SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 16, 2012

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. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1316

CA 11-00785

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND SCONIERS, JJ.

ANDREA S. HEDGECOCK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LAURA PEDRO, ELLEN B. STERMAN,
CRAIG CHERTACK, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

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

LAW OFFICE OF LAURIE G. OGDEN, BUFFALO (PAMELA S. SCHALLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS ELLEN B. STERMAN AND CRAIG CHERTACK.

HOGAN WILLIG, GETZVILLE (STEVEN M. COHEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered July 29, 2010 in a personal injury action. The order denied the motions of defendants Laura Pedro, Ellen B. Sterman and Craig Chertack for summary judgment dismissing the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion of defendant Laura Pedro for summary judgment dismissing the amended complaint against her insofar as it alleges, as amplified by the bill of particulars, that plaintiff sustained a serious injury under the permanent consequential limitation of use category of serious injury within the meaning of Insurance Law § 5102 (d) and dismissing the amended complaint to that extent and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained in four separate motor vehicle accidents that occurred between September 2004 and November 2006. In each of the accidents, plaintiff's vehicle was rear-ended. Supreme Court denied the motion of Laura Pedro, the defendant involved in the first accident, and the motion of Ellen B. Sterman and Craig Chertack (collectively, Sterman defendants), the defendants involved in the second accident, both of which sought summary judgment dismissing the amended complaint on the ground that plaintiff did not sustain a

serious injury within the meaning of Insurance Law § 5102 (d).

We conclude that Pedro and the Sterman defendants each established their entitlement to judgment as a matter of law with respect to the categories of serious injury alleged by plaintiff, i.e., permanent consequential limitation of use, significant limitation of use and 90/180-day category. In support of their motions, Pedro and the Sterman defendants submitted plaintiff's deposition testimony concerning her long-term preexisting condition of chronic migraine headaches. With respect to the first accident, plaintiff alleged that her migraine headaches increased in frequency and intensity and that she suffered, inter alia, cervical sprain as a result of the accident. With respect to the second accident, which occurred less than two months later, plaintiff alleged that the injuries she sustained in the first accident were exacerbated and that she sustained lumbar sprain and subluxation. At her deposition, plaintiff described her preexisting migraine headache condition and two previous injuries to her back, i.e., compression fractures. We therefore conclude that Pedro and the Sterman defendants each submitted "persuasive evidence that plaintiff's alleged pain and injuries were related to . . . preexisting condition[s, and thus] plaintiff had the burden to come forward with evidence addressing [their] claimed lack of causation" (*Carrasco v Mendez*, 4 NY3d 566, 580; *see D'Angelo v Litterer*, 87 AD3d 1357).

In opposition to the motions, plaintiff submitted her entire deposition testimony, the affidavit of her treating chiropractor and the affidavit of her treating neurologist. Inasmuch as the treating neurologist discussed the combined effect of all four accidents on plaintiff's symptoms, his affidavit fails to raise a triable issue of fact whether the first or second accident caused a serious injury (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). With respect to the first accident, the affidavit of the treating chiropractor detailed plaintiff's worsening migraine symptoms following that accident and noted that there were muscle tension and trigger points upon palpation following that accident. The treating chiropractor also stated that plaintiff's symptoms improved prior to the second accident, but that her medical condition had not returned to the state it had been in immediately prior to the first accident. With respect to the second accident, the treating chiropractor stated that plaintiff's symptoms had not improved with treatment prior to the third accident, which occurred nearly one year after the second accident, and he outlined the quantitative restrictions of the range of motion of her cervical and lumbar spine, comparing those restrictions to the normal range of motion (*see Burke v Moran*, 85 AD3d 1710, 1711; *cf. Houston v Geerlings*, 83 AD3d 1448, 1449-1450). Further, plaintiff was granted a medical withdrawal from her graduate studies immediately following the second accident based upon the frequency and intensity of her migraine headaches, each of which lasted up to 24 hours and prevented her from driving, attending classes or doing household chores. Thus, we conclude that plaintiff raised a triable issue of fact sufficient to defeat those parts of each motion with respect to the significant limitation of use category (*see generally Roll v Gavitt*, 77 AD3d 1412), as well as the 90/180-day

category (*see generally Houston*, 83 AD3d at 1450). Because plaintiff's treating chiropractor stated that plaintiff's symptoms had not improved in the nearly one-year period between the second and third accidents, we conclude that plaintiff also raised a triable issue of fact sufficient to defeat that part of the Sterman defendants' motion with respect to the permanent consequential limitation of use category (*see generally Roll*, 77 AD3d 1412). We further conclude, however, that plaintiff failed to raise a triable issue of fact sufficient to defeat that part of Pedro's motion with respect to the permanent consequential limitation of use category, inasmuch as plaintiff's treating chiropractor stated that her symptoms improved prior to the second accident, and thus that the court erred in denying the motion in its entirety. We therefore modify the order accordingly.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01816

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND GORSKI, JJ.

ANDREA S. HEDGECOCK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LAURA PEDRO, ET AL., DEFENDANTS,
AND MELISSA SAJAC, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ADAMS, HANSON, FINDER, HUGHES, REGO, KAPLAN & FISH, WILLIAMSVILLE (BETHANY A. RUBIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

STEVEN M. COHEN, AMHERST, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered March 18, 2011 in a personal injury action. The order denied the motion of defendant Melissa Sajac for summary judgment dismissing the amended complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion of defendant Melissa Sajac in part and dismissing the amended complaint against her insofar as it alleges, as amplified by the bill of particulars, that plaintiff sustained a serious injury under the permanent consequential limitation of use and significant limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained in four separate motor vehicle accidents that occurred between September 2004 and November 2006. In each of the accidents, the vehicle driven by plaintiff was rear-ended. Supreme Court denied the motion of Melissa Sajac (defendant), who was involved in the fourth accident, seeking summary judgment dismissing the amended complaint against her on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

We conclude that the court properly determined that defendant failed to meet her initial burden of establishing her entitlement to judgment with respect to the 90/180-day category (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). We further conclude, however, that the court erred in determining that plaintiff raised an issue of fact sufficient to defeat the motion with respect to the remaining categories of serious injury allegedly sustained by plaintiff, i.e., the permanent consequential limitation of use and

significant limitation of use categories. We therefore modify the order accordingly. Defendant established that plaintiff had preexisting conditions of migraine headaches and spinal injuries, which were allegedly exacerbated and/or caused by one or more of the three previous accidents, and thus "plaintiff had the burden to come forward with evidence addressing defendant's claimed lack of causation" with respect to the fourth accident (*Carrasco v Mendez*, 4 NY3d 566, 580; *see Webb v Bock*, 77 AD3d 1414, 1415). Although plaintiff submitted the affidavit of her treating chiropractor, that affidavit failed to specify how plaintiff's conditions were caused or further exacerbated by the fourth accident (*see Webb*, 77 AD3d at 1415; *cf. Hedgecock v Pedro* [appeal No. 1], ___ AD3d ___ [Mar. 16, 2012]; *see generally Carrasco*, 4 NY3d at 579-580; *Anania v Verdgeline*, 45 AD3d 1473). Plaintiff's treating neurologist discussed the combined effect of all four accidents on her symptoms, and thus his affirmation fails to raise a triable issue of fact whether the fourth accident caused a serious injury (*see Hedgecock*, ___ AD3d at ___; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 10-00080

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN L. ALLEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered November 18, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), criminal possession of a weapon in the second degree (§ 265.03 [1] [b]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We note at the outset that defendant's first trial ended in a mistrial for reasons not relevant herein. Prior to that trial, defendant moved to sever his trial from that of the codefendant. "[W]e conclude that [Supreme C]ourt neither abused nor improvidently exercised its discretion in denying the motion for severance" (*People v Sutton*, 71 AD3d 1396, 1397, *lv denied* 15 NY3d 778). Contrary to defendant's contention, there was no irreconcilable conflict between the defense theories (*see People v Snyder*, 84 AD3d 1710, 1711, *lv denied* 17 NY3d 810; *see generally People v Mahboubian*, 74 NY2d 174, 184-185). Here, neither defendant nor the codefendant attempted to blame the other for the shooting, and both defendants generally took the same defense approach of attempting to demonstrate that the People could not identify the codefendant as the shooter. Moreover, there was no significant danger that a conflict between the defenses would lead the jury to infer defendant's guilt (*see People v Ott*, 83 AD3d 1495, 1496-1497, *lv denied* 17 NY3d 808; *cf. People v Nixon*, 77 AD3d 1443, 1444; *People v Kyser*, 26 AD3d 839, 840; *see generally Mahboubian*, 74 NY2d at 184-185). Defendant's further contention that he was denied his constitutional and statutory right to be present for

the codefendant's severance motion, which was made prior to the second trial, is based on material outside the record and thus must be raised by way of a motion pursuant to CPL article 440 (*see e.g. People v Carey*, 86 AD3d 925, 926, *lv denied* 17 NY3d 814; *People v Shorter*, 305 AD2d 1070, 1071, *lv denied* 100 NY2d 566). Defendant failed to preserve for our review his contention that the court erred in denying that severance motion (*see People v Eisenreich*, 121 AD2d 561, *lv denied* 68 NY2d 913; *see also People v Clark*, 28 AD3d 1231, 1232), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also challenges the procedure employed by the court in responding to three jury notes. With respect to the first jury note, defendant contends that the court influenced deliberations in determining the extent of the readback of certain testimony requested by that note. That contention is not preserved for our review, however, inasmuch as defendant did not object to the court's handling of the note (*see People v Starling*, 85 NY2d 509, 516; *People v Rivera*, 83 AD3d 1370, 1370-1371, *lv denied* 17 NY3d 904), and we decline to exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). With respect to the second jury note, defendant contends that the court violated CPL 310.30 inasmuch as it failed to read that note aloud and simply responded to the note on its own. Although the failure to inform counsel of the verbatim contents of a jury's note is inherently prejudicial (*see People v Kadarko*, 14 NY3d 426, 429), here, the court read the second note aloud, and thus there was no error.

With respect to the fourth jury note, defendant contends that the court erred in its response thereto inasmuch as it did not allow the jury to clarify the note in its own words. That contention is unpreserved for our review inasmuch as defense counsel may not rely on objections by the codefendant's counsel and did not make a specific objection with respect to that note (*see People v Thompson*, 300 AD2d 1032, 1033, *lv denied* 99 NY2d 620; *see generally People v Balls*, 69 NY2d 641, 642). Defendant further contends with respect to the fourth jury note that the court erred insofar as it made no attempt to determine whether the verbal response of one of the jurors to the court's question concerning the scope of that note reflected the view of the jury as a whole. That contention is also unpreserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). The record belies defendant's contention that the court permitted the jury to conduct "mini-deliberations" inside the courtroom (*see generally* CPL 310.10 [1]).

Defendant further contends that he was deprived of a fair trial by the cumulative effect of four rulings at trial. Defendant failed to preserve for our review his contentions that the court erred in allowing the People to present evidence of a prior uncharged crime (*see People v Palmer*, 299 AD2d 235, 236, *lv denied* 99 NY2d 584; *see generally Balls*, 69 NY2d at 642; *People v Smith*, 24 AD3d 1253, 1253, *lv denied* 6 NY3d 818), and that the court erred in failing to provide

a limiting instruction to the jury (*see People v Ramos*, 220 AD2d 330, *lv denied* 87 NY2d 976). We decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). The record is insufficient to enable us to review defendant's contention that the court erred in excluding certain videotape footage from evidence (*see generally People v Kinchen*, 60 NY2d 772, 773-774). We conclude that defendant was not denied his right to be present at a material stage of the trial when the court conducted an in camera interview of a sworn juror to determine whether that sworn juror was grossly unqualified to serve, at which the prosecutor and defendant's counsel were present but defendant was not. " 'Whether a seated juror is grossly unqualified to serve is a legal determination . . . , and as such the presence of counsel at a hearing to determine a juror's qualification is adequate' " (*People v Oakes*, 57 AD3d 1425, 1426, *lv denied* 12 NY3d 786, quoting *People v Harris*, 99 NY2d 202, 212). Defendant's further contention that the court failed to address misconduct in the form of a juror who was "giggling" is based on material outside the record and thus must be raised by way of a motion pursuant to CPL article 440 (*see e.g. Carey*, 86 AD3d at 926; *Shorter*, 305 AD2d at 1071).

We reject defendant's challenge to the legal sufficiency of the evidence at the first trial with respect to the crime of murder in the second degree. Although "[t]he Double Jeopardy Clause precludes a second trial if the evidence from the first trial is determined by the reviewing court to be legally insufficient" (*People v Scerbo*, 74 AD3d 1730, 1731, *lv denied* 15 NY3d 757), we conclude that, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), the evidence at the first trial is legally sufficient to support the conviction of murder in the second degree (*see generally People v Fernandez*, 88 NY2d 777, 781; *People v Bleakley*, 69 NY2d 490, 495). Defendant failed to preserve for our review his further contention that the evidence at the second trial is legally insufficient to support the conviction (*see People v Hawkins*, 11 NY3d 484, 492; *People v Gray*, 86 NY2d 10, 19) and, in any event, that contention lacks merit. 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). "Where . . . witness credibility is of paramount importance to the determination of guilt or innocence, [we] must give '[g]reat deference . . . [to the jury's] opportunity to view the witnesses, hear the testimony and observe demeanor' " (*People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831, quoting *Bleakley*, 69 NY2d at 495; *see People v Kilbury*, 83 AD3d 1579, 1580, *lv denied* 17 NY3d 860; *People v Batista*, 235 AD2d 631, 631-632, *lv denied* 89 NY2d 1088). Finally, the sentence is not unduly harsh or severe.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 10-02337

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

WENDY JOHNSON, DANE V. JOHNSON AND DANIKA V. JOHNSON, PLAINTIFFS-APPELLANTS,

V ORDER

NEW YORK STATE AND LOCAL RETIREMENT SYSTEM, OFFICE OF NEW YORK STATE COMPTROLLER, THOMAS P. DINAPOLI, KIMBERLY LEONE-JOHNSON, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT. (APPEAL NO. 1.)

HAGERTY & BRADY, BUFFALO (EDWIN P. HUNTER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (RALPH C. LORIGO OF COUNSEL), FOR DEFENDANT-RESPONDENT KIMBERLY LEONE-JOHNSON.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered October 27, 2010. The order, among other things, awarded defendant Kimberly Leone-Johnson one-third of decedent Dan Johnson's New York State Retirement Plan death benefit.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-00831

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

WENDY JOHNSON, DANE V. JOHNSON AND DANIKA V. JOHNSON, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

NEW YORK STATE AND LOCAL RETIREMENT SYSTEM, OFFICE OF NEW YORK STATE COMPTROLLER, THOMAS P. DINAPOLI, KIMBERLY LEONE-JOHNSON, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT. (APPEAL NO. 2.)

HAGERTY & BRADY, BUFFALO (EDWIN P. HUNTER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (RALPH C. LORIGO OF COUNSEL), FOR DEFENDANT-RESPONDENT KIMBERLY LEONE-JOHNSON.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered February 3, 2011. The order, upon reargument, amended a prior order by determining that decedent Dan Johnson's New York State Retirement Plan death benefit shall be paid in accordance with the final determination in the administrative appeal.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and plaintiffs' motion for summary judgment seeking to designate plaintiffs Dane V. Johnson and Danika V. Johnson as the joint irrevocable beneficiaries of the New York State Retirement Plan death benefit of Dan Johnson is granted.

Memorandum: Plaintiff Wendy Johnson and Dan Johnson (decedent) were divorced in 1998. During the divorce action, they executed a matrimonial settlement agreement, pursuant to which they were required to name their children, plaintiffs Dane V. Johnson and Danika V. Johnson (collectively, children), as "joint irrevocable designated beneficiaries" of, inter alia, the death benefits provided by their retirement plans. That agreement was subsequently incorporated but not merged into the judgment of divorce. In March 1998, shortly before executing the matrimonial settlement agreement, decedent had named his then girlfriend, defendant Kimberly Leone-Johnson (Leone), as a one-third beneficiary of his New York State Retirement Plan death benefit (hereafter, retirement plan death benefit) and each of his

children as a one-third beneficiary. Leone was not removed as a beneficiary after the judgment of divorce was entered in May 1998 and, moreover, in June 1998 decedent purportedly designated Leone as the sole beneficiary of his retirement plan death benefit.

In July 2000 decedent and Leone executed a prenuptial agreement and were married. Pursuant to that agreement, decedent and Leone expressly waived all rights and claims to each other's pensions and retirement plans. In June 2006, decedent and Leone executed a separation agreement, which contained clauses that, inter alia, reaffirmed the pension and retirement plan waivers contained in the prenuptial agreement and mutually released and waived all rights that decedent and Leone had to each other's estate. Decedent and Leone allegedly reconciled without divorcing just prior to decedent's death in October 2008. No beneficiary changes were made to decedent's retirement plan death benefit after Leone was allegedly named the sole beneficiary in 1998. After decedent died, however, defendant New York State and Local Retirement System (System) notified Leone that decedent's designation naming her as the sole beneficiary was invalid and that the System intended to disburse the death benefit to Leone and the children in accordance with decedent's March 1998 designation.

Plaintiffs commenced this action seeking, inter alia, to designate the children as the joint irrevocable beneficiaries of decedent's retirement plan death benefit in compliance with the matrimonial settlement agreement and to remove Leone as a beneficiary thereof. They subsequently moved for, inter alia, summary judgment on the complaint, and Supreme Court determined that Leone and the children were each entitled to one-third of decedent's retirement plan death benefit. The court thereafter granted Leone's motion for leave to reargue her opposition to plaintiffs' motion and, upon reargument, the court amended its prior order by, inter alia, providing that the retirement plan death benefit should be paid in the manner determined by the System in the pending administrative appeal. In that appeal, Leone contends that the System erred in determining that the designation naming her as sole beneficiary was invalid. We agree with plaintiffs that Leone was not entitled to any part of decedent's retirement plan death benefit, and we therefore reverse.

The matrimonial settlement agreement clearly required decedent to name the children as the "joint irrevocable designated beneficiaries" of his retirement plan death benefit. As a result of that agreement, decedent was without authority to name any other person as a partial or sole beneficiary of such death benefit. Moreover, any right to that benefit that Leone would have acquired by virtue of being married to decedent was waived by the prenuptial and separation agreements. The court erred in determining that Leone's waiver of her interest in the retirement plan death benefit was not "explicit, voluntary and made in good faith" (*Silber v Silber*, 99 NY2d 395, 404, *cert denied* 540 US 817). The contention of Leone that decedent's obligation to name the children as beneficiaries of his retirement plan death benefit was solely to provide security for his child support obligation is contrary to a fair interpretation of the matrimonial settlement agreement. We reject Leone's further contention that her

separation agreement with decedent became void when they allegedly reconciled prior to his death. By its terms, the separation agreement could only be canceled in writing.

Pursuant to Retirement and Social Security Law § 803-a, "the comptroller is hereby authorized . . . to change or correct . . . [a] beneficiary consistent with a subsequent order by a court of competent jurisdiction . . . ." We reject Leone's contention that the statute does not apply because it was not enacted until after Wendy Johnson and decedent divorced. Plaintiffs' action against Leone is not dependant on the existence of that statute. Rather, section 803-a merely eliminated the need for the Legislature to pass a specific bill with respect to each case to achieve the same result (*see* Bill Jacket, L 1999, ch 300, at 4-5).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 10-01061

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN TOLLIVER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN TOLLIVER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered May 4, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and 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 a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). We reject the contention of defendant in his main and pro se supplemental briefs that he was denied a fair trial based on the use of his nicknames "Crim" and "Criminal" in the indictment. Supreme Court properly instructed the jury that the indictment contained "simply . . . accusation[s]" and "was not in any way evidence" of those accusations (*see People v Johnson*, 253 AD2d 702, 703-704, *lv denied* 92 NY2d 1031, 1034). In addition, inasmuch as several of the People's witnesses knew defendant only by his nicknames, it was permissible for the People to elicit testimony regarding those nicknames at trial for identification purposes (*see People v Hoffler*, 41 AD3d 891, 892, *lv denied* 9 NY3d 962, 963; *People v Caver*, 302 AD2d 604, *lv denied* 99 NY2d 652, 653). Indeed, the court instructed the jury that the evidence concerning defendant's nicknames was "competent for one particular purpose only: [e]stablishing the identity of the [d]efendant." Defendant's further contention in his main and pro se supplemental briefs that the prosecutor's use of the nicknames during summation constituted misconduct is not preserved for our review (*see Caver*, 302 AD2d 604). In any event, any error with respect to the prosecutor's use of the nicknames is harmless inasmuch

as the evidence of defendant's guilt was overwhelming and there was no significant probability that defendant would have been acquitted but for the alleged error, especially in light of the court's instruction to the jury (*see id.*; *see generally People v Crimmins*, 36 NY2d 230, 241-242). We reject defendant's contention in his main and pro se supplemental briefs that defense counsel was ineffective in failing to object to comments made by the prosecutor during summation (*see People v Lyon*, 77 AD3d 1338, 1339, *lv denied* 15 NY3d 954).

Defendant's challenge to the legal sufficiency of the evidence corroborating the testimony of his accomplice, raised in his main and pro se supplemental briefs, is unpreserved for our review because he did not raise the issue of accomplice corroboration in his general motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19). In any event, defendant's challenge is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495). We reject defendant's contention in his main brief that he was denied effective assistance of counsel based on the failure of defense counsel to move for a trial order of dismissal on that ground (*see generally People v Baldi*, 54 NY2d 137, 147). "Defendant has not shown that [such a] motion, if made, would have been successful and thus has failed to establish that defense counsel was ineffective in failing to make such a motion" (*People v Borcyk*, 60 AD3d 1489, 1490, *lv denied* 12 NY3d 923). 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 accord great deference to the jury's resolution of credibility issues and conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

By failing to object to the court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his further contention in his main brief that the ruling constitutes an abuse of discretion (*see People v Brown*, 39 AD3d 1207, *lv denied* 9 NY3d 921; *People v Alston*, 27 AD3d 1141, *lv denied* 6 NY3d 892). In any event, the court's *Sandoval* ruling did not constitute a " 'clear abuse of discretion' " warranting reversal (*People v Nichols*, 302 AD2d 953, 953, *lv denied* 99 NY2d 657; *see People v Reid*, 34 AD3d 1273, *lv denied* 8 NY3d 884). The prior convictions in question were relevant to the credibility of defendant (*see People v Marquez*, 22 AD3d 388, 391, *lv denied* 6 NY3d 778). Finally, the sentence is not unduly harsh or severe.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01509

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ.

RICHARD HUNT, PLAINTIFF,

V MEMORANDUM AND ORDER

CIMINELLI-COWPER CO., INC., ET AL., DEFENDANTS.

CIMINELLI-COWPER CO., INC., THIRD-PARTY
PLAINTIFF-APPELLANT,

V

THE PHOENIX INSURANCE COMPANY, MERCHANTS MUTUAL
INSURANCE COMPANY, THIRD-PARTY
DEFENDANTS-RESPONDENTS,
ET AL., THIRD-PARTY DEFENDANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT.

LAZARE POTTER & GIACOVAS LLP, NEW YORK CITY (YALE GLAZER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT THE PHOENIX INSURANCE COMPANY.

SMITH, MURPHY & SCHOEPPERLE, LLP, BUFFALO (FRANK G. GODSON OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT MERCHANTS MUTUAL INSURANCE COMPANY.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered December 15, 2010. The order and judgment, insofar as appealed from, granted the motions of third-party defendants Travelers Property Casualty Company of America, incorrectly sued as The Phoenix Insurance Company, and Merchants Mutual Insurance Company for summary judgment and declared that those third-party defendants have no duty to defend and indemnify in the underlying action.

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs, the motions of third-party defendants Travelers Property Casualty Company of America, incorrectly sued as The Phoenix Insurance Company, and Merchants Mutual Insurance Company are denied, the first through sixth decretal paragraphs are vacated and the third-party complaint against those third-party defendants is reinstated.

Memorandum: Third-party plaintiff, Ciminelli-Cowper Co., Inc.

(Ciminelli), commenced this third-party action seeking a declaration that, inter alia, third-party defendants Travelers Property Casualty Company of America, incorrectly sued as The Phoenix Insurance Company (Travelers), and Merchants Mutual Insurance Company (Merchants) are obligated to defend and indemnify it in the underlying personal injury action. Plaintiff commenced the underlying action seeking damages for injuries he sustained when he slipped and fell while performing construction work on property owned by Jamestown Community College (JCC). Ciminelli served as the construction manager on the project. There was no general contractor, and JCC contracted directly with various prime contractors, including David Ogiony Development Co., Inc. (Ogiony) and Pettit & Pettit, Inc. (Pettit).

JCC's contracts with Ogiony and Pettit required the contractors to indemnify JCC and Ciminelli against claims for personal injury arising from the construction work. The contracts also required Ogiony and Pettit to procure insurance coverage for claims arising out of their obligations under the contracts and to obtain endorsements to their general liability policies naming Ciminelli and JCC as additional insureds on a primary basis. At the time of plaintiff's accident, Ogiony was insured under a commercial general liability policy issued by Travelers (hereafter, Travelers policy), and Pettit was insured under a commercial insurance policy issued by Merchants (hereafter, Merchants policy).

Travelers moved for summary judgment dismissing the third-party complaint and any cross claims against it and declaring that it had "no obligation to defend, indemnify and/or reimburse [Ciminelli] or any other entity for any settlement payments made or defense costs incurred in the underlying . . . action." Travelers contended that it had no obligation to provide coverage to Ciminelli because Ciminelli failed to notify it of the claim in a timely manner, in accordance with the terms of the Travelers policy. Merchants also moved for summary judgment dismissing the third-party complaint against it and declaring that it was not obligated to defend or indemnify Ciminelli in the underlying action. Merchants contended that its policy afforded no coverage to Ciminelli.

We agree with Ciminelli that Supreme Court erred in granting the motions of Travelers and Merchants, dismissing the third-party complaint against them and declaring that they had "no obligation to defend, indemnify or reimburse [Ciminelli] for any settlement payments made or defense costs incurred" in the underlying action. We therefore reverse the order and judgment insofar as appealed from, deny the motions of Travelers and Merchants, vacate the first through sixth decretal paragraphs and reinstate the third-party complaint against Travelers and Merchants. "In determining a dispute over insurance coverage, we first look to the language of the policy" (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221). "As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning . . ., and the interpretation of such provisions is a question of law for the court" (*White v Continental Cas. Co.*, 9 NY3d 264, 267; *see Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177). "If the terms of a

policy are ambiguous, however, any ambiguity must be construed in favor of the insured and against the insurer" (*White*, 9 NY3d at 267; *see United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232; *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 353, *rearg denied* 46 NY2d 940).

With respect to the motion of Travelers, we note that the Travelers policy states that its terms "can be amended or waived only by endorsement issued by [Travelers] as part of this policy." The "Commercial General Liability - Contractors Coverage Form" provides that, "[t]hroughout this policy[,] the words 'you' and 'your' refer to the Named Insured shown in the Declarations, *and any other person or organization qualifying as a Named Insured under this policy*" (emphasis added). With respect to notice of claims, the policy provides that the insured must notify Travelers "as soon as practicable of an 'occurrence' or an offense which may result in a claim." The policy further provides that Travelers "will not deny coverage based solely on your delay in reporting an 'occurrence' or offense unless we are prejudiced by your delay."

Travelers contends that the policy provision requiring it to demonstrate prejudice before disclaiming on the basis of late notice applies only to Ogiony as the "Named Insured." We reject that contention. It is undisputed that Ciminelli qualifies as an additional insured under the Travelers policy. The term additional insured "is a recognized term in insurance contracts, and the well-understood meaning of the term is an entity enjoying the *same* protection as the named insured" (*Kassis v Ohio Cas. Ins. Co.*, 12 NY3d 595, 599-600 [internal quotation marks omitted]; *see Pecker Iron Works of N.Y. v Traveler's Ins. Co.*, 99 NY2d 391, 393; *David Christa Constr., Inc. v American Home Assur. Co.*, 59 AD3d 1136, 1138, *lv denied* 12 NY3d 713). Thus, "*[i]n the absence of unambiguous contractual language to the contrary*, an additional insured 'enjoy[s] the same protection as the named insured' " (*William Floyd School Dist. v Maxner*, 68 AD3d 982, 986 [emphasis added]). It is well settled that, "in construing an endorsement to an insurance policy, the endorsement and the policy must be read together, *and the words of the policy remain in full force and effect except as altered by the words of the endorsement*" (*County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 [emphasis added]). Here, the additional insured endorsement modified the coverage provided under the "Commercial General Liability – Contractors Coverage Part." Specifically, the endorsement provided that the section identifying who is an insured under the policy "is amended to include any person or organization you are required to include as an additional insured on this policy by a written contract or written agreement in effect during this policy period and executed prior to the occurrence of any loss." Although Travelers correctly notes that the endorsement contains no provision requiring it to demonstrate prejudice in order to disclaim on the basis of late notice, we note that the endorsement likewise does not specifically eliminate the prejudice requirement set forth in the policy (*see William Floyd School Dist.*, 68 AD3d at 987; *see also Continental Ins. Co.*, 83 NY2d at 628). Thus, at a minimum, the policy

creates an ambiguity, which must be resolved against Travelers as the insurer (*see Del Bello v General Acc. Ins. Co. of Am.*, 185 AD2d 691, 692; *see generally Breed*, 46 NY2d at 353; *Tomco Painting & Contr., Inc. v Transcontinental Ins. Co.*, 21 AD3d 950, 951) and, here, Travelers failed to allege or establish that it was prejudiced by Ciminelli's late notice of the claim.

With respect to Merchants' motion, Merchants correctly notes that the policy it issued to Pettit does not contain an additional insured endorsement. The "Coverages" section of the "Commercial General Liability Coverage Form," however, contains a "Supplementary Payments" section, which states that, "[i]f [Merchants] defend[s] an insured against a 'suit' and an indemnitee of the insured is also named as a party to the 'suit[,]' [Merchants] will defend the indemnitee" in the event that certain conditions are met. Those conditions include that "[t]he 'suit' against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an 'insured contract' "; "[the] insurance applies to such liability assumed by the insured"; and "[t]he obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same 'insured contract . . . .' " The Merchants policy defines " 'insured contract' " in relevant part as "[t]hat part of any other contract or agreement pertaining to [the insured's] business (including an indemnification of a municipality in connection with work performed for a municipality) under which [the insured] assume[s] the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement."

We agree with Ciminelli that the contract between JCC and Pettit, Merchants' insured, constitutes an "insured contract." Specifically, the contract provides that, "[t]o the fullest extent permitted by law, [Pettit] shall indemnify and hold harmless [JCC and its agents] . . . from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the [w]ork, provided that such claim, damage, loss or expense is attributable to bodily injury . . . ." Although Merchants contends that Ciminelli failed to comply with one or more of the conditions set forth in the "Supplementary Payments" section of the Merchants policy, Ciminelli's compliance with those conditions is a question of fact that precludes summary judgment. We further note that the record contains a certificate of liability insurance issued to Ciminelli, pursuant to which Ciminelli is an "[a]dditional [i]nsured[] on a primar[y] basis" under the Merchants policy issued to Pettit. Although "[i]t is well established that a certificate of insurance, by itself, does not confer insurance coverage," such a certificate is " 'evidence of a carrier's intent to provide coverage' " (*Sevenson Envtl. Servs., Inc. v Sirius Am. Ins. Co.*, 74 AD3d 1751, 1753).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01077

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ.

WENDOVER FINANCIAL SERVICES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JO-ANN RIDGEWAY, AS HEIR TO THE ESTATE OF AMELIA DONVITO, ALSO KNOWN AS AMELIA C. DONVITO, DECEASED, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS.

ROSICKI, ROSICKI & ASSOCIATES, P.C., PLAINVIEW (EDWARD RUGINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SCACCIA LAW FIRM, SYRACUSE (DANTE M. SCACCIA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered December 16, 2010. The order, among other things, vacated a judgment of foreclosure and sale dated December 18, 2009.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by dismissing the complaint and as modified the order is affirmed with costs.

Memorandum: Plaintiff appeals from an order insofar as it denied, inter alia, those parts of its motion to reissue the judgment of foreclosure and to amend the caption to add defendant Jo-Ann Ridgeway, who was sued as heir to the estate of Amelia Donvito, also known as Amelia C. Donvito (deceased) (hereafter, decedent), as the executrix of decedent's estate. Although Supreme Court did not address those parts of the motion with respect to reissuing the judgment and amending the caption, the failure to rule on those parts of the motion is deemed a denial thereof (*see Fisher v Flanigan*, 89 AD3d 1398, 1399; *Brown v U.S. Vanadium Corp.*, 198 AD2d 863, 864).

Approximately 6½ years prior to her death, decedent executed a note and mortgage with respect to her home (hereafter, property) that plaintiff alleges it now owns by virtue of a series of assignments. Letters Testamentary were issued to Ridgeway following the death of decedent. Plaintiff subsequently commenced this action to foreclose the mortgage. Notwithstanding decedent's death, plaintiff named her as a defendant in the summons and complaint. We therefore conclude that "the action [against decedent] from its inception was a nullity [inasmuch as] it is well established that the dead cannot be sued"

(*Marte v Graber*, 58 AD3d 1, 3; *see Jordan v City of New York*, 23 AD3d 436, 437; *see also Arbelaez v Chun Kuei Wu*, 18 AD3d 583). Further, we conclude that the caption may not be properly amended pursuant to CPLR 305 (c). "That provision is generally used to correct an irregularity, for example where a plaintiff is made aware of a mistake in the defendant's name or the wrong name or wrong form is used" (*Marte*, 58 AD3d at 4). In the order appointing a referee, the court amended the caption of this action by "striking the name of the defendant AMELIA DONVITO A/K/A AMELIA C. DONVITO . . . and substituting in place thereof JO-ANN RIDGEWAY AS HEIR TO THE ESTATE OF AMELIA DONVITO A/K/A AMELIA C. DONVITO . . . ." Here, however, decedent was never a party to the action, and thus there was no party for whom substitution could be effected pursuant to CPLR 1015 (a).

We reject plaintiff's contention that it obtained personal jurisdiction over Ridgeway by serving her in her capacity as an alleged heir of decedent. Although the captions in the summons and complaint included " 'John Does' and 'Jane Does,' " those unknown defendants were described in the complaint as tenants or occupants of the property or those claiming a lien against the property. Ridgeway does not fit within either of those categories in any capacity. In order to name unknown parties pursuant to CPLR 1024, the complaint must adequately describe the intended parties such that, " 'from the description in the complaint,' " they would have known that they were intended defendants (*Lebowitz v Fieldston Travel Bur.*, 181 AD2d 481, 482; *see generally Olmsted v Pizza Hut of Am., Inc.*, 28 AD3d 855, 856). Here, inasmuch as plaintiff named both decedent and the "Doe" defendants in the summons and complaint and the complaint fails to mention decedent's death, it cannot be said that plaintiff intended to describe the "Doe" defendants to include decedent's heirs, nor did plaintiff adequately do so. We further conclude that, because Ridgeway, as executrix of decedent's estate, was not properly made a party to the action, the complaint fails to assert a viable cause of action against a properly named party. "Perhaps, had [plaintiff] abandoned [its] initial action, and properly filed a summons and complaint by purchasing a new index number and naming [Ridgeway], the personal representative of [decedent], as defendant, the matter before us would not be the nullity it is" (*Marte*, 58 AD3d at 5).

We reject plaintiff's further contention that Ridgeway waived the defense of plaintiff's lack of standing by serving a notice of appearance as "Executrix under the Last Will" of decedent and failing to raise that defense in a pleading or pre-answer motion. Pursuant to CPLR 3211 (e), "a party" waives such a defense by failing to raise it in a responsive pleading or a pre-answer motion. Inasmuch as Ridgeway was never properly made a party to this action in any capacity, the waiver provisions of CPLR 3211 (e) are inapplicable to her.

We therefore modify the order by dismissing the complaint. In light of our determination, we need not address plaintiff's remaining contentions.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 10-01765

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALBERT DRAKE, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (CHRISTOPHER P. JURUSIK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered August 3, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, tampering with physical evidence and false personation.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]), defendant contends that Supreme Court erred in refusing to suppress both physical evidence discovered in his vehicle by the police and his statements to the police. We reject that contention. As defendant correctly concedes, the People established that the police officer was entitled to approach him to conduct a common-law inquiry because the officer had the requisite "founded suspicion that criminal activity [was] afoot" (*People v De Bour*, 40 NY2d 210, 223). On the evening prior to the police conduct at issue, the police received five separate 911 telephone calls reporting a man displaying a handgun. The callers provided detailed descriptions of the suspect's physical appearance, his vehicle, and his location. When the police responded to the scene, however, they were unable to locate the suspect or a handgun. While on patrol the following evening near the location where the suspect had been reported, an officer observed a vehicle matching the description provided by the 911 telephone callers being driven into a gas station. In addition, the driver's physical appearance and clothing matched the descriptions of the suspect provided in the 911 telephone calls. Based upon that information, the officer was justified in approaching defendant and requesting his name (*see generally People v Moore*, 6 NY3d 496, 500; *De Bour*, 40 NY2d at

223). After the officer parked his patrol vehicle behind defendant's vehicle at the gas station, however, defendant "jumped out of the car, leaving the [driver's side] door open," and "dart[ed]" toward the store. The officer further testified that he could not see defendant's hands and that defendant was moving his arms in an unusual manner. Defendant's actions upon exiting the vehicle, coupled with the 911 telephone calls that a man matching his description had been seen displaying a handgun in the area the previous evening, furnished the requisite reasonable suspicion for the officer to detain defendant temporarily (*see Moore*, 6 NY3d at 500-501; *People v Benjamin*, 51 NY2d 267, 270-271). For the same reasons, the officer was justified in conducting a limited protective frisk of defendant's outer clothing in order to ascertain whether he was armed (*see People v Wilson*, 50 AD3d 1609, 1610, *lv denied* 11 NY3d 796; *People v Robinson*, 278 AD2d 808, 809, *lv denied* 96 NY2d 787).

Contrary to defendant's further contention, we conclude that he was not subjected to a de facto arrest when he was briefly detained in the patrol vehicle for the officer's safety (*see People v McCoy*, 46 AD3d 1348, 1349, *lv denied* 10 NY3d 813; *cf. People v Lowman*, 49 AD3d 1262, 1263-1264; *see generally People v Allen*, 73 NY2d 378, 379-380). It is well established that not every forcible detention constitutes an arrest (*see People v Hicks*, 68 NY2d 234, 239). Indeed, "[i]n determining whether a de facto arrest has taken place, the test to be applied is what a reasonable person, innocent of any crime, would have thought had he [or she] been in the defendant's position" (*People v Ward*, 163 AD2d 501, 502, *lv denied* 77 NY2d 883; *see Hicks*, 68 NY2d at 240; *People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851). Here, after the officer was unable to complete the pat down of defendant due to defendant's bulky clothing and repeated movements, the officer placed defendant in the backseat of the patrol vehicle for the officer's safety, until assistance arrived. Backup arrived shortly thereafter and, after the second officer observed crack cocaine on the front seat of defendant's vehicle, the police advised defendant of his rights and placed him under arrest. Under the circumstances presented, the officer was entitled to "effect [defendant's] nonarrest detention in order to ensure [his] own safety" while awaiting assistance (*Allen*, 73 NY2d at 379).

Finally, to the extent that defendant's contention that he was denied effective assistance of counsel is not forfeited by his guilty plea (*see People v Shubert*, 83 AD2d 1577), we conclude that it lacks merit. Defendant's contention is based on the alleged failure of defense counsel to make any arguments in support of suppression. Although no motion papers are included in the record on appeal, it is apparent from the court's suppression decision and order that defense counsel in fact made arguments in support of suppression, including that the police lacked the authority to stop and frisk defendant and that defendant's statements were involuntary. Moreover, a review of the suppression hearing transcript reflects that defense counsel focused his cross-examination at the suppression hearing on those issues. Thus, contrary to defendant's contention, defense counsel developed a strategy in seeking suppression of both the physical evidence seized by the police and defendant's statements to the police

(*see generally People v Ford*, 86 NY2d 397, 404).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 10-02491

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

IN THE MATTER OF THE ARBITRATION BETWEEN
RONALD LUCAS, AS PRESIDENT OF TEAMSTERS LOCAL
264 OF THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

CITY OF BUFFALO, BYRON BROWN, MAYOR, STEVEN
STEPNIAK, COMMISSIONER, PUBLIC WORKS, PARKS
AND STREETS, AND KARLA THOMAS, COMMISSIONER,
HUMAN RESOURCES, RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

GOLDBERG SEGALLA, LLP, BUFFALO (MELANIE J. BEARDSLEY OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

REDEN & O'DONNELL, LLP, BUFFALO (TERRY M. SUGRUE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered September 17, 2010 in a proceeding pursuant to CPLR article 75. The judgment and order, among other things, confirmed an arbitration award.

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

Memorandum: Petitioner commenced these proceedings pursuant to CPLR article 75 seeking to confirm two arbitration awards. The August 21, 2009 arbitration award at issue in appeal No. 1 (hereafter, 2009 award) found that respondents had violated the collective bargaining agreement (CBA) by ignoring a binding past practice in which the most senior caulker supervisor was to be offered the right of first refusal for the acting-time position of Assistant Water Distribution Superintendent. The 2009 award further directed that the impacted employees shall be made whole, and the arbitrator retained jurisdiction only in the event that the parties were unable to implement the remedy "or determine the amount of the make whole remedy." The parties were unable to implement the remedy or determine the amount thereof, and they returned to the arbitrator. The October 25, 2010 arbitration award at issue in appeal No. 2 (hereafter, 2010 award) directed respondents to pay Donald Mackowiak the sum of $54,282.71 and Ronald French the sum of $1,094.99 based on respondents' failure to provide Mackowiak and French with the right of

first refusal. By the judgment and order in each appeal, Supreme Court confirmed the awards and denied respondents' counterclaims to vacate the awards.

We reject respondents' contentions that the awards require them to violate Civil Service Law § 61 (2) and § 64 (2) and are against public policy. Although pursuant to section 61 (2) employees are prohibited from serving in out-of-title positions in nonemergency situations (*see Evangelista v Irving*, 177 AD2d 1005, 1006), respondents' submissions to the court establish that, at least as of January 2010, respondents considered acting-time positions to be temporary appointments under section 64 (2), and such temporary appointments are made "without regard to existing eligible lists" (*id.*). Section 64 (2) does not specify that there must be an emergency situation for an employee to be temporarily appointed to work for a period not exceeding three months in an acting-time position (*see* § 61 [2]). Further, there is no indication in the record that the employees who worked in acting-time positions during the time period involved in the grievance were improperly appointed to those positions in violation of the Civil Service Law.

Although as noted section 64 (2) places a three-month time limit on temporary appointments that are completed without reference to an existing eligible list, the 2009 award does not require respondents to *grant* the most senior caulker supervisor an acting-time position whenever an Assistant Water Distribution Superintendent is absent. Rather, the award merely states that, if there is an acting-time position, then the right of first refusal must be given to the most senior caulker supervisor.

Further, the 2009 award does not define what constitutes an acting-time position. Indeed, we note that, just as respondents are not bound to grant acting-time positions under the 2009 award but instead must merely offer the right of first refusal, respondents are also free to define acting-time positions under the award to the extent that such definition is consistent with the CBA. Thus, it is completely within the power of respondents to determine whether the three-month time limit set forth in section 64 (2) is violated, and it therefore cannot be said that the 2009 award violates the Civil Service Law or public policy on those grounds.

To the extent that respondents contend that the 2010 award must be vacated because an employee has no right to a job appointment that does not comply with the Civil Service Law and no right to back pay where he or she was not appointed in accordance with the Civil Service Law, that contention is without merit. There is no indication that the individuals working in acting-time positions were improperly appointed to those positions in violation of the provisions of the Civil Service Law.

We reject the further contention of respondents that the damages awarded by the 2010 award are speculative or contrary to public policy. The monetary awards provided to Mackowiak and French were based upon the instances after September 2005 when respondents failed

to offer those individuals the right of first refusal. Specifically, the impacted workers were paid the difference between their own wages and the wages they would have earned in the acting-time position of Assistant Water Distribution Superintendent, as well as lost overtime opportunities for those occasions. Thus, the record establishes that the 2010 award was not speculative, but was properly "intended to compensate the [workers] at issue for the losses [they] sustained based on [respondents'] failure to comply with the terms of the [CBA]" (*Matter of Mohawk Val. Community Coll. [Mohawk Val. Community Coll. Professional Assn.]*, 28 AD3d 1140, 1141).

We further reject respondents' contention that, under the circumstances of this case, a limitation on their discretion regarding acting-time positions violates public policy. A public employer is not prohibited by public policy considerations from agreeing to limit its discretion in the manner in which it appoints employees (*see Matter of Professional, Clerical, Tech. Empls. Assn. [Buffalo Bd. of Educ.]*, 90 NY2d 364, 374-376 [*PCTEA*]); such an agreement may be inferred from past practice and prior negotiations, and it need not be explicitly set forth in the CBA (*see id.* at 377 n 6). Where there are public policy implications that warrant a waiver of discretion, there must be "compelling evidence that [there was] a conscious choice to do so" (*Matter of Buffalo Police Benevolent Assn. [City of Buffalo]*, 4 NY3d 660, 664; *see generally Consedine v Portville Cent. School Dist.*, 12 NY3d 286, 294).

Here, the record contains the hearing testimony concerning a past practice of offering the acting-time position to the most senior caulker supervisor and, according to the arbitrator, the "records" from the time period in question support that assertion. In addition, article 22 of the CBA provides that "[a]ll conditions or provisions beneficial to employees now in effect which are not specifically provided for in this agreement, or which have not been replaced by provisions of this agreement, shall remain in effect for the duration of this agreement, unless mutually agreed otherwise between [respondent City of Buffalo] and the Union." The records in question, together with article 22 of the CBA, are sufficient to establish a past practice in which respondents waived their discretion. This is not a situation where the safety of the community is involved (*cf. Buffalo Police Benevolent Assn.*, 4 NY3d at 664), and we thus conclude that public policy does not require an explicit waiver. Nor is this an appointment to a permanent position. At most, an employee will be in the position for a period not in excess of three months. Therefore, under these circumstances, respondents have "not relinquished [their] ultimate appointment authority" (*PCTEA*, 90 NY2d at 377), and there are no public policy barriers to a waiver of discretion.

We reject respondents' contentions that the arbitrator's awards are completely irrational, and in excess of the arbitrator's power as limited by the CBA. It is well settled that "[t]he role of the courts with respect to disputes submitted to binding arbitration pursuant to a CBA is limited, and a court should not substitute its judgment for that of the arbitrator . . . Unless the arbitration award 'is clearly

violative of a strong public policy, . . . is totally or completely irrational, or . . . manifestly exceeds a specific, enumerated limitation on the arbitrator[’s] power,’ the award must be confirmed” (*Matter of Buffalo Council of Supervisors & Adm’rs, Local No. 10, Am. Fedn. of School Adm’rs [Board of Educ. of City School Dist. of Buffalo]*, 75 AD3d 1067, 1068). As discussed herein, the awards are not against public policy, and we equally reject respondents’ contention that the arbitrator’s awards are irrational and were issued in excess of the arbitrator’s authority. “An award is irrational if there is ‘no proof whatever to justify the award’ ” (*Buffalo Council of Supervisors & Adm’rs, Local No. 10, Am. Fedn. of School Adm’rs*, 75 AD3d at 1068; *see Matter of Buffalo Teachers Fedn., Inc. v Board of Educ. of City School Dist. of City of Buffalo*, 50 AD3d 1503, 1505, *lv denied* 11 NY3d 708).

Pursuant to the CBA, the arbitrator could not amend, modify, or delete any provision of the CBA. The arbitrator did not violate that provision, however, nor are the arbitrator’s awards irrational inasmuch as it cannot be said that there is no proof whatever to support them. Indeed, the arbitrator recounted the hearing testimony and evidence tending to establish a past practice concerning the distribution of acting time in which the most senior caulker supervisor was given the right of first refusal. Although we acknowledge that there was contradictory testimony regarding the past practice, there nevertheless is proof in the record to justify the arbitrator’s awards such that it cannot be said that they are irrational and that the arbitrator exceeded the power granted to him under the CBA.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-00965

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

IN THE MATTER OF THE ARBITRATION BETWEEN
MARY HOLL, AS PRESIDENT OF TEAMSTERS LOCAL
264 OF THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

CITY OF BUFFALO, BYRON BROWN, MAYOR, STEVEN
STEPNIAK, COMMISSIONER, PUBLIC WORKS, PARKS
AND STREETS, AND KARLA THOMAS, COMMISSIONER,
HUMAN RESOURCES, RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

GOLDBERG SEGALLA, LLP, BUFFALO (MELANIE J. BEARDSLEY OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

REDEN & O'DONNELL, LLP, BUFFALO (TERRY M. SUGRUE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 4, 2011 in a proceeding pursuant to CPLR article 75. The judgment and order, among other things, confirmed an arbitration award.

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

Same Memorandum as in *Matter of Lucas* (*City of Buffalo*) (___ AD3d ___ [Mar. 16, 2012]).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

142

CA 10-02061

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

RUSSELL YOUKER, PLAINTIFF-RESPONDENT,
ET AL., PLAINTIFF,

V ORDER

VILLAGE OF DOLGEVILLE, ET AL., DEFENDANTS,
MICHAEL SWARTZ AND FRANK BEAULIEU,
DEFENDANTS-APPELLANTS.
(ACTION NO. 1.)

VILLAGE OF DOLGEVILLE, PLAINTIFF,

V

THE NEW YORK MUNICIPAL INSURANCE
RECIPROCAL, DEFENDANT.
(ACTION NO. 2.)
(APPEAL NO. 1.)

TOWNE, RYAN & PARTNERS, P.C., ALBANY (CLAUDIA A. RYAN OF COUNSEL), FOR DEFENDANT-APPELLANT MICHAEL SWARTZ.

FITZGERALD MORRIS BAKER FIRTH P.C., GLENS FALLS (JILL E. O'SULLIVAN OF COUNSEL), FOR DEFENDANT-APPELLANT FRANK BEAULIEU.

CHRISTOPHER J. PELLI, UTICA, FOR PLAINTIFF-RESPONDENT.

MCLANE SMITH AND LASCURETTES, LLP, UTICA (TODD M. LASCURETTES OF COUNSEL), FOR PLAINTIFF VILLAGE OF DOLGEVILLE.

CONGDON FLAHERTY O'CALLAGHAN REID DONLON TRAVIS & FISHLINGER, UNIONDALE (RICHARD NICOLELLO OF COUNSEL), FOR DEFENDANT THE NEW YORK MUNICIPAL INSURANCE RECIPROCAL.

Appeals from an order of the Supreme Court, Herkimer County (Anthony F. Shaheen, J.), entered August 26, 2010. The order, among other things, denied in part the motions of defendants Michael Swartz and Frank Beaulieu for summary judgment.

Now, upon reading and filing the stipulation of withdrawal signed by the attorneys for the parties on February 3, 26 and 29, 2012 and March 5 and 7, 2012,

It is hereby ORDERED that said appeals are dismissed without

costs upon stipulation.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

143

CA 11-01199

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

RUSSELL YOUKER, PLAINTIFF-RESPONDENT,
ET AL., PLAINTIFF,

V ORDER

VILLAGE OF DOLGEVILLE, VILLAGE OF DOLGEVILLE
POLICE DEPARTMENT, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(ACTION NO. 1.)

VILLAGE OF DOLGEVILLE, PLAINTIFF,

V

THE NEW YORK MUNICIPAL INSURANCE
RECIPROCAL, DEFENDANT.
(ACTION NO. 2.)
(APPEAL NO. 2.)

LEMIRE JOHNSON, LLC, MALTA (GREGG T. JOHNSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CHRISTOPHER J. PELLI, UTICA, FOR PLAINTIFF-RESPONDENT.

MCLANE SMITH AND LASCURETTES, LLP, UTICA (TODD M. LASCURETTES OF COUNSEL), FOR PLAINTIFF VILLAGE OF DOLGEVILLE.

CONGDON FLAHERTY O'CALLAGHAN REID DONLON TRAVIS & FISHLINGER, UNIONDALE (RICHARD NICOLELLO OF COUNSEL), FOR DEFENDANT THE NEW YORK MUNICIPAL INSURANCE RECIPROCAL.

Appeal from an order of the Supreme Court, Herkimer County (Anthony F. Shaheen, J.), entered November 18, 2010. The order granted in part the motion of plaintiff-respondent for reargument.

Now, upon reading and filing the stipulation of withdrawal signed by the attorneys for the parties on February 3, 26 and 29, 2012 and March 5 and 7, 2012,

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

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

183

CAF 10-02262

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

IN THE MATTER OF ILONA H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ELTON H., RESPONDENT-APPELLANT.

BERNADETTE M. HOPPE, BUFFALO, 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 ILONA H.

Appeal from an amended order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered September 23, 2010 in a proceeding pursuant to Family Court Act article 10. The amended order adjudged that respondent neglected the subject child.

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

Memorandum: Respondent father appeals from an amended order adjudging that he neglected the child who is the subject of this proceeding. The father contends that petitioner failed to establish that domestic violence occurred in the presence of the child and that the child was at risk of being harmed during the alleged domestic violence. We agree with the father, and we therefore reverse the amended order and dismiss the petition.

We must give great deference to Family Court's assessment of the credibility of the witnesses at the fact-finding hearing (*see Matter of Tina L.*, 255 AD2d 868), and its decision "will not be disturbed unless [it] lack[s] a sound and substantial basis in the record" (*Matter of Kaleb U.*, 77 AD3d 1097, 1098). To establish neglect, the petitioner must demonstrate by a preponderance of the evidence "first, that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent . . . to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368; *see* Family Ct Act § 1012 [f] [i]; § 1046 [b] [i]). Although the "exposure of the child to domestic

violence between the parents may form the basis for a finding of neglect" (*Matter of Michael G.*, 300 AD2d 1144, 1144), "exposing a child to domestic violence is *not* presumptively neglectful. Not every child exposed to domestic violence is at risk of impairment" (*Nicholson*, 3 NY3d at 375). Indeed, a single incident of domestic violence that the child did not witness may be insufficient to establish neglect (*see e.g. Matter of Eustace B.*, 76 AD3d 428; *Matter of Christy C.*, 74 AD3d 561, 562; *cf. Matter of Ariella S.*, 89 AD3d 1092, 1093-1094; *Matter of Batchateu v Peters*, 77 AD3d 1366).

Here, the only evidence of domestic violence presented by petitioner was that the father struck the child's mother on one occasion when the child was eight months old. The father testified at the fact-finding hearing that the altercation occurred outside the presence of the child. Thus, we conclude that petitioner did not establish by a preponderance of the evidence that the physical, mental or emotional condition of the child had been placed in danger of impairment as a result of the father's conduct (*see* Family Ct Act § 1012 [f] [i] [B]; § 1046 [b] [i]; *Eustace B.*, 76 AD3d 428; *Christy C.*, 74 AD3d at 562). There is no evidence in the record indicating that the domestic violence was anything other than an isolated incident with no negative repercussions on the child's well-being. A neglect determination may not be premised solely on a finding of domestic violence without any evidence that the physical, mental or emotional condition of the child was impaired or was in imminent danger of becoming impaired (*see Nicholson*, 3 NY3d at 368-369).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

187

CA 11-01555

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

IN THE MATTER OF THAD L. KEMPISTY AND MICHAEL KEMPISTY, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF GEDDES, EMANUELE FALCONE, SUPERVISOR, CHRISTOPHER RYAN, JERRY ALBRIGO, DANIEL PATALINO, E. ROBERT CZAPLICKI, PAUL VALENTI AND VINCENT PALERINO, CONSTITUTING THE TOWN BOARD OF TOWN OF GEDDES, TOWN OF GEDDES PLANNING BOARD, AND PETER J. ALBRIGO, AS CODE ENFORCEMENT OFFICER OF TOWN OF GEDDES, RESPONDENTS-RESPONDENTS.

ROBERT LOUIS RILEY, SYRACUSE, FOR PETITIONERS-APPELLANTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (NADINE C. BELL OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered October 14, 2010 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, denied the petition in part.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting those parts of the petition seeking to annul the determination insofar as it imposed conditions three through eight upon approval of the amended site plan and as modified the judgment is affirmed without costs.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination of the individual respondents constituting the Town Board of Town of Geddes (Town Board) approving their amended site plan with certain conditions. Supreme Court denied the petition except insofar as it sought to annul conditions 1 (c) and 1 (d) of the Town Board resolution approving the amended site plan. Petitioners appeal from the judgment insofar as it denied the remaining relief requested in the petition. We agree with petitioners that conditions three through eight of the resolution are arbitrary and capricious, and we therefore modify the judgment by granting those parts of the petition seeking to annul the determination insofar as it imposed those conditions upon approval of the amended site plan.

Petitioner Thad L. Kempisty is the owner of two contiguous

parcels of property (hereafter, properties) in the Town of Geddes (Town), and petitioner Michael Kempisty is the lessee of the properties. The first parcel, a .50-acre lot located at 1187 State Fair Boulevard and identified as Onondaga County Tax Map No. 019-01-11.1 (hereafter, developed property), contains various family businesses, including, inter alia, a motor vehicle dealership and an automotive repair business. The second parcel, a 1.13-acre lot identified as Onondaga County Tax Map No. 019-01-12.2, is vacant (hereafter, undeveloped property). Thad Kempisty purchased the undeveloped property in order "to expand the family business . . . ." Specifically, petitioners sought to establish "a vehicle and equipment sales and repair facility" on the undeveloped property.

Both properties are zoned as "Commercial C: Heavy Commercial District" pursuant to section 240-17 of the Zoning Ordinance of the Town Code. The Town Code provides that, "after site plan review," permitted uses in Heavy Commercial Districts include, inter alia, motor vehicle sales and motor vehicle service and repair, as well as accessory buildings and structures for those uses (§ 240-17 [A]). Because the developed property was used for motor vehicle sales, service and repair prior to the adoption of the current Town Code, that property did not undergo site plan review.

Thad Kempisty submitted a site plan review application seeking approval for a "[p]roposed motor vehicle sales lot [with] office and accessory vehicle inventory area" to be located on the undeveloped property. In a letter of intent to the Town, Thad Kempisty explained that he was "looking to expand and reconfigure [his] vehicle sales and service operations located [on the developed property]" and that the purchase of the undeveloped property would "allow [him] to better organize and give [his] operation a better scope for the future, aesthetically and financially." The Town Board referred the site plan application to petitioner Town of Geddes Planning Board (Planning Board) for review and recommendation.

While the application was under review, the Town concluded that the site plan review process should include the developed property as well as the undeveloped property. Petitioners therefore submitted an amended site plan review application. The amended application listed both the developed and undeveloped properties, but it stated that the developed property was "included [i]n [p]rotest [inasmuch] as it is a legal non-conforming use." Petitioners described the project as a proposed motor vehicle sales and repair facility with accessory vehicle inventory area on the undeveloped property and an existing motor vehicle sales and repair facility, construction yard and wholesale business on the developed property.

The Planning Board voted to recommend the approval of the amended site plan subject to four conditions, and the Town Board subsequently passed a resolution approving the amended site plan subject to 12 conditions. The 4 conditions proposed by the Planning Board were incorporated into the first condition of the resolution, and the second condition incorporated conditions of approval set forth by the Town Zoning Board of Appeals. Conditions three through eight imposed

special conditions set forth in section 240-25 (D) (4) and (5) of the Town Code, for motor vehicle service and repair facilities and motor vehicle sales facilities where such uses require a special permit.

It is well settled that " '[a] local planning board has broad discretion in reaching its determination on applications . . . and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion' " (*Matter of In-Towne Shopping Ctrs., Co. v Planning Bd. of the Town of Brookhaven*, 73 AD3d 925, 926). We reject petitioners' contention that the Town Board and Planning Board abused their discretion in requiring petitioners to include the developed property in their amended application for site plan review. Petitioners are correct that, because they used the developed property for motor vehicle sales, service and repair prior to the amendment of the Town Code in 1988, those legal nonconforming uses were permitted to continue without site plan review (*see generally* Town Code § 240-22 [A]). Pursuant to Town Code § 240-22 (B), however, "[a] legal nonconforming use may not be enlarged to occupy . . . additional lot space nor be converted to another use except in conformance with this chapter," and, here, the Town properly determined that the proposed use of the undeveloped property was, in effect, an enlargement of the nonconforming use on the developed property.

As noted above, Thad Kempisty acknowledged that he purchased the undeveloped property in order to expand the motor vehicle sales and repair businesses operated on the developed property. The record reflects that, shortly after Thad Kempisty purchased the undeveloped property, he began to store vehicles on that property in connection with the repair business operated on the developed property. Indeed, Thad Kempisty admitted at the November 2009 trial on his alleged violations of the Town Code that he occasionally stored vehicles and machinery connected with his repair business on the undeveloped property. Thus, inasmuch as the record reflects petitioners' intent to use the undeveloped property to expand the business located on the developed property, we conclude that the Town Board and Planning Board did not abuse their discretion in requiring petitioners to include the developed property in their amended site plan review application (*see generally* Town Code § 240-22 [B]; *cf. Matter of E.F.S. Ventures Corp. v Foster*, 71 NY2d 359, 371-374; *Leemac Sand & Stone Corp. v Anderson*, 57 AD2d 916).

We agree with petitioners, however, that the Town Board abused its discretion and acted arbitrarily and capriciously in imposing conditions three through eight, i.e., the conditions for a special permit, upon its approval of the amended site plan. "It is uncontroverted that a town . . . board [may] impose reasonable conditions on the approval of a site plan to further the health, safety and general welfare of the community . . . and its decision, if 'made within the scope of the authority granted it by the local government, will not be set aside unless it is arbitrary or unlawful' " (*Matter of Castle Props. Co. v Ackerson*, 163 AD2d 785, 786; *see also Matter of Twin Town Little League v Town of Poestenkill*, 249 AD2d 811, 813, *lv denied* 92 NY2d 806). Indeed, pursuant to Town

Law § 274-a (4), "[t]he authorized board shall have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to a proposed site plan." Such conditions, however, " 'must be reasonable and relate only to the real estate involved without regard to the person who owns or occupies it' " (*Matter of St. Onge v Donovan*, 71 NY2d 507, 515, quoting *Matter of Dexter v Town Bd. of Town of Gates*, 36 NY2d 102, 105). Further, "[a] planning board may not impose conditions that are not reasonably designed to mitigate some demonstrable defect" (*Matter of Richter v Delmond*, 33 AD3d 1008, 1010).

Here, conditions three through eight of the resolution required petitioners to modify their site plan "[i]n accordance with the special conditions set forth in" Town Code § 240-25 (D) (4)-(5), i.e., the special conditions for a special permit to operate a motor vehicle service and repair facility or motor vehicle sales facility. Pursuant to section 240-25 (A), the Town Zoning Board of Appeals "may authorize the issuance of a special permit *for those uses requiring a special permit pursuant to each zoning district's regulations*" (emphasis added). Here, however, the properties are located in a Commercial C: Heavy Commercial District, in which motor vehicle sales, service and repair are permitted uses upon site plan review (§ 240-17 [A] [4]-[5]). Thus, a special permit is not required. Indeed, respondent Emanuele Falcone, Town Supervisor, admitted in his affidavit in support of the Town's motion to dismiss the petition that "the Town Board took note that motor vehicle service and repair and motor vehicle sales facilities are subject to special permit approval in every zoning district wherein such uses are permitted, *except the Commercial C: Heavy Commercial District*" (emphasis added). Nevertheless, Falcone stated that, "*given the long and continuing history of noncompliance with Town Code provisions by . . . Thad Kempisty*, the Town Board decided to adopt and apply the special permit conditions relating to the operation of motor vehicle sales and motor vehicle service and repair, as set forth in [section 240-25 (D)] . . . ."

Thus, it is apparent from the record that the Town's determination to impose special permit conditions on its approval of the amended site plan was based upon Thad Kempisty's alleged history of zoning violations and the acrimonious relationship between the Town and petitioners, rather than upon the need to "minimiz[e] [any] adverse impact that might result from the grant of the [application]" (*Twin Town Little League*, 249 AD2d at 813; *see Richter*, 33 AD3d at 1010). The Town's determination with respect to conditions three through eight runs afoul of the "fundamental principle" that "conditions imposed on the [approval of a site plan] must relate only to the use of the property that is the subject of the [site plan] without regard to the person who owns or occupies that property" (*St. Onge*, 71 NY2d at 511).

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

188

CA 11-01477

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

CATHERINE KOVAL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EDWINA MARKLEY, DEFENDANT-RESPONDENT.

FINKELSTEIN & PARTNERS, LLP, NEWBURGH (VICTORIA LIGHTCAP OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered January 11, 2011 in a personal injury action. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she fell down the basement staircase at defendant's home. Plaintiff used the bathroom in defendant's home upon her arrival, and she returned down the same hallway to use the bathroom several hours later. Although the hallway was dark at that time, plaintiff did not ask defendant where a light switch was located, nor did plaintiff attempt to find one. Plaintiff proceeded to open a door in the hallway to what she believed to be the bathroom, but the door led to the basement stairs. She then entered the doorway and fell down those stairs. Defendant moved for summary judgment dismissing the complaint on the grounds that there were no defects on her property that caused or contributed to plaintiff's injuries and that defendant had no duty to warn plaintiff of the unlit basement staircase. We conclude that Supreme Court properly granted defendant's motion.

Contrary to plaintiff's contention, her conduct in opening the basement door and entering the unlit staircase resulted in an open and obvious danger of which defendant had no duty to warn (*see Tagle v Jakob*, 97 NY2d 165, 169; *Duclos v County of Monroe*, 258 AD2d 925; *cf. Pollack v Klein*, 39 AD3d 730). Indeed, plaintiff had used the bathroom earlier during her visit. Moreover, plaintiff recognized that the door to the basement opened in a different manner than the door to the bathroom that she had used earlier, but she failed to turn

on any of the available lights in the hallway. We reject plaintiff's further contention that defendant failed to instruct her in a proper manner regarding how to navigate the hallway to the bathroom. There is no evidence in the record that defendant gave any erroneous directions to plaintiff (*cf. Guenzberg v Heyman*, 5 AD2d 766, *lv denied* 4 NY2d 676).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

196

TP 11-02075

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

IN THE MATTER OF FRANK RUSSELL, PETITIONER,

V ORDER

DAVID STALLONE, SUPERINTENDENT, CAYUGA CORRECTIONAL FACILITY, RESPONDENT.

FRANK RUSSELL, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, 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, Cayuga County [Mark H. Fandrich, A.J.], entered June 22, 2011) 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.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

199

KA 11-00550

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JEFFREY C. WHITMER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered February 28, 2011. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

201

KA 09-01721

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. WELLS, ALSO KNOWN AS MICHAEL WELLS,
DEFENDANT-APPELLANT.

DAVID J. PAJAK, ALDEN, 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 December 9, 2009. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that we should have granted his pretrial motion to change venue, which was previously before us pursuant to CPL 230.20 (2). Our prior decision denying that motion, which is unpublished, constitutes the law of the case (*see People v Scalercio*, 10 AD3d 697, *lv denied* 3 NY3d 742; *People v Knapp*, 113 AD2d 154, 158, *cert denied* 479 US 844), and defendant has made no showing that it "was based on manifest error, or that exceptional circumstances" warrant reconsideration of his motion (*Scalercio*, 10 AD3d at 697). The sentence is not unduly harsh or severe.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

202

KA 09-02653

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

RYAN S. SMITH, DEFENDANT-APPELLANT.

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

RYAN S. SMITH, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered November 17, 2009. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (five counts), robbery in the first degree (seven counts), kidnapping in the second degree (three counts), criminal use of a firearm in the first degree (two counts), assault in the first degree, assault in the second degree (two counts), criminal possession of a weapon in the second degree, menacing a police officer, grand larceny in the third degree and resisting arrest.

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

Opinion by PERADOTTO, J.: On appeal from a judgment convicting him upon a jury verdict of, inter alia, five counts of burglary in the first degree (Penal Law § 140.30 [2] - [4]) and seven counts of robbery in the first degree (§ 160.15 [1], [3], [4]), defendant contends in his main and pro se supplemental briefs that County Court erred in denying his motion to suppress DNA evidence because he lacked notice of the application seeking to compel him to provide a buccal swab and because the police used excessive force to obtain the swab. We agree, and we therefore conclude that the judgment should be reversed, defendant's motion to suppress the DNA evidence should be granted, and a new trial should be granted.

I

In July 2006, four men participated in two home invasion-style armed robberies at two residences in Niagara Falls (hereafter, home invasions). In December 2006, two men committed an armed robbery of a

gas station in Niagara Falls (hereafter, gas station robbery). Approximately two years later, defendant was convicted of assault in the third degree in connection with an unrelated crime, and his DNA was collected pursuant to Executive Law § 995. Defendant's DNA was entered into the CODIS system, and there was a "hit" indicating that his DNA matched evidence collected in the 2006 home invasions and the gas station robbery. By an order to show cause in August 2008, the People sought to compel defendant to provide a buccal swab to the Niagara Falls Police Department (NFPD). Defendant did not appear on the return date of the order to show cause, and the court issued an order requiring defendant to provide a buccal swab "to be taken by or at the direction of the [NFPD]." The order indicates that defendant was served with notice of the order to show cause and that the People provided proof of service upon defendant. Defendant submitted to a buccal swab pursuant to the order.

According to the People, after that swab was obtained from defendant, the DNA sample was sent to the incorrect lab and was "compromised." As a result, the People sought an order to collect a second buccal swab from defendant by a letter to the court in September 2008. The court issued a second order requiring defendant to provide the NFPD with another buccal swab. It is undisputed that defendant was not provided with notice of the People's application for a second buccal swab and was not served with the second order. Thereafter, the police approached defendant on a street in Niagara Falls, handcuffed him, and transported him to the police station for the purpose of obtaining a buccal swab. When defendant refused to open his mouth to allow the officers to obtain the buccal swab, the police applied a taser to defendant's bare skin for several seconds, after which they were able to obtain the sample.

II

An order compelling an individual to provide corporeal evidence, such as blood or saliva for DNA analysis, constitutes a search and seizure within the meaning of the Fourth Amendment (*see Skinner v Railway Labor Executives' Assn.*, 489 US 602, 618; *Schmerber v California*, 384 US 757, 767; *Matter of Abe A.*, 56 NY2d 288, 295). Although no New York statute expressly authorizes courts to compel uncharged suspects to supply a DNA sample (*see Abe A.*, 56 NY2d at 293-294; *cf.* CPL 240.40 [2]), the Court of Appeals has held that a court may issue an order to obtain a blood sample from a suspect so long as the People establish: "(1) probable cause to believe the suspect has committed the crime, (2) a 'clear indication' that relevant material evidence will be found, and (3) the method used to secure it is safe and reliable. In addition, the issuing court must weigh the seriousness of the crime, the importance of the evidence to the investigation and the unavailability of less intrusive means of obtaining it, on the one hand, against concern for the suspect's constitutional right to be free from bodily intrusion on the other. Only if this stringent standard is met . . . may the intrusion be sustained" (*Abe A.*, 56 NY2d at 291). Here, the court determined that the People satisfied the requirements of *Abe A.* set forth above, and defendant does not expressly challenge that determination. Rather,

defendant contends that (1) he was denied due process because the second order compelling defendant to provide a buccal swab was not made upon notice to him; and (2) the method of collecting the swab, i.e., the use of the taser, was excessive and objectively unreasonable. We agree with defendant on both counts, and thus that reversal is required.

III

Addressing first defendant's due process contention, we conclude that defendant's due process rights were violated when he was not afforded an opportunity to appear before the court and contest the second order compelling him to submit to a buccal swab (*see* US Const Amend XIV; NY Const, art I, § 6). Where, as here, there are no exigencies, we conclude that the People's application for an order to compel a suspect to provide a DNA sample must be made upon notice to the suspect (*see Abe A.*, 56 NY2d at 296; *see also People v King*, 161 Misc 2d 448, 452, *affd* 232 AD2d 111, *lv denied* 91 NY2d 875; *People v Latibeaudierre*, 174 Misc 2d 60, 61-62). "After all, when frustration of the purpose of the application is not at risk, it is an elementary tenet of due process that the target of the application be afforded the opportunity to be heard in opposition before his or her constitutional right to be left alone may be infringed" (*Abe A.*, 56 NY2d at 296). Indeed, as the United States Supreme Court stated, "[t]he importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great" (*Schmerber*, 384 US at 770).

We reject the contention of the People that no notice was required because defendant failed to appear in opposition to the People's first application for a buccal swab. Defendant's failure to object to the first order compelling him to provide a buccal swab does not constitute a waiver to any subsequent such orders inasmuch as each order constitutes a bodily intrusion warranting notice and an opportunity to be heard (*see Schmerber*, 384 US at 770; *Abe A.*, 56 NY2d at 296; *King*, 161 Misc 2d at 452). Further, we disagree with the dissent that, because defendant received notice of the first application for a buccal swab, the People were not obligated to provide notice of any further such applications. In our view, it does not elevate form over substance with respect to defendant's due process rights to require the People to provide notice to an uncharged suspect each and every time they seek authorization to invade the individual's body in search of evidence of guilt (*see generally Schmerber*, 384 US at 770; *Abe A.*, 56 NY2d at 296). Although the People may not need to make a showing of probable cause upon each successive application, defendant could contest, among other things, the need for further buccal swabs and the availability of less intrusive means of obtaining a DNA sample (*see Abe A.*, 56 NY2d at 291). Inasmuch as the second order pursuant to which the DNA evidence was obtained was entered in violation of defendant's due process rights, we conclude that the DNA evidence must be suppressed on that ground (*see Latibeaudierre*, 174 Misc 2d at 61-62).

IV

We further conclude that the DNA evidence must be suppressed because the police utilized excessive force to obtain the buccal swab. Claims that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other seizure of a person "are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard" (*Graham v Connor*, 490 US 386, 388; *see Mazzariello v Town of Cheektowaga*, 305 AD2d 1118, 1119; *Ostrander v State of New York*, 289 AD2d 463, 464). "Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake" (*Graham*, 490 US at 396 [internal quotation marks omitted]). The test of reasonableness under the Fourth Amendment "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he [or she] is actively resisting arrest or attempting to evade arrest by flight" (*id.*; *see Tracy v Freshwater*, 623 F3d 90, 96).

Here, we conclude that the use of a taser to obtain the buccal swab was objectively unreasonable under the circumstances (*see Hammer v Gross*, 932 F2d 842, 846, *cert denied* 502 US 980). Although the crimes at issue are unquestionably serious, the record establishes that defendant posed no immediate threat to the safety of himself or the officers, nor did he attempt to evade the officers by flight (*see Graham*, 490 US at 396). The testimony at the suppression hearing established that, when the two police officers approached defendant on the street and told him that he had to be transported to the police station, defendant did not resist and entered the police vehicle, even though the police did not tell him why he had to accompany them. While at the police station, defendant was placed in a secure room, where he was handcuffed, seated on the floor, and surrounded by three patrol officers and two detectives. It is undisputed that defendant did not threaten, fight with, or physically resist the officers at any time; rather, he simply refused to open his mouth to allow the officers to obtain a buccal swab (*cf. Orem v Rephann*, 523 F3d 442, 444-445; *Burkett v Alachua County*, 250 Fed Appx 950, 950-954 [11th Cir.], 2007 WL 2963844, *1-3; *People v Hanna*, 223 Mich App 466, 468, 472-475, *lv denied* 458 Mich 862, *cert denied* 528 US 1131). Notably, the record reflects that defendant refused to open his mouth for, at most, 10 to 15 minutes before the police used the taser to force him to do so. Defendant was picked up by the police at approximately 6:00 P.M., and was tased at 6:18 P.M. During the intervening time, the police drove defendant to the police station, consulted with their superiors, and decided to utilize the taser. We cannot agree with the suppression court that, after 10 to 15 minutes of asking a suspect to comply with a court-ordered buccal swab of which the suspect had no prior knowledge, it is reasonable for the police to tase a nonviolent, handcuffed, and secured defendant in order to force the suspect into submission (*cf. J.B. Hickey v Reeder*, 12 F3d 754, 759).

Significantly, there were no exigent circumstances to justify the failure to employ a less-intrusive alternative to the use of a taser. An individual's DNA, unlike blood-alcohol content or other types of evanescent evidence, is not susceptible to alteration, destruction or loss if not obtained in a timely manner (*cf. Hanna*, 223 Mich App at 473).

While the People seek to characterize the use of a taser as a "minimal" degree of force and emphasized at the suppression hearing that defendant did not lose consciousness and suffered no visible scarring or injuries, we note that "extreme pain can be inflicted with little or no injury" (*Hickey*, 12 F3d at 757). The officers who witnessed the tasing incident acknowledged that the use of a taser causes pain and that, upon application of the taser, defendant appeared to be in pain and shouted for the officers to stop using it. Our review of a videotape of the tasing incident supports the conclusion that defendant was in pain upon application of the taser to his bare skin.

Finally, we note that there were reasonable alternatives to the use of the taser. For example, the police could have arrested defendant for contempt, thereby securing him while awaiting court intervention (*see Abe A.*, 56 NY2d at 292-293). Indeed, after tasing defendant and obtaining the buccal swab, the police in fact arrested him for criminal contempt. The People then could have sought and, upon good cause shown, received judicial approval to use physical force if necessary to extract the DNA sample (*see United States v Bullock*, 71 F3d 171, 176, *cert denied* 517 US 1126).

We thus conclude that the use of a taser to obtain the buccal swab was objectively unreasonable under the circumstances (*see Graham*, 490 US at 399), and that the DNA evidence therefore should have been suppressed as the product of an unconstitutional search and seizure (*see generally Matter of Victor M.*, 9 NY3d 84, 86; *People v Whetstone*, 47 AD2d 995, 995).

V

Contrary to defendant's further contention, we conclude that the court did not abuse its discretion in denying that part of his omnibus motion seeking to sever the counts relating to the home invasions from the counts relating to the gas station robbery (*see generally People v Owens*, 51 AD3d 1369, 1370-1371, *lv denied* 11 NY3d 740; *People v Dozier*, 32 AD3d 1346, 1346, *lv dismissed* 8 NY3d 880). As defendant correctly concedes, the charges relating to the home invasions and those relating to the gas station robbery were properly joinable pursuant to CPL 200.20 (2) (c) because, "[e]ven though based upon different criminal transactions, . . . such offenses are defined by the same or similar statutory provisions and consequently are the same or similar in law" (*id.*). The record belies defendant's contention that there was substantially more proof of his involvement in the home invasions than the gas station robbery (*see* CPL 200.20 [3] [a]). Defendant was connected to both crimes by the presence of his DNA at or near the crime scenes, and no witnesses to either incident were

able to identify defendant.

VI

In light of our conclusion with respect to suppression of the DNA evidence, there is no need to address defendant's remaining contentions. Accordingly, we conclude that the judgment should be reversed, defendant's motion to suppress the DNA evidence should be granted, and a new trial on the indictment should be granted.

All concur except SCUDDER, P.J., who dissents and votes to affirm in the following Opinion: I respectfully dissent. In my view, under the circumstances presented here, defendant's due process and Fourth Amendment rights in connection with obtaining a buccal swab from defendant's mouth were not violated and thus I disagree with the majority's determination to reverse the judgment and grant defendant's motion to suppress the DNA evidence retrieved from that swab.

It is essentially undisputed that County Court properly determined that the People established that there was probable cause to believe that defendant committed both the home invasions and the gas station robbery based upon DNA located at both crime scenes that matched information regarding defendant's DNA contained in the CODIS data base. With respect to defendant's due process rights, it is well established that defendant was entitled to notice of the application to obtain a buccal swab in order to provide him with the opportunity to contest the People's contention that probable cause existed to believe that he was involved in the robberies before he could be compelled by police to provide a buccal swab (*see generally Matter of Abe A.*, 56 NY2d 288, 296). The issue then is whether defendant's due process rights were violated when the People asked the court to issue a second order because the sample obtained pursuant to the first order was compromised, without providing notice to defendant of that request. I respectfully disagree with the majority's conclusion that defendant's due process rights were violated by the failure of the People to provide defendant with notice of that second request.

Defendant was "afforded the opportunity to be heard in opposition" to the People's initial application (*id.*), and he failed to appear to oppose the application. The People's second application was nothing more than a duplicate of their first application, which had been determined by the court to have met the "stringent standard" that a buccal swab was a minimally intrusive means to obtain evidence that was critical for the investigation of serious crimes (*id.* at 291). In my view, defendant was properly given the requisite notice that the People sought evidence in the form of a buccal swab to connect him to both the home invasions and the gas station robbery (*see id.* at 296), and thus the court properly determined that his due process rights were not violated when the People sought a duplicate order. In my view, to conclude otherwise, under the unique circumstances presented here, improperly places the form of the required due process protection over its substance.

I also respectfully disagree with the majority that defendant's

Fourth Amendment rights were violated by the very brief use of a taser to effectuate defendant's cooperation to obtain the buccal swab. "Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake" (*Graham v Connor*, 490 US 386, 396 [internal quotation marks omitted]). Although defendant did not physically resist the police, he repeatedly and adamantly refused to open his mouth to provide the requested DNA sample and, indeed, repeated several times that the police would have to "tase" him to get a sample. Inasmuch as the police were familiar with defendant's violent tendencies, and after consultation with their superiors, the officers made the determination that the risk to officer safety and to defendant's safety would be reduced by the use of the drive stun on defendant's shoulder, rather than by an attempt to compel defendant to open his mouth by any other means requiring the use of force. They therefore placed defendant on the floor to reduce the risk of injury in the event that defendant struggled or fell. The recording device on the taser established that it was in use for a total of five seconds. An officer testified that it takes 1½ seconds for the device to turn on and 1½ seconds to turn off. Thus, although pain was inflicted for approximately two to three seconds, the officer testified that the pain experienced by defendant stopped immediately when the trigger was off. Although I do not disagree with the majority that the police could have sought judicial intervention for permission to use force (*see United States v Bullock*, 71 F3d 171, 176, *cert denied* 517 US 1126), I nevertheless submit that the failure to do so does not render the officers' actions " 'objectively [un]reasonable' in light of the facts and circumstances confronting them" (*Graham*, 490 US at 397). In my view, because defendant was "actively," albeit not physically, resisting the police, and because another method to obtain the sample would likely result in injury to defendant and/or the officers, and in light of the seriousness of the crimes, the test whether the use of force was reasonable under the Fourth Amendment has been met here (*id.* at 396).

The United States Supreme Court, while recognizing that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State" (*Schmerber v California*, 384 US 757, 767), further recognized that there are circumstances warranting intrusion and thus provided guidance for courts in determining whether the Fourth Amendment has been violated in a particular circumstance (*see id.* at 769-771). In my view, the instant circumstance is one in which the intrusion by the State was warranted. First, the procedure utilized to obtain the necessary DNA evidence, i.e., a buccal swab, did not pose any risk to defendant's health or safety (*see Bullock*, 71 F3d at 176). Second, defendant's dignity was not infringed upon by using a buccal swab to obtain the evidence, despite the need to use reasonable force in light of defendant's steadfast refusal to open his mouth (*see id.*). Third, the "need for the scientific evidence from the [saliva] samples was great" (*id.* at 177). Thus, I submit that the court properly determined that defendant's Fourth Amendment rights were not violated.

Accordingly, I would therefore affirm the judgment.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 10-01777

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY A. MITCHELL, 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 July 19, 2010. 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.

Memorandum: Defendant appeals from a judgment convicting him, upon a plea of guilty, of attempted criminal possession of a controlled substance in the fifth degree (Penal Law §§ 110.00, 220.06 [5]). Preliminarily, we note that defendant's notice of appeal recites an incorrect date on which judgment was rendered. Defendant's notice of appeal recites the correct indictment number, however, and thus we exercise our discretion, in the interest of justice, and treat the notice of appeal as valid (*see* CPL 460.10 [6]).

We reject defendant's contention that the language used by County Court during the plea allocution concerning his waiver of the right to appeal was vague and did not absolutely prohibit defendant from contesting the court's suppression rulings on appeal. " '[Trial courts are not required to engage in any particular litany during an allocution in order to obtain a valid guilty plea in which defendant waives a plethora of rights,' including the right to appeal" (*People v Gilbert*, 17 AD3d 1164, 1164, *lv denied* 5 NY3d 762, quoting *People v Moistest*, 76 NY2d 909, 910-911). Here, the record establishes that the court stated that defendant was waiving his right to appeal, and defendant indicated that he understood that he was waiving his right to appeal. Defendant's valid waiver of the right to appeal thus encompasses his challenges to the court's suppression rulings (*see People v Kemp*, 94 NY2d 831, 833; *Gilbert*, 17 AD3d at 1164). To the extent that defendant contends that his plea was not knowing, intelligent, and voluntary, that contention in fact is premised on

defendant's challenge to the allegedly incorrect suppression rulings. Thus, that contention is in effect also a challenge to the suppression rulings, which is encompassed by the valid waiver of the right to appeal (*see Kemp*, 94 NY2d at 833).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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CAF 10-02049

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

IN THE MATTER OF JUSTAIN R. AND SHANE R.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JUAN F., RESPONDENT-APPELLANT.

FARES A. RUMI, ROCHESTER, FOR RESPONDENT-APPELLANT.

DAVID VAN VARICK, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered September 28, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that the subject children were permanently neglected by respondent and committed the guardianship and custody of the subject children to petitioner.

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

Memorandum: Respondent father appeals from an order terminating his parental rights pursuant to Social Services Law § 384-b on the ground of permanent neglect. We affirm. Petitioner met its burden of proving "by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between [the father] and the child[ren]" (*Matter of Ja-Nathan F.*, 309 AD2d 1152; *see* § 384-b [7] [a]; *Matter of Rachael N.*, 70 AD3d 1374, *lv denied* 15 NY3d 708). Contrary to the contention of the father, the evidence at the hearing establishes that, despite petitioner's diligent efforts to reunite him with the children, he continued to use drugs; lived in numerous temporary or rundown rooms or apartments that were unsuitable for children; continued to demonstrate problems with aggression in general and domestic violence against the children's mother in particular; and refused to participate in counseling of any kind until either immediately before or immediately after the termination petition was filed. Thus, petitioner established that the father "failed to address successfully the problems that led to the removal of the child[ren] and continued to prevent the child[ren]'s safe return" (*Ja-Nathan F.*, 309 AD2d 1152; *see Matter of Brittany K.*, 59 AD3d 952, 953, *lv denied* 12 NY3d 709).

We reject the father's contention that termination of his

parental rights was not in the best interests of the children. The minimal " 'progress made by [the father] in the months preceding the dispositional determination was not sufficient to warrant any further prolongation of the child[ren]'s unsettled familial status' " (*Matter of Roystar T.*, 72 AD3d 1569, 1569, *lv denied* 15 NY3d 707; *see Matter of Sean W.*, 87 AD3d 1318, 1319, *lv denied* 18 NY3d 802). Finally, we conclude that Family Court properly refused to allow any post-termination contact between the father and the children (*see Matter of Atreyu G.*, 91 AD3d 1342; *Matter of Cayden L.R.*, 83 AD3d 1550, 1551; *Matter of Christopher J.*, 60 AD3d 1402, 1403).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

207

CAF 11-01401

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

IN THE MATTER OF AUSTIN M. AND ANNA M.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-APPELLANT;

ORDER

SARAH H., RESPONDENT.

DALE M., INTERVENOR-RESPONDENT.

NELSON LAW FIRM, MEXICO (ANNALISE M. DYKAS OF COUNSEL), FOR PETITIONER-APPELLANT.

FIX LAW FIRM, OSWEGO (ROBERT H. FIX OF COUNSEL), FOR INTERVENOR-RESPONDENT.

CHARLES H. CIESZESKI, ATTORNEY FOR THE CHILDREN, FULTON, FOR AUSTIN M. AND ANNA M.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered June 29, 2011 in a proceeding pursuant to Family Court Act article 10. The order directed the final discharge of the subject children to Dale M. by August 1, 2011.

Now, upon reading and filing the stipulation of withdrawal signed by the attorneys for the parties, and by the Attorney for the Children and filed on January 6, 2012,

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-00476

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

DARNELL BACKUS, PLAINTIFF-APPELLANT,

V ORDER

KALEIDA HEALTH, DOING BUSINESS AS BUFFALO GENERAL HOSPITAL, ET AL., DEFENDANTS, AND BOONCHUAY ANUNTA, M.D., DEFENDANT-RESPONDENT.

CAMPBELL & SHELTON LLP, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BROWN & TARANTINO, LLC, BUFFALO (JEFFREY A. WIECZKOWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered November 12, 2010 in a medical malpractice action. The order granted the motion of defendant Boonchuay Anunta, M.D. for a directed verdict and dismissed the complaint against defendant Boonchuay Anunta, M.D.

Now, upon reading and filing the stipulation of discontinuance of appeal signed by the attorneys for the parties on February 15, 2012,

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-00538

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

INTER-COMMUNITY MEMORIAL HOSPITAL OF NEWFANE, INCORPORATED AND INTEGRATED CARE SYSTEMS, LLC, DOING BUSINESS AS NEWFANE REHABILITATION & HEALTH CARE CENTER, PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

THE HAMILTON WHARTON GROUP, INC., WALTER B. TAYLOR, AS MANAGING DIRECTOR OF NEW YORK HEALTH CARE FACILITIES WORKERS' COMPENSATION TRUST AND INDIVIDUALLY, DEFENDANTS-APPELLANTS-RESPONDENTS, CATHY MADDEN, LINDA VILLANO, PHYLLIS ETTINGER, PATRICIA HUBER, ROSA BARKSDALE, SAM HARTE, DANIEL MUSHKIN, TIMOTHY FERGUSON, JANE DOE AND JOHN DOE, AS TRUSTEES OF NEW YORK HEALTH CARE FACILITIES WORKERS' COMPENSATION TRUST, DEFENDANTS-RESPONDENTS, MATTHEWS, BARTLETT & DEDECKER, INC., NOW KNOWN AS M&T INSURANCE AGENCY, INC., ET AL., DEFENDANTS.

MILBER MAKRIS PLOUSADIS & SEIDEN, LLP, WILLIAMSVILLE (BRIAN WISNIEWSKI OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS THE HAMILTON WHARTON GROUP, INC. AND WALTER B. TAYLOR, AS MANAGING DIRECTOR OF NEW YORK HEALTH CARE FACILITIES WORKERS' COMPENSATION TRUST AND INDIVIDUALLY.

WATSON BENNETT COLLIGAN JOHNSON & SCHECHTER, L.L.P., BUFFALO (MELISSA A. DAY OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT DANIEL MUSHKIN.

HOGAN WILLIG, AMHERST (STEVEN G. WISEMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS SAM HARTE AND TIMOTHY FERGUSON.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (JOSEPH E. ZDARSKY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, ALBANY (BENJAMIN F. NEIDL OF COUNSEL), FOR DEFENDANT-RESPONDENT PHYLLIS ETTINGER.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (R. SCOTT ATWATER OF COUNSEL), FOR DEFENDANT-RESPONDENT ROSA BARKSDALE.

LAW OFFICE OF BRUCE S. ZEFTEL, BUFFALO (BRUCE S. ZEFTEL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CATHY MADDEN AND PATRICIA HUBER.

LAW OFFICES OF PATRICK J. SULLIVAN, MINEOLA (PATRICK J. SULLIVAN OF COUNSEL), FOR DEFENDANT-RESPONDENT LINDA VILLANO.

SALTARELLI & ASSOCIATES, P.C., TONAWANDA (MARK E. SALTARELLI OF COUNSEL), FOR DEFENDANT-RESPONDENT JOHN DOE, AS TRUSTEE OF NEW YORK HEALTH CARE FACILITIES WORKERS' COMPENSATION TRUST.

Appeal and cross appeal from an order of the Supreme Court, Niagara County (John M. Curran, J.), entered May 20, 2010. The order, among other things, upon the motions of defendants-appellants-respondents and defendants-respondents, dismissed the amended complaint in part.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part of the first ordering paragraph granting plaintiffs leave to replead the second and third causes of action, by vacating the third ordering paragraph, and by denying the motions of defendants-appellants-respondents and defendants-respondents insofar as they sought dismissal of the fourth and seventh causes of action in their entirety and reinstating those causes of action to the extent that they are based upon breaches that occurred within six years prior to the commencement of the action, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs, formerly active members in a group self-insurance trust fund created pursuant to Workers' Compensation Law § 50 (3-a), commenced this action seeking to recover, inter alia, damages for the amounts that had been levied against them to account for the trust's financial deficits. As relevant to the appeal, plaintiffs sued defendants The Hamilton Wharton Group, Inc. (HWG) and Walter B. Taylor, HWG's sole owner and controlling principal (collectively, HWG and Taylor), as program administrator and managing director of the trust, as well as individual trustees, for negligence, gross negligence, breach of contract, and breach of fiduciary duty. As a preliminary matter, we note that the motion of defendant Phyllis Ettinger seeking to strike point IV of plaintiffs' reply brief was denied by this Court, with leave to renew the motion at oral argument of the appeal. Ettinger in fact renewed the motion at oral argument, and we hereby grant it. We further note that plaintiffs have abandoned any contentions with respect to the dismissal of the causes of action for negligence, gross negligence, and breach of fiduciary duty against all of the individual trustees (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984; *see also Johnson v Bauer Corp.*, 71 AD3d 1586, 1587). We also do not consider two additional arguments. With respect to the first argument, the failure of any party to "furnish this Court with a copy of [the second] amended complaint prevents consideration of [the] argument that such pleading moots the appeal" (*Pier 59 Studios L.P. v Chelsea Piers L.P.*, 27 AD3d 217, 217; *see American Express Travel Related Servs. Co. v North Atl. Resources*, 261 AD2d 310, 310-311). With respect to the second argument, i.e., that plaintiffs have a potential derivative cause of action for breach of contract, that argument is raised for the first time on appeal and thus is not properly before us (*see Ciesinski*, 202 AD2d at 985).

We agree with HWG and Taylor that Supreme Court abused its discretion in granting plaintiffs leave, sua sponte, to replead the second and third causes of action, for negligence and gross negligence, respectively, against them. "New York does not recognize tort claims arising out of the negligent performance of a contract" (*Verizon N.Y., Inc. v Barlam Constr. Corp.* [appeal No. 2], 90 AD3d 1537, 1538; *see Sommer v Federal Signal Corp.*, 79 NY2d 540, 551) and, here, plaintiffs have not alleged the breach of a duty independent of a contract (*see Pacnet Network Ltd. v KDDI Corp.*, 78 AD3d 478, 479). The court speculated that plaintiffs might be able to plead a viable cause of action under one of the three exceptions set forth in *Espinal v Melville Snow Contrs.* (98 NY2d 136, 138-140), but even assuming, arguendo, that plaintiffs' allegations are true and according them the benefit of every possible favorable inference (*see generally Leon v Martinez*, 84 NY2d 83, 87-88), we conclude that plaintiffs cannot state a cause of action under any *Espinal* exception (*see Sommer*, 79 NY2d at 552). We therefore modify the order accordingly.

We further conclude that the court abused its discretion in the third ordering paragraph in sua sponte allowing plaintiffs, upon repleading the second and third causes of action, to assert a new cause of action for indemnification. "Leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit" (*Letterman v Reddington*, 278 AD2d 868; *see* CPLR 3025 [b]; *Nastasi v Span, Inc.*, 8 AD3d 1011, 1013; *Nizam v Friol*, 294 AD2d 901, 902), and "[t]he decision to allow or disallow the amendment is committed to the court's discretion" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959; *see Fingerlakes Chiropractic v Maggio*, 269 AD2d 790, 791). Here, however, plaintiffs did not seek leave to amend their amended complaint to add the indemnification cause of action, so "they necessarily have not established that any proposed amendment 'is not patently lacking in merit' " (*Bialy v Honeywell Intl. Inc.*, 49 AD3d 1328, 1330, *lv denied* 10 NY3d 714). We therefore further modify the order accordingly.

Turning to the fourth and seventh causes of action, for breach of contract against HWG and Taylor and against the individual trustees, respectively, we conclude that the court erred in dismissing them in their entirety as time-barred. Although plaintiffs withdrew from active participation in the trust in 2001, they continued to have claims with the trust, and they continued to be jointly and severally liable for the deficits of the trust. Thus, the obligations of the parties as set forth in the operative trust documents continued beyond the period of plaintiffs' active membership. The court therefore erred in holding that any breach of contract for which plaintiffs seek damages occurred when plaintiffs were members of the trust, i.e., more than six years before the commencement of this action.

It is well settled that, "where a contract provides for continuing performance over a period of time, each breach may begin the running of the statute [of limitations] anew such that accrual occurs continuously and plaintiffs may assert claims for damages occurring up to six years prior to filing of the suit" (*Airco Alloys*

Div. v Niagara Mohawk Power Corp., 76 AD2d 68, 80; *see Westchester County Correction Officers Benevolent Assn., Inc. v County of Westchester*, 65 AD3d 1226, 1228). Because the record does not disclose the precise nature and timing of the breaches alleged by plaintiffs, we conclude that HWG and Taylor and the individual trustees have not met their burden of establishing that plaintiffs have no cause of action for breach of contract. We therefore further modify the order accordingly with respect to the fourth and seventh causes of action. We note that those causes of action may contemplate as a component of damages the pro rata deficit assessments against plaintiffs. Damages are an essential element of a breach of contract cause of action (*see Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1055), and, here, plaintiffs could not allege damages for the pro rata deficit assessments until those assessments were levied against them by the Workers' Compensation Board (*see State of N.Y., Workers' Compensation Bd. v A & T Healthcare, LLC*, 85 AD3d 1436, 1437-1438; *see also Metal Goods & Mfrs. Ins. Trust Fund v Advent Tool & Mold, Inc.*, 61 AD3d 1412, 1414). That occurred on June 30, 2005. Plaintiffs' original complaint was filed on June 27, 2008, and thus the pro rata deficit assessments as a component of damages are well within the six-year statute of limitations for contracts.

Finally, contrary to the contention of HWG and Taylor, the court properly denied that part of their motion seeking to dismiss the action against Taylor, individually. Granting the amended complaint a liberal construction (*see Leon*, 84 NY2d at 87-88), we conclude that it states a cause of action against Taylor, individually, particularly in light of the evidence in the record that HWG "and/or Walter B. Taylor" was approved to serve as program administrator of the trust.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

216

CA 11-02071

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

IN THE MATTER OF THE ARBITRATION BETWEEN NAIL IT CONSTRUCTION, INC., DOING BUSINESS AS CARLSON CONSTRUCTION, PETITIONER-APPELLANT,

AND ORDER

GERALD CARLSON AND TARA CARLSON, ALSO KNOWN AS TARA HUSTON, RESPONDENTS-RESPONDENTS.

SELLSTROM LAW FIRM, LLP, JAMESTOWN (STEPHEN E. SELLSTROM OF COUNSEL), FOR PETITIONER-APPELLANT.

BLY, SHEFFIELD, BARGAR & PILLITTIERI, JAMESTOWN (LANA M. HUSTON OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered June 15, 2011 in a proceeding pursuant to CPLR article 75. The order remanded this matter to the American Arbitration Association for new proceedings in accordance with its "Regular Track" procedures.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

218

TP 11-01912

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

IN THE MATTER OF CHRISTOPHER CAPPON, PETITIONER,

V MEMORANDUM AND ORDER

CARLOS CARBALLADA, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF NEIGHBORHOOD AND BUSINESS DEVELOPMENT OF CITY OF ROCHESTER AND CITY OF ROCHESTER, RESPONDENTS.

SANTIAGO BURGER ANNECHINO LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR PETITIONER.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [John J. Ark, J.], entered September 12, 2011) to review a determination of respondents. The determination convicted petitioner of violating the Municipal Code of the City of Rochester.

It is hereby ORDERED that the order is unanimously vacated without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: We agree with petitioner that Supreme Court erred in transferring this CPLR article 78 proceeding to this Court pursuant to CPLR 7804 (g) because, contrary to the court's determination, the petition does not raise a substantial evidence issue (*see id.*; *Matter of Burns v Carballada*, 79 AD3d 1785), and under the circumstances we decline to review the merits of the petition in the interest of judicial economy (*see Burns,* 79 AD3d 1785; *cf*. *Matter of Foster v Aurelius Fire Dist.*, 90 AD3d 1585). In his petition, petitioner sought to annul the determination that he violated the Municipal Code of respondent City of Rochester (Code) on the grounds that his conviction under the Code "violates his rights under the Fourth Amendment of the United States Constitution and Article 1 section 12 of the New York Constitution; . . . unlawfully deprives [him] of the beneficial enjoyment of his property and the right to derive income therefrom; and . . . is therefore in violation of lawful procedure, affected by an error of law and arbitrary and capricious." Furthermore, in his brief to this Court, petitioner stated that the petition does not raise a substantial evidence issue. We thus conclude that, under these circumstances, the proceeding should not have been transferred to this Court.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

219

TP 11-01794

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

IN THE MATTER OF LYNWOOD WRIGHT, PETITIONER,

V ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered August 31, 2011) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

221

KA 10-00531

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CLIFFORD D. WATERS, ALSO KNOWN AS CLIFFORD WATERS,
DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, 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 November 9, 2009. 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.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

224

KA 11-00140

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD WHITE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

RONALD WHITE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered December 14, 2010. The judgment convicted defendant, upon a jury verdict, of rape in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him following a jury trial of rape in the third degree (Penal Law § 130.25 [3]), arising out of an incident that occurred on October 10, 2005. Defendant was arrested on August 20, 2008 and indicted on February 19, 2009. We reject defendant's contention in his main brief that Supreme Court erred in denying his motion to dismiss the original indictment pursuant to CPL 30.30 (1) (a). Contrary to the contention of defendant, the People complied with their obligation to be ready for trial within six months of the commencement of the criminal action (*see* CPL 30.30 [1] [a]). The People announced their readiness for trial in open court on February 19, 2009, within the six-month period (*see People v Goss*, 87 NY2d 792, 797; *see generally People v Kendzia*, 64 NY2d 331, 337). Although defendant was not arraigned until March 6, 2009, the time between the announcement of readiness and the arraignment "is attributable solely to the court and not charged to the prosecution" (*Goss*, 87 NY2d at 798; *see People v Rickard*, 71 AD3d 1420, 1421, *lv denied* 15 NY3d 809). In addition, we conclude that because defendant received prompt written notice of the People's readiness for trial, despite the fact that defense counsel was not present at the time of the announcement of readiness and the written notice was sent to the wrong attorney, the People satisfied their obligation to notify defendant of their readiness within the requisite six-month period (*see People v Roberts*, 176 AD2d 1200, 1200-1201, *lv*

denied 79 NY2d 831; *see generally People v Carter*, 91 NY2d 795, 799).

We reject defendant's further contention in his main brief that the court erred in denying his motion to dismiss the superseding indictment on the ground that the People failed to comply with CPL 30.30 (1) (a). The superseding indictment, which only corrected the date of the offense, related back to the commencement of the proceeding for purposes of computing the six-month period (*see People v Sinistaj*, 67 NY2d 236, 239).

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 reject the contention of defendant in his pro se supplemental brief that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant further contends in his pro se supplemental brief that his constitutional rights to a speedy trial and due process of law were violated by the preindictment delay of approximately 40 months (*see generally People v Singer*, 44 NY2d 241, 253-254; *People v Wheeler*, 289 AD2d 959, 959-960). Defendant failed to raise that contention before the trial court, and thus it is not preserved for our review (*see People v Faro*, 83 AD3d 1569, 1569, *lv denied* 17 NY3d 858). Defendant also contends, however, that the failure of defense counsel to move to dismiss the indictment on that ground deprived him of effective assistance of counsel (*see People v Edwards*, 271 AD2d 812, 812). Because we cannot determine on this record whether counsel's failure to make that motion deprived defendant of meaningful representation, we hold the case, reserve decision and remit the matter to Supreme Court for a hearing to determine whether the preindictment delay deprived defendant of his constitutional rights to a speedy trial and due process (*see id.* at 812-813).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

226

KA 10-00616

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STUART J. DIZAK, DEFENDANT-APPELLANT.

BERNARD H. UDELL, BROOKLYN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered December 4, 2009. The judgment convicted defendant, upon a jury verdict, of conspiracy in the second degree (two counts) and criminal solicitation in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts each of conspiracy in the second degree (Penal Law § 105.15) and criminal solicitation in the second degree (§ 100.10). We conclude at the outset, to the extent the People contend that the appeal must be dismissed because defendant failed to serve his notice of appeal in a timely manner, that contention lacks merit. Pursuant to CPL 460.10 (1) (b), "[i]f the defendant is the appellant, he [or she] must, within [30 days after sentence is imposed], serve a copy of [the] notice of appeal upon the district attorney of the county embracing the criminal court in which the judgment . . . being appealed was entered." Any defect in service of the notice of appeal here, however, is not fatal. "[T]he People waived any objection to defendant's failure to serve the notice of appeal by responding to his appeal on the merits rather than filing a motion to dismiss the appeal at some earlier juncture . . . The People, moreover, have failed to demonstrate any prejudice as a result of defendant's alleged failure to comply with CPL 460.10 (1) (b)" (*People v Sayles*, 292 AD2d 641, 642 n, *lv denied* 98 NY2d 681).

Turning to the merits, we reject defendant's contention that County Court erred in limiting his cross-examination of the second coconspirator to testify. We agree with defendant, however, that the court erred in limiting his cross-examination of the first coconspirator to testify. "[C]urtailment [of cross-examination] will

be judged improper when it keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony" (*People v Gross*, 71 AD3d 1526, 1527, *lv denied* 15 NY3d 774 [internal quotation marks omitted]). Although the court providently exercised its discretion by refusing to permit defendant to inquire with respect to that witness's youthful offender adjudication (*see People v Smith*, 90 AD3d 1565, 1566; *see generally People v Cook*, 37 NY2d 591, 595), it erred in limiting defendant's cross-examination concerning the circumstances underlying the youthful offender adjudication and that witness's disorderly conduct conviction (*see People v Gray*, 84 NY2d 709, 712; *People v Lucius*, 289 AD2d 963, 964, *lv denied* 98 NY2d 638; *see generally Gross*, 71 AD3d at 1527). "We . . . conclude, however, that the error is harmless where, as here, 'the witness['s] prior criminal history was extensively explored on cross-examination[,] although not totally or definitively set forth as the defendant may have wished' . . . The record establishes that the court permitted defense counsel to impeach the witness with a litany of other prior bad acts, and thus we conclude that there is no reasonable possibility that the error might have contributed to defendant's conviction" (*Lucius*, 289 AD2d at 964; *see generally People v Crimmins*, 36 NY2d 230, 237). We reject defendant's further contention that the People violated CPL 240.45 based on their failure to comply with their relevant disclosure obligations (*see People v Griffin*, 48 AD3d 894, 895, *lv denied* 10 NY3d 959).

Contrary to defendant's contention, the court's *Molineux* ruling was not an abuse of discretion (*see People v Dorm*, 12 NY3d 16, 19; *People v DiTucci*, 81 AD3d 1249, 1250, *lv denied* 17 NY3d 794). The evidence in question was relevant to defendant's motive and intent (*see People v Kelly*, 71 AD3d 1520, 1521, *lv denied* 15 NY3d 775; *see also People v Bryant*, 74 AD3d 1794, 1795, *lv denied* 15 NY3d 802, 919). In addition, the court "properly balanced the probative value of the evidence against its potential for prejudice to defendant" (*People v Presha*, 83 AD3d 1406, 1407; *see Kelly*, 71 AD3d at 1521). Defendant failed to preserve for our review two of his six contentions concerning alleged instances of prosecutorial misconduct and, in any event, " 'any alleged [prosecutorial] misconduct was not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Szyzskowski*, 89 AD3d 1501, 1503).

We further conclude that the court properly permitted the prosecutor to rehabilitate the second coconspirator to testify on redirect examination. Defense counsel incorrectly impeached that witness on cross-examination by establishing that he omitted a material fact, i.e., his agreement to kill defendant's ex-wife, when he provided a statement to law enforcement authorities shortly after defendant solicited him to kill defendant's ex-wife (*see generally People v Victory*, 33 NY2d 75, 88-89, *cert denied* 416 US 905). There is no evidence in the record that the witness was specifically asked during the subject interaction with authorities whether he agreed to commit the murder, nor was it unnatural for that witness, who was incarcerated at the time, to have omitted that detail from his statements to the authorities (*see People v Broadhead*, 36 AD3d 423,

424, *lv denied* 8 NY3d 919; *People v Byrd*, 284 AD2d 201, *lv denied* 97 NY2d 679; *see also People v Savage*, 50 NY2d 673, 679, *cert denied* 449 US 1016). Defendant failed to preserve for our review his challenges to the jury instructions inasmuch as he did not raise those challenges at trial (*see People v Knapp*, 79 AD3d 1805, 1807, *lv denied* 17 NY3d 807, 808), and we decline to exercise our power to review those challenges as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject the further contention of defendant that the court erred in denying after a hearing his motion pursuant to CPL 330.30, which was based on his alleged inability to hear the proceedings. Defendant's allegations concerning his hearing impairment were refuted by the People's witnesses at the hearing, who collectively described his reaction to testimony and statements at trial and testified that defendant never complained that he was unable to hear the proceedings. "There is no basis to disturb the court's fact-findings and credibility determinations, which are entitled to great deference on appeal" (*People v Romano*, 8 AD3d 503, 504, *lv denied* 3 NY3d 711).

Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence with respect to the intent element of his crimes because he failed to move for a trial order of dismissal on that ground (*see People v Carncross*, 14 NY3d 319, 324-325; *People v Gray*, 86 NY2d 10, 19). In any event, defendant's challenge lacks merit. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to support the convictions (*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 conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject the further contention of defendant that he was denied a fair trial based on various alleged errors. "Insofar as the contention of defendant that he was denied effective assistance of counsel involves matters outside the record on appeal, it must be raised by way of a motion pursuant to CPL article 440" (*see e.g. People v Peters*, 90 AD3d 1507, 1508; *People v McKnight*, 55 AD3d 1315, 1317, *lv denied* 11 NY3d 927). To the extent that defendant's contention is properly before us, we conclude that it lacks merit (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

229

CAF 11-00597

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

IN THE MATTER OF ELSWORTH L. WEAVER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PAMELA L. DURFEY AND ROBERT R. DURFEY,
RESPONDENTS-RESPONDENTS.

ELSWORTH L. WEAVER, PETITIONER-APPELLANT PRO SE.

LEONARD G. TILNEY, JR., LOCKPORT, FOR RESPONDENTS-RESPONDENTS.

KATHLEEN M. CONTRINO, ATTORNEY FOR THE CHILD, NORTH TONAWANDA, FOR SAMANTHA D.

Appeal from an order of the Family Court, Niagara County (David E. Seaman, J.), entered February 17, 2011 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for visitation and custody.

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

Memorandum: Petitioner appeals from an order dismissing his petition seeking, inter alia, visitation with respondents' daughter. Family Court (John F. Batt, J.) dismissed his prior petition seeking to establish paternity of the child. The court found that respondents were married when the child was born and at the time of the hearing on the paternity petition and that, based upon petitioner's admissions, he had acted as a friendly neighbor to the child, although he had regular and significant contact with the child with respondents' consent. The court therefore determined that it was not in the best interests of the child to disrupt her legitimate paternal relationship with respondent father.

After he perfected his appeal from the prior order dismissing the paternity petition, petitioner discontinued that appeal based on his agreement with respondents that respondent mother and the child would participate in DNA testing, which revealed a probability of 99.99% that petitioner is the child's biological father, and that respondents would permit petitioner to visit with the child. The child subsequently began to receive Social Security benefits as petitioner's biological child. Thereafter, respondents refused to permit petitioner to visit with the child, and he filed a petition seeking,

inter alia, visitation based upon the DNA test results. Family Court (David E. Seaman, J.), determined, inter alia, that the petition was barred by res judicata and dismissed the petition. We affirm.

"The resolution of the instant proceeding presents a coalescence of the various societal interests promoted by the doctrine of res judicata, particularly the need for finality, stability and consistency in family status determinations" (*Matter of Michael H. v Carole S.D.*, 198 AD2d 414, 415, *lv denied* 83 NY2d 753). Thus, the court properly determined that it was prohibited by the doctrine of res judicata from considering petitioner's biological parental status as a basis for determining his standing to seek visitation with the child (*see generally Matter of Kelley C. v Kim M.*, 278 AD2d 893, 893). Inasmuch as petitioner has no legal standing to seek visitation with the child, we conclude that the court properly dismissed the petition (*see Michael H.*, 198 AD2d at 415).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

230

CAF 10-00949

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

IN THE MATTER OF TRACY FOX,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CARMEN COLEMAN, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

CARMEN COLEMAN, RESPONDENT-APPELLANT PRO SE.

TRACY FOX, PETITIONER-RESPONDENT PRO SE.

MICHAEL A. ROSENBLOOM, ATTORNEY FOR THE CHILD, ROCHESTER, FOR JUSTIN F.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered March 30, 2010 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted primary physical custody of the parties' younger child to petitioner.

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

Memorandum: In appeal No. 1, respondent mother appeals pro se from an order that, following a hearing, granted in part petitioner father's cross petition seeking, inter alia, to modify a prior order of custody and visitation and awarded him primary physical custody of the parties' younger child, with visitation to the mother. In appeal No. 2, petitioner mother appeals from an order denying her motion seeking, inter alia, attorneys' fees. We affirm the order in each appeal.

We note at the outset that the order in appeal No. 1 addresses the issues of custody and visitation with respect to only the parties' younger child. The mother's contentions with respect to the parties' older child are not properly before us because she failed to appeal from the prior order granting the father custody of that child (*see Johnson v Johnson*, 190 AD2d 1084; *see generally Hoffman v Hoffman*, 31 AD3d 1125, 1126; *Matter of Parrinello*, 213 AD2d 1006, 1006-1007). In any event, we note that the mother stipulated to that prior order, and no appeal lies from an order entered upon the parties' consent (*see Matter of Cherilyn P.*, 192 AD2d 1084, *lv denied* 82 NY2d 652).

Contrary to the mother's contention in appeal No. 1, Family Court

properly granted the father's cross petition. Inasmuch as "there is no challenge to [the c]ourt's finding of a change in circumstances, we need only address whether it was in the child[ ]'s best interests to" award custody to the father (*Matter of Bush v Bush*, 74 AD3d 1448, 1449, *lv denied* 15 NY3d 711; *see Matter of Dickerson v Robenstein*, 68 AD3d 1179, 1180). To the extent that the mother contends that the court's determination is not supported by legally sufficient evidence, we reject that contention. " 'Generally, a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record' " (*Matter of Dubuque v Bremiller*, 79 AD3d 1743, 1744). Here, the court's determination is supported by the requisite " 'sound and substantial basis in the record,' " and thus it will not be disturbed (*id.*).

We have considered the mother's remaining contentions with respect to each appeal and conclude that they are without merit.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

231

CAF 10-02053

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

IN THE MATTER OF CARMEN COLEMAN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TRACY FOX, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

CARMEN COLEMAN, PETITIONER-APPELLANT PRO SE.

TRACY FOX, RESPONDENT-RESPONDENT PRO SE.

MICHAEL A. ROSENBLOOM, ATTORNEY FOR THE CHILD, ROCHESTER, FOR JUSTIN F.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered September 17, 2010 in a proceeding pursuant to Family Court Act article 6. The order denied the motion of petitioner for attorneys' fees.

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

Same Memorandum as in *Matter of Fox v Coleman* (___ AD3d ___ [Mar. 16, 2012]).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

234

CA 11-00173

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

PATRICIA J. CURTO, CLAIMANT-APPELLANT,

V ORDER

NEW YORK STATE THRUWAY AUTHORITY AND
NEW YORK STATE, DEFENDANTS-RESPONDENTS.
(CLAIM NO. 116804-A.)
(APPEAL NO. 1.)

PATRICIA J. CURTO, CLAIMANT-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered April 2, 2010. The order dismissed the claim for lack of jurisdiction pursuant to CPLR 3211.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

235

CA 11-00175

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

PATRICIA J. CURTO, CLAIMANT-APPELLANT,

V ORDER

NEW YORK STATE THRUWAY AUTHORITY AND
NEW YORK STATE, DEFENDANTS-RESPONDENTS.
(CLAIM NO. 116804-A.)
(APPEAL NO. 2.)

PATRICIA J. CURTO, CLAIMANT-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered September 16, 2010. The order, inter alia, granted the motion of claimant for leave to reargue, and upon reargument, dismissed the claim pursuant to CPLR 3212.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

239

CA 11-01890

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

SHAWN MCCARTHY, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

CSX TRANSPORTATION, INC.,
DEFENDANT-RESPONDENT-APPELLANT.

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

MAYER BROWN LLP, WASHINGTON, D.C. (CARL J. SUMMERS OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered November 19, 2010. The order denied plaintiff's motion to set aside the verdict and denied defendant's cross motion to set aside the verdict.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

243

CA 11-02094

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

FRANK M. PIACENTE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JANICE J. PIACENTE, DEFENDANT-RESPONDENT.

DONALD J. MURPHY, UTICA, FOR PLAINTIFF-APPELLANT.

WILLARD R. PRATT, III, SYLVAN BEACH, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered June 6, 2011 in a divorce action. The order directed plaintiff to pay to defendant the sum of $96,564.37, plus interest, costs and attorneys' fees.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part directing plaintiff to pay interest prior to the entry of the order and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Herkimer County, for a determination whether plaintiff's failure to transfer the remaining amount owed to defendant pursuant to the judgment of divorce was willful.

Memorandum: Plaintiff appeals from an order granting, inter alia, that part of defendant's motion seeking enforcement of the judgment of divorce insofar as it distributed certain assets. Contrary to the contention of plaintiff, the clear and unambiguous language of the parties' stipulation, which was incorporated but not merged into the judgment of divorce, provided that plaintiff would pay to defendant a total amount of $130,000 (*see generally Lape v Lape*, 66 AD3d 1405, 1406). Thus, we conclude that Supreme Court properly determined that plaintiff was required to transfer to defendant from his IRA account the amount of $96,564.37, i.e., the balance owed to her after the transfer of a joint investment account.

We reject plaintiff's further contention that the court erred in awarding defendant attorneys' fees without first conducting a hearing to determine the reasonableness of the fees. Plaintiff did not request such a hearing, and thus he waived that right (*see Bogannam v Bogannam*, 60 AD3d 985, 987). In any event, we conclude that the court properly awarded fees to defendant, "the less monied spouse," in this enforcement proceeding, inasmuch as plaintiff failed to rebut the statutory presumption that defendant is entitled to attorneys' fees (Domestic Relations Law § 237 [b]).

Finally, plaintiff contends that the court erred in ordering him to pay interest on the remaining amount owed to defendant from the date he transferred the joint account to defendant to the date of the hearing on the motion. We are unable to determine on this record whether the court found that plaintiff's failure to transfer the funds from the IRA account was willful (*see* Domestic Relations Law § 244; *cf. Goldkranz v Goldkranz*, 82 AD3d 699, 700). We therefore modify the order by vacating that part awarding defendant interest prior to the entry of the order, and we remit the matter to Supreme Court for a determination whether plaintiff's failure to transfer those funds was willful.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

244

CA 11-02074

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

KIM M. BRADY, PLAINTIFF,

V MEMORANDUM AND ORDER

PAT CASILIO, ROSEMARY CASILIO, CASILIO REAL ESTATE & DEVELOPMENT CORPORATION, DELAWARE NASH BUILDING, LLC, NORTHWEST BANKCORP MHC, DEFENDANTS-APPELLANTS,
HUNT & ASSOCIATES 2021, LLC, JJJJJ & ASSOCIATES, LLC, AND M.J. MANZELLA & ASSOCIATES, LLC, DEFENDANTS-RESPONDENTS.

SUGARMAN LAW FIRM LLP, SYRACUSE (MICHAEL A. RIEHLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS PAT CASILIO, ROSEMARY CASILIO, CASILIO REAL ESTATE & DEVELOPMENT CORPORATION, AND DELAWARE NASH BUILDING, LLC.

THE LAW OFFICE OF EDWARD M. EUSTACE, WHITE PLAINS (CHRISTOPHER M. YAPCHANYK OF COUNSEL), FOR DEFENDANT-APPELLANT NORTHWEST BANKCORP MHC.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (NEIL A. PAWLOWSKI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered July 14, 2011 in a personal injury action. The order denied the motion of defendants Pat Casilio, Rosemary Casilio, Casilio Real Estate & Development Corporation, and Delaware Nash Building, LLC, and the cross motion of defendant Northwest Bankcorp MHC for summary judgment dismissing the complaint and cross claims.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion and cross motion are granted and the complaint and all cross claims against defendants Pat Casilio, Rosemary Casilio, Casilio Real Estate & Development Corporation, Delaware Nash Building, LLC and Northwest Bankcorp MHC are dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell in a parking lot. Defendants Pat Casilio, Rosemary Casilio, Casilio Real Estate & Development Corporation and Delaware Nash Building, LLC (collectively, Casilio defendants) moved for summary judgment dismissing the complaint and all cross claims against them, and defendant Northwest Bankcorp MHC (Northwest) cross-moved for the same relief. We agree with the Casilio defendants and Northwest that Supreme Court erred in

denying their motion and cross motion, respectively, and we therefore reverse.

According to plaintiff, she fell on the premises at 2987 Delaware Avenue in Kenmore, New York. Defendants Hunt & Associates 2021 LLC, JJJJJ & Associates, LLC and M.J. Manzella & Associates, LLC (collectively, Hunt defendants) admitted in their answer that they owned that property. The Casilio defendants moved and Northwest cross-moved for summary judgment on the ground that they did not own or control the premises upon which the accident allegedly occurred. In support of the motion and cross motion, they submitted the pleadings and the deposition testimony of plaintiff, in which she testified that she slipped and fell in a parking lot, as well as the photograph exhibit from that deposition, which established that the parking lot is adjacent to the property owned or leased by the Casilio defendants and Northwest. We therefore conclude that those defendants met their initial burden by submitting admissible evidence establishing that they did not own the property where the accident occurred (*see Biggs v Hess*, 85 AD3d 1675, 1675-1676).

In opposition to the motion and the cross motion, the Hunt defendants failed to raise a triable issue of fact whether the Casilio defendants and Northwest owned the property in question. Contrary to the contention of the Hunt defendants, the police accident report and the deposition testimony of the officer who filled it out are insufficient to raise a triable issue of fact. The officer did not observe the accident, and his testimony repeating plaintiff's statements constitutes hearsay (*see generally Quinones v New England Motor Frgt. Inc.*, 80 AD3d 514, 515; *Christopher v Coach Leasing, Inc.*, 66 AD3d 1522, 1523). Furthermore, even assuming, arguendo, that the testimony and report would be admissible evidence, we conclude that they fail to establish that plaintiff contradicted her deposition testimony regarding the location of the accident.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

245

CA 11-01485

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

BOARD OF EDUCATION OF SOLVAY UNION FREE SCHOOL DISTRICT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

J.D. TAYLOR CONSTRUCTION CORPORATION, TURNER CONSTRUCTION COMPANY, DEFENDANTS-RESPONDENTS, AND QPK DESIGN, DEFENDANT-APPELLANT.

J.D. TAYLOR CONSTRUCTION CORPORATION, THIRD-PARTY PLAINTIFF,

V

DAMACO WINDOW CONTRACTORS, INC., THIRD-PARTY DEFENDANT-RESPONDENT, AND KALWALL CORPORATION, THIRD-PARTY DEFENDANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (MATTHEW D. GUMAER OF COUNSEL), FOR DEFENDANT-APPELLANT.

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C., EAST SYRACUSE (KATHERINE E. GAVETT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

SHEATS & ASSOCIATES, P.C., BREWERTON (JASON B. BAILEY OF COUNSEL), FOR DEFENDANT-RESPONDENT J.D. TAYLOR CONSTRUCTION CORPORATION.

GOLDBERG SEGALLA LLP, SYRACUSE (KENNETH M. ALWEIS OF COUNSEL), FOR DEFENDANT-RESPONDENT TURNER CONSTRUCTION COMPANY.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered May 9, 2011. The order, among other things, denied the motion of defendant QPK Design for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of defendant QPK Design's motion for summary judgment dismissing the third and fourth cross claims of defendant Turner Construction Company against it and as modified the order is affirmed without costs.

Memorandum: We conclude that Supreme Court erred in denying those parts of defendant QPK Design's motion for summary judgment dismissing the third and fourth cross claims of defendant Turner Construction Company against it, for contractual indemnification and

breach of contract based on QPK Design's failure to procure the requisite insurance (*cf. DiBuono v Abbey, LLC*, 83 AD3d 650, 652-653; *Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 939; *see generally A & E Stores, Inc. v U.S. Team, Inc.*, 63 AD3d 486). We therefore modify the order accordingly. We reject the remaining contentions of QPK Design for reasons stated by the court in its bench decision.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

246

KA 10-02151

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TREMEL STONE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered September 22, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

247

KA 10-02431

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RASAUN L. BLACKMON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered October 5, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

248

KA 10-01861

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DUANE L. LOYD, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered April 14, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree and criminal possession of a weapon in the third degree.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

249

KA 10-01862

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DUANE L. LOYD, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered April 14, 2010. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree and attempted forgery in the second degree.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

251

KA 09-01485

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTWON M. WILLIAMS, ALSO KNOWN AS ANTWON Q. WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered May 27, 2009. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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

Memorandum: Upon appeal from a judgment convicting him following his plea of guilty of burglary in the first degree (Penal Law § 140.30 [2]), defendant contends that his written waiver of his right to appeal, which he executed as part of the plea agreement, is not valid. We reject that contention (*see People v Caraballo*, 59 AD3d 971, *lv denied* 12 NY3d 852; *People v Duncan*, 267 AD2d 995, *lv denied* 94 NY2d 918). Defendant's further contention that County Court erred in denying that part of his omnibus motion seeking to suppress his statement made to the police is encompassed by defendant's waiver of the right to appeal (*see People v Kemp*, 94 NY2d 831, 833). Although defendant's contention that his plea was not knowing, voluntary and intelligent survives his valid waiver of the right to appeal (*see People v Zulian*, 68 AD3d 1731, 1732, *lv denied* 14 NY3d 894), defendant failed to preserve that contention for our review inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction (*see People v Watts*, 78 AD3d 1593, *lv denied* 16 NY3d 838). Nor can it be said that this case falls within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

252

KA 10-02161

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE L. SCOTT, ALSO KNOWN AS ANDRE SCOTT,
DEFENDANT-APPELLANT.

CHARLES J. GREENBERG, BUFFALO, 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 October 28, 2010. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, attempted murder in the second degree and arson in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and arson in the second degree (§ 150.15), defendant contends that the evidence is legally insufficient to support the conviction. We reject that contention. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences to support the jury's finding that defendant committed the crimes of which he was convicted based on the evidence presented at trial (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant's contention that County Court erred in refusing to suppress evidence that was seized by a parole officer and provided to the police officers investigating the instant criminal activity. It is well settled that a "parole officer may conduct a warrantless search where 'the conduct of the parole officer was rationally and reasonably related to the performance of the parole officer's duty' " (*People v Nappi*, 83 AD3d 1592, 1593, *lv denied* 17 NY3d 820, quoting *People v Huntley*, 43 NY2d 175, 181). Here, two parole officers were assisting Batavia police officers in locating

defendant, and the parole officers smelled alcohol on defendant's breath. They knew that defendant's special conditions of parole prohibited him from consuming alcohol, and they therefore were acting within their duties in taking samples of his saliva and breath for alcohol and drug testing purposes. Based on the evidence presented at the suppression hearing, we cannot conclude that "the trial court erred, as a matter of law, in concluding that the search of the defendant[] . . . by [the] parole officer[s], with police assistance, . . . 'was in furtherance of parole purposes and related to [their] duty' " as parole officers (*People v Johnson*, 63 NY2d 888, 890, *rearg denied* 64 NY2d 647; *see People v Lynch*, 60 AD3d 1479, 1480, *lv denied* 12 NY3d 926).

Contrary to defendant's further contention, the court did not abuse its discretion in refusing to permit him to introduce evidence of a third party's alleged involvement in the criminal activity. Although "evidence tending to show that another party might have committed the [criminal activity] would be admissible, before such testimony can be received there must be such proof of connection with it, such a train of facts or circumstances as tend clearly to point out [someone] besides [defendant] as the guilty party" (*Greenfield v People*, 85 NY 75, 89; *see People v Schulz*, 4 NY3d 521, 529). Furthermore, "[r]emote acts, disconnected and outside of the [criminal activity] itself, cannot be separately proved for such a purpose" (*Greenfield*, 85 NY at 89; *see Schulz*, 4 NY3d at 529). Here, given the lack of evidence supporting defendant's theory, "the testimony of the defense witness that the third party in question might have [had a motive to harm one of the residents of the apartment building where the fire occurred] was irrelevant and, indeed, was likely to cause undue prejudice . . . and confusion with respect to the evidence presented to the jury" (*People v Prindle*, 63 AD3d 1597, 1598, *mod on other grounds* 16 NY3d 768 [internal quotation marks omitted]; *see Schulz*, 4 NY3d at 528). "Contrary to the defendant's [further] contention, the court properly allowed the People's witness to testify as an expert in the field of forensic DNA analysis and the court's decision, given the absence of an abuse or improvident exercise of discretion, [will] not be disturbed on appeal" (*People v Holman*, 248 AD2d 637, 638, *lv denied* 92 NY2d 853, 861; *see generally People v Cronin*, 60 NY2d 430, 432-433).

Inasmuch "as defense counsel never specifically objected to the DNA testimony on the grounds he now presses on appeal, namely that [there was an insufficient foundation for the introduction of that evidence due to the testing that was performed], defendant failed to preserve this issue for our review" (*People v Encarnacion*, 87 AD3d 81, 89, *lv denied* 17 NY3d 952; *see generally People v Gray*, 86 NY2d 10, 19). In any event, defendant's contentions go to the weight of the evidence, not its admissibility (*see People v Borden*, 90 AD3d 1652, 1653). Contrary to defendant's further contention that there was an insufficient chain of custody with respect to the evidence upon which the DNA testing was performed, we conclude that " 'the circumstances provide reasonable assurances of the identity and unchanged condition' of the evidence" (*People v Julian*, 41 NY2d 340, 343), and any deficiencies in the chain of custody therefore "affect only the weight

of the evidence and not its admissibility" (*People v Watkins*, 17 AD3d 1083, 1084, *lv denied* 5 NY3d 771).

Finally, defendant failed to preserve for our review his contention that the orders of protection issued by the court do not comport with CPL 530.13 (*see People v Nieves*, 2 NY3d 310, 315-317), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

254

KA 11-01328

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

JAVIER BACHILLER, DEFENDANT-RESPONDENT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MICHAEL A. KASMAREK OF COUNSEL), FOR APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), dated February 15, 2011. The order granted the motion of defendant to suppress certain physical evidence.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, that part of the omnibus motion to suppress physical evidence is denied, and the matter is remitted to Onondaga County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion to suppress physical evidence, i.e., a handgun. We agree with the People that reversal is required.

The testimony at the suppression hearing established that an officer responded to a report of a possible stabbing in the City of Syracuse and observed approximately 100 people in the street leaving a house party. In addition to some "minor disturbances," there was also "yelling." The area in which the reported stabbing occurred had been the scene of numerous violent crimes and a recent homicide. After the responding officer exited his patrol car, his attention was drawn to a heated argument between defendant and another man. The other man turned and ran through adjacent backyards, and defendant chased him.

As defendant correctly concedes, the report of a possible stabbing coupled with the responding officer's observations at the scene furnished the police with the requisite "founded suspicion that criminal activity [was] afoot" sufficient to justify the common-law right of inquiry (*People v Moore*, 6 NY3d 496, 498; *see People v De Bour*, 40 NY2d 210, 223). "This right authorized the police to ask questions of defendant—and to follow defendant while attempting to engage him—but not to seize him in order to do so" (*Moore*, 6 NY3d at 500).

The issue before us thus is whether the police thereafter obtained the requisite reasonable suspicion to justify their pursuit of defendant (*see generally People v Sierra*, 83 NY2d 928, 929; *People v Martinez*, 80 NY2d 444, 446; *People v Riddick*, 70 AD3d 1421, 1422, *lv denied* 14 NY3d 844). "Flight alone, . . . or even in conjunction with equivocal circumstances that might justify a police request for information . . . , is insufficient to justify pursuit because an individual has a right 'to be let alone' and refuse to respond to police inquiry" (*People v Holmes*, 81 NY2d 1056, 1058; *see Riddick*, 70 AD3d at 1422). However, "a defendant's flight in response to an approach by the police, *combined with other specific circumstances indicating that the suspect may be engaged in criminal activity*, may give rise to reasonable suspicion" (*Sierra*, 83 NY2d at 929 [emphasis added]; *see Holmes*, 81 NY2d at 1058; *Riddick*, 70 AD3d at 1422). In determining whether a pursuit was justified by reasonable suspicion, " 'the emphasis should not be narrowly focused on . . . any . . . single factor, but [rather] on an evaluation of the totality of circumstances, which takes into account the realities of everyday life unfolding before a trained officer' " (*People v Stephens*, 47 AD3d 586, 589, *lv denied* 10 NY3d 940).

Here, the responding officer and two other officers patrolled the area searching for defendant and the other man in order to investigate whether they were involved in the alleged stabbing or in other criminal activity. The initial responding officer drove around the surrounding area until he saw defendant. When defendant observed the patrol car, he "immediately turned and began to walk in a brisk manner . . . in the opposite direction [from which] he was heading." The responding officer then radioed the two other officers and notified them of defendant's location and direction of travel. Shortly thereafter, the two officers observed defendant moving toward them at a fast pace. When defendant saw the officers, he stopped, turned, and ran in the opposite direction. While defendant was running, the two officers observed him grab and hold onto an object in his waistband area with his left hand. Both officers testified that they believed that defendant was grabbing a gun concealed in his waistband. One of the officers yelled to the other that he believed defendant had a gun, and both officers drew their service weapons and pursued defendant as he fled. Defendant did not respond to the officers' repeated requests to stop and show his hands. As defendant was running, he discarded a handgun, which the police later recovered.

We agree with the People that defendant's flight from the police, coupled with his actions in grabbing an object at his waistband, gave rise to a reasonable suspicion sufficient to justify their pursuit of defendant (*see Moore*, 6 NY3d at 500-501; *People v Zeigler*, 61 AD3d 1398, 1398-1399, *lv denied* 13 NY3d 864; *see also People v Pines*, 99 NY2d 525; *People v Crisler*, 81 AD3d 1308, 1309, *lv denied* 17 NY3d 793; *Stephens*, 47 AD3d at 587-589). Although defendant contends that the police did not know what he was holding in his left hand, "[i]t is quite apparent to an experienced police officer, and indeed it may almost be considered common knowledge, that a handgun is often carried in the waistband" (*People v Benjamin*, 51 NY2d 267, 271; *see Zeigler*, 61 AD3d at 1399; *see also Holmes*, 81 NY2d at 1058). Courts have long

held that the police need not "await the glint of steel" before acting to preserve their safety (*Benjamin*, 51 NY2d at 271; *see People v Stokes*, 262 AD2d 975, 976, *lv denied* 93 NY2d 1028). Notably, defendant was not simply reaching in the direction of his waistband. Rather, the two officers as well as the initial responding officer, who was also pursuing defendant, testified that defendant was clutching an object that appeared to be a gun at his waistband, and the court "fully credit[ed]" their testimony.

Thus, under the circumstances presented here, we conclude that the court erred in granting that part of defendant's omnibus motion seeking suppression of the physical evidence seized by the police.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

256

KA 09-00594

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNY MILLS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered July 21, 2008. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fifth degree and criminal possession of a controlled substance in the seventh degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a nonjury trial, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and related offenses. County Court properly denied defendant's motion seeking suppression of physical evidence seized by police officers from his person and his vehicle. Contrary to defendant's contention, the approach of the vehicle by the police officer was "justified by an 'articulable basis,' meaning 'an objective, credible reason not necessarily indicative of criminality' " (*People v Grady*, 272 AD2d 952, *lv denied* 95 NY2d 905, quoting *People v Ocasio*, 85 NY2d 982, 985). The officer observed the vehicle at 2:30 A.M. parked with the engine running in an area known for drug activity and, after checking the records on the license plate, the officer learned that the vehicle was registered to a parolee. He thus had articulable bases for approaching the vehicle and requesting information (*see People v Gandy*, 85 AD3d 1595, *lv denied* 17 NY3d 859; *Grady*, 272 AD2d 952). The officer acquired the requisite probable cause to search defendant and the vehicle when he looked into the vehicle and observed what appeared to be baggies of marihuana in plain view (*see Gandy*, 85 AD3d at 1596; *Grady*, 272 AD2d 952). Contrary to defendant's further contention, minor discrepancies in the suppression hearing testimony of that officer and the backup officer who arrived at the scene do not warrant

disturbing the court's determination (*see People v Weems*, 61 AD3d 472, *lv denied* 13 NY3d 750).

By failing to renew his motion for a trial order of dismissal after presenting the testimony of a witness, defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish his intent to sell the marihuana (*see People v Hines*, 97 NY2d 56, 61). In any event, that contention lacks merit (*see People v James*, 90 AD3d 1249; *People v Brown*, 52 AD3d 1175, 1177, *lv denied* 11 NY3d 923). Further, in view of our determination that the evidence is legally sufficient to support the conviction, defendant has failed to establish that a renewed motion for a trial order of dismissal " 'would be meritorious upon appellate review,' " and thus we reject defendant's contention that he was denied effective assistance of counsel based upon defense counsel's failure to renew the motion (*People v Carrasquillo*, 71 AD3d 1591, 1591, *lv denied* 15 NY3d 803; *see People v Donaldson*, 89 AD3d 1472, 1473). Finally, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

257

CAF 10-02219

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF DANIEL B. HARDER, JR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NICOLE B. PHETTEPLACE, RESPONDENT-RESPONDENT.

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

KELIANN M. ELNISKI, ELLICOTTVILLE, FOR RESPONDENT-RESPONDENT.

EMILY A. VELLA, ATTORNEY FOR THE CHILD, SPRINGVILLE, FOR OLIVIA H.

Appeal from an order of the Family Court, Cattaraugus County (Judith E. Samber, R.), entered September 29, 2010 in a proceeding pursuant to Family Court Act article 6. The order denied the amended petition for a modification of a prior visitation order.

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

Memorandum: Petitioner father appeals from an order denying his amended petition seeking to modify a prior visitation order. Contrary to the father's contention, we conclude that the Court Attorney Referee (Referee) properly denied the amended petition. "An order of visitation cannot be modified unless there has been a sufficient change in circumstances since the entry of the prior order which, 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). Contrary to the father's contention, he failed to demonstrate such a change in circumstances.

We reject the father's further contention that the Referee erred in directing that visitation be therapeutically supervised. "Generally, a [referee]'s determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record . . . We see no basis to disturb the [Referee]'s determination inasmuch as it was based on the [Referee]'s credibility assessments of the witnesses and is supported by a sound and substantial basis in the record" (*Matter of Krug v Krug*, 55 AD3d 1373, 1374 [internal quotation marks omitted]; *see Matter of Dubuque v*

Bremiller, 79 AD3d 1743). We note in particular that the father failed to establish that he had fully complied with the preconditions to visitation that were set forth in the prior order, to which he stipulated.

Finally, we also reject the father's contention that the Referee erred in reiterating a condition from the prior order that directed the father, before unsupervised visitation would be permitted, to undergo a further evaluation by a psychologist who had previously evaluated him. The Referee's reiteration of that condition in the prior order "clearly does not constitute an impermissible requirement of participation in therapy as a condition to applying for visitation" (*Zafran v Zafran*, 28 AD3d 753, 756; *see* Family Ct Act § 251 [a]; *cf. Shuchter v Shuchter*, 259 AD2d 1013).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

258

CAF 10-01707

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF JHANELLE B.

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

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

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

KIMBERLY A. KOLCH, UTICA, FOR PETITIONER-RESPONDENT.

MONICA R. BARILE, ATTORNEY FOR THE CHILD, NEW HARTFORD, FOR JHANELLE B.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered June 28, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent.

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

Memorandum: In each appeal, respondent mother appeals from respective orders revoking a suspended judgment and terminating her parental rights with respect to her three children. Contrary to the mother's contention, Family Court did not err in failing to conduct a dispositional hearing on the best interests of the children following her admission that she failed to comply with the conditions of the suspended judgments. Indeed, the record establishes that the court "had already considered their best interests when it suspended judgment and indicated to [the mother] that if [s]he failed to comply with the conditions [her] parental rights could be terminated" (*Matter of Grace Q.*, 200 AD2d 894, 896; *see Matter of Shavira P.*, 283 AD2d 1027, 1028, *lv denied* 97 NY2d 604; *Matter of Brendan A.*, 278 AD2d 784, 784-785; *see generally* Family Ct Act § 633 [f]; 22 NYCRR 205.50 [d] [5]). The court was not required to conduct a further dispositional hearing (*see Matter of Darren V.*, 61 AD3d 986, 986-987, *lv denied* 12 NY3d 715; *Matter of Christopher J.*, 60 AD3d 1402, 1403; *Shavira P.*, 283 AD2d at 1028; *Brendan A.*, 278 AD2d at 785), inasmuch as matters considered in regard to a parent's violation of a suspended judgment are part of the dispositional stage in permanent neglect proceedings (*see Christopher J.*, 60 AD3d at 1403; *Matter of Seandell L.*, 57 AD3d 1511, 1511, *lv denied* 12 NY3d 708; *Matter of Saboor C.*, 303 AD2d 1022,

1023). In addition, we conclude that the court did not abuse its discretion in declining to do so, and we note that in fact the mother did not request a hearing. Further, the record establishes that the children have spent almost their entire lives in foster care and were in a placement that was an adoptive resource, and that the mother has been unwilling to confront her chemical dependency issues, which was a central concern that led to the removal of the children. We thus conclude that the court's determination to terminate her parental rights was in the children's best interests (*see Matter of Clifton ZZ.*, 75 AD3d 683, 685; *Darren V.*, 61 AD3d at 988; *Matter of Lord-El T.*, 260 AD2d 955, 956; *Grace Q.*, 200 AD2d at 896). The mother's remaining contentions are either not preserved for our review or are without merit.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

259

CAF 10-01708

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF MELAKHAI P.

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

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

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

KIMBERLY A. KOLCH, UTICA, FOR PETITIONER-RESPONDENT.

MONICA R. BARILE, ATTORNEY FOR THE CHILD, NEW HARTFORD, FOR MELAKHAI P.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered June 28, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent.

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

Same Memorandum as in *Matter of Jhanelle B.* (___ AD3d ___ [Mar. 16, 2012]).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

260

CAF 10-01709

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF OCTAVIA S.

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

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

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

KIMBERLY A. KOLCH, UTICA, FOR PETITIONER-RESPONDENT.

MONICA R. BARILE, ATTORNEY FOR THE CHILD, NEW HARTFORD, FOR OCTAVIA S.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered June 28, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent.

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

Same Memorandum as in *Matter of Jhanelle B.* (___ AD3d ___ [Mar. 16, 2012]).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

261

CAF 11-01998

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

IN THE MATTER OF JUDY A. KAVANAUGH,
PETITIONER-RESPONDENT,

V ORDER

LAWRENCE M. KAVANAUGH, JR.,
RESPONDENT-APPELLANT.

LAW OFFICES OF JAWORSKI & GIACOBBE, CHEEKTOWAGA (DAVID V. JAWORSKI OF COUNSEL), FOR RESPONDENT-APPELLANT.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered January 19, 2011 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of respondent to the order of the Support Magistrate.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 14, 2012,

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

263

CA 11-01858

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

WELLESLEY ISLAND WATER CORP.,
PLAINTIFF-APPELLANT,

V ORDER

WELLS ISLAND REALTY CORP., JOAN C. LEWIS, LINDA A. TWICHELL, JAMES KIERNAN, JUDITH KIERNAN, DONALD BARTER, JANET BARTER, JOHN EDMINSTER, VALERIE EDMINSTER, JAMES BREUER, TAYLOR FAMILY PARTNERSHIP, JOHN HESSION, JOAN HESSION, GLENN TIMMERMAN, PHYLLIS TIMMERMAN, JAMES W. FENN, SARAH DUNKIRK,
DEFENDANTS-RESPONDENTS,
ELIZABETH WILMOT, ET AL., DEFENDANTS.

SLYE & BURROWS, WATERTOWN (ROBERT J. SLYE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FIX SPINDELMAN BROVITZ & GOLDMAN, P.C., FAIRPORT (KARL S. ESSLER OF COUNSEL), FOR DEFENDANT-RESPONDENT SARAH DUNKIRK.

MENTER, RUDIN & TRIVELPIECE, P.C., WATERTOWN (JULIAN B. MODESTI OF COUNSEL), FOR DEFENDANT-RESPONDENT WELLS ISLAND REALTY CORP.

P. DAVID TWICHELL, BALDWINSVILLE, FOR DEFENDANTS-RESPONDENTS JOAN C. LEWIS AND LINDA A. TWICHELL.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS JAMES KIERNAN, JUDITH KIERNAN, DONALD BARTER, JANET BARTER, JOHN EDMINSTER, VALERIE EDMINSTER, JAMES BREUER, TAYLOR FAMILY PARTNERSHIP, JOHN HESSION, JOAN HESSION, GLENN TIMMERMAN, PHYLLIS TIMMERMAN, AND JAMES W. FENN.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered February 2, 2011. The order, among other things, dismissed plaintiff's first amended complaint.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Da Silva v Musso*, 76 NY2d 436).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

264

CA 11-01570

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

ERNEST P. THOMPSON AND WENDY J. THOMPSON,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TINA M. NAISH, ALSO KNOWN AS TINA M. GERNATT,
DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

SOUTHERN TIER LEGAL SERVICES, A DIVISION OF LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., JAMESTOWN (TODD M. THOMAS OF COUNSEL), FOR DEFENDANT-APPELLANT.

CLARK & WHIPPLE, LLP, FREDONIA (RICHARD F. WHIPPLE, JR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered April 4, 2011 in a foreclosure action. The order vacated a previous order setting aside a judgment of foreclosure and reinstated said judgment.

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

Memorandum: As limited by her brief, Tina M. Naish, also known as Tina M. Gernatt (defendant), appeals from an order, entered following a nonjury trial, determining that defendant was in default on a mortgage issued by plaintiffs, and reinstating a previously vacated judgment of foreclosure. Contrary to defendant's contention, Supreme Court did not err in concluding that she had defaulted on the mortgage. Plaintiffs established that defendant did not pay the mortgage for the final six months of its term, nor did she pay it within the month after that term expired. Plaintiffs' attorney then wrote defendant a letter demanding payment within seven days, and defendant failed to respond within that time, or within the month after the expiration of that seven-day grace period.

We agree with defendant that "[o]f particular importance is a fundamental principle that has informed the law of agency and corporations for centuries; namely, the acts of agents, and the knowledge they acquire while acting within the scope of their authority are presumptively imputed to their principals" (*Kirschner v KPMG LLP*, 15 NY3d 446, 465; *see Henry v Allen*, 151 NY 1, 9). Thus, the payment that she belatedly provided to plaintiffs' attorney is

deemed received by plaintiffs at that time. Given that a month had passed between the final date set in plaintiffs' demand letter and the time she sent that payment, however, and given that additional accrued interest was added to the mortgage balance pursuant to the terms of the mortgage contract, her payment did not constitute full payment of the outstanding balance of the loan. Furthermore, we agree with the court that plaintiffs acted in good faith to protect their investment when they paid the outstanding three-year tax bill on the mortgaged property without actual knowledge that defendant had paid part of her balance due on the mortgage. That payment was also added to the mortgage balance pursuant to the terms of the contract. Inasmuch as defendant owed plaintiffs far more than the minimal interest on the unpaid balance (*cf. Matter of County of Ontario [Middlebrook]*, 59 AD3d 1065), the court did not abuse its discretion in concluding that she was in default on the mortgage.

Contrary to defendant's further contention, she "failed to show that the equities indisputably favor [her]" position (*Citibank, N.A. v Grant*, 21 AD3d 924). Defendant is correct that, " '[o]nce equity is invoked, the court's power is as broad as equity and justice require' " (*Mortgage Elec. Regis. Sys. v Horkan*, 68 AD3d 948, 948). Here, however, equity does not require a different result. Although defendant tendered the amount demanded by plaintiffs, she did so more than a month after the date upon which plaintiffs indicated that they would accept payment in lieu of commencing a foreclosure action, and failed to include any payment for the interest that accrued in the interim. In addition, she was still in default on the property's taxes. She failed to contact plaintiffs to notify them that she was sending payment, and in fact the payment was sent to plaintiffs' attorney while he was on vacation. Thus, the court did not abuse its discretion in balancing the equities in favor of plaintiffs, and declining to overlook defendant's default.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

265

CA 11-01050

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF JOVAN FLUDD,
PETITIONER-APPELLANT,

V ORDER

ROBERT A. KIRKPATRICK, SUPERINTENDENT, WENDE
CORRECTIONAL FACILITY, ET AL.,
RESPONDENTS-RESPONDENTS.

JOVAN FLUDD, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated decision and order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered March 31, 2011 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

266

CA 11-01972

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

THERESA HARRITY,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

JARED M. LEONE AND MARTIN PETERSON,
DEFENDANTS-APPELLANTS-RESPONDENTS.

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

LAW OFFICES OF KAREN LAWRENCE, DEWITT (BARNEY F. BILELLO OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT MARTIN PETERSON.

CELLINO & BARNES, P.C., ROCHESTER (SAREER A. FAZILI OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeals and cross appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered February 8, 2011 in a personal injury action. The order granted in part and denied in part the respective motion and cross motions of the parties for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of plaintiff's cross motion seeking dismissal of the first affirmative defense in each answer and reinstating that affirmative defense and by transposing defendants' surnames in the last ordering paragraph, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries she sustained when the vehicle in which she was a passenger, driven by defendant Jared M. Leone, collided with a vehicle driven by defendant Martin Peterson. Supreme Court granted those parts of defendants' respective motion and cross motion for summary judgment dismissing plaintiff's claims under the significant disfigurement and the 90/180-day categories of serious injury within the meaning of Insurance Law § 5102 (d), but denied those parts of their motions on the issue of negligence and on plaintiff's claims under the permanent consequential limitation of use and the significant limitation of use categories of serious injury. In addition, the court granted that part of plaintiff's cross motion seeking dismissal of the affirmative defenses alleging plaintiff's

culpable conduct, failure to wear a seatbelt, and improper service, but denied that part of plaintiff's cross motion for partial summary judgment on the issue of serious injury. This appeal by defendants and cross appeal by plaintiff ensued. We note at the outset that plaintiff has abandoned any contention with respect to the serious disfigurement category of serious injury and we therefore do not address it (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Contrary to plaintiff's contention, the court properly granted those parts of defendants' respective motion and cross motion with respect to the 90/180-day category of serious injury. Defendants submitted plaintiff's medical records establishing that there are no "objective medical findings of a medically determined injury or impairment of a nonpermanent nature which caused the alleged limitations on [her] daily activities" within 90 of the 180 days immediately following the occurrence of the injury or impairment (*Dabiere v Yager*, 297 AD2d 831, 832, *lv denied* 99 NY2d 503; *see* Insurance Law § 5102 [d]; *O'Brien v Bainbridge*, 89 AD3d 1511, 1512-1513). Based on the record before us we agree with the court's reasoning in its decision that plaintiff failed to raise an issue of fact with respect thereto (*see generally Linton v Nawaz*, 62 AD3d 434, 443, *affd* 14 NY3d 821). Contrary to the contentions of defendants, however, the court properly denied those parts of their motion and cross motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury. Defendants met their initial burden with respect to those categories by submitting the affirmation of a physician, who concluded that plaintiff had only degenerative changes in her spine and had suffered only a strain injury, and that her subjective complaints were not based on objective medical findings (*see generally Eteng v Dajos Transp.*, 89 AD3d 506, 507; *Herbst v Marshall* [appeal No. 2], 49 AD3d 1194, 1195). Plaintiff, however, raised an issue of fact with respect to those two categories by submitting the affidavit of her treating physician, who outlined the objective medical evidence of plaintiff's injury in those two categories, including a positive EMG test indicating acute bilateral radiculopathy at the L5 nerve root (*see Frizzell v Giannetti*, 34 AD3d 1202, 1203), positive straight leg tests (*see id.*; *see also Lavali v Lavali*, 89 AD3d 574, 575), positive Patrick tests (*see Parczewski v Leone*, 14 Misc 3d 1218 [A], 2003 NY Slip Op 50065[U], *2 [Sup Ct, Queens County]; *see also Navedo v Jaime*, 32 AD3d 788, 788), and notations of muscle spasms and trigger points (*see Pagels v P.V.S. Chems., Inc.*, 266 AD2d 819, 819). Plaintiff's treating physician further raised an issue of fact by opining that the accident was the cause of plaintiff's lumbar spine injuries and continued disability, and by quantifying plaintiff's resulting limitations. Plaintiff's treating physician thus controverted the opinion offered by the physician in defendants' submissions that the worsening of plaintiff's physical problems were not caused by the trauma sustained in the accident (*see Brown v Dunlap*, 4 NY3d 566, 577-578; *cf. Pommells v Perez*, 4 NY3d 566, 575).

Contrary to the contention of the parties, the court did not dismiss the affirmative defense in Leone's answer that plaintiff failed to mitigate her damages. The order on appeal specifies that

the court dismissed a total of three affirmative defenses, i.e., plaintiff's culpable conduct, plaintiff's failure to wear a seat belt, and improper service. Leone alleged the first two, in his first and third affirmative defenses, while Peterson alleged all three, in his first through third affirmative defenses. It is clear from the record that the court merely transposed the names of those defendants in the second ordering paragraph, and we therefore modify the order accordingly. We conclude, however, that the court erred in granting that part of plaintiff's cross motion seeking dismissal of the affirmative defense of plaintiff's culpable conduct in each answer. There are records indicating that the source of plaintiff's burn to her hand was hot butter, an injury sustained at plaintiff's residence, while by plaintiff's own account her hand was burned during the accident, when meat juices spilled from a pan of pot roast that she was carrying on her lap in the vehicle. We conclude that defendants are entitled to explore that discrepancy as well as whether plaintiff's conduct in carrying a pan of pot roast on her lap was culpable. "If there is any doubt as to the availability of a defense, it should not be dismissed" (*Warwick v Cruz*, 270 AD2d 255). Likewise, although we would agree with the court that carrying the pan of pot roast was not a causative factor of the accident or of plaintiff's spinal injuries, it could have been a causative factor of the burn on her hand. We thus further modify the order by reinstating that affirmative defense in each answer.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

268

CA 11-00467

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF THE APPLICATION OF MAUREEN BOSCO, ACTING EXECUTIVE DIRECTOR OF CENTRAL NEW YORK PSYCHIATRIC CENTER, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL N., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (JASON D. FLEMMA OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered December 9, 2010. The order, among other things, determined that respondent lacked the capacity to make a reasoned decision concerning his own treatment and adjudged that medication may be administered to respondent over his objection.

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

Memorandum: Respondent appeals from an order granting the application of petitioner seeking authorization to administer medication to respondent over his objection. The order has since expired, rendering this appeal moot, and this case does not fall within the exception to the mootness doctrine (*see Matter of Rene L.*, 27 AD3d 1136; *Matter of McGrath*, 245 AD2d 1081).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

269

CA 11-00468

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF THE APPLICATION OF DONALD SAWYER, PH.D., EXECUTIVE DIRECTOR OF CENTRAL NEW YORK PSYCHIATRIC CENTER, PETITIONER-RESPONDENT,

V ORDER

MICHAEL N., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (JASON D. FLEMMA OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered January 11, 2011. The order denied respondent's motion for the appointment of a psychiatric examiner.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

270

CA 11-00572

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

DEERE & COMPANY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

M.P. JONES COMPANIES, INC., MELISSA A. HORNUNG AND RICHARD R. JONES, DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

GILLES R.R. ABITBOL, LIVERPOOL, FOR DEFENDANTS-APPELLANTS.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (JENNIFER E. MATHEWS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered November 22, 2010 in a breach of contract action. The order, among other things, granted plaintiff's motion for summary judgment and awarded plaintiff a money judgment.

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

Memorandum: In these consolidated appeals arising from a breach of contract action, in appeal No. 1 defendants appeal from an order that, inter alia, struck their answers and counterclaims, granted plaintiff's motion for summary judgment, and awarded plaintiff a money judgment. In appeal No. 2, defendants appeal from an order awarding plaintiff a "judgment" of attorney's fees and costs incurred in obtaining the order in appeal No. 1. Contrary to the contention of defendants in appeal No. 1, Supreme Court properly declined to take judicial notice of their signatures in their verified pleadings to find a triable issue of fact sufficient to defeat plaintiff's motion for summary judgment. Plaintiff met its initial burden on the motion by submitting the contract and evidence establishing that defendants failed to make the payments required by its terms (*see Convenient Med. Care v Medical Bus. Assoc.*, 291 AD2d 617, 618). The court struck defendants' answers based upon their collective repeated failures to comply with the court's discovery orders. Thus, whether the contents of the answers might otherwise have raised an issue of fact to defeat the motion is not relevant.

We have considered defendants' remaining contentions with respect

to both appeals, and we conclude that they are without merit.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

271

CA 11-00679

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

DEERE & COMPANY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

M.P. JONES COMPANIES, INC., MELISSA A. HORNUNG AND RICHARD R. JONES, DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

GILLES R.R. ABITBOL, LIVERPOOL, FOR DEFENDANTS-APPELLANTS.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (JENNIFER E. MATHEWS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered January 19, 2011 in a breach of contract action. The order awarded plaintiff a "judgment" of attorney's fees in the amount of $20,523.25 and costs in the amount of $2,003.30 against defendants.

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

Same Memorandum as in *Deere & Co. v M.P. Jones Cos., Inc.* ([appeal No. 1] ___ AD3d ___ [Mar. 16, 2012]).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

272

CA 11-01846

PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ.

ROGER J. WIECHEC, PLAINTIFF-RESPONDENT,

V ORDER

JOHN E. DOLINA, DEFENDANT.

MERCHANTS MUTUAL INSURANCE COMPANY, APPELLANT.

HAMBERGER & WEISS, BUFFALO (KRISTIN M. MACHELOR OF COUNSEL), FOR APPELLANT.

HODGSON RUSS LLP, BUFFALO (MICHAEL E. MAXWELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered December 22, 2010. The order granted the motion of plaintiff for permission to settle the action.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

274

KAH 09-02258

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
BERNARD PITTS, PETITIONER-APPELLANT,

V ORDER

ROBERT A. KIRKPATRICK, SUPERINTENDENT, WENDE
CORRECTIONAL FACILITY, AND ATTORNEY GENERAL OF
NEW YORK STATE, RESPONDENTS-RESPONDENTS.

THOMAS E. ANDRUSCHAT, EAST AURORA, FOR PETITIONER-APPELLANT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (M. William Boller, A.J.), entered July 8, 2009 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

275

KA 08-01580

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JANE HILBURN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (JACQUELINE MCCORMICK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered August 7, 2007. The judgment convicted defendant, upon her plea of guilty, of criminal mischief in the third degree and attempted forgery in the second degree.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

276

KA 08-01581

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JANE HILBURN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (JACQUELINE MCCORMICK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered August 7, 2007. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

277

KA 10-01177

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL J. HESS, DEFENDANT-APPELLANT.

SCOTT P. FALVEY, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered June 30, 2009. 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.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

278

KA 10-02090

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

EDWARD ANDERSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered September 7, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted 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 Lococo*, 92 NY2d 825, 827).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

279

KA 07-01375

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOHN MCCULLOUGH, DEFENDANT-APPELLANT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (HANNAH STITH LONG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered May 22, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

282

KA 11-00226

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALVIN G. EDWARDS, DEFENDANT-APPELLANT.

THEODORE W. STENUF, MINOA, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Onondaga County Court (Joseph E. Fahey, J.), dated November 24, 2010. 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 erred in assessing 30 points against him under risk factor 5, for the age of the victim, and 20 points against him under risk factor 6, for the physical helplessness of the victim. We reject those contentions. Although defendant pleaded guilty to a count of the indictment alleging that he raped his stepdaughter when she was 13 years old, it is well settled that, in assessing a defendant's risk level, the court is not limited to the crime to which the defendant pleaded guilty (*see People v Scott*, 71 AD3d 1417, 1417-1418, *lv denied* 14 NY3d 714; *People v Hubel*, 70 AD3d 1492, 1493). The court may also consider "reliable hearsay," including the case summary prepared by the Board of Examiners of Sex Offenders (*People v Hucks*, 72 AD3d 1608, 1609, *lv denied* 15 NY3d 706; *see People v Cunningham*, 68 AD3d 1795, 1795-1796, *lv denied* 15 NY3d 709). Here, the case summary stated, and the indictment alleged, that defendant engaged in a course of sexual conduct with the victim that started when she was seven years old. The court therefore properly assessed 30 points against defendant under risk factor 5.

Points may be assessed under risk factor 6 in the event that the victim was "physically helpless" when the sexual crime was committed. Here, defendant pleaded guilty to rape in the first degree pursuant to Penal Law § 130.35 (2). A person is guilty of that crime "when he or

she engages in sexual intercourse with another person . . . [w]ho is incapable of consent by reason of being physically helpless" (*id.*). According to the case summary, the victim alleged that she was sleeping on one occasion when defendant began to rape her. We have repeatedly concluded that a victim who is asleep during a sexual assault or "the beginning portion of the sexual assault" is physically helpless for the purposes of risk factor 6 (*People v Vaughn*, 26 AD3d 776, 777; *see People v Cullen*, 60 AD3d 1466, *lv denied* 12 NY3d 712; *People v Harris*, 46 AD3d 1445, 1446, *lv denied* 10 NY3d 707).

Finally, there is no merit to defendant's further contention that the court, by assessing points against him under risk factors 5 and 6, engaged in impermissible double-counting. "Points may be properly [assessed] under both [risk factors] where[, as here,] a child victim is . . . asleep at the beginning of the sexual offense" (*People v Rhodehouse*, 88 AD3d 1030, 1032; *see People v Ramirez*, 53 AD3d 990, 990-991, *lv denied* 11 NY3d 710; *People v Davis*, 51 AD3d 442, *lv denied* 11 NY3d 703).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

284

KA 10-01074

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHERRELL WILLIAMS, DEFENDANT-APPELLANT.

JOHN E. TYO, SHORTSVILLE, 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 (Frederick G. Reed, A.J.), rendered November 21, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument 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 forged instrument in the second degree (Penal Law § 170.25), defendant contends that Ontario County Court erred in concluding that he was collaterally estopped from relitigating a witness's identification of him from a photo array that was the subject of a *Wade* hearing held in Monroe County Court. We reject that contention. The doctrine of collateral estoppel "prevents a party from relitigating an issue decided against [him or her] in a prior proceeding" (*People v Aguilera*, 82 NY2d 23, 29), and it applies where there is identity of parties and issues, a final and valid prior judgment and a full and fair opportunity to litigate the prior determination (*see id*. at 29-30). The doctrine of collateral estoppel applies in both criminal and civil cases (*see generally id.* at 29; *People v Plevy*, 52 NY2d 58, 64-65).

Here, the parties stipulated to the fact that Monroe County Court refused to suppress a photo identification following a *Wade* hearing in the case against him in that county, and it is undisputed that the parties involved in that determination are identical to the parties involved here. The People established identity of the issue through a police witness who testified that the photo array in question at the Monroe County Court *Wade* hearing was the only photo array ever shown to the witness and was the same photo array challenged by defendant in Ontario County Court. We conclude that defendant had a full and fair opportunity to litigate the issue with respect to suppression of the

identification before Monroe County Court (*see generally People v Paccione*, 290 AD2d 567, 568).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

285

CAF 10-02071

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

IN THE MATTER OF BRANDON B., JASON B., JOSHUA B., KRISTINA B., AND SAMANTHA B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

SCOTT B., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

WILLIAM D. BRODERICK, JR., ELMA, 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 JASON B.

KENNETH W. GIBBONS, ATTORNEY FOR THE CHILD, BUFFALO, FOR BRANDON B.

THOMAS A. DEUSCHLE, ATTORNEY FOR THE CHILD, WEST SENECA, FOR JOSHUA B.

ELIZABETH M. DIPIRRO, ATTORNEY FOR THE CHILDREN, GETZVILLE, FOR KRISTINA B. AND SAMANTHA B.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered September 28, 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.

Memorandum: Respondent father appeals from an order terminating his parental rights with respect to the five children who are the subject of this proceeding based on a finding of permanent neglect and freeing the children for adoption. We reject the father's contention that he was denied effective assistance of counsel at the fact-finding stage of the proceeding. " 'There was no showing of ineffectiveness here, nor may ineffectiveness be inferred merely because the attorney counseled [the father] to admit [to] the allegations in the petition[s]' " (*Matter of Sean W.*, 87 AD3d 1318, 1319, *lv denied* 18 NY3d 802). It is clear from the record that the attorney's recommendation that the father admit to the allegations of permanent neglect was a matter of strategy (*see Matter of Elijah D.*, 74 AD3d 1846, 1847; *see generally People v Benevento*, 91 NY2d 708, 712-713). Further, "[a] parent alleging ineffective assistance of counsel [in a

Family Court case] has the burden of demonstrating . . . that the deficient representation resulted in actual prejudice" (*Matter of Michael C.*, 82 AD3d 1651, 1652, *lv denied* 17 NY3d 704; *see Sean W.*, 87 AD3d at 1319), and the father failed to meet that burden here.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

287

CAF 10-01473

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

IN THE MATTER OF CATHERINE MYERS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD J. TRACY, RESPONDENT-APPELLANT.

SUSAN P. REINECKE, CLARENCE, FOR RESPONDENT-APPELLANT.

PAUL R. DIDIO, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered June 1, 2010 in a proceeding pursuant to Family Court Act article 4. The order confirmed the determination of the Support Magistrate.

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

Memorandum: Respondent father appeals from an order confirming the Support Magistrate's determination that he willfully failed to obey a child support order and imposing a suspended sentence of 90 days in jail. The Support Magistrate's finding of a willful violation of the support order was based upon admissions made by the father in open court when the parties entered into a settlement agreement. Because the father consented to the order confirming the Support Magistrate's determination, including his recommended sentence, the appeal must be dismissed. It is well settled that "[n]o appeal lies from an order entered by consent upon the stipulation of the appealing party" (*Matter of Starz v Tissiera*, 206 AD2d 432; *see Matter of Adney v Morton*, 68 AD3d 1742; *Matter of Culton v Culton*, 2 AD3d 1446). In any event, we note that the father's sole contention on appeal that he was denied effective assistance of counsel is based largely on matters dehors the record and thus should be raised by way of a motion to vacate the order in Family Court (*see generally Matter of Commissioner of Social Servs. of Rensselaer County [Faresta] v Faresta*, 11 AD3d 750).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

289

CA 11-01929

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

CHRISTOPHER CATUZZA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID RODRIGUEZ, ESQ., NOEMI FERNANDEZ-HILTZ, ESQ., AND THE LAW OFFICES OF NOEMI FERNANDEZ, PLLC, DEFENDANTS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (KARA M. ADDELMAN OF COUNSEL), FOR DEFENDANT-APPELLANT DAVID RODRIGUEZ, ESQ.

HURWITZ & FINE, P.C., BUFFALO (EARL K. CANTWELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS NOEMI FERNANDEZ-HILTZ, ESQ., AND THE LAW OFFICES OF NOEMI FERNANDEZ, PLLC.

KEVIN T. STOCKER, TONAWANDA, FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered April 4, 2011 in a legal malpractice action. The order denied the motions of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this legal malpractice action seeking damages allegedly resulting from defendants' negligence in their representation of him in an action against, inter alia, his former employer, the Erie County Water Authority (hereafter, ECWA action). The ECWA action was dismissed based upon plaintiff's failure to comply with discovery demands. Supreme Court properly denied the motion of defendant David Rodriguez, Esq. and the motion of defendants Noemi Fernandez-Hiltz, Esq. and The Law Offices of Noemi Fernandez, PLLC seeking summary judgment dismissing the complaint. Defendants moved for such relief on the ground that plaintiff could not have prevailed in the ECWA action, inasmuch as he failed to exhaust his administrative remedies by appealing the determination of the Hearing Officer in the prior proceeding pursuant to Civil Service Law § 72. Defendants, however, failed to establish as a matter of law that the complaint in the ECWA action would have been dismissed on that ground (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Failure to exhaust administrative remedies is a defense that may be waived if not timely raised (*see Matter of Punis v Perales*, 112 AD2d

236, 238), and the defendants in the ECWA action did not raise that defense in their answer. Further, inasmuch as " 'the grounds urged for relief' and the remedies sought in [the ECWA action and the prior Civil Service Law § 72 proceeding] are separate and distinct," plaintiff did not fail to exhaust his administrative remedies with respect to the conduct of the defendants in the ECWA action (*Matter of Sokol v Granville Cent. School Dist. Bd. of Educ.*, 260 AD2d 692, 694).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

290

CA 11-01493

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

KRISTINE SIMMONS-KINDRON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

1218770 ONTARIO INC., DOING BUSINESS AS FYKE TRADING CO., VICTOR J. NICKERSON, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (ERIC S. BERNHARDT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DAVID W. POLAK ATTORNEY AT LAW, P.C., WEST SENECA (DAVID W. POLAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered October 7, 2010 in a personal injury action. The order denied the motion of defendants 1218770 Ontario Inc., doing business as Fyke Trading Co., and Victor J. Nickerson 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 against defendants 1218770 Ontario Inc., doing business as Fyke Trading Co., and Victor J. Nickerson is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when the vehicle she was driving was rear-ended by a truck owned by 1218770 Ontario Inc., doing business as Fyke Trading Co., and driven by Victor J. Nickerson (collectively, defendants). We agree with defendants that Supreme Court erred in denying their motion for summary judgment dismissing the complaint against them based on the emergency doctrine. That doctrine " 'recognizes that when [a driver] is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the [driver] to be reasonably so disturbed that [he or she] must make a speedy decision without weighing alternative courses of conduct, the [driver] may not be negligent if the actions taken are reasonable and prudent in the emergency context' " (*Caristo v Sanzone*, 96 NY2d 172, 174, quoting *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327, *rearg denied* 77 NY2d 990). "[I]t generally remains a question for the trier of fact to determine whether an emergency existed and, if so, whether the [driver's] response thereto was reasonable" (*Schlanger v Doe*, 53 AD3d

827, 828; *see Heye v Smith*, 30 AD3d 991, 992; *Esposito v Wright*, 28 AD3d 1142, 1143). Nevertheless, summary judgment is appropriate " 'when the driver presents sufficient evidence to establish the reasonableness of his or her actions and there is no opposing evidentiary showing sufficient to raise a legitimate question of fact on the issue' " (*McGraw v Glowacki*, 303 AD2d 968, 969; *see Ward v Cox*, 38 AD3d 313, 314).

Defendants met their initial burden of establishing that Nickerson was confronted with an emergency situation when plaintiff suddenly entered his lane and that there was nothing he could have done to avoid the collision (*see Hotkins v New York City Tr. Auth.*, 7 AD3d 474, 475; *Lucksinger v M.T. Unloading Servs.*, 280 AD2d 741, 741-742; *cf. Fratangelo v Benson*, 294 AD2d 880, 881). In support of the motion, defendants submitted the deposition testimony of plaintiff and Nickerson. Plaintiff, who was traveling in the left lane of traffic, admitted that she moved her vehicle to the right lane when traffic in front of her slowed down, but that she failed to observe Nickerson's truck in the right lane. Nickerson testified that he observed plaintiff brake and drive directly in front of his truck. He further testified that he had no time to apply his brakes or to take any evasive action. Indeed, he was moving his foot to the brake pedal when the impact occurred.

In opposition to the motion, plaintiff failed to raise a triable issue of fact whether Nickerson "was negligent in failing to take evasive action to avoid the collision" (*Lupowitz v Fogarty*, 295 AD2d 576, 576). Plaintiff submitted the deposition testimony of another defendant driver who was behind the truck and who testified that Nickerson may have been traveling 60 to 65 miles per hour immediately before the accident. She failed to demonstrate, however, that Nickerson could have avoided the collision regardless of his speed (*see Lucksinger*, 280 AD2d at 742). Further, plaintiff's expert affidavit was insufficient to raise a triable issue of fact with respect to the reasonableness of Nickerson's actions (*see Wasson v Szafarski*, 6 AD3d 1182, 1183).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

299

CA 11-00215

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

ISIDRO ABASCAL, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 113160.)

ISIDRO ABASCAL, CLAIMANT-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK K. WALSH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Norman I. Siegel, J.), dated January 20, 2011. The judgment dismissed the claim after trial.

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

Memorandum: Claimant commenced this action seeking damages for injuries he allegedly sustained as a result of a prostate examination performed at the correctional facility where he was incarcerated. Contrary to the contention of claimant, the Court of Claims properly dismissed his claim based on his failure to present expert medical evidence. Claimant, "like any medical malpractice plaintiff, [alleges that] he was injured because a doctor failed to perform competently a procedure requiring the doctor's specialized skill" (*Bazakos v Lewis*, 12 NY3d 631, 634; *see generally Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 787-788; *Toepp v Myers Community Hosp.*, 280 AD2d 921). "Because the claim 'substantially related to medical diagnosis and treatment, the action it gives rise to is by definition one for medical malpractice rather than for simple negligence' " (*McDonald v State of New York*, 13 AD3d 1199, 1200; *see Weiner*, 88 NY2d at 788). Further, claimant's allegation that defendant deviated from an accepted standard of care in performing the prostate examination raises medical issues that are not "within the ordinary experience and knowledge of laypersons" (*Mosberg v Elahi*, 80 NY2d 941, 942; *see Wood v State of New York*, 45 AD3d 1198; *Tatta v State of New York*, 19 AD3d 817, 818, *lv denied* 5 NY3d 712). Thus, contrary to claimant's contention, expert medical evidence was required (*see Mosberg*, 80 NY2d at 942; *Wood*, 45 AD3d 1198; *McDonald*, 13 AD3d at 1200).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

301

KA 10-01156

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ERIC D. MCGILL, 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 judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered February 23, 2010. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

302

KA 10-01038

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MARCIA A. WEBER, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), dated March 19, 2010. The order directed defendant to pay restitution of $9,925.11.

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 (*see People v Joseph*, 90 AD3d 1646, 1647).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

303

KA 11-00346

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LAVON WALKER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

304

KA 11-00347

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LAVON WALKER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

305

KA 10-02100

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHAD E. HEIDEMAN, DEFENDANT-APPELLANT.

SHIRLEY A. GORMAN, BROCKPORT, 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 July 12, 2010. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

306

KA 10-00011

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JESSE N.F., DEFENDANT-APPELLANT.

SCOTT P. FALVEY, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (HEATHER A. PARKER OF COUNSEL), FOR RESPONDENT.

Appeal from an adjudication of the Ontario County Court (Frederick G. Reed, A.J.), rendered December 2, 2009. Defendant was adjudicated a youthful offender upon his plea of guilty to burglary in the second degree.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

307

KA 09-00069

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAKEEM J. GOLSON, DEFENDANT-APPELLANT.

ANTHONY J. LANA, BUFFALO, 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 21, 2008. The judgment convicted defendant, upon a jury verdict, of conspiracy in the fourth degree (two counts), burglary in the first degree (five counts), burglary in the second degree, robbery in the first degree (six counts), robbery in the second degree (two counts) and assault in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of burglary in the second degree and dismissing count eight of the indictment as and modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of, inter alia, two counts of conspiracy in the fourth degree (Penal Law § 105.10 [1]) and five counts of burglary in the first degree (§ 140.30 [2 - 4]). As a preliminary matter, as we noted in the appeal of defendant's codefendant, count eight, charging defendant with burglary in the second degree under Penal Law § 140.25 (2), "must be dismissed as a lesser inclusory count of counts three through seven, charging defendant with burglary in the first degree" (*People v Clark*, 90 AD3d 1576, 1577). We therefore modify the judgment accordingly.

Contrary to defendant's contention, viewing the evidence in light of the elements of the remaining crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant was identified by only two prosecution witnesses; one is a drug addict who also was indicted for these crimes and who received a favorable plea agreement in exchange for her testimony, and the other has a lengthy criminal record. Thus, we agree with defendant that another result would not have been

unreasonable (*see id.* at 495). Nevertheless, we further conclude that, upon weighing the " 'relative strength of conflicting inferences that may be drawn from the testimony,' " the jury did not fail to give the evidence the weight it should be accorded (*id.*).

Because he failed to object in a timely manner to the prosecutor's failure to correct the testimony of a prosecution witness that she did not receive any benefit for her testimony, defendant failed to preserve for our review his contention that the People's failure to correct that testimony deprived him of a fair trial (*see People v Hendricks*, 2 AD3d 1450, 1451, *lv denied* 2 NY3d 762). In any event, we conclude that, although the prosecutor has an obligation "to correct misstatements by a witness concerning the nature of a promise" (*People v Novoa*, 70 NY2d 490, 496), the error in failing to do so here is harmless because County Court instructed the jury that the witness also had been indicted for these crimes and had been permitted to plead guilty to lesser offenses in exchange for her testimony (*see generally Hendricks*, 2 AD3d at 1451).

We also reject defendant's contention that the court erred in permitting the People to present the testimony of a police witness regarding the out-of-court identification of defendant by a prosecution witness (*see* CPL 60.25). During her testimony, the witness mistakenly identified the codefendant as defendant, and explained that defendant had long hair with braids at the time of the crime. It is undisputed that defendant's hair was short at the time of the trial. Thus, based upon defendant's change of appearance, the court properly determined that the witness was unable to identify defendant on the basis of present recollection (*see generally People v Quevas*, 81 NY2d 41, 45-46; *People v Nival*, 33 NY2d 391, 394-395, *appeal dismissed and cert denied* 417 US 903).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

308

KA 10-01508

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY S. WACKWITZ, SR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (JOHN C. LUZIER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered November 9, 2009. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree and scheme to defraud in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the third degree (Penal Law former § 155.35) and scheme to defraud in the first degree (§ 190.65 [1] [b]). In appeal No. 2, he appeals from a judgment convicting him, upon the same plea of guilty, of burglary in the third degree (§ 140.20). Contrary to the contention of defendant in both appeals, his waiver of the right to appeal was valid. 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 treat that right as one of the rights automatically forfeited by a guilty plea" (*People v Bilus*, 44 AD3d 325, 326, *lv denied* 9 NY3d 1031; *see People v Lopez*, 6 NY3d 248, 256-257; *cf. People v Moyett*, 7 NY3d 892). The valid waiver encompasses defendant's challenge to the factual sufficiency of the plea allocution (*see People v Jackson*, 50 AD3d 1615, 1615-1616, *lv denied* 10 NY3d 960). In any event, defendant failed to move to withdraw the plea or to vacate the judgments of conviction on that ground and thus failed to preserve that challenge for our review (*see People v Lopez*, 71 NY2d 662, 665). This case does not fall within the rare exception to the preservation requirement set forth in *Lopez* (71 NY2d at 666). Even assuming, arguendo, that defendant's statements during the colloquy called into question the voluntariness of the plea and thus that the preservation exception applies, we conclude upon our review of the record that the court made

sufficient further inquiry to ensure that defendant's plea was knowing and voluntary (*see id.*).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

309

KA 10-01509

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY S. WACKWITZ, SR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (JOHN C. LUZIER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered November 9, 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.

Same Memorandum as in *People v Wackwitz* ([appeal No. 1] ___ AD3d ___ [Mar. 16, 2012]).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

313

CAF 11-00708

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

IN THE MATTER OF JOHN B. AND SHAWN B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JULIE W., RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR JOHN B. AND SHAWN B.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered March 17, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred custody and guardianship of the subject children to petitioner.

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 twin sons. We affirm. Contrary to the mother's contention, petitioner established by clear and convincing evidence that she was physically able to plan for the future of her children but failed to do so (*see* Social Services Law § 384-b [7] [a]). Petitioner established that, during the first year in which the children were in foster care, the mother attended 31 of the 52 visits that were scheduled. We note that some of the visits did not occur because petitioner cancelled the visit due to a lack of proper hygiene on the part of the mother when she appeared, or because the mother had a fever. Visits were suspended one year before the permanent neglect petition was filed, after the mother reported having a fever, until such time as the mother provided medical documentation that she did not have a contagious illness. The mother failed to provide that documentation. Although the mother complained that she had pain in various areas of her body and that she sometimes had fevers, she failed to pursue medical treatment for her ailments despite petitioner's recommendation that she do so. The mother testified that she was unable to complete the required programs for parenting classes, substance abuse and mental health treatment because

she suffered from depression and thereafter developed a variety of serious physical illnesses. The Court of Appeals has concluded, however, that a mental health diagnosis is not sufficient to establish a lack of physical ability to plan for the future of the children (*see Matter of Hime Y.*, 52 NY2d 242, 250-251), and the mother otherwise failed to provide evidence to substantiate her alleged physical illnesses in order to refute petitioner's evidence that she was physically able to plan for the future of her children.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

314

CAF 11-00445

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

IN THE MATTER OF CINDY C. STILSON,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

DAVID R. STILSON, SR.,
RESPONDENT-PETITIONER-RESPONDENT.

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

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (MAURA C. SEIBOLD OF COUNSEL), FOR RESPONDENT-PETITIONER-RESPONDENT.

DAVID C. BRAUTIGAM, ATTORNEY FOR THE CHILD, HOUGHTON, FOR DAVID R.S., II.

Appeal from an order of the Family Court, Allegany County (Lynn L. Hartley, J.H.O.), entered January 3, 2011 in a proceeding pursuant to Family Court Act article 6. The order granted respondent-petitioner primary physical custody of the parties' child.

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

Memorandum: Petitioner-respondent mother commenced this proceeding seeking to modify a prior order of custody and visitation. She appeals from an order that, following a hearing, granted respondent-petitioner father's cross petition by awarding him primary physical custody of the parties' child, with visitation to the mother. Contrary to the mother's contention, Family Court properly granted the cross petition.

"The mother . . . failed to preserve for our review her contention that the father failed to establish a change of circumstances warranting review of the prior order" (*Matter of Canfield v McCree*, 90 AD3d 1653, 1654; *see Matter of Deegan v Deegan*, 35 AD3d 736). Indeed, in her petition, the mother alleged that there had been such a change of circumstances. In any event, the mother is correct that, " '[w]here an order of custody and 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 child[ ]' " (*Matter of Donnelly v Donnelly*, 55 AD3d 1373). Here, we conclude that there was a sufficient showing of

changed circumstances based, inter alia, upon the parties' inability to reach an agreement regarding certain aspects of the child's visitation schedule, and upon the changes in the child's school schedule since the entry of the prior order (*see generally Matter of Claflin v Giamporcaro*, 75 AD3d 778, 779-780, *lv denied* 15 NY3d 710; *Matter of Schimmel v Schimmel*, 262 AD2d 990, *lv denied* 93 NY2d 817).

Moreover, contrary to the mother's further contention, the court properly determined that it was in the child's best interests to award the father primary physical custody of the child. " 'Generally, a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record' " (*Matter of Dubuque v Bremiller*, 79 AD3d 1743, 1744). Here, the court's determination is supported by the requisite "sound and substantial basis in the record" and thus will not be disturbed (*id.*). We agree with the court's conclusion that, although both parties appear to be fit and loving parents, the evidence presented at the hearing establishes that the father is better able to provide for the child's educational and medical needs.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

315

CAF 09-02544

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

IN THE MATTER OF JAMES M. FOX,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ELAINE H. FOX, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

SHIRLEY A. GORMAN, BROCKPORT, FOR RESPONDENT-APPELLANT.

SUSAN GRAY JONES, CANANDAIGUA, FOR PETITIONER-RESPONDENT.

M. KATHLEEN CURRAN, ATTORNEY FOR THE CHILD, CANANDAIGUA, FOR SARA F.

Appeal from an order of the Family Court, Ontario County (William F. Kocher, J.), entered November 23, 2009 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole legal and physical custody of the parties' child to petitioner.

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

Same Memorandum as in *Matter of Fox v Fox* ([appeal No. 2] ___ AD3d ___ [Mar. 16, 2012).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

316

CAF 10-00836

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

IN THE MATTER OF JAMES M. FOX,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ELAINE H. FOX, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

SHIRLEY A. GORMAN, BROCKPORT, FOR RESPONDENT-APPELLANT.

SUSAN GRAY JONES, CANANDAIGUA, FOR PETITIONER-RESPONDENT.

M. KATHLEEN CURRAN, ATTORNEY FOR THE CHILD, CANANDAIGUA, FOR SARA F.

Appeal from an order of the Family Court, Ontario County (William F. Kocher, J.), entered March 22, 2010 in a proceeding pursuant to Family Court Act article 6. The order granted sole legal and physical custody of the parties' child to petitioner and suspended the visitation of respondent.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the directive suspending respondent's visitation with the child and as modified the order is affirmed without costs and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the following Memorandum: In appeal No. 1, respondent mother appeals from an order granting petitioner father's motion to dismiss her petition for modification of the existing custody order with respect to custody and visitation (consent order) by awarding sole legal and physical custody of the parties' child to the father and suspending the mother's overnight visitation. In appeal No. 2, the mother appeals from an order granting the father's violation petition and the relief sought in his order to show cause by awarding sole legal and physical custody of the child to the father and suspending the mother's visitation with the child in its entirety. We note at the outset that the mother's appeal from the order in appeal No. 1 must be dismissed inasmuch as that order was superseded by the order in appeal No. 2 (*see generally Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985). Indeed, Family Court issued the order in appeal No. 2 following the continuation of the hearing upon which the order in appeal No. 1 was based.

With respect to the order in appeal No. 2, we reject the mother's contention that the father failed to establish a change in

circumstances since entry of the consent order to warrant reexamination of the visitation arrangement (*see Matter of Black v Watson*, 81 AD3d 1316, 1317, *lv dismissed in part and denied in part* 17 NY3d 747). The consent order awarded the father sole legal and physical custody of the child and granted the mother two weeknight visits and overnight visitation on alternating Saturdays. The father testified that, since the entry of that order, the mother failed to comply with court-ordered psychiatric treatment, failed to return the child from visitation on one occasion, and filed unfounded child abuse complaints against him. The father further testified that the mother engaged in alienating behavior such as telling the child that she had to choose between the parents and that there could be fires at the father's house while the child was sleeping. We conclude that such testimony, which the court found to be credible, was sufficient to establish the requisite change in circumstances (*see Matter of Howden v Keeler*, 85 AD3d 1561, 1561).

We agree with the mother in appeal No. 2, however, that the court's suspension of the mother's visitation with the child lacks a sound and substantial basis in the record (*see Matter of Lydia C.*, 89 AD3d 1434, 1436). "When making a determination with respect to visitation, the most important factor is the best interests of the child" (*Matter of Balgley v Cohen*, 73 AD3d 1038, 1038), and "[v]isitation may not be denied solely for reasons unrelated to the welfare of the child[ ]" (*Vasile v Vasile*, 116 AD2d 1021, 1021). "In determining whether visitation between a parent and child should be suspended, the court is to apply a 'best interest[s] of the child' standard. However, it is presumed that parental visitation is in the best interest[s] of the child in the absence of proof that it will be harmful" (*Matter of Nathaniel T.*, 97 AD2d 973, 974; *see Matter of Mark C. v Patricia B.*, 41 AD3d 1317, 1318). Thus, "[t]he denial of visitation to a noncustodial parent constitutes such a drastic remedy that it should be ordered only when there are compelling reasons, and there must be substantial evidence that such visitation is detrimental to the child[ ]'s welfare" (*Vasile*, 116 AD2d at 1021; *see Matter of Diedrich v Vandermallie*, 90 AD3d 1511; *Matter of Frierson v Goldston*, 9 AD3d 612, 614).

Here, the record lacks the requisite "substantial evidence" that visitation with the mother is detrimental to the child's welfare (*Vasile*, 116 AD2d 1021; *see Diedrich*, 90 AD3d 1511; *Frierson*, 9 AD3d at 614). The record is clear, and the court specifically found, that the child wished to continue to visit the mother (*cf. Lydia C.*, 89 AD3d at 1436; *Matter of Jacobs v Chadwick*, 67 AD3d 1373). The father testified that he did not observe any odd behavior when the child returned from visitation with the mother, and he acknowledged that the child was generally "happy" to visit her mother. The psychologist acknowledged that the mother loves the child and that the child is "functioning well," and both parents testified that the child is thriving in school. Indeed, the Attorney for the Child told the court at the close of the hearing that she "certainly would never want to recommend that [the child] have no contact with her mother."

We therefore modify the order in appeal No. 2 by vacating the

directive suspending any and all periods of visitation between the mother and the child, and we remit the matter to Family Court to determine an appropriate visitation schedule, which may include supervised visitation (*see Matter of Cameron C.*, 283 AD2d 946, 947, *lv denied* 97 NY2d 606).

We have reviewed the remaining contentions of the mother and conclude that they are without merit.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

317

CA 11-01301

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

JASON BURLEW, ET AL., PLAINTIFFS,
AND RICHARD KATCHUK, PLAINTIFF-RESPONDENT,

V ORDER

TALISMAN ENERGY USA INC., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

HARRIS BEACH PLLC, ALBANY (JOHN T. MCMANUS OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAMSON, CLUNE & STEVENS, ITHACA (JOHN H. HANRAHAN, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Kenneth R. Fisher, J.), entered April 19, 2011 in a breach of contract action. The order, among other things, granted the cross motion of plaintiff Richard Katchuk for partial summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

318

CA 11-01302

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

JASON BURLEW, ET AL., PLAINTIFFS,
AND RICHARD KATCHUK, PLAINTIFF-RESPONDENT,

V ORDER

TALISMAN ENERGY USA INC., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

HARRIS BEACH PLLC, ALBANY (JOHN T. MCMANUS OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAMSON, CLUNE & STEVENS, ITHACA (JOHN H. HANRAHAN, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Steuben County (Kenneth R. Fisher, J.), entered April 19, 2011 in a breach of contract action. The judgment awarded plaintiff Richard Katchuk the sum of $418,416.64 against defendant.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

321

CA 11-01891

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

SENECA ONE REALTY, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, DEFENDANT-RESPONDENT.

FRANK T. GAGLIONE, P.C., AMHERST (KELLIE M. ULRICH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAVID RODRIGUEZ, ACTING CORPORATION COUNSEL, BUFFALO (CINDY T. COOPER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered March 10, 2011 in a breach of contract action. The order granted the motion of defendant to dismiss the complaint.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as plaintiff challenges the determination that the action is barred by defendant's Charter § 21-2, and the order is otherwise affirmed without costs.

Memorandum: Plaintiff commenced this breach of contract action alleging that defendant failed to pay its share of the cost of work performed on two elevators, as required by a contract between defendant and plaintiff's predecessor in interest. Defendant moved to dismiss the complaint pursuant to CPLR 3211 (a) (7), contending, inter alia, that the action is barred by section 21-2 of defendant's Charter. Supreme Court concluded in its bench decision that section 21-2 required dismissal of the complaint, but denied the motion on the other grounds raised by defendant. We therefore dismiss the remainder of the appeal inasmuch as plaintiff is not aggrieved thereby (*see* CPLR 5511).

Contrary to plaintiff's contention, the court properly granted the motion. In pertinent part, defendant's Charter § 21-2 provides that "[n]o action or proceeding to recover or enforce any unliquidated account or claim against the city shall be brought until such claim shall have been filed with the city clerk . . . ." We reject plaintiff's contention that this is an action for a liquidated account and thus falls outside the ambit of section 21-2. The contract did not specify that defendant was required to pay a specific sum of "money, nor was a specified sum to be paid in any other way. The damages were unliquidated" (*Van Rensselaer v Jewett*, 2 NY 135, 139). Thus, inasmuch as the action is encompassed by section 21-2 and it is

undisputed that plaintiff failed to comply with the notice of claim requirement set forth in that section, the court properly granted defendant's motion to dismiss the complaint.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

322

CA 11-00841

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

IN THE MATTER OF CHARLES BUXTON,
PETITIONER-APPELLANT,

V ORDER

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

CHARLES BUXTON, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered March 16, 2011 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

324

CA 11-00908

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

IN THE MATTER OF MATTHEW MITCHELL,
PETITIONER-APPELLANT,

V ORDER

ONTARIO COUNTY AND ONTARIO COUNTY SHERIFF,
RESPONDENTS-RESPONDENTS.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (LAWRENCE J. ANDOLINA OF COUNSEL), FOR PETITIONER-APPELLANT.

JOHN W. PARK, COUNTY ATTORNEY, CANANDAIGUA, FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered August 4, 2010 in a proceeding pursuant to CPLR article 78. The judgment denied and dismissed the petition.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

325

CA 11-01078

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

IN THE MATTER OF FRANCES S. BRADLEY,
PETITIONER-RESPONDENT,

V ORDER

TOWN OF BOONVILLE ZONING BOARD OF APPEALS,
RESPONDENT.

FORREST C. BARTELOTTE AND MARILYN G.
BARTELOTTE, INTERVENORS-APPELLANTS.
(APPEAL NO. 1.)

DURR & RILEY, BOONVILLE, PETER M. HOBAICA, LLC, UTICA (GEORGE E. CURTIS OF COUNSEL), FOR INTERVENORS-APPELLANTS.

THE AYERS LAW FIRM, PLLC, PALATINE BRIDGE (MEGHAN M. MANION OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered February 18, 2011 in a proceeding pursuant to CPLR article 78. The order granted petitioner two variances.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

326

CA 11-01600

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

IN THE MATTER OF FRANCES S. BRADLEY,
PETITIONER-RESPONDENT,

V ORDER

TOWN OF BOONVILLE ZONING BOARD OF APPEALS,
RESPONDENT.

FORREST C. BARTELOTTE AND MARILYN G.
BARTELOTTE, INTERVENORS-APPELLANTS.
(APPEAL NO. 2.)

DURR & RILEY, BOONVILLE, PETER M. HOBAICA, LLC, UTICA (GEORGE E. CURTIS OF COUNSEL), FOR INTERVENORS-APPELLANTS.

THE AYERS LAW FIRM, PLLC, PALATINE BRIDGE (MEGHAN M. MANION OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered July 25, 2011 in a proceeding pursuant to CPLR article 78. The judgment granted petitioner two variances.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

327

OP 11-01161

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

IN THE MATTER OF GREAT LAKES CONSULTING SERVICES, LLC AND COVEY TREE, INC., PETITIONERS,

V ORDER

NEW YORK STATE DEPARTMENT OF LABOR, RESPONDENT.

BLAIR & ROACH, LLP, TONAWANDA (MICHAEL A. SMEADER OF COUNSEL), FOR PETITIONERS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (SETH KUPFERBERG OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to Labor Law § 220 [8]) to vacate a determination of respondent.

Now, upon reading and filing the stipulation of withdrawal and discontinuance of appeal signed by the attorneys for the parties on December 28, 2011,

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

329

KA 11-01000

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SCOTT A. COREY, SR., DEFENDANT-APPELLANT.

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN JAMES MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered December 16, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

330

KA 11-00251

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA P. REID, 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 January 5, 2011. The judgment convicted defendant, upon a nonjury verdict, of criminal sexual act in the third degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of criminal sexual act in the third degree (Penal Law § 130.40 [2]) and endangering the welfare of a child (§ 260.10 [1]). Contrary to defendant's contention, the evidence is legally sufficient to support the conviction. Based on the testimony and evidence presented at trial, there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by [County Court]" (*People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Finally, the sentence is not unduly harsh or severe.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

331

KA 10-00807

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL SPRINGS, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET SOMES 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 August 19, 2008. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree, assault in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

334

KA 11-00195

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT E. GREENE, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, 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.), dated January 5, 2011. 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: We reject defendant's contention that County Court improvidently exercised its discretion in determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Defendant was presumptively classified as a level three risk pursuant to the risk assessment instrument, and we conclude based on the record before us that defendant failed to present clear and convincing evidence of special circumstances to warrant a downward departure (*see People v Burgos*, 32 AD3d 1289, *lv denied* 8 NY3d 801; *People v Marks*, 31 AD3d 1142, 1143, *lv denied* 7 NY3d 715). Defendant, who was 20 years old at the time of the underlying offenses, engaged in sexual activity with a 13-year-old female he initially met over the Internet. Defendant mistakenly relies on cases in which this Court concluded that a downward departure from the presumptive risk level was warranted where there was no evidence of forcible compulsion and the defendant was not appreciably older than the victim (*see People v Goossens*, 75 AD3d 1171, 1171-1172; *People v Brewer*, 63 AD3d 1604, 1605; *People v Weatherley*, 41 AD3d 1238, 1238-1239; *see generally* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4-5 [2006]). This case is distinguishable in part because of defendant's extensive criminal history, which includes two prior convictions for criminal contempt in the second degree. In addition, defendant was on probation for attempted burglary in the second degree at the time he committed the underlying offenses. After defendant committed and was charged with the sex offenses at issue, he was charged with additional

counts of criminal contempt in the second degree for communicating with the victim, for whom the court had issued an order of protection. We agree with the court that "defendant's criminal history evinces a lack of restraint and a willingness to place his self-interest above that of society which warrants the highest level of notification to vulnerable populations . . . ."

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

335

KA 08-01689

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERYL BROWN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered June 16, 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: In appeal No. 1, 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]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant contends in each appeal that County Court erred in refusing to suppress physical evidence based on its determination following a *Darden* hearing with respect to the confidential informant relied upon by the police. We reject that contention (*see generally People v Edwards*, 95 NY2d 486, 493-494; *People v Darden*, 34 NY2d 177, 181-182, *rearg denied* 34 NY2d 995). We have reviewed the sealed transcript of the *Darden* hearing, as well as the court's requisite "summary report as to the existence of the informer and with respect to the communications made by the informer to the police to which the police testify" made available to defendant and the People (*Darden*, 34 NY2d at 181). Based on those documents, we conclude that the court properly determined that the confidential informant existed and that he provided the information to the police concerning defendant's possession of the handgun at the location where defendant was stopped by the police and subsequently arrested.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

336

KA 08-02090

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERYL BROWN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered June 23, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree.

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

Same Memorandum as in *People v Brown* ([appeal No. 1] ___ AD3d ___ [Mar. 16, 2012]).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

342

CAF 10-02507

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

IN THE MATTER OF JOSIAH C.

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

COLLEEN C., RESPONDENT-APPELLANT.

CHARLES J. GREENBERG, BUFFALO, 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 JOSIAH C.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered November 17, 2010 in a proceeding pursuant to Family Court Act article 10. The order granted the motion of the Attorney for the Child for summary judgment.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

344

CA 11-00963

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

RENAULD DAVIS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ESTELLE VALLIE, DEFENDANT-RESPONDENT.

FRANK S. FALZONE, BUFFALO, FOR PLAINTIFF-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 21, 2010 in a personal injury action. The judgment dismissed the complaint upon a jury verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained on property owned by defendant. According to plaintiff, he was injured as a result of defendant's negligent failure to maintain and service a defective storm glass window. Plaintiff contends that Supreme Court erred in admitting in evidence a Rental Assistance Corporation Inspection Report (hereafter, Inspection Report) and the lease agreement between defendant and the tenant of the property in question. Plaintiff objected to the admission in evidence of the Inspection Report only on the ground that it was not authenticated pursuant to CPLR 4518 and therefore constituted hearsay. He failed to object to that report on any of the grounds raised on appeal or to object to the admission in evidence of the lease agreement, and thus his contention is not preserved for our review (*see Ames v Shute*, 90 AD3d 1629, 1630; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985; *see generally* CPLR 5501 [a] [3]). Even assuming, arguendo, that the court erred in admitting the Inspection Report in evidence, we conclude that the error is harmless (*see generally Rizzuto v Getty Petroleum Corp.*, 289 AD2d 217, 217-218).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

345

CA 11-01310

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

WILLIAM D. AUSTIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BUFFALO BILLS, INC., DEFENDANT-RESPONDENT.

CHIACCHIA & FLEMING, LLP, HAMBURG (ANDREW P. FLEMING OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WALSH, ROBERTS & GRACE, BUFFALO (KEITH N. BOND OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered March 1, 2011 in a personal injury action. The order granted defendant's motion for summary judgment.

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

Memorandum: Supreme Court properly granted defendant's motion seeking summary judgment dismissing the complaint. Plaintiff was injured while working as a security guard during a home game of the Buffalo Bills football team. Plaintiff was positioned on the field near the end zone when two players left the field of play and collided with him. The court properly determined that plaintiff assumed the risk of his injury. Where, as here, the plaintiff fully comprehended the risks or the risks are " 'perfectly obvious, [then the] plaintiff has consented to them and [the] defendant has performed its duty' " (*Morgan v State of New York*, 90 NY2d 471, 484, quoting *Turcotte v Fell*, 68 NY2d 432, 439; *see Bereswill v National Basketball Assn.*, 279 AD2d 292, 293; *Cannavale v City of New York*, 257 AD2d 462, 462-463). Plaintiff's contention that he was under an inherent compulsion to assume the risk 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 (*see generally Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 658-659).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

346

CA 11-01966

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

IN THE MATTER OF THE TRUST UNDER THE AGREEMENT OF HELEN W. RIVAS, AS DONOR, THE UNIVERSITY OF ROCHESTER, AS DONEE.

---------- ORDER

BANK OF AMERICA, N.A., SUCCESSOR TO SECURITY TRUST COMPANY OF ROCHESTER, TRUSTEE, PETITIONER-RESPONDENT;

UNIVERSITY OF ROCHESTER, RESPONDENT-APPELLANT.

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

CHAMBERLAIN D'AMANDA, OPPENHEIMER & GREENFIELD LLP, ROCHESTER (EDWARD C. RADIN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a decree (denominated order) of the Surrogate's Court, Monroe County (Edmund A. Calvaruso, S.), entered January 5, 2011. The decree disallowed the proposed investment of the trust assets in respondent's long term investment pool.

It is hereby ORDERED that the decree so appealed from is unanimously affirmed without costs for reasons stated in the decision by the Surrogate.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

351

CA 11-01884

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

EKLECCO NEWCO, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

Q OF PALISADES, LLC, DOING BUSINESS AS QDOBA MEXICAN GRILL, AND ROBERT A. LYON, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

YOUNG/SOMMER LLC, ALBANY (J. MICHAEL NAUGHTON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (W. COOK ALCIATI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered July 21, 2011 in a breach of contract action. The order denied plaintiff's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of plaintiff's motion seeking summary judgment on the second, sixth, and ninth causes of action and summary judgment dismissing the counterclaims and as modified the order is affirmed without costs, and

It is further ORDERED that judgment be entered in favor of plaintiff and against defendant Q of Palisades, LLC, doing business as Qdoba Mexican Grill, in the amount of $172,305.12.

Memorandum: Plaintiff (hereafter, landlord) commenced this action seeking, inter alia, to recover unpaid rent pursuant to the terms of its commercial property lease with defendant Q of Palisades, LLC, doing business as Qdoba Mexican Grill (hereafter, tenant). The tenant's principal, defendant Robert A. Lyon, executed a guaranty of the lease. In appeal No. 1, the landlord appeals from an order denying its motion for summary judgment on the complaint and dismissing the counterclaims and to strike defendants' affirmative defenses. In appeal No. 2, the landlord appeals from an order denying its motion for "leave to renew or reargue" those parts of its prior motion for summary judgment on the first and second causes of action.

We note at the outset that, as limited by its brief, the landlord has abandoned any issues with respect to those parts of its motion seeking summary judgment on the first, third, fifth, seventh, and

eighth causes of action and to strike the affirmative defenses (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). With respect to the order in appeal No. 1, we agree with the landlord that Supreme Court erred in denying that part of its motion seeking summary judgment on the second cause of action, for past due rent against the tenant. The landlord established that the tenant was obligated to pay rent pursuant to the terms of the lease and owed $172,305.12 in past due rent as of May 31, 2011, the time of its motion for summary judgment, and the tenant failed to raise a triable issue of fact (*see Crystal Run Newco, LLC v United Pet Supply, Inc.*, 70 AD3d 1418, 1419). We therefore modify the order in appeal No. 1 accordingly, and we direct that judgment be entered in favor of the landlord and against the tenant in the amount of $172,305.12.

We further agree with the landlord that the court erred in determining that triable issues of fact existed with respect to the counterclaims and in denying those parts of its motion seeking summary judgment dismissing the counterclaims, and we therefore further modify the order in appeal No. 1 accordingly. In the first counterclaim, for fraud in the inducement, defendants alleged that the landlord made misrepresentations concerning the number of annual visitors at the property and the sales volume of other tenants. The required elements of a fraud cause of action are representation of material fact, falsity, scienter, reliance, and injury (*see Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421; *Brenner v American Cyanamid Co.*, 288 AD2d 869, 870). Here, the landlord established as a matter of law that defendants were prohibited from relying upon the representations of the landlord based on section 23.16 of the lease (*see Valassis Communications v Weimer*, 304 AD2d 448, 448, *appeal dismissed* 2 NY3d 794). That section provided, in relevant part, that "Tenant acknowledges and agrees that neither Landlord nor any representative of Landlord nor any broker has made any representation to or agreement with Tenant relating to the Premises, this Lease or the Shopping Center which is not contained in the express terms of this Lease. Tenant acknowledges and agrees that Tenant's execution and delivery of this Lease is based upon Tenant's independent investigation and analysis of the business potential and expenses represented by this Lease, and Tenant hereby expressly waives any and all claims or defenses by Tenant against the enforcement of this Lease which are based upon allegations of representations, projections, estimates, understandings or agreements by Landlord or Landlord's representative that are not contained in the express terms of this Lease." Contrary to defendants' contention, that section was not a general merger clause, but rather it was a specific disclaimer that defeats defendants' allegation that they executed the lease in reliance upon the landlord's oral representations (*see Danann Realty Corp. v Harris*, 5 NY2d 317, 320-321).

Defendants' second counterclaim sought an accounting of the "additional rent" that the tenant paid as part of the lease agreement. We agree with the landlord that the counterclaim must be dismissed based on the doctrine of account stated. " 'An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the

separate items composing the account and the balance due, if any, in favor of one party or the other' " (*Shea & Gould v Burr*, 194 AD2d 369, 370). In support of its motion, the landlord submitted the yearly statements it provided to the tenant that indicated the monthly charges, including charges for additional rent. Defendants never raised any objection to those charges and, pursuant to the doctrine of account stated, they cannot object to them now (*see generally Francis W. King Petroleum Prods. v Geiger*, 231 AD2d 906; *Shea & Gould*, 194 AD2d at 371).

Finally, we agree with the landlord that the court erred in denying those parts of its motion for summary judgment on the sixth and ninth causes of action, seeking attorneys' fees against each defendant. Both the lease and the guaranty contain a provision granting the landlord the right to recover attorneys' fees upon a default in paying rent, and those provisions are unambiguous (*see generally Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492). We therefore further modify the order in appeal No. 1 accordingly.

With respect to the order in appeal No. 2, we dismiss the appeal from that order insofar as it denied the landlord's motion for leave to reargue certain parts of its prior motion (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984). To the extent that the order denied the landlord's motion for leave to renew those parts of its prior motion, we affirm. "A motion for leave to renew . . . shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]). The court properly determined that, although the landlord submitted new evidence, the facts contained therein would not have changed the court's prior determination (*see Garcea v Battista*, 53 AD3d 1068, 1070).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

352

CA 11-01885

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

EKLECCO NEWCO, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

Q OF PALISADES, LLC, DOING BUSINESS AS QDOBA MEXICAN GRILL, AND ROBERT A. LYON, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

YOUNG/SOMMER LLC, ALBANY (J. MICHAEL NAUGHTON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (W. COOK ALCIATI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered September 12, 2011 in a breach of contract action. The order, among other things, denied plaintiff's motion for leave to reargue and/or renew.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is otherwise affirmed without costs.

Same Memorandum as in *Eklecco Newco, LLC v Q of Palisades, LLC* ([appeal No. 1] ___ AD3d ___ [Mar. 16, 2012]).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

353

CA 11-01911

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

IN RE: EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION.

LINDA FISCHER, AS EXECUTOR OF THE ESTATE OF ROBERT A. FREIHEIT, DECEASED, PLAINTIFF-RESPONDENT,

V

AMERICAN PREMIUM UNDERWRITERS, INC., FORMERLY KNOWN AS THE PENN CENTRAL CORPORATION, ET AL., DEFENDANTS,
AND KOHLER CO., DEFENDANT-APPELLANT.

ORDER

HOAGLAND, LONGO, MORAN, DUNST & DOUKAS, LLP, NEW YORK CITY (WENDY R. KAGAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ & PONTERIO, LLC, BUFFALO (DENNIS P. HARLOW OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John P. Lane, J.H.O.), entered January 4, 2011. The order denied the motion of defendant Kohler Co. for summary judgment.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

355

KA 11-00937

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RANDY REISS, ALSO KNOWN AS RANDY A. REISS, ALSO KNOWN AS RANDY A. REISS, JR., ALSO KNOWN AS RANDY REISS, JR., DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, 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 February 28, 2011. 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.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

356

KA 11-00789

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANNON V. HILL, DEFENDANT-APPELLANT.

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 (Matthew J. Murphy, III, J.), rendered April 19, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [1]). We reject defendant's contention that his waiver of the right to appeal is invalid. "No particular litany is required for an effective waiver of the right to appeal" (*People v McDonald*, 270 AD2d 955, *lv denied* 95 NY2d 800; *see People v Moissett*, 76 NY2d 909, 910-911). The record establishes that defendant's waiver of the right to appeal was knowing, voluntary and intelligent and was "intended comprehensively to cover all aspects of the case" (*People v Muniz*, 91 NY2d 570, 575). Insofar as defendant contends that the waiver of the right to appeal should not encompass any issues raised in a CPL article 330 or article 440 motion or in an application for coram nobis relief (*see generally People v Liggins*, 56 AD3d 1265), that contention is premature because it seeks merely an advisory opinion. Defendant's further contention that he received ineffective assistance of counsel does not survive the waiver of the right to appeal or the guilty plea inasmuch as there is no showing that "the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney['s] allegedly poor performance" (*People v Gleen*, 73 AD3d 1443, 1444, *lv denied* 15 NY3d 773 [internal quotation marks omitted]).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

360

KA 10-02501

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWNEE Q. OLDSHIELD, DEFENDANT-APPELLANT.

JAMES L. DOWSEY, III, ELLICOTTVILLE, FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (JOHN C. LUZIER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered November 29, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree and criminal mischief in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him, following his plea of guilty, of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]) and criminal mischief in the fourth degree (§ 145.00), defendant contends that he did not validly waive his right to appeal. We reject that contention (*see generally People v Lopez*, 6 NY3d 248, 256), and his contention that he did not receive effective assistance of counsel does not survive either the guilty plea or the valid waiver of the right to appeal "because [t]here is no showing that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance" (*People v Robinson*, 39 AD3d 1266, 1267, *lv denied* 9 NY3d 869 [internal quotation marks omitted]). Defendant further contends that his plea was not knowing, voluntary and intelligent. Defendant, however, did not move to withdraw his guilty plea or to vacate the judgment of conviction on that ground and thus, although his contention survives the valid waiver of the right to appeal, it is not preserved for our review (*see People v Zulian*, 68 AD3d 1731, 1732, *lv denied* 14 NY3d 894). Upon our review of the record, we conclude that this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

361

KA 09-02242

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK A. VELARDI, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (ROBERT R. REITTINGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered May 29, 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.

Memorandum: On appeal from a judgment convicting him, upon his guilty plea, of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]), defendant contends that County Court erred in refusing to suppress contraband that he was seen dumping onto the ground. That contention, however, is encompassed by his valid waiver of the right to appeal and we therefore do not address it (*see People v Kemp*, 94 NY2d 831, 833; *People v Bell*, 89 AD3d 1518; *People v McKeon*, 78 AD3d 1617, 1618, *lv denied* 16 NY3d 799).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

362

KA 11-01967

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSE C. SMITH, DEFENDANT-APPELLANT.

MEGGESTO, CROSSETT & VALERINO, LLP, SYRACUSE (JAMES A. MEGGESTO 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 June 3, 2011. 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 and the matter is remitted to Supreme Court, Onondaga County, for proceedings pursuant to CPL 460.50 (5).

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that he was entitled to specific performance of the original plea agreement. "The remedy of specific performance in the context of plea agreements applies where a defendant has been placed in a no-return position in reliance on the plea agreement . . . , such that specific performance is warranted as a matter of essential fairness" (*People v Sierra*, 85 AD3d 1659, 1659, *lv denied* 17 NY3d 905 [internal quotation marks omitted]; *see generally People v McConnell*, 49 NY2d 340, 348-349). Here, Supreme Court properly determined that specific performance of the original plea agreement was not warranted.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

363

KA 11-01324

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

RONALD B. SCOTT, DEFENDANT-RESPONDENT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR APPELLANT.

MARK S. WILLIAMS, PUBLIC DEFENDER, OLEAN, FOR DEFENDANT-RESPONDENT.

Appeal from an amended decision of the Cattaraugus County Court (Larry M. Himelein, J.), dated December 29, 2010. The amended decision dismissed the indictment against defendant.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: The People appeal from an amended decision granting defendant's motion to dismiss the indictment pursuant to CPL 30.30. The appeal must be dismissed because no judgment or order is included in the record on appeal, and "[n]o appeal lies from a decision" (*People v McCarter*, 97 AD2d 852).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

365

KA 10-02123

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES RICHARDS, JR., 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 (Matthew J. Murphy, III, J.), rendered September 29, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that his waiver of the right to appeal is invalid. That contention lacks merit. County Court specifically advised defendant that the waiver of the right to appeal was not automatic based upon the plea (*cf. People v Moyett*, 7 NY3d 892), and the court asked defendant whether he had discussed the waiver of his right to appeal with his attorney and in fact provided defendant with a further opportunity to speak to his attorney concerning the waiver. Under the circumstances, the court did not " 'conflate' " the waiver of the right to appeal with those rights automatically forfeited by the plea (*People v Porter*, 55 AD3d 1313, *lv denied* 11 NY3d 899). Defendant's waiver of the right to appeal forecloses his contention regarding the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255). Finally, defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus has failed to preserve for our review his challenge to the factual sufficiency of the plea allocution (*see People v Lopez*, 71 NY2d 662, 665). We note in any event that no factual colloquy was required inasmuch as defendant pleaded guilty to a crime lesser than that charged in the indictment (*see People v Zimmerman*, 219 AD2d 848, *lv*

denied 88 NY2d 856).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

366

CAF 11-01012

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

IN THE MATTER OF KELLY DIPAOLO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MATTHEW K. AVERY, RESPONDENT-RESPONDENT.

EDWARD G. KAMINSKI, UTICA, FOR PETITIONER-APPELLANT.

DOREEN M. ST. THOMAS, ATTORNEY FOR THE CHILDREN, UTICA, FOR BREANA A. AND TRYSTA A.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered April 11, 2011 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of a prior custody order.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated and the matter is remitted to Family Court, Oneida County, for a hearing on the petition in accordance with the following Memorandum: Petitioner mother contends on appeal that Family Court erred in sua sponte dismissing her petition seeking modification of a prior custody order by awarding her primary custody of the children without conducting a hearing and after a judicial hearing officer had denied respondent father's motion to dismiss the petition. We agree. The petition alleged that modification of the existing custody arrangement, pursuant to which the father had primary custody, was warranted because, inter alia, the mother and her current husband have completed counseling and have a stable home. In her bill of particulars, the mother added the allegation that the father was not involved in the children's schooling and had refused to obtain counseling for the children to enable them to address their adjustment and coping issues. We thus conclude that the mother "made a sufficient evidentiary showing of a change in circumstances to warrant a hearing" (*Matter of Mayer v Londraville*, 26 AD3d 758; *cf. Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417-1418). We therefore reverse the order, reinstate the petition and remit the matter to Family Court for a hearing on the petition before a different judge.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

367

CAF 10-02163

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

IN THE MATTER OF CLEOPHUS B.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ERIKA B., RESPONDENT.

TORRENCE B., APPELLANT.

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

DENISE J. MORGAN, UTICA, FOR PETITIONER-RESPONDENT.

JOHN G. KOSLOSKY, ATTORNEY FOR THE CHILD, UTICA, FOR CLEOPHUS B.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered September 30, 2010 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that it is in the best interests of the subject child to remain in the custody of petitioner.

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

Memorandum: Appellant father appeals from an order that continued placement of the child in the custody of petitioner. We note at the outset that this appeal is moot in light of the subsequent permanency orders continuing placement of the child in the custody of petitioner (*see Matter of Dustin B.*, 71 AD3d 1426, 1427). We conclude, however, that the exception to the mootness doctrine applies herein (*see Matter of Latanya H.*, 89 AD3d 1528, 1529; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Family Court adjudicated the child to be neglected by respondent mother, but we affirmed an order dismissing the petition insofar as it alleged that the father derivatively neglected the child (*Matter of Cleophus M.B.*, 90 AD3d 1512). The father moved for summary judgment seeking to vacate the order of placement of the child in petitioner's custody and to award him immediate custody. The court denied the motion, determining that the father failed to allege any facts demonstrating his present ability to care for the child, and the court then conducted a hearing. Both the Attorney for the Child and petitioner raised the issue of extraordinary circumstances at the hearing. After the hearing, the court determined that extraordinary

circumstances did not exist to continue placement of the child in petitioner's custody and released the child to the father's custody. The court, however, placed the father under the supervision of petitioner and ordered the father to comply with, inter alia, random drug and alcohol testing. It is undisputed that the father failed to comply with the drug testing, whereupon the court entered the order that is currently before us on appeal.

Initially, we reject the father's contention that the court erred in denying his motion for summary judgment. The court denied the motion and held the hearing so that the father could "make a basic showing of an ability to provide for the child's needs." Considering that the child had been in foster care for nine months prior to the motion, we conclude that it was proper for the court to hold a hearing to determine if the father was entitled to custody of the child (*see Matter of Alex LL. v Albany County Dept. of Social Servs.*, 270 AD2d 523, 527).

The father contends that, because the court dismissed the neglect petition against him, the court was without jurisdiction to impose conditions on his behavior through an order of supervision and to make compliance with those conditions a prerequisite to returning the child to his care and custody. We reject that contention. Upon determining that the mother had neglected the child, the court issued an order of disposition pursuant to Family Court Act § 1054 (a). That statute provides in relevant part that, "[i]f the order of disposition releases the child to the custody of his or her parent or other person legally responsible for his or her care at the time of the filing of the petition, the court may place the person to whose custody the child is released under supervision of a child protective agency or of a social services official or duly authorized agency . . . ." Contrary to the father's contention, the fact that there was no finding of neglect against him is of no moment inasmuch as " '[t]he parent or other person legally responsible to whose custody the child is released need not be the respondent' " (*Matter of Kahira C.*, 269 AD2d 840, 841, *lv denied* 95 NY2d 751; *see also Matter of Christina I.*, 226 AD2d 789, *lv denied* 88 NY2d 808).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

370

CA 11-01459

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

GARY A. BENNETT, PLAINTIFF-APPELLANT,

V ORDER

PRESBYTERIAN SENIOR CARE OF WESTERN NEW YORK, INC., DEFENDANT-RESPONDENT, ET AL., DEFENDANT.

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

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

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered February 7, 2011 in a personal injury action. The order, insofar as appealed from, denied the cross motion of plaintiff for partial summary judgment.

Now, upon reading and filing the stipulation withdrawing and discontinuing appeal signed by the attorneys for the parties on January 19, 2012 and filed on February 15, 2012,

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

371

CA 11-01941

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

IN THE MATTER OF THE ARBITRATION BETWEEN
CITY OF OSWEGO, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

OSWEGO CITY FIREFIGHTERS ASSOCIATION,
LOCAL 2707, RESPONDENT-RESPONDENT.

ROEMER WALLENS GOLD & MINEAUX LLP, ALBANY (EARL T. REDDING OF COUNSEL), FOR PETITIONER-APPELLANT.

SATTER & ANDREWS, LLP, SYRACUSE (MIMI C. SATTER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered May 5, 2011 in a proceeding pursuant to CPLR article 75. The order denied the petition and confirmed the arbitration award.

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

Memorandum: Petitioner, City of Oswego (City), appeals from an order that denied its application seeking to vacate an arbitration award pursuant to CPLR 7511 (b) (1) (iii) and granted the application of respondent, Oswego City Firefighters Association, Local 2707 (Union), improperly denominated as petitioner in the second ordering paragraph in the order on appeal, to confirm the award pursuant to CPLR 7510. In its petition, the City contended that the arbitrator exceeded his authority by rendering an award that was in direct contravention of the Retirement and Social Security Law, the Civil Service Law and the "strong public policies" underlying those laws. We conclude that Supreme Court properly denied the petition and confirmed the award.

The City and the Union were parties to an agreement concerning the employment of firefighters in the City. That agreement was to "be effective as of January 1, 2007, and [to] remain[] in full force and effect" through December 31, 2009. As pertinent to this appeal, section 26.1 of the agreement provided that the City would pay the firefighters' costs in the New York State Police and Fireman's Retirement System (PFRS). In addition, the City agreed to make a Plan 384-d (*see* Retirement and Social Security Law § 384-d) available to the firefighters.

In 2009, the Legislature enacted Retirement and Social Security Law article 22, which provides in relevant part that all members of the PFRS who joined the PFRS on or after the effective date of article 22 would be required to contribute 3% of their annual wages to the State retirement fund in which they were enrolled (§ 1204). The Legislature, however, created an exception setting forth that, "[n]otwithstanding any provision of law to the contrary, nothing in this act shall limit the eligibility of any member of an employee organization to join a special retirement plan open to him or her pursuant to a collectively negotiated agreement with any state or local government employer, where such agreement is in effect on the effective date of this act and so long as such agreement remains in effect thereafter; provided, however, that any such eligibility shall not apply upon termination of such agreement for employees otherwise subject to the provisions of article twenty-two of the retirement and social security law" (L 2009, ch 504, part A, § 8 [hereafter, Section 8]).

By letter dated January 12, 2010, which was shortly after article 22 took effect, the New York State Retirement System (Retirement System) requested that the City provide copies of any agreements covering PFRS employees that were "in effect" on January 9, 2010. The City responded by enclosing, inter alia, the subject agreement, and noting that it "expired on December 31, 2009" and was "currently being renegotiated." Ultimately, the Retirement System advised the City by letter dated March 2, 2010 that firefighters hired on or after the effective date of article 22 would have to contribute toward their retirements inasmuch as the last contract "expired on December 31, 2009."

In the meantime, the City had hired several firefighters and, when the City refused to contribute toward their respective retirements, the Union filed a grievance and sought arbitration of that grievance. The parties stipulated to the exhibits to be submitted to the arbitrator and left it to the arbitrator to frame the issue. In his "opinion and award," the arbitrator concluded, inter alia, that the firefighters who were hired by the City after the effective date of article 22 were eligible to elect to participate in the 384-d plan provided for in section 26.1 of the agreement and that the City would be required to pay for the employees' contributions as negotiated under the terms of that agreement.

As a preliminary matter, we reject the Union's contention that the City, by participating in the arbitration, waived its contention that the arbitrator exceeded his authority. It is well settled that a party who fails to apply for a stay of arbitration and who participates in the arbitration waives any contention that the claim is not arbitrable or that the arbitrator lacked the power to resolve the question submitted (*see Rochester City School Dist. v Rochester Teachers Assn.*, 41 NY2d 578, 583; *Matter of County of Onondaga [Civil Serv. Empls. Assn.]*, 248 AD2d 1026; *Matter of RRN Assoc. [DAK Elec. Contr. Corp.]*, 224 AD2d 250). Participation in arbitration, however, does not constitute the waiver of a contention that the arbitrator, during the course of the proceeding or in fashioning the actual award,

exceeded his or her authority (*see Matter of Brijmohan v State Farm Ins. Co.*, 239 AD2d 496, 497, *affd* 92 NY2d 821; *Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 310).

Also as a preliminary matter, however, we agree with the Union that any documents that were not submitted to the arbitrator should not be considered in reviewing the propriety of the award (*see Matter of Campbell v New York City Tr. Auth.*, 32 AD3d 350, 352; *Matter of Hirsch Constr. Corp. [Cooper]*, 181 AD2d 52, 55, *lv denied* 81 NY2d 701), even though they were attached to the petition and thus were properly included in the record on appeal (*see* CPLR 5526; 22 NYCRR 1000.4 [a] [2]; *cf. Wells Fargo Bank Intl. v Saud*, 97 AD2d 945).

Turning now to the merits, we agree with the Union that the court properly confirmed the arbitration award. It is axiomatic that "courts are obligated to give deference to the decision of the arbitrator" (*Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL–CIO*, 6 NY3d 332, 336), and that "[a]n award may be vacated on the ground that an arbitrator exceeded his or her power 'only where the arbitrator's award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power' " (*Matter of Communication Workers of Am., Local 1170 v Town of Greece*, 85 AD3d 1668, 1669, *lv denied* 18 NY3d 802, quoting *New York City Tr. Auth.*, 6 NY3d at 336; *see Matter of Buffalo Teachers Fedn., Inc. v Board of Educ. of City School Dist. of City of Buffalo*, 50 AD3d 1503, 1505, *lv denied* 11 NY3d 708).

Contrary to the contention of the City, the award herein is not contrary to existing statutes, does not violate a strong public policy and is not irrational. The crucial issue on this appeal is whether the exception in Section 8 applies to the subject firefighters. That issue turns on whether the agreement between the City and the Union was still in effect at the time the subject firefighters joined the PFRS. Pursuant to what is known as the *Triborough* doctrine (*see Matter of Professional Staff Congress-City Univ. of N.Y. v New York State Pub. Empl. Relations Bd.*, 7 NY3d 458, 466), as embodied in Civil Service Law § 209-a (1) (e), it is an improper practice, but for an exception not relevant here, for a public employer "to refuse to continue *all* the terms of an expired agreement until a new agreement is negotiated" (§ 209-a [1] [e] [emphasis added]; *see Matter of Triborough Bridge & Tunnel Auth. [District Council 37 & Local 1396]*, 5 PERB ¶ 3037). Because a new agreement between the City and the Union had not yet been negotiated at the time the subject firefighters joined the PFRS, all of the terms of the expired agreement were still in effect (*see generally Association of Surrogates & Supreme Ct. Reporters Within City of N.Y. v State of New York*, 79 NY2d 39, 45). Through Section 8, the Legislature recognized the need to provide for employees who had been accorded certain retirement benefits under agreements that were still in effect. Thus, the determination to apply the Section 8 exception to the subject firefighters does not "violate a defined and discernible public policy . . . or . . . create[] an *explicit* conflict with other laws and their attendant

policy concerns" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 327).

Contrary to the further contention of the City, a determination to apply the Section 8 exception in this case does not constitute a "negotiation" of retirement benefits as prohibited by Civil Service Law § 201 (4) and Retirement and Social Security Law § 470 (*cf. Matter of City of Yonkers v Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, 90 AD3d 1043). The determination whether a certain group of employees falls within a legislatively-created exception to a statute is not a negotiation of retirement benefits. It is merely an interpretation of Section 8 as it applies to a previously-negotiated agreement.

While we recognize that this decision is inconsistent with the determination of the Retirement System as set forth in its letter to the City dated March 2, 2010, "where, as here, the question is one of pure statutory construction, dependent only on accurate apprehension of legislative intent, judicial review is less restricted and there is little basis to rely upon any special competence or expertise of the administrative agency" (*New York City Campaign Fin. Bd. v Ortiz*, 38 AD3d 75, 81; *see generally Matter of KSLM-Columbus Apts., Inc. v New York State Div. of Hous. & Community Renewal*, 5 NY3d 303, 312).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-02147

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

OPHELIA KWEH, AS GUARDIAN OF THE PERSON AND PROPERTY OF JOHN KWEH, AND OPHELIA KWEH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER C. EDMUNDS, PATRICK D. SAMPSON, SKINNER SALES, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(ACTION NO. 1.)

OPHELIA KWEH, AS ADMINISTRATRIX OF THE ESTATE OF SAMPSON KWEH, DECEASED, PLAINTIFF-RESPONDENT,

V

CHRISTOPHER C. EDMUNDS, PATRICK D. SAMPSON, SKINNER SALES, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(ACTION NO. 2.)

PHILIP KWEH, PLAINTIFF-RESPONDENT,

V

CHRISTOPHER C. EDMUNDS, PATRICK D. SAMPSON, SKINNER SALES, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(ACTION NO. 3.)

KADRA DAYOW, AS ADMINISTRATRIX OF THE ESTATE OF MOHAMED DAYOW, DECEASED, PLAINTIFF-RESPONDENT,

V

OPHELIA KWEH, AS ADMINISTRATRIX OF THE ESTATE OF JUTY KWEH, DECEASED, DEFENDANT, PATRICK D. SAMPSON AND CHRISTOPHER C. EDMUNDS, DEFENDANTS-APPELLANTS.
(ACTION NO. 4.)

KADRA DAYOW, AS ADMINISTRATRIX OF THE ESTATE
OF MOHAMED DAYOW, DECEASED,
PLAINTIFF-RESPONDENT,

V

SKINNER SALES, INC., DEFENDANT-APPELLANT.
(ACTION NO. 5.)

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

BRINDISI, MURAD, BRINDISI, PEARLMAN, JULIAN & PERTZ, LLP, UTICA (RICHARD PERTZ OF COUNSEL), THE GOLDEN LAW FIRM, AND PETER M. HOBAICA LLC, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, A.J.), entered February 15, 2011 in personal injury and wrongful death actions. The order, insofar as appealed from, denied the motion of defendants Christopher C. Edmunds, Patrick D. Sampson and Skinner Sales, Inc. for summary judgment dismissing the complaints and all cross claims against them.

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

Memorandum: Plaintiffs commenced these negligence and wrongful death actions stemming from a motor vehicle accident that occurred when a vehicle operated by decedent Juty Kweh (Kweh) collided with a vehicle operated by defendant Christopher C. Edmunds. The collision occurred when Edmunds and Kweh were driving in opposite directions on a two-lane highway, and the vehicle driven by Kweh entered Edmunds's lane of travel. Supreme Court properly denied the motion of Edmunds, defendant Patrick D. Sampson, and defendant Skinner Sales, Inc. (hereafter, defendants) for summary judgment seeking dismissal of the complaints and all cross claims against them. In order to establish their entitlement to summary judgment based on the emergency doctrine in this crossover case, defendants were required to establish "both that [Kweh's] vehicle 'suddenly entered the lane where [Edmunds] was operating [his vehicle] in a lawful and prudent manner and that there was nothing [Edmunds] could have done to avoid the collision' " (*Fratangelo v Benson*, 294 AD2d 880, 881, quoting *Pilarski v Consolidated Rail Corp.*, 269 AD2d 821, 822; *see Rost v Stolzman*, 81 AD3d 1401, 1402). Defendants failed to meet that burden inasmuch as the proof submitted by them in support of their motion, including the accident reconstruction analysis and Edmunds's deposition testimony, raises an issue of fact whether Edmunds was negligent in failing to take sufficient evasive action (*see Testerman v Zielinski*, 68 AD3d 1751, 1752-1753; *Fratangelo*, 294 AD2d at 881). In any event, plaintiffs raised a triable issue through their expert's affidavit (*see Richards v Bartholomew*, 60 AD3d 1405, 1406). Contrary to

defendants' contention, the expert had a sufficient evidentiary

foundation to support his opinions (*cf. Rost*, 81 AD3d at 1403).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-02045

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

IN THE MATTER OF MARTIN J. SAWMA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHRIS COLLINS, COUNTY EXECUTIVE, COUNTY OF ERIE, RESPONDENT-RESPONDENT.

LAW OFFICE OF MICHAEL KUZMA, BUFFALO (MICHAEL KUZMA OF COUNSEL), FOR PETITIONER-APPELLANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (VINCENT M. MIRANDA OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated decision and order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 8, 2010 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 appeals from a judgment dismissing his CPLR article 78 petition that sought disclosure of certain records of respondent pursuant to the Freedom of Information Law ([FOIL] Public Officers Law art 6). We agree with Supreme Court that the documents sought are exempt from disclosure pursuant to Public Officers Law § 87 (2) (g) inasmuch as they are inter-agency or intra-agency materials that are not statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations. Respondent met his burden of establishing that the documents were part of a government decision-making process that involved the use of consultation, and such predecisional material that an agency decision-maker uses to arrive at a decision is exempt from FOIL disclosure (*see Matter of Xerox Corp. v Town of Webster*, 65 NY2d 131; *Matter of Bass Pro, Inc. v Megna*, 69 AD3d 1040). In light of our determination, we need not address the remaining exemptions under FOIL upon which respondent relies.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01601

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

IN THE MATTER OF THE ESTATE OF ANITA D. SHELDON, DECEASED.

SANDRA HAWN, AS EXECUTRIX OF THE ESTATE OF RICHARD SHELDON, DECEASED, PETITIONER-RESPONDENT,

ORDER

V

LYNNE SUORSA AND CLYDE HOWSON, RESPONDENTS-APPELLANTS.

LELAND T. WILLIAMS, ROCHESTER, FOR RESPONDENTS-APPELLANTS.

SCOTT AND GILBERT, LLP, CANANDAIGUA (JOHN J. GILBERT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a decree (denominated decision and order) of the Surrogate's Court, Ontario County (Frederick G. Reed, S.), entered April 4, 2011. The decree determined the right of election of Richard Sheldon to be valid.

It is hereby ORDERED that the decree so appealed from is unanimously affirmed without costs for reasons stated in the decision by the Surrogate.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01440

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

KATHLEEN E. TAFT, PLAINTIFF-APPELLANT,

V ORDER

ANDREA G. MORAN AND DENISE J. MCILWAIN, ALSO KNOWN AS DENISE J. AKINS, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

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

LEVENE GOULDIN & THOMPSON, LLP, VESTAL (SARAH E. NUFFER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered April 7, 2011 in a personal injury action. The order granted the motion of defendants for summary judgment dismissing the complaint and denied the cross motion of plaintiff for partial summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01876

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

KATHLEEN E. TAFT, PLAINTIFF-APPELLANT,

V ORDER

ANDREA G. MORAN AND DENISE J. MCILWAIN, ALSO KNOWN AS DENISE J. AKINS, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

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

LEVENE GOULDIN & THOMPSON, LLP, VESTAL (SARAH E. NUFFER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered April 20, 2011 in a personal injury action. The judgment dismissed the complaint.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-02084

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

SOPRAMCO III, LLC, PLAINTIFF-APPELLANT,

V ORDER

CAPITAL DISTRICT ORTHOTIC GROUP, INC.,
DEFENDANT-RESPONDENT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ROBERT D. HOOKS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE SUMMERS LAW FIRM, P.C., ALBANY (JOHN BELLUSCIO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered May 7, 2010 in a breach of contract action. The order denied plaintiff's motion for summary judgment.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 11-02114

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTHONY S. PIGNATARO, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered May 4, 2010. Defendant was resentenced pursuant to Penal Law § 70.85.

It is hereby ORDERED that the resentence so appealed from is unanimously affirmed (*see People v Williams*, 82 AD3d 1576, *lv denied* 17 NY3d 810).

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

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

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CAF 10-02336

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

IN THE MATTER OF DANIELLE DENAULT WINDER,
PETITIONER-RESPONDENT,

V ORDER

CHRISTOPHER WILLIAMS, RESPONDENT-APPELLANT.

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

ELISABETH M. COLUCCI, ATTORNEY FOR THE CHILD, BUFFALO, FOR CHRISTA W.

Appeal from a corrected order of the Family Court, Erie County (Kevin M. Carter, J.), entered October 22, 2010 in a proceeding pursuant to Family Court Act article 6. The corrected order determined that respondent would be responsible for transportation to and from visitation.

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

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1007/08) KA 07-01184. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JACK VANDEVIVER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, AND LINDLEY, JJ. (Filed Mar. 16, 2012.)

MOTION NO. (395/09) KA 08-00861. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V NORMAN C. SONBERG, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, AND CARNI, JJ. (Filed Mar. 16, 2012.)

MOTION NO. (538/09) KA 06-02148. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BILLY G. WILLIAMS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, AND MARTOCHE, JJ. (Filed Mar. 16, 2012.)

MOTION NO. (758/10) KA 07-00127. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JACOB ROUSE, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., FAHEY, CARNI, AND SCONIERS, JJ. (Filed Mar. 16, 2012.)

MOTION NO. (212.2/11) CA 10-02057. -- COLONIAL SURETY COMPANY, PETITIONER-APPELLANT-RESPONDENT, V LAKEVIEW ADVISORS, LLC, RESPONDENT-RESPONDENT-APPELLANT, RESOLUTION MANAGEMENT, LLC, RESPONDENT-RESPONDENT, AND NATIONAL

CREDIT ADJUSTERS, LLC, RESPONDENT. (APPEAL NO. 2.) -- Motion for reargument of the appeal and cross appeal is granted and, upon reargument, the memorandum and order entered February 18, 2011 (81 AD3d 1460) is amended by adding to the first sentence of the order the words "and cross appeal" after the word "Appeal" and, beginning with the second paragraph, is otherwise vacated and the following memorandum and ordering paragraph is substituted therefor:

"It is hereby ORDERED that the cross appeal is unanimously dismissed and the order and judgment so appealed from is reversed on the law without costs, the petition is reinstated and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Petitioner previously obtained a judgment against Paul W. O'Brien, the manager and sole principal of respondent Lakeview Advisors, LLC (Lakeview). Petitioner commenced this proceeding pursuant to CPLR article 52 seeking to enforce that judgment with respect to, inter alia, a debt owed to Lakeview by respondent Resolution Management, LLC (Resolution), as well as Resolution's accounts receivable in which Lakeview had a security interest. Petitioner contended that it was entitled to pierce the corporate veil of Lakeview and thus to execute its judgment upon Lakeview's interest in that property. In appeal No. 1, petitioner appeals from an order that, inter alia, directed Resolution to pay the sum of $537,000 into an escrow account pending resolution of the proceeding. In appeal No. 2, petitioner appeals from an order and judgment that, inter alia, vacated the order in appeal No. 1 and dismissed the petition.

Initially, we note that the appeal from the order in appeal No. 1 must be dismissed because the right to appeal from that intermediate order terminated upon the entry of the order and judgment in appeal No. 2 (*see Murphy v CSX Transp., Inc.* [appeal No. 1], 78 AD3d 1543; *Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435). The issues raised in appeal No. 1 will be considered upon the appeal from the order and judgment in appeal No. 2 (*see Matter of Aho*, 39 NY2d 241, 248).

Next, we note that the cross appeal in appeal No. 2 must be dismissed. Lakeview, '[which] is not aggrieved by the [order and] judgment . . . appealed from [in appeal No. 2] and [which], therefore, has no right to bring an appeal [therefrom], is entitled to raise an error made below, for review by the appellate court, as long as that error has been properly preserved and would, if corrected, support a judgment in [its] favor . . . Any such error is reviewable once[, as here,] the final judgment or order has been properly appealed from by the losing party' (*Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 546). We conclude that the issue raised by Lakeview was properly preserved and would warrant judgment in its favor in the event that it had merit. Therefore, although we must dismiss the cross appeal because Lakeview is not aggrieved, we consider its contention as an alternate ground for affirmance. Nevertheless, we further conclude that Lakeview's contention is without merit because we agree with petitioner that Supreme Court abused its discretion in dismissing the petition.

By its order and judgment in appeal No. 2, the court reverse-pierced the corporate veil of Lakeview and concluded that it was the alter ego of O'Brien based, inter alia, upon the evidence in the record establishing that O'Brien was using Lakeview in an attempt to thwart petitioner's attempts to collect on its underlying judgment. Respondents contend that we should determine that the court erred in reverse-piercing the corporate veil and in concluding that Lakeview, a limited liability company, was the alter ego of O'Brien. We reject that contention.

Contrary to respondents' contention, petitioner satisfied its burden of justifying the piercing of the corporate veil. It is well settled that 'the doctrine of piercing the corporate veil . . . applies to limited liability companies . . . In so doing, [petitioner] bears "a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences" ' (*Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210 [internal quotation marks omitted], quoting *TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339). Here, O'Brien in fact admitted that he dominated the limited liability company (LLC). In addition, the evidence in the record demonstrates that O'Brien established the LLC after the prior judgment at issue herein was entered against him in order to shield his assets from petitioner, and after he fraudulently attempted to have the debt discharged in bankruptcy. Furthermore, he used LLC funds to pay personal expenses, make payments to his wife in lieu of his salary, and contribute to his personal IRA account. He also closed his

personal checking account and used Lakeview checks to pay his personal bills. Based on those actions, we conclude that inequitable consequences would result if we were to permit him to shield his assets from petitioner, his judgment creditor, by misusing the LLC in this manner (*see generally National Union Fire Ins. Co. of Pittsburgh, Pa. v Bodek*, 270 AD2d 139, *lv dismissed* 95 NY2d 887, *rearg denied* 95 NY2d 959; *Austin Powder Co. v McCullough*, 216 AD2d 825). Thus, the court did not abuse its discretion in reverse-piercing Lakeview's corporate veil.

In its bench decision underlying the order and judgment in appeal No. 2, the court concluded, among other things, that it 'would not be equitable' to permit petitioner to pursue money that Resolution owed to Lakeview because to do so would 'prejudice creditors of Lakeview,' i.e., six entities (hereafter, note holders) that allegedly loaned Lakeview the money that it in turn later loaned to Resolution. We agree with petitioner that, based on the evidence in the record and the court's determination of the credibility of the witnesses who testified at the hearing on the instant petition, the court abused its discretion in its balancing of the equities.

It is clear that the court has the authority under CPLR article 52 to consider the rights of other entities who may also have a claim to property or debts owed to a judgment creditor and, indeed, pursuant to CPLR 5225 (b) and 5227, '[t]he court may permit any adverse claimant to intervene in the [CPLR article 52] proceeding and may determine his [or her] rights in accordance with section 5239.' In addition, 'CPLR 5240 grants the courts

broad discretionary power to control and regulate the enforcement of a money judgment under article 52 to prevent "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" ' (*Guardian Loan Co. v Early*, 47 NY2d 515, 519; *see Rondack Constr. Servs., Inc. v Kaatsbaan Intl. Dance Ctr., Inc.*, 13 NY3d 580, 585; *Matter of Stern v Hirsch*, 79 AD3d 1046). The statute 'serves as an equitable safety valve which allows a court to restrain execution upon its judgment where unwarranted hardship would otherwise result. The decisional process invoked is the balancing of harm likely to result from execution, against the necessity of using that immediate means of attempted satisfaction' (*Seyfarth v Bi-County Elec. Corp.*, 73 Misc 2d 363, 365; *see Fiore v Oakwood Plaza Shopping Ctr., Inc.*, 178 AD2d 311, 312, *appeal dismissed* 80 NY2d 826). One of the factors that the court was required to consider was whether 'the record supports the [petitioner]'s contention that [respondents are] attempting to frustrate [petitioner]'s attempts to collect the money owed' to petitioner by O'Brien (*Putnam County Natl. Bank of Carmel v Pryschlak*, 226 AD2d 358, 358; *see Matter of AMEV Capital Corp. v Kirk*, 180 AD2d 791).

Here, we conclude that the court failed to consider petitioner's right to execute upon its judgment, failed to take proper consideration of respondents' efforts to prevent petitioner from collecting on its judgment, and reached its conclusion regarding the prejudice to the note holders in the absence of any compelling evidence that such prejudice exists. Although both O'Brien and Mark Bohn, the president of Resolution, testified

at the hearing on the petition that the note holders would be damaged, their credibility was severely damaged by, among other things, the court's finding that one of O'Brien's affidavits was 'inherently incredible,' and the denial of O'Brien's request to discharge in bankruptcy the judgment underlying this proceeding on the ground that he provided false filings and testimony in the bankruptcy matter. Indeed, notably absent from the record is any testimony or evidence from the note holders establishing that Resolution in fact repurchased the original notes, what the terms of such a repurchase might have been, or how the note holders would be prejudiced by any default or delay in repayment of their loans. In addition, the substituted promissory notes that allegedly demonstrated that a repurchase of the loan occurred were not notarized, and they were undated with the exception of one dated approximately eight months before the repurchase transaction is alleged to have occurred. Based upon our review of the record as a whole, we conclude that the court erred in determining that the prejudice to the note holders outweighed petitioner's right to collect on its judgment.

Consequently, we reverse the order and judgment and reinstate the petition, and we remit the matter to Supreme Court for further proceedings, including a new hearing on the petition. The court may determine the rights of any claimant to the funds held in escrow upon the intervention of such party pursuant to CPLR 5225 (b) and 5227. We further direct that, pending the disposition of the petition, the second, third and sixth ordering paragraphs of the order of this Court dated November 5, 2010 shall

continue to be in full force and effect unless modified by Supreme Court in accordance with our decision herein, and we expressly incorporate those ordering paragraphs into our order in appeal No. 2. We note that petitioner has made several motions in this Court seeking discovery with respect to Resolution's compliance with the conditions of the order of this Court dated November 5, 2010. We refer those matters to Supreme Court, to be resolved in conjunction with the further proceedings on the petition.

We have considered petitioner's remaining contentions and conclude that they are without merit, or are academic in light of our determination." PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed Mar. 16, 2012.)

MOTION NO. (944/11) TP 11-00377. -- IN THE MATTER OF DOUGLAS J. GIAMBRONE AND MARCON ERECTORS, INC., PETITIONERS, V ALEXANDER B. GRANNIS, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, AND NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, RESPONDENTS. -- Motion for reargument denied. PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND SCONIERS, JJ. (Filed Mar. 16, 2012.)

MOTION NO. (994/11) KA 08-01129. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TERRIS HANKS, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, LINDLEY, AND SCONIERS, JJ. (Filed Mar. 16, 2012.)

MOTION NO. (1093/11) CA 11-00089. -- IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER FOR AN "INSPECTION WARRANT" TO INSPECT 449 CEDARWOOD TERRACE, CITY OF ROCHESTER, COUNTY OF MONROE, STATE OF NEW YORK. JILL CERMAK AND BRUCE HENRY, APPELLANTS, V CITY OF ROCHESTER, RESPONDENT. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed Mar. 16, 2012.)

MOTION NO. (1094/11) CA 11-00362. -- IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER FOR AN "INSPECTION WARRANT" TO INSPECT 449-451 CEDARWOOD TERRACE, CITY OF ROCHESTER, COUNTY OF MONROE, STATE OF NEW YORK. JILL CERMAK AND BRUCE HENRY, APPELLANTS, V CITY OF ROCHESTER, RESPONDENT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed Mar. 16, 2012.)

MOTION NO. (1099/11) CA 11-00181. -- IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER FOR AN "INSPECTION WARRANT" TO INSPECT 187 CLIFTON STREET, CITY OF ROCHESTER, COUNTY OF MONROE, STATE OF NEW YORK. FLORINE NELSON AND WALTER NELSON, APPELLANTS, V CITY OF ROCHESTER, RESPONDENT. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed Mar. 16, 2012.)

MOTION NO. (1100/11) CA 11-00363. -- IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER FOR AN "INSPECTION WARRANT" TO INSPECT 187 CLIFTON STREET, CITY OF ROCHESTER, COUNTY OF MONROE, STATE OF NEW YORK. FLORINE NELSON AND WALTER NELSON, APPELLANTS, V CITY OF ROCHESTER, RESPONDENT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed Mar. 16, 2012.)

MOTION NO. (1117/11) CA 11-01069. -- KAREN L. SALVATO, PLAINTIFF-RESPONDENT, V LARRY P. SALVATO, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Mar. 16, 2012.)

MOTION NO. (1146/11) CA 11-00343. -- JOSEPH F. GAGNON, JR. AND SHARON GAGNON, PLAINTIFFS-APPELLANTS, V ST. JOSEPH'S HOSPITAL, THROUGH ITS OFFICERS, AGENTS AND/OR EMPLOYEES, RICHARD KELLEY, M.D., INDIVIDUALLY AND AS AN OFFICER, AGENT AND/OR EMPLOYEE OF ST. JOSEPH'S HOSPITAL, DAVID ENG, M.D., INDIVIDUALLY AND AS AN OFFICER, AGENT AND/OR EMPLOYEE OF ST. JOSEPH'S HOSPITAL, AND CRAIG MONTGOMERY, M.D., INDIVIDUALLY AND AS AN OFFICER, AGENT AND/OR EMPLOYEE OF ST. JOSEPH'S HOSPITAL, DEFENDANTS-RESPONDENTS. -- Motions for reargument or leave to appeal to the Court of Appeals denied. PRESENT: FAHEY, J.P., CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Mar. 16, 2012.)

MOTION NO. (1296/11) CA 11-01428. -- A.J. BAYNES FREIGHT CONTRACTORS, LTD., AJAC TRUCKING, LLC, AND LENNON WILLIAMS, PLAINTIFFS-RESPONDENTS, V NORMAN L. POLANSKI, JR., AS MAYOR OF CITY OF LACKAWANNA, CITY COUNCIL OF CITY OF LACKAWANNA, JAMES L. MICHEL, AS CHIEF OF CITY OF LACKAWANNA POLICE DEPARTMENT AND CITY OF LACKAWANNA, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Mar. 16, 2012.)

MOTION NO. (1320/11) CA 11-00676. -- PHILIP ARNO AND MARY ARNO, PLAINTIFFS-RESPONDENTS, V MARIA CIMATO AND CARMELO CIMATO, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND SCONIERS, JJ. (Filed Mar. 16, 2012.)

MOTION NO. (1422/11) KA 09-02351. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTONIO CLARK, DEFENDANT-APPELLANT. -- Motion for reargument and reconsideration denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND MARTOCHE, JJ. (Filed Mar. 16, 2012.)

MOTION NO. (1448/11) CA 11-00838. -- ROBERT PETHICK, PLAINTIFF-APPELLANT, V ELIZABETH PETHICK, NOW KNOWN AS ELIZABETH CACCAMISE, DEFENDANT-RESPONDENT. -- Motion for reargument denied. PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Mar. 16, 2012.)

KA 11-01288. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V STEPHEN C. BADMAN, 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 Cayuga County Court, Mark Fandrich, A.J. - Criminal Mischief, 3rd Degree). PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Mar. 16, 2012.)

KA 11-01290. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V STEPHEN C. BADMAN, 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 Cayuga County Court, Mark Fandrich, A.J. - Criminal Possession of a Controlled Substance, 5th Degree). PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Mar. 16, 2012.)

KA 09-01172. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V REGGIE CLARK, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Monroe County Court, John J. Connell, J. - Criminal Possession of a Weapon, 3rd Degree). PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Mar. 16, 2012.)

KA 10-00190. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DOLPH A.

GRAYSON, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Monroe County Court, Patricia D. Marks, J. - Petit Larceny). PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Mar. 16, 2012.)

KA 10-00191. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DOLPH A. GRAYSON, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Monroe County Court, Patricia D. Marks, J. - Petit Larceny). PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Mar. 16, 2012.)