 AD2d 994; *Matter of Mills v Sweeting*, 278 AD2d 943). The court noted that the parties' son has psychiatric diagnoses and properly credited the testimony of his treating therapist that visitation with the father in prison would be detrimental to the emotional and psychological welfare of the son (*see Matter of Frank P. v Judith S.*, 34 AD3d 1324; *Matter of Medina v Kast*, 298 AD2d 956; *Lonobile*, 295 AD2d 994). Contrary to the father's contention, the court properly determined, without the benefit of psychological evidence, that the parties' daughter should be allowed to grow and develop before any further in-person visitation with the father (*see Matter of McCullough v Brown*, 21 AD3d 1349). "[N]either the parties nor the [Attorney for the Children] requested any psychological examinations, and it cannot be said that the court should have sua sponte ordered the examinations where, as here, there otherwise was sufficient testimony from the parties for the court to resolve the

[matter]" (*Matter of Tracy v Tracy*, 309 AD2d 1252, 1253).

We reject the further contention of the father that he received ineffective assistance of counsel at the hearing (*see generally Matter of Derrick C.*, 52 AD3d 1325, 1326, *lv denied* 11 NY3d 705). "It is not the role of this Court to second-guess the attorney's tactics or trial strategy" (*Matter of Katherine D. v Lawrence D.*, 32 AD3d 1350, 1351-1352, *lv denied* 7 NY3d 717) and, "[b]ased on our review of the record, we conclude that [the father] received meaningful representation" (*id.* at 1352).

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

1574

CAF 09-02261

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

IN THE MATTER OF LAURA TADUSZ,
PETITIONER-APPELLANT,

V

ORDER

DANIEL TADUSZ, RESPONDENT-RESPONDENT.

IN THE MATTER OF DANIEL TADUSZ,
PETITIONER-RESPONDENT,

V

LAURA TADUSZ, RESPONDENT-APPELLANT.

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

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

DEBORAH J. SCINTA, ATTORNEY FOR THE CHILDREN, KENMORE, FOR MATTHEW T., NOAH T., AND HAILEY T.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, A.J.), entered October 7, 2009 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the parties' children to Daniel Tadusz.

Now, upon reading and filing the stipulation discontinuing appeal signed by petitioner-respondent on September 8, 2010 and by the attorneys for the parties on September 23 and 29, 2010,

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1575

CAF 09-01358

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

IN THE MATTER OF NICHOLAS W. ROGERS,
PETITIONER-APPELLANT,

V

ORDER

KRISTI L. ANDERSON, RESPONDENT-RESPONDENT.

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered April 30, 2009 in a proceeding pursuant to Family Court Act article 6. The order, among other things, denied the visitation sought by petitioner.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Demetrius B.*, 28 AD3d 1249, 1250, *lv denied* 7 NY3d 707).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1576

CA 10-01338

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

IN THE MATTER OF THE ARBITRATION BETWEEN
MONROE COUNTY SHERIFF'S OFFICE,
PETITIONER-RESPONDENT,

AND

MEMORANDUM AND ORDER

MONROE COUNTY DEPUTY SHERIFFS'
ASSOCIATION, INC., RESPONDENT-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (DANIEL P. DEBOLT OF
COUNSEL), FOR RESPONDENT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (PETER J. SPINELLI OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered September 8, 2009 in a proceeding pursuant to CPLR article 75. The order and judgment vacated an arbitration award.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the petition is denied, the application is granted and the arbitration award is confirmed.

Memorandum: Respondent appeals from an order and judgment in this CPLR article 75 proceeding that granted the petition seeking to vacate an arbitration award. Contrary to respondent's contention, Supreme Court properly determined that the arbitrator exceeded his authority by adding an implied contract term to the collective bargaining agreement (CBA) based on petitioner's past practice. Although "[p]ast practices may be considered by an arbitrator . . . when interpreting a specific contractual provision . . .[, a]n arbitrator may not rewrite a contract by adding a new clause based upon past practices" (*Matter of Hunsinger v Minns*, 197 AD2d 871; see *Matter of Good Samaritan Hosp. v 1199 Natl. Health & Human Servs. Empls. Union*, 69 AD3d 721).

We agree with respondent, however, that the court erred in concluding that the arbitrator exceeded his authority by determining that petitioner's denial of paid release time requests submitted by members of respondent to prepare for upcoming contract negotiations with petitioner was unreasonable. We therefore reverse the order and judgment, deny the petition and grant respondent's application to

confirm the arbitration award. Pursuant to the CBA, such requests for "[r]elease time for union business shall not be unreasonably denied" by petitioner. The arbitrator determined that petitioner's denial of the requests to keep overtime costs down was unreasonable absent evidence of "financial exigency." That determination was a proper exercise of the arbitrator's authority and did not, as the court concluded, add a "financial exigency" criterion to the reasonableness standard set forth in the CBA. We further agree with respondent that the arbitrator's reasonableness determination was not irrational inasmuch as "[a]n arbitration award must be upheld when the arbitrator offer[s] even a barely colorable justification for the outcome reached" (*Matter of Rochester City School Dist. [Rochester Teachers Assn. NYSUT/AFT-AFL/CIO]*, 38 AD3d 1152, 1153, lv denied 9 NY3d 813 [internal quotation marks omitted]), and that is the case here.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1577

CA 10-00781

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

GENEVIEVE ROLLO, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

SERVICO NEW YORK, INC., SERVICO NEW YORK, INC.,
DOING BUSINESS AS HOLIDAY INN SELECT, LODGIAN
HOTELS, INC., LODGIAN HOTELS, INC., DOING
BUSINESS AS HOLIDAY INN SELECT, LODGIAN, INC.,
LODGIAN INC., DOING BUSINESS AS HOLIDAY INN
SELECT, HOLIDAY INN SELECT, AND JOHN DOE, WHOSE
IDENTITY IS PRESENTLY UNKNOWN,
DEFENDANTS-RESPONDENTS.

SPADAFORA & VERRASTRO, LLP, BUFFALO (RICHARD E. UPDEGROVE OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

MORENUS, CONWAY, GOREN & BRANDMAN, BUFFALO (PHYLISS A. HAFNER OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered December 23, 2009 in a personal injury action. The order granted the motion of defendants for leave to renew their motion for summary judgment and, upon renewal, dismissed the complaint.

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

Memorandum: In December 2000 plaintiff allegedly fell and sustained injuries on defendants' property. Defendants filed for bankruptcy under chapter 11 of the Bankruptcy Code less than one year after the accident, and they were discharged from liability for, inter alia, personal injury claims. Plaintiff did not file a proof of claim in the bankruptcy proceedings. In May 2007, however, plaintiff commenced this action seeking damages for the injuries that she sustained in the December 2000 accident on defendants' property.

Defendants moved to dismiss the complaint on the ground that the action was precluded by the discharge in bankruptcy. Supreme Court denied the motion, concluding that plaintiff was permitted to maintain the action "only to the extent [that defendants have] insurance coverage that is applicable" Defendants thereafter moved for

leave to renew their motion on the ground that no insurance coverage was applicable and thus that the complaint should be dismissed. We conclude that the court properly granted that part of the motion for leave to renew. "Although[,] as a general rule[,] a motion for renewal should be based on newly[]discovered facts, [that] requirement is not an inflexible one, and the court has the discretion to grant renewal even upon facts known to the movant at the time of the original motion" (*Argento v Wal-Mart Stores, Inc.*, 66 AD3d 930, 933; see *Foxworth v Jenkins*, 60 AD3d 1306). Inasmuch as the original motion focused on defendants' discharge in bankruptcy and did not address the amount and extent of available insurance, the court properly exercised its discretion in granting the motion, despite defendants' failure to allege newly discovered facts (see *Foxworth*, 60 AD3d 1306).

Upon granting leave to renew, however, the court erred in granting defendants' motion to dismiss the complaint on the ground that no insurance coverage was applicable, and we therefore modify the order accordingly. It is well established that a bankruptcy discharge "does not bar a plaintiff in a personal injury action from obtaining a judgment against the bankrupt defendant[s] for the limited purpose of pursuing payment from defendant[s'] insurance carrier" (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 355; see *Pomerantz v In-Stride, Inc.*, 39 AD3d 522, 523-524; *Roman v Hudson Tel. Assoc.*, 11 AD3d 346). Defendants contend that no insurance is available because their insurer's obligations under the applicable general liability policy (policy) are not triggered until the self-insured retention (SIR) amount is satisfied, and the SIR will never be satisfied because defendants' obligations to pay thereunder were discharged in bankruptcy. We reject that contention. "[A]s with the construction of contracts generally, 'unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court' " (*Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177; see *Lattimore Rd. Surgicenter, Inc. v Merchants Group, Inc.*, 71 AD3d 1379, 1380). Here, the unambiguous provisions of the endorsement to the policy provide that the insurer is obligated to provide coverage in excess of the SIR irrespective of whether the SIR is satisfied (see generally *Admiral Ins. Co. v Grace Indus., Inc.*, 409 BR 275, 279-280).

Even assuming, arguendo, that the policy endorsement is ambiguous or that it expressly conditions the insurer's coverage obligation on satisfaction of the SIR, we conclude that Insurance Law § 3420 (a) (1) "makes clear that bankruptcy does not relieve the insurance company of its obligation to pay damages for injuries or losses covered under an existing policy" (*Lang*, 3 NY3d at 355). Thus, defendants' insurer remains obligated to pay damages for injuries or losses covered under the policy, despite the fact that defendants' obligation to satisfy the SIR was discharged through the bankruptcy proceedings (see generally *Lang*, 3 NY3d at 355-356; *Roman*, 11 AD3d 346; *Admiral Ins. Co.*, 409 BR at 281-282), and plaintiff is permitted to prosecute the action to "obtain[] a judgment against the bankrupt defendant[s] for the limited purpose of pursuing payment from defendant[s]' insurance

carrier" (*Lang*, 3 NY3d at 355).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1578

CA 10-00672

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

ARND PRALLE, PLAINTIFF-APPELLANT,

V

ORDER

CHRISTOPHER S. PETRIE, DEFENDANT-RESPONDENT.

EDELMAN, KRASIN & JAYE, PLLC, CARLE PLACE (PAUL B. EDELMAN OF COUNSEL), POLLACK, POLLACK, ISAAC & DECICCO, NEW YORK CITY (BRIAN J. ISAAC OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOUVIER PARTNERSHIP, LLP, BUFFALO (PAUL F. HAMMOND OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered December 29, 2009 in a personal injury action. The order granted defendant's motion to dismiss the complaint.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on September 24, 2010,

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1579

CA 10-01376

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

IN THE MATTER OF MICHAEL A. MOON AND
TRACY L. MOON, PETITIONERS-APPELLANTS,

V

ORDER

VILLAGE OF BROCTON ZONING BOARD OF APPEALS
AND JOHN A. SIMONE, RESPONDENTS-RESPONDENTS.

GODELL & RANKIN, JAMESTOWN (ANDREW W. GODELL OF COUNSEL), FOR
PETITIONERS-APPELLANTS.

WRIGHT, WRIGHT AND HAMPTON, JAMESTOWN (EDWARD P. WRIGHT OF COUNSEL),
FOR RESPONDENT-RESPONDENT VILLAGE OF BROCTON ZONING BOARD OF APPEALS.

DAVID M. CIVILETTE, P.C., DUNKIRK (DAVID M. CIVILETTE OF COUNSEL), FOR
RESPONDENT-RESPONDENT JOHN A. SIMONE.

Appeal from a judgment of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered January 5, 2010 in a proceeding pursuant to CPLR article 78. The judgment, among other things, denied plaintiffs' motion to set aside the use variance granted to defendant John A. Simone by defendant Village of Brocton Zoning Board of Appeals.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1580

CA 10-01340

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

C. BRUCE LAWRENCE, ESQ., TRUSTEE IN BANKRUPTCY
FOR ROGER JACKSON,
PLAINTIFF-RESPONDENT-APPELLANT,

V

ORDER

GUARDSMARK, LLC, DEFENDANT-APPELLANT-RESPONDENT.

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

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

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered January 6, 2010 in a personal injury action. The order denied the motion of defendant to dismiss the complaint as untimely.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1581

CA 10-01302

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

KEVIN M. ZELIE, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

TOWN OF VAN BUREN, DEFENDANT-APPELLANT.

GALLO & IACOVANGELO, ROCHESTER, CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (KATHLEEN D. FOLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

COSTELLO COONEY & FEARON, PLLC, SYRACUSE (CHRISTINA F. DEJOSEPH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered March 2, 2010 in a personal injury action. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he fell in a drainage ditch (ditch) while playing basketball at a park owned by defendant. Plaintiff ran and jumped while attempting to prevent the ball from going out of bounds, and he landed in the ditch approximately four to eight feet away from the outside boundary of the basketball court (court). Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint. Defendant failed to meet its initial burden of establishing that the ditch near the court was open and obvious and thus that the risk of injury from running out of bounds and falling into it was inherent in playing on the court (*cf. Trevett v City of Little Falls*, 6 NY3d 884, *rearg denied* 7 NY3d 845; *Brown v City of New York*, 69 AD3d 893; *see generally Maddox v City of New York*, 66 NY2d 270, 277-278). In support of its motion, defendant submitted the testimony of plaintiff at a General Municipal Law § 50-h hearing, in which he testified that he had previously never been to the park in question. Plaintiff was not asked, nor did he give any indication, whether he had seen or was otherwise aware of the ditch prior to his accident. Defendant also submitted photographs of the court and the ditch that, contrary to its contention, do not conclusively establish that the ditch was open and obvious (*see Gallagher v County of Nassau*, 74 AD3d 877, 879; *cf. Lincoln v Canastota Cent. School Dist.*, 53 AD3d 851, 852). Contrary to the further contention of

defendant, it failed to establish as a matter of law that the ditch did not constitute a dangerous condition or that the conduct of plaintiff was the sole proximate cause of his injuries (*cf. O'Rourke v Menorah Campus, Inc.*, 13 AD3d 1154).

We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1582

CA 10-00477

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

DALE R. STEELE AND HOWARD STEELE, INDIVIDUALLY
AND AS HUSBAND AND WIFE, PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

TIMOTHY LAFFERTY, DEFENDANT-RESPONDENT.

CELLINO & BARNES, P.C., BUFFALO (JEFFREY C. SENDZIAK OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

LAW OFFICE OF MARY A. BJORK, ROCHESTER (STEPHANIE A. MACK OF COUNSEL),
FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County
(Christopher J. Burns, J.), entered January 28, 2010 in a personal
injury action. The order granted defendant's motion for summary
judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for
injuries sustained by Dale R. Steele (plaintiff) when she slipped and
fell outside of the property leased by plaintiffs from defendant.
According to plaintiffs, defendant was negligent in permitting snow
and ice to accumulate on the property. Supreme Court properly granted
defendant's motion for summary judgment dismissing the complaint. In
support of the motion, defendant submitted the deposition testimony of
plaintiff, who testified that she had walked over the area of her fall
approximately 40 minutes prior thereto and did not "notice anything at
all in particular about [the] area" Plaintiff further
testified that she did not know why she fell until she observed ice on
the ground after she had fallen. In addition, plaintiffs testified at
their depositions that the tenants of the property performed all snow
and ice removal and that they never notified defendant that the snow
and ice on the property had created a dangerous condition. Defendant
also submitted his deposition testimony in which he testified that
plaintiffs were responsible for the removal of snow and ice on the
property and that he did not recall ever observing a buildup of snow
or ice on the property. Based on that evidence, defendant met his
initial burden by establishing that he did not create the allegedly
dangerous condition and that he lacked actual or constructive notice
thereof (*see Wilkowski v Big Lots Stores, Inc.*, 67 AD3d 1414;
Bellassai v Roberts Wesleyan Coll., 59 AD3d 1125). Indeed, defendant

established as a matter of law that any ice on the property " 'formed so close in time to the accident that [it] could not reasonably have been expected to notice and remedy the condition' " (*Kimpland v Camillus Mall Assoc., L.P.*, 37 AD3d 1128, 1129). Plaintiffs failed to raise a triable issue of fact sufficient to defeat the motion (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1584

CA 10-00721

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

AUTUMN D. ROGERS AND EUGENE ROGERS, INDIVIDUALLY
AND AS HUSBAND AND WIFE, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

JANNA K. EDELMAN, DEFENDANT-APPELLANT.

HAGELIN KENT LLC, ROCHESTER (JOHN E. ABEEL OF COUNSEL), FOR
DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (CHARLES F. BURKWIT OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (MATTHEW
A. LENHARD OF COUNSEL), FOR PLAINTIFF-RESPONDENT EUGENE ROGERS, ON THE
COUNTERCLAIM.

Appeal from an order of the Supreme Court, Wayne County (Dennis M. Kehoe, A.J.), entered December 30, 2009 in a personal injury action. The order, among other things, granted plaintiffs' motion for summary judgment on the issue of negligence.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained when the vehicle driven by Eugene Rogers (plaintiff), in which plaintiff Autumn D. Rogers was a passenger, collided with a vehicle driven by defendant. We conclude that Supreme Court properly granted the motion of plaintiff for summary judgment dismissing the counterclaim against him, as well as the "cross motion" of both plaintiffs for partial summary judgment on the issue of negligence. It is undisputed that the collision occurred when defendant, who was turning into a driveway, turned left in front of plaintiffs' oncoming vehicle. Plaintiffs testified at their respective depositions that their vehicle was traveling at or below the speed limit, that they saw defendant's vehicle for some distance before it turned, and that, when defendant's vehicle turned left, there was no opportunity to avoid the accident. Defendant, on the other hand, testified at her deposition that she never saw plaintiffs' vehicle prior to the collision.

It is well settled that "[a driver] who has the right of way is entitled to anticipate that other vehicles will obey the traffic laws

that require them to yield" (*Namisnak v Martin*, 244 AD2d 258, 260; see *Wallace v Kuhn*, 23 AD3d 1042, 1043; *Doxtader v Janczuk*, 294 AD2d 859, lv denied 99 NY2d 505). "Plaintiff[s] met [their] initial burden by establishing as a matter of law 'that the sole proximate cause of the accident was defendant's failure to yield the right of way' to plaintiff[s]" (*Guadagno v Norward*, 43 AD3d 1432, 1433; see *Kelsey v Degan*, 266 AD2d 843; *Galvin v Zacholl*, 302 AD2d 965, 967, lv denied 100 NY2d 512), and defendant failed to raise a triable issue of fact (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to defendant's contention, plaintiff established as a matter of law that he "was free from fault in the occurrence of the accident" (*Hillman v Eick*, 8 AD3d 989, 991).

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

1585

KA 09-00491

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

ROBERTO MALDONADO, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered March 2, 2009. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act following a redetermination hearing.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1586

KA 10-00122

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAMIAN BRANTLEY, DEFENDANT-APPELLANT.

RONALD C. VALENTINE, PUBLIC DEFENDER, LYONS (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (CHRISTOPHER BOKELMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered October 27, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree and escape in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]) and escape in the second degree (§ 205.10 [2]), defendant contends that County Court abused its discretion in denying his request for youthful offender status. We reject that contention (*see People v Randleman*, 60 AD3d 1358, *lv denied* 12 NY3d 919; *People v Syrell*, 42 AD3d 947, 948), and we decline to grant the further request of defendant that, even in the absence of an abuse of discretion, we exercise our interest of justice jurisdiction to adjudicate him a youthful offender (*see Randleman*, 60 AD3d 1358; *cf. People v Shrubbsall*, 167 AD2d 929, 930-931).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1587

KA 09-01704

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KIRSSY KNAPP, ALSO KNOWN AS KIRSSY MEDOS,
DEFENDANT-APPELLANT.

LAW OFFICE OF HERIBERTO A. CABRERA, ESQ., BROOKLYN (HERIBERTO A. CABRERA OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered September 11, 2009. The judgment convicted defendant, upon a jury verdict, of body stealing (26 counts), opening graves (26 counts), unlawful dissection of the body of a human being (26 counts) and falsifying business records in the first degree (25 counts).

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of 26 counts each of body stealing (Public Health Law § 4216), opening graves (§ 4218), and unlawful dissection of the body of a human being (§ 4210-a), as well as 25 counts of falsifying business records in the first degree (Penal Law § 175.10). Defendant failed to preserve for our review her contention that the counts of the indictment charging her with body stealing and opening graves were duplicitous (*see People v Sponburgh*, 61 AD3d 1415, *lv denied* 12 NY3d 929). Defendant likewise failed to preserve for our review her contention that she should have been permitted to assert Public Health Law § 4306 (3) as a "complete defense" to her prosecution under Public Health Law article 42 inasmuch as she failed to raise that contention either in her pretrial motions or prior to the close of proof at trial (*see generally People v Fuentes*, 52 AD3d 1297, *lv denied* 11 NY3d 736; *People v Hill*, 236 AD2d 799, *lv denied* 89 NY2d 1036). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*). Defendant further contends that Supreme Court erred in denying her request to charge the jury on the "good faith" defense set forth in Public Health Law § 4306 (3). Insofar as defendant contends that the court erred in refusing to charge Public Health Law § 4306 (3) with

respect to the falsifying business records counts, we conclude that she waived that contention inasmuch as she acknowledged at trial that section 4306 (3) is not a defense to those counts (see generally *People v Harris*, 74 AD3d 1844, lv denied 15 NY3d 893). As for the remaining counts, we conclude that there is no reasonable view of the evidence that defendant acted "in good faith in accord with the terms of [article 43]," which concerns anatomical gifts (§ 4306 [3]; see generally *People v Williams*, 74 AD3d 1834, lv denied 15 NY3d 857; *People v Cobb*, 72 AD3d 1565, 1567, lv denied 15 NY3d 803). The evidence introduced at trial established that defendant and the BioMedical Tissue Services (BTS) employees under her supervision removed tissue and/or bone from the decedents without consent from the donors or their next of kin. Indeed, the People presented evidence establishing that defendant instructed BTS employees to sign blank consent forms as witnesses for use in future recoveries, and those forms were subsequently filled out with false information. Notably, numerous falsified consent forms and other BTS records related to the illegal recoveries were in defendant's handwriting or bore defendant's signature.

Defendant's constitutional challenge to Public Health Law article 42 is not properly before us inasmuch as there is no indication in the record that the Attorney General was given the requisite notice of that challenge (see Executive Law § 71 [3]; *People v Perez*, 67 AD3d 1324, 1326, lv denied 13 NY3d 941). In any event, that challenge is unreserved for our review inasmuch as defendant did not move to dismiss the indictment on the ground that the Public Health Law statutes in question are unconstitutionally vague, either facially or as applied (see *People v Iannelli*, 69 NY2d 684, cert denied 482 US 914; cf. *People v Bakolas*, 59 NY2d 51, 53), and defendant did not otherwise make her position on that issue known to the court prior to or during the course of the trial (see *Iannelli*, 69 NY2d at 685). The belated constitutional challenge raised by defendant in her post-trial motion to set aside the verdict pursuant to CPL 330.30 is insufficient to preserve that challenge for our review (see *People v Davidson*, 98 NY2d 738, 739-740).

In her motion for a trial order of dismissal, defendant failed to raise any of the specific challenges now raised on appeal and thus failed to preserve for our review her challenges to the legal sufficiency of the evidence (see *People v Gray*, 86 NY2d 10, 19). Defendant likewise failed to preserve for our review her challenges to the jury instructions inasmuch as she did not raise those challenges at trial (see CPL 470.05 [2]; *Cobb*, 72 AD3d at 1566-1567; *People v Burch*, 256 AD2d 1233, lv denied 93 NY2d 871), and we decline to exercise our power to review those challenges to the jury instructions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Finally, we reject the contention of defendant that she was denied effective assistance of counsel based on defense counsel's failure to make certain motions. It is well established that "[d]eprivation of appellate review . . . does not per se establish

ineffective assistance of counsel" (*People v Acevedo*, 44 AD3d 168, 173, *lv denied* 9 NY3d 1004). "[R]ather, a defendant must also show that his or her [motion] would be meritorious upon appellate review" (*People v Bassett*, 55 AD3d 1434, 1438, *lv denied* 11 NY3d 922), and here defendant failed to make that showing. Moreover, viewed as a whole and as of the time of the representation, the record reflects that trial counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1588

KA 10-00466

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOHN P. SMALL, JR., III, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Stephen R. Sirkin, A.J.), rendered October 30, 2009. The judgment convicted defendant, after a nonjury trial, of burglary in the first degree (three counts), burglary in the second degree, and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of, inter alia, three counts of burglary in the first degree (Penal Law § 140.30 [1], [3], [4]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). Even assuming, arguendo, that defendant preserved for our review his contention that County Court erred in failing to conduct a *Sandoval* hearing, we conclude that any error in failing to do so in this nonjury trial is harmless. "Unlike a lay jury, a [justice] 'by reasons of . . . learning, experience and judicial discipline, is uniquely capable of distinguishing the issues and of making an objective determination' based upon appropriate legal criteria, despite awareness of facts which cannot properly be relied upon in making the decision" (*People v Moreno*, 70 NY2d 403, 406). "Although a jury may tend to conclude, despite limiting instructions, that a defendant who has committed previous crimes is more likely to have committed the crime charged . . . , the [justice] in a nonjury trial will not have that tendency . . . [Indeed, t]o require a trial court to conduct a *Sandoval* hearing in every nonjury trial would be a wasteful expenditure of the court's time and effort" (*People v Stevenson*, 163 AD2d 854, 854-855). In any event, we note that defendant testified herein and that the prosecutor did not cross-examine defendant concerning his criminal history.

Defendant made only a general motion for a trial order of

dismissal and thus failed to preserve for our review his contention concerning the alleged insufficiency of the evidence (see *People v Gray*, 86 NY2d 10, 19). We conclude in any event that the testimony of the victim and two other prosecution witnesses that defendant kicked down a door, "pistol-whipped" the victim, and placed the gun in the victim's mouth provided a " 'valid line of reasoning and permissible inferences [that] could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial' " (*People v Johnston*, 71 AD3d 1507, 1508, lv denied 15 NY3d 752). Viewing the evidence in light of the elements of the crimes in this nonjury trial (see *People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contention that the court erred in ordering that a buccal swab be taken of defendant inasmuch as he raises new grounds in support of that contention for the first time on appeal (see CPL 470.05 [2]; *People v Peele*, 73 AD3d 1219, 1221). In any event, the indictment provided the court with the requisite " 'clear indication' " that probative evidence could be discovered from a buccal swab (see *Matter of Abe A.*, 56 NY2d 288, 297; see also *People v Pryor*, 14 AD3d 723, 725, lv denied 6 NY3d 779), and defendant stipulated to the adequacy of the chain of custody of the buccal swab as well as other swabs that were taken (see *People v White*, 211 AD2d 982, 984, lv denied 85 NY2d 944). Finally, the sentence is not unduly harsh or severe.

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

1589

KA 09-00766

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JURI P. THOMAS, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SARAH E. RYAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered February 17, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). We reject the contention of defendant that he was denied effective assistance of counsel based on defense counsel's failure to move to suppress physical evidence. "Defendant has not shown that a suppression motion, if made, would have been successful and thus has failed to establish that defense counsel was ineffective in failing to make such a motion" (*People v Borcyk*, 60 AD3d 1489, 1490, lv denied 12 NY3d 923). We further conclude that the sentence is not unduly harsh or severe.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1590

KA 10-00330

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS CASCIO, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered October 28, 2009. The judgment convicted defendant, upon a jury verdict, of robbery in the third degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of robbery in the third degree (Penal Law § 160.05), defendant contends that Supreme Court erred in accepting the verdict after a juror stated during jury polling that "I think he was not guilty on the third, we all agreed, but" We reject defendant's contention that the court was required to direct the jury to return for further deliberations as soon as the juror made that statement. Rather, we conclude that the court properly exercised its discretion by instead clarifying both what the juror meant by the statement and what her verdict was (*see generally People v Simms*, 13 NY3d 867, 871; *People v Mercado*, 91 NY2d 960, 962-963; *People v Francois*, 297 AD2d 750, 751). During the court's ensuing discussion with the juror, it became clear that the juror had found defendant guilty, and that the reason for her statement during jury polling was that she had initially believed that defendant was not guilty but had thereafter agreed with her fellow jurors that he had committed the crime.

We further reject the contention of defendant that the court erred in instructing the jury with respect to the definition of proof beyond a reasonable doubt. The court's charge, which was analogous to the reasonable doubt charge set forth in CJI2d (NY), accurately stated the law (*see People v Perkins*, 27 AD3d 890, 893, *lv denied* 6 NY3d 897, 7 NY3d 761). The fact that the charge did not include certain

language that defendant believed would be included did not have a detrimental effect on defense counsel's summation in referring to that language, inasmuch as the jury had been informed several times that it was the role of the court to instruct them on the law.

Viewing the evidence in light of the elements of the crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict finding that defendant was the individual who committed the robbery is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). The People presented evidence that an eyewitness had identified defendant from a photo array five days after the crime. In addition, the evidence included clothing from defendant's closet containing a flaw on a jacket sleeve that was consistent with the perpetrator's clothing, the bank surveillance videos and photographs, and the testimony of a police officer that he recognized defendant from a news airing of a bank surveillance photograph. Thus, while a different verdict may not have been unreasonable, upon independently "weigh[ing] the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony," we conclude that the verdict is not against the weight of the evidence (*People v Rayam*, 94 NY2d 557, 560 [internal quotation marks omitted]; see *Bleakley*, 69 NY2d at 495).

Defendant further contends that the court erred in refusing to suppress the identification of defendant in court by the witness who had identified him in the photo array because the aforementioned bank surveillance photograph of the robber was aired on the news before the witness had viewed the photo array. We reject that contention. There is no indication that the witness saw the broadcast or, in the event that he had, that the news broadcast impaired the fairness of the photo array procedure (see generally *People v Rodriguez*, 49 AD3d 433, 434, *lv denied* 10 NY3d 964). "We cannot . . . conceive of how viewing a clear image of the robber [from a bank surveillance photograph] is an 'undue' or improper suggestion of what he [or she] looked like" (*People v Gee*, 99 NY2d 158, 164, *rearg denied* 99 NY2d 652). "Undue suggestiveness lies at the heart of *Wade* jurisprudence, but that concern is not ordinarily implicated when (as here) the [witness has seen] an actual depiction of the robbery [he himself] witnessed" (*id.* at 163).

The court also did not err in refusing to suppress statements that defendant made by telephone to his mother, in the presence of a police detective. Defendant was aware of the detective's presence throughout the conversation, and he nevertheless spoke freely and unguardedly. Spontaneous statements are admissible, even when made after the right to counsel has attached (see *People v Gonzales*, 75 NY2d 939, *cert denied* 498 US 833; *People v Rivers*, 56 NY2d 476, 479, *rearg denied* 57 NY2d 775; *People v Cooper*, 38 AD3d 678, 680). Defendant's reliance on *People v Jackson* (202 AD2d 689, 690-691) is misplaced, because here the police respected defendant's assertion of the right to counsel, and there was no surreptitious or improper maneuvering to overhear defendant's telephone conversation in

contravention thereof.

Finally, the sentence is not unduly harsh or severe.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1591

KA 09-01500

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DWAYNE BROWN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Orleans County (James P. Punch, A.J.), rendered July 7, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the second degree and criminal trespass in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed as moot (*see People v Rollins*, 50 AD3d 1535, 1536, *lv denied* 10 NY3d 939).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1593

KA 09-02218

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DELBERT J. JACQUES, JR., DEFENDANT-APPELLANT.

AMDURSKY, PELKY, FENNEL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (HANNAH STITH LONG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered September 14, 2009. The judgment convicted defendant, upon his plea of guilty, of conspiracy in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of conspiracy in the second degree (Penal Law § 105.15). Defendant failed to preserve for our review his contention that County Court's policy prohibiting further plea bargaining after the final plea conference constitutes an abuse of discretion (*see People v Nieves*, 2 NY3d 310, 315-316), and we decline to exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Moreover, that contention does not survive defendant's valid waiver of the right to appeal in any event, inasmuch as plea bargaining policies "do not implicate constitutional considerations" (*People v Humphrey*, 30 AD3d 766, 767, *lv denied* 7 NY3d 813) and, "generally, an appeal waiver will encompass any issue that does not involve a right of constitutional dimension going to 'the very heart of the process' " (*People v Lopez*, 6 NY3d 248, 255). The record does not support defendant's further contention that the court refused to accept a plea bargain " 'based on circumstances unrelated to . . . defendant and the proposed bargain at issue' " (*People v Bonilla*, 299 AD2d 934, 934, *lv denied* 99 NY2d 580). The contention of defendant that he was denied effective assistance of counsel survives the plea and waiver of the right to appeal only to the extent that "he contends that his plea was infected by the allegedly ineffective assistance and that he entered the plea because of his attorney's allegedly poor performance" (*People v Bethune*, 21 AD3d 1316, *lv denied* 6 NY3d 752; *see People v Neal*, 56 AD3d 1211, *lv*

denied 12 NY3d 761). We conclude, however, that defendant's contention lacks merit to that extent (see generally *People v Ford*, 86 NY2d 397, 404).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1595

CA 10-00983

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

GLENN M. HELLMAN, PLAINTIFF-APPELLANT,

V

ORDER

BRUCE HELLMAN, STOCKWOOD LLC, AND MAYNARDS
ELECTRIC SUPPLY, INC., DEFENDANTS-RESPONDENTS.

HARTER SECREST & EMERY LLP, ROCHESTER (JEFFREY J. CALABRESE OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

NIXON PEABODY LLP, ROCHESTER (RICHARD A. MCGUIRK OF COUNSEL), FOR
DEFENDANT-RESPONDENT BRUCE HELLMAN.

EVANS & FOX LLP, ROCHESTER (JARED P. HIRT OF COUNSEL), FOR
DEFENDANT-RESPONDENT STOCKWOOD LLC.

Appeal from a judgment (denominated decision and order) of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered February 12, 2010. The judgment, following a nonjury trial, among other things, determined that defendant Bruce Hellman had implied actual and presumptive authority to execute the lease at issue and dismissed plaintiff's complaint against defendant Stockwood LLC.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1596

TP 10-01362

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

IN THE MATTER OF MARY W. WALLIS, PETITIONER,

V

MEMORANDUM AND ORDER

SANDY CREEK CENTRAL SCHOOL DISTRICT BOARD OF
EDUCATION, RESPONDENT.

JAMES R. SANDNER, LATHAM (ANTHONY J. BROCK OF COUNSEL), FOR
PETITIONER.

HOGAN, SARZYNSKI, LYNCH, SUROWKA & DEWIND, LLP, JOHNSON CITY (MICHAEL
G. SUROWKA 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, Oswego County [Norman W. Seiter, Jr., J.], entered October 28, 2009) to review a determination of respondent. The determination discharged petitioner from her position as a bus driver.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination terminating her employment as a bus driver for respondent school district following a hearing pursuant to Civil Service Law § 75. We conclude that the determination is supported by substantial evidence, i.e., "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or [an] ultimate fact" (300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 180; see CPLR 7803 [4]). We reject the contention of petitioner that the determination must be annulled because all of her absences were for legitimate reasons, including a period of time during which she was absent due to a work-related injury. Petitioner was charged pursuant to Civil Service Law § 75 with incompetency or misconduct based on excessive absenteeism, and thus respondent was entitled to terminate her on those grounds even in the event that her "excessive absences [were] caused by physical incapacity" (Matter of Considine v Pirro, 38 AD3d 773, 774). It therefore is irrelevant whether she had legitimate reasons for missing work (see Cicero v Triborough Bridge & Tunnel Auth., 264 AD2d 334, 336, lv dismissed 94 NY2d 931; Matter of Gradel v Lilholt, 257 AD2d 972; see also Considine, 38 AD3d at 774-775). The issue with respect to the charge against petitioner under Civil Service Law § 75 is

whether her excessive absences "and [their] disruptive and burdensome effect on the employer rendered [her] incompetent to continue [her] employment" (*Matter of Romano v Town Bd. of Town of Colonie*, 200 AD2d 934, appeal dismissed 83 NY2d 963; see *Considine*, 38 AD3d at 775; *Cicero*, 264 AD2d at 336). Here, there is substantial evidence in the record establishing that petitioner was insubordinate and that her absences had a disruptive and burdensome effect on respondent. Petitioner received several warnings about her excessive absenteeism, yet she had an absentee rate of over 60% for a period of approximately 1½ years. There was also testimony presented at the hearing that it was difficult for respondent to secure substitute drivers to cover for petitioner when she was absent.

Finally, we conclude under the circumstances of this case that the penalty of termination of employment is not " 'so disproportionate to the offense as to be shocking to one's sense of fairness' " and thus does not constitute an abuse of discretion as a matter of law (*Matter of Kelly v Safir*, 96 NY2d 32, 38, rearg denied 96 NY2d 854; see *Cicero*, 264 AD2d at 336).

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

1597

CA 10-01611

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

ELAINE SMITH, INDIVIDUALLY AND AS EXECUTRIX OF
THE ESTATE OF GEORGIANNA G. SMITH, DECEASED,
PLAINTIFF-APPELLANT,

V

ORDER

CROUSE HEALTH HOSPITAL, INC., DOING BUSINESS AS
CROUSE HOSPITAL, DEFENDANT-RESPONDENT.

LAW OFFICE OF STEWART L. WEISMAN, MANLIUS (STEWART L. WEISMAN OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

GALE & DANCKS, LLC, SYRACUSE (MATTHEW J. VANBEVEREN OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered October 6, 2009 in a medical malpractice action. The order granted defendant's motion for summary judgment dismissing the complaint.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1598

CA 10-01184

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

HANNAH B. ACRES, LLC, ET AL., PLAINTIFFS,

V

ORDER

MARTHA A. HOWE, AS GUARDIAN OF THE PERSON AND
PROPERTY OF ANNA P. KOHL, SUED HEREIN AS ANNA P.
KOHL, INDIVIDUALLY AND AS SURVIVOR OF WALTER A.
KOHL, DEFENDANT-APPELLANT,
AND THOMAS J. GRANCHELLI, DEFENDANT-RESPONDENT.

MUSCATO, DIMILLO & VONA, LLP, LOCKPORT (GEORGE V.C. MUSCATO OF
COUNSEL), FOR DEFENDANT-APPELLANT.

HENRIK H. HANSEN, PLLC, LOCKPORT (HENRIK H. HANSEN OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered March 12, 2010. The order, insofar as appealed from, granted the motion of defendant Thomas J. Granchelli for summary judgment dismissing the cross claim and affirmative defense of defendant Martha K. Howe, as guardian of the person and property of Anna P. Kohl, sued herein as Anna P. Kohl, individually and as survivor of Walter A. Kohl.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1601

CA 10-01625

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

IN THE MATTER OF FINGER LAKES RACING
ASSOCIATION, INC. AND CANANDAIGUA
ENTERPRISES CORPORATION,
PETITIONERS-RESPONDENTS,

V

MEMORANDUM AND ORDER

TOWN OF FARMINGTON AND ITS ASSESSOR AND
BOARD OF ASSESSMENT REVIEW,
RESPONDENTS-APPELLANTS.

BOYLAN, BROWN, CODE, VIGDOR & WILSON, LLP, ROCHESTER (SHEILA M.
CHALIFOUX OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

HISCOCK & BARCLAY, LLP, BUFFALO (MARK R. MCNAMARA OF COUNSEL), FOR
PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County
(Kenneth R. Fisher, J.), entered April 8, 2010 in a proceeding
pursuant to RPTL article 7. The order denied the motion of
respondents to dismiss the petition.

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

Memorandum: Petitioners commenced this proceeding seeking review
of their real property tax assessments pursuant to RPTL article 7
after respondent Town of Farmington's Board of Assessment Review
(Board) dismissed their complaints seeking to reduce the assessments
on their properties. The Board dismissed the complaints upon
determining that the failure of petitioners to comply with the Board's
legitimate and reasonable requests for business income information was
willful. Supreme Court denied respondents' motion to dismiss the
petition. We affirm.

A board of assessment review "may require the person whose real
property is assessed . . . to appear before the board and be examined
concerning such complaint, and to produce any papers relating to such
assessment. If the person . . . shall willfully neglect or refuse to
[do so,] such person shall not be entitled to any reduction of the
assessment subject to the complaint" (RPTL 525 [2] [a]). A petition
challenging an assessment should not be dismissed, however, "absent
proof that noncompliance was occasioned by a desire to frustrate
administrative review" (*Matter of Fifth Ave. Off. Ctr. Co. v City of*

Mount Vernon, 89 NY2d 735, 742).

The determination of the Board that petitioners willfully failed to comply with its legitimate and reasonable requests for the information in question in order to frustrate administrative review is not supported by the record (see *Matter of Doubleday & Co. v Board of Assessors of Vil. of Garden City*, 202 AD2d 424, 425, lv dismissed 83 NY2d 906; cf. *Matter of Gelber Enters., LLC v Williams*, 41 AD3d 1207, 1208). Although the information sought was "relevant, proper, and tailored to the matter in dispute" (*Matter of Sass v Town of Brookhaven*, 73 AD3d 785, 788), we nevertheless conclude under the circumstances of this case that there is no evidence of a desire by petitioners to frustrate administrative review. Rather, we conclude on the record before us that petitioners were merely attempting to comply with the Board's request for the information while at the same time protecting the confidentiality of the requested information (see *Matter of Curtis/Palmer Hydroelectric Co. v Town of Corinth*, 306 AD2d 794, 796). Although petitioners initially refused to provide the requested information on the ground that it was not relevant, they thereafter agreed to provide the information if the Board members signed a confidentiality agreement. Upon learning that the Board members refused to sign the confidentiality agreement, petitioners revised the confidentiality agreement by removing the language of the agreement to which the Board had objected, and they provided various alternatives to the Board in order to provide the information sought while protecting its confidentiality, and thus there is no evidence of the requisite willfulness.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1602

CA 10-01427

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

MARY BETH SMITH, PLAINTIFF-RESPONDENT,

V

ORDER

PAUL F. SCHULTZ, II, DEFENDANT-APPELLANT.

FLAHERTY & SHEA, BUFFALO (MICHAEL J. FLAHERTY OF COUNSEL), FOR
DEFENDANT-APPELLANT.

GEORGE W. NARBY, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered October 14, 2009. The order partitioned certain real property.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1603

CA 09-02199

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

IN THE MATTER OF JASON NIEDERMAIER,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

TOWN OF CONESUS AND STEPHEN MARTUCIO, AS
HIGHWAY SUPERINTENDENT OF THE TOWN OF CONESUS,
RESPONDENTS-APPELLANTS.

JONES AND SKIVINGTON, GENESEO (PETER K. SKIVINGTON OF COUNSEL), FOR
RESPONDENTS-APPELLANTS.

STEVEN D. SESSLER, GENESEO, FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Livingston County (Thomas M. Van Strydonck, J.), dated September 28, 2009 in a proceeding pursuant to CPLR article 78. The judgment, among other things, declared Kuder Hill Road a Town highway of Town of Conesus within the meaning of Highway Law § 3 (5).

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking a determination that Kuder Hill Road in respondent Town of Conesus (Town) is a Town highway and that respondent Highway Superintendent is required to maintain it. Respondents contended in their answer, however, that a specified portion of the road is abandoned and thus is no longer a highway, and they sought judgment directing petitioner, inter alia, to reimburse respondents for the reasonable attorneys fees incurred by them in defending this proceeding. Following a hearing on the petition, Supreme Court determined that the Town's certificate of abandonment for the relevant portion of Kuder Hill Road was null and void, and the court further ordered respondents to repair and otherwise maintain the road in accordance with Highway Law § 140. We affirm.

Highway Law § 205 (1) provides in relevant part that "every highway that shall not have been traveled or used as a highway for six years[] shall cease to be a highway," and the party asserting that there has been an abandonment has the burden of establishing that there has in fact been one (see *Matter of Shawangunk Holdings v Superintendent of Highways of Town of Shawangunk*, 101 AD2d 905, 907, appeal dismissed 63 NY2d 773; *Matter of Flacke v Strack*, 98 AD2d 881,

882). The court's determination on the issue of abandonment will not be disturbed unless there is no fair interpretation of the evidence to support it (see *Daetsch v Taber*, 149 AD2d 864, 865; *McCall v Town of Middlebury*, 52 AD2d 736). Here, various witnesses testified at the hearing on the petition that the road had been regularly "traveled or used as a highway" during the six years prior to the filing of the certificate of abandonment (§ 205 [1]), and thus the court's determination that respondents failed to prove that the road was abandoned is supported by the requisite fair interpretation of the evidence (see *Matter of Faigle v Macumber*, 169 AD2d 914; *Daetsch*, 149 AD2d at 865; *Shawangunk Holdings*, 101 AD2d at 907).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1607

KA 09-02222

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEVIN MANUEL, DEFENDANT-APPELLANT.

RONALD C. VALENTINE, PUBLIC DEFENDER, LYONS (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (DAVID V. SHAW OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Stephen R. Sirkin, J.), rendered October 16, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). The contention of defendant that County Court failed to apprehend the extent of its discretion in sentencing him is not supported by the record (*see People v Moon*, 43 AD3d 1379, *lv denied* 9 NY3d 1036; *People v Lee*, 24 AD3d 1246, *lv denied* 6 NY3d 850; *cf. People v Schafer*, 19 AD3d 1133). To the extent that the further contention of defendant that he was denied effective assistance of counsel survives his plea (*see People v Barnes*, 32 AD3d 1250), it "involve[s] matters outside the record on appeal and thus [is] properly raised by way of a motion pursuant to CPL article 440" (*People v Barnes*, 56 AD3d 1171, 1171-1172; *see People v Graham*, 77 AD3d 1439).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1609

CAF 09-02006

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

IN THE MATTER OF DEVONTE M.T.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LEROY T., JR., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

DEBRA D. WILSON, LOCKPORT, FOR RESPONDENT-APPELLANT.

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

THOMAS M. O'DONNELL, ATTORNEY FOR THE CHILD, NIAGARA FALLS, FOR
DEVONTE M.T.

Appeal from an order of the Family Court, Niagara County (David E. Seaman, J.), entered September 16, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: Respondent father appeals from orders terminating his parental rights with respect to the subject children on the ground that he suffers from a mental illness (see Social Services Law § 384-b [4] [c]; *Matter of Deondre M.*, 77 AD3d 1362). Contrary to the father's contention, there was an adequate foundation for the opinion of petitioner's expert that the father suffers from schizophrenia and has borderline intellectual functioning. That testimony, together with the testimony of caseworkers who supervised the father's visitation with the children, provided the requisite clear and convincing evidence that the father is "presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for [the] child[ren]" (§ 384-b [4] [c]; see § 384-b [6] [a]; *Deondre M.*, 77 AD3d 1362). The contention of the father that he was deprived of effective assistance of counsel is impermissibly based on speculation, i.e., that favorable evidence could and should have been offered on his behalf (see *Matter of Brenden O.*, 20 AD3d 722, 723). Viewing the representation as a whole, we conclude that the father's attorney provided meaningful

representation (see *Matter of Elijah D.*, 74 AD3d 1846).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1610

CAF 09-02007

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

IN THE MATTER OF SHENI A.T.

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

LEROY T., JR., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

DEBRA D. WILSON, LOCKPORT, FOR RESPONDENT-APPELLANT.

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

THOMAS M. O'DONNELL, ATTORNEY FOR THE CHILD, NIAGARA FALLS, FOR SHENI
A.T.

Appeal from an order of the Family Court, Niagara County (David E. Seaman, J.), entered September 16, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Same Memorandum as in *Matter of Devonte M.T.* (___ AD3d ___ [Dec. 30, 2010]).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1611

CAF 09-02008

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

IN THE MATTER OF SHIAH A.-R.T.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LEROY T., JR., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

DEBRA D. WILSON, LOCKPORT, FOR RESPONDENT-APPELLANT.

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

THOMAS M. O'DONNELL, ATTORNEY FOR THE CHILD, NIAGARA FALLS, FOR SHIAH
A.-R.T.

Appeal from an order of the Family Court, Niagara County (David E. Seaman, J.), entered September 16, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Same Memorandum as in *Matter of Devonte M.T.* (___ AD3d ___ [Dec. 30, 2010]).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1612

CAF 09-02009

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

IN THE MATTER OF SYANNE L.T.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LEROY T., JR., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

DEBRA D. WILSON, LOCKPORT, FOR RESPONDENT-APPELLANT.

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

THOMAS M. O'DONNELL, ATTORNEY FOR THE CHILD, NIAGARA FALLS, FOR SYANNE L.T.

Appeal from an order of the Family Court, Niagara County (David E. Seaman, J.), entered September 16, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Same Memorandum as in *Matter of Devonte M.T.* (___ AD3d ___ [Dec. 30, 2010]).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1613

CAF 09-02010

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

IN THE MATTER OF TOYIN S.T.

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

LEROY T., JR., RESPONDENT-APPELLANT.
(APPEAL NO. 5.)

DEBRA D. WILSON, LOCKPORT, FOR RESPONDENT-APPELLANT.

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

THOMAS M. O'DONNELL, ATTORNEY FOR THE CHILD, NIAGARA FALLS, FOR TOYIN
S.T.

Appeal from an order of the Family Court, Niagara County (David E. Seaman, J.), entered September 16, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Same Memorandum as in *Matter of Devonte M.T.* (___ AD3d ___ [Dec. 30, 2010]).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1614

CA 10-01539

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

KRISTEN RICKERT, ET AL., PLAINTIFFS,

V

ORDER

COUNTY OF ONONDAGA, DEFENDANT-APPELLANT,
AND BELLOWS CONSTRUCTION SPECIALTIES, LLC,
DEFENDANT-RESPONDENT.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (MARY J. FAHEY OF COUNSEL),
FOR DEFENDANT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (JENNIFER L. NUHFER OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County
(Deborah H. Karalunas, J.), entered September 30, 2009 in a personal
injury action. The order granted the motion of defendant Bellows
Construction Specialties, LLC for summary judgment dismissing the
complaint and cross claims against it.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1615

CA 10-00897

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

VALERIE SHANE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CENTRAL NEW YORK REGIONAL TRANSPORTATION
AUTHORITY, CENTRO OF ONEIDA, INC. AND
STEPHEN PIZUR, DEFENDANTS-RESPONDENTS.

LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL J. LONGSTREET OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (JONATHAN H. BARD OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County
(Anthony J. Paris, J.), entered January 25, 2010. The order denied
the motion of plaintiff for leave to file and serve a late notice of
claim.

It is hereby ORDERED that the order so appealed from is reversed
on the law without costs and the application is granted upon condition
that the proposed notice of claim is served within 20 days of the date
of entry of the order of this Court.

Memorandum: We conclude that Supreme Court abused its discretion
in denying plaintiff's application for leave to serve a late notice of
claim. Plaintiff offered a reasonable excuse for the delay in serving
a notice of claim because she was unaware of the severe or permanent
nature of her injuries until after the statutory time period had
elapsed (*see Matter of Greene v Rochester Hous. Auth.*, 273 AD2d 895;
More v General Brown Cent. School Dist., 262 AD2d 1030; *Matter of*
Esposito v Carmel Cent. School Dist., 187 AD2d 854). In any event,
the failure to offer an excuse for the delay "is not fatal where . . .
actual notice was had and there is no compelling showing of prejudice
to [defendants]" (*Matter of Hall v Madison-Oneida County Bd. of Coop.*
Educ. Servs., 66 AD3d 1434, 1435 [internal quotation marks omitted]).
The record establishes that defendants had actual knowledge of the
motor vehicle accident at issue because defendants paid plaintiff's
property damage claim. Once defendants were notified of plaintiff's
property damage claim, they should have conducted a prompt
investigation of the accident (*see Matter of Trotman v Rochester City*
School Dist., 67 AD3d 1484). "Having failed to do so, [defendants]
cannot now be heard to complain that the late filing of [the] claim
will prejudice [their] preparation of a defense" (*id.* at 1485

[internal quotation marks omitted]).

All concur except CARNI and LINDLEY, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent and therefore would affirm the order denying plaintiff's application for leave to serve a late notice of claim. Supreme Court is " 'vested with broad discretion to grant or deny [an] application' " for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5) (*Matter of Hall v Madison-Oneida County Bd. of Coop. Educ. Servs.*, 66 AD3d 1434, 1435; see *Carpenter v NY Advance Elec., Inc.*, 77 AD3d 1344, 1345) and, absent a clear abuse of discretion, the court's determination should not be disturbed (see *Matter of Schwindt v County of Essex*, 60 AD3d 1248, 1249; *Matter of Hinton v New Paltz Cent. School Dist.*, 50 AD3d 1414, 1415). Here, in our view, the court's denial of the application does not constitute a clear abuse of discretion.

With respect to her excuse for failing to file a timely notice of claim, plaintiff contends that she did not know that she had sustained a serious injury within the meaning of Insurance Law § 5102 (d) until April 2009, when she was out of work as a result of injuries that she allegedly sustained in the accident. The record demonstrates, however, that plaintiff did not file her application for leave to serve a late notice of claim until October 2009, far more than 90 days after she allegedly learned that she sustained a serious injury. In addition, although defendants knew of the accident soon after it occurred and they compensated plaintiff for her property damage, there is no indication in the record that defendants had actual knowledge that plaintiff had been injured in the accident. "Knowledge of the injuries . . . claimed by a plaintiff, rather than mere notice of the underlying occurrence, is necessary to establish actual knowledge of the essential facts of the claim within the meaning of General Municipal Law § 50-e (5)" (*Lemma v Off Track Betting Corp.*, 272 AD2d 669, 671; see *Matter of Mangona v Village of Greenwich*, 252 AD2d 732).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1616

CA 10-01610

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

IN THE MATTER OF MICHAEL MCDONALD,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

JUSTIN TAYLOR, SUPERINTENDENT, GOUVERNEUR
CORRECTIONAL FACILITY, RESPONDENT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), entered September 17, 2009. The judgment, among other things, directed the Department of Correctional Services to credit petitioner with an additional 113 days of jail-time credit and adjust his sentence accordingly.

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

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus, alleging that he was entitled to certain jail-time credit with respect to the sentence for his conviction of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]). According to petitioner, he was entitled to credit for the days he served in federal prison between the date of his state conviction and the date of his release from federal prison. Petitioner was convicted of the federal crime at issue and sentenced with respect thereto before he pleaded guilty to the state charge.

Supreme Court determined that petitioner's request for habeas corpus relief was moot inasmuch as petitioner had been released to parole supervision, and it converted the proceeding to one pursuant to CPLR article 78. The court granted the petition "to the extent that the Department of Correctional Services is directed to credit the petitioner with an additional 113 days of jail-time credit and adjust his sentence accordingly." That was error. Pursuant to Penal Law § 70.30 (2-a), "where a person who is subject to an undischarged term of imprisonment imposed at a previous time by a court of another jurisdiction is sentenced to an additional term . . . of imprisonment by a court of this state, to run concurrently with such undischarged term, such additional term . . . shall be deemed to commence when the said person is returned to the custody of the appropriate official of

such other jurisdiction" Here, however, petitioner had been discharged from federal custody by the time he was sentenced on his state conviction. Moreover, Penal Law § 70.30 (3) does not compel a different result inasmuch as the time in question was credited against petitioner's prior federal sentence. We therefore reverse the judgment and dismiss the petition.

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

1617

CA 09-01615

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

IN THE MATTER OF ALPHONSO SIMMONS,
PETITIONER-APPELLANT,

V

ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES,
RESPONDENT-RESPONDENT.

ALPHONSO SIMMONS, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered March 27, 2009 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1618

CA 10-00267

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

HARRY J. BEACH AND SANDRA L. BEACH,
PLAINTIFFS-APPELLANTS,

V

ORDER

VILLAGE OF WOLCOTT, VILLAGE OF WOLCOTT
HIGHWAY DEPARTMENT, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

SHANLEY LAW OFFICES, MEXICO (P. MICHAEL SHANLEY OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

PETRONE & PETRONE, P.C., UTICA (DAVID H. WALSH OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered October 5, 2009. The order and judgment granted the motion of defendants Village of Wolcott and Village of Wolcott Highway Department for summary judgment and dismissed the complaint against them.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1619

CA 10-01426

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

JARVIS CARR, JR., PLAINTIFF-APPELLANT,

V

ORDER

COUNTY OF NIAGARA, DEFENDANT-RESPONDENT.

LAW OFFICES OF JAMES E. MORRIS, BUFFALO (JOSHUA P. RUBIN OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

SLIWA & LANE, BUFFALO (MICHAEL T. COUTU OF COUNSEL), FOR DEFENDANT-
RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County
(Richard C. Kloch, Sr., A.J.), entered November 13, 2009 in a personal
injury action. The order denied the motion of plaintiff for summary
judgment on liability.

Now, upon the stipulation of discontinuance signed by the
attorneys for the parties on September 30, 2010, and filed in the
Niagara County Clerk's Office on October 15, 2010,

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1620

CA 10-00844

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

DANIEL P. CALDWELL, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

RHONDA D. WARD AND DANNY R. WARD,
DEFENDANTS-RESPONDENTS.

WILLIAM K. MATTAR, P.C., WILLIAMSVILLE (C. DANIEL MCGILLICUDDY OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (LISA G. BERRITTELLA
OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Wayne County
(John B. Nesbitt, A.J.), entered November 4, 2009 in a personal injury
action. The amended order, insofar as appealed from, granted
defendants' motion for summary judgment.

It is hereby ORDERED that the amended order insofar as appealed
from is reversed on the law without costs, the motion is denied with
respect to the fracture category of serious injury within the meaning
of Insurance Law § 5102 (d) and the complaint, as amplified by the
bill of particulars, is reinstated.

Memorandum: Plaintiff commenced this action to recover damages
for injuries he sustained when a vehicle operated by defendant Rhonda
D. Ward collided with the vehicle driven by plaintiff, under icy
conditions. Supreme Court erred in granting defendants' motion for
summary judgment dismissing the complaint on the ground that plaintiff
did not sustain a serious injury within the meaning of Insurance Law §
5102 (d). We note at the outset that, although plaintiff contended in
his bill of particulars that he sustained a serious injury under
several categories of serious injury set forth in Insurance Law § 5102
(d), on appeal he contends only that he sustained a serious injury
within the meaning of the fracture category and thus is deemed to have
abandoned any issues with respect to the remaining categories (see
Ciesinski v Town of Aurora, 202 AD2d 984). We conclude that, although
defendants met their initial burden by establishing that plaintiff did
not sustain a fracture, plaintiff raised a triable issue of fact to
defeat the motion with respect to the fracture category (see generally
Zuckerman v City of New York, 49 NY2d 557, 562). He submitted the
affirmed report of his primary care physician stating that plaintiff
"did sustain an anterior compression fracture causally related" to the
motor vehicle accident in question, and he also submitted the affirmed

report of his orthopedic surgeon stating that, based upon X rays taken in 2006 as well as those taken in 2008, he "sustained mild compression fractures at T12 and L1 in February 2006 related to a motor vehicle crash" (see *Wheeler v Laechner*, 34 AD3d 1222; *Boorman v Bowhers*, 27 AD3d 1058).

All concur except MARTOCHE, J.P., who dissents and votes to affirm in the following Memorandum: I respectfully dissent and would affirm the order granting defendants' motion for summary judgment dismissing the complaint for reasons stated in the decision at Supreme Court with respect to the fracture category.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1621

CA 10-01331

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

TERESA E. MARTIN,
PLAINTIFF-APPELLANT-RESPONDENT,

V

ORDER

ROCHESTER ATHLETIC CLUB AND 21 GOODWAY
DRIVE, INC., DEFENDANTS-RESPONDENTS.

ROCHESTER ATHLETIC CLUB AND 21 GOODWAY DRIVE,
INC., THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

YORUK PROPERTIES, LLC, THIRD-PARTY
DEFENDANT-RESPONDENT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR
PLAINTIFF-APPELLANT-RESPONDENT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (ALISON
M.K. LEE OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

DAMON MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS-RESPONDENTS.

Appeal and cross appeal from an order of the Supreme Court,
Monroe County (Evelyn Frazee, J.), entered October 14, 2009 in a
personal injury action. The order granted defendants-third-party
plaintiffs' motion for summary judgment dismissing plaintiff's
complaint and granted plaintiff's cross motion for partial summary
judgment.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1622

TP 10-01577

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

IN THE MATTER OF TIM SHARPE, PETITIONER,

V

ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT.

TIM SHARPE, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered July 23, 2010) to review separate determinations of respondent. Respondent determined, after a Tier III hearing that petitioner had violated an inmate rule and further determined that petitioner should not be paroled.

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

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1623

CA 10-01440

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

IN THE MATTER OF THE ARBITRATION BETWEEN
ONONDAGA COMMUNITY COLLEGE,
PETITIONER-RESPONDENT,

AND

MEMORANDUM AND ORDER

ONONDAGA COMMUNITY COLLEGE FEDERATION OF
TEACHERS AND ADMINISTRATORS AFT, LOCAL 1845,
RESPONDENT-APPELLANT.

JAMES R. SANDNER, LATHAM (ROBERT T. REILLY OF COUNSEL), FOR
RESPONDENT-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (CHRISTOPHER J. HARRIGAN OF COUNSEL),
FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered March 2, 2010 in a proceeding pursuant to CPLR article 75. The order granted the application of petitioner to stay arbitration and denied the application of respondent to compel arbitration.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 75 to stay arbitration of a grievance by respondent on behalf of one of respondent's members whose probationary employment was terminated by petitioner. In support of the petition, petitioner asserted that the grievance in question is not arbitrable under the collective bargaining agreement (CBA). Supreme Court properly granted the petition. "A party to an agreement may not be compelled to arbitrate its dispute with another unless the evidence establishes the parties' 'clear, explicit and unequivocal' agreement to arbitrate" (*God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 374). Here, the employee in question was employed as a software systems administrator and was terminated within three months after he was hired, while he undisputedly was a probationary employee. As the court properly noted, the CBA explicitly excludes the termination of employment of probationary administrators from the grievance procedures of the CBA, including the right to arbitration. Indeed, a provision of the CBA expressly provides that administrators "serving in a probationary period other than a probationary period attendant to and resulting from promotions shall not have [any] right,

relief, or access to contest disciplinary action, including dismissal from employment, under the grievance procedure contained herein."

The attempt by respondent to recast the grievance as one challenging petitioner's failure to evaluate the employee in question after nine months pursuant to Article IV of the CBA is unavailing. The heart of this dispute is the termination of employment, and any failure by petitioner to comply with the evaluation procedures set forth in Article IV of the CBA is irrelevant in view of the CBA provision rendering arbitration unavailable to probationary administrators who are terminated. We thus conclude that the court properly granted the petition.

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

1627

TP 10-01595

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

IN THE MATTER OF LISA LYONS, PETITIONER,

V

MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
CITY OF ROCHESTER, RESPONDENTS.

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

THOMAS S. RICHARDS, CORPORATION COUNSEL, ROCHESTER (YVETTE CHANCELLOR
GREEN OF COUNSEL), FOR RESPONDENT CITY OF ROCHESTER.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [William P. Polito, J.], entered June 1, 2010) to review a determination of respondent New York State Division of Human Rights. The determination dismissed the complaint of sexual, marital, and retaliatory discrimination in employment.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of respondent New York State Division of Human Rights (hereafter, SDHR) dismissing her complaint alleging unlawful discrimination and retaliation. We conclude that the determination is supported by substantial evidence and thus must be confirmed (*see generally Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106). To establish a prima facie case of employment discrimination, petitioner was required to demonstrate that she was a member of a protected class, that she was qualified for her position, that she was terminated from employment or suffered another adverse employment action, and that the termination or other adverse action "occurred under circumstances giving rise to an inference of discriminatory motive" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 306). We agree with SDHR that petitioner failed to meet that burden with respect to her claim for sex discrimination inasmuch as she failed to demonstrate that any of the actions taken by respondent City of Rochester constituted "a materially adverse change in the terms and conditions of [her] employment" (*id.*). We further conclude that petitioner failed to establish a prima facie case with respect to her claim based on a hostile work environment (*see generally Harris v*

Forklift Sys., Inc., 510 US 17, 21), or with respect to her claim for retaliation (see generally *Gordon v New York City Bd. of Educ.*, 232 F3d 111, 117).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1628

CA 10-00570

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

DORIS KRIEGER AND FRANK KRIEGER,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

MCDONALD'S RESTAURANT OF NEW YORK, INC.,
HECTOR URENA, DOING BUSINESS AS MCDONALD'S
RESTAURANT, CP NATIONAL ENTERPRISES, INC.,
DOING BUSINESS AS MCDONALD'S RESTAURANT, AND
CRG AT ARNOT MALL, INC., DOING BUSINESS AS
MCDONALD'S RESTAURANT, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

CRAIG Z. SMALL, BUFFALO, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A.
CIRANDO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BURKE, SCOLAMIERO, MORTATI & HURD, LLP, HUDSON (JOHN D. HOLT OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered May 26, 2009 in a personal injury action. The order, among other things, denied plaintiffs' motion for judgment notwithstanding the verdict.

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

Memorandum: The plaintiffs in appeal No. 1 commenced an action seeking damages for injuries sustained by plaintiff Doris Krieger when she slipped and fell on ice on a sidewalk maintained by defendants. The plaintiff in appeal No. 2 commenced a separate action seeking damages for injuries he sustained when, shortly after plaintiff Doris Krieger's accident, he slipped and fell on ice in a different area of the same sidewalk. The two actions were consolidated for trial on the issue of liability, and the jury found that defendants were not negligent.

In these consolidated appeals, the plaintiffs in each appeal (collectively, plaintiffs) contend that Supreme Court erred in denying their post-trial motion seeking, inter alia, to set aside the verdict as against the weight of the evidence and for a new trial. We reject that contention. We note at the outset that, to the extent that plaintiffs further contend that the verdict should be set aside as inconsistent, they failed to preserve that contention for our review

inasmuch as they "failed to object to the verdict on that ground before the jury was discharged" (*Potter v Jay E. Potter Lbr. Co., Inc.*, 71 AD3d 1565, 1567; see *Kunzman v Barody*, 60 AD3d 1369, 1370).

" 'A verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence' " (*Lifson v City of Syracuse* [appeal No. 2], 72 AD3d 1523, 1524; see *Lolik v Big V Supermarkets*, 86 NY2d 744, 746), and that cannot be said here. According to plaintiffs' expert meteorologist, a storm deposited significant amounts of freezing rain in the early morning on the day of the accidents. He testified that, at approximately 10:00 A.M., the freezing rain changed to "plain rain," which in turn changed to drizzle in the early afternoon. By 4:00 P.M., there was "very light freezing drizzle," with "a little snow mixed in toward the end of the day." Thus, plaintiffs' expert concluded that, although the winter storm ceased by midday, the later meteorological conditions that included the light freezing drizzle as well as a drop in temperature could have created slippery conditions shortly before the accidents. Nevertheless, plaintiffs' expert did not testify concerning the timing of the formation of the icy areas that caused the accidents (see *Robinson v Albany Hous. Auth.*, 301 AD2d 997, 998; cf. *Bullard v Pfohl's Tavern, Inc.*, 11 AD3d 1026). We thus conclude that a fair interpretation of the evidence supports the jury's verdict, i.e., that the specific icy areas at issue "formed so close in time to the accident[s] that [defendants] could not reasonably have been expected to notice and remedy [them]" (*Piersielak v Amyell Dev. Corp.*, 57 AD3d 1422, 1423 [internal quotation marks omitted]; see *Wilkowski v Big Lots Stores, Inc.*, 67 AD3d 1414, 1415). Although a shift manager for defendants testified that he observed ice in one or two areas of the sidewalk and elsewhere at or around 2:00 P.M., those icy areas were near a different building entrance. It is well established that "[g]eneral awareness that snow or ice may be present is legally insufficient to constitute notice of the particular condition that caused" a plaintiff to fall (*Kaplan v DePetro*, 51 AD3d 730, 731; see *Boucher v Watervliet Shores Assoc.*, 24 AD3d 855, 857; *Stoddard v G.E. Plastics Corp.*, 11 AD3d 862, 863). For the same reasons, we conclude that the court also properly denied plaintiffs' post-trial motion to the extent that it sought judgment notwithstanding the verdict (see generally *Adamy v Ziriakus*, 92 NY2d 396, 400; *Kunzman*, 60 AD3d at 1369-1370).

Finally, plaintiffs' contention that the jury was confused with respect to the concept of negligence based on the court's failure to re-read a portion of the charge with respect thereto is unpreserved for our review (see *Delong v County of Chautauqua* [appeal No. 2], 71 AD3d 1580, 1580-1581; *Garris v K-Mart, Inc.*, 37 AD3d 1065). We note in any event that, contrary to plaintiffs' contention, the court's charge "accurately stated the law as it applie[d] to the facts in this case and did not prevent the jury from considering the issues before it" (*Dietz v Compass Prop. Mgt. Corp.*, 49 AD3d 1152 [internal quotation marks omitted]; see *Schmidt v Buffalo Gen. Hosp.*, 278 AD2d

827, *lv denied* 96 NY2d 710).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1629

CA 10-00571

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

MICHAEL RUCKER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

MCDONALD'S RESTAURANT OF NEW YORK, INC.,
HECTOR URENA, DOING BUSINESS AS MCDONALD'S
RESTAURANT, CP NATIONAL ENTERPRISES, INC.,
DOING BUSINESS AS MCDONALD'S RESTAURANT, AND
CRG AT ARNOT MALL, INC., DOING BUSINESS AS
MCDONALD'S RESTAURANT, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

CRAIG Z. SMALL, BUFFALO, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A.
CIRANDO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BURKE, SCOLAMIERO, MORTATI & HURD, LLP, HUDSON (JOHN D. HOLT OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered May 26, 2009 in a personal injury action. The order, among other things, denied plaintiff's motion for judgment notwithstanding the verdict.

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

Same Memorandum as in *Kreiger v McDonald's Rest. of N.Y., Inc.* (___ AD3d ___ [Dec. 30, 2010]).

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1630

CAF 10-01237

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

IN THE MATTER OF JASON THOMAS,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

JAMIEE THOMAS, RESPONDENT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (EDWARD L. CHASSIN OF
COUNSEL), FOR RESPONDENT-APPELLANT.

GERALD J. VELLA, SPRINGVILLE, FOR PETITIONER-RESPONDENT.

KIMBERLY W. WEISBECK, ATTORNEY FOR THE CHILDREN, ROCHESTER, FOR JAKOB
T. AND JACINDA T.

Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J.), entered May 3, 2010 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the petition for permission to relocate permanently with the parties' children to the State of Maryland.

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

Memorandum: Petitioner father commenced this proceeding seeking modification of the parties' existing order of joint custody. Respondent mother contends that Family Court erred in granting the petition, in which the father sought permission for the parties' minor children to relocate with him from Arcade, New York to the State of Maryland. We affirm. Contrary to the mother's contention, the court properly determined that the father met his burden of establishing by a preponderance of the evidence that the proposed relocation is in the children's best interests (*see Matter of Cynthia L.C. v James L.S.*, 30 AD3d 1085; *see generally Matter of Tropea v Tropea*, 87 NY2d 727, 740-741). The father demonstrated an economic necessity for the proposed move and, "[a]lthough *Tropea* emphasizes that 'no single factor should be treated as dispositive or given such disproportionate weight as to predetermine the outcome' . . . , it indicates that 'economic necessity . . . may present a particularly persuasive ground for permitting the proposed move' " (*Matter of Stone v Wyant*, 8 AD3d 1046, 1046). Furthermore, we note that, although the Attorney for the Children indicates in her brief on appeal that the children have "changed their minds" since the time of trial and no longer wish to relocate to Maryland with their father, the children's wishes are not

determinative (see *Eschbach v Eschbach*, 56 NY2d 167, 172-173; *Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1450).

We have examined the remaining contentions of the Attorney for the Children and conclude that they are without merit.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court

MOTION NO. (1776/88) KA 10-02097. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ADRIAN JACKSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PINE, AND GORSKI, JJ. (Filed Dec. 30, 2010.)

MOTION NO. (288/94) KA 10-01190. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHARLIE MIXON, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND GORSKI, JJ. (Filed Dec. 30, 2010.)

MOTION NO. (116/98) KA 00-02917. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOHN STAUFFER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, PINE, AND GORSKI, JJ. (Filed Dec. 30, 2010.)

MOTION NO. (926/06) KAH 04-02987. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. FRANK PRUITT, PETITIONER-APPELLANT, V ANTHONY ZON, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Motion for renewal denied. PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, LINDLEY, AND GORSKI, JJ. (Filed Dec. 30, 2010.)

MOTION NO. (327/07) KA 00-00725. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JONATHAN CARTER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PINE, JJ. (Filed Dec. 30, 2010.)

MOTION NO. (911/08) KA 04-00435. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TIMOTHY R. THOMAS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, PINE, AND GORSKI, JJ. (Filed Dec. 30, 2010.)

MOTION NOS. (1424-1426/09) KA 08-01903, KA 08-01904, AND KA 08-01905. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DORIAN FACEN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: MARTOCHE, J.P., SMITH, CARNI, AND PINE, JJ. (Filed Dec. 30, 2010.)

MOTION NO. (651/10) CA 09-02359. -- JENNIFER D. MARTINO, PLAINTIFF-RESPONDENT, V MICHAEL A. STOLZMAN, DEFENDANT-RESPONDENT, MICHAEL OLIVER AND SUSAN OLIVER, DEFENDANTS-APPELLANTS. (ACTION NO. 1.) JUDITH A. ROST, PLAINTIFF-RESPONDENT, V MICHAEL A. STOLZMAN, JENNIFER D. MARTINO, GINA L. AVINO, DEFENDANTS-RESPONDENTS, MICHAEL OLIVER AND SUSAN OLIVER, DEFENDANTS-APPELLANTS. (ACTION NO. 2.) -- Motion for leave to appeal to the Court of Appeals granted. PRESENT: MARTOCHE, J.P., SMITH, FAHEY, PERADOTTO, AND GREEN, JJ. (Filed Dec. 30, 2010.)

MOTION NO. (935/10) CA 09-02509. -- THOMAS J. TRZASKA AND DARLENE M. TRZASKA, PLAINTIFFS-APPELLANTS, V ALLIED FROZEN STORAGE, INC., DEFENDANT. W.C.S. OF NEW YORK, INC., RESPONDENT. (APPEAL NO. 2.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Dec. 30, 2010.)

MOTION NO. (944/10) CA 10-00614. -- DOUGLAS J. CURELLA AND DARLENE CURELLA, PLAINTIFFS-RESPONDENTS, V TOWN OF AMHERST, TOWN OF AMHERST HIGHWAY DEPARTMENT AND DAVID M. PETRIE, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND GREEN, JJ. (Filed Dec. 30, 2010.)

MOTION NO. (990/10) CA 09-02290. -- CHRISTINA L. HERDENDORF, PLAINTIFF-RESPONDENT, V GEICO INSURANCE COMPANY, DEFENDANT-APPELLANT. CHRISTINA L. HERDENDORF, PLAINTIFF-RESPONDENT, V JESSE JANSKY AND GEICO INSURANCE COMPANY, DEFENDANTS-APPELLANTS. -- Motion for reargument denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GORSKI, JJ. (Filed Dec. 30, 2010.)

MOTION NO. (1003/10) TP 09-01922. -- IN THE MATTER OF ROBIN DINATALE, PETITIONER, V NEW YORK STATE DIVISION OF HUMAN RIGHTS, GALEN D. KIRKLAND, COMMISSIONER, NEW YORK STATE DIVISION OF HUMAN RIGHTS, NEW YORK STATE INSURANCE FUND, NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, AND NEW YORK STATE OFFICE OF STATE COMPTROLLER, DEPARTMENT OF AUDIT AND CONTROL, RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ. (Filed Dec. 30, 2010.)

MOTION NO. (1008/10) CA 10-00507. -- ROBERT BAKER AND DARLENE BAKER, INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF DOMINICK BAKER, DECEASED, PLAINTIFFS-RESPONDENTS, V COUNTY OF OSWEGO, DEFENDANT-APPELLANT,

CARL F. ERIKSON AND DEBRA L. ERIKSON, AS PARENTS AND NATURAL GUARDIANS OF JOHN M. ERIKSON, AN INFANT, AND THERESA L. PROCTOR, DEFENDANTS-RESPONDENTS.

-- Motion for reargument or leave to appeal to the Court of Appeals denied.

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ. (Filed Dec. 30, 2010.)

MOTION NO. (1044/10) TP 10-00767. -- IN THE MATTER OF SANDRA BOWLER, PETITIONER, V NEW YORK STATE DIVISION OF HUMAN RIGHTS AND NIAGARA COUNTY, RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ. (Filed Dec. 30, 2010.)

MOTION NO. (1050/10) CA 10-00225. -- TRISHA BROWN, INDIVIDUALLY AND AS CO-EXECUTOR OF THE ESTATE OF LOYOLA MCCORMICK, DECEASED, AND GREG MCCORMICK, INDIVIDUALLY AND AS CO-EXECUTOR OF THE ESTATE OF LOYOLA MCCORMICK, DECEASED, PLAINTIFFS-RESPONDENTS, V ARNOT MEDICAL CENTER, ET AL., DEFENDANTS, AND KEVIN D. O'SHEA, M.D., DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ. (Filed Dec. 30, 2010.)

MOTION NO. (1053/10) CA 10-00136. -- LAIDLAW ENERGY AND ENVIRONMENTAL, INC., PETITIONER-APPELLANT, V TOWN OF ELLICOTTVILLE, TOWN OF ELLICOTTVILLE ZONING BOARD OF APPEALS, JOHN E. KRAMER, IN HIS CAPACITY AS CHAIR OF TOWN OF ELLICOTTVILLE ZONING BOARD OF APPEALS, CYNTHIA DAYTON, IN HER CAPACITY AS CO-CHAIR OF TOWN OF ELLICOTTVILLE ZONING BOARD OF APPEALS, ALAN ADAMS, JOHN E. CADY, AND NORMAN WINKLER, IN THEIR RESPECTIVE CAPACITIES AS MEMBERS

OF TOWN OF ELLICOTTVILLE ZONING BOARD OF APPEALS, RESPONDENTS-RESPONDENTS.

-- Motion for leave to appeal to the Court of Appeals denied. PRESENT:
MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ. (Filed Dec. 30, 2010.)

**MOTION NO. (1079/10) CA 10-00094. -- IN THE MATTER OF THE ARBITRATION
BETWEEN NEW YORK STATE NURSES ASSOCIATION, INC, PETITIONER-RESPONDENT, AND
COUNTY OF ERIE, RESPONDENT-APPELLANT.** -- Motion for leave to appeal to the
Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO,
SCONIERS, AND PINE, JJ. (Filed Dec. 30, 2010.)

**MOTION NO. (1079.1/10) CA 10-00776. -- IN THE MATTER OF THE STATE OF NEW
YORK, PETITIONER-APPELLANT, V DANIEL FLAGG, RESPONDENT-RESPONDENT.** --
Motion insofar as it seeks reargument or leave to appeal to the Court of
Appeals denied. Motion insofar as it seeks to amend the record granted.
PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ. (Filed
Dec. 30, 2010.)

**KA 09-01881. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARCOS
GOMEZ, ALSO KNOWN AS MARCOS J. GOMEZ, ALSO KNOWN AS MARCOS JUAN GOMEZ, ALSO
KNOWN AS JUAN MERCED, 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 Genesee
County Court, Robert C. Noonan, J. - Attempted Robbery, 2nd Degree).
PRESENT: SCUDDER, P.J., SMITH, GREEN, PINE, AND GORSKI, JJ. (Filed Dec.
30, 2010.)

CAF 10-00544. -- IN THE MATTER OF MARQUITA HARPER, PETITIONER-RESPONDENT, V

MILTON BURKE, RESPONDENT-APPELLANT. -- Order unanimously affirmed.

Counsel's motion to be relieved of assignment granted (*see Matter of Jordan S.*, 179 AD2d 1091). (Appeal from Order of Family Court, Onondaga County (Michelle Pirro Bailey, J. - Wilful Violation). PRESENT: SCUDDER, P.J., SMITH, GREEN, PINE, AND GORSKI, JJ. (Filed Dec. 30, 2010.)

KA 08-01987. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RAYMOND E. HILL, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Monroe County Court, Stephen T. Miller, A.J. - Attempted Burglary, 2nd Degree). PRESENT: SCUDDER, P.J., SMITH, GREEN, PINE, AND GORSKI, JJ. (Filed Dec. 30, 2010.)

KA 08-00481. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES B. METALES, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Monroe County Court, Stephen T. Miller, A.J. - Attempted Robbery, 2nd Degree). PRESENT: SCUDDER, P.J., SMITH, GREEN, PINE, AND GORSKI, JJ. (Filed Dec. 30, 2010.)

KA 09-00298. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ERIC G. SCHWABLE, DEFENDANT-APPELLANT. -- Appeal dismissed as moot. Counsel's motion to be relieved of assignment granted. (Appeal from Judgment of Genesee County Court, Robert C. Noonan, J. - Burglary, 2nd Degree). PRESENT: SCUDDER, P.J., SMITH, GREEN, PINE, AND GORSKI, JJ. (Filed Dec. 30, 2010.)

KA 09-02481. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JEREMY YANTZ, ALSO KNOWN AS JEREMY S. YANTZ, 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 Genesee County Court, Robert C. Noonan, J. - Violation of Probation).
PRESENT: SCUDDER, P.J., SMITH, GREEN, PINE, AND GORSKI, JJ. (Filed Dec. 30, 2010.)