SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 10, 2011

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

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. JEROME C. GORSKI

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

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

1048

CA 10-00137

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

JEAN M. WALESKI, PLAINTIFF-RESPONDENT,

V ORDER

CITY OF SYRACUSE, SYRACUSE POLICE DEPARTMENT
AND SEAN CARLEO, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

JUANITA PEREZ WILLIAMS, CORPORATION COUNSEL, SYRACUSE (NANCY J. LARSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SIDNEY P. COMINSKY TRIAL LAWYERS, LLC, SYRACUSE (SIDNEY P. COMINSKY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered August 10, 2009 in a personal injury action. The order, insofar as appealed from, denied the motion of defendants for summary judgment and granted the cross motion of plaintiff for leave to amend her complaint.

Now, upon reading and filing the stipulation of discontinuance of appeal signed by the attorneys for the parties on December 21, 2010,

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

All concur except PINE, J., who is not participating.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1287

CA 10-00545

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

HAHN AUTOMOTIVE WAREHOUSE, INC.,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

AMERICAN ZURICH INSURANCE COMPANY AND
ZURICH AMERICAN INSURANCE COMPANY,
DEFENDANTS-RESPONDENTS-APPELLANTS.

THE WOLFORD LAW FIRM LLP, ROCHESTER (MICHAEL R. WOLFORD OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

DAMON MOREY LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered June 15, 2009 in a breach of contract action. The order, among other things, granted plaintiff's cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by granting those parts of the motion seeking summary judgment dismissing the second through fourth causes of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this breach of contract action seeking, inter alia, a determination that bills sent by defendants to plaintiff pursuant to several insurance contracts issued to plaintiff by defendants were time-barred and thus that plaintiff had no duty to pay those bills. In their second amended answer, defendants asserted 19 counterclaims seeking to recover damages for plaintiff's alleged breach of those insurance contracts. Defendants moved for, inter alia, a determination that they were entitled to satisfy any part of plaintiff's outstanding debt from a $400,000 letter of credit previously issued to them by plaintiff, and plaintiff cross-moved for partial summary judgment determining, inter alia, that any amounts sought by defendants in the counterclaims were time-barred. Logically addressing first plaintiff's cross motion, we note that Supreme Court granted those parts seeking dismissal of the counterclaims as time-barred insofar as they sought recovery for debts arising more than six years prior to the commencement of this action. The court also, however, granted that part of defendants' motion seeking a determination that defendants were entitled to satisfy any part of plaintiff's outstanding debt from a $400,000 letter of credit previously issued to them by plaintiff, notwithstanding the expiration

of the statute of limitations.

We reject the contention of plaintiff on its appeal that the court erred in determining that defendants were entitled to apply the letter of credit to all debts, including those that were time-barred. A letter of credit is interpreted in accordance with the same rules that apply to any other contract (*see Venizelos, S.A. v Chase Manhattan Bank*, 425 F2d 461, 465-466), and "[a] familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162). Contrary to plaintiff's contention, the letter of credit unequivocally permitted defendants to apply the letter of credit to any debts that plaintiff owed to defendants. The letter of credit did not permit plaintiff to direct the particular debt to which the letter of credit should be applied, nor did it prohibit defendants from using the letter of credit to satisfy otherwise time-barred debts. Furthermore, plaintiff provided the letter of credit well before the current controversy arose. Thus, because "the payment in question [was] already in the creditor[s'] possession as security for a debt . . ., the money already belong[ed] to the creditor[s] and [they were entitled to] apply it to the obligation in any manner" that they chose (*Lines v Bank of Am. Nat'l Trust & Sav. Assn.*, 743 F Supp 176, 180 n 2). Contrary to plaintiff's further contention, plaintiff could not set conditions upon the use of the letter of credit after it had been provided to defendants. As previously noted, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc.*, 77 NY2d at 162), and the letter of credit at issue specifically stated that it "cannot be modified or revoked without [defendants'] consent."

With respect to plaintiff's contention that defendants could not apply the letter of credit to the debts that arose prior to the expiration of the statute of limitations, we note the well-settled proposition that "[t]he expiration of the time period prescribed in a [s]tatute of [l]imitations does not extinguish the underlying right, but merely bars the remedy . . . Nicely summarized elsewhere, '[t]he theory of the statute of limitations generally followed in New York is that the passing of the applicable period does not wipe out the substantive right; it merely suspends the remedy' " (*Tanges v Heidelberg N. Am.*, 93 NY2d 48, 55; *see Matter of Paver & Wildfoerster [Catholic High School Assn.]*, 38 NY2d 669, 676). Notably, plaintiff does not contend that the debts at issue are not due and owing. Thus, despite the expiration of the statute of limitations with respect to those debts, defendants were entitled to apply the letter of credit to them.

Contrary to the contention of defendants on their cross appeal, however, the court properly concluded that the counterclaims for any debt that arose more than six years prior to the commencement of this action were time-barred. The contention of defendants that the claims

for those debts did not accrue until they made a demand for payment is without merit. " 'Where, as here, the claim is for payment of a sum of money allegedly owed pursuant to a contract, the cause of action accrues when the [party making the claim] possesses a legal right to demand payment' " (*Minskoff Grant Realty & Mgt. Corp. v 211 Mgr. Corp.*, 71 AD3d 843, 845; *see Kingsley Arms, Inc. v Copake-Taconic Hills Cent. School Dist.*, 9 AD3d 696, 698, *lv dismissed* 3 NY3d 767; *Albany Specialties v Shenendehowa Cent. School Dist.*, 307 AD2d 514, 516; *Town of Brookhaven v MIC Prop. & Cas. Ins. Corp.*, 245 AD2d 365, *lv denied* 92 NY2d 806). Thus, in such a case, the statute of limitations "begins to run when the right to make the demand for payment is complete, and the [party making the claim] will not be permitted to prolong the [s]tatute of [l]imitations simply by refusing to make a demand" (*State of New York v City of Binghamton*, 72 AD2d 870, 871). Here, the court properly determined that the counterclaims for payment of the debts at issue were time-barred because defendants had the right to demand payment for those debts more than six years prior to the commencement of this action. That conclusion does not, however, prevent defendants from applying the letter of credit, which plaintiff had previously provided to them, to any debt, including those debts that are time-barred, inasmuch as the expiration of the statute of limitations merely bars the remedy but does not extinguish defendants' rights.

We agree with the further contention of defendants on their cross appeal that those parts of their motion for summary judgment dismissing the second through fourth causes of action seeking damages arising from their use of the letter of credit should have been granted. Indeed, we note that the court properly determined that those causes of action were without merit, but it did not expressly dismiss them. We therefore modify the order accordingly.

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

All concur except PERADOTTO, J., who dissents in part and votes to modify in accordance with the following Memorandum: I respectfully dissent in part. I cannot agree with the majority that Supreme Court properly determined that defendants' breach of contract counterclaims for any debt that arose more than six years prior to the commencement of the action are time-barred. Rather, in my view, those counterclaims did not accrue until defendants demanded, and plaintiff refused to pay, premiums and other amounts owed under insurance contracts issued by defendants. I therefore would further modify the order by denying plaintiff's cross motion and granting those parts of defendants' motion seeking summary judgment determining that none of defendants' counterclaims is barred by the statute of limitations and by dismissing plaintiff's third affirmative defense asserting that the counterclaims in question are time-barred.

The facts of this case are largely undisputed, although I note that the underlying insurance contracts are somewhat complex. Plaintiff and defendants entered into several contracts for workers' compensation insurance, general liability insurance, and business

automobile insurance from 1992 through 2003. Beginning in 1997, defendants also began providing claim services in connection with automobile physical damage claims for which plaintiff was self-insured. Plaintiff purchased four types of policies that are relevant to this matter: (1) retrospective premium policies, (2) adjustable deductible policies, (3) deductible policies, and (4) claim services contracts. Each of the policies provided for the payment of an initial premium, deductible or fee that was subsequently adjusted based upon actual losses or expenses. Several of the policies were subject to a Retrospective Premium Agreement, pursuant to which plaintiff's initial premiums were based upon estimated exposures and losses under the policies. The premiums were recalculated 18 months after the inception of the policy and annually thereafter, based upon audited exposures and actual claims experience. Plaintiff was required to pay an additional premium if the recalculated premium exceeded the estimated amount, while plaintiff was entitled to a refund if the recalculated premium was below the estimated amount. Of particular relevance to the instant matter, the Retrospective Premium Agreement provided that "*the Insured shall pay to the Company within ten (10) days of receipt of its demand therefor[]*, Earned Retrospective Premium based upon Incurred Losses valued as [o]f a date six (6) months after the expiration of each such period, as soon as practicable after such valuation. Additional Earned Retrospective Premium Adjustments shall be computed by the Company based upon Incurred Losses valued annually thereafter as soon as practicable after such valuation dates, *payable within ten (10) days of receipt of its demand therefor[]*" (emphases added).

The deductible policies were subject to a Deductible Agreement, pursuant to which plaintiff was required to pay a deductible of $250,000 per occurrence or accident, as well as allocated loss adjustment expenses and a variable fee factor. The Deductible Agreement similarly provided for an initial adjustment 18 months after the inception of the policies and then at yearly intervals thereafter. With respect to payment, the Deductible Agreement provided that "*[t]he Insured shall pay to the Company within twenty (20) days of its demand* in the manner set forth in this Agreement: a) All paid losses and all reserves as determined and established by the Company plus an allowance for losses incurred but not reported, within the Deductible Amounts, and b) All payments for Allocated Loss Adjustment Expense made by the Company and all reserves for Allocated Loss Adjustment Expense plus an allowance for expenses incurred but not reported, as established and determined by the Company . . ., and c) All other insurance related expenses, assessments, taxes, fines or penalties which are charged or assessed by any administrative, regulatory or governmental authority or court of competent jurisdiction as a direct liability against any policy listed" in another portion of the Agreement. The Claim Services Contracts likewise provided for the payment of estimated fees during the terms of the agreements, with a final reconciliation to be performed 12 months after the expiration of each agreement. Under those contracts, "[plaintiff]'s payment was then due within [30] days of receipt of the invoice from [defendants]."

In 2005, defendants initiated a "deductible reconciliation program," pursuant to which they reviewed all of their deductible programs and their general ledger to determine whether there were any discrepancies. During the course of that reconciliation, defendants discovered that they had neglected to bill plaintiff for losses, expenses or fees for which plaintiff was responsible under its business automobile and general liability coverage policies for the policy year from September 30, 1995 through September 30, 1996. On April 25, 2005, defendants issued an invoice to plaintiff in the amount of $1,123,874.27 based upon loss and expense payments made by defendant beginning September 30, 1995, when the policies in question went into effect. In early 2006, defendants further discovered that they had failed to bill plaintiff for any of the amounts for which plaintiff was responsible under the Claim Services Contracts. They thus issued an invoice to plaintiff on March 27, 2006 in the amount of $71,615.71, representing amounts due under those contracts from March 1997 until February 2006. Plaintiff did not pay either of the invoices.

Defendants also issued two "adjustment" invoices to plaintiff. When a new senior underwriter for defendants assumed responsibility for plaintiff's account in 2005, she learned that plaintiff had not paid any of the 1998, 1999 or 2003 adjustment invoices prepared by defendants. Plaintiff's insurance agent indicated that plaintiff had not paid any of those adjustments because plaintiff did not understand them. Defendants' underwriter then voided those three invoices and performed a new adjustment, taking into account losses and expenses incurred from March 31, 1995, the date of the prior undisputed adjustment, through March 31, 2005. The result was a March 2, 2006 adjustment invoice in the amount of $751,514. Plaintiff responded to that adjustment invoice by letter, asserting that, "[a]lthough there may be no dispute as to the amounts that have been invoiced by [defendants], it is also evident that these amounts would appear to be uncollectible and that any attempt to collect these amounts through legal proceedings would be barred by the statute of limitations. Therefore, we do not believe that there is any basis for [defendants] to claim that the invoiced amounts are owed by [plaintiff]." Defendants then issued a second adjustment invoice to plaintiff dated June 2, 2006, which reflected adjustments to policies subject to retrospective premium agreements and adjustable deductible policies as of March 31, 2006. Although the March 31, 2006 adjustment resulted in a refund to plaintiff of $262,480, defendants did not remit that amount to plaintiff inasmuch as plaintiff's outstanding obligations exceeded the amount of its refund.

Plaintiff commenced this breach of contract action seeking, inter alia, a determination that it had no duty to pay the invoices issued by defendants because any claim for the amounts owed was time-barred. In their second amended answer, defendants asserted 19 counterclaims seeking to recover damages for plaintiff's alleged breach of the insurance contracts. In its reply to the counterclaims, plaintiff asserted various affirmative defenses, including that defendants' counterclaims, in whole or in part, were barred by the statute of limitations.

Thereafter, defendants moved for, inter alia, a determination that plaintiff owed them the amounts set forth in the four invoices and that the statute of limitations did not bar any of their counterclaims. Defendants also sought dismissal of plaintiff's third affirmative defense, in which plaintiff asserted that the counterclaims "are barred, in whole or in part, by the applicable statute of limitations." Plaintiff cross-moved for partial summary judgment determining, inter alia, that any amounts sought by defendants in the counterclaims were time-barred to the extent that they could have been billed to plaintiff more than six years before the commencement of this action. The court granted plaintiff's cross motion, concluding that "the statute of limitations has run as to all claims for which [defendants] had the right to demand payment more than six years prior to the commencement of this action." In my view, that was error.

It is well settled that "[t]he [s]tatute of [l]imitations begins to run once a cause of action accrues (CPLR 203 [a]), that is, when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court" (*Aetna Life & Cas. Co. v Nelson*, 67 NY2d 169, 175). Thus, "[i]n contract cases, the cause of action accrues and the [s]tatute of [l]imitations begins to run from the time of the breach" (*John J. Kassner & Co. v City of New York*, 46 NY2d 544, 550; *see LaGreca v City of Niagara Falls*, 244 AD2d 862, *lv denied* 91 NY2d 813; *Micha v Merchants Mut. Ins. Co.*, 94 AD2d 835, 835-836).

Supreme Court and the majority herein rely on a line of cases holding that a breach of contract action accrues when the party making the claim possesses a legal right to demand payment (*see e.g. Kingsley Arms, Inc. v Copake-Taconic Hills Cent. School Dist.*, 9 AD3d 696, 698, *lv dismissed* 3 NY3d 767; *Albany Specialties v Shenendehowa Cent. School Dist.*, 307 AD2d 514, 516). However, those cases are inapposite inasmuch as they involve contracts pursuant to which the plaintiff contractors were entitled to payment upon completion or substantial completion of the work. In *Kingsley Arms* (9 AD3d at 698), for example, the court held that the plaintiff's breach of contract cause of action accrued when the plaintiff "requested and was refused a certificate of substantial completion and was told that it would 'not be paid the balance of the money owed on the project.' " At that point, or shortly thereafter, "the breach of contract had occurred and plaintiff's damages were clearly ascertainable . . . ." (*id.*).

Here, by contrast, each of the insurance contracts explicitly provided that plaintiff's obligation to pay was contingent upon "notice" or a "demand" by defendants. "[A]s a general rule, when the right to final payment is subject to a condition, the obligation to pay arises and the cause of action accrues[] only when the condition has been fulfilled" (*John J. Kassner & Co.*, 46 NY2d at 550). Under the express language of the contracts at issue in this case, plaintiff's obligation to pay the retrospective premiums, adjustable deductibles and other fees arose – and defendants' breach of contract counterclaims accrued – only after defendants demanded payment thereof

and plaintiff refused to pay (*see generally Russack v Weinstein*, 291 AD2d 439, 440-441). Although the insurance policies required defendants to make periodic adjustments, plaintiff's payment obligation was not triggered until defendants provided plaintiff with an invoice or other demand for reimbursement. Thus, the contracts at issue were not breached, and defendants' counterclaims did not accrue, until defendants calculated the necessary adjustments, sent an invoice to plaintiff, and plaintiff refused to pay the amounts due.

Indeed, numerous federal and state courts confronting retrospective premium and adjustable deductible policies similar to those at issue here have concluded that the relevant date, for statute of limitations purposes, is when the invoices were sent and the recipient failed or refused to pay (*see e.g. National Union Fire Ins. Co. of Pittsburgh, Pa. v LSB Indus., Inc.*, 296 F3d 940; *Continental Ins. Co. v Coyne Intl. Enter. Corp.*, 700 F Supp 2d 207, 212-213; *Potomac Ins. Co. of Ill. v Richmond Home Needs Servs., Inc.*, 2006 WL 2521283, *2; *Liberty Mut. Ins. Co. v Precision Valve Corp.*, 402 F Supp 2d 481; *Brookshire Grocery Co. v Bomer*, 959 SW2d 673; *Commissioners of State Ins. Fund v SM Transp. Ltd.*, 11 Misc 3d 1083[A], 2006 NY Slip Op 50677[U]). As the court in *SM Trans. Ltd.* (2006 NY Slip Op 50677[U], *2) reasoned, "The [s]tatute of [l]imitations did not begin to run at the end of each policy period, but rather began to run at a point after contemplated adjustments to the premium were made pursuant to the audit . . . CPLR 213 began to run when the plaintiff's cause of action accrued . . ., and the plaintiff's cause of action accrued *when the defendant breached the terms of its policies by failing to pay premiums demanded after the audit*" (emphasis added).

The majority cites *State of New York v City of Binghamton* (72 AD2d 870, 871) for the proposition that a party "will not be permitted to prolong the [s]tatute of [l]imitations simply by refusing to make a demand." That case, however, did not involve a breach of contract; rather, it involved a statutory provision requiring the State to notify the City when a highway project was completed and requiring the City to pay any amount owed within 60 days thereafter (*id.* at 871). Thus, the Court concluded that, "[w]hile the required statutory notice was not given here until April 11, 1977, the cause of action accrued on April 19, 1971, 60 days after the conceded date of completion when there first existed the legal right to be paid" (*id.*).

Here, because the insurance contracts explicitly conditioned plaintiff's obligation to pay upon notice or a demand by defendants, defendants' breach of contract counterclaims did not accrue until plaintiff failed or refused to pay in accordance with defendants' demands (*see Russack*, 291 AD2d at 440-441; *Henry Boeckmann, Jr. & Assoc. v Board of Educ., Hempstead Union Free School Dist. No. 1*, 207 AD2d 773, 775; *see also Continental Cas. Co. v Stronghold Ins. Co., Ltd.*, 77 F3d 16, 21). Notably, in both *Continental* (77 F3d 16) and *Russack* (291 AD2d 439), the plaintiffs had a right to demand payment *several years* before they actually did so. Nevertheless, both the United States Court of Appeals for the Second Circuit and the Second Department held that this was of no moment for statute of limitations

purposes inasmuch as the plaintiffs' causes of action did not accrue until they provided notice to and/or demanded payment from the defendants.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1289

CA 10-00539

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

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

V MEMORANDUM AND ORDER

ROBERT M. CARRIER, INDIVIDUALLY AND AS OFFICER/AGENT OF LEGEND DEVELOPERS, LLC, ET AL., DEFENDANTS, DAVID L. VICKERS, INDIVIDUALLY AND AS OFFICER/AGENT OF LEGEND DEVELOPERS, LLC, AND LEGEND DEVELOPERS, LLC, DEFENDANTS-RESPONDENTS.

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

SAUNDERS KAHLER, L.L.P., UTICA (GREGORY J. AMOROSO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Brian F. DeJoseph, J.), entered December 14, 2009. The order, insofar as appealed from, granted in part the motion of defendants David L. Vickers, individually and as officer/agent of Legend Developers, LLC, and Legend Developers, LLC by dismissing plaintiffs' breach of warranty claims.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, the motion of defendants is denied in its entirety and any breach of warranty causes of action against defendants David L. Vickers, individually and as officer/agent of Legend Developers, LLC, and Legend Developers, LLC are reinstated.

Memorandum: Plaintiffs commenced these consolidated actions seeking damages arising from the allegedly negligent construction of the homes purchased by them in a housing development. Supreme Court granted defendants' pre-answer motion in part by dismissing any causes of action against David L. Vickers, individually and as officer/agent of Legend Developers, LLC, and Legend Developers, LLC (hereafter, Legend defendants) alleging breach of warranty based on the violation of General Business Law article 36-B. On appeal, plaintiffs contend that the court erred in granting that part of defendants' motion. We agree.

To the extent that section 777-a of the General Business Law, entitled "Housing merchant implied warranty," provides in subdivision (4) (a) that "[t]he owner[s] . . . shall afford the builder reasonable opportunity to inspect, test and repair the portion of the home to which the warranty claim relates," we conclude that such a requirement, unlike the written notice provision in the preceding sentence of that subdivision, is not a condition precedent to asserting a cause of action for breach of warranty. In further contrast to the written notice provision, the issue whether a "reasonable" opportunity has been afforded to a builder can be a fact-laden determination, the resolution of which prior to consideration of the merits of a claim in the context of a lawsuit would result in duplicative and unnecessary litigation. Further, although subdivision (4) (b) provides that an action for breach of a housing merchant implied warranty "may be commenced within one year after the last date on which such repairs are performed," there is no statutory language prohibiting the commencement of an action prior to such time. Indeed, as our concurring colleague agrees, that language merely acts as a toll in the event that a repair is commenced. We therefore conclude that the duty to afford a defendant an opportunity to inspect, test and repair an alleged defect is not a condition precedent to asserting a cause of action for breach of warranty, and we further conclude that the failure to afford a defendant such an opportunity may be asserted as an affirmative defense in response to such a cause of action.

Moreover, "[i]n order to prevail on a CPLR 3211 (a) (1) motion, the moving party must show that the documentary evidence [submitted in support thereof] conclusively refutes plaintiffs['] . . . allegations" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591; *see Kumar v American Tr. Ins. Co.*, 49 AD3d 1353, 1354), and defendants failed to meet that burden here. The letter from plaintiffs' counsel, upon which defendants relied in support of their motion with respect to breach of warranty, unambiguously offered the Legend defendants the opportunity to inspect and test the portions of the homes in question, as required by the statute. To the extent that the letter purports to deny the Legend defendants the opportunity to repair, we conclude that defendants failed to establish as a matter of law that the repair offer would have been sufficient to remedy the alleged defects (*see Hirshorn v Little Lake Estates*, 251 AD2d 377, 379). Thus, defendants failed to meet their initial burden in support of their motion with respect to any causes of action for breach of warranty against the Legend defendants (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

All concur except CARNI, J., who concurs in the result in the following Memorandum: I respectfully disagree with the conclusion of my colleagues that the legislative intent is unclear with respect to whether the "reasonable opportunity to inspect, test and repair" requirement of General Business Law § 777-a (4) (a) is a condition precedent to the commencement of an action alleging breach of warranty based on the violation of General Business Law article 36-B. In my view, the Legislature intended the requirement to be a condition precedent. Inasmuch as I agree with my colleagues that defendants failed to meet their burden on their pre-answer motion of establishing

that plaintiffs failed to provide a reasonable opportunity to inspect and test the portions of the homes in question prior to the commencement of this action, I concur in the result reached by my colleagues.

General Business Law § 777-a (4) (a) provides that "[w]ritten notice of a warranty claim for breach of a housing merchant implied warranty must be received by the builder prior to the commencement of any action under . . . subdivision [(4) (b)] . . . The owner and occupant of the home *shall* afford the builder reasonable opportunity to inspect, test and repair the portion of the home to which the warranty claim relates" (emphasis added). Subdivision (4) (b) of the statute provides that, "[i]f the builder makes repairs in response to a warranty claim under . . . subdivision [(4) (a)], an action with respect to such claim may be commenced within one year after the last date on which such repairs are performed." Subdivision (4) (b) essentially extends or tolls the period of limitations for an action on the housing merchant implied warranty if repairs are made by the builder. It simply makes no sense that the Legislature would intend that the "reasonable opportunity," inter alia, to repair would be afforded after an action has been commenced. Once litigation has begun, the parties' relationship has deteriorated, costs have been incurred and judicial resources have been consumed. Likewise, there would be no purpose to the requirement that the owner *shall* serve the builder with written notice of a warranty claim if a "reasonable opportunity" to remedy the defect was not contemplated by the Legislature prior to commencement of an action on the warranty. The extension or tolling of the period of limitations until the last repair has been made is clearly part of the Legislature's intent to require the parties to utilize the statutory written notice and "reasonable opportunity" mechanism as a means to avoid litigation. Moreover, once litigation has commenced, CPLR article 31 discovery devices provide the builder with adequate statutory means, inter alia, to inspect and test the portion of the home to which the warranty claim relates (*see* CPLR 3120 [1] [ii]). Thus, subdivision (4) (a) would be redundant if the inspection and testing was intended to take place after an action had been commenced on the warranty. While the nature and scope of the "reasonable opportunity" is not precisely defined in the statute, that lack of specificity is no barrier to the conclusion that the "reasonable opportunity" was intended to be afforded prior to the commencement of the action and is therefore a condition precedent to the commencement of an action. It goes without saying that statutes are often revised by the Legislature over the course of time, and perhaps the Legislature will see fit to adding a specific definition of "reasonable opportunity" or a precise waiting period after service of the notice of claim before an action may be commenced (*see e.g.* General Municipal Law § 50-i [1]). Nevertheless, the current absence of such a definition should not preclude us from performing our duty to construe and interpret the statute such that our construction thereof is "the one which more nearly carries out what appears to be the general legislative design on the subject" (*People ex rel. Cohen v Rattigan*, 157 NYS 1003, 1007 [Bronx County Ct

1915], *affd* 172 App Div 957).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1392

CA 10-01223

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

WILLIAM MORAN AND WENDY MORAN,
PLAINTIFFS-RESPONDENTS,

V ORDER

CITY OF SYRACUSE, DEFENDANT,
CONDREN REALTY MANAGEMENT CORP., SYRACUSE
INTOWN HOUSES, INC., AND TOWNSEND TOWER
ASSOCIATES, DEFENDANTS-APPELLANTS.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (MAUREEN G. FATCHERIC OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FINKELSTEIN & PARTNERS LLP, NEWBURGH (GEORGE A. KOHL, II, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered February 23, 2010 in a personal injury action. The order denied the motion of defendants Condren Realty Management Corp., Syracuse Intown Houses, Inc., and Townsend Tower Associates for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 3, 2011,

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

All concur except PINE, J., who is not participating.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1395

CA 10-00442

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

ROBERT GREEN AND KERRY GREEN,
PLAINTIFFS-RESPONDENTS,

V ORDER

C.O. FALTER CONSTRUCTION CORP., CITY OF
BUFFALO SEWER AUTHORITY AND CITY OF
BUFFALO, DEFENDANTS-APPELLANTS.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (AMY L. DIFRANCO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COLLINS & BROWN, LLP, BUFFALO (CHARLES H. COBB OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 6, 2010. The order, insofar as appealed from, denied in part the cross motion of defendants for summary judgment.

Now, upon the stipulation of discontinuance of action signed by the attorneys for the parties on November 30 and December 3, 2010, and filed in the Erie County Clerk's Office on January 12, 2011,

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

All concur except PINE, J., who is not participating.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1483

CA 10-01300

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

RANDALL K. BEST AND CORINNE BEST,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SWAN GROUP LIMITED PARTNERSHIP, SWAN GROUP LIMITED PARTNERSHIP, DOING BUSINESS AS ELLICOTT PARKING, AND ELLICOTT DEVELOPMENT COMPANY, LLC,
DEFENDANTS-APPELLANTS.

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

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

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered January 6, 2010 in a personal injury action. The order, among other things, set aside the jury's verdict on the issue of damages and ordered a new trial on that issue.

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

Memorandum: Supreme Court properly granted plaintiffs' motion to set aside the verdict on damages and for a new trial (*see* CPLR 4404 [a]). The record establishes that the court failed to instruct the jury to disregard its apportionment of fault in calculating the amount of damages (*see* PJI 2:36.2). That error was so fundamental as to preclude a proper consideration of the issue of damages (*see Hoffman v Domenico Bus Serv.*, 183 AD2d 807; *see generally Kelly v Tarnowski*, 213 AD2d 1054). Consequently, the court properly determined that a new trial limited to the issue of damages is appropriate (*see Flanagan v Southside Hosp.*, 251 AD2d 447, 448-449; *Hoffman*, 183 AD2d 807; *McStocker v Kolment*, 160 AD2d 980, 981). Finally, we note that defendants are correct in contending that "the use of [juror] affidavits for the purpose of exploring the deliberative processes of the jury and impeaching its verdict is patently improper" (*Hoffman*, 183 AD2d at 808; *see Phelinger v Krawczyk*, 37 AD3d 1153; *see generally Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 460), and we therefore have not considered the juror affidavits contained in the record in

reaching our determination.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1484

CA 10-01081

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

ROBIN CUSTODI AND JOHN CUSTODI,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF AMHERST, ET AL., DEFENDANTS,
PETER MUFFOLETTO AND SUSAN MUFFOLETTO,
DEFENDANTS-RESPONDENTS.

ANDREWS, BERNSTEIN & MARANTO, LLP, BUFFALO (ROBERT J. MARANTO, JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

WATSON, BENNETT, COLLIGAN & SCHECHTER, LLP, BUFFALO (JOEL B. SCHECHTER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered February 24, 2010 in a personal injury action. The order granted the motion of defendants Peter Muffoletto and Susan Muffoletto for summary judgment dismissing plaintiffs' complaint against them.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is denied and the complaint against defendants Peter Muffoletto and Susan Muffoletto is reinstated.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Robin Custodi (plaintiff) while rollerblading on Countryside Lane in defendant Town of Amherst. Plaintiff allegedly tripped over a two-inch height differential between the apron at the end of a driveway owned by Peter Muffoletto and Susan Muffoletto (defendants) and a culvert or "C curb" (hereafter, curb) that separated the driveway from the public roadway. We agree with plaintiffs that Supreme Court erred in granting the motion of defendants seeking summary judgment dismissing the complaint against them based on the doctrine of primary assumption of the risk. "Under [that] doctrine . . ., a person who voluntarily participates in a sporting activity generally consents, by his or her participation, to those injury-causing events, conditions[] and risks [that] are inherent in the activity" (*Cotty v Town of Southampton*, 64 AD3d 251, 253; *see generally Morgan v State of New York*, 90 NY2d 471, 483-486; *Turcotte v Fell*, 68 NY2d 432, 438-440). The policy underlying the doctrine of primary assumption of the risk is "to facilitate free and vigorous participation in athletic activities" (*Benitez v New York*

City Bd. of Educ., 73 NY2d 650, 657; *see Anand v Kapoor*, 61 AD3d 787, 792, *affd* ___ NY3d ___ [Dec. 21, 2010]). The Court of Appeals has emphasized "that athletic and recreative activities possess enormous social value, even while they involve significantly heightened risks[] and [that the Court has] employed the notion that [the] risks may be voluntarily assumed to preserve [those] beneficial pursuits as against the prohibitive liability to which they would otherwise give rise. [The Court has] *not applied the doctrine outside of [that] limited context[,] and it is clear that its application must be closely circumscribed if it is not seriously to undermine and displace the principles of comparative causation*" (*Trupia v Lake George Cent. School Dist.*, 14 NY3d 392, 395 [emphasis added]).

We conclude that, under the circumstances of this case, the doctrine of primary assumption of the risk does not apply to the activity in which plaintiff was engaged at the time of her injury (*see Lauricella v Friol*, 46 AD3d 1459). On the day of the accident, plaintiff was rollerblading along Countryside Lane when she encountered an ice cream truck that had stopped in the roadway. To avoid the truck, plaintiff rollerbladed onto the sidewalk and thereafter attempted to re-enter the roadway using defendants' driveway. As she rollerbladed down the driveway, plaintiff looked to her left and to her right for oncoming traffic. Her foot then struck or caught something, and she tripped and fell at the edge of defendants' driveway. The evidence submitted by defendants in support of their motion established that plaintiff was an experienced rollerblader and that she was aware that tripping and falling are risks inherent in the activity, which are increased when rollerblading on uneven surfaces such as sidewalks. Defendants also submitted evidence, however, establishing that plaintiff had not rollerbladed on Countryside Lane prior to the date of the accident, that she did not observe the height differential between defendants' driveway apron and the curb prior to falling and that, in her prior rollerblading experience, she had not encountered a height differential of similar dimension. Thus, it cannot be said that the height differential between defendants' driveway apron and the curb was a "known, apparent or reasonably foreseeable consequence[]" of rollerblading on a paved roadway, sidewalk, or driveway (*Turcotte*, 68 NY2d at 439), nor can it be said "that plaintiff was aware of the [height differential] and the resultant risk" presented thereby (*Lamey v Foley*, 188 AD2d 157, 164). To the contrary, we conclude that the height differential between defendants' driveway apron and the curb " 'created a dangerous condition over and above the usual dangers that are inherent in the sport' " of rollerblading (*Morgan*, 90 NY2d at 485; *see Cotty*, 64 AD3d at 257; *see also Trupia*, 14 NY3d at 396; *Quackenbush v City of Buffalo*, 43 AD3d 1386, 1388-1389; *Andrews v County of Onondaga*, 298 AD2d 837). In other words, the risk of falling on improperly maintained premises is not a risk that is inherent in the activity undertaken by plaintiff in this case (*see Weller v Colleges of the Senecas*, 217 AD2d 280, 282-284; *see generally Morgan*, 90 NY2d at 484).

We cannot agree with defendants that the height differential between their driveway apron and the curb was an open and obvious

condition and that they are thereby absolved of liability. It is well settled that "the open and obvious nature of the allegedly dangerous condition . . . does not negate the duty to maintain [the] premises in a reasonably safe condition but, [instead], bears only on the injured person's comparative fault" (*Konopczynski v ADF Constr. Corp.*, 60 AD3d 1313, 1315 [internal quotation marks omitted]; *see Cupo v Karfunkel*, 1 AD3d 48, 52). In any event, we conclude that there is a triable issue of fact whether the height differential was open and obvious (*see Quackenbush*, 43 AD3d at 1388-1389; *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72).

We further conclude that there is a triable issue of fact whether the height differential was a proximate cause of the accident and plaintiff's resulting injuries. " 'As a general rule, issues of proximate cause are for the trier of fact' " (*Bucklaew v Walters*, 75 AD3d 1140, 1142). In support of their motion, defendants submitted the deposition testimony of plaintiff, who testified that, at the time of the accident, she did not know what caused her to fall. In opposition to the motion, however, plaintiffs submitted an affidavit in which plaintiff averred that, prior to entering the roadway, she felt one of her rollerblades strike something at the end of defendants' driveway apron that felt like a change in elevation and propelled her into the street. Plaintiff further averred that she did not observe any condition at the site of the accident, other than the height differential between the driveway apron and the curb, that could have caused her to fall. Thus, the record contains sufficient facts from which a factfinder could reasonably infer that the height differential caused the accident and plaintiff's resulting injuries (*see Bulman v P & R Enter.*, 17 AD3d 1139, 1140; *see also Belles v United Church of Warsaw*, 66 AD3d 1470).

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

All concur except MARTOCHE, J.P., and SMITH, J., who dissent and vote to affirm in the following Memorandum: We agree with Supreme Court that the doctrine of primary assumption of risk bars plaintiffs' recovery. We therefore respectfully dissent and would affirm the order granting the motion of defendants for summary judgment dismissing the complaint against them.

Plaintiff, who testified at her deposition that she was an experienced rollerblader whose skill level was "between intermediate and advanced," was rollerblading in the street near defendants' house. An ice cream truck blocked plaintiff's path and, although plaintiff was aware that the sidewalk was "bumpier" than the street, with cracks and elevation differentials between the concrete slabs, she chose to rollerblade on the sidewalk instead of crossing the street or waiting for the truck to move. As she re-entered the street, she fell when her rollerblade hit a raised lip where defendants' driveway met the street.

"One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a

fencer accepts the risk of a thrust by his [or her] antagonist or a spectator at a ball game the chance of contact with the ball . . . A different case would be here if the dangers inherent in the sport were obscure or unobserved . . ., or so serious as to justify the belief that precautions of some kind must have been taken to avert them" (*Murphy v Steeplechase Amusement Co.*, 250 NY 479, 482-483; *see Morgan v State of New York*, 90 NY2d 471, 482-483). "Awareness of the risk assumed is 'to be assessed against the background of the skill and experience of the particular plaintiff' " (*Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 657, quoting *Maddox v City of New York*, 66 NY2d 270, 278). Furthermore, "[i]t is not necessary to the application of [the doctrine of primary] assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results" (*Maddox*, 66 NY2d at 278).

Here, given plaintiff's advanced skill level with respect to rollerblading and the choice of plaintiff to rollerblade on a surface that she knew to be uneven and bumpy, we conclude that she "assumed the risks inherent in the sport of roller[]blading, as well as those arising from the open and obvious condition of the [sidewalk and driveway] on which [she] was traveling" (*Sorice v Captree Homes*, 250 AD2d 755; *see Mor v Yeshiva Yesode Hatorah Nachlals Yakov*, 256 AD2d 393).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1491

KA 06-03311

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

PIERRE D. COSBY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered August 21, 2006. The judgment convicted defendant, upon a jury verdict, of rape in the first degree and menacing in the second degree (two counts).

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

Opinion by CENTRA, J.P.:

I

In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of rape in the first degree (Penal Law § 130.35 [1]) and two counts of menacing in the second degree (§ 120.14 [1]). In appeal No. 2, defendant appeals with permission of a Justice of this Court from an order denying his CPL 440.10 motion to vacate the judgment of conviction in appeal No. 1. The primary issue on appeal is whether defendant was denied effective assistance of counsel based on defense counsel's failure to advise defendant that defendant, rather than defense counsel, had the final decision whether to testify on his own behalf at trial. We agree with Supreme Court that defendant was not denied effective assistance of counsel, and we therefore conclude that the judgment in appeal No. 1 and the order in appeal No. 2 should be affirmed.

II

Defendant was charged with, inter alia, rape in the first degree based on his allegedly having had forcible sexual intercourse with the victim. At trial, the victim testified that she was staying overnight at her cousin's apartment when defendant came over. The victim testified that defendant punched her and then raped her while pointing

a gun at her. The People also presented evidence that DNA from a vaginal swab taken from the victim matched defendant's DNA. Defendant did not call any witnesses, and the record is devoid of any indication whether defendant wished to testify. As noted, the jury convicted him of, inter alia, rape in the first degree.

Appellate counsel was assigned to perfect defendant's appeal and moved pursuant to CPL 440.10 to vacate the judgment of conviction on the ground that defendant was denied effective assistance of counsel based on, inter alia, defense counsel's failure to advise defendant that it was his decision whether or not to testify at trial. Supreme Court held a hearing at which defendant's trial attorney, defendant, and several members of defendant's family testified. Defendant testified that he explained to his trial attorney what had occurred on the night in question, i.e., that he received a telephone call from the victim and told her that he would come see her. Upon arriving at the apartment, defendant had consensual sexual intercourse with the victim, and they again had sexual intercourse in a park after taking a walk outside, whereupon defendant walked the victim back to the apartment and left. According to defendant, he and the victim previously had consensual sexual intercourse on numerous occasions.

At the conclusion of the hearing, the court found that the evidence established that defendant told his trial attorney of his desire to testify and that his trial attorney advised him not to do so, but that the trial attorney failed to advise defendant that the decision to testify was his alone. The court denied the motion, however, relying on its additional finding that defendant failed to establish that he would have testified at trial to his version of the events on the night in question.

III

Addressing first appeal No. 2, we note that defendant contends that the testimony elicited at the CPL article 440 hearing establishes that he was denied effective assistance of counsel. We reject that contention.

As previously noted, the court found at the conclusion of the CPL article 440 hearing that defendant established that he had informed his trial attorney that he wished to testify and that his trial attorney advised him not to do so. In addition, the court found that the trial attorney did not advise defendant that he, not she, had the final say in that regard. We afford deference to the court's findings of fact, which are supported by the record (*see People v Whitfield*, 72 AD3d 1610, *lv denied* 15 NY3d 811; *People v Johnson*, 17 AD3d 932, 933, *lv denied* 5 NY3d 790).

It is well settled that, in New York, a defendant receives effective assistance of counsel "[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147). In determining whether a defendant received effective assistance of

counsel, we must consider " 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result' " (*People v Henriquez*, 3 NY3d 210, 229 [G.B. Smith, J., dissenting], quoting *Strickland v Washington*, 466 US 668, 686, *reh denied* 467 US 1267).

Regarding a defendant's right to testify, it is beyond cavil that "a criminal defendant has a constitutional right to testify in his [or her] own behalf at trial" (*United States v Teague*, 953 F2d 1525, 1530, *cert denied* 506 US 842; *see United States v Dunnigan*, 507 US 87, 96; *Rock v Arkansas*, 483 US 44, 51-52). The fundamental decision whether to testify at trial is reserved to the defendant, not defense counsel (*see Jones v Barnes*, 463 US 745, 751; *People v Ferguson*, 67 NY2d 383, 390). The trial court has no obligation to inform a defendant of his or her right to testify or to ascertain if the failure to testify was a voluntary and intelligent waiver of his or her right to do so (*see People v Fratta*, 83 NY2d 771, 772; *People v Dolan*, 2 AD3d 745, 746, *lv denied* 2 NY3d 798). The issue here, however, is whether a defendant's attorney has a duty to advise the defendant of his or her right to testify, even against the advice of the attorney. We conclude that the attorney does have that duty.

"[T]rial counsel's duty of effective assistance includes the responsibility to advise the defendant concerning the exercise of [the] constitutional right" to testify at trial (*Brown v Artuz*, 124 F3d 73, 74, *cert denied* 522 US 1128; *see People v Carpenter*, 52 AD3d 729, *lv denied* 11 NY3d 830; *People v Perry*, 266 AD2d 151, 152, *lv denied* 95 NY2d 856). In addition to informing the defendant that he or she has the right to testify at trial, in the event that the attorney advises the defendant not to testify, the attorney must also inform the defendant that the ultimate decision whether to testify is the defendant's alone (*see Brown*, 124 F3d at 79; *Teague*, 953 F2d at 1533). Without receiving such advice, a defendant may erroneously believe that the decision whether to testify is one of the many decisions over which the defendant's attorney has control (*see generally Ferguson*, 67 NY2d at 390).

The People contend that "the law should not, as a matter of sound public policy, place the burden of affirmatively telling a client that the client can ignore defense counsel's advice upon a defense attorney." We reject that contention. Rather, we conclude that it is indeed sound public policy for defense counsel to notify a defendant that he or she has a fundamental right to testify on his or her own behalf and that the decision whether to testify rests with defendant, not counsel. Of course, defense counsel should still render advice to defendant concerning whether a good trial strategy would warrant testifying on his or her own behalf. But we cannot stress enough that defense counsel should make it clear to the defendant that it is the defendant, not counsel, who has the final word on the matter. The imposition of such a duty on defense counsel is consistent with the Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.2 (a), which provides in relevant part that, "[i]n a criminal case, the lawyer shall abide by the client's decision, after consultation with the

lawyer, as to . . . whether the client will testify." We thus agree with the court that defense counsel erred in this case by failing to advise defendant that the final decision whether to testify was defendant's to make.

We further agree with the court, however, that this single error by defense counsel did not deprive defendant of effective assistance of counsel. A single error by defense counsel may constitute ineffective assistance, but a court must examine defense counsel's entire representation of the defendant (*see People v Flores*, 84 NY2d 184, 188). Although rare, "there may be cases in which a single failing in an otherwise competent performance [may be] so 'egregious and prejudicial' as to deprive a defendant of his [or her] constitutional right" to effective assistance of counsel (*People v Turner*, 5 NY3d 476, 480; *see People v Caban*, 5 NY3d 143, 152). Stated differently, "[w]here a single, substantial error by counsel so seriously compromises a defendant's right to a fair trial, it will qualify as ineffective representation" (*People v Hobot*, 84 NY2d 1021, 1022).

We conclude under the circumstances of this case that defense counsel's failure to advise defendant that the decision whether to testify was his alone to make was not so egregious and prejudicial as to deprive defendant of his constitutional right to effective assistance of counsel (*see generally Turner*, 5 NY3d at 480). Upon our review of the transcript of the CPL article 440 hearing, we agree with the court that defendant failed to prove that he would have given relevant testimony at trial. The record supports the court's finding that the account given by defendant at the CPL article 440 hearing regarding his activities on the night in question was never given to his counsel during the trial. Indeed, the record establishes that defense counsel testified that defendant would not tell her what happened on the evening in question. If he had, then it is only logical to assume that the trial strategy would have varied greatly. Trial counsel would have argued from the outset of the trial that the sex between the victim and defendant was consensual and that the victim and defendant in fact had a prior sexual relationship. Again, it is only logical to assume that trial counsel would have mentioned it during her opening statement; she would have cross-examined the victim about it; and she would have made more mention of the finding of vegetation in the victim's underwear, inasmuch as the vegetation would have supported the theory that defendant and the victim had sex in the park. Instead, however, the record establishes that defendant would not give his counsel any explanation for what occurred that evening, and that trial counsel did the best she could by formulating a defense theory that attacked the credibility of the witnesses. Thus, even though the record supports the court's finding that defendant asked his attorney whether he could testify, the record further establishes that defendant either would not have testified or would not have given the testimony that he gave at the CPL article 440 hearing. We therefore conclude that defense counsel's error did not seriously compromise the right of defendant to a fair trial (*see generally Hobot*, 84 NY2d at 1022).

IV

Turning next to appeal No. 1, we conclude that none of defendant's contentions with respect thereto have merit. Defendant contends that the court's *Sandoval* ruling constituted an abuse of discretion inasmuch as the ruling allowed the People to cross-examine defendant with respect to a prior conviction of criminal possession of a weapon in the third degree and the facts underlying that conviction. Defendant contends that the ruling was unduly prejudicial because that conviction and the crime for which he was on trial both involved the use of a gun. We reject that contention. Cross-examination of a defendant concerning a prior crime is not prohibited solely because of the similarity between that crime and the crime charged (*see People v Hayes*, 97 NY2d 203, 208).

Defendant next contends that he was deprived of a fair trial when the court refused to supplement its response to a note from the jury during its deliberations by giving the falsus in uno instruction (*see* CJI2d[NY] Credibility of Witnesses - Accept in Whole or in Part [Falsus in Uno]). We agree with the court that the requested instruction was not responsive to the jury's note, and we conclude that the court properly exercised its discretion in formulating a meaningful response to the jury's note (*see People v Santi*, 3 NY3d 234, 248; *People v Smith*, 21 AD3d 1277, 1277-1278, *lv denied* 7 NY3d 763). The court was not obligated to go beyond the jury's request for information (*see People v Barreto*, 70 AD3d 574, 575, *lv denied* 15 NY3d 772). The sentence is not unduly harsh or severe. We have examined defendant's remaining contentions and conclude that they are without merit.

V

Accordingly, we conclude that the judgment in appeal No. 1 should be affirmed, as should the order in appeal No. 2.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1492

KA 09-01036

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

PIERRE D. COSBY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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 Supreme Court, Onondaga County (John J. Brunetti, A.J.), entered May 14, 2009. The order denied the motion of defendant to vacate his conviction pursuant to CPL 440.10.

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

Same Opinion by CENTRA, J.P., as in *People v Cosby* ([appeal No. 1] ___ AD3d ___ [Feb. 10, 2011]).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1494

KA 08-01563

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS DONAHUE, ALSO KNOWN AS DENNIS DONOHUE,
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 (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered June 30, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that County Court erred in refusing to grant his motions for a mistrial based on the effect of media coverage of the case upon prospective jurors. He further contends that the court erred in denying his requests for an adjournment to allow the media coverage to subside and for a stay of the proceedings to enable him to move again for a change in venue. We reject defendant's contentions. The court properly determined that the prospective jurors' exposure to news accounts did not warrant a mistrial or an adjournment, nor did such exposure warrant a stay of the proceedings to enable defense counsel to move again for a change of venue (*see generally People v Matt*, 78 AD3d 1616; *People v Fernandez*, 269 AD2d 167, *lv denied* 95 NY2d 796). Contrary to the further contention of defendant, he was not deprived of meaningful representation based on defense counsel's failure to renew defendant's motion for a change of venue after defense counsel's request for a stay of the proceedings was denied, inasmuch as defendant failed to establish that such a motion, if made, would have been successful (*see generally People v Borcyk*, 60 AD3d 1489, 1490, *lv denied* 12 NY3d 923).

Defendant failed to preserve for our review his contention that the court erred in denying his challenge for cause to a prospective juror based on the alleged failure of the prospective juror to

understand the burden of proof (*see generally People v Chatman*, 281 AD2d 964, *lv denied* 96 NY2d 899). In any event, "[a]ny alleged error on County Court's part was cured when defendant was granted two extra peremptory challenges during a meaningful point in the jury selection process," thus enabling defendant to exercise a peremptory challenge with respect to that prospective juror (*People v Miles*, 55 AD3d 955, 955, *lv denied* 11 NY3d 928; *see People v Johnson*, 265 AD2d 930, 931, *lv denied* 94 NY2d 921).

Contrary to the contention of defendant, his constitutional right to due process was not violated by the 14-year delay between the death of the victim and the date on which he was indicted. We note at the outset that the 14-year delay "does not, by itself, require dismissal of the indictment" (*People v Hayes*, 39 AD3d 1173, 1174, *lv denied* 9 NY3d 923). Rather, in determining whether a preindictment delay was unreasonable, we must examine the factors set forth in *People v Taranovich* (37 NY2d 442, 445), including "the reason for the delay [and] the nature of the underlying charge" (*Hayes*, 39 AD3d at 1174). Here, the People established good cause for the delay by demonstrating that defendant was not a person of interest in the investigation before the year 2007. Indeed, they established that they lacked sufficient evidence to charge defendant until September 2007, at which time defendant agreed to provide a sample of his DNA and his DNA matched DNA samples taken from the victim's fingernails (*see People v Bradberry*, 68 AD3d 1688, 1689-1690, *lv denied* 14 NY3d 838; *see generally People v Decker*, 13 NY3d 12, 14-16). Finally, we note that the underlying charge was murder in the second degree, "inarguably a very serious offense" (*Decker*, 13 NY3d at 15), and that is another factor to consider in determining whether the preindictment delay was reasonable (*see Hayes*, 39 AD3d at 1174).

We reject the contention of defendant that the court erred in denying his *Batson* challenge with respect to the prosecutor's use of peremptory challenges to three male prospective jurors. Defendant failed to present "facts and other relevant circumstances sufficient to raise an inference that the prosecution used its peremptory challenges" in a discriminatory manner (*People v Childress*, 81 NY2d 263, 266; *see generally Batson v Kentucky*, 476 US 79, 93-94). "Specifically, defense counsel did not compare the challenged jurors to similarly-situated unchallenged prospective jurors, point to factors in the challenged jurors' background that made them likely to be pro-prosecution, or enunciate any factor that suggested that the prosecutor exercised the challenges due to the prospective jurors' gender" (*People v MacShane*, 11 NY3d 841, 842; *see People v Hecker*, ___ NY3d ___, ___ [Nov. 30, 2010]).

Contrary to defendant's contention, the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Also contrary to defendant's contention, viewing the evidence in light of the elements of the crime of murder 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). The sentence is not unduly

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1499

CA 10-01199

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

DONNA TERWILLIGER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTINA L. KNICKERBOCKER AND DEBRA M. KNICKERBOCKER, DEFENDANTS-APPELLANTS.

LEVENE GOULDIN & THOMPSON, LLP, BINGHAMTON (DAVID F. MCCARTHY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICE OF JACOB P. WELCH, CORNING (ANNA CZARPLES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered November 10, 2009 in a personal injury action. The order denied the motion of defendants for summary judgment on the issue of serious injury and granted the cross motion of plaintiff for summary judgment on the issue of negligence.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she allegedly sustained when she was struck by a vehicle operated by Christina L. Knickerbocker (defendant). Plaintiff was a pedestrian crossing the street at an intersection, and defendant struck her while turning right at a red light. As a result of the low-speed collision, plaintiff fell on her buttocks and allegedly injured her back as well as her “left arm/elbow.” The record establishes, however, that plaintiff had injured her back approximately one month earlier when she slipped and fell on ice. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of the three categories of serious injury set forth in her bill of particulars, i.e., the permanent consequential limitation of use, significant limitation of use, and the 90/180 categories in Insurance Law § 5102 (d), and plaintiff cross-moved for summary judgment on the issue of negligence. Supreme Court denied the motion and granted the cross motion. We affirm.

Although defendants met their initial burden of proof in support of their motion by submitting evidence establishing that plaintiff’s injuries were attributable to preexisting conditions, we conclude that plaintiff raised an issue of fact sufficient to defeat the motion (*see*

generally Zuckerman v City of New York, 49 NY2d 557, 562). Specifically, plaintiff submitted the affidavits of a treating physician and chiropractor, each of whom averred that plaintiff's back problems were asymptomatic prior to the accident and that, after the accident, plaintiff had a quantified limited range of motion in her lower back. The treating physician and chiropractor further averred that plaintiff's symptoms of lower back pain radiating into the right leg were consistent with MRI results showing pressure on the L-4 nerve root, and that such injury was caused by the collision. Contrary to defendants' contention, the affidavits submitted by plaintiff "contain the requisite objective medical findings that raise issues of fact whether plaintiff sustained a serious injury" (*Roll v Gavitt*, 77 AD3d 1412, 1413).

We further conclude that the court properly granted plaintiff's cross motion for summary judgment on the issue of negligence. The evidence submitted by plaintiff in support thereof established that defendant was negligent as a matter of law in turning right at a red light while plaintiff was entering the intersection at a crosswalk, and defendant failed to submit any evidence that plaintiff was careless in entering the intersection (*see Benedikt v Certified Lbr. Corp.*, 60 AD3d 798; *Hoey v City of New York*, 28 AD3d 717).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1500

CA 10-01449

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

VILLAGE OF PALMYRA, PLAINTIFF,

V MEMORANDUM AND ORDER

HUB LANGIE PAVING, INC., ET AL., DEFENDANTS.

HUB LANGIE PAVING, INC., THIRD-PARTY PLAINTIFF-RESPONDENT,

V

SNIEDZE ASSOCIATES, THIRD-PARTY DEFENDANT-APPELLANT.

TURNER UNDERGROUND, THIRD-PARTY PLAINTIFF-RESPONDENT,

V

SNIEDZE ASSOCIATES, THIRD-PARTY DEFENDANT-APPELLANT.

HARTER, SECREST & EMERY LLP, ROCHESTER (MICHAEL DAMIA OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

LAW OFFICES OF LAURIE G. OGDEN, ESQ., ROCHESTER (GARY J. O'DONNELL OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT TURNER UNDERGROUND.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, WHITE PLAINS (ADAM J. DETSKY OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT HUB LANGIE PAVING, INC.

Appeal from an order of the Supreme Court, Wayne County (Dennis M. Kehoe, A.J.), entered December 24, 2009 in a breach of contract action. The order, insofar as appealed from, denied the cross motion of third-party defendant for summary judgment dismissing the third-party complaints.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of third-party defendant in part, dismissing the third-party complaint of third-party plaintiff Hub Langie Paving, Inc. in its entirety and dismissing the third-party complaint of third-party plaintiff Turner Underground insofar as it seeks common-law indemnification and as modified the order is affirmed without costs.

Memorandum: Plaintiff, the Village of Palmyra (Village), contracted with defendant-third-party plaintiff Hub Langie Paving, Inc. (Hub Langie), to perform work to improve the Village's sanitary sewer system, including the installation of an underground force main. Hub Langie, in turn, subcontracted some of the work, including drilling work, to third-party plaintiff, Turner Underground (Turner). When the drilling work performed by Turner allegedly damaged the Village's existing sewer line, the Village sued Hub Langie and Turner seeking damages for the costs of repairing the damaged sewer line. Hub Langie and Turner, in turn, each commenced third-party actions against Sniedze Associates (Sniedze), the Village's engineer on the sewer project, seeking common-law indemnification or contribution. On appeal, Sniedze contends that Supreme Court erred in denying its motion for summary judgment seeking dismissal of both third-party complaints.

We conclude that the court erred in denying that part of the motion with respect to Hub Langie's third-party complaint, and we therefore modify the order accordingly. The express terms of the contract between the Village and Hub Langie provided, inter alia, that Hub Langie had complete knowledge and information necessary to perform the work required by the contract and was fully responsible for the performance of the contract, including the work of subcontractors. The contract further provided that Hub Langie had full responsibility for "the safety and protection of all . . . Underground Facilities," e.g., existing sewer lines, and that Sniedze owed no duty to Hub Langie. Moreover, with respect to any right to common-law indemnification, there are no circumstances under which Hub Langie could be held vicariously liable to the Village based on the negligence of a third party such as Sniedze (*see generally Glaser v Fortunoff of Westbury Corp.*, 71 NY2d 643, 646-647; *Brickel v Buffalo Mun. Hous. Auth.*, 280 AD2d 985, 985; *Colyer v K Mart Corp.*, 273 AD2d 809, 810).

With respect to Turner's third-party complaint, Turner correctly concedes that it is not entitled to common-law indemnification from Sniedze. On this record, there is simply no basis for determining that Turner may be vicariously liable for the damage to the Village's sewer line (*see Glaser*, 71 NY2d at 646). We therefore further modify the order accordingly. Nevertheless, we reject the contention of Sniedze that Turner is not entitled to contribution from Sniedze, and we thus conclude that the court properly denied that part of the motion of Sniedze. According to Sniedze, the Village's complaint against Turner is for "purely economic loss resulting from a breach of contract [and thus] does not constitute 'injury to property' within the meaning of New York's contribution statute," i.e., CPLR 1401 (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26; *see Scalp & Blade v Advest, Inc.*, 300 AD2d 1068, 1069). That is not the case, however, inasmuch as the Village expressly seeks, inter alia, damages for portions of its sewer line that were not included in the work that was the subject of the contract. As a result, the Village seeks to recover for negligence that resulted in damage to its property, for which contribution may be obtained from a third party such as Sniedze (*cf. Laur & Mack Contr.*

Co. v Di Cienzo, 274 AD2d 960, *lv denied in part and dismissed in part* 96 NY2d 895). Finally, we note that Turner is not barred from seeking contribution from Sniedze based on the contract between the Village and Hub Langie, inasmuch as Turner is not a signatory to that contract.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1502

CA 10-01598

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

EDWARD A. PISKORZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARILYN PISKORZ, DEFENDANT-RESPONDENT.

ZARCONE ASSOCIATES, PLLC, AMHERST (KELLY V. ZARCONE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SHARON ANSCOMBE OSGOOD, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Janice M. Rosa, J.), entered March 9, 2010, which granted defendant's motion to enter a stipulated qualified domestic relations order.

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

Memorandum: On this appeal by plaintiff from a qualified domestic relations order (QDRO), we note that no appeal lies as of right from such an order (*see Irato v Irato*, 288 AD2d 952). Nevertheless, inasmuch as plaintiff "raised timely objections prior to the entry of the QDRO and thereby preserved a record for our review," we treat the notice of appeal as an application for leave to appeal and grant the application (*id.* at 952). Upon considering the merits of plaintiff's contention, we affirm the order.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1504

CA 10-01567

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

LILY LARKIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROCHESTER HOUSING AUTHORITY,
DEFENDANT-RESPONDENT.

LIPSITZ & PONTERIO, LLC, BUFFALO (JOHN NED LIPSITZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ERNEST D. SANTORO, ESQ., P.C., ROCHESTER (ERNEST D. SANTORO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered April 1, 2010. The order and judgment, granted defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries allegedly caused by her exposure as a child to lead paint in an apartment owned by defendant, a municipal housing authority. Prior to discovery, defendant moved pursuant to CPLR 3211 and 3212 to dismiss the complaint on statute of limitations grounds, contending that the action was time-barred under General Municipal Law § 50-i (1) because it was not commenced within one year and 90 days of plaintiff's 18th birthday, as tolled by CPLR 208 during the period of plaintiff's infancy. We conclude that Supreme Court erred in granting the motion. In support of its motion insofar as it was based on CPLR 3211 (a) (5), defendant had "the initial burden of establishing prima facie that the time in which to sue has expired" (*Savarese v Shatz*, 273 AD2d 219, 220; *see Cimino v Dembeck*, 61 AD3d 802), and thus was required to "establish, inter alia, when the plaintiff's cause of action accrued" (*Swift v New York Med. Coll.*, 25 AD3d 686). Similarly, insofar as defendant sought summary judgment based on statute of limitations grounds, defendant was required to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

In support of its motion, defendant submitted only a copy of the summons and complaint, neither of which indicated when plaintiff discovered her alleged injuries or the date "when through the exercise of reasonable diligence the injury should have been discovered" (CPLR 214-c [3]). Defendant thus failed to establish when plaintiff's cause of action accrued and, in the absence of such evidence, defendant was unable to make a prima facie showing that the applicable statute of limitations period had expired. In view of the fact that defendant failed to meet its initial burden, the motion should have been denied "regardless of the sufficiency of the opposing papers" submitted by plaintiff (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). We reject defendant's contention that the court should have searched the record and considered the evidence submitted by plaintiff in opposition to the motion. Although defendant is correct that a court has the authority to search the record and to grant relief to a nonmoving party pursuant to CPLR 3212 (b), defendant has provided no authority that allows a court to search the record and to grant relief to a moving party where, as here, the moving party has failed to meet its initial burden of proof.

In any event, even assuming, arguendo, that defendant met its initial burden on the motion, we conclude that plaintiff raised an issue of fact whether the action was commenced within the requisite one year and 90 days of "the date of discovery of the injury by the plaintiff or on the date when through the exercise of reasonable diligence the injury should have been discovered" (CPLR 214-c [3]). Plaintiff asserted in an opposing affidavit that she did not discover that she had elevated levels of lead in her blood until May 2008, and that date falls within the statute of limitations period for commencing this action. Finally, we note that "any inconsistency between the [General Municipal Law § 50-h hearing] testimony of [plaintiff] submitted in support of the motion and her affidavit presents a credibility issue to be resolved at trial" (*Palmer v Horton*, 66 AD3d 1433, 1434).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1505

CA 10-00401

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

WILLIAM E. BURKHART, JR.,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN V. MODICA, J. MICHAEL WOOD,
CHAMBERLAIN, D'AMANDA, OPPENHEIMER AND
GREENFIELD, LLP, DEFENDANTS-RESPONDENTS,
AND MERCURY PRINT PRODUCTIONS, INC.,
DEFENDANT-RESPONDENT-APPELLANT.

WILLIAM E. BURKHART, JR., ROCHESTER, PLAINTIFF-APPELLANT-RESPONDENT PRO SE.

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

HISCOCK & BARCLAY, LLP, ROCHESTER (ERICA M. DIRENZO OF COUNSEL), FOR DEFENDANT-RESPONDENT STEVEN V. MODICA.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (PAUL G. FERRARA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS J. MICHAEL WOOD AND CHAMBERLAIN, D'AMANDA, OPPENHEIMER AND GREENFIELD, LLP.

Appeal and cross appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered November 5, 2009. The order granted the motions of defendants to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed with costs and the matter is remitted to Supreme Court, Wayne County, for further proceedings in accordance with the following Memorandum: Plaintiff attorney previously represented William H. Bolia in an action in the United States District Court for the Western District of New York entitled *Bolia v Mercury Print Productions, Inc.* (hereafter, federal action). At a settlement conference on December 7, 2005 in the federal action, it became apparent to the District Court that plaintiff's paramount concern was that he would receive payment for attorney fees in the amount of $160,000, allegedly earned by plaintiff in representing Bolia. The record establishes that the District Court considered that fee to be far in excess of the reasonable settlement value of the case, and the District Court therefore sent a letter to plaintiff and another attorney who had appeared for Bolia expressing its concern on the issue whether Bolia's interests were being adequately represented, in

light of plaintiff's fee demand. Bolia thereafter retained defendant Steven V. Modica to represent him in place of plaintiff, and the federal action was settled with defendant Mercury Print Productions, Inc. (Mercury) for $60,000, a sum that was deemed to include any claim for attorney fees. Mercury was represented in the federal action by two of the defendants in this action, J. Michael Wood and the law firm of Chamberlain, D'Amanda, Oppenheimer and Greenfield, LLP. As a result of the settlement, Bolia executed a general release and waiver on January 3, 2006 in favor of Mercury and, inter alia, its employees and agents.

Plaintiff filed a notice of lien dated December 30, 2005 against the settlement proceeds in the federal action pursuant to 28 USC § 1367 and Judiciary Law § 475, alleging that he was discharged without cause, and he thereafter filed a petition to enforce the lien. He contended therein that, inter alia, he was entitled to judgment for services rendered as the attorney for Bolia. Upon concluding that plaintiff had thereby invoked the jurisdiction of the court pursuant to Judiciary Law § 475, the District Court referred the fee dispute to a federal magistrate judge to conduct a hearing and to issue a report and recommendation concerning whether plaintiff was, inter alia, "entitled to any fees and/or disbursements, and if so, the amounts to which [he] is entitled." Following a hearing, the Magistrate Judge determined that plaintiff was not entitled to any fees for representing Bolia in the federal action because plaintiff "placed his personal interest in collecting a fee ahead of his client's desire to obtain a fair and reasonable settlement and failed to keep his client informed of the fees and expenses he was charging his client in violation of the parties' retainer agreement." The Magistrate Judge further ordered that any objections to his Report and Recommendation must be filed within 10 days of the receipt of a copy thereof, and that "[f]ailure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order" adopting the Report and Recommendation. Bolia and plaintiff subsequently settled their fee dispute for the sum of $8,750, and they each executed general releases. In June 2006 the District Court issued an order dismissing the federal action with prejudice.

Plaintiff commenced the instant action in December 2008 asserting causes of action based on, inter alia, Judiciary Law § 487 (1) and § 475 and seeking to recover damages based on allegations that he was unlawfully deprived of the attorney fees he claimed to have earned as a result of his representation of Bolia in the federal action.

We reject plaintiff's contention that Supreme Court erred in granting the pre-answer motions of all defendants and we further agree with the court that the instant action is wholly frivolous, warranting the imposition of sanctions for commencing it. Plaintiff had a full and fair opportunity to litigate any claim for attorney fees in the federal action before the Magistrate Judge, although the claim was ultimately settled. Plaintiff is thus barred by the doctrine of collateral estoppel from relitigating that claim in the instant action, inasmuch as that doctrine "precludes a party from raising, in

subsequent litigation, any issue that was decided in prior litigation so long as the issue was necessarily determined in the prior litigation and the party to be estopped had a full and fair opportunity to litigate the issue" (*Tuper v Tuper*, 34 AD3d 1280, 1282; *see Buechel v Bain*, 97 NY2d 295, 303-304, *cert denied* 535 US 1096). In any event, we conclude that plaintiff's claims in this action are barred by the general releases that he and Bolia executed in settling the federal action, both of which included their respective claims for attorney fees.

Finally, we note that, in granting defendants' pre-answer motions to dismiss the instant complaint, the court ordered plaintiff to pay defendants' costs incurred in defending this action, including the costs incurred with respect to the pre-answer motions. We further note that, although the court ordered that plaintiff pay sanctions to defendants, the court failed to specify the amount of such sanctions. Inasmuch as we agree with the court that the instant action is frivolous and thus that sanctions are warranted (*see* 22 NYCRR 130-1.1 [c]), we remit the matter to Supreme Court to determine the amount of sanctions to be imposed, following a hearing if necessary.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1509

KA 07-00393

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RASHAD PETERKIN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 January 23, 2007. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (six counts), burglary in the first degree, kidnapping in the second degree (three counts), aggravated sexual abuse in the first degree, sexual abuse in the first degree, petit larceny, and unlawful imprisonment 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, six counts of robbery in the first degree (Penal Law § 160.15 [4]) arising from two separate gunpoint robberies. Contrary to defendant's contention, Supreme Court properly refused "to suppress the in-court identification of [the] victim who had viewed defendant's photograph in the newspaper . . . or to require the People to establish that [such] victim[] had an independent basis for [his] identification[]" (*People v Fontanez*, 278 AD2d 933, 934, *lv denied* 96 NY2d 862; *see People v Stevens*, 44 AD3d 882; *People v Fuller*, 185 AD2d 446, 449, *lv denied* 80 NY2d 974, 81 NY2d 788). We reject the contention of defendant that the in-court identification was tainted because the lineup in which the victim in question identified defendant was conducted after that victim had viewed a photo array. "Multiple pretrial identification procedures are not inherently suggestive . . ., and the record supports the court's determination that the photo array and subsequent lineup 'were not so suggestive as to create the substantial likelihood that defendant would be misidentified' " (*People v Johnson*, 52 AD3d 1286, 1286, *lv denied* 11 NY3d 738; *see People v Brown*, 254 AD2d 781, 782, *lv denied* 92 NY2d 1029). Contrary to defendant's contention, the comments of the police investigator, including her "comment to the [victim in

question] that [she] believed that the police had arrested the same individual [he] had selected from the photo[ ] array did not render the lineup unduly suggestive . . . [inasmuch as] there was no suggestion as to which of the lineup participants was that individual" (*People v Simmonds*, 182 AD2d 650, 651-652, *lv denied* 80 NY2d 910; *see People v Goodman*, 167 AD2d 352, *lv denied* 77 NY2d 878). Further, we conclude that "[t]he prosecutor's reference to the prior photo identification was ill-advised, but [it] was not tantamount to coaching the [victim] to make a particular selection at the lineup" (*People v Coble*, 168 AD2d 981, 982, *lv denied* 78 NY2d 954; *see generally People v Wongshing*, 245 AD2d 186, *lv denied* 91 NY2d 978). We have considered defendant's remaining contentions concerning suppression of the identification testimony and conclude that they are without merit.

Defendant further contends that he was deprived of a fair trial based on the court's denial of his request for funding in excess of the $1,000 statutory limit to retain an expert with respect to identification issues (*see* County Law § 722-c). Even assuming, arguendo, that the court erred in denying that request, we conclude that defendant was not thereby deprived of a fair trial because this "is not a 'case [that] turns on the accuracy of eyewitness identifications [where] there is little or no corroborating evidence connecting the defendant to the crime' " (*People v Abney*, 13 NY3d 251, 269; *see People v Lee*, 96 NY2d 157, 162-163). Indeed, "the corroboration was strong enough for the . . . court reasonably to conclude that the expert's testimony would be of minor importance" (*People v Young*, 7 NY3d 40, 45).

We reject the contention of defendant that the court abused its discretion in denying his request for an adjournment of the trial based on the People's belated delivery of records related to DNA evidence and his inability to retain an expert concerning the issue of identification. Although defendant is correct that the court's discretion with respect to a request for an adjournment is more narrowly construed when a fundamental right is impacted (*see People v Spears*, 64 NY2d 698, 699-700; *People v McNear*, 265 AD2d 810, 810-811, *lv denied* 94 NY2d 864), it is well settled that "[t]he court's exercise of discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice" (*People v Arroyo*, 161 AD2d 1127, 1127, *lv denied* 76 NY2d 852; *see People v Bones*, 50 AD3d 1527, *lv denied* 10 NY3d 956), and defendant made no such showing here. Defendant was not prejudiced by the People's belated delivery of records related to DNA evidence inasmuch as the trial did not commence until two weeks after defendant obtained those records and the court eventually precluded the People from introducing that evidence. Also, defendant was not prejudiced by his inability to retain an expert on the issue of identification.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1515

KA 08-01950

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN L. MULLINGS, DEFENDANT-APPELLANT.

TIMOTHY PATRICK MURPHY, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), rendered June 18, 2008. The order directed defendant to pay restitution.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the amount of restitution ordered and as modified the order is affirmed, and the matter is remitted to Genesee County Court for a new hearing in accordance with the following Memorandum: Defendant appeals from an order of restitution that was entered following a hearing conducted after he was sentenced to a term of incarceration upon his conviction of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15). We note at the outset that, "[a]s a general rule, a defendant may not appeal as of right from a restitution order in a criminal case . . . Here, however, [County Court] bifurcated the sentencing proceeding by severing the issue of restitution for a separate hearing, and thus 'defendant may properly appeal as of right from both the judgment of conviction . . . and the sentence as amended . . ., directing payment of restitution . . ., [with] no need to seek leave to appeal from [the] order of restitution' " (*People v Brusie*, 70 AD3d 1395, 1396). As defendant contends and the People correctly concede, the court erred in delegating its responsibility to conduct a restitution hearing to its court attorney (*see id.*; *People v Bunnell*, 59 AD3d 942, *amended on rearg* 63 AD3d 1671, *amended* 63 AD3d 1727). We reject the further contention of defendant, however, that the court erred in severing the issue of restitution from the other aspects of sentencing (*see People v Swiatowy*, 280 AD2d 71, 72-73, *lv denied* 96 NY2d 868). We also reject defendant's contention that the People should not be given another opportunity to conduct a restitution hearing. Inasmuch as all of the proceedings in this case took place prior to this Court's decision in *Bunnell*, it would be fundamentally unfair to the People and the victim to deprive the People of the right to conduct a second hearing. We therefore modify the order by vacating the amount

of restitution ordered, and we remit the matter to County Court for a new hearing to determine the amount of restitution in compliance with Penal Law § 60.27.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1516

KA 10-01301

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANKLIN D. SCHAFER, DEFENDANT-APPELLANT.

LAW OFFICE OF RONALD D. ANTON, NIAGARA FALLS (SCOTT A. STEPIEN 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 August 13, 2009. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child, 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 upon a jury verdict of, inter alia, predatory sexual assault against a child (Penal Law § 130.96). In response to the jury's request for a readback of certain testimony, County Court directed the court reporter not to read the victim's testimony concerning uncharged acts of oral sodomy. Contrary to the contention of defendant, he was not thereby denied a fair trial. The court had previously granted defendant's motion to preclude that testimony, but the six-year-old victim spontaneously testified with respect to those uncharged acts. "[T]he failure to read back everything called for by the note did not 'seriously prejudice[ ]' defendant . . . because the omitted testimony was insignificant and provided [no] support for defendant's defense" (*People v Ingram*, 3 AD3d 437, 438, *lv denied* 2 NY3d 801; *see People v Aller*, 33 AD3d 621, 622, *lv denied* 8 NY3d 918).

Defendant failed to preserve for our review his further contention that the court erred in striking the prosecutor from defendant's witness list and precluding defendant from calling her as a witness. Although defendant included the prosecutor on his witness list and thus requested permission to call her as a witness, that request was not based upon any of the reasons that he now raises on appeal. In any event, the contention of defendant is without merit, "[i]n light of [his] failure to establish that the prosecutor would

give testimony adverse to the People if called by the defense or that there was a significant possibility that her testimony was necessary or relevant to a material issue at trial" (*People v Wilhelm*, 34 AD3d 40, 54; *see People v Garcia*, 27 AD3d 398, *lv denied* 7 NY3d 789; *see generally People v Paperno*, 54 NY2d 294).

Contrary to defendant's contention, the court properly admitted in evidence the record of the nurse practitioner's examination of the victim, in which the victim described the incident. The examination "had a dual purpose of investigation and treatment of the victim's potential physical and psychological injuries. Because the history [of the incident] was germane to treatment, it falls within the traditional business records exception . . ., and the hearsay was therefore admissible" (*People v Rogers*, 8 AD3d 888, 892; *see People v Bailey*, 252 AD2d 815, 815-816, *lv denied* 92 NY2d 922).

Although defendant is correct that he has the right to introduce evidence of the witnesses' reputation in the community for veracity (*see generally People v Hanley*, 5 NY3d 108), we reject his contention that the court precluded him from introducing such evidence. On direct examination, defense counsel asked defendant two questions with respect to the reputation of the victim and her brother for veracity. The court properly sustained the prosecutor's objection to the first question inasmuch as it was a compound question seeking information regarding two separate witnesses (*see generally Devlin v Hinman*, 161 NY 115, 118). The court also properly sustained the prosecutor's objection to the second question because it sought information regarding defendant's knowledge of whether the victim ever lied, and "[i]t is well settled that impeachment of a witness by evidence of his [or her] reputation in the community is limited to his [or her] reputation for truth and veracity[] and may not extend to . . . specific acts of dishonesty" (*Stanton v Velis*, 172 AD2d 415; *see People v Pavao*, 59 NY2d 282, 289).

Defendant further contends that the court erred in refusing to permit him to testify with respect to the victim's sexual conduct pursuant to CPL 60.42. To the extent that defendant contends that he was thereby denied his right to present a defense, he failed to preserve his contention for our review (*see generally People v Angelo*, 88 NY2d 217, 222). Insofar as defendant contends that the court erred in applying CPL 60.42 in refusing to permit him to testify with respect to the conduct in question, we conclude that the testimony in question does " 'not fall within any of the exceptions set forth in CPL 60.42 (1) through (4), and defendant failed to make an offer of proof demonstrating that such evidence was relevant and admissible pursuant to CPL 60.42 (5)' " (*People v Wright*, 37 AD3d 1142, 1143, *lv denied* 8 NY3d 951; *see People v Brink*, 30 AD3d 1014, 1015, *lv denied* 7 NY3d 810). Defendant's only application pursuant to CPL 60.42 concerned testimony regarding a different incident than the one about which he attempted to testify, and that testimony was to be given by a different witness than defendant, for a different purpose than the one

raised on appeal.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1523

CA 10-01320

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

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

V MEMORANDUM AND ORDER

CITY OF BUFFALO, RESPONDENT-DEFENDANT-APPELLANT.

DAVID RODRIGUEZ, ACTING CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT.

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

Appeal from a judgment (denominated decision and order) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 29, 2010 in a proceeding pursuant to CPLR article 78 and a declaratory judgment action. The judgment, among other things, declared null and void certain conditions the City of Buffalo attached to a use permit.

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

Memorandum: Petitioners-plaintiffs (petitioners) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to compel respondent-defendant (respondent) to issue a new use permit omitting certain language included in the most recent use permit issued by respondent. That permit allowed petitioners to operate a "portable concrete mixing plant" and to conduct "rock and stone crushing" pursuant to Buffalo City Code § 511-48 (B) (4). The language at issue provided that the "permit does not allow a construction and demolition debris processing facility as defined in 6 NYCRR 360-1.2 (b) (39). More specifically, [the] permit does not allow any activities requiring permitting, registration or reporting under 6 NYCRR [360-1.4]. Per [resolution of the City of Buffalo's] Common Council . . ., concrete crushing is not a permitted use." Petitioners alleged that respondent's determination to include such language was arbitrary and capricious. We note at the outset that Supreme Court properly determined that the proceeding and declaratory judgment action was only a CPLR article 78 proceeding. "Petitioners do not challenge the constitutionality of any statutes or regulations" (*Matter of Custom Topsoil, Inc. v City of Buffalo*, 63 AD3d 1511, 1511), and they have an adequate remedy by way of the CPLR

article 78 proceeding (*see Greystone Mgt. Corp. v Conciliation & Appeals Bd. of City of N.Y.*, 62 NY2d 763, 765).

We reject the contention of respondent that the court erred in denying its motion to dismiss the petition on the ground that it is barred by the doctrine of collateral estoppel and the four-month statute of limitations. In a prior appeal with respect to a related proceeding involving petitioners and respondent, we reversed the order denying the respondents' motion to dismiss as time-barred the petition seeking, inter alia, to annul a "Stop All Work Order" issued in May 2007 (*Custom Topsoil, Inc.*, 63 AD3d 1511). We concluded that a letter issued by the respondents in August 2006 "gave petitioners sufficient notice of respondents' final determination that the amended use permit [for the operation of a portable concrete mixing plant] had expired" (*id.* at 1512). Here, however, petitioners seek to compel respondent to issue a new permit, a matter that has not been litigated in any prior case (*see O'Donnell v Ferguson*, 23 AD3d 1005, 1007), and the letter issued by respondent in August 2006 did not unequivocally inform petitioners that concrete crushing activities were not permitted under a permit to operate a concrete mixing plant (*see generally* CPLR 217 [1]; *Nickerson v City of Jamestown*, 178 AD2d 1003). Even assuming, arguendo, that the matter had been raised in the prior proceeding, we conclude that this proceeding is not barred inasmuch as we dismissed the petition in the prior proceeding as time-barred (*Custom Topsoil, Inc.*, 63 AD3d 1511; *see Town of Oyster Bay v Commander Oil Corp.*, 96 NY2d 566, 575 n 5).

Contrary to the further contention of respondent, the court properly denied its motion to dismiss the petition on the ground that petitioners failed to exhaust their administrative remedies. Buffalo City Code § 511-125 (B), which pertains to the Zoning Board of Appeals, provides: "In case it is alleged by an appellant that there is error or misinterpretation in any order, requirement, decision, grant or refusal made by . . . [an] administrative official having authority to issue licenses or permits in the carrying out or enforcement of the provisions of . . . chapter [511], an appeal *may be filed* in the manner hereinbefore specified and a decision shall be made by the [Zoning] Board of Appeals" (emphasis added). Because the language of that provision is permissive rather than mandatory, petitioners were not required to file such an appeal (*see Triomphe Disc Corp. v Chilean Line*, 93 AD2d 228, 231; *Matter of Green v Safir*, 174 Misc 2d 400, 404-405, *mod on other grounds* 255 AD2d 107, *lv dismissed and denied* 93 NY2d 882; *see also Matter of Fiduciary Trust Co. of N.Y. v State Tax Commn.*, 120 AD2d 848, 850).

In its answer, respondent contended as an objection in point of law that the language in the permit prohibiting use of petitioners' property for a construction and demolition debris processing facility was not arbitrary and capricious. We agree with respondent, and we thus conclude that the court erred in determining that the language in question was an arbitrary and capricious "condition" and in granting the petition. In our view, the language at issue is neither a "condition" of the permit nor a prohibition on the actual use of

crushed concrete in petitioners' concrete-making activities. It is a mere clarification of the scope of the permit, which recognizes the fact that concrete-crushing may fall under the ambit of 6 NYCRR part 360. Although petitioners correctly contend that there is no language in the Buffalo City Code defining a "concrete mixing plant," we conclude that there is no ambiguity in the language at issue that could be construed to grant them the right to "crush" materials from demolished buildings or structures to be made into concrete (*see generally Incorporated Vil. of Saltaire v Feustel*, 40 AD3d 586, 587).

In addition, petitioners failed to establish that they were not required to be registered or to obtain a permit pursuant to 6 NYCRR part 360, which provides in-depth regulation concerning the processing of construction and demolition debris and other solid waste. Inasmuch as petitioners have "failed to establish that they have a clear legal right to the relief they seek," i.e., a permit without the language at issue, we reverse the order and dismiss the petition (*see Matter of Eck v Mayor of Vil. of Attica*, 28 AD3d 1195, 1196).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1526

CA 10-00992

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

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10 ELLICOTT SQUARE COURT CORPORATION, DOING BUSINESS AS ELLICOTT DEVELOPMENT CO., LLC, 1097 GROUP, LLC, AND 4628 GROUP, INC., PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

VIOLET REALTY, INC., VIOLET REALTY, INC., DOING BUSINESS AS MAIN PLACE LIBERTY GROUP, AND PATRICK HOTUNG, DEFENDANTS-RESPONDENTS.

MOSEY PERSICO, LLP, BUFFALO (JENNIFER C. PERSICO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

THE KNOER GROUP, PLLC, BUFFALO (ROBERT E. KNOER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John M. Curran, J.), entered February 10, 2010. The order and judgment granted the motion of defendants to dismiss the complaint and for summary judgment.

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

Memorandum: In this action to recover damages for, inter alia, tortious interference with prospective economic advantage, plaintiffs appeal from an order and judgment granting that part of defendants' motion seeking to dismiss the complaint, as well as those parts of the motion seeking summary judgment dismissing the second and sixth causes of action.

Contrary to plaintiffs' contention, Supreme Court properly granted that part of the motion seeking to dismiss the complaint. When reviewing "a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414; *see Leon v Martinez*, 84 NY2d 83, 87-88). Applying that standard, we conclude that the court properly granted the motion with respect to the first cause of action, alleging tortious interference with prospective economic advantage. "Where, as here, the alleged interference was with prospective contractual

relationships, rather than existing contracts, '[the] plaintiff[s] must show that the defendant[s] interfered with the plaintiff[s'] business relationships either with the sole purpose of harming the plaintiff[s] or by means that were unlawful or improper' " (*Out of Box Promotions, LLC v Koschitzki*, 55 AD3d 575, 577; *see Emergency Enclosures, Inc. v National Fire Adj. Co., Inc.*, 68 AD3d 1658, 1660-1661). Unlawful or improper means, sometimes referred to as wrongful means, may include physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and economic pressure (*see Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191).

Here, plaintiffs alleged that defendants tortiously interfered with their business relations by commencing four civil suits. Contrary to plaintiffs' contention, however, "civil suits and threats thereof constitute 'improper means' only if such tactics are frivolous" (*Pagliaccio v Holborn Corp.*, 289 AD2d 85; *see generally Carvel Corp. v Noonan*, 3 NY3d 182, 192), and that is not the case here. Plaintiffs stipulated to a settlement of the first civil suit and, although this Court affirmed the judgments in two of the civil suits that, inter alia, dismissed the petitions, we nevertheless concluded that the litigation was not frivolous (*see Matter of Violet Realty, Inc. v City of Buffalo Planning Bd.*, 20 AD3d 901, 904, *lv denied* 5 NY3d 713). Further, plaintiffs failed to allege that the remaining civil suit was frivolous.

Plaintiffs also failed to allege that defendants acted solely to harm plaintiffs. To the contrary, the complaint, as well as the affidavits submitted by plaintiffs in opposition to defendants' motion (*see Martino v Stolzman*, 74 AD3d 1764, 1765-1766, *appeal dismissed* 15 NY3d 890), repeatedly allege that defendants were motivated by their desire to acquire the subject properties for their own business purposes (*see Besicorp, Ltd. v Kahn*, 290 AD2d 147, 150, *lv denied* 98 NY2d 601).

Contrary to the further contention of plaintiffs, the court properly granted that part of the motion seeking to dismiss as time-barred the second cause of action, alleging tortious interference with prospective economic advantage. It is well settled that a three-year statute of limitations applies to such a cause of action (*see Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 48, *lv dismissed in part and denied in part* 14 NY3d 736). The court concluded, based on a document that they failed to include in the record on appeal, that plaintiffs agreed that the second cause of action concerned their attempts to acquire the property at 30 Court Street. Plaintiffs do not dispute that they purchased that property more than three years prior to the commencement of this action and thus that they created a contractual relationship at that time. "Because plaintiff[s] and [the seller of that property] had already entered into a contract, plaintiff[s] failed to plead any prospective business relationship" upon which the second cause of action may be based (*Nicosia v Board of Mgrs. of Weber House Condominium*, 77 AD3d 455, 457).

Plaintiffs contend that the court erred in granting those parts

of the motion seeking to dismiss as time-barred the third through fifth causes of action, for malicious prosecution, abuse of process and prima facie tort, respectively, because the statute of limitations did not begin to run with respect to those causes of action until the Court of Appeals denied their motion for leave to appeal from the judgment dismissing the last of the four civil suits commenced by defendants. We reject that contention. A cause of action for malicious prosecution is governed by a one-year statute of limitations, which begins to run upon termination of the underlying lawsuit (*see* CPLR 215 [3]; *Syllman v Nissan*, 18 AD3d 221; *Dudick v Gulyas*, 277 AD2d 686, 688). A one-year statute of limitations also governs a cause of action for abuse of process (*see Benyo v Sikorjak*, 50 AD3d 1074, 1077; *Beninati v Nicotra*, 239 AD2d 242), as well as a cause of action for intentional prima facie tort (*see Casa de Meadows Inc. [Cayman Is.] v Zaman*, 76 AD3d 917, 921; *Yong Wen Mo v Gee Ming Chan*, 17 AD3d 356, 358). It is long settled that those causes of action accrue "when plaintiff[s] first become[] entitled to maintain the action[,]i.e., when there is a determination favorable to plaintiff[s], notwithstanding the pendency of an appeal" (*Lombardo v County of Nassau*, 6 Misc 3d 836, 840; *see also Marks v Townsend*, 97 NY 590, 594-595; *Reed Co. v International Container Corp.*, 43 F Supp 644, 645). Consequently, the causes of action for malicious prosecution, abuse of process and prima facie tort accrued upon dismissal of the underlying civil lawsuits, the last of which occurred more than one year prior to the commencement of this action.

Even assuming, arguendo, that a three-year statute of limitations applies to the prima facie tort cause of action (*see Barrett v Huff*, 6 AD3d 1164, 1166; *Stacom v Wunsch*, 173 AD2d 401, *lv denied* 78 NY2d 859), we conclude that the court properly granted the motion with respect thereto for failure to state a cause of action. To state a cause of action for prima facie tort under the circumstances of this case, the complaint must allege that defendants' sole motivation for the otherwise lawful conduct was " 'a disinterested malevolence to injure plaintiff[s]' " (*Emergency Enclosures, Inc.*, 68 AD3d at 1660; *see Great Am. Trucking Co. v Swiech*, 267 AD2d 1068, 1069). Here, however, the complaint and the affidavits submitted in opposition to the motion repeatedly allege that defendants acted in their own economic interest (*see Niagara Mohawk Power Corp. v Testone*, 272 AD2d 910, 911-912; *Great Am. Trucking Co.*, 267 AD2d at 1069).

Inasmuch as we conclude that the court properly granted that part of defendants' motion seeking to dismiss the complaint, the contentions of the parties concerning that part of the motion seeking summary judgment dismissing the second and sixth causes of action are moot. We have considered plaintiffs' remaining contentions and conclude that they are without merit.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1527

CA 10-00368

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

BERNARD DIPIZIO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DOROTHY DIPIZIO, DEFENDANT-APPELLANT.

HOGAN WILLIG, AMHERST (GEFFREY GISMONDI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Janice M. Rosa, J.), entered December 17, 2009. The judgment granted in part the amended complaint to enforce the parties' postnuptial agreement.

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

Memorandum: As limited by her brief, defendant appeals from a judgment granting in part the relief requested in the amended complaint insofar as that judgment brings up for review a prior order entered in December 2008. That order, inter alia, denied defendant's motion to dismiss the amended complaint seeking to enforce the terms of the parties' postnuptial agreement. The contention of defendant that the postnuptial agreement is unenforceable because her signature was not acknowledged as required by Domestic Relations Law § 236 (b) (3) was raised for the first time in her reply papers and thus was not properly before Supreme Court (*see Schissler v Athens Assoc.*, 19 AD3d 979; *Hoyte v Epstein*, 12 AD3d 487, 488). Indeed, the court did not address that contention in its December 2008 order. To the extent that defendant further contends that the court erred in denying the motion because the postnuptial agreement was obtained as a result of plaintiff's misrepresentations concerning its contents and because plaintiff failed to comply with the terms of that agreement, we conclude that defendant failed to submit any evidence to support that contention. Rather, defendant merely relied on conclusory allegations in support of the motion, which plaintiff disputed (*see generally Dominski v Frank Williams & Son, LLC*, 46 AD3d 1443).

The contention of defendant that her motion should have been granted because the Judicial Hearing Officer (JHO) erred in incorporating the terms of the postnuptial agreement into a September

2002 order discontinuing and dismissing defendant's divorce action is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In any event, that contention is without merit. We conclude that the JHO did not abuse his discretion in discontinuing the action upon the consent of both parties or incorporating the terms of the postnuptial agreement into the September 2002 order inasmuch as the incorporation of those terms was a condition of discontinuance that the JHO "deem[ed] proper" and, indeed, that the parties requested (CPLR 3217 [b]).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1530

CA 09-02324

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

IN THE MATTER OF THE ADMINISTRATION OF THE ESTATE OF CAROL PETOTE, DECEASED.

KAREN M. PETOTE, PETITIONER-APPELLANT;

THOMAS CHICHESTER, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

MEMORANDUM AND ORDER

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-APPELLANT.

MICHAEL A. ROSENHOUSE, ROCHESTER, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Monroe County (Edmund A. Calvaruso, S.), entered January 7, 2009. The order, among other things, denied the petition to grant letters of administration to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the fees awarded to the Public Administrator and the attorney's fees awarded to the attorney for respondent and as modified the order is affirmed without costs.

Memorandum: Petitioner commenced this proceeding seeking to be appointed administrator of the estate of her sister (decedent). The petition was opposed by respondent, who alleged that he was married to decedent and thus had priority over petitioner with respect to the granting of letters of administration (*see* SCPA 1001 [1] [a]). In appeal No. 1, petitioner appeals from an order entered following an evidentiary hearing that denied the petition and awarded respondent "costs for fees charged by [the Public Administrator] and [respondent's attorney] for the time spent in the hearing . . . ." Surrogate's Court determined, inter alia, that respondent was in fact married to decedent at the time of her death. In appeal No. 2, petitioner appeals from an order awarding attorneys' fees to the attorney for respondent in the amount of $3,000.

With respect to the order in appeal No. 1, petitioner contends that the Surrogate erred in admitting in evidence a marriage certificate from the State of California indicating that respondent and decedent were married on December 29, 2001, approximately 4½ years before decedent died. According to petitioner, the marriage certificate was not properly authenticated pursuant to CPLR 4540. That contention is not preserved for our review, inasmuch as petitioner did not object to the marriage certificate at the hearing

and did not challenge its authenticity at that time (*see generally Matter of Elijah P.*, 76 AD3d 631, 632, *lv denied* 15 NY3d 712; *Taitt v Snelling* [appeal No. 2], 74 AD3d 1827). We note that petitioner does not contend that the marriage certificate is unauthentic, i.e., not a true and accurate copy of the certificate on file in the Orange County Clerk's Office in California. Rather, petitioner contends that decedent's purported signature on the certificate is a forgery. Even assuming, arguendo, that decedent's signature is a forgery, we conclude that the forged signature does not have any bearing on the marriage certificate's authenticity. We also note that the Surrogate obtained a copy of the marriage certificate directly from the Orange County Clerk's Office in California pursuant to judicial subpoena and that the marriage certificate was identical to the one proffered by respondent. We thus perceive no reason to address petitioner's contention as a matter of discretion in the interest of justice.

Petitioner further contends in appeal No. 1 that the Surrogate imposed an unduly high burden of proof upon her to rebut the marriage presumption. We disagree. "An extremely strong presumption of validity arises from . . . a ceremonial marriage" (*Matter of Esmond v Lyons Bar & Grill*, 26 AD2d 884, 884), regardless whether the marriage is performed in the State of New York (*see Fisher v Fisher*, 250 NY 313, 317; *Esmond*, 26 AD2d 884). "[T]he well-settled marriage recognition rule 'recognizes as valid a marriage considered valid in the place where celebrated' " (*Lewis v New York State Dept. of Civ. Serv.*, 60 AD3d 216, 219, *affd* 13 NY3d 358, quoting *Van Voorhis v Brintnall*, 86 NY 18, 25). Once respondent produced a facially valid marriage certificate, petitioner, as "a stranger to the marriage relationship[, had] a heavy burden to establish its invalidity" (*Matter of Meltzer v McAnns Bar & Grill*, 85 AD2d 826, 826). We conclude that petitioner failed to meet that burden. Although petitioner's handwriting expert testified that the signature of decedent on the marriage certificate was forged, the expert's testimony was thoroughly impeached on cross-examination, and the Surrogate had ample reasons for rejecting the expert's opinion. We further conclude that, contrary to the contention of petitioner, the Surrogate did not improperly limit her proof at the hearing.

We agree with petitioner, however, that the court erred in awarding fees to the Public Administrator and attorney's fees to the attorney for respondent. We therefore modify the order in appeal No. 1 by vacating the fees awarded to the Public Administrator and the attorney's fees awarded to the attorney for respondent, and we reverse the order in appeal No. 2. In our view, petitioner did not engage in frivolous conduct warranting the imposition of sanctions against her pursuant to 22 NYCRR 130-1.1 (a). Inasmuch as decedent did not inform her closest friends and relatives that she was married and filed her taxes as a single person, petitioner had a good faith basis to question whether decedent was married to respondent. Although her challenge to the validity of the marriage certificate was unsuccessful, petitioner also had a legitimate basis for believing that her sister's signature on the marriage certificate may have been

forged.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1531

CA 10-00164

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

IN THE MATTER OF THE ADMINISTRATION OF THE ESTATE OF CAROL PETOTE, DECEASED.

KAREN M. PETOTE, PETITIONER-APPELLANT;

THOMAS CHICHESTER, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

MEMORANDUM AND ORDER

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-APPELLANT.

MICHAEL A. ROSENHOUSE, ROCHESTER, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Monroe County (Edmund A. Calvaruso, S.), entered February 26, 2009. The order awarded respondent attorney's fees.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs.

Same Memorandum as in *Matter of Petote* ([appeal No. 1] ___ AD3d ___ [Feb. 10, 2011]).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1532

CA 09-00631

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

IN THE MATTER OF THE APPLICATION OF DONALD L.L.,
PETITIONER-APPELLANT, FOR THE APPOINTMENT OF A
GUARDIAN OF THE PERSON AND PROPERTY OF JESSIE
D.L., AN ALLEGED INCAPACITATED PERSON.

ROBERT J. MICELI, RESPONDENT. ORDER
(APPEAL NO. 1.)

IN THE MATTER OF THE APPLICATION OF DONALD L.L.,
PETITIONER-APPELLANT, FOR THE APPOINTMENT OF A
GUARDIAN OF THE PERSON AND PROPERTY OF JESSIE
D.L., AN ALLEGED INCAPACITATED PERSON.

ROBERT J. MICELI, RESPONDENT.
(APPEAL NO. 2.)

ROBERT J. MICELI, AS GUARDIAN OF THE PERSON AND
PROPERTY OF JESSIE D.L., PLAINTIFF-RESPONDENT,

V

DONALD L.L. AND PATRICIA FITZGERALD,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

FRANK A. ALOI, ROCHESTER, FOR PETITIONER-APPELLANT AND DEFENDANTS-APPELLANTS.

LAW OFFICES OF RICHARD A. KROLL, ROCHESTER (RICHARD A. KROLL OF COUNSEL), PARKER LAW OFFICE, PLLC, FOR RESPONDENT AND PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (David Michael Barry, J.), entered April 21, 2008. The order and judgment, inter alia, appointed a guardian for the person and property of the incapacitated person.

It is hereby ORDERED that said appeal is unanimously dismissed with costs (*see Matter of Cherilyn P.*, 192 AD2d 1084, *lv denied* 82 NY2d 652; *see also* CPLR 5511).

Entered: February 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1533

CA 09-00632

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

IN THE MATTER OF THE APPLICATION OF DONALD L.L., PETITIONER-APPELLANT, FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND PROPERTY OF JESSIE D.L., AN ALLEGED INCAPACITATED PERSON.

ROBERT J. MICELI, RESPONDENT. ORDER
(APPEAL NO. 1.)

IN THE MATTER OF THE APPLICATION OF DONALD L.L., PETITIONER-APPELLANT, FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND PROPERTY OF JESSIE D.L., AN ALLEGED INCAPACITATED PERSON.

ROBERT J. MICELI, RESPONDENT.
(APPEAL NO. 2.)

ROBERT J. MICELI, AS GUARDIAN OF THE PERSON AND PROPERTY OF JESSIE D.L., PLAINTIFF-RESPONDENT,

V

DONALD L.L. AND PATRICIA FITZGERALD, DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

FRANK A. ALOI, ROCHESTER, FOR PETITIONER-APPELLANT AND DEFENDANTS-APPELLANTS.

LAW OFFICES OF RICHARD A. KROLL, ROCHESTER (RICHARD A. KROLL OF COUNSEL), PARKER LAW OFFICE, PLLC, FOR RESPONDENT AND PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (David Michael Barry, J.), entered July 24, 2008. The order and judgment granted the incapacitated person a money judgment against petitioner.

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

Entered: February 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1534

CA 09-00633

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

IN THE MATTER OF THE APPLICATION OF DONALD L.L., PETITIONER-APPELLANT, FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND PROPERTY OF JESSIE D.L., AN ALLEGED INCAPACITATED PERSON.

ROBERT J. MICELI, RESPONDENT. OPINION AND ORDER
(APPEAL NO. 1.)

IN THE MATTER OF THE APPLICATION OF DONALD L.L., PETITIONER-APPELLANT, FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND PROPERTY OF JESSIE D.L., AN ALLEGED INCAPACITATED PERSON.

ROBERT J. MICELI, RESPONDENT.
(APPEAL NO. 2.)

ROBERT J. MICELI, AS GUARDIAN OF THE PERSON AND PROPERTY OF JESSIE D.L., PLAINTIFF-RESPONDENT,

V

DONALD L.L. AND PATRICIA FITZGERALD, DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

FRANK A. ALOI, ROCHESTER, FOR PETITIONER-APPELLANT AND DEFENDANTS-APPELLANTS.

LAW OFFICES OF RICHARD A. KROLL, ROCHESTER (RICHARD A. KROLL OF COUNSEL), PARKER LAW OFFICE, PLLC, FOR RESPONDENT AND PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered January 28, 2009. The order, insofar as appealed from, denied the cross motion of defendants to vacate and set aside a stipulation dated January 24, 2008, and to amend and resettle subsequent orders and judgments.

It is hereby ORDERED that the order so appealed from is unanimously affirmed with costs, plaintiff is awarded attorneys' fees on appeal and the matter is remitted to Supreme Court, Monroe County, for further proceedings.

Opinion by SCONIERS, J.: This appeal concerns the issue whether the Equitable Distribution Law (Domestic Relations Law § 236 [B]) is

applicable to a stipulation of settlement, entered during proceedings pursuant to article 81 of the Mental Hygiene Law, that divides property in a manner similar to equitable distribution but does not involve the dissolution of a marriage. We conclude that the Equitable Distribution Law is not applicable to this case.

Donald L.L. (defendant) and his wife, the person for whom plaintiff was, inter alia, appointed guardian (hereafter, defendant's wife), were married in 1966. In May 2005, defendant's wife suffered a stroke that caused severe brain damage and left her unable to care for herself. Defendant is also in poor health and is not capable of caring for his wife. Thus, defendant's wife lives in the home of plaintiff, who provides 24-hour care for defendant's wife. In October 2007, defendant commenced a proceeding pursuant to Mental Hygiene Law article 81, seeking, inter alia, an order naming the Catholic Family Center as the guardian of his wife's person and property. Plaintiff cross-petitioned for an order naming himself as guardian of defendant's wife and her property. During proceedings in Supreme Court on January 24, 2008, plaintiff and defendant entered into an oral stipulation of settlement whereby plaintiff would be named the guardian of the person and property of defendant's wife, which the court converted into an order naming plaintiff as the guardian. With plaintiff acting as guardian of defendant's wife, plaintiff and defendant immediately entered into a second oral stipulation of settlement (hereafter, stipulation of settlement) whereby defendant and his wife would live separately, with defendant having the right to visitation. Plaintiff and defendant further stipulated, inter alia, that the marital property of defendant and his wife would be divided between them and that defendant would make weekly "maintenance and support" payments to his wife. The second stipulation included the following statement: "[Plaintiff and defendant] would like to stipulate to settle issues of property settlement and spousal support in the nature of an opting[-]out agreement as the same is provided for under the Domestic Relations Law. [They] do not intend to make this a divorce proceeding but would like [the stipulation] to serve as their agreement as to the issues . . . set forth [herein] and to that extent would also like to sign a written adoption of the oral stipulation."

After the terms of the second oral stipulation were read into the record, plaintiff and defendant signed a written adoption of the oral stipulation. In an order and judgment entered April 21, 2008, the court, inter alia, determined that defendant's wife was an incapacitated person, appointed plaintiff as the guardian of the person and property of defendant's wife and incorporated by reference the terms of the stipulation of settlement.

In September 2008, plaintiff commenced this action seeking to enforce the stipulation of settlement with respect to the "maintenance and support" payments by defendant and to void various allegedly fraudulent transfers between defendant and defendant Patricia Fitzgerald. Plaintiff moved for, inter alia, a preliminary injunction enjoining defendants from "dealing" with any of their property pending resolution of the action. Defendants cross-moved for, inter alia, an order vacating and setting aside the stipulation of settlement. In an

order entered January 28, 2009, the court denied the motion and cross motion.

Defendants contend that the court erred in granting relief in the form of equitable distribution without conducting a hearing on the economic issues between defendant and his wife. We reject that contention inasmuch as those economic issues were resolved by the stipulation of settlement. Furthermore, the record demonstrates that the stipulation of settlement was the product of extensive negotiations conducted after full disclosure of economic information. Therefore, there is no need to remit the matter for the resolution of economic issues (*cf. Matter of Joseph S.*, 25 AD3d 804, 806).

The Equitable Distribution Law does not require a different result. Domestic Relations Law § 236 (B) is "applicable to actions for an annulment or dissolution of a marriage, for a divorce, for a separation, for a declaration of the nullity of a void marriage" and other similar actions (§ 236 [B] [2] [a]). Thus, "[t]he concept of equitable distribution is written into the laws of the State so as to apply only in certain cases involving the abrogation of the marital status" (*Yedvarb v Yedvarb*, 92 AD2d 591, 592; *see also Sperber v Schwartz*, 139 AD2d 640, 642, *lv dismissed* 73 NY2d 871, *lv denied* 74 NY2d 606). In the absence of an action for the abrogation of the marital status, a court cannot "hold [a party] liable to [another party] . . . solely on the basis of equitable distribution" (*Yedvarb*, 92 AD2d at 592). Here, however, the court did not hold any party liable solely on the basis of equitable distribution because plaintiff, as the guardian of defendant's wife, and defendant resolved all economic issues through a negotiated settlement agreement that included an explicit statement that defendant and his wife were not divorcing. Therefore, the Equitable Distribution Law is not applicable to this case (*see* § 236 [B] [2]; *see generally Yedvarb*, 92 AD2d 591). In light of our determination, we do not address defendants' contention that the written adoption of the stipulation of settlement did not meet the requirements of Domestic Relations Law § 236 (B) (3).

Contrary to the further contention of defendants, the stipulation of settlement should not be vacated or reformed. " '[A] stipulation will not be destroyed without a showing of good cause therefor, such as fraud, collusion, mistake, accident[] or some other ground of the same nature' " (*Matter of Frutiger*, 29 NY2d 143, 150). Defendants contend that, at the time of the stipulation of settlement, defendant did not understand the nature and consequences thereof. Defendant stated in open court, however, that he discussed the terms of the agreement with his attorney and that he understood the terms of the stipulation of settlement. Defendant also signed a written affidavit of adoption of the stipulation of settlement that included an acknowledgment that he understood and agreed to its terms. Therefore, defendant's " 'unsubstantiated and conclusory allegations that [defendant] did not understand the significance of the [stipulation of settlement] . . . do not provide a sufficient basis for vacatur of the [stipulation of settlement]' " (*Matter of Titus*, 39 AD3d 1203, 1204, *lv denied* 9 NY3d 804; *see generally Matter of Frutiger*, 29 NY2d at

150).

Finally, plaintiff is entitled to attorneys' fees and costs associated with defending this appeal pursuant to the terms of the stipulation of settlement, and we remit the matter to Supreme Court to determine the amount of reasonable attorneys' fees incurred (*see John T. Nothnagle, Inc. v Chiariello*, 66 AD3d 1524).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1535

KA 08-02118

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GLORIA T. GONZALEZ, DEFENDANT-APPELLANT.

ABBIE GOLDBAS, 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 August 22, 2007. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting her of assault in the second degree (Penal Law § 120.05 [2]) and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that she was denied a fair trial by three statements made by the prosecutor during his summation. By failing to object to any of those statements, defendant has failed to preserve her contention for our review (*see* CPL 470.05 [2]; *People v Carpenter*, 52 AD3d 1050, 1051, *lv denied* 11 NY3d 735, *cert denied* ___ US ___, 129 S Ct 1613; *People v McNear*, 265 AD2d 810, 811-812, *lv denied* 94 NY2d 864). In any event, defendant's contention is without merit. To the extent that the statements could be interpreted as a reference to defendant's failure to testify at trial, any error with respect to the statements is harmless. County Court instructed the jury on several occasions throughout the trial that defendant had no burden to testify or present any evidence, and the court further explicitly instructed the jury that it could not draw any unfavorable inference from defendant's failure to testify. Given those instructions and the overwhelming evidence of defendant's guilt, there is no reasonable possibility that the prosecutor's statements might have contributed to the conviction (*see generally People v Crimmins*, 36 NY2d 230, 237; *People v Valdez*, 262 AD2d 338, 339, *lv denied* 93 NY2d 1028; *People v Torres*, 213 AD2d 503, *lv denied* 88 NY2d 996).

Finally, we note that the certificate of conviction incorrectly recites that defendant was convicted of criminal possession of a

weapon in the second degree, and it must therefore be amended to recite that defendant was convicted of criminal possession of a weapon in the third degree under Penal Law § 265.02 (1) (*see People v Saxton*, 32 AD3d 1286).

All concur except PINE, J., who is not participating.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1539

KA 09-02127

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

COLBY FOSS, III, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

COLBY FOSS, III, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered June 1, 2005. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree (three counts) and endangering the welfare of a child.

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

All concur except PINE, J., who is not participating.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1541

KA 07-01840

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONYELL J. MCKENZIE, DEFENDANT-APPELLANT.

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

DONYELL J. MCKENZIE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered August 22, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant's contention, County Court properly refused to charge the affirmative defense of extreme emotional disturbance. Such a charge is not appropriate where, as here, the defendant's conduct before, during and after the offense is "inconsistent with the loss of self-control associated with the defense" (*People v Roche*, 98 NY2d 70, 77; *see People v Smith*, 1 NY3d 610, 612). Viewing the evidence in the light most favorable to defendant, we conclude that there was not the requisite "sufficient credible evidence . . . presented for the jury to find, by a preponderance of the evidence, that the elements of the affirmative defense [had] been established" (*People v White*, 79 NY2d 900, 902-903), particularly in view of the conflicting reasons given by defendant for his actions.

Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

All concur except PINE, J., who is not participating.

Entered: February 10, 2011

Patricia L. Morgan
Clerk of the Court

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

1583

CA 10-00264

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

PROGRESSIVE NORTHEASTERN INSURANCE COMPANY,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STATE FARM INSURANCE COMPANIES, CRAIG DONAGHEY,
GLORIA CARD, JEANETTE BOSKET, CANDICE A. RHEA,
GABE'S AUTO, DEFENDANTS-RESPONDENTS,
CHARTER OAK FIRE INSURANCE COMPANY,
DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

HISCOCK & BARCLAY, LLP, ROCHESTER (JOSEPH A. WILSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (RYAN T. EMERY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS STATE FARM INSURANCE COMPANIES AND CANDICE A. RHEA.

COLELLA LAW OFFICE, CHITTENANGO (JOHN D. COLELLA OF COUNSEL), FOR DEFENDANT-RESPONDENT GABE'S AUTO.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered October 14, 2009 in a declaratory judgment action. The judgment, inter alia, declared that defendant Charter Oak Fire Insurance Company is obligated to defend and indemnify Gabe's Auto, Gabriel O'Loughlin and Craig Donaghey in an underlying personal injury action.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion of defendant Gabe's Auto in its entirety, vacating in part the 4th decretal paragraph and vacating in their entirety the 7th and 10th decretal paragraphs, and granting judgment in favor of defendant Charter Oak Fire Insurance Company as follows:

> It is ADJUDGED and DECLARED that defendant Charter Oak Fire Insurance Company is not obligated to defend or indemnify defendant Gabe's Auto, Gabriel O'Loughlin or Craig Donaghey in the underlying personal injury action brought by defendants Jeanette Bosket and Gloria Card and is not obligated to reimburse defendant Gabe's Auto and Gabriel O'Loughlin in hiring substitute counsel in that underlying personal injury action and as modified the judgment is affirmed without costs.

Memorandum: This declaratory judgment action involves a dispute over insurance coverage of various parties involved in a motor vehicle accident. The accident occurred when a vehicle occupied by defendants Jeanette Bosket and Gloria Card was rear-ended by a vehicle owned by defendant Candice Rhea and operated by defendant Craig Donaghey. Earlier that day, Rhea had taken her vehicle to defendant Gabe's Auto in Syracuse for minor repairs and an inspection. Because a light for the vehicle's Onboard Diagnostic System (ODS) had been activated, an inspection sticker could not be issued at that time because the inspection could be approved only after the light was deactivated. Because the light would not deactivate until the vehicle had been driven for a period of time, that same day the owner of Gabe's Auto gave Donaghey, his employee, permission to drive the vehicle to Binghamton to pick up his son for visitation. The accident occurred when Donaghey was returning from Binghamton. The occupants of the other vehicle, Bosket and Card, were injured in the accident, and they later commenced the underlying personal injury action against Donaghey and Rhea.

In its amended complaint in this action, plaintiff, Progressive Northeastern Insurance Company, sought a declaration that it is not obligated to defend or indemnify its insured, Donaghey, in the underlying action. Gabe's Auto in turn asserted a cross claim seeking a declaration that its insurer, defendant Charter Oak Fire Insurance Company (Charter Oak), is obligated to defend and indemnify it in the underlying action as well as a second cross claim seeking, inter alia, a declaration that Charter Oak is obligated to reimburse Gabe's Auto and Gabriel O'Loughlin for the costs of hiring substitute counsel to defend them in the underlying personal injury action. Charter Oak thereafter moved for summary judgment dismissing, inter alia, that cross claim against it, and Gabe's Auto cross-moved for summary judgment on its cross claim. Supreme Court issued the declaration sought by Gabe's Auto in its cross claim, and Charter Oak appeals.

We agree with Charter Oak that the court erred in declaring that it has a duty to defend and indemnify Gabe's Auto in the underlying action. The commercial liability policy issued by Charter Oak specifically excludes coverage for injuries and property damage arising from the use of any "auto" owned, operated, or rented or loaned to the insured. Pursuant to the "Operation of Customers Autos Garage Operations" endorsement, however, the auto exclusion "does not apply to any 'customer's auto' while on or next to those premises you [the insured] own, rent or control *and* that are being used for any 'garage operations' " (emphasis added). That endorsement is inapplicable in this case because the accident involving the customer's auto did not occur "on or next to" the insured premises; as noted, it occurred in another city, some 60 miles away. We thus conclude that, even assuming that Donaghey was using Rhea's vehicle for "garage operations" at the time of the accident, the policy does not afford coverage, and Charter Oak has no obligation to defend or indemnify Gabe's Auto in the underlying action.

Gabe's Auto contends that the court properly determined that the endorsement is ambiguous and should therefore be construed against

Charter Oak. According to Gabe's Auto, the endorsement can reasonably be read to limit the auto exclusion where the accident occurs "on or next to" the premises *or* if the vehicle is being used at the time for "garage operations," which includes the servicing and repair of a customer's auto. We disagree. Although insurance contracts should be liberally construed in favor of the insured (*see Salimbene v Merchants Mut. Ins. Co.*, 217 AD2d 991, 992, *appeal withdrawn* 88 NY2d 979), it is equally true that policies must be interpreted in light of "the plain language of the contract as it would be understood by an average or ordinary citizen" (*RLI Ins. Co. v Smiedala*, 71 AD3d 1553, 1554), and "[w]here the provisions of an insurance contract are clear and unambiguous, the courts should not strain to superimpose an unnatural or unreasonable construction" (*Maurice Goldman & Sons, Inc. v Hanover Ins. Co.*, 80 NY2d 986, 987). In our view, the construction of the relevant policy language urged by Gabe's Auto, and accepted by the court, is strained, unnatural and unreasonable. The endorsement is phrased in the conjunctive, meaning that for an accident to be covered, two conditions must be satisfied - i.e., the customer's auto must be "on or next to those premises," *and* the premises must be "being used for any 'garage operations.' " Interpreting this language in the manner urged by Gabe's Auto effectively turns the conjunctive "and" into a disjunctive "or." The structure of the sentence does not support that interpretation. Moreover, the interpretation proffered by Gabe's Auto relies on a construction of the sentence that is grammatically incorrect, in that it requires the plural verb "are" to modify the singular noun "auto." Thus, "the plain language" of this sentence, "as it would be understood by an average or ordinary citizen" (*RLI Ins. Co.*, 71 AD3d at 1554), supports the interpretation urged by Charter Oak.

We also reject respondents' alternative contention that the Garagekeepers Liability endorsement applies to this case. That endorsement provides coverage only for property damage to a customer's vehicle; it does not provide liability coverage for damage caused by a customer's vehicle. We therefore modify the judgment accordingly and declare that Charter Oak is not obligated to defend or indemnify Gabe's Auto (or its employee, Donaghey) in the underlying action.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1592

KA 09-00429

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON GANO, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON 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 January 16, 2009. The judgment convicted defendant, upon a jury verdict, of scheme to defraud in the first degree, body stealing (17 counts), opening graves (17 counts) and unlawful dissection of the body of a human being (17 counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, 17 counts each of body stealing (Public Health Law § 4216), opening graves (§ 4218), and unlawful dissection of the body of a human being (§ 4210-a). Defendant contends that the evidence is legally insufficient to support the conviction of body stealing and opening graves because the People failed to prove that body parts were removed from bodies that were "buried" (§ 4216) or "awaiting burial" (*id.*; § 4218), or that he acted with one of the statutory purposes set forth in Public Health Law §§ 4216 and 4218. Defendant failed to raise those contentions in his motion for a trial order of dismissal and thus failed to preserve them for our review (*see People v Gray*, 86 NY2d 10, 19). In any event, defendant's contentions lack merit. We further reject defendant's contention that the evidence is legally insufficient to support the conviction of body stealing, opening graves, and unlawful dissection under an accomplice theory. Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), we conclude that a rational trier of fact could have found defendant guilty as an accomplice beyond a reasonable doubt (*see generally People v Bleakley*, 69 NY2d 490, 495).

We further conclude that Supreme Court did not err in refusing to suppress statements made by defendant to an investigator from Kings

County pursuant to a proffer agreement. The agreement expressly provides that the Kings County District Attorney's Office would "not use any statements made by [defendant] during the proffer in its case-in-chief in any criminal proceeding," but there is no provision therein that the statements made by defendant would not be used to prosecute him in another jurisdiction. Morever, the testimony adduced at the *Huntley* hearing established that Kings County personnel did not consult with Monroe County personnel before presenting the proffer agreement to defendant, and that no one from the Monroe County District Attorney's Office, the Rochester Police Department, or any member of Rochester law enforcement was present during defendant's interview with the King's County District Attorney's Office. Thus, the record belies defendant's contention "that Monroe County and Kings County were acting in concert such that the former could be bound by the promises of the latter" (*People v Batjer*, 77 AD3d 1279, 1280).

Contrary to the further contention of defendant, we conclude that the court did not err in admitting in evidence records of various tissue processing companies, inasmuch as the People established that the records fall within the business records exception to the hearsay rule (*see* CPLR 4518 [a]; CPL 60.10). Although much of the information contained in the records of BioMedical Tissue Services (BTS) was false, the testimony of two BTS employees established that the donor names, tissue recovery location, and recovery dates were accurately recorded on index cards; that such information was recorded in the regular course of BTS' business; and that the records were made at or about the time that the tissue recoveries took place (*see* CPLR 4518 [a]; *People v Kennedy*, 68 NY2d 569, 579-580; *cf. Batjer*, 77 AD3d at 1280-1281). The information from the index cards was then copied onto BTS recovery logs in the regular course of the business of BTS at or about the time that its New Jersey office received the tissue from Rochester, New York (*see People v Morrow*, 204 AD2d 356, 357). In any event, we note that the record contains circumstantial evidence establishing the identity of the decedents.

The sentence is not unduly harsh or severe. Finally, we have reviewed defendant's remaining contentions and conclude that they are lacking in merit.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1594

CAF 09-02209

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

IN THE MATTER OF SHANIA S.

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

CHANEESE T., RESPONDENT,
AND LARRY R.S., JR., RESPONDENT-APPELLANT.

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

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

EUGENE P. ADAMS, ATTORNEY FOR THE CHILD, BUFFALO, FOR SHANIA S.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered October 19, 2009 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed the subject child in the custody of petitioner.

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

Memorandum: Petitioner commenced this proceeding pursuant to Family Court Act article 10 against respondent mother and respondent "putative" father (father), and the father now appeals from an order adjudicating the newborn child at issue in this appeal to be a neglected child. Contrary to the father's contention, the finding of neglect is supported by a preponderance of the evidence (*see* § 1046 [b] [i]). The evidence presented at the fact-finding hearing demonstrated that the father was virtually homeless and that, at the time of the hearing on the petition, he had neither the resources nor the ability to care for the child. A neglected child includes one "whose physical, mental or emotional condition . . . is in imminent danger of becoming impaired as a result of the failure of [her] parent or other person legally responsible for [her] care to exercise a minimum degree of care" in, inter alia, providing adequate food, clothing and shelter (§ 1012 [f] [i]). " 'Actual injury or impairment need not be found, as long as a preponderance of the evidence establishes that the child is in imminent danger of either injury or impairment' " (*Matter of Elijah NN.*, 66 AD3d 1157, 1159, *lv denied* 13 NY3d 715). The father contends for the first time on appeal that the petition must be dismissed against him because he is not a "parent or other person legally responsible for [the] child's care" (§ 1012 [a]; *see* § 1012 [g]), and that contention therefore is not properly before

us. We note in any event that the contention of the father is wholly inconsistent with his testimony at the hearing on the petition that the child is in fact his daughter.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1599

CA 10-01309

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

IN THE MATTER OF JOSEPH ESPOSITO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER AND CITY OF ROCHESTER
PLANNING COMMISSION, CONSISTING OF D.
WATSON, S. REBHOLTZ, D. SUCHY, E. MARLIN,
H. ZIMMER-MEYER, AND W. CLARK,
RESPONDENTS-RESPONDENTS.

FRANK A. ALOI, ROCHESTER, FOR PETITIONER-APPELLANT.

THOMAS S. RICHARDS, CORPORATION COUNSEL, ROCHESTER (MICHELE DIGAETANO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated decision) of the Supreme Court, Monroe County (William P. Polito, J.), entered December 7, 2009 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination denying his application for a special permit allowing him to use specified property for parking in connection with the Cordial Lounge, an adult cabaret owned and operated by petitioner. We conclude that Supreme Court properly dismissed the petition.

The Cordial Lounge is located at 392 Lyell Avenue in Rochester, and petitioner also owns property on Sherman Street that is located in an R-1 low density residential zoning district. The Sherman Street property (hereafter, Sherman Street lots) adjoins 392 Lyell Avenue and has been used as off-street parking for the Cordial Lounge, although petitioner and his predecessors in interest never obtained zoning approval to use the Sherman Street lots for such parking.

In 2003 petitioner entered into a contract with respondent City of Rochester (City) to purchase property located at 406-410 Lyell Avenue, which also adjoins 392 Lyell Avenue, for use as additional off-street parking for the Cordial Lounge. The contract provided that the transfer of title was contingent on petitioner’s compliance with the existing zoning classifications and that any changes of land use

classification would be initiated by petitioner and completed prior to the date of transfer of title. Respondent City of Rochester Planning Commission (Planning Commission) subsequently informed petitioner that, pursuant to the City's zoning ordinance, the development of 406-410 Lyell Avenue as a parking lot required the approval of the Planning Commission. In addition, the Planning Commission informed petitioner that he must obtain approval for the off-street parking use of the Sherman Street lots because those lots "will connect and integrate" with the properties at 406-410 Lyell Avenue and 392 Lyell Avenue, and City ordinances prohibit the sale of real property to a purchaser who owns other property that is not in compliance with the City's codes and ordinances.

In October 2005, petitioner's application for a special permit allowing parking use of 406-410 Lyell Avenue and the Sherman Street lots was denied by the Planning Commission because, inter alia, the proposed use was not in harmony with the goals, standards and objectives of the City's comprehensive plan, despite the allegations of petitioner that he had neighborhood support for his application. Petitioner did not seek judicial review of the Planning Commission's determination. In early 2006, the City cancelled the contract for the sale of 406-410 Lyell Avenue on the ground that petitioner failed to obtain the requisite zoning approval. Subsequently, in June 2009, the Planning Commission denied petitioner's second application for a special permit allowing the use of 406-410 Lyell Avenue and the Sherman Street lots as ancillary parking for the benefit of the Cordial Lounge because, inter alia, the proposed use was not in harmony with the goals, standards and objectives of the City's comprehensive plan.

We reject petitioner's contention that the City improperly cancelled the contract for the sale of 406-410 Lyell Avenue. It is undisputed that petitioner did not obtain the zoning approval required by the contract, and thus the City was entitled to cancel the contract because petitioner failed to satisfy a condition precedent for closing. Also contrary to petitioner's contention, the determination of the Planning Commission that petitioner was required to obtain approval for the parking use of the Sherman Street lots had a rational basis and was supported by substantial evidence (*see generally Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613).

We further conclude that petitioner did not establish that he acquired an easement by prescription to use 406-410 Lyell Avenue as a parking lot. In order to establish that he had such an easement, petitioner had the "burden of establishing by clear and convincing evidence that his use of [the] land was adverse, open and notorious, continuous and uninterrupted for the prescriptive period" (*Bush v Ozogar*, 21 AD3d 1407, 1408; *see* RPAPL 311). Petitioner admitted, however, that the City's predecessor in interest had permitted the use of 406-410 Lyell Avenue as parking for customers of the Cordial Lounge and, because the use "was initially permissive in nature, it was incumbent upon [petitioner] to show the assertion of a hostile right which is made known to the property owner" (*Northtown, Inc. v Vivacqua*, 272 AD2d 917, 918 [internal quotation marks omitted]; *see*

Penn Hgts. Beach Club, Inc. v Myers, 42 AD3d 602, 606, *lv dismissed* 10 NY3d 746). Petitioner failed to make any such showing.

Petitioner failed to exhaust his administrative remedies with respect to his further contention that no special permit to use the Sherman Street lots was needed because his use of those properties was a legal nonconforming use. Petitioner failed to raise that contention before the Planning Commission, and "[t]his Court has no discretionary authority to review the merits" of that contention (*Matter of Charest v Morrison*, 48 AD3d 1178, 1179; *see Matter of Nelson v Coughlin*, 188 AD2d 1071, *appeal dismissed* 81 NY2d 834). Contrary to petitioner's further contentions, the June 2009 determination of the Planning Commission denying petitioner's second application for a special permit was not " 'illegal, arbitrary and capricious or irrational . . .[, nor was it] an abuse of discretion' " (*Matter of Violet Realty, Inc. v City of Buffalo Planning Bd.*, 20 AD3d 901, 902, *lv denied* 5 NY3d 713; *see generally Pecoraro*, 2 NY3d at 613). Finally, we reject the contention of petitioner that there are remaining issues of fact warranting remittal for a trial (*see generally* CPLR 7804 [h]).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1605

KA 09-02125

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROY HOOTEN, ALSO KNOWN AS ROY D. HOOTEN,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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 July 13, 2009. The judgment ordered defendant to pay restitution in the amount of $20,841.08.

It is hereby ORDERED that said appeal from the judgment insofar as it imposes a sentence of incarceration is unanimously dismissed and the judgment is otherwise modified on the law by vacating the amount of restitution ordered and ordering defendant to pay restitution in the amount of $19,516.77 and as modified the judgment is affirmed.

Memorandum: In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the third degree (Penal Law §§ 110.00, 140.20) and imposing a sentence of incarceration and, in appeal No. 1, he appeals from a judgment that again imposes the identical sentence of incarceration and further orders him to pay restitution in the amount of $20,841.08. Addressing first appeal No. 2, we note that defendant's sole contention is that the sentence is unduly harsh and severe, and we reject that contention. We agree with defendant in appeal No. 1, however, that the certificate of conviction reflects an amount of restitution that conflicts with the amount to which defendant stipulated. At the restitution hearing, County Court indicated that one of the restitution claims had been withdrawn, reducing the total amount of restitution requested by the People. Defense counsel then indicated that defendant was prepared to stipulate to restitution in the amount of $18,587.40, based on the remaining claims, together with the 5% surcharge of $929.37, for a total restitution figure of $19,516.77. The People agreed to that amount and the court accepted the stipulation. We therefore modify the judgment in appeal No. 1 by vacating the amount of restitution ordered and ordering defendant to pay restitution in the amount of $19,516.77 in accordance with the

stipulation. We dismiss the appeal from the judgment in appeal No. 1 insofar as it imposes a sentence of incarceration inasmuch as we have addressed that issue in appeal No. 2.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1606

KA 09-00321

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROY HOOTEN, ALSO KNOWN AS ROY D. HOOTEN,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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 January 13, 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.

Same Memorandum as in *People v Hooten* ([appeal No. 1] ___ AD3d ___ [Feb. 10, 2011]).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

1

TP 10-01788

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

IN THE MATTER OF RICHARD SCOTT, JR.,
PETITIONER,

V ORDER

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

RICHARD SCOTT, JR., 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, Erie County [Christopher J. Burns, J.], entered August 26, 2010) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

2

TP 10-01923

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

IN THE MATTER OF JAVIS TOLEDO, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT.

JAVIS TOLEDO, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (SANIA W. KHAN OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Bernadette T. Clark, J.], entered January 25, 2010) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

3

KA 09-02178

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RAKEM T. COLDALLAH, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

KATHLEEN E. CASEY, BARKER, 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 October 6, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the fifth degree.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

4

KA 08-01331

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TERRENCE L. JOHNSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (ERIC M. DOLAN 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 (John J. Connell, J.), rendered January 18, 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.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

5

KA 08-02368

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

PRESTON GREEN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (ERIC M. DOLAN 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 (John R. Schwartz, A.J.), rendered July 28, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

6

KA 10-00176

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL FAUL, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD H. DODD, DISTRICT ATTORNEY, OSWEGO (MICHAEL G. CIANFARANO OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Oswego County Court (John J. Elliott, A.J.), entered December 2, 2009. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We agree with defendant that the People failed to prove by the requisite clear and convincing evidence that he had a history of alcohol and drug abuse (*see generally* § 168-n [3]). We thus conclude that County Court erred in assessing 15 points on the risk assessment instrument (RAI) for risk factor 11, and that his score on the RAI must be reduced from 110 to 95, rendering him a presumptive level two risk. We therefore modify the order accordingly.

The case summary presented by the People at the SORA hearing stated that defendant had previously been asked to leave his father's house because of alcohol abuse and his lack of a job. Although the case summary further stated that defendant was scored "non-alcoholic" on the Michigan Alcohol Screening test (*cf. People v Johnson*, 77 AD3d 548; *People v Gonzalez*, 48 AD3d 284, *lv denied* 10 NY3d 711), he nevertheless was recommended for a chemically dependent sex offender treatment program (*see People v Abrams*, 76 AD3d 1058, 1059), and the court relied upon defendant's attendance in that program for its determination that the assessment of 15 points was warranted under risk factor 11. The People also presented the presentence report (PSR), which stated that defendant did not have a history of drug or

alcohol abuse; that he drank alcohol only occasionally; and that his father asked him to leave his residence because of alcohol use. The PSR is consistent with defendant's testimony at the SORA hearing, wherein he denied having a problem with alcohol or drugs, and he further testified that his father did not approve of his consumption of alcohol and that he drank alcohol occasionally with friends and had used marihuana only once or twice when he was 18 years old (*cf. People v Abrams*, 76 AD3d 1058, 1058-1059; *People v Urbanski*, 74 AD3d 1882, *lv denied* 15 NY3d 707; *People v Murphy*, 68 AD3d 832, *lv dismissed* 14 NY3d 812). In addition, defendant testified that he participated in the chemically dependent sex offender treatment program in order to complete his program requirements.

The SORA risk assessment guidelines and commentary for risk factor 11 state that "[a]lcohol and drug abuse are highly associated with sex offending . . . [According to the relevant literature] . . ., it serves as a disinhibitor and therefore is a precursor to offending . . . The category focuses on the offender's history of abuse and the circumstances at the time of the offense. It is not meant to include occasional social drinking" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 15 [2006 ed]). We note that the fact that alcohol was not a factor in the underlying offense is not dispositive inasmuch as the guidelines further provide that "[a]n offender need not be abusing alcohol or drugs at the time of the instant offense to receive points in this category" (*id.*).

We conclude that the case summary provided "only very limited information about [defendant's] alleged prior history of drug and alcohol abuse" and that the PSR did not provide evidence of a history of alcohol or drug abuse (*People v Mabee*, 69 AD3d 820, 820, *lv denied* 15 NY3d 703). Thus, the People failed to meet their burden of establishing by clear and convincing evidence that defendant had a history of alcohol or drug abuse.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

8

KA 09-02181

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RAKEM T. COLDALLAH, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

KATHLEEN E. CASEY, BARKER, 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 October 6, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

9.1

KAH 11-00136

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
GLENN E. VAN NORSTRAND, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered June 17, 2009 in a proceeding pursuant to CPLR article 70. The judgment denied and dismissed the petition for a writ of habeas corpus.

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

Memorandum: Petitioner commenced this proceeding for a writ of habeas corpus contending, inter alia, that he was denied effective assistance of counsel at sentencing and that the Board of Parole's determination denying him discretionary release to parole supervision was arbitrary, capricious and irrational. Supreme Court properly dismissed the petition. Petitioner's contention concerning the alleged ineffectiveness of counsel could have been raised on direct appeal or by way of a motion pursuant to CPL 440.10, and thus habeas corpus relief is not available with respect to that contention (*see People ex rel. Lanfair v Corcoran*, 60 AD3d 1351, *lv denied* 12 NY3d 714; *People ex rel. Mills v Poole*, 55 AD3d 1289, *lv denied* 11 NY3d 712). In any event, even if that contention had merit, petitioner would not be entitled to immediate release from custody, and thus habeas corpus relief is not available with respect to that contention for that reason as well (*see People ex rel. Gloss v Costello*, 309 AD2d 1160, *lv denied* 1 NY3d 504; *Matter of Caroselli v Goord*, 269 AD2d 706, *lv denied* 95 NY2d 754). Further, petitioner is not entitled to habeas corpus relief based upon the determination of the Board of Parole denying him discretionary release to parole supervision (*see People ex rel. Alford v Berbary*, 2 AD3d 1337, *lv denied* 2 NY3d 702, *cert denied* 542 US 942). Finally, we reject the contention of petitioner that the

court erred in denying his applications for assigned counsel (*see Gloss*, 309 AD2d at 1161).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

9

KAH 10-00037

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
GLENN E. VAN NORSTRAND, PETITIONER-APPELLANT,

V ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

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

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered October 19, 2009 in a proceeding pursuant to CPLR article 70. The order denied the motion of petitioner for a stay and reconsideration.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see People ex rel. Hinton v Graham*, 66 AD3d 1402, 1403, *lv denied* 13 NY3d 934, 14 NY3d 795).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

10

KA 10-01941

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID J. DITUCCI, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK A. ALOI, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Elma A. Bellini, J.), rendered July 31, 2008. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and criminal contempt in the first degree (two counts).

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence on the conviction of assault in the second degree is unanimously dismissed and the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]) and two counts of criminal contempt in the first degree (§ 215.51 [b] [v]; [c]). Contrary to defendant's contention, County Court's *Molineux* ruling was not an abuse of discretion (*see People v Dorm*, 12 NY3d 16, 19; *People v Gorham*, 17 AD3d 858, 860-861). The record reflects that "[t]he court meticulously weighed the probative value of each incident against the potential for prejudice and limited or excluded numerous relevant incidents due to their prejudicial nature" (*Gorham*, 17 AD3d at 860). Contrary to defendant's further 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), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Any inconsistencies in the victim's testimony were highlighted by defense counsel, and the jury's resolution of credibility issues with respect to the testimony of the victim is entitled to great deference (*see People v McFarley*, 77 AD3d 1282). We also reject the contention of defendant that he was denied his right of confrontation based on the court's denial of his motion to disqualify the prosecutor and his application to call the prosecutor as a witness in order to question the prosecutor on the issue of her alleged influence over the victim. Defense counsel was free to cross-

examine the victim on that issue, and in fact did so (*see generally People v Chin*, 67 NY2d 22, 29-30). Defendant's remaining contentions with respect to appeal No. 1 are not preserved for our review (*see* CPL 470.05 [2]) and, in any event, are without merit.

In appeal No. 2, defendant appeals from a resentence with respect to the conviction of assault in the second degree, in which the court additionally imposed a five-year term of postrelease supervision. Contrary to defendant's contention, the imposition of the period of postrelease supervision was proper inasmuch as defendant was sentenced to a determinate term of imprisonment in appeal No. 1 as a second felony offender (*see* Penal Law § 70.06 [6] [c]; § 70.45 [2] [e]). Finally, we reject defendant's challenge to the severity of the sentence and the resentence in appeal Nos. 1 and 2.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

11

KA 10-01943

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID J. DITUCCI, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK A. ALOI, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Monroe County Court (Elma A. Bellini, J.), rendered August 8, 2008. Defendant was resentenced to a determinate term of six years with five years postrelease supervision upon his conviction of assault in the second degree.

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

Same Memorandum as in *People v Ditucci* ([appeal No.1] ___ AD3d ___ [Feb. 10, 2011]).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

12

KA 08-02049

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN M. CAMPBELL, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH, 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 Steuben County Court (Joseph W. Latham, J.), entered July 1, 2008. The order denied the motion of defendant to vacate his 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 Steuben County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order summarily denying his motion pursuant to CPL 440.10 seeking to vacate the judgment convicting him upon his plea of guilty on the seventh day of the trial of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1], [3]). Defendant contends that he was denied effective assistance of counsel based, inter alia, upon the failure of his trial counsel to inform him of potentially exculpatory evidence, i.e., that before the murder an inmate at a state prison had advised the District Attorney that he had information concerning a plot to murder the victim that implicated persons other than defendant. According to defendant's affidavit submitted in support of the CPL 440.10 motion, which in turn is supported by the correspondence between the inmate and the District Attorney, defendant would not have pleaded guilty if he had been aware of that evidence. We agree with defendant that County Court erred in denying his motion without conducting a hearing.

It is undisputed that defendant's trial counsel had obtained an "open file" discovery arrangement with the District Attorney and that the correspondence was included in the file. Despite the fact that counsel representing defendant on the CPL 440.10 motion asked defendant's trial counsel to provide an affidavit setting forth what he knew and what he had advised defendant about the information in that correspondence, trial counsel failed to provide the affidavit. We thus conclude that the court erred in failing to conduct a hearing inasmuch as defendant raised an issue of fact whether defendant's

trial counsel was aware of the potentially exculpatory evidence and whether he advised defendant about that evidence (*cf. People v Waymon*, 65 AD3d 708, 709, *lv denied* 13 NY3d 857, 863). We further conclude that defendant's assertion of ineffective assistance of counsel has not been "conclusively refuted by documentary evidence" (*People v Session*, 34 NY2d 254, 256), although we note that an appendix to the People's brief and portions of the brief were stricken by order of this Court entered December 2, 2010 because they addressed matters outside the record. We therefore conclude, based upon the record before us, that " 'a hearing should be held to promote justice [because] the issues raised by the motion are sufficiently unusual and suggest searching investigation' " (*People v Ausserau*, 77 AD2d 152, 155, quoting *People v Crimmins*, 38 NY2d 407, 416; *see People v Kearney*, 78 AD3d 1329; *People v Nicholson*, 222 AD2d 1055, 1057). Thus, we hold the case, reserve decision and remit the matter to County Court to conduct a hearing to determine what defendant's trial counsel knew about the alleged potentially exculpatory evidence and whether he related that information to defendant.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

13

CA 09-02486

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

BRIAN RAULS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DIRECTV, INC., DEFENDANT-APPELLANT.

LEMERY GREISLER LLC, SARATOGA SPRINGS (ROBERT A. LIPPMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (HARRY J. FORREST OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered November 9, 2009 in a personal injury action. The order and judgment awarded plaintiff money damages for defendant's violation of Labor Law § 240 (1).

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

Memorandum: Defendant contends on appeal that Supreme Court erred in sua sponte converting plaintiff's motion for leave to "renew" his prior motion for a default judgment to a motion for summary judgment, granting summary judgment to plaintiff, and awarding damages on plaintiff's Labor Law § 240 (1) claim. We agree. We note at the outset that defendant's notice of appeal recites that the appeal is taken from Supreme Court's "Decision and Order" entered November 9, 2009 when in fact the record contains a document entitled an "order and judgment" that was entered on that date. We nevertheless exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the order and judgment (*see* CPLR 5520 [c]). With respect to the merits, we note that there is no procedural mechanism in the CPLR authorizing a court to convert a motion for leave to renew a motion for a default judgment to a motion for summary judgment. In any event, it is well established that a "court may not, on its own initiative, convert a motion for [relief other than for summary judgment] into one for summary judgment without giving adequate notice to the parties and affording the parties an opportunity to lay bare their proof" (*Clark v New York State Off. of Parks, Recreation & Historic Preserv.*, 288 AD2d 934, 935). Here, it is undisputed that neither party moved for summary judgment and that the court at oral argument of plaintiff's motion for leave to renew provided no notice

to the parties before sua sponte converting the motion to a motion for summary judgment and then granting summary judgment to plaintiff. The court thus "deprived [defendant] of the opportunity to make an appropriate record" (*Matter of Wargo v Amica Mut. Ins. Co.*, 6 AD3d 541, 543).

We cannot agree with plaintiff that the court properly converted the motion on the ground that the parties were " 'deliberately charting a summary judgment course' " (*Mihlovan v Grozavu*, 72 NY2d 506, 508; *see Clark*, 288 AD2d at 935). After this Court reversed the prior order of Supreme Court insofar as appealed from by granting in its entirety defendant's motion to vacate the default judgment entered against it (*Rauls v DirecTV, Inc.*, 60 AD3d 1337), defendant interposed an answer, served discovery demands, and noticed depositions. Depositions of plaintiff and a representative of defendant had been scheduled and were adjourned at the request of plaintiff's counsel. Shortly thereafter, plaintiff moved for leave to renew the prior motion seeking a default judgment and, notably, in opposition to that motion, defendant expressly contended that "[t]he plaintiff must proceed forward with discovery and move for summary judgment at the appropriate time."

Plaintiff contends in the alternative that we should modify the order and judgment on appeal by granting his motion for leave to renew and reinstating the default judgment. Plaintiff was not entitled to take a cross appeal, having obtained the full relief sought, "even where [the plaintiff] disagrees with the particular findings, rationale or the opinion supporting the judgment or order below in his favor" (*Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545). Nevertheless, plaintiff may assert an alternative ground for affirmance where, as here, the defendant would prevail on a reversal on appeal (*see generally id.* at 545-546; *Harnischfeger v Moore*, 56 AD3d 1131). We conclude, however, that plaintiff's alternative contention lacks merit. A plaintiff may seek a default judgment only "[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed" (CPLR 3215 [a]). Here, once defendant interposed its answer pursuant to this Court's decision on defendant's prior appeal (*Rauls*, 60 AD3d at 1338), defendant was no longer in default and there was thus no procedural basis for seeking leave to "renew" the motion for a default judgment entered upon defendant's earlier failure to answer the complaint in a timely manner.

In light of our determination, we do not address the remaining contentions of the parties.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

14

CA 10-00481

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

OTU A. OBOT, PLAINTIFF-APPELLANT,

V ORDER

NATIONAL FUEL GAS DISTRIBUTION CORPORATION,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

OTU A. OBOT, PLAINTIFF-APPELLANT PRO SE.

FELDMAN KIEFFER, LLP, BUFFALO (BRIAN BOGNER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered February 8, 2010. The order granted the motion of defendant for permission to enter plaintiff's residence for the purpose of moving the interior gas meter to the exterior.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

15

CA 10-00895

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

OTU A. OBOT, PLAINTIFF-APPELLANT,

V ORDER

NATIONAL FUEL GAS DISTRIBUTION CORPORATION,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

OTU A. OBOT, PLAINTIFF-APPELLANT PRO SE.

FELDMAN KIEFFER, LLP, BUFFALO (BRIAN BOGNER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered March 30, 2010. The order dismissed plaintiff's complaints and directed that, in the event that plaintiff decides to bring another claim against defendant, he must first obtain leave of court.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

16

CA 09-02522

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

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

V ORDER

JAMAAL ALI, 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 (FRANK BRADY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered November 18, 2009 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, committed respondent to a secure treatment facility.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

17

CA 09-02610

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

IN THE MATTER OF RONALD ENGLERT AND FRAN ENGLERT, PETITIONERS-APPELLANTS,

V ORDER

ZONING BOARD OF APPEALS OF TOWN OF NORTH DANSVILLE AND BENJAMIN GORDON, RESPONDENTS-RESPONDENTS.

JONES AND SKIVINGTON, GENESEO (GREGORY J. MCCAFFREY OF COUNSEL), FOR PETITIONERS-APPELLANTS.

JOHN C. PUTNEY, MOUNT MORRIS, FOR RESPONDENT-RESPONDENT ZONING BOARD OF APPEALS OF TOWN OF NORTH DANSVILLE.

LAW OFFICE OF R. BRIAN GOEWEY, ROCHESTER (R. BRIAN GOEWEY OF COUNSEL), FOR RESPONDENT-RESPONDENT BENJAMIN GORDON.

Appeal from a judgment (denominated order) of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered December 7, 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 for reasons stated in the decision at Supreme Court.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

18

CA 09-00081

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

THERESA ANNE JELFO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN MICHAEL JELFO, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FINOCCHIO & ENGLISH, ESQS., SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (ELIZABETH deV. MOELLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES E. CORL, JR., CICERO (J. SCOTT PORTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

SHERENE PAVONE, ATTORNEY FOR THE CHILDREN, MANLIUS, FOR JESSICA A.S.J. AND JOANNA S.J.

Appeal from a judgment of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered April 11, 2008 in a divorce action. The judgment, inter alia, granted plaintiff a divorce and ordered defendant to pay support and maintenance.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment of divorce and contends, inter alia, that Supreme Court erred in awarding plaintiff maintenance and attorney's fees. In appeal No. 2, he contends that the court erred in denying his motion insofar as he sought a downward modification of the maintenance and child support obligations and further erred in ordering him to pay plaintiff the sum of $2,500 for attorney's fees incurred by her in connection with his motion.

We reject the contention of defendant in appeal No. 1 that the court erred in refusing to take into account the payments that he made to assist in the support and college expenses of his children from a prior marriage. It is undisputed that there was neither a court order nor a written agreement with respect to the support of those children, and thus the court properly refused to reduce defendant's income by the amount of those payments in calculating his instant child support obligation (*see* Domestic Relations Law § 240 [1-b] [b] [5] [vii] [D]). Furthermore, it is well settled that the court may consider the needs of children who are not the subject of this divorce action in determining whether the pro-rata share of defendant's child support

obligation is unjust or inappropriate "only if the resources available to support such children are less than the resources available to support the children who are subject to the instant action" (§ 240 [1-b] [f] [8]), and that is not the case here.

We reject defendant's further contention in appeal No. 1 that the court abused its discretion in requiring him to pay maintenance to plaintiff. At the time of the trial, defendant earned approximately $110,000 per year, while plaintiff earned approximately $45,000 per year. It is well established that the " 'amount and duration of maintenance are committed to the sound discretion of the trial court' " (*Frost v Frost*, 49 AD3d 1150, 1150-1151), and we conclude that the court did not abuse its discretion in awarding maintenance to plaintiff for a period of five years. The record establishes that the court properly considered the factors set forth in Domestic Relations Law § 236 (B) (6), including the reasonable needs of both parties (*see Griggs v Griggs*, 44 AD3d 710, 712; *see generally Hartog v Hartog*, 85 NY2d 36, 52).

Defendant further contends in appeal No. 1 that the court abused its discretion in ordering him to pay the attorney's fees of plaintiff incurred with respect to the divorce action, and in appeal No. 2 he contends the court abused its discretion in ordering him to pay plaintiff $2,500 toward her attorney's fees with respect to his motion. We conclude in appeal No. 1, i.e., the divorce action, that the court properly considered, inter alia, the disparity in the parties' respective incomes, and thus the court did not abuse its discretion in requiring defendant to pay the attorney's fees for plaintiff in the divorce action (*see generally DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881; *Mann v Mann*, 244 AD2d 928, 929-930). With respect to the order in appeal No. 2, however, we conclude that the court improvidently exercised its discretion in requiring defendant in the fourth ordering paragraph to contribute to the attorney's fees for plaintiff incurred in connection with his motion inasmuch as the parties had comparable financial resources at that time, and plaintiff had sufficient funds with which to pay those fees (*see Penna v Penna*, 29 AD3d 970, 972). We therefore modify the order in appeal No. 2 accordingly.

Finally, we conclude in appeal No. 2 that the court properly denied defendant's motion for a downward modification of his child support and maintenance obligations based upon his loss of employment. It is well settled that a loss of employment may constitute a change in circumstances justifying a downward modification of those obligations " 'where the termination occurred through no fault of the [party seeking modification] and the [party] has diligently sought re-employment' " (*Matter of Fragola v Alfaro*, 45 AD3d 684, 685). Here, the court properly determined that defendant contributed to the termination inasmuch as he failed to meet the expectations of his employer, although we agree with defendant that the court erred in determining that he did not diligently seek re-employment. Indeed, the record establishes that defendant was interviewed for several jobs over a three-month period within a one-hour radius of Syracuse before accepting the only position that he was offered, with a resulting

reduction in income in the amount of $30,000. We further agree with defendant that, inasmuch as he was awarded joint custody and liberal visitation with his daughters, his failure to pursue job leads provided to him by plaintiff both in the New York City area and in states other than New York does not render his job search less than diligent. Nevertheless, the record establishes that defendant had liquid assets in addition to his income, and we thus conclude that the court did not abuse its discretion in determining that he had the ability to meet his child support and maintenance obligations (*see generally Fragola*, 45 AD3d at 685; *Matter of Muselevichus v Muselevichus*, 40 AD3d 997, 998-999).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

19

CA 10-01542

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

THERESA ANNE JELFO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN MICHAEL JELFO, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FINOCCHIO & ENGLISH, ESQS., SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (ELIZABETH deV. MOELLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES E. CORL, JR., CICERO (J. SCOTT PORTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

SHERENE PAVONE, ATTORNEY FOR THE CHILDREN, MANLIUS, FOR JESSICA A.S.J. AND JOANNA S.J.

Appeal from an order of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered October 29, 2009 in a divorce action. The order, inter alia, denied the motion of defendant for a downward modification of support and maintenance.

It is hereby ORDERED that the order so appealed from is unanimously modified in the exercise of discretion by vacating the fourth ordering paragraph and as modified the order is affirmed without costs.

Same Memorandum as in *Jelfo v Jelfo* ([appeal No. 1] ___ AD3d ___ [Feb. 10, 2011]).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

20

CA 10-01950

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

KENT G. HUMPHREY, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MARY E. HUMPHREY, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SHEILA F. GARDNER, M.D., ET AL., DEFENDANTS, AND GENEVA GENERAL HOSPITAL, DEFENDANT-RESPONDENT.

DEMPSEY & DEMPSEY, BUFFALO (HELEN KANEY DEMPSEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered November 27, 2009 in a medical malpractice action. The order, insofar as appealed from, granted the motion of defendant Geneva General Hospital for summary judgment dismissing the amended complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendants Sheila F. Gardner, M.D., Gardner Anesthesiology Services, P.C. and Geneva General Hospital is denied with respect to defendant Geneva General Hospital and the amended complaint is reinstated against that defendant.

Memorandum: Plaintiff, individually and as executor of the estate of his wife (decedent), appeals from an order insofar as it granted that part of the motion of Sheila F. Gardner, M.D., Gardner Anesthesiology Services, P.C. and Geneva General Hospital (defendants) for summary judgment dismissing the amended complaint against the latter defendant (hereafter, Hospital) in this medical malpractice action. We agree with plaintiff that Supreme Court erred in granting the motion with respect to the Hospital inasmuch as defendants failed to meet their "initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff['s decedent] was not injured thereby" with respect to the Hospital (*Williams v Sahay*, 12 AD3d 366, 368; *see James v Wormuth*, 74 AD3d 1895). "Where, as here, an expert's affidavit fails to address each of the specific factual claims of negligence raised in [the] plaintiff's bill of particulars, that affidavit is insufficient to support a motion for summary judgment as a matter of law" (*Larsen v*

Banwar, 70 AD3d 1337, 1338; *see Terranova v Finklea*, 45 AD3d 572; *Kuri v Bhattacharya*, 44 AD3d 718). In this case, the affidavit of defendants' expert did not address several claims of negligence raised in the amended complaint, as amplified by the bill of particulars, including, inter alia, the Hospital's alleged failure to call a code and initiate cardiopulmonary resuscitation (CPR) in a timely manner. Indeed, defendants' own submissions suggest that there may have been a delay of 15 minutes between the discovery of decedent unresponsive in her hospital bed and the initiation of CPR, a delay that defendants' expert failed to address in his affidavit. Consequently, that part of defendants' motion with respect to the Hospital should have been denied, regardless of the sufficiency of plaintiff's opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Larsen*, 70 AD3d at 1338).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

25

CAF 09-00701

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

IN THE MATTER OF CATHERINE CHOMIK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JAROSLAW SYPNIAK, RESPONDENT-RESPONDENT.

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

CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD LLP, ROCHESTER (ERIC J. METZLER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered March 11, 2009. The appeal was held by this Court by order entered February 11, 2010, decision was reserved and the matter was remitted to Family Court, Monroe County, for further proceedings (70 AD3d 1336). The proceedings were held and completed (Deborah K. Owlett, S.M.).

It is hereby ORDERED that the order so appealed from is unanimously modified in the interest of justice and on the law by providing that petitioner owes child support arrears in the amount of $500 and as modified the order is affirmed without costs.

Memorandum: We previously held this case, reserved decision and remitted the matter to Family Court to determine whether petitioner mother's "income was 'less than or equal to the poverty income guidelines amount for a single person as reported by the federal department of health and human services' when the $14,000 in child support arrears [that Family Court ordered her to pay pursuant to a consent order had] accrued" (*Matter of Chomik v Sypniak*, 70 AD3d 1336, 1337). The mother had commenced this proceeding seeking to vacate the consent order on the ground that, during the time period in which the arrears had accrued, she was on public assistance and thus, pursuant to Family Court Act § 413 (1) (g), arrears could not accrue in excess of $500. We noted that, although consent orders generally are not appealable, "it is well settled that 'a court maintains inherent power to vacate a judgment [or order] in the interest of justice[, and that t]he enumerated grounds in CPLR 5015 are neither preemptive nor exhaustive and were not intended to limit that power' " (*Chomik*, 70 AD3d at 1337). Under the limited circumstances of this case, we determined that the consent order on appeal was subject to vacatur.

Upon remittal, the court determined that the mother was on public assistance for substantial periods of time during the period in which the arrears had accrued, and that her income remained far less than poverty income guidelines for a single person during the entirety of that period. We therefore modify the order entering judgment in favor of respondent father in the amount of $14,000 by instead ordering the mother to pay child support arrears in the amount of $500 (*see* Family Ct Act 413 [1] [g]; *Chomik*, 70 AD3d at 1337; *Matter of Blake v Syck*, 230 AD2d 596, 599, *lv denied* 90 NY2d 811).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

26

TP 10-01991

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

IN THE MATTER OF MIGUEL JEFFREY, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT.

KAREN MURTAGH-MONKS, BUFFALO (NICOLE B. GODFREY OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered September 29, 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).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

27

KA 09-02217

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DEQUANA M. WHITE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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 (Matthew J. Murphy, J.), rendered July 20, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree and manslaughter in the first degree.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

28

KA 08-02115

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ULYSSES CAMACCHO, DEFENDANT-APPELLANT.

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

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

Appeal from a new sentence of the Monroe County Court (John J. Connell, J.), rendered October 26, 2007 imposed upon defendant's conviction of criminal possession of a controlled substance in the second degree and criminal sale of a controlled substance in the second degree. Defendant was resentenced pursuant to the 2005 Drug Law Reform Act upon his 2004 conviction.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

29

KA 09-01440

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM J. COKE, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. COKE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Niagara County Court (Peter L. Broderick, Sr., J.), rendered April 25, 2002. The judgment convicted defendant, upon his plea of guilty, of sodomy 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 sodomy in the third degree (Penal Law former § 130.40 [2]). We reject the contention of defendant that his waiver of the right to appeal was invalid. County Court "made clear that the waiver of the right to appeal was a condition of [the] plea, not a consequence thereof, and the record reflects that defendant understood that the waiver of the right to appeal was 'separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Graham*, 77 AD3d 1439, 1439, quoting *People v Lopez*, 6 NY3d 248, 256). Defendant's challenge to the severity of the sentence is encompassed by the valid waiver of the right to appeal (*see People v Hidalgo*, 91 NY2d 733, 737). To the extent that the contention of defendant in his pro se supplemental brief that he was denied effective assistance of counsel survives the plea and the waiver of the right to appeal (*see People v Cloyd*, 78 AD3d 1669; *People v Pratt*, 77 AD3d 1337), we conclude that his contention is lacking in merit (*see generally People v Ford*, 86 NY2d 397, 404). We have reviewed the remaining contentions of defendant in his pro se supplemental brief and conclude that they are also without merit.

Entered: February 10, 2011

Patricia L. Morgan
Clerk of the Court

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

30

KA 10-00288

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WILBERT WILSON, JR., DEFENDANT-APPELLANT.

RONALD C. VALENTINE, PUBLIC DEFENDER, LYONS (DAVID M. PARKS 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 (Stephen R. Sirkin, J.), rendered May 15, 2009. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

31

KA 10-01402

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS CUMMINGS, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (GREGORY A. KILBURN OF COUNSEL), FOR DEFENDANT-APPELLANT.

GERALD L. STOUT, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wyoming County Court (Mark H. Dadd, J.), dated May 11, 2009. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that he was entitled to a downward departure from his presumptive risk level. We reject that contention. "A departure from the presumptive risk level is warranted where 'there exists an aggravating or mitigating factor of a kind or to a degree, not otherwise adequately taken into account by the [Risk Assessment Guidelines of the Sex Offender Registration Act]' . . . There must exist clear and convincing evidence of the existence of special circumstance[s] to warrant an upward or downward departure" (*People v Guaman*, 8 AD3d 545). Here, defendant failed to establish his entitlement to a downward departure from the presumptive risk level. The jury convicted defendant of rape by forcible compulsion (Penal Law § 130.35 [1]). Forcible compulsion means to compel by either the use of physical force or a threat, express or implied, that places another in fear of, inter alia, immediate death or physical injury (*see* Penal Law § 130.00 [8]). By virtue of its verdict, the jury necessarily found that defendant used either physical force or a threat of such force to overcome the victim's lack of consent.

Contrary to the contention of defendant, a downward departure is not warranted on the ground that, subsequent to his conviction, the Legislature amended article 130 of the Penal Law (*see* L 2000, ch 1). That legislation, in relevant part (*see* L 2000, ch 1, § 32), added a

new subdivision to rape in the third degree, pursuant to which a person is guilty of that crime if "[h]e or she engage[d] in sexual intercourse with another person without such person's consent where such lack of consent is by reason of some factor other than incapacity to consent" (§ 130.25 [3]). The legislation was " 'designed to address the so-called date rape or acquaintance rape situations [where] there [might] be consent to various acts leading up to the sexual act, but at the time of the act, the victim clearly says no or otherwise expresses a lack of consent, and a reasonable person in the actor's situation would understand that the victim was expressing a lack of consent' " (*People v Newton*, 8 NY3d 460, 463). Defendant contends that the new subdivision encompasses the conduct for which he was convicted and thus renders his conduct less culpable. That contention is without merit. A review of the legislative history establishes that the legislation was intended to "increase[] penalties against sex offenders . . . and close[] existing loopholes related to sex crime prosecution" (Budget Rep on Bills, Bill Jacket, L 2000, ch 1, at 3). In addition, the legislation was intended to address "the [former] inadequate definition of 'lack of consent' by expanding it to apply where a person, at the time of an act of sexual intercourse or deviate sexual intercourse, clearly expresses lack of consent to engage in such acts" (Mem of Off of Attorney Gen, Bill Jacket, L 2000, ch 1, at 5). Thus, it cannot be said that the legislation was also intended to reduce the penalties for forcible rape.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

32

KA 10-00718

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DEQUANA M. WHITE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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 (Mark A. Violante, A.J.), rendered January 21, 2009. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

34

KA 08-00379

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK D. SANDS, DEFENDANT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, 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 January 7, 2008. The judgment convicted defendant, upon a jury verdict, of use of a child in a sexual performance, promoting an obscene sexual performance by a child, sexual abuse in the third degree, endangering the welfare of a child, unlawfully dealing with a child in the first degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, use of a child in a sexual performance (Penal Law § 263.05). County Court properly refused to suppress the oral and written statements that defendant made to a police investigator. The record of the suppression hearing supports the court's determination that defendant knowingly, voluntarily and intelligently waived his *Miranda* rights before he made those statements (*see People v Shaw*, 66 AD3d 1417, *lv denied* 14 NY3d 773). Defendant failed to preserve for our review his contention that his statements were elicited after he requested counsel, and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see People v Rumrill*, 40 AD3d 1273, 1274, *lv denied* 9 NY3d 926). "To the extent that defendant preserved for our review his contention that the conviction is not supported by legally sufficient evidence, we conclude that his contention lacks merit" (*People v Barnard*, 295 AD2d 999, *lv denied* 98 NY2d 708). Finally, the sentence is not unduly harsh or severe.

Entered: February 10, 2011

Patricia L. Morgan
Clerk of the Court

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

35

KA 09-01788

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYAN COLON, 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 (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Sara S. Sperrazza, A.J.), rendered May 13, 2009. The judgment convicted defendant, upon a nonjury verdict, of escape in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the indictment is dismissed and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him following a bench trial of escape in the first degree (Penal Law § 205.15 [2]), defendant contends that the conviction is not supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We agree, and we therefore reverse the judgment.

Defendant's parole officer reported to a senior parole officer that defendant had violated the conditions of his parole. Upon learning of the alleged violations, the senior parole officer instructed defendant's parole officer to take defendant into custody when he arrived at the parole office. No warrant for defendant's arrest was issued at that time. Later that day, defendant was arrested and shackled when he arrived at the parole office. The senior parole officer finished processing the necessary forms to obtain a warrant after defendant was taken into custody. Several minutes after he was arrested, defendant escaped from the parole office in shackles and was later recaptured.

At trial, the People contended that parole officers had authority pursuant to the Executive Law to issue "verbal warrants" and that defendant was lawfully taken into custody at the time of his arrest. The People further contended that the written warrant was signed before defendant escaped from the parole office. We conclude that Supreme Court erred in determining that defendant was lawfully

detained based on the senior parole officer's verbal authorization and that the warrant issued after he was taken into custody but before his escape was sufficient for a valid arrest.

In *People v Bratton* (8 NY3d 637, 641-642), the Court of Appeals concluded that, pursuant to Executive Law § 259-i (3) (a) (i) and 9 NYCRR 8004.2, a parole officer is *required* to obtain a warrant before arresting a parolee for an alleged parole violation. The Court further noted that there is currently no statutory exception to that warrant requirement (*Bratton*, 8 NY3d at 643), although a parole officer may effect a warrantless arrest if the alleged parole violation constituted an " '[o]ffense' " pursuant to Penal Law § 10.00 (1) and was committed in his or her presence (*Bratton*, 8 NY3d at 643; *see* CPL 140.25). The Court reversed defendant's conviction for resisting arrest (Penal Law § 205.30), concluding that defendant's arrest was not "authorized" because it was made without a warrant in violation of Executive Law § 259-i (3) (a) (i) and 9 NYCRR 8004.2 (*Bratton*, 8 NY3d at 641-644).

Applying *Bratton* to the facts of this case, we conclude that the evidence is legally insufficient to support the conviction of escape in the first degree. Pursuant to Penal Law § 205.15 (2), "[a] person is guilty of escape in the first degree when . . . [h]aving been arrested for, charged with or convicted of a class A or class B felony, he [or she] escapes from custody . . . ." A person is in "[c]ustody" when he or she is restrained "by a public servant pursuant to an *authorized* arrest" (§ 205.00 [2] [emphasis added]). Inasmuch as defendant's arrest for a parole violation was not made pursuant to a warrant, it was not authorized (*see Bratton*, 8 NY3d at 642-643), and thus defendant was not in "[c]ustody" pursuant to Penal Law § 205.00 (2). Even assuming, arguendo, that the warrant was signed and issued after defendant's arrest but before his escape, we conclude that such warrant did not render the arrest valid (*see Bratton*, 8 NY3d at 642-643).

In light of our determination, we need not address defendant's remaining contentions.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

36

CAF 09-02492

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

IN THE MATTER OF SHANNON HUARD,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOSE LUGO, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered November 10, 2009 in a proceeding pursuant to Family Court Act article 4. The order confirmed the Support Magistrate's determination that respondent willfully failed to obey an order of support and sentenced respondent to 90 days in jail.

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

Memorandum: Respondent father appeals from an order confirming the determination of the Support Magistrate that he willfully violated an order of child support and sentencing him to a term of incarceration of 90 days. The father contends that the Support Magistrate erred in allowing him to proceed pro se at the fact-finding hearing. We conclude that the father failed to preserve that contention for our review.

We note at the outset that the father did not file any objections to the Support Magistrate's order (*see generally* Family Ct Act § 439 [e]). In *Matter of Oswego County Support Collection Unit v Richards* (305 AD2d 1101, *lv denied* 100 NY2d 637), we determined that, because the respondent failed to file objections to the Hearing Examiner's order finding willfulness and recommending commitment pursuant to Family Court Act § 439 (former [e]), he "waiv[ed] his right to appellate review of the finding of a willful violation . . . ." Section 439 (e), however, was revised in 2004 by providing that a determination of willful violation of a support order where commitment is recommended does not constitute a final order (*see* L 2004, ch 336, § 3; Assembly Mem in Support, Bill Jacket, L 2004, ch 336, at 4-5). "A determination by a support magistrate that a person is in willful violation of a support order and recommending commitment has no force and effect until confirmed by a Judge of the Family Court . . . Such a determination by a support magistrate does not constitute a final order to which a party may file written objections" (*Matter of Dakin v Dakin*, 75 AD3d 639, 639-640, *lv dismissed* 15 NY3d 905; *see* § 439 [a],

[e]). A party's "sole remedy" is to appeal from the final order of Family Court (*Dakin*, 75 AD3d at 640). Thus, to the extent that *Matter of Oswego County Support Collection Unit v Richards* requires a party to file objections in order to preserve a contention regarding such a determination, it should no longer be followed.

We conclude, however, that the father failed to preserve his contention for our review under the "normal rules of preservation" because he failed to raise it before Family Court at the confirmation proceeding, where he was represented by counsel (*Matter of Michelle F.F. v Edward J.F.*, 50 AD3d 348, 350, *lv denied* 11 NY3d 708). In any event, the father's contention lacks merit.

We reject the father's further contention that petitioner mother failed to present clear and convincing evidence that he willfully violated the support order. In order to establish a willful violation of a support order, there must be "proof of both the ability to pay support and the failure to do so" (*Matter of Powers v Powers*, 86 NY2d 63, 68). The father is presumed to have sufficient means to support his child (*see* Family Ct Act § 437), and his failure to pay support constitutes "prima facie evidence of a willful violation" (§ 454 [3] [a]; *see Powers*, 86 NY2d at 69). "[P]roof that [the father] has failed to pay support as ordered alone establishes [the mother's] direct case of willful violation, shifting to [the father] the burden of going forward" (*Powers*, 86 NY2d at 69). The record of the fact-finding hearing establishes that there was a court order requiring the father to pay child support, and the father conceded that he did not pay it. The father testified, however, that he lacked the means to do so because he did not want to jeopardize his business or "get [into] any tax problems." We thus conclude that the father failed to offer any "competent, credible evidence of his inability to make the required payments" (*id.* at 70; *see Matter of Seleznov v Pankratova*, 57 AD3d 679, 680-681).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

37

CAF 10-01639

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

IN THE MATTER OF DANTE P., RESPONDENT-APPELLANT.
---------- MEMORANDUM AND ORDER
ERIE COUNTY ATTORNEY, PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR RESPONDENT-APPELLANT.

CHERYL A. GREEN, COUNTY ATTORNEY, BUFFALO (MICHAEL J. LISZEWSKI OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended order of the Family Court, Erie County (Paul G. Buchanan, J.), entered October 21, 2010 in a proceeding pursuant to Family Court Act article 3. The amended order adjourned the petition in contemplation of dismissal.

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

Memorandum: Petitioner commenced this proceeding pursuant to article 3 of the Family Court Act, alleging that respondent and other juveniles committed acts that, if committed by an adult, would constitute the crime of unauthorized use of a vehicle in the third degree (Penal Law § 165.05 [1]). Respondent appeals from an order that, inter alia, granted an adjournment in contemplation of dismissal (ACD) of the proceeding upon the condition that he pay $800 as restitution for damage to the vehicle that he and the other juveniles used. We note at the outset that the order was superseded by a subsequent amended order, from which no appeal was taken. In the exercise of our discretion, however, we treat the notice of appeal as valid and deem the appeal as taken from the amended order (*see Matter of Steven M.*, 37 AD3d 1072; *see also* CPLR 5520 [c]). Further, we conclude that the appeal is not moot inasmuch as the ACD has been extended by a subsequent order of Family Court.

Contrary to respondent's contention, the court did not abuse its discretion in ordering restitution as a condition of the ACD (*see generally* Family Ct Act § 315.3 [1]; 22 NYCRR 205.24 [a]). Respondent accepted the ACD, which the court unequivocally conditioned upon payment of restitution. Furthermore, the testimony of the victim regarding the damage to his vehicle arising from its use by respondent and the other juveniles was sufficient to warrant the imposition of restitution (*cf. Matter of David N.*, 97 AD2d 980).

Respondent failed to preserve for our review his further contention that the court was required to consider his ability to pay before ordering him to pay restitution, and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see Matter of Arceny H.*, 59 AD3d 262; *see generally Matter of George N.B.*, 57 AD3d 1456, *lv denied* 12 NY3d 706; *Matter of Yadiel Roque C.*, 17 AD3d 1168).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

39

CAF 10-00293

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

IN THE MATTER OF TRACY ANDERSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SARAH RONCONE, RESPONDENT-RESPONDENT.

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

ELIZABETH J. CIAMBRONE, BUFFALO, FOR RESPONDENT-RESPONDENT.

KENNETH W. GIBBONS, ATTORNEY FOR THE CHILDREN, BUFFALO, FOR CHEYENNE R. AND JEFFREY R., JR.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered January 20, 2010 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 mother appeals from an order that denied her petition seeking to modify a prior order of custody and visitation by providing her with unsupervised visitation with two of her children. Those children are in the custody of respondent, their paternal aunt. "An order of visitation cannot be modified unless there has been a sufficient change in circumstances since the entry of the prior order [that], if not addressed, would have an adverse effect on the children's best interests" (*Matter of Neeley v Ferris*, 63 AD3d 1258, 1259; *see Matter of Taylor v Fry*, 63 AD3d 1217, 1218). Here, the mother failed to demonstrate such a change in circumstances, and the record supports Family Court's determination that the best interests of the children would be served by continuing the requirement that visitation be supervised (*see Matter of Burczynski v Rodgers*, 61 AD3d 1401; *Matter of De Cicco v De Cicco*, 29 AD3d 1095, 1096).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

41

CA 10-01442

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

WALTER F. REYNOLDS, III, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAM KREBS, INDIVIDUALLY AND AS MAYOR OF VILLAGE OF SPRINGVILLE, TIMOTHY L. HORNER, INDIVIDUALLY AND AS VILLAGE ADMINISTRATOR OF VILLAGE OF SPRINGVILLE, MICHAEL KALETA, INDIVIDUALLY AND AS CODE ENFORCEMENT OFFICER/BUILDING INSPECTOR OF VILLAGE OF SPRINGVILLE, AND VILLAGE OF SPRINGVILLE, DEFENDANTS-RESPONDENTS.

DAVID J. SEEGER, BUFFALO, FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (JENNIFER A. KELLEHER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered March 17, 2010. The order granted defendants' motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendants' motion in part and reinstating the second cause of action and as modified the order is affirmed without costs.

Memorandum: After fire had damaged a building owned by plaintiff, defendant William Krebs, acting in his capacity as Mayor of defendant Village of Springville, ordered the building demolished. Plaintiff thereafter commenced an action in the United States District Court for the Western District of New York against defendants, contending, inter alia, that they denied him procedural due process in ordering and proceeding with the demolition without affording him notice and an opportunity to be heard. The District Court granted defendants' motion for summary judgment dismissing the complaint and determined, inter alia, that no reasonable trier of fact could conclude that defendants violated plaintiff's right to procedural due process (*Reynolds v Krebs*, US Dist Ct, WD NY, Mar. 20, 2008, Skretny, J.). The United States Court of Appeals for the Second Circuit affirmed the order of the District Court and held, "substantially for the reasons stated by the District Court in its thorough decision and order . . ., that summary judgment for defendants was appropriate" (*Reynolds v Krebs*, 336 Fed Appx 27, 29).

While the federal action was pending, plaintiff commenced this action alleging that defendants had violated his right to due process under the New York Constitution. In addition, plaintiff alleged that defendants were negligent in ordering the demolition of the building and in permitting the general public to enter the building, resulting in the "purloining" of plaintiff's personal property. Supreme Court granted defendants' motion for summary judgment pursuant to CPLR 3211 (a) (5) on the ground that plaintiff should be collaterally estopped from relitigating issues that were decided in the prior federal action.

We note at the outset that plaintiff has abandoned any issues with respect to that part of the motion for summary judgment dismissing the first cause of action, alleging that he was denied due process under the New York Constitution (*see Ciesinski v Town of Aurora*, 202 AD2d 984). We conclude, however, that the court erred in granting that part of the motion with respect to the second cause of action, alleging that "[p]laintiff's . . . losses were sustained solely and wholly as a result of [d]efendants' acts of negligence." We therefore modify the order accordingly.

We agree with plaintiff that he is not collaterally estopped from alleging that defendants were negligent. "Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue [that] has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling" (*Buechel v Bain*, 97 NY2d 295, 303-304, *cert denied* 535 US 1096; *see Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349).

With respect to defendants' alleged negligence in demolishing the building, the District Court discussed the process that is due where, as here, the defendants alleged that the demolition of a building occurred as a result of an emergency situation. It is well established that, "although notice and a predeprivation hearing are generally required, in certain circumstances, the lack of such predeprivation process will not offend the constitutional guarantee of due process, provided there is sufficient postdeprivation process" (*Catanzaro v Weiden*, 188 F3d 56, 61; *see generally Parratt v Taylor*, 451 US 527, 538-539, *overruled on other grounds by Daniels v Williams*, 474 US 327, 330-331). An emergency situation is one such circumstance justifying denial of a predeprivation hearing (*see Hodel v Virginia Surface Min. & Reclamation Assn.*, 452 US 264, 299-300). "Protection of the health and safety of the public is a paramount governmental interest [that] justifies summary administrative action" (*id.* at 300). In determining whether an emergency situation existed, courts are "to accord the decision to invoke the procedure some deference[] and not to engage in a hindsight analysis of whether the damage to the buildings actually created an immediate danger to the public. Under *Hodel*, the due process guarantee is offended only when an emergency procedure is invoked in an abusive and arbitrary manner; therefore, there is no constitutional violation unless the decision to invoke the emergency procedure amounts to an abuse of the constitutionally afforded discretion" (*Catanzaro*, 188 F3d at 62; *see Hodel*, 452 US at

302-303).

In granting defendants' motion for summary judgment dismissing the complaint in the federal action, the District Court determined that Krebs had not acted arbitrarily or abused his discretion when he invoked the emergency demolition procedures. The standard in a negligence case, however, is whether a defendant breached a duty of reasonable care (*see generally Pulka v Edelman*, 40 NY2d 781, 782, *rearg denied* 41 NY2d 901; *Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 342, *rearg denied* 249 NY 511). Thus, the issue to be decided with respect to defendants' alleged negligence in demolishing the building was not actually and necessarily decided in the federal action.

Plaintiff further alleges that defendants were negligent in permitting the general public to access his property, resulting in the "purloining" of his personal property. That allegation was not raised or necessarily decided in the federal action, and thus plaintiff is not collaterally estopped from raising it in this action (*see generally Buechel*, 97 NY2d at 303-304).

To the extent that defendants contend as an alternative ground for affirmance that plaintiff should have raised his claims by way of a CPLR article 78 proceeding, that contention is not properly before us inasmuch as defendants moved for summary judgment dismissing the complaint solely on the ground that the action was barred by collateral estoppel (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

46

TP 10-01806

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

IN THE MATTER OF BISILOLA JACKSON, AS ADMINISTRATRIX OF THE ESTATE OF JERELENE GIWA, DECEASED, AND MADRENE KEMP, PETITIONERS,

V MEMORANDUM AND ORDER

BUFFALO MUNICIPAL HOUSING AUTHORITY, RESPONDENT.

NEW YORK STATE DIVISION OF HUMAN RIGHTS, RESPONDENT.

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

SLIWA & LANE, BUFFALO (PAUL F. MURAK OF COUNSEL), FOR RESPONDENT BUFFALO MUNICIPAL HOUSING AUTHORITY.

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, Erie County [Frank A. Sedita, Jr., J.], entered August 2, 2010) to review a determination of respondent New York State Division of Human Rights. The determination, among other things, found that respondent Buffalo Municipal Housing Authority did not engage in unlawful discriminatory practices against petitioners.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul the determination of respondent New York State Division of Human Rights (SDHR) dismissing the complaints of decedent Jerelene Giwa and petitioner Madrene Kemp. Giwa and Kemp, who are African-American, alleged that respondent Buffalo Municipal Housing Authority (BMHA) engaged in unlawful employment discrimination. We conclude that substantial evidence supports SDHR's determination that petitioners failed to establish a prima facie case of unlawful employment discrimination based on race (*see generally Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106). Petitioners failed to establish that the layoffs of Giwa and Kemp from their positions as case managers with BMHA "occurred under circumstances giving rise to an inference of discriminatory motive" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 306). The retention by BMHA of a Caucasian registered nurse, an independent

contractor who provided services to BMHA's elderly tenants, does not give rise to such an inference. The education, qualifications, duties and employment status of the nurse bore little resemblance to those of Giwa and Kemp, and thus the retention of the nurse does not support a determination that Giwa and Kemp were "treated less favorably than a similarly situated employee outside [their] protected group" (*Castro v New York Univ.*, 5 AD3d 135, 136).

Substantial evidence also supports SDHR's determination dismissing the complaint of Giwa insofar as it alleged unlawful discrimination based upon disability. Petitioners failed to demonstrate "that [Giwa] requested and was refused reasonable accommodations" (*Pimentel v Citibank, N.A.*, 29 AD3d 141, 146, *lv denied* 7 NY3d 707; *see Pembroke v New York State Off. of Ct. Admin.*, 306 AD2d 185).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

48

CA 10-00928

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

IRIC BURTON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ANDREW C. MATTELIANO, M.D., NIAGARA FRONTIER TRANSPORTATION AUTHORITY AND DONALD J. JACOB, M.D., DEFENDANTS-RESPONDENTS.

JOHN D. WIESER, GETZVILLE, FOR PLAINTIFF-APPELLANT.

DAVID M. GREGORY, BUFFALO (WAYNE R. GRADL OF COUNSEL), FOR DEFENDANT-RESPONDENT NIAGARA FRONTIER TRANSPORTATION AUTHORITY.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (MARK R. AFFRONTI OF COUNSEL), FOR DEFENDANT-RESPONDENT ANDREW C. MATTELIANO, M.D.

DAMON MOREY LLP, BUFFALO (FRANK C. CALLOCCHIA OF COUNSEL), FOR DEFENDANT-RESPONDENT DONALD J. JACOB, M.D.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered July 9, 2009. The order granted defendants' motions to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion of defendant Andrew C. Matteliano, M.D. to dismiss the first cause of action and reinstating that cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff was involved in a motor vehicle accident in July 2005 that was unrelated to his employment with defendant Niagara Frontier Transportation Authority (NFTA). He suffered various injuries as a result of the accident and took a leave of absence from his employment. In April 2006 plaintiff's treating physician, defendant Andrew C. Matteliano, M.D., released plaintiff to return to work " 'full duty, without restrictions.' " NFTA, however, required plaintiff to undergo a physical examination by its medical director, defendant Donald J. Jacob, M.D. Following that examination, Matteliano complied with Jacob's request that Matteliano forward plaintiff's medical records concerning the injuries that plaintiff sustained in the motor vehicle accident. As a result of the examination and a review of those medical records, Jacob determined that plaintiff was not physically fit to return to work full duty without restrictions, and he requested objective studies demonstrating that plaintiff's injuries had resolved. No further studies were

forwarded to Jacob and, when plaintiff's leave of absence expired in July 2006, plaintiff was discharged from his employment with NFTA because the restrictions imposed on him rendered him physically unable to perform the duties of his job.

Plaintiff filed a complaint against NFTA with the New York State Division of Human Rights (SDHR) for unlawful discrimination, but that complaint was dismissed after SDHR determined that there was no probable cause to believe that NFTA had engaged in any unlawful discriminatory practices. Plaintiff then commenced a federal action against, inter alia, NFTA. The United States District Court for the Western District of New York dismissed the federal law claims with prejudice and dismissed the state law claims without prejudice to their maintenance in state court (*Burton v Niagara Frontier Transp. Auth.*, US Dist Ct, WD NY, Aug. 29, 2008).

Plaintiff thereafter commenced this action seeking damages arising out of his discharge from employment with NFTA. NFTA moved to dismiss the complaint against it pursuant to CPLR 3211 (a) (1), (5) and (7) "and/or" for summary judgment dismissing the complaint against it. Matteliano moved to dismiss the complaint against him pursuant to CPLR 3211 (a) (7) and Jacob moved to dismiss the complaint against him pursuant to CPLR 3211 (a) (1), (5) and (7).

We conclude that Supreme Court erred in granting that part of the motion of Matteliano seeking to dismiss the first cause of action, which was asserted against only him. We therefore modify the order accordingly. In that cause of action, plaintiff alleges that Matteliano breached his fiduciary duty to plaintiff because he disclosed plaintiff's confidential medical records to Jacob and NFTA without plaintiff's consent, knowledge, waiver, release or authorization. Matteliano's motion to dismiss was based solely on CPLR 3211 (a) (7), and we therefore must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference[] and determine only whether the facts as alleged fit within any cognizable legal theory . . . '[T]he criterion is whether [plaintiff] has a cause of action, not whether he has stated one' " (*Leon v Martinez*, 84 NY2d 83, 87-88). It is well established that a patient may maintain a cause of action for breach of fiduciary duty against his or her physician resulting from the physician's unauthorized disclosure of the patient's medical records (*see Tighe v Ginsberg*, 146 AD2d 268, 269-271; *see also Randi A. J. v Long Is. Surgi-Center*, 46 AD3d 74, 78; *cf. Juric v Bergstraesser*, 44 AD3d 1186, 1187-1188). "[T]he duty not to disclose confidential personal information springs from the implied covenant of trust and confidence that is inherent in the physician patient relationship, the breach of which is actionable as a tort" (*Doe v Community Health Plan–Kaiser Corp.*, 268 AD2d 183, 187). Although Matteliano sets forth several reasons to justify or excuse his disclosure of plaintiff's medical records, "[j]ustification or excuse will depend upon a showing of circumstances and competing interests [that] support the need to disclose . . . Because such showing is a matter of affirmative defense, [Matteliano] is not entitled to dismissal of the [first cause

of] action" (*MacDonald v Clinger*, 84 AD2d 482, 488; *see Juric*, 44 AD3d at 1188).

We further conclude, however, that the court properly granted the remainder of Matteliano's motion, as well as the motions of NFTA and Jacob. Addressing first NFTA's motion, we conclude that the breach of contract and tort causes of action against NFTA are barred because plaintiff failed to file a notice of claim as required by Public Authorities Law § 1299-p (1) and (2) (*see Palmer v Niagara Frontier Transp. Auth.*, 56 AD3d 1245). Furthermore, the tort causes of action against NFTA are time-barred pursuant to section 1299-p (2). Although plaintiff, in opposition to NFTA's motion, sought to amend his complaint to add a cause of action against NFTA pursuant to 42 USC § 1983, for which no notice of claim is required, we conclude that he is barred by the doctrine of res judicata from asserting such a cause of action inasmuch as the dismissal of his federal action "constitutes an adjudication that the plaintiff has no [f]ederal claim" (*Mastroianni v Incorporated Vil. of Hempstead*, 166 AD2d 560, 562; *cf. Troy v Goord*, 300 AD2d 1086).

We conclude that the court properly granted those parts of the motions of NFTA, Matteliano and Jacob with respect to the first joint cause of action against them, inasmuch as there is no private cause of action pursuant to CPLR 4504 (*see Doe*, 268 AD2d at 186-187; *Waldron v Ball Corp.*, 210 AD2d 611, 614, *lv denied* 85 NY2d 803; *see generally Lightman v Flaum*, 97 NY2d 128, 136-137, *cert denied* 535 US 1096). The court also properly granted those parts of the motions of Matteliano and Jacob with respect to the second joint cause of action against them, alleging that defendants intended to cause and did cause plaintiff "extreme emotional distress and mental anguish." We conclude that "the conduct of [Matteliano and Jacob], viewed in the light most favorable to plaintiff, is not sufficiently outrageous in character and extreme in degree as to exceed all bounds of decency" (*Albert v Solimon*, 252 AD2d 139, 141, *affd* 94 NY2d 771; *see Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303). The cases relied on by plaintiff are distinguishable inasmuch as the damages awarded for mental anguish in those cases arose out of other independent causes of action (*see e.g. Matter of Diaz Chem. Corp. v New York State Div. of Human Rights*, 237 AD2d 932, 933, *affd* 91 NY2d 932; *Miner v City of Glens Falls*, 999 F2d 655, 662-663).

Plaintiff did not raise any issues concerning the third joint cause of action against all defendants, and we therefore deem any issues with respect thereto abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984). We conclude that the court properly granted those parts of the motions of Matteliano and Jacob with respect to the fourth joint cause of action against them for lost wages. We agree with defendants that lost wages are a measure of damages and thus cannot form the basis of an independent cause of action.

We have reviewed plaintiff's remaining contentions and conclude

that they are without merit.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

50

KA 09-01277

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RICHARD BENJAMIN ARNOLD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered May 5, 2009. 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.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

51

KA 09-02279

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTHONY GRILL WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered October 30, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

53

KA 07-01490

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HARVEY L. BUSSEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered May 11, 2007. 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: Defendant appeals from a judgment convicting him, upon a jury verdict, 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]). We reject the contention of defendant that Supreme Court erred in denying his motion to dismiss the superseding indictment based on the violation of his statutory right to a speedy trial, pursuant to CPL 30.30. The People became aware less than 24 hours prior to the scheduled arraignment that defendant, who had previously been released on his own recognizance, was in custody in a different county on an unrelated charge. The court therefore properly excluded an additional 14 days because, once defendant's unavailability was known, the People could not by the exercise of due diligence obtain his presence at the scheduled arraignment (*see* CPL 30.30 [4] [c] [i]). We also reject defendant's challenge to the severity of the sentence.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

54

KA 09-02382

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TECOY INGRAM, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE, MITCHELL GORIS & STOKES, LLC (STEWART F. HANCOCK, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered August 20, 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: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]), defendant contends that Supreme Court erred in refusing to suppress both the drugs found on his person and his statements to the police on the ground that he was unlawfully detained. Contrary to defendant's contention, we conclude that the police officer's first request for identification information from defendant, a passenger in a vehicle detained pursuant to a valid traffic stop, was reasonably related in scope to the traffic stop and was supported by an objective credible reason, i.e., the driver's inability to produce a valid driver's license (*see People v Jones*, 8 AD3d 897, 898, *lv denied* 3 NY3d 708; *see generally People v Hollman*, 79 NY2d 181, 185). The officer testified at the suppression hearing that he sought the information from defendant and another passenger in order to ascertain whether one of them was licensed to operate the vehicle. Upon learning that defendant gave him a false name, the officer warned defendant that, if he gave the officer a second false name, that would constitute the crime of false personation pursuant to Penal Law § 190.23. Contrary to defendant's contention, we conclude that the officer was entitled to issue that warning in conjunction with seeking defendant's correct name, pursuant to the officer's right to conduct a common-law inquiry pursuant to *People v De Bour* (40 NY2d 210, 223). The first false name provided by defendant gave the officer the "founded suspicion that criminality [was] afoot" required

for a common-law inquiry (*Hollman*, 79 NY2d at 185; *see People v Battaglia*, 86 NY2d 755, 756). When defendant gave a second false name to the officer, the officer was justified in asking defendant to exit the vehicle at that time and in conducting a search of defendant's person pursuant to a lawful arrest for false personation (*see People v Johnson*, 71 AD3d 1521, *lv denied* 15 NY3d 775).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

55

KA 09-02349

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TROY E. SWAN, DEFENDANT-APPELLANT.

CYNTHIA B. BRENNAN, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN N. BAUERSFELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, J.), rendered May 21, 2009. The judgment convicted defendant, upon a nonjury verdict, of escape in the second degree.

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

Memorandum: Defendant previously was convicted upon his plea of guilty of escape in the second degree (Penal Law § 205.10 [1]), based on allegations that he escaped from a detention facility while working as a member of a gardening crew. We affirmed the judgment of conviction (*People v Swan*, 50 AD3d 1566) but, when the Court of Appeals thereafter granted defendant's motion for leave to appeal (*Swan*, 11 NY3d 795), the People consented to vacate the judgment provided, inter alia, that a bench trial would be conducted on stipulated facts. In our decision in the prior appeal, we had noted that defendant failed to preserve for our review his contention that the plea allocution was legally insufficient because defendant stated therein "that he escaped from jail while gardening on the grounds outside the jail and thus did not escape from 'a detention facility' within the meaning of the statute" (*Swan*, 50 AD3d at 1566), and we further noted that defendant's contention did not fall within the rare case exception to the preservation doctrine (*id.* at 1566-1567). Following the bench trial, County Court found defendant guilty as charged and, on appeal from the judgment of conviction, defendant now contends that the evidence is legally insufficient to support the conviction. We affirm.

According to the stipulated facts as well as testimony presented by the People, defendant was working in an area located a few hundred feet from the detention facility when he fled. The area was on property owned by Cayuga County, and it was used exclusively by the detention facility for gardening by inmates. Inmates assigned to the

gardening crew, including defendant, were escorted by and worked under the supervision of one or more correction officers. We thus conclude that, contrary to defendant's contention, the area was part of the detention facility within the meaning of Penal Law § 205.10 (1) (*see People v Blank*, 87 AD2d 947; *cf. People v Sharland*, 130 AD2d 819). Inasmuch as the People submitted uncontested evidence that defendant escaped from the facility, i.e., its gardening area, on the date specified in the indictment, the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

56

KA 09-02148

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYON DRENNAN, DEFENDANT-APPELLANT.

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered October 29, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that County Court erred in refusing to suppress his statements to the police. We reject that contention. The evidence at the suppression hearing establishes that, after the police questioned defendant and his parents at their residence concerning the whereabouts of the victim, defendant voluntarily agreed to continue the interview at the police station and arranged his own transportation there. While at the police station, defendant was not handcuffed or otherwise restrained. The portion of the interview that preceded the administration of *Miranda* warnings lasted only 30 minutes, during which time the questioning was largely investigatory in nature. The record thus supports the court's determination that defendant's statements made prior to the administration of *Miranda* warnings were not the product of custodial interrogation (*see People v Copp*, 78 AD3d 1548; *People v Davis*, 48 AD3d 1086, 1087, *lv denied* 10 NY3d 861; *People v Lunderman*, 19 AD3d 1067, 1068-1069, *lv denied* 5 NY3d 830). Defendant's remaining statements were made after he waived his *Miranda* rights, having acknowledged that he understood those rights (*see People v Morgan*, 75 AD3d 1050, 1054, *lv denied* 15 NY3d 894).

Defendant failed to preserve for our review his contention concerning the alleged legal insufficiency of the evidence inasmuch as 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; *People v Roundtree*, 75 AD3d 1136, *lv denied* 15 NY3d 855). In any event, 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 caused the death of the victim and intended to do so (*see* Penal Law § 125.25 [1]; *see generally People v Bleakley*, 69 NY2d 490, 495). Further, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Indeed, we conclude that an acquittal would have been unreasonable, based upon the credible evidence presented at trial (*see People v Rickard*, 71 AD3d 1420, 1422, *lv denied* 15 NY3d 809; *see generally Danielson*, 9 NY3d at 348-349; *Bleakley*, 69 NY2d at 495).

We reject the contention of defendant that he was denied effective assistance of counsel. There is no support in the record for defendant's assertion that defense counsel failed to investigate his case and, indeed, the record belies that assertion. With respect to defendant's contention that defense counsel failed to call expert witnesses to rebut the expert testimony presented by the People, we note that the court granted defense counsel's request for an adjournment to enable defense counsel to contact expert witnesses and to conduct additional testing and, in addition, defense counsel also sought authorization from the court to retain a psychiatrist to evaluate defendant. Defense counsel's ultimate decision not to call an expert witness was thus a matter of strategy that cannot support defendant's contention that he was denied effective assistance of counsel (*see People v Bermudez*, 38 AD3d 1325, *lv denied* 9 NY3d 840). In any event, " '[d]efendant has not demonstrated that such [expert] testimony was available, that it would have assisted the jury in its determination or that he was prejudiced by its absence' " (*People v Jurgensen*, 288 AD2d 937, 938, *lv denied* 97 NY2d 684).

With respect to defendant's contention that defense counsel was ineffective in failing to afford defendant an opportunity to testify before the grand jury, we note that defendant waived that contention inasmuch as he withdrew his pro se motion to dismiss the indictment on that ground after discussing the issue with substitute counsel. Defendant's further contention that defense counsel allegedly failed to challenge the validity of his confession based upon defendant's seizure disorder and/or medication issues and thus was ineffective on that ground as well is unsupported by the record. In fact, defense counsel specifically contended in support of defendant's suppression motion that defendant's statements to the police were involuntary based on defendant's "physical and emotional condition." Further, the record establishes that the court was aware that defendant suffered from epilepsy and was taking anti-seizure medication, and the record is bereft of any evidence that defendant's condition or medication had any impact on the voluntariness or validity of his statements to the police. It is well established that "[t]here 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). Based on our review of

the record, we conclude that "the evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of the representation, reveal that [defense counsel] provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147).

Finally, in light of the brutal nature of the crime and defendant's lack of remorse, it cannot be said that the sentence imposed is unduly harsh or severe.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

59

KA 07-00754

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CAL WILLIAMS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered February 21, 2007. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (three counts), robbery in the second degree (eight counts) and grand larceny in the third degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts each of robbery in the first degree (Penal Law § 160.15 [4]) and grand larceny in the third degree (§ 155.35), and eight counts of robbery in the second degree (§ 160.10 [1]), in connection with his participation in three separate bank robberies. In light of the absence of any evidence at the suppression hearing that the police procedures used in creating and presenting photo arrays created a substantial likelihood that defendant was singled out for identification, we reject defendant's contention that County Court erred in refusing to suppress the identification testimony presented at trial (*see generally People v Chipp*, 75 NY2d 327, 335-336, *cert denied* 498 US 833; *People v Martinez*, 298 AD2d 897, 897-898, *lv denied* 98 NY2d 769, *cert denied* 538 US 963, *reh denied* 539 US 911). To the extent that defendant's contention with respect to the alleged insufficiency of the evidence to support the conviction is preserved for our review (*see People v Gray*, 86 NY2d 10, 19), we also reject that contention. Contrary to that part of defendant's contention that is preserved for our review, the testimony of the witness who identified defendant as having participated in the second of the three robberies was not incredible as a matter of law, and we note in any event that defense counsel thoroughly cross-examined her on her ability to identify defendant and the jury nevertheless credited her testimony (*see People v Baker*, 30 AD3d 1102, 1102-1103,

lv denied 7 NY3d 846). 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).

We agree with defendant, however, that the aggregate consecutive sentence of imprisonment of 150 years is unduly harsh and severe in light of the absence of any violence or injuries sustained during the robberies. Because that aggregate consecutive sentence is reduced by operation of law to an aggregate maximum term of 50 years pursuant to Penal Law § 70.30 (1) (e) (vi), however, we see no reason to modify the sentence.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

60

KA 09-01503

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS MILLER, DEFENDANT-APPELLANT.

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

DONALD H. DODD, DISTRICT ATTORNEY, OSWEGO (MICHAEL G. CIANFARANO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered May 21, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal sale of a controlled substance in the third degree (§ 220.39 [1]). Defendant contends that he was denied effective assistance of counsel based on various alleged errors committed by defense counsel. We reject that contention. Defendant failed to demonstrate that defense counsel's failure to meet with two potential witnesses or to seek the authorization of County Court to obtain the assistance of a private investigator pursuant to County Law § 722-c to locate those potential witnesses was not a reasonable and legitimate trial strategy under the circumstances of this case (*see generally People v Benevento*, 91 NY2d 708, 712; *People v Rivera*, 71 NY2d 705, 709; *People v Morgan*, 77 AD3d 1419). Defense counsel was in possession of written statements from those two potential witnesses and could have concluded based on the testimony of the People's witnesses that the testimony of those two potential witnesses would not be helpful but, rather, possibly would be harmful to the defense (*see generally People v Safford*, 74 AD3d 1835, 1837; *People v Fields*, 63 AD3d 1626, 1626-1627, *lv denied* 13 NY3d 835). The fact that defense counsel made a general rather than a specific motion for a trial order of dismissal also does not constitute ineffective assistance of counsel where, as here, a specific motion would have had little or no chance of success (*see People v Martinez*, 73 AD3d 1432, *lv denied* 15 NY3d 807; *People v*

Hunter, 70 AD3d 1388, 1389, *lv denied* 15 NY3d 751; *see generally People v Caban*, 5 NY3d 143, 152). Indeed, we note that defendant does not contend on appeal that the evidence is legally insufficient to support the conviction. Also contrary to defendant's contention, defense counsel's strategy in informing the jurors that he was "not going to put [defendant] on the stand" did not constitute ineffective assistance (*see People v Riley*, 292 AD2d 822, 823, *lv denied* 98 NY2d 640). We have examined defendant's remaining allegations of ineffective assistance of counsel and conclude that they lack merit (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant failed to preserve for our review his further contention that he was penalized for exercising his right to a jury trial on the ground that he received a harsher sentence than that proposed as part of a plea agreement (*see People v Dorn*, 71 AD3d 1523; *People v Lombardi*, 68 AD3d 1765, *lv denied* 14 NY3d 802). In any event, his contention is without merit. "[T]he 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 evidence in the record that the sentencing court was vindictive" (*Lombardi*, 68 AD3d at 1765-1766 [internal quotation marks omitted]; *see People v Chappelle*, 14 AD3d 728, 729, *lv denied* 5 NY3d 786; *see generally People v Pena*, 50 NY2d 400, 411-412, *rearg denied* 51 NY2d 770, *cert denied* 449 US 1087). Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

61

CAF 10-00475

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

IN THE MATTER OF PAIGE K. AND NICHOLAS T.

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

JAY J.B., RESPONDENT-APPELLANT.

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR RESPONDENT-APPELLANT.

CARACCIOLI & NELSON, PLLC, MEXICO (ANNALISE M. DYKAS OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, ATTORNEY FOR THE CHILDREN, MANLIUS, FOR PAIGE K. AND NICHOLAS T.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered February 1, 2010 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected and abused the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, Family Court granted petitioner's motion for summary judgment on the petition, which sought a determination that respondent abused his girlfriend's son and derivatively neglected the son's older sister. We note at the outset that respondent's contentions concern only the alleged derivative neglect of the sister, and that he does not challenge the finding of abuse in connection with his girlfriend's son. In addition, we note that respondent's contentions in opposition to the motion for summary judgment are raised for the first time on appeal and are therefore not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In any event, contrary to respondent's contention, petitioner established as a matter of law that respondent was a person legally responsible for the sister (*see* § 1012 [g]; *see generally Matter of Yolanda D.*, 88 NY2d 790, 796) and that, when he abused his girlfriend's son by murdering him, he thereby derivatively neglected the sister (*see Matter of Justice T.*, 305 AD2d 1076, *lv denied* 100 NY2d 512; *see generally Matter of Jovon J.*, 51 AD3d 1395; *Matter of Seth G.*, 50 AD3d 1530). Contrary to the contention of respondent, he failed to raise a triable issue of fact (*see generally*

Zuckerman v City of New York, 49 NY2d 557, 562).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

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CAF 09-01797

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

IN THE MATTER OF VINCENT E.D.G.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

ROZZIE M.G., RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR RESPONDENT-APPELLANT.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

CAROLYN L. CHASE, ATTORNEY FOR THE CHILD, WEBSTER, FOR VINCENT E.D.G.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered August 10, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to her son on the ground of mental illness. Contrary to the mother's contention, we conclude that petitioner met its burden of demonstrating by clear and convincing evidence that the mother 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* § 384-b [6] [a]; *Matter of Alyssa Genevieve C.*, ___ AD3d ___ [Dec. 9, 2010]; *Matter of Deondre M.*, 77 AD3d 1362). Indeed, petitioner presented clear and convincing evidence establishing that the mother is presently suffering from a mental illness that "is manifested by a disorder or disturbance in behavior, thinking or judgment to such an extent that if such child were placed in . . . the custody of [the mother], the child would be in danger of becoming a neglected child" (§ 384-b [6] [a]; *see Matter of Kahlil S.*, 35 AD3d 1164, 1165, *lv dismissed* 8 NY3d 977). The psychiatrist appointed by Family Court testified at the hearing on the petition that the mother had schizoaffective disorder and a substance abuse problem that worsened the symptoms of her mental illness. The psychiatrist further testified that schizoaffective disorder can be treated with medication, but that the mother's denial that she has a mental illness

has resulted in her refusal to take medication to treat it. Although the psychiatrist testified that persons undergoing proper treatment can function on a day-to-day basis and are able to care for children, we note that "the mere possibility that the mother might be capable of providing adequate care at some indefinite point in the future does not warrant denial of the petition" (*Matter of Alexander James R.*, 48 AD3d 820, 821; *see Deondre M.*, 77 AD3d at 1363).

Finally, we conclude that the court did not abuse its discretion in denying the mother's request for an adjournment in order to conduct a dispositional hearing. It is well settled that "a separate dispositional hearing is not required following the determination that [a parent] is unable to care for [a] child because of mental illness" (*Matter of Demariah A.*, 71 AD3d 1469, 1470, *lv denied* 15 NY3d 701).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

66

CA 10-01860

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

TAJOURA WALLEY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ASHLEY BIVINS, AN INFANT, ET AL., DEFENDANTS,
AND ONONDAGA CENTRAL SCHOOL DISTRICT,
DEFENDANT-RESPONDENT.

CRAIG J. BILLINSON & ASSOCIATES, SYRACUSE (PETER M. HARTNETT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (JENNIFER L. NUHFER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered November 30, 2009 in a personal injury action. The order granted the motion of defendant Onondaga Central School District for summary judgment dismissing the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint against defendant Onondaga Central School District is reinstated.

Memorandum: Plaintiff, a ninth grade student at Onondaga Central School District (defendant), commenced this action seeking damages for injuries she sustained when she was stabbed by Ashley Bivins, a seventh grade student attending the same school. It is undisputed that defendant had notice of three altercations between plaintiff and Bivins prior to the instant stabbing. The first incident occurred approximately two weeks earlier, when the two students were verbally arguing and a teacher had to restrain Bivins in order to prevent a physical altercation. Approximately one week later, a volleyball coach interceded during a physical altercation between the two students on a school bus. The third incident occurred the following morning, as soon as plaintiff and Bivins entered the school. They were engaged in a physical altercation and had to be separated by teachers. As a result of the third incident, both students were suspended for three days. On the first day upon returning from her suspension, Bivins exited the bus, proceeded to plaintiff's locker, and stabbed plaintiff in the leg with a knife.

Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint against it. A school district will

be held liable for negligent supervision of its students when "school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" (*Mirand v City of New York*, 84 NY2d 44, 49). In the context of defendant's motion, defendant was required in the first instance to establish that there was no negligence on its part, i.e., that there was no breach of the duty of supervision and further, in the event that there was such a breach, that the breach was not a proximate cause of the injuries (*see id.* at 50). The court determined, and defendant does not dispute, that defendant failed to establish that it did not breach its duty of supervision (*see Johnson v Ken-Ton Union Free School Dist.*, 48 AD3d 1276, 1278). Indeed, based on the escalating nature of the interactions between plaintiff and Bivins, defendant certainly could have anticipated that another altercation would occur when the two students returned to school. Although the school principal testified at his deposition that it was the school's practice to counsel a student if there was a concern that a student had a violent nature, no such counseling occurred in this case. It was also a school policy for teachers to stand outside their classrooms at the start of the school day to prevent any problems, but the two teachers with classrooms next to plaintiff's locker were not in compliance with that policy at the time of the instant incident.

Although as noted defendant does not dispute that it breached its duty of supervision, it contended that its alleged negligence was not a proximate cause of plaintiff's injuries, and the court agreed with defendant in granting defendant's motion for summary judgment dismissing the complaint against it. That was error. The test for proximate cause is "whether under all the circumstances the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the school's negligence" (*Mirand*, 84 NY2d at 50). If the act of violence was unforeseeable, then defendant is not held liable (*see id.*). "Proximate cause is a question of fact for the jury where varying inferences are possible" (*id.* at 51; *see Johnson*, 48 AD3d at 1277). Defendant contends that it is not liable as a matter of law because "the assault occurred so suddenly that no amount of supervision would have prevented it" (*Sanzo v Solvay Union Free School Dist.*, 299 AD2d 878, 879; *see Kozakiewicz v Frontier Middle School*, 37 AD3d 1138, 1139). We cannot agree. Rather, based on the circumstances of this case, including the recent incidents of physical contact between the two students, the school's own failure to comply with its practice of counseling a student in the event that the school was concerned that the student had a violent nature as well as its failure to comply with its own security plan, and the fact that the incident occurred on the first day on which both students had returned to school following their suspensions, we conclude that there is an issue of fact whether the undisputed breach by defendant of its duty of supervision was a proximate cause of plaintiff's injuries, thus precluding summary

judgment (*see Mirand*, 84 NY2d at 51).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

67

CA 10-01805

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

DAVID HAMMOND AND KARYL HAMMOND,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

GORDON BAKER, ESTHER BAKER, RANDALL BAKER, AND
ADDY BAKER, DEFENDANTS-APPELLANTS.

HARRIS, CHESWORTH, O'BRIEN, JOHNSTONE, WELCH & LEONE, LLP, ROCHESTER (EUGENE WELCH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROSE AND REH, LLC, VICTOR (THOMAS D. REH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered November 16, 2009. The amended order, among other things, awarded plaintiffs a portion of defendants' land.

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

Memorandum: In this action to quiet title by adverse possession, defendants appeal from an amended order entered following a bench trial awarding plaintiffs a portion of land (hereafter, disputed property) previously purchased by defendants Gordon Baker and Esther Baker. According to defendants, plaintiffs failed to meet their burden of establishing by clear and convincing evidence that, inter alia, their possession of the disputed property was open and notorious (*see Walling v Przybylo*, 7 NY3d 228, 232; *West Middlebury Baptist Church v Koester*, 50 AD3d 1494). Defendants contend that, among other reasons, a hedgerow screened or obscured plaintiffs' possessory actions. We reject that contention. The record establishes that, during the required period of adverse possession, plaintiffs erected a shed, constructed and reconfigured a stone wall, refurbished a swing set, planted and fertilized grass, and regularly mowed the lawn (*see West v Tilley*, 33 AD2d 228, 230, *lv denied* 27 NY2d 481; *see also Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 160; *Villani v Holton*, 50 AD3d 1543; *Gorman v Hess*, 301 AD2d 683). We thus conclude that "even a casual inspection by [the record owner] . . . of the boundary lines of the property . . . would have revealed [plaintiffs'] occupation and use" of the disputed property (*West*, 33 AD2d at 230).

Inasmuch as defendants tacitly concede, and the record

establishes, that plaintiffs' possession and use of the disputed property was also actual, exclusive, and continuous for the required period of at least 10 years (*see generally Walling*, 7 NY3d at 232), a presumption of hostility under a claim of right arose, satisfying the remaining element of a cause of action for adverse possession (*see DeRosa v DeRosa*, 58 AD3d 794, 796, *lv denied* 12 NY3d 710; *Parsons v Hollingsworth*, 259 AD2d 1054). We conclude that defendants failed to rebut the presumption (*see Merget v Westbury Props., LLC*, 65 AD3d 1102, 1104-1105*; Parsons*, 259 AD2d at 1054; *see generally Walling*, 7 NY3d at 232-233). "[Defendants'] analysis focuses far too much on [plaintiffs'] state of mind, i.e., what they knew or reasonably should have known by virtue of deed descriptions [and] survey maps . . . and far too little on [plaintiffs'] actions" (*Birkholz v Wells*, 272 AD2d 665, 666).

Under the version of the RPAPL in effect on June 13, 2008, when plaintiffs' summons and complaint were filed, plaintiffs were also required to show that the disputed property was "usually cultivated or improved" (RPAPL 522 former [1]), or "protected by a substantial inclosure" (RPAPL 522 former [2]). Defendants err in contending that we should apply the current version of the RPAPL rather than that former version. Indeed, it is of no moment that the current version lacks a requirement of usual cultivation or improvement (*see* RPAPL 522 [1]), and deems permissive and non-adverse certain "de minimus non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, [and] sheds" (RPAPL 543 [1]), as well as "the acts of lawn mowing or similar maintenance" (RPAPL 543 [2]). As we concluded in *Franza v Olin* (73 AD3d 44, 47), "where title has vested by adverse possession, it may not be disturbed retroactively by newly-enacted or amended legislation . . . ." We further noted in *Franza* that the 2008 amendments "define[d] as 'permissive and non-adverse' actions that, under the prior statutory law and long-standing principles of common law, were sufficient to obtain title by adverse possession" (*id.*). Thus, applying the former version of the RPAPL, we note that "[t]he type of cultivation or improvement sufficient under the statute will vary with the character, condition, location and potential uses for the property . . . and need only be consistent with the nature of the property so as to indicate exclusive ownership" (*City of Tonawanda v Ellicott Cr. Homeowners Assn.*, 86 AD2d 118, *appeal dismissed* 58 NY2d 824; *see Ray*, 88 NY2d at 159-160), and here plaintiffs established that they "usually cultivated or improved" the disputed property in accordance with the nature of the property (*see Franza*, 73 AD3d at 47; *West Middlebury Baptist Church*, 50 AD3d at 1495; *Villani*, 50 AD3d at 1543; *Gorman*, 301 AD2d at 684-685).

As a final matter, we conclude that Supreme Court's measurement of the dimensions of the disputed property is supported by the record (*see generally Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170).

Entered: February 10, 2011 Patricia L. Morgan
Clerk of the Court

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

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CA 10-01977

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

CHARLES J. ZECK, JR. AND CLAUDIA ZECK,
PLAINTIFFS-APPELLANTS,

V ORDER

VICTOR GASPAR, DEFENDANT-RESPONDENT.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (STEPHEN A. DAVOLI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, A.J.), entered July 26, 2010 in a personal injury action. The order, among other things, denied in part plaintiffs' motion for summary judgment.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

69

CA 10-01992

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

KRISTEN RICKERT AND ROBERT RICKERT,
PLAINTIFFS-RESPONDENTS,

V ORDER

COUNTY OF ONONDAGA, DEFENDANT-APPELLANT.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (MARY J. FAHEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

LYNN LAW FIRM, LLP, SYRACUSE (PATRICIA A. LYNN-FORD OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered February 24, 2010 in a personal injury action. The order denied the motion of defendant for summary judgment.

Now, upon reading and filing the stipulation of withdrawal of appeal signed by the attorneys for the parties on December 30, 2010 and January 4, 2011,

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

70

CA 10-01073

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

SCOTT MARTZLOFF AND KIMBERLY MARTZLOFF, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF VICTORIA MARTZLOFF, AN INFANT, PLAINTIFFS-APPELLANTS,

ORDER

V

RUSH-HENRIETTA CENTRAL SCHOOL DISTRICT, DEFENDANT-RESPONDENT.

REDMOND & PARRINELLO, LLP, ROCHESTER (BRUCE F. FREEMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

PETRONE & PETRONE, P.C., SYRACUSE (LOUIS J. TRIPOLI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered January 19, 2010 in a personal injury action. The order granted defendant's motion in limine to preclude plaintiff Kimberly Martzloff from offering any evidence in support of her claim for emotional 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.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

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OP 10-01878

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

IN THE MATTER OF PEOPLE EX REL. J.A. SESSION, ATTORNEY ON BEHALF OF DEREK L. ARCHIE, ALSO KNOWN AS DIESE GAME DIESE, PETITIONER,

V ORDER

DAVID STALLONE, SUPERINTENDENT, CAYUGA CORRECTIONAL FACILITY, RESPONDENT.

J.A. SESSION, ROCHESTER, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 70 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 7002 [b] [2]) seeking a writ of habeas corpus.

It is hereby ORDERED that said petition is unanimously dismissed without costs as moot.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

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KA 08-02584

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ALFONSO D. WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered July 17, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in or near school grounds.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

75

KA 10-00285

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MIGUEL A. TORRO-TORRES, ALSO KNOWN AS “MICKEY,”
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered November 30, 2009. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree and attempted murder in the second degree.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

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KA 10-00150

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JERMAINE O. SENIOR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered January 12, 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).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

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KA 06-02430

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT A. LYNCH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered September 8, 2005. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, robbery in the second degree (two counts) and robbery in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count each of robbery in the first degree (Penal Law § 160.15 [3]) and robbery in the third degree (§ 160.05) and two counts of robbery in the second degree (§ 160.10 [1], [2] [a]). Contrary to defendant's contention, "[t]he showup [identification procedure] was not rendered unduly suggestive by factors '[i]nherent in any showup' . . ., including the victim's apparent awareness that [she] was viewing a possible suspect and the presence of police officers guarding defendant" (*People v Grant*, 77 AD3d 558, 558). In addition, "[t]he circumstances that defendant was handcuffed behind his back . . . and that the [victim] was told that [she] would be viewing a suspect, did not render the procedure unduly suggestive" (*People v Edwards*, 259 AD2d 343, 344, *lv denied* 93 NY2d 969; *see People v Lewis*, 306 AD2d 931, *lv denied* 100 NY2d 596).

Defendant failed to preserve for our review his further contention that the jury actually convicted him of robbery in the third degree as a lesser included offense of robbery in the first degree as charged in the second count of the indictment, rather than robbery in the first degree (*see People v Nairne*, 258 AD2d 671, *lv denied* 93 NY2d 1003, 1004; *People v Rundblad*, 154 AD2d 746, 747-748; *see generally People v Mercado*, 91 NY2d 960, 963; *People v Marilla*, 7 NY2d 319, 320). In any event, "[b]ased on the minutes and the jury

verdict sheet" (*People v Williams*, 262 AD2d 218, 219, *lv denied* 93 NY2d 1046), as well as County Court's charge to the jury, it is clear that the court clerk merely misspoke when she asked whether the jury found defendant guilty of robbery in the third degree and that the jury actually found defendant guilty of robbery in the first degree as charged in the second count. Furthermore, with respect to the second count, the court instructed the jury, inter alia, to consider robbery in the third degree as a lesser included offense of robbery in the first degree only if it found defendant not guilty of the charged offense, and the jury rendered only a single guilty verdict on the second count. When taking the verdict in court, the court clerk also indicated that the crime was "Robbery in the Third Degree, Dangerous Instrument," and the use or threat of use of a dangerous instrument is an element of robbery in the first degree as charged in the second count (*see* Penal Law § 160.15 [3]). Robbery in the third degree has no such requirement (*see* § 160.05).

Insofar as defendant contends that the verdict is repugnant because, inter alia, he was acquitted of robbery in the first degree as charged in the first count of the indictment but convicted of that crime as charged in the second count, we conclude that he failed to preserve that contention for our review by failing to object to the verdict before the jury was discharged (*see People v Alfaro*, 66 NY2d 985, 987). 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 defendant's further 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).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contention and conclude that it is without merit.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

82

KA 08-01878

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRICK GAUSE, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered August 7, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1] [intentional murder]), defendant contends that his retrial is barred by double jeopardy. In a prior appeal from the judgment convicting defendant of murder in the second degree (§ 125.25 [2] [depraved indifference murder]) following his first trial, we noted that the jury considered only the depraved indifference murder count and did not reach the intentional murder count (*People v Gause*, 46 AD3d 1332, *lv dismissed* 10 NY3d 811). We concluded that the evidence was legally insufficient to support the conviction of depraved indifference murder, and we reversed the judgment, dismissed the depraved indifference murder count and granted a new trial on the intentional murder count (*id.*). We stated that, "[b]ecause the jury never considered the intentional murder count, we agree with the People that double jeopardy does not preclude a new trial on that count" (*id.* at 1333). Our prior decision is the law of the case and thus reconsideration of the double jeopardy issue is precluded absent a showing that the "prior decision was based on manifest error or that exceptional circumstances exist to warrant a departure from the law of the case doctrine" (*People v Collins*, 238 AD2d 435, 436, *lv denied* 90 NY2d 903, 91 NY2d 890). We conclude that neither of those exceptions exists here.

We further conclude that defendant's contention with respect to the charge on accomplice liability is not preserved for our review

(*see People v Kendricks*, 23 AD3d 1119), 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 have considered defendant's remaining contentions and conclude that they are without merit.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

83

CA 10-01099

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

VERIZON NEW YORK, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LABARGE BROTHERS CO., INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

EDWARD C. COSGROVE, BUFFALO (JAMES C. COSGROVE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ANN MAGNARELLI ALEXANDER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered August 6, 2009. The order, among other things, granted defendant's motion for summary judgment dismissing plaintiff's complaint and denied plaintiff's cross motion for leave to amend the complaint to add Suburban Pipeline Co., Inc. as a defendant.

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

Memorandum: Plaintiff commenced this action alleging that defendant damaged plaintiff's underground cables. In appeal No. 1, plaintiff appeals from an order granting defendant's motion for summary judgment dismissing the complaint and denying plaintiff's cross motion seeking leave to amend the complaint to add Suburban Pipeline Co., Inc. (Suburban) as an additional defendant. In appeal No. 2, plaintiff appeals from an order denying its motion for leave to renew and reargue its opposition to defendant's motion and for leave to renew and reargue its cross motion.

Addressing first appeal No. 2, we conclude that the appeal must be dismissed insofar as plaintiff appeals from those parts of the order denying its motion for leave to reargue its opposition to the motion and for leave to reargue its cross motion. It is well settled that no appeal lies from an order denying leave to reargue (*see Empire Ins. Co. v Food City*, 167 AD2d 983). With respect to the remainder of the order, we note that plaintiff failed to address in its brief any issues concerning it, and we therefore deem any such issues abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

With respect to the order in appeal No. 1, plaintiff contends that Supreme Court erred in denying its cross motion because, although the statute of limitations had expired, the relation back doctrine permits it to add a new defendant. We reject that contention. Pursuant to the relation back doctrine, a claim may be asserted against a new defendant after the expiration of the statute of limitations when, inter alia, "the new [defendant] is united in interest with the original defendant[] and by reason of that relationship can be charged with such notice of the institution of the action that the new [defendant] will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement" (*Mondello v New York Blood Ctr.–Greater N.Y. Blood Program*, 80 NY2d 219, 226). "In [the] context [of this case], unity of interest means that the interest of the parties in the subject[]matter is such that they stand or fall together and that judgment against one will similarly affect the other . . . Although the parties might share a multitude of commonalities, including shareholders and officers . . ., the unity of interest test will not be satisfied unless the parties share precisely the same jural relationship in the action at hand . . . Indeed, unless the original defendant and new [defendant] are vicariously liable for the acts of the other . . . there is no unity of interest between them" (*Zehnick v Meadowbrook II Assoc.*, 20 AD3d 793, 796-797, *lv dismissed in part and denied in part* 5 NY3d 873 [internal quotation marks omitted]; *see Xavier v RY Mgt. Co., Inc.*, 45 AD3d 677, 679). Here, despite the numerous commonalities between defendant and Suburban, plaintiff failed to establish that Suburban was vicariously liable for the acts of defendant and thus failed to establish that the relation back doctrine applies.

We reject plaintiff's further contention that the court should have pierced the corporate veils of defendant and Suburban and concluded that, inasmuch as they were alter egos of each other, they were united in interest. "Generally, a party seeking to pierce the corporate veil must establish that '(1) the owners exercised complete domination of the corporation in respect to the transaction attacked[] and (2) that such domination was used to commit a fraud or wrong against the plaintiff [that] resulted in the plaintiff's injury' " (*Matter of Goldman v Chapman*, 44 AD3d 938, 939, *lv denied* 10 NY3d 702, quoting *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141). Even assuming, arguendo, that Suburban exercised dominion and control over defendant or a joint owner exercised dominion and control over both entities, we conclude that plaintiff failed to establish that any party used its dominion and control to commit a fraud or wrong against plaintiff (*see Morris*, 82 NY2d at 141-142). We thus agree with defendant and Suburban that they were not united in interest within the context of this action.

We have considered plaintiff's remaining contentions in appeal No. 1 and conclude that they are without merit.

Entered: February 10, 2011

Patricia L. Morgan
Clerk of the Court

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

84

CA 10-01101

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

VERIZON NEW YORK, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LABARGE BROTHERS CO., INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

EDWARD C. COSGROVE, BUFFALO (JAMES C. COSGROVE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ANN MAGNARELLI ALEXANDER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered March 4, 2010. The order denied plaintiff's motion for leave to renew and reargue.

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

Same Memorandum as in *Verizon New York, Inc. v LaBarge Bros. Co., Inc*. ([appeal No. 1] ___ AD3d ___ [Feb. 10, 2011]).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

88

CA 10-01970

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

DALE R. GELSTER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARIA L. JAOUDE, DEFENDANT-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS P. KAWALEC OF COUNSEL), FOR DEFENDANT-APPELLANT.

O'BRIEN BOYD, P.C., WILLIAMSVILLE (CHRISTOPHER J. O'BRIEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered June 11, 2010 in a personal injury action. The order denied the motion of defendant for summary judgment.

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

Memorandum: Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint. Defendant met her initial burden by establishing that plaintiff, a pedestrian, unexpectedly darted into the path of her vehicle (*see Jellal v Brown*, 37 AD3d 179; *Sheppeard v Murci*, 306 AD2d 268; *Ash v McNamara*, 288 AD2d 956, *lv denied* 97 NY2d 612). In opposition to the motion, however, plaintiff raised a triable issue of fact whether defendant was speeding at the time of the accident (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to defendant's contention, the deposition testimony of a non-party witness regarding defendant's speed was not so inconsistent or speculative as to render it insufficient to defeat the motion (*cf. Sheppeard*, 306 AD2d 268; *Wolf v We Transp.*, 274 AD2d 514).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

89

CA 10-01102

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

VERIZON NEW YORK, INC., PLAINTIFF-APPELLANT,

V ORDER

LABARGE BROTHERS CO., INC. AND LABARGE COMPANIES, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 3.)

EDWARD C. COSGROVE, BUFFALO (JAMES C. COSGROVE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ANN MAGNARELLI ALEXANDER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered August 6, 2009. The order, among other things, granted defendants' motion for summary judgment dismissing plaintiff's complaint and denied plaintiff's cross motion for leave to amend the complaint to add Suburban Pipeline Co., Inc. as a defendant.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Verizon New York, Inc. v LaBarge Bros. Co., Inc*. [appeal No. 1], ___ AD3d ___ [Feb. 10, 2011]).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

90

CA 10-01103

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

VERIZON NEW YORK, INC., PLAINTIFF-APPELLANT,

V ORDER

LABARGE BROTHERS CO., INC. AND LABARGE COMPANIES, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 4.)

EDWARD C. COSGROVE, BUFFALO (JAMES C. COSGROVE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ANN MAGNARELLI ALEXANDER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered March 4, 2010. The order denied plaintiff's motion for leave to renew and reargue.

It is hereby ORDERED that said appeal from the order insofar as it denied those parts of plaintiff's motion for leave to reargue its opposition to defendants' motion for summary judgment dismissing the complaint and for leave to reargue its cross motion is unanimously dismissed and the order is otherwise affirmed without costs (*see Verizon New York, Inc. v LaBarge Bros. Co., Inc*. [appeal No. 1], ___ AD3d ___ [Feb. 10, 2011]).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

94

CA 10-01145

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

ASD SPECIALTY HEALTHCARE, INC., DOING BUSINESS AS ONCOLOGY SUPPLY COMPANY, DERIVATIVELY ON BEHALF OF SYRACUSE HEMATOLOGY/ONCOLOGY, P.C., PLAINTIFF-RESPONDENT,

V ORDER

J. ROBERT SMITH, DEFENDANT, BENJAMIN S. HIMPLER AND ANGELIE ROMAN, DEFENDANTS-APPELLANTS.

WALTER D. KOGUT, P.C., SYRACUSE (WALTER D. KOGUT OF COUNSEL), AND FRANKLIN A. JOSEF, FAYETTEVILLE, FOR DEFENDANTS-APPELLANTS.

PORTER NORDBY HOWE, LLP, SYRACUSE (ERIC C. NORDBY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered February 22, 2010. The order granted plaintiff's motion for leave to reargue and upon reargument reinstated plaintiff's complaint.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on January 11, 2011,

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

95

CA 10-01971

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

ELIZABETH LAYMON AND JERRY W. LAYMON, SR.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JAMES F. ALLEN, DOING BUSINESS AS ALLEN'S
VILLAGE GREENE LANDSCAPING CO.,
DEFENDANT-APPELLANT,
BRANCK CONSTRUCTION, ET AL., DEFENDANTS.

LAW OFFICES OF THERESA J. PULEO, SYRACUSE (JOHN F. PFEIFER OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL A. CASTLE, HERKIMER, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered November 24, 2009 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant James F. Allen, doing business as Allen's Village Greene Landscaping Co., 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 Elizabeth Laymon (plaintiff) when she fell after her foot became caught in a hole in a parking lot maintained by, inter alia, James F. Allen, doing business as Allen's Village Greene Landscaping Co. (defendant). Contrary to the contention of defendant, Supreme Court properly denied his motion for summary judgment dismissing the amended complaint against him. "A contractor may be liable for an affirmative act of negligence [that] results in the creation of a dangerous condition upon a public street or sidewalk" (*Losito v City of New York*, 38 AD3d 854, 855; *see Brown v Welsbach Corp.*, 301 NY 202, 205). Here, the evidence submitted by defendant in support of his motion was insufficient to establish as a matter of law that he did not create or cause the allegedly dangerous condition (*see Losito*, 38 AD3d at 854) or that his alleged negligence was not a proximate cause of plaintiff's injuries (*see Dodge v City of Hornell Indus. Dev. Agency*, 286 AD2d 902; *Kanney v Goodyear Tire & Rubber Co.*, 245 AD2d 1034, 1036).

Entered: February 10, 2011

Patricia L. Morgan
Clerk of the Court

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

97

TP 10-01653

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

IN THE MATTER OF RICKY BRYANT, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT.

RICKY BRYANT, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Anthony F. Shaheen, J.], entered May 19, 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 the determination is unanimously confirmed without costs and the petition is dismissed.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

98

KA 08-00347

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LATISHA WEBB, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM G. PIXLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered November 21, 2007. The judgment convicted defendant, upon her plea of guilty, of burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that Supreme Court abused its discretion in refusing to consider relevant factors during the sentencing proceeding, such as her drug addiction, and thus erred in imposing an enhanced sentence. Defendant failed to move to withdraw the plea or to vacate the judgment of conviction on that ground and thus has failed to preserve her contention for our review (*see People v Reed*, 78 AD3d 1534; *People v Ortiz*, 43 AD3d 1348, *lv denied* 9 NY3d 1008; *People v Mariani*, 6 AD3d 1206, *lv denied* 3 NY3d 643), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's further challenge to the severity of the sentence and decline her request to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]; *see generally People v Farrar*, 52 NY2d 302).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

102

KA 09-02647

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

EDMUND PIECZYNSKI, III, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered November 18, 2009. The judgment convicted defendant, upon his plea of guilty, of reckless endangerment in the first degree.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

108

KA 08-00480

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DONNY BOWEN, ALSO KNOWN AS DONNIE BOWEN,
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered January 29, 2008. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

109

KA 09-00835

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HECTOR R. CRUZ, DEFENDANT-APPELLANT.

ROBERT TUCKER, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered April 3, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fourth degree (three counts), criminal sale of a controlled substance in the third degree, and criminal possession of a controlled substance in the fifth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that his plea was not voluntarily entered inasmuch as he entered the plea because of the length of his pre-plea incarceration and his desire to obtain medical treatment in a state prison. "[D]efendant failed to preserve that challenge for our review by moving to withdraw his plea or [raising that ground in his motion to] vacate the judgment of conviction" (*People v Cloyd*, 78 AD3d 1669, ___). We reject defendant's contention that this is one of those rare cases in which the exception to the preservation requirement applies (*see People v Lopez*, 71 NY2d 662, 666). The record establishes that County Court, "when confronted with statements casting significant doubt upon [the voluntariness of the plea], properly conducted further inquiry to ensure that [the] plea was . . . voluntary" (*id.* at 667-668; *see People v High*, 46 AD3d 1435, *lv denied* 10 NY3d 812). The sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

110

CAF 09-02495

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

IN THE MATTER OF ELIZABETH A. ZOSH,
PETITIONER-RESPONDENT,

V ORDER

THOMAS SMITH, RESPONDENT-APPELLANT.

LOVALLO & WILLIAMS, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered November 18, 2009 in a proceeding pursuant to Family Court Act article 4. The order confirmed the Support Magistrate's determination that respondent willfully failed to obey an order of the court and sentenced respondent to 180 days in jail.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

112

CAF 10-00169

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

IN THE MATTER OF THOMAS C. AND TRISTAN C.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

JENNIFER C., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR RESPONDENT-APPELLANT.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (SARA J. LANGAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

LISA M. FAHEY, ATTORNEY FOR THE CHILDREN, EAST SYRACUSE, FOR THOMAS C. AND TRISTAN C.

Appeal from an order of the Family Court, Onondaga County (Martha Walsh Hood, J.), entered December 14, 2009 in a proceeding pursuant to Family Court Act article 10. The order adjudged that respondent neglected her children.

It is hereby ORDERED that said appeal from the order insofar as it concerns visitation is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: Respondent mother appeals from an order that, inter alia, adjudicated her two children to be neglected by her and provided that her visitation with them must be supervised. We dismiss the appeal from the order insofar as it concerns visitation inasmuch as that part of the order was entered on the mother's consent, and thus no appeal lies therefrom (*see* CPLR 5511; *Matter of Gittens v Chin-On*, 19 AD3d 596). We note in any event that the part of the order concerning visitation has since expired, rendering that part of the appeal moot (*see Matter of Forsyth v Avery*, 263 AD2d 705). We reject the mother's contention that petitioner failed to meet its burden of establishing that the children were neglected. Petitioner established by a preponderance of the evidence that the mental or emotional condition of each child had been or was in imminent danger of becoming impaired as the result of the mother's conduct in making false accusations of neglect against the father (*see Matter of Kevin M.H.*, 76 AD3d 1015, *lv denied* ___ NY3d ___ [Dec. 16, 2010]), and in otherwise involving the children in her antagonistic conduct toward the father (*see Matter of Caleb L.*, 287 AD2d 831). Contrary to the further contention of the mother, we conclude that Family Court

neither violated the Family Court Act nor denied her the right to due process when it curtailed her direct and cross-examination of witnesses. The scope of the examination of witnesses rests within the trial court's sound discretion (*see generally Matter of Shane MM. v Family & Children Servs.*, 280 AD2d 699, 700-701), and we perceive no abuse of that discretion here.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

113

CAF 10-00512

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

IN THE MATTER OF JALEEL E.F.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CHERYL S. (DECEASED), RESPONDENT,
AND ERNEST F., 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 JALEEL E.F.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered February 9, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order freed the subject child for adoption.

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

Memorandum: Petitioner commenced this proceeding pursuant to Social Services Law § 384-b seeking to free the subject children for adoption following the death of their mother. Respondent Ernest F. (hereafter, father), the biological father of one of the children, previously appealed from an order determining that his consent to that child's adoption is not required (*Matter of Jaleel F.*, 63 AD3d 1539; *see* § 384-c [1], [2] [a]; [3]). There, we concluded that the father had been denied his right to due process based on the failure to inform him of the date of the dispositional hearing on the termination of parental rights petition. We therefore reversed the order insofar as appealed from and vacated the determination that the father is a notice father pursuant to Social Services Law § 384-c, and we remitted the matter for a hearing at which the father was to be afforded the opportunity to present evidence that he was a consent father rather than a notice father, as well as to afford him the opportunity to be heard on the issue of the child's best interests (*id.*). The father now appeals from the order entered following that hearing determining he is not a consent father, i.e., that his consent to the adoption was not required, and freeing that child for adoption. We affirm.

Contrary to the contention of the father, he failed to meet his burden of establishing his right to consent to the adoption (*see* Domestic Relations Law § 111 [1] [d]; *Matter of Andrew Peter H. T.*, 64 NY2d 1090, 1091). The father testified at the hearing upon remittal that he had no contact with the child for the three years prior to the hearing. In addition, the record does not support the assertion of the father on appeal that he attempted to communicate regularly with the child during that time, inasmuch as the only evidence of such an attempt is a single card sent to the child more than two years after the father learned of the mother's death (*see* § 111 [1] [d] [iii]; *Matter of Taylor R.*, 290 AD2d 830, 832-833).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

114

CA 10-01969

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

IN THE MATTER OF THE ARBITRATION BETWEEN
NIAGARA FRONTIER TRANSPORTATION AUTHORITY,
PETITIONER-APPELLANT,

AND ORDER

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION
LOCAL 1949, RESPONDENT-RESPONDENT.

DAVID M. GREGORY, BUFFALO (WAYNE R. GRADL OF COUNSEL), FOR PETITIONER-APPELLANT.

SANDERS & SANDERS, CHEEKTOWAGA (HARVEY P. SANDERS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered June 1, 2010 in a proceeding pursuant to CPLR article 75. The order denied the petition for a stay of arbitration.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

120

CA 10-01717

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

FRANK W. KILEY, III, PLAINTIFF-RESPONDENT,

V ORDER

GREENFIELD MANOR, INC. AND WILSANDRA CONSTRUCTION CO., INC., DEFENDANTS-APPELLANTS.

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

LEWIS & LEWIS, P.C., BUFFALO (ALLAN M. LEWIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered May 3, 2010 in a personal injury action. The order, insofar as appealed from, denied the motion of defendants for summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action insofar as it is based upon a violation of 12 NYCRR 23-1.8 (c) (1).

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on December 6, 2010,

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

122

KA 09-00718

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DEREK EASTERLING, ALSO KNOWN AS DEREK J. EASTERLING, 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 March 10, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

124

KA 09-00734

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHESTER PARKER, 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 order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered March 4, 2009. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court abused its discretion in failing to grant him a downward departure from his presumptive risk level. Defendant failed to preserve that contention for our review inasmuch as he did not request such relief before the court (*see People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708; *People v Graham*, 35 AD3d 299, *lv denied* 8 NY3d 808). In any event, we conclude that defendant "failed to present the requisite clear and convincing evidence of the existence of special circumstances warranting a downward departure" (*People v Marks*, 31 AD3d 1142, 1143, *lv denied* 7 NY3d 715; *see Ratcliff*, 53 AD3d 1110). Although defendant completed two sex offender treatment programs as well as aggression replacement and substance abuse treatment programs while incarcerated, he failed to offer any evidence suggesting that his response to that treatment was "exceptional" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 17 [2006]). Moreover, the fact that defendant may have abstained from using alcohol and drugs or engaging in inappropriate sexual behavior while incarcerated is " 'not necessarily predictive of his behavior when [he is] no longer under such supervision' " (*People v Urbanski*, 74 AD3d 1882, 1883, *lv denied* 15 NY3d 707; *see People v Vangorder*, 72 AD3d 1614), and defendant "offered no competent evidence of his behavior since his release from prison" (*People v Ferrara*, 38 AD3d

1302, 1303, *lv denied* 8 NY3d 815).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

125

KA 08-00544

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

GARTH O. BENNETT, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM G. PIXLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), rendered January 24, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree (four counts).

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

126

KA 10-00247

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TERRY R. ANDERSON, 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 (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered December 3, 2009. 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.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

127

KA 09-02337

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID A. BROWN, DEFENDANT-APPELLANT.

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

DAVID A. BROWN, DEFENDANT-APPELLANT PRO SE.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered July 8, 2009. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree and criminal mischief in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of burglary in the third degree (Penal Law § 140.20) and criminal mischief in the fourth degree (§ 145.00 [1]) in connection with the burglary of a car dealership. 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). Even assuming, arguendo, that a different result would not have been unreasonable based upon defendant's testimony that he happened upon a burglary in progress and cut his finger when he placed computer equipment that had been left outside the building on the desk that was near the broken window, we conclude that the jury's credibility determination is entitled to great weight and it will not be disturbed here (*see id.*). We reject defendant's contention that County Court erred in refusing to charge the jury that the case against him was based entirely on circumstantial evidence inasmuch as the DNA evidence and defendant's testimony constituted direct evidence (*see People v Whitfield*, 72 AD3d 1610, *lv denied* 15 NY3d 811; *see generally People v Guidice*, 83 NY2d 630, 636).

Defendant further contends that he was penalized for exercising his right to a trial because he was sentenced as a second felony offender to an aggregate term of imprisonment of 3¼ to 6½ years rather

than a term of 2½ to 5 years, as offered prior to trial. We reject that contention. " 'Given that the *quid pro quo* of the bargaining process will almost necessarily involve offers to moderate sentences that ordinarily would be greater . . ., it is . . . to be anticipated that sentences handed out after trial may be more severe than those proposed in connection with a plea' " (*People v Smith*, 21 AD3d 1277, 1278, *lv denied* 7 NY3d 763, quoting *People v Pena*, 50 NY2d 400, 412, *rearg denied* 51 NY2d 770, *cert denied* 449 US 1087). Indeed, we note that defendant was eligible to be sentenced as a persistent felony offender (*see* Penal Law § 70.10 [1] [a]), but that the court denied the People's request that he be sentenced as such.

Contrary to the contention of defendant in his pro se supplemental brief, the conviction is supported by legally sufficient evidence (*see generally Bleakley*, 69 NY2d at 495). The DNA contained in blood samples retrieved from the desk on which the stolen computer monitor was located, as well as from the cord of a window blind, matched defendant's DNA and, during his testimony at trial, defendant admitted that he was at the location. We reject the further contention of defendant in his pro se supplemental brief that the court erred in denying his motion seeking a change of venue or the appointment of a special prosecutor based upon an alleged conflict of interest of the District Attorney, who was a defendant in a civil action commenced by defendant. The court properly determined that a prosecutor should be removed "only to protect a defendant from 'actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence' " (*People v Williams*, 37 AD3d 626, 627, *lv denied* 11 NY3d 836, quoting *Matter of Schumer v Holtzman*, 60 NY2d 46, 55), and defendant failed to "demonstrate 'actual prejudice or so substantial a risk thereof as could not be ignored' " (*id.*, quoting *Schumer*, 60 NY2d at 55). We have reviewed the remaining contentions of defendant in his pro se supplemental brief and conclude that they are without merit.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

128

KA 10-00024

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TROY T. POWELL, DEFENDANT-APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD H. DODD, DISTRICT ATTORNEY, OSWEGO (MICHAEL G. CIANFARANO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered May 11, 2009. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree and petit larceny.

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]) and petit larceny (§ 155.25). Contrary to the contention of defendant, he was not denied effective assistance of counsel based on defense counsel's allegedly improper cross-examination of a police investigator regarding identification evidence and procedures (*see generally People v Baldi*, 54 NY2d 137, 147). Defendant's contention involves a " 'simple disagreement[] with strategies, tactics or the scope of possible cross-examination, weighed long after the trial,' and thus [is] insufficient to establish ineffective assistance of counsel" (*People v Adams*, 59 AD3d 928, 929, *lv denied* 12 NY3d 813, quoting *People v Flores*, 84 NY2d 184, 187). We further conclude that defense counsel's failure to call an expert witness did not constitute ineffective assistance of counsel inasmuch as defendant failed to demonstrate "that the expert's testimony would have assisted the trier of fact or that defendant was prejudiced by the absence of such testimony" (*People v Loret*, 56 AD3d 1283, *lv denied* 11 NY3d 927; *see People v Brandi E.*, 38 AD3d 1218, *lv denied* 9 NY3d 863). Defendant also failed to demonstrate a lack of strategic or other legitimate explanations for defense counsel's request for a circumstantial evidence charge, his request to charge criminal trespass as a lesser included offense of burglary or his failure to request a charge of criminal possession of stolen property (*see People v Benevento*, 91 NY2d 708, 712-713; *People v Ramkissoon*, 36 AD3d 834). "[T]he

evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of the representation, reveal that [defense counsel] provided meaningful representation" (*Baldi*, 54 NY2d at 147).

Defendant's further contention that he was punished for exercising his right to a trial is without merit. "[T]he 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" (*People v Brink*, 78 AD3d 1483, ___ [internal quotation marks omitted]), and " 'the record shows no retaliation or vindictiveness against . . . defendant for electing to proceed to trial' " (*People v Dorn*, 71 AD3d 1523, 1524; *see People v Brown*, 67 AD3d 1427, *lv denied* 14 NY3d 839). The sentence imposed in this case is not unduly harsh or severe.

Defendant failed to preserve for our review his contention that County Court abused its discretion by prohibiting a plea bargain after a certain date (*see* CPL 470.05 [2]). In any event, that contention is without merit. The record demonstrates that defendant had sufficient time to consider the People's plea offer and that the plea bargaining process was fair (*cf. People v Compton*, 157 AD2d 903, *lv denied* 75 NY2d 918; *see generally People v Selikoff*, 35 NY2d 227, 233-234, *cert denied* 419 US 1122; *People v Parker*, 271 AD2d 63, 68, *lv denied* 95 NY2d 967).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

130

KA 08-00621

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARQUES T. CRISLER, 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 Supreme Court, Monroe County (Francis A. Affronti, J.), rendered January 29, 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: 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 [3]), defendant contends that Supreme Court erred in refusing to suppress the gun and other tangible evidence found inside the coat that he discarded while fleeing from the police. We reject that contention. The initial observations of defendant by the police gave rise to an objective, credible reason for approaching him and asking him, in a manner that was "devoid of harassment or intimidation," where he had been prior to his encounter with the police (*People v De Bour*, 40 NY2d 210, 220; *see People v Hollman*, 79 NY2d 181, 190-191; *People v Moyaho*,12 AD3d 692, 693, *lv denied* 4 NY3d 766). Contrary to the contention of defendant, his response to the request for that information, coupled with the observation by the police of a bulge in defendant's pocket that appeared to be consistent with a hidden firearm, provided the police with justification for taking the minimal precautionary measure of asking defendant to remove his hand from his pocket (*see De Bour*, 40 NY2d at 221; *People v Herold*, 282 AD2d 1, 7, *lv denied* 97 NY2d 682; *People v Dawson*, 243 AD2d 318, *lv denied* 91 NY2d 890). We further conclude under the circumstances of this case that the police had the requisite reasonable suspicion to pursue defendant when he immediately fled in response to the request to remove his hand from his pocket (*see People v Cruz*, 14 AD3d 730, *lv denied* 4 NY3d 852; *People v Fajardo*, 209 AD2d 284, *lv denied* 84 NY2d 1031; *see generally People v Sierra*, 83 NY2d

928, 929), and that the coat was discarded by defendant during that lawful pursuit (*see People v Terry*, 190 AD2d 1064, 1065, *lv denied* 81 NY2d 1081).

By pleading guilty, defendant forfeited his further contention that the court should have adjourned the suppression hearing to enable him to obtain additional evidence to present at the suppression hearing (*see generally People v Campbell*, 73 NY2d 481, 486; *People v Oliveri*, 49 AD3d 1208, 1209; *People v Pryor*, 12 AD3d 695, *lv denied* 4 NY3d 802).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

131

KA 07-00936

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL R. SULLI, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered March 28, 2007. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree and robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him, following a jury trial, of robbery in the first degree (Penal Law § 160.15 [3]) and robbery in the second degree (§ 160.10 [3]), defendant contends that County Court erred in denying his request for a circumstantial evidence charge. We reject that contention inasmuch as the People presented direct evidence in the form of defendant's admissions of guilt (*see People v Casper*, 42 AD3d 887, 888, *lv denied* 9 NY3d 990). We reject defendant's further contention that the court erred in denying his request for a missing witness charge. The witness in question, i.e., the victim, indicated through her attorney that she would assert her Fifth Amendment privilege against self-incrimination if she were called to testify. We thus conclude that the witness would not have been expected to testify favorably to the party that did not call her, i.e., the People and that she was "unavailable" to the People because she had refused to testify on Fifth Amendment grounds (*see People v Gonzalez*, 68 NY2d 424, 427; *see generally People v Savinon*, 100 NY2d 192, 198). The court also properly denied defendant's request to charge petit larceny (§ 155.25) as a lesser included offense of both robbery in the first degree and robbery in the second degree. There was no reasonable view of the evidence to support a finding that defendant committed petit larceny, i.e., stole property, but that he did not forcibly steal a vehicle or that he did not forcibly steal a vehicle without using or threatening the use of a dangerous instrument (*see* § 160.10 [3]; § 160.15 [3]; *see generally People v Glover*, 57 NY2d 61, 63).

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish that defendant used or threatened to use the vehicle in question as a dangerous instrument (*see People v Gray*, 86 NY2d 10, 19). We reject defendant's further contention that the evidence is legally insufficient to establish the element of forcible stealing. The evidence at trial established a valid line of reasoning and permissible inferences that could lead a rational person to conclude that defendant forcibly stole the vehicle (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime of robbery in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict with respect to that count is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends that he was denied a fair trial based on prosecutorial misconduct when, during summation, the prosecutor misstated the evidence by indicating that the voice of the victim could be heard on the recording of one of the 911 calls. That contention is not preserved for our review because defendant failed to object to the allegedly improper comment during summation (*see People v Balls*, 69 NY2d 641). Defendant's further contention that the court erred in admitting in evidence the recording of the second 911 call as an excited utterance is also not preserved for our review (*see* CPL 470.05 [2]). We decline to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's contention that he was denied his right to confrontation based on the admission in evidence of the second 911 call inasmuch as the statements contained in that call were not testimonial in nature (*see People v Nunez*, 51 AD3d 1398, 1400, *lv denied* 11 NY3d 792).

The court's *Sandoval* ruling did not constitute an abuse of discretion (*see People v Nichols*, 302 AD2d 953, *lv denied* 99 NY2d 657). Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

135

CA 10-00448

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

JASON PHILLIPS, ET AL., PLAINTIFFS,

V ORDER

HENRY B'S INC., ET AL., DEFENDANTS,
AND JON W. BUCHWALD, INDIVIDUALLY AND
AS OWNER OF PROPERTY AT 86 FALL STREET,
DEFENDANT-APPELLANT.
(ACTION NO. 1.)

JASON PHILLIPS, ET AL., PLAINTIFFS,

V

VILLAGE OF SENECA FALLS, DEFENDANT-RESPONDENT.
(ACTION NO. 2.)

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (MAUREEN G. FATCHERIC OF COUNSEL), FOR DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (RYAN G. SMITH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered January 28, 2010. The order, insofar as appealed from, granted the motion of defendant Village of Seneca Falls for summary judgment dismissing the complaint and all cross claims against it and denied the cross motion of defendant Jon W. Buchwald, individually and as owner of property at 86 Fall Street, for leave to serve an amended answer.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

136

CA 10-01333

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

HENRY FIEBIGER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JAY-K LUMBER, INC., DEFENDANT-RESPONDENT.

RALPH W. FUSCO, UTICA, FOR PLAINTIFF-APPELLANT.

ROSSI AND MURNANE, NEW YORK MILLS (VINCENT J. ROSSI, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered February 8, 2010 in a personal injury action. The order dismissed the complaint after a nonjury trial on the issue of liability.

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

Memorandum: Plaintiff appeals from an order dismissing the complaint following a bench trial on the issue of liability. We affirm. "To establish a prima facie case of negligence in a [slip and fall] case, a plaintiff must show that the defendant either created the condition [that] caused the accident[] or that it had actual or constructive notice [thereof]" (*Panetta v Phoenix Beverages, Inc.*, 29 AD3d 659). Here, the weight of the evidence supports Supreme Court's determination that defendant did not create or have actual or constructive notice of the hydraulic fluid spill that caused plaintiff's fall. Contrary to plaintiff's contention, the court's questions to witnesses did not deprive him of a fair trial, inasmuch as those questions sought only to clarify the testimony, and there was no indication of prejudice or bias against plaintiff (*see Lewis v Port Auth. of N.Y. & N.J.*, 8 AD3d 205; *Hemmerling v Barnes* [appeal No. 2], 269 AD2d 752; *Delcor Labs. v Cosmair, Inc.*, 263 AD2d 402, *lv denied* 94 NY2d 761, *rearg denied* 95 NY2d 792).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

145

CA 10-01526

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

JAN MULLANEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROYALTY PROPERTIES, LLC, DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM & COPPOLA, LLC, BUFFALO, GANNON, ROSENFARB & MOSKOWITZ, NEW YORK CITY (LISA L. GOKHULSINGH OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (JEFFREY C. SENDZIAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered April 19, 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 reversed on the law without costs, the motion is granted and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he slipped and fell on black ice in the parking lot of the apartment complex owned by defendant. We agree with defendant that Supreme Court erred in denying its motion for summary judgment dismissing the complaint. Defendant met its initial burden of establishing as a matter of law that it lacked constructive notice of the icy condition by submitting plaintiff's deposition testimony that the black ice was not visible (*see Pugliese v Utica Natl. Ins. Group*, 295 AD2d 992; *Wright v Rite-Aid of NY*, 249 AD2d 931). In opposition to the motion, plaintiff failed to raise a triable issue of fact inasmuch as he failed to submit evidence establishing that the ice was visible and apparent and that a reasonable inspection by defendant would have led to discovery thereof (*see Quinn v Holiday Health & Fitness Ctrs., N.Y., Inc.*, 15 AD3d 857; *cf. Pugliese*, 295 AD2d 992; *Wright*, 249 AD2d 931).

Plaintiff failed to allege that defendant created the icy condition, and thus he is not entitled to rely upon that theory to defeat the motion (*see Marchetti v East Rochester Cent. School Dist.*, 26 AD3d 881), and he has abandoned any issue with respect to actual notice by failing to raise any such issue on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984). In view of our determination, we need

not address defendant’s remaining contention.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

146

TP 10-01869

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

IN THE MATTER OF COUNTY OF ERIE, PETITIONER,

V ORDER

STATE OF NEW YORK PUBLIC EMPLOYMENT RELATIONS BOARD, AND ITS CHAIR JEROME LEFKOWITZ, AND CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, ERIE COUNTY UNIT OF LOCAL 815, AND ITS PRESIDENT JOAN BENDER, RESPONDENTS.

GOLDBERG SEGALLA LLP, BUFFALO (ELISHA J. BURKART OF COUNSEL), FOR PETITIONER.

NANCY E. HOFFMAN, ALBANY (TIMOTHY CONNICK OF COUNSEL), FOR RESPONDENT CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, ERIE COUNTY UNIT OF LOCAL 815, AND ITS PRESIDENT JOAN BENDER.

DAVID P. QUINN, ALBANY, FOR RESPONDENT STATE OF NEW YORK PUBLIC EMPLOYMENT RELATIONS BOARD, AND ITS CHAIR JEROME LEFKOWITZ.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Donna M. Siwek, J.], dated August 10, 2010) to review a determination of respondent State of New York Public Employment Relations Board. The determination, among other things, ordered petitioner to stop replacing full-time positions with regular part-time positions to perform the same level of services.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition is dismissed and the counterclaim for enforcement of the order of respondent State of New York Public Employment Relations Board dated April 22, 2010 is granted for reasons stated in the decision of that respondent.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

148

KA 09-00774

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

COREY SLATTERY, DEFENDANT-APPELLANT.

COREY SLATTERY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Jeffery R. Merrill, A.J.), rendered January 29, 2009. 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.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

149

KA 09-01481

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TY JONES, 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 (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 19, 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 (*see People v Lococo*, 92 NY2d 825, 827).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

151

KA 10-00702

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RONALD A. SMITH, 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 an order of the Genesee County Court (Robert C. Noonan, J.), entered October 6, 2009. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

155

KA 08-01558

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

C.W. POOLE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered August 14, 2007. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree and assault in the second degree (four counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentence imposed on count two of the indictment shall run concurrently with the sentences imposed on counts four and six of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The conviction arises from an altercation between defendant and two Rochester police officers, during which defendant obtained one of the officers' service weapons and struck both of the officers with it, causing each of them physical injury. Based on the record before us, we reject defendant's contention that Supreme Court erred in denying his request to charge the defense of justification (*see People v Stevenson*, 31 NY2d 108, 112; *People v Rison*, 130 AD2d 596, *lv denied* 70 NY2d 654).

We agree with defendant, however, that the sentence imposed for criminal possession of a weapon in the second degree must run concurrently with the sentences imposed for assault in the second degree (Penal Law § 120.05 [former (2)]) under counts four and six of the indictment inasmuch as the possession of the weapon by defendant and his use of the weapon as a dangerous instrument against each officer arose out of the same criminal act (*see* § 70.25 [2]; *see generally People v Cox*, 256 AD2d 1244, *lv denied* 93 NY2d 923). We therefore modify the judgment accordingly. The sentence, as modified,

is not unduly harsh or severe.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

156

KA 07-02678

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON CURRY, 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 September 26, 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: 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]). Contrary to defendant's contention, County Court properly refused to suppress the handgun found on his person by a police officer inasmuch as the officer had reasonable suspicion to detain and subsequently frisk him (*see generally People v De Bour*, 40 NY2d 210, 223). According to the transcript of the suppression hearing, while investigating a reported fight between two black males with handguns, the officer was informed by three witnesses that the men involved in the fight had "just walked in" a nearby market. The officer responded to the market immediately and, upon opening the door to the market, he observed defendant in the doorway. Defendant "stepped into" and attempted to "push past" the officer, at which point the officer ordered defendant to stop. Based on the information known to the officer and defendant's furtive behavior upon encountering the officer in the doorway, the officer had reasonable suspicion to detain defendant (*see id.*; *see generally People v May*, 81 NY2d 725, 728). The officer was also authorized to frisk defendant once defendant moved his hand quickly toward his waistband as the officer pulled him aside for questioning. "A corollary of the statutory right to temporarily detain for questioning is the authority to frisk if the officer reasonably suspects that he [or she] is in danger of physical injury by virtue of the detainee being armed" (*De Bour*, 40 NY2d at 223). It is well settled that a

police officer need not “await the glint of steel before [the officer] can act to preserve his [or her] safety” (*People v Benjamin*, 51 NY2d 267, 271).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

157

CAF 10-00589

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

IN THE MATTER OF DONNA BLACK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOHN PAUL WATSON, RESPONDENT-RESPONDENT.

MARY R. HUMPHREY, NEW HARTFORD, FOR PETITIONER-APPELLANT.

JOHN G. KOSLOSKY, ATTORNEY FOR THE CHILDREN, UTICA, FOR JONISSA H. AND JAHQUIN H.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered January 19, 2010 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that respondent did not willfully violate an order of the court and suspended petitioner's visitation with the parties' children.

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

Memorandum: In this proceeding pursuant to article 6 of the Family Court Act, petitioner mother appeals from an order that, inter alia, suspended her visitation with the parties' children until further order of Family Court and adjudged that respondent father should not be sanctioned for violating a prior order regarding certain letters written by the parties' children. We reject the contention of the mother that the court erred in modifying the prior order of visitation by suspending her visitation. It is well settled that, "[w]here an order of . . . visitation is entered on stipulation, a court cannot modify that order unless a sufficient change in circumstances—since the time of the stipulation—has been established, and then only where a modification would be in the best interests of the children" (*Matter of Hight v Hight*, 19 AD3d 1159, 1160 [internal quotation marks omitted]; *see Matter of Donnelly v Donnelly*, 55 AD3d 1373). Here, the parties stipulated to certain testimony at the hearing on their respective petitions, and the stipulated testimony was sufficient, if accepted by the court, to establish the requisite change in circumstances. The prior order required the mother to pay the cost of transporting the father and the children to the correctional facility in which she was incarcerated, and the mother stipulated to the evidence establishing that she failed to do so. In addition, contrary to the contention of the mother, the court's "determination that it was in the best interests of the subject

child[ren] to suspend [her] visitation with [them] has a sound and substantial basis in the record and, thus, we decline to disturb it" (*Matter of Balgley v Cohen*, 73 AD3d 1038, 1038; *see generally Matter of Cross v Davis*, 298 AD2d 939). We have considered the mother's remaining contentions and conclude that they are without merit.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

158

CAF 10-00390

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

IN THE MATTER OF VONDAJIA P.G., TONAJIA L.L.G., CIERRA C.C., AND PRECIOUS G.K.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SUSAN S.G., RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, 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 VONDAJIA P.G.

JENNIFER M. LORENZ, ATTORNEY FOR THE CHILDREN, LANCASTER, FOR TONAJIA L.L.G., CIERRA C.C. AND PRECIOUS G.K.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered February 2, 2010 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 four of her children. Contrary to the contentions of the mother and the Attorney for the Child on behalf of Vondajia P.G., Family Court did not abuse its discretion in refusing to issue a suspended judgment. The record supports the court's determination that a suspended judgment, i.e., "a brief grace period designed to prepare the parent to be reunited with the child[ren]" (*Matter of Michael B.*, 80 NY2d 299, 311), was not in the children's best interests (*see generally Matter of Shadazia W.*, 52 AD3d 1330, *lv denied* 11 NY3d 706; *Matter of Da'Nasjeion T.*, 32 AD3d 1242).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

159

CAF 09-01920

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

IN THE MATTER OF ROBERT E. JONES,
PETITIONER-APPELLANT,

V ORDER

THERESA M. LAIRD, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR RESPONDENT-RESPONDENT.

ROBERT L. GOSPER, ATTORNEY FOR THE CHILDREN, CANANDAIGUA, FOR ZACHARY J., ZADA J. AND AURORA J.

Appeal from an order of the Family Court, Ontario County (William F. Kocher, J.), entered September 1, 2009 in a proceeding pursuant to Family Court Act article 6. The order, among other things, dismissed the petitions with prejudice.

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).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

160

CAF 09-02014

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

IN THE MATTER OF THERESA M. LAIRD,
PETITIONER-RESPONDENT,

V ORDER

ROBERT E. JONES, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR PETITIONER-RESPONDENT.

ROBERT L. GOSPER, ATTORNEY FOR THE CHILDREN, CANANDAIGUA, FOR ZACHARY J., ZADA J. AND AURORA J.

Appeal from an order of the Family Court, Ontario County (William F. Kocher, J.), entered September 25, 2009 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner sole custody of the subject children.

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).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

161

CAF 09-02619

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

IN THE MATTER OF CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF LAURIE MCGIRR, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NICCOLE ROBERTS, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered November 19, 2009 in a proceeding pursuant to Family Court Act article 4. The order denied respondent's objections and confirmed an order of the Support Magistrate entered October 6, 2009.

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

Memorandum: Respondent mother appeals from an order of Family Court denying her objections to the order of the Support Magistrate that, inter alia, found that she had willfully violated a prior child support order and denied her petition seeking modification of that prior order. Based upon the evidence before the Support Magistrate, the court properly denied the mother's objection with respect to the finding of a willful violation of the prior order. There is a statutory presumption that the mother had sufficient means to support her child (*see* Family Ct Act § 437; *Matter of Powers v Powers*, 86 NY2d 63, 68-69), and the evidence that the mother failed to pay support as ordered constitutes "prima facie evidence of a willful violation" (§ 454 [3] [a]). The mother failed to meet her burden of rebutting the presumption "inasmuch as [s]he failed to present evidence establishing that [s]he made 'reasonable efforts to obtain gainful employment to meet [her] . . . support obligations' " (*Matter of Christine L.M. v Wlodek K.*, 45 AD3d 1452, 1452). The record supports the Support Magistrate's findings that the mother's participation in substance abuse treatment does not render her unable to make the required support payments (*see generally Matter of Hopkins v Gelia*, 70 AD3d 1335, 1336), or that such participation constitutes a basis for modifying the amount of her child support obligation (*see generally Matter of Knights v Knights*, 71 NY2d 865, 866-867). Finally, the mother's contention that the court erred in failing to cap her unpaid

child support arrears at $500 is raised for the first time on appeal and thus is not preserved for our review (*see Matter of Cattaraugus County Dept. of Social Servs. v Stark*, 75 AD3d 1098).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

162

CAF 10-01751

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

IN THE MATTER OF PAMELA COULDERY,
PETITIONER-RESPONDENT-APPELLANT,

V ORDER

ROBERT COULDERY,
RESPONDENT-PETITIONER-RESPONDENT.

VENZON LAW FIRM PC, BUFFALO (CATHARINE M. VENZON OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

CLAYTON & BERGEVIN, NIAGARA FALLS (MICHELE G. BERGEVIN OF COUNSEL), FOR RESPONDENT-PETITIONER-RESPONDENT.

NICHOLAS A. PELOSINO, JR., ATTORNEY FOR THE CHILD, NIAGARA FALLS, FOR TYLER E.C.

Appeal from an order of the Family Court, Niagara County (David E. Seaman, J.), entered November 10, 2009 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that respondent Robert Couldery shall have sole custody of 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.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

163

CA 10-01695

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

BONNIE P. BENTLEY, PLAINTIFF-APPELLANT,

V ORDER

RIDGE ROAD EXPRESS INCORPORATED, LORI LAVELLE AND GARY W. GOW, DEFENDANTS-RESPONDENTS.

LAW OFFICE OF JOHN J. FROMEN, BUFFALO, MAGAVERN MAGAVERN GRIMM LLP (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (CHRISTOPHER G. FLOREALE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS RIDGE ROAD EXPRESS INCORPORATED AND LORI LAVELLE.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered March 1, 2010 in a personal injury action. The order, among other things, denied plaintiff's motion for an order of protection.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

164

CA 10-00378

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

IN THE MATTER OF THE APPLICATION OF DOROTHY GILBERT, PETITIONER-APPELLANT,

V ORDER

DAVID SUTKOWY, COMMISSIONER, ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, AND DAVID A. HANSELL, COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, RESPONDENTS-RESPONDENTS.

LEGAL SERVICES OF CENTRAL NEW YORK, INC., SYRACUSE (JULIE B. MORSE OF COUNSEL), FOR PETITIONER-APPELLANT.

ZACHARY L. KARMEN, SYRACUSE, FOR RESPONDENT-RESPONDENT DAVID SUTKOWY, COMMISSIONER, ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENT-RESPONDENT DAVID A. HANSELL, COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE.

Appeal from a judgment of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered November 16, 2009 in a proceeding pursuant to CPLR article 78. The judgment denied the petition and granted the motions of respondents to dismiss the petition pursuant to CPLR 3211 (a) (7).

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on November 9 and 16, 2010,

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

168

CA 10-01354

PRESENT: SMITH, J.P., SCONIERS, GREEN, AND GORSKI, JJ.

CHARLES L. DAVIS, PLAINTIFF-APPELLANT,

V ORDER

RUSSELL FIRMAN, M.D., EMERGENCY MEDICINE PHYSICIANS OF CORTLAND COUNTY, PLLC, CORTLAND MEMORIAL HOSPITAL AND LYNN CUNNINGHAM, M.D., DEFENDANTS-RESPONDENTS.

CHARLES L. DAVIS, PLAINTIFF-APPELLANT PRO SE.

PHELAN, PHELAN & DANEK, LLP, ALBANY (TIMOTHY S. BRENNAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS RUSSELL FIRMAN, M.D. AND EMERGENCY MEDICINE PHYSICIANS OF CORTLAND COUNTY, PLLC.

BROWN & TARANTINO, LLC, BUFFALO (NICOLE SCHREIB MAYER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CORTLAND MEMORIAL HOSPITAL AND LYNN CUNNINGHAM, M.D.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered January 12, 2010 in a medical malpractice action. The order granted the motions of defendants for summary judgment dismissing the complaint.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

169

CA 10-01818

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

JEAN M. WALESKI, PLAINTIFF-RESPONDENT,

V ORDER

CITY OF SYRACUSE, SYRACUSE POLICE DEPARTMENT,
AND SEAN CARLEO, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

JUANITA PEREZ WILLIAMS, CORPORATION COUNSEL, SYRACUSE (NANCY J. LARSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SIDNEY P. COMINSKY TRIAL LAWYERS, LLC, SYRACUSE (SIDNEY P. COMINSKY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered April 2, 2010 in a personal injury action. The order, insofar as appealed from, denied the cross motion of defendants to bifurcate the liability and damages phases of trial.

Now, upon reading and filing the stipulation of discontinuance of appeal signed by the attorneys for the parties on December 21, 2010,

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

170

KA 10-00719

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ZACHERY A. ROGERS, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered February 9, 2010. The judgment convicted defendant, upon his plea of guilty, of rape 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 rape in the second degree (Penal Law § 130.30 [1]). Contrary to defendant's contention, his waiver of the right to appeal was voluntarily, knowingly and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256). County Court " 'expressly ascertained from defendant that, as a condition of the plea, he was agreeing to waive his right to appeal, and the court did not conflate that right with those automatically forfeited by a guilty plea' " (*People v Porter*, 55 AD3d 1313, *lv denied* 11 NY3d 899). Furthermore, defendant executed a written waiver of the right to appeal and advised the court that he understood the contents of that written waiver. The valid waiver encompasses defendant's challenges to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737), and to the court's denial of his request for youthful offender status (*see Porter*, 55 AD3d 1313).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

171

KA 08-01234

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOLPHUS L. JACKSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Dennis M. Kehoe, A.J.), rendered September 5, 2007. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [3]). In addition to sentencing defendant to time served, Supreme Court issued an order of protection for the victim. Defendant failed to preserve for our review his contentions that the court failed to take into account the jail time credit to which he is entitled in determining the duration of the order of protection and erred in setting an eight-year duration for the order of protection (*see People v Nieves*, 2 NY3d 310, 316-317), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see People v Letman*, 74 AD3d 1854, *lv denied* 15 NY3d 853).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

174

KA 07-00753

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

THOMAS M. BAKER, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (ANNEMARIE DILS 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 February 22, 2007. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

175

KA 10-00154

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON DAVIS, 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 (LAUREN A. WILLIAMSON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered December 16, 2009. The judgment convicted defendant, after a nonjury trial, of criminal possession of stolen property in the fifth degree, false impersonation, resisting arrest and obstructing governmental administration 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 following a bench trial of, inter alia, criminal possession of stolen property in the fifth degree (Penal Law § 165.40) and resisting arrest (§ 205.30). Contrary to defendant's contention, County Court properly refused to suppress physical evidence on the ground that the police illegally detained defendant. We conclude that "the police activity was 'justified in its inception' and 'reasonably related in scope to the circumstances [that] rendered its initiation permissible' " (*People v Magnifico*, 59 AD2d 914, 915, quoting *People v De Bour*, 40 NY2d 210, 215). The court also properly refused to suppress certain statements that defendant made to the police, inasmuch as those statements were either spontaneous (*see People v Burse*, 299 AD2d 911, 912, *lv denied* 99 NY2d 613), or constituted pedigree information (*see People v Ligon*, 66 AD3d 516, *lv denied* 14 NY3d 889).

Defendant failed to preserve for our review his further contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). Viewing the evidence in light of the elements of the crimes in this bench trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We have reviewed defendant's remaining contentions

and conclude that they are without merit.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

180

KA 09-00724

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. TABB, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Richard C. Kloch, Sr., A.J.), rendered September 4, 2008. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]). Defendant was indicted for murder in the second degree (§ 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [1] [b]), but he pleaded guilty to manslaughter on the condition that he waive his right to appeal. Contrary to defendant's contention, the record demonstrates that he validly waived his right to appeal. We conclude that County Court did not indicate to defendant that he automatically forfeited his right to appeal upon pleading guilty (*cf. People v Moyett*, 7 NY3d 892). Rather, the court "engaged in a fuller colloquy, describing the nature of the right being waived without lumping that right into the panoply of trial rights automatically forfeited upon pleading guilty" (*People v Lopez*, 6 NY3d 248, 257).

Defendant failed to preserve for our review his challenge to the factual sufficiency of the plea colloquy because he neither moved to withdraw the plea nor moved to vacate the judgment of conviction (*see People v Lopez*, 71 NY2d 662, 665). In any event, that challenge is encompassed by defendant's valid waiver of the right to appeal (*see People v Adzajlic*, 74 AD3d 1866).

Entered: February 10, 2011

Patricia L. Morgan
Clerk of the Court

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

181

CA 10-01720

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GORSKI, JJ.

MARLENE WHITMORE AND JOHN R. WHITMORE,
PLAINTIFFS-APPELLANTS,

V ORDER

FEDERATED RETAIL HOLDING, INC., THE MAY
DEPARTMENT STORES COMPANY, DOING BUSINESS
AS KAUFMANS, DEFENDANTS-RESPONDENTS.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BOUVIER PARTNERSHIP, LLP, BUFFALO (KENNETH A. PATRICIA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered October 21, 2009. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

188

CA 10-01334

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GORSKI, JJ.

JAMES E. MCMANUS, PLAINTIFF,

V ORDER

COUNTY OF ONONDAGA, ET AL., DEFENDANTS.

COUNTY OF ONONDAGA AND ONONDAGA COUNTY HOUSING DEVELOPMENT FUND COMPANY, INC., THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

JAMES M. KRAUS, DOING BUSINESS AS JAMES M. KRAUS CONSTRUCTION, THIRD-PARTY DEFENDANT-RESPONDENT, AND H.G. SPICER & SON, INC., THIRD-PARTY DEFENDANT-APPELLANT.

H.G. SPICER & SON, INC., FOURTH-PARTY PLAINTIFF-RESPONDENT,

V

TREVOR MORRIS, DOING BUSINESS AS CREATIVE HARDSCAPES, FOURTH-PARTY DEFENDANT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (JENNIFER L. NUHFER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT AND FOURTH-PARTY PLAINTIFF-RESPONDENT.

RICHARD P. PLOCHOCKI, SYRACUSE, FOR FOURTH-PARTY DEFENDANT-APPELLANT.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (MARY J. FAHEY OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-RESPONDENTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (STEPHEN A. DAVOLI OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered February 10, 2010 in a personal injury action. The order, insofar as appealed from, denied the cross motions of third-party defendant H.G. Spicer & Son, Inc. and fourth-party defendant Trevor Morris, doing business as Creative Hardscapes, for summary judgment.

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

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

191

CA 10-01688

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GORSKI, JJ.

DENISE GIBLIN AND DANIEL GIBLIN, AS PARENTS AND NATURAL GUARDIANS OF DANIELLE GIBLIN, AN INFANT, INDIVIDUALLY AND FOR THEIR DERIVATIVE CLAIM, PLAINTIFFS-RESPONDENTS,

V ORDER

WEST IRONDEQUOIT CENTRAL SCHOOL DISTRICT, WEST IRONDEQUOIT CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION AND ITS SUPERINTENDENT OF SCHOOLS, JEFFREY B. CRANE AS EMPLOYEES, AGENTS OR SERVANTS OF WEST IRONDEQUOIT CENTRAL SCHOOL DISTRICT, DEFENDANTS-APPELLANTS.

PETRONE & PETRONE, P.C., WILLIAMSVILLE (JAMES H. COSGRIFF, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered November 6, 2009 in a personal injury action. The order, among other things, denied in part defendants' 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.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

211

CA 10-00854

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

IN THE MATTER OF HUSSAYN MCCLAIN,
PETITIONER-APPELLANT,

V ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES AND NEW YORK STATE EXECUTIVE BOARD
OF PAROLE, RESPONDENTS-RESPONDENTS.

HUSSAYN MCCLAIN, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered February 2, 2010 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.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

213

KA 09-01304

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERMAINE MCCRIMAGER, 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 (Penny M. Wolfgang, J.), rendered June 11, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for resentencing.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). Contrary to defendant's contention, "the record does not establish that Supreme Court was unaware that it had the ability to exercise its discretion in determining whether to impose a lesser period of postrelease supervision" (*People v Tyes*, 9 AD3d 899, *lv denied* 3 NY3d 682; *cf. People v Stanley*, 309 AD2d 1254, 1254-1255).

We agree with defendant, however, that the court failed to apprehend the scope of its sentencing discretion in connection with the term of imprisonment to be imposed. During the plea proceeding conducted on February 27, 2007, the court agreed to sentence defendant to the "minimum sentence permitted by law[,] . . . a determinate sentence of [3½] years," and the court informed defendant that it could impose the maximum sentence of "nine years" in the event that defendant violated a condition of the plea. In fact, however, the court had the discretion pursuant to the law in effect on that date to sentence defendant as a second felony drug offender to a determinate term of imprisonment with a minimum of two years and a maximum of eight years (*see* Penal Law § 70.70 [3] [b] [former (ii)]). After he pleaded guilty, defendant failed to appear for sentencing and, on June

11, 2009, the court imposed an enhanced determinate sentence of five years imprisonment without any indication that it was aware of the permissible sentence range for defendant's offense at that time, which after the amendment to Penal Law § 70.70 (3) (b) (ii) effective April 7, 2009 and applicable to defendant was a determinate term of imprisonment with a minimum of 1½ years and a maximum of 8 years (*see* L 2009, ch 56, pt AAA, §§ 23, 33 [f]). " 'The failure of the court to apprehend the extent of its discretion deprived defendant of the right to be sentenced as provided by law' " (*People v Schafer*, 19 AD3d 1133). We therefore modify the judgment by vacating the sentence, and we remit the matter to Supreme Court for resentencing. In light of our determination, we do not address defendant's challenge to the severity of the sentence.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

216

KA 09-01458

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD M. MOORE, DEFENDANT-APPELLANT.

SCHLATHER, STUMBAR, PARKS & SALK, LLP, ITHACA (DAVID M. PARKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered June 19, 2008. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of driving while intoxicated as a felony (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (i)]). We reject the contention of defendant that he was denied the benefit of his plea bargain. "Compliance with a plea bargain is to be tested against an objective reading of the bargain[] and not against a defendant's subjective interpretation thereof" (*People v Cataldo*, 39 NY2d 578, 580). Here, the records of the plea and sentencing proceedings establish that County Court complied with the plea bargain when it imposed sentence. Defendant's further contentions with respect to his motions to set aside the sentence pursuant to CPL 440.20 are not properly before us on appeal from the judgment of conviction, and defendant has not obtained permission to appeal from the order denying those motions (*see People v Thayer*, 210 AD2d 977; *see also People v Jermain*, 56 AD3d 1165, *lv denied* 11 NY3d 926).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

218

KA 09-01206

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT LAWRENCE, DEFENDANT-APPELLANT.

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

ROBERT LAWRENCE, DEFENDANT-APPELLANT PRO SE.

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 13, 2009. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of predatory sexual assault against a child (Penal Law § 130.96) and endangering the welfare of a child (§ 260.10 [1]). Defendant contends that he was denied his rights to due process and equal protection when the People prosecuted him for predatory sexual assault against a child rather than rape in the first degree (§ 130.35 [4]). Relying on *Apprendi v New Jersey* (530 US 466), defendant further contends that he was denied his right to a trial by jury because the prosecutor, and not the jury, decided that defendant should be subjected to a greater penalty. Defendant's contentions are not preserved for our review (*see generally People v Jackson*, 71 AD3d 1457, 1458, *lv denied* 14 NY3d 888; *People v Schaurer*, 32 AD3d 1241), and they are without merit in any event.

The elements of rape in the first degree under subdivision (4) of that statute are identical to the elements of predatory sexual assault against a child (*see* Penal Law § 130.35 [4]; § 130.96; *see also People v Scott*, 61 AD3d 1348, *lv denied* 12 NY3d 920, 13 NY3d 799). Predatory sexual assault against a child is a class A-II felony, however, while rape in the first degree is a class B felony. Where the elements of two crimes overlap, the prosecutor has "broad discretion" to decide which crime to charge (*People v Urbaez*, 10 NY3d 773, 775; *see People v*

Eboli, 34 NY2d 281, 287). The fact that "under certain circumstances the crimes of rape in the first degree and [predatory sexual assault against a child] may be identical . . . does not . . . amount to a denial of equal protection" or due process (*People v Vicaretti*, 54 AD2d 236, 239; *see Eboli*, 34 NY2d at 287-288). It is apparent that the Legislature intended the more serious offense of predatory sexual assault against a child to be charged where the rape occurs to a child less than 13 years old and the defendant is at least 18 years old (*see* Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 130.00, at 82). Moreover, "the discretion to decide what is an 'exceptional' case warranting prosecution for the lower degree[] is entrusted to the prosecutor" (*Eboli*, 34 NY2d at 288), and we agree with the People that this is not an exceptional case. In addition, "[t]here was no *Apprendi* violation because [Supreme C]ourt did not increase the penalty for the crime of which defendant had been convicted based upon facts not found by the jury" (*People v Adams*, 50 AD3d 433, 433, *lv denied* 10 NY3d 955).

We reject defendant's contention that the evidence is legally insufficient because of the uncertainty concerning the precise date on which the crime occurred (*see People v Alteri*, 49 AD3d 918, 919-920; *see generally People v Bleakley*, 69 NY2d 490, 495). 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 reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Defendant failed to preserve for our review his contention that he was denied a fair trial based on the testimony of an expert with respect to child sexual abuse accommodation syndrome (*see People v Martinez*, 68 AD3d 1757, 1757-1758, *lv denied* 14 NY3d 803), and in any event his contention is without merit. "[E]xpert testimony regarding . . . abused child syndrome . . . may be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand" (*People v Carroll*, 95 NY2d 375, 387; *see People v Taylor*, 75 NY2d 277, 287-288). Here, the expert described specific behavior that might be unusual or beyond the ken of a jury but did not give an opinion concerning whether the abuse actually occurred (*see Martinez*, 68 AD3d at 1758).

Defendant contends that he was denied effective assistance of counsel based on defense counsel's failure to request that the court charge rape in the first degree as a lesser included offense of predatory sexual assault against a child. Where, as here, the statutes contain identical language, it is for the court to determine whether to charge the lesser offense based on a reasonable view of the evidence, but such a charge "should be reserved for the 'unusual factual situation[,' which is] not presented by the evidence here" (*People v Discala*, 45 NY2d 38, 43). Thus, defense counsel was not ineffective in failing to move for such a charge because any such motion would have had " 'little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152). We have examined the remaining allegations of ineffective assistance of counsel raised by defendant in the main brief and pro se supplemental brief and conclude that they lack merit

(*see generally People v Baldi*, 54 NY2d 137, 147). The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions in the main brief and conclude that they are without merit.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

223

CAF 10-00965

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

IN THE MATTER OF ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF ALICIA JENKINS, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL P. SHAW, RESPONDENT-APPELLANT.

MINDY L. MARRANCA, BUFFALO, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered April 7, 2010 in a proceeding pursuant to Family Court Act article 4. The order committed respondent to the Erie County Jail for willful violation of a court order.

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

Memorandum: In this proceeding pursuant to Family Court Act article 4, respondent father appeals from an order finding him in willful violation of a New Jersey child support order (hereafter, support order) and committing him to a term of 90 days in jail. The father's contention that he was not properly served with the notice of registration of the support order pursuant to Family Court Act § 580-605 (a) is not preserved for our review inasmuch as it is raised for the first time on appeal (*see generally Matter of Cattaraugus County Dept. of Social Servs. v Stark*, 75 AD3d 1098; *Matter of Ashley L.C.*, 68 AD3d 1742). In any event, the father's contention is not supported by the record inasmuch as he admitted at the willfulness hearing that he received the notice of registration (*see generally Matter of Ashley L.C.*, 68 AD3d 1742).

We reject the further contention of the father that Family Court erred in confirming the Support Magistrate's finding that he willfully violated the support order. The father's admission at the hearing that he had not paid child support as required by that order constituted prima facie evidence of a willful violation thereof, and thus the burden shifted to the father to present some competent and credible evidence justifying his failure to pay child support (*see Matter of Powers v Powers*, 86 NY2d 63, 68-69; *Matter of Lomanto v Schneider*, 78 AD3d 1536). We conclude that the father failed to meet that burden. The father's voluntary termination of his employment without any other employment prospects other than his general plan to develop real estate "amounts to a willful violation" of the child

support order (*Matter of Laeyt v Laeyt*, 256 AD2d 743, 744; *see Matter of Falk v Owen*, 29 AD3d 991; *Matter of Fogg v Stoll*, 26 AD3d 810). In addition, we note that the father "presented no evidence that he was unable to find employment" (*Matter of Riggs v VanDusen*, 78 AD3d 1577, 1578; *see also Matter of Hopkins v Gelia*, 70 AD3d 1335).

The father contends that the court erred in failing to cap his unpaid child support arrears at $500 (*see* Family Ct Act § 413 [1] [g]). That contention is raised for the first time on appeal and thus is not preserved for our review (*see Cattaraugus County Dept. of Social Servs.*, 75 AD3d 1098). We reject the further contentions of the father that the court was biased against him (*see Matter of Amy L.W. v Brendan K.H.*, 37 AD3d 1060; *Matter of Angie M.P.*, 291 AD2d 932, *lv denied* 98 NY2d 602), and that he was deprived of his right to counsel at the support proceedings (*see Matter of Shea v Hoskins*, 12 AD3d 1191).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

227

CAF 10-01096

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

IN THE MATTER OF NICHOLAS S.

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

BENJAMIN S., RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY A. GORMAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (SARA J. LANGAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

JOHN S. CRISAFULLI, ATTORNEY FOR THE CHILD, SYRACUSE, FOR NICHOLAS S.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered May 4, 2010 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.

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

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

228

CA 10-02001

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

IN THE MATTER OF MARGARET A. CONIBER, AS EXECUTRIX OF THE ESTATE OF GEORGE C. CONIBER, DECEASED, AND MARGARET A. CONIBER, INDIVIDUALLY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

UNITED MEMORIAL MEDICAL CENTER, DEFENDANT-RESPONDENT.

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

FELDMAN KIEFFER, LLP, BUFFALO (BRIAN BOGNER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered July 6, 2010 in a wrongful death action. The order, insofar as appealed from, denied the motion of plaintiff to compel the production of certain hospital records.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of plaintiff's motion with respect to the document entitled "Medication Event Report Form" and directing defendant to disclose that document and as modified the order is affirmed without costs.

Memorandum: Plaintiff, individually and as executrix of the estate of her husband (decedent), commenced this action seeking damages for his wrongful death and conscious pain and suffering allegedly caused by defendant's improper administration of medication to decedent. Plaintiff also alleged that defendant was negligent in failing to document the improper administration of medication and a fall sustained by decedent while he was hospitalized. Plaintiff moved to compel defendant to provide certain incident reports, and defendant opposed the motion on the ground that the reports were privileged pursuant to Education Law § 6527 (3) and Public Health Law § 2805-m (2) because they were created as part of its quality assurance review function.

We conclude that Supreme Court, following its in camera inspection, abused its discretion in denying plaintiff's motion with respect to the document entitled "Medication Event Report Form" (hereafter, form), and we therefore modify the order by directing

defendant to disclose that document. Defendant failed to establish that the form was " 'generated in connection with a quality assurance review function pursuant to Education Law § 6527 (3) or a malpractice prevention program pursuant to Public Health Law § 2805-j' " (*Learned v Faxton-St. Luke's Healthcare*, 70 AD3d 1398, 1399; *see Aldridge v Brodman*, 49 AD3d 1192, 1193-1194). The form does not appear to be made for quality assurance review purposes, and the conclusory statement in the affidavit submitted by defendant's Director of Quality Assurance that all of the documents in question "were prepared pursuant to [defendant's] quality assurance review function" is "insufficient to demonstrate that [the form] . . . [was] actually generated at the behest of [defendant's] Quality Assurance Department" (*Kivlehan v Waltner*, 36 AD3d 597, 599).

We further conclude, however, that the court properly denied plaintiff's motion with respect to the remaining documents (*see Little v Hicks*, 236 AD2d 794).

Patricia L. Morgan

Entered: February 10, 2011

Clerk of the Court

MOTION NO. (783/96) KA 10-01645. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EDWIN GARCIA, DEFENDANT-APPELLANT. –- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, SCONIERS, AND GREEN, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (721/99) KA 98-08290. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLAUDE R. GIGUERE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (55/01) KA 99-05510. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DUDLEY HARRIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GREEN, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (1473/04) KA 02-00396. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ISMAEL SALADEEN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, GREEN, AND MARTOCHE, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (1631/06) KA 05-01265. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHARLES J. FISHER, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, GREEN, AND MARTOCHE, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (1632/06) KA 05-01269. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHARLES J. FISHER, DEFENDANT-APPELLANT. (APPEAL NO. 2.) --

Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, GREEN, AND MARTOCHE, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (1634/06) KA 05-00497. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DARRELL DAVENPORT, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, GREEN, AND MARTOCHE, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (1125/07) KA 06-01069. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHAWN E. AKIN, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, FAHEY, LINDLEY, AND GREEN, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (1609/09) KA 08-01145. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLARENCE CARR, JR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND CARNI, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (780/10) KA 09-00160. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT L. WILLIAMS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, AND LINDLEY, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (928/10) CA 09-02444. -- IN THE MATTER OF THE ACCOUNTING BY LAURIE C. KALKMAN, AS TRUSTEE UNDER L. WILLIAM COULTER FAMILY TRUST DATED JULY 20, 1994 UNDER WILL OF L. WILLIAM COULTER, DECEASED, RESPONDENT. GEOFFREY R. COULTER, APPELLANT. -- Motion for reargument denied. PRESENT:

SCUDDER, P.J., PERADOTTO, GREEN, GORSKI, AND MARTOCHE, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (1045/10) CA 10-00746. -- GEOFFREY BOND AND SALLY T. BOOTEY, PLAINTIFFS-APPELLANTS-RESPONDENTS, V THOMAS A. TURNER, MICHELLE M. TURNER, DEFENDANTS-RESPONDENTS-APPELLANTS, AND VILLAGE OF LAKEWOOD, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CARNI, J.P., GREEN, GORSKI, AND MARTOCHE, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (1071/10) CA 10-00740. -- DONNA PONHOLZER AND WILLIAM PONHOLZER, PLAINTIFFS-RESPONDENTS, V EDWARD D. SIMMONS, M.D. AND SIMMONS ORTHOPAEDIC & SPINE ASSOCIATES, LLP, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, AND SCONIERS, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (1166/10) CA 10-00689. –- MOHAWK VALLEY WATER AUTHORITY, PLAINTIFF-RESPONDENT-APPELLANT, V STATE OF NEW YORK, ERIE BOULEVARD HYDROPOWER, L.P., AND NEW YORK STATE CANAL CORPORATION, DEFENDANTS-APPELLANTS-RESPONDENTS. (APPEAL NO. 2.) –- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GREEN, AND GORSKI, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (1181/10) CA 10-01250. -- IN THE MATTER OF JANET HELLNER, PETITIONER-APPELLANT-RESPONDENT, V BOARD OF EDUCATION OF WILSON CENTRAL SCHOOL DISTRICT, WILSON CENTRAL SCHOOL DISTRICT, MICHAEL S. WENDT, IN HIS

CAPACITY AS SUPERINTENDENT OF WILSON CENTRAL SCHOOL DISTRICT, RESPONDENTS-RESPONDENTS, BOARD OF EDUCATION OF ORLEANS/NIAGARA BOARD OF COOPERATIVE EDUCATIONAL SERVICES, ORLEANS/NIAGARA BOARD OF COOPERATIVE EDUCATIONAL SERVICES AND DR. CLARK J. GODSHALL, IN HIS CAPACITY AS DISTRICT SUPERINTENDENT OF ORLEANS/NIAGARA BOARD OF COOPERATIVE EDUCATIONAL SERVICES, RESPONDENTS-RESPONDENTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: LINDLEY, J.P., SCONIERS, GORSKI, AND MARTOCHE, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (1185/10) CA 10-00950. -- IN THE MATTER OF THE ARBITRATION BETWEEN MICHAEL DRENNEN, AS PRESIDENT OF AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 650, AFL-CIO, PETITIONER-RESPONDENT, AND CITY OF BUFFALO, BYRON BROWN, MAYOR, AND KARLA THOMAS, COMMISSIONER OF HUMAN RESOURCES, RESPONDENTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: LINDLEY, J.P., SCONIERS, GORSKI, AND MARTOCHE, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (1233/10) CA 10-00891. -- MARTA CHAIKOVSKA AND CREEK VENTURES, LLC, PLAINTIFFS-APPELLANTS, V ERNST & YOUNG, LLP, DEFENDANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., LINDLEY, SCONIERS, AND GORSKI, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (1235/10) CA 10-00091. -- AMY MCCABE AND THOMAS MCCABE, PLAINTIFFS-RESPONDENTS-APPELLANTS, V ST. PAUL FIRE AND MARINE INSURANCE COMPANY, DEFENDANT-APPELLANT-RESPONDENT, ET AL., DEFENDANT. (APPEAL NO.

2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., LINDLEY, SCONIERS, AND GORSKI, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (1303/10) CA 09-02583. -- W. JAMES CAMPERLINO, PLAINTIFF-APPELLANT, V TOWN OF MANLIUS MUNICIPAL CORPORATION, VILLAGE OF MANLIUS, DEFENDANTS-RESPONDENTS, BENITA ROGERS, FRANK HEATH, CHRISTINE WARFIELD SMITH, EVAN SCOTT SMITH, KERI SEAGRAVES, DAVID ALTHOFF, MARY ANN CALO, MICHAEL J. CALO, DR. DAVID FEIGLIN, SHARON A. LINDBERG, JEROME A. LINDBERG, CAROL ILACQUA, DAVID SAMUEL, AND TROOP D VETERANS, INC., INTERVENORS-DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CARNI, LINDLEY, AND GREEN, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (1323/10) CA 09-01969. -- IN THE MATTER OF THE COMPULSORY ACCOUNTING OF THE LIFETIME TRUST OF JOSEPH SROZENSKI, DECEASED. SUSAN PORCELLI, PETITIONER-RESPONDENT; BARBARA SROZENSKI, RESPONDENT-RESPONDENT; ROBERT SROZENSKI, RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SCONIERS, GREEN, AND MARTOCHE, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (1374/10) CA 10-01013. -- IN THE MATTER OF MARTIN LUTHER NURSING HOME, INC., PETITIONER-APPELLANT, V MICHAEL J. DOWLING, COMMISSIONER OF SOCIAL SERVICES OF STATE OF NEW YORK, MARK CHASSIN, M.D., COMMISSIONER OF HEALTH OF STATE OF NEW YORK AND RUDY F. RUNKO, DIRECTOR OF BUDGET OF STATE OF NEW YORK, RESPONDENTS-RESPONDENTS. -- Motion for reargument or leave to

appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, AND MARTOCHE, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (1376.1/10) CA 10-00771. -- IN THE MATTER OF THE STATE OF NEW YORK, PETITIONER-APPELLANT, V MICHAEL MATTER, RESPONDENT-RESPONDENT. (APPEAL NO. 1.) -- Motion for reargument denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, AND MARTOCHE, JJ. (Filed Feb. 10, 2011.)

MOTION NO. (1376.2/10) KAH 10-00772. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. MICHAEL MATTER, PETITIONER-RESPONDENT, V MICHAEL F. HOGAN, PH.D., COMMISSIONER, NEW YORK STATE OFFICE OF MENTAL HEALTH, RESPONDENT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, AND MARTOCHE, JJ. (Filed Feb. 10, 2011.)

KA 09-01312. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HERLAND W. BOUWENS, III, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon a guilty plea of criminal sale of a controlled substance in the third degree (2 counts) (Penal Law § 220.39 [1]), and was sentenced to concurrent determinate terms of imprisonment of three and one-half years and three years postrelease supervision. Defendant’s assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38), and has submitted an affidavit in which he concludes that there are no nonfrivolous issues meriting this Court’s consideration. However, upon our review of the record we conclude that a nonfrivolous issue exists as to whether the court erred in failing either to offer the defendant the

opportunity to withdraw his plea, or to conduct a hearing to determine whether defendant had met the requirements of the People's plea offer or had been prevented from doing so. Therefore, we relieve counsel of his assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Ontario County Court, Frederick G. Reed, A.J. - Criminal Sale of a Controlled Substance, 3rd Degree). PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed Feb. 10, 2011.)

KA 08-00642. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARVIN BROWN, 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, Alex R. Renzi, J. - Criminal Possession of a Controlled Substance, 2nd Degree). PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed Feb. 10, 2011.)

KA 09-01209. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DARRYN GIBSON, DEFENDANT-APPELLANT. -- Order unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Order of Supreme Court, Erie County, John L. Michalski, A.J. - Sex Offender Registration Act). PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed Feb. 10, 2011.)

KAH 10-01654. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. LEROY WHITLEY, PETITIONER-APPELLANT, V CHARLES HYNES, KINGS COUNTY DA, J.V. CARDONE, ORLEANS COUNTY DA, S. KHAHAIFA, SUPERINTENDENT, ORLEANS CORRECTIONAL

FACILITY, ET AL., RESPONDENTS-RESPONDENTS. -- Appeal dismissed without costs as moot. Counsel’s motion to be relieved of assignment granted. (Appeal from Judgment of Supreme Court, Orleans County, James P. Punch, A.J. - Habeas Corpus). PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed Feb. 10, 2011.)