SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 23, 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

90

CA 11-00643

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

PATRICIA KARAM, AS ADMINISTRATRIX OF THE ESTATE OF TONY KARAM, DECEASED, AND PATRICIA KARAM, INDIVIDUALLY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ADIRONDACK NEUROSURGICAL SPECIALISTS, P.C., ET AL., DEFENDANTS, ST. ELIZABETH MEDICAL CENTER AND TIMOTHY EDWARD PAGE, DEFENDANTS-RESPONDENTS.

POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), MARK L. BODNER, PC, NEW YORK CITY, FOR PLAINTIFF-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered December 7, 2010 in a medical malpractice and wrongful death action. The judgment dismissed the complaint.

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

Memorandum: Plaintiff, as administratrix of the estate of Tony Karam (decedent) and individually, appeals, as limited by her brief, from a judgment insofar as it dismissed the complaint against St. Elizabeth Medical Center (Hospital) and Timothy Edward Page (collectively, defendants), following a jury verdict in favor of all defendants in this medical malpractice and wrongful death action. We note at the outset that plaintiff failed to raise any issues with respect to the judgment insofar as it dismissed the complaint against defendants Adirondack Neurosurgical Specialists, P.C. and Walter George Rusyniak, Jr., and we therefore deem any such issues abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

Decedent sustained a head injury and was taken to the Hospital, where he was admitted at 10:26 A.M. and examined by Page, an emergency physician, at approximately 11:01 A.M. Although decedent appeared neurologically normal at that time, Page ordered a head CT scan. The CT scan, which was performed between 11:39 A.M. and 11:46 A.M., revealed a subdural hematoma, but no evidence of midline shift or mass effect. Decedent had sustained prior subdural hematomas in 2001 and

2005.

At 12:05 P.M., after reviewing the CT scan results, Page telephoned Rusyniak, who was the neurosurgeon on call at the time although he was away from the Hospital, and informed him that decedent had a small subdural hematoma and was neurologically normal. At some point, Page became aware that decedent's neurological condition was deteriorating. He reported that development to Rusyniak at 12:58 P.M., and Rusyniak ordered a second CT scan. The second CT scan demonstrated that the hematoma had grown much larger, and midline shift and mass effect were visible. Rusyniak performed a craniotomy to remove the hematoma, and decedent never regained consciousness after the operation.

According to plaintiff, defendants were negligent in, inter alia, failing to apprise Rusyniak of changes in decedent's condition in a timely manner. The trial focused on the time at which decedent began to deteriorate neurologically. A note in decedent's emergency room record entered by nurse Richard Dodge, reportedly at 11:23 A.M., stated that decedent was vomiting and starting to complain of a severe headache and that he was beginning to deteriorate in condition. That note described decedent's speech as "clear" and "[n]ormal," and his skin as "warm [and] dry," but the note also described his skin as "[m]oist [and] sweaty." Several witnesses testified for plaintiff that decedent began to deteriorate between 11:00 A.M. and 11:30 A.M. Page testified that the Hospital's computer system had been in place for only a few months at the time decedent was treated and that Dodge's note was inconsistent. He stated that it sometimes appeared "as if there were gremlins in [the] computer system." Page further testified that it was possible that some of the entries for the 11:23 A.M. note had in fact been made at 12:35 P.M. Counsel for defendants admitted that, by procuring such testimony from Page, he was impeaching in part defendants' own record.

Counsel for defendants subsequently attempted to introduce an "audit trail" of the computer system establishing that much of the 11:23 A.M. note was made at a later time. Supreme Court expressed its concern that the attempt to introduce the audit trail constituted "unfair surprise" and "trial by ambush." In response, defendants' counsel indicated that the proper remedy would be to grant a mistrial. Plaintiff's counsel opposed that remedy and instead requested that the court impose monetary sanctions against defendants' counsel. The court denied defendants' request to allow evidence of the audit trail and for a mistrial and declined to impose sanctions. Earlier in the trial, the court had denied plaintiff's request for a cautionary instruction that any belated evidence introduced concerning the computer "gremlins" should be disregarded by the jury. The jury ultimately returned a verdict finding no negligence on the part of any defendant.

Plaintiff failed to preserve for our review her contention that defendants' presentation of evidence regarding computer problems with respect to the 11:23 A.M. note denied her a fair trial. Plaintiff did not seek an adjournment of the trial or a mistrial (*see Romeo v*

Haranek, 15 AD2d 588, 589; *see also Oubre v Carpenter*, 241 AD2d 964). Indeed, plaintiff opposed defendants' request for a mistrial (*see Boyd v Manhattan & Bronx Surface Tr. Operating Auth.*, 79 AD3d 412, 413). We decline to grant plaintiff the relief she now seeks when that relief was available during trial.

Plaintiff's further contention that the court erred in allowing a witness to recant his testimony is without merit (*see generally Matter of Alarcon v Board of Educ. of S. Orangetown Cent. School Dist.*, 85 AD3d 780, 781, *lv denied* 18 NY3d 803). Plaintiff failed to preserve for our review her contention that the summation of defendants' counsel was improper (*see Short v Daloia*, 70 AD3d 1384, 1384-1385). We decline to address that contention in the interest of justice, although we note that the behavior of defendants' counsel was reprehensible. The tactics of counsel, including his inflammatory comments on summation, "can hardly be considered a service to his clients and certainly constitute[] a disservice to the court" (*Mena v New York City Tr. Auth.*, 238 AD2d 159, 160).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

94

CA 11-01041

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

NICHOLAS B. BOSWORTH, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARYROSE W. BOSWORTH, DEFENDANT-RESPONDENT.

DAMON MOREY LLP, BUFFALO (CHRISTOPHER A. CARDILLO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PAUL A. VANCE, BUFFALO (JAMES P. RENDA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered January 31, 2011. The order directed plaintiff to pay certain tax liabilities.

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

Memorandum: Plaintiff's sole contention on appeal is that Supreme Court erred in concluding that the terms of the parties' separation agreement, which was incorporated but not merged into the judgment of divorce, rendered him responsible for the tax liability of defendant arising from defendant's status as a shareholder of PMC Gage, Inc. (PMC), a subchapter S corporation. Pursuant to the separation agreement, defendant's shares in PMC were transferred to plaintiff in approximately June 2006. The separation agreement also provided that, in exchange for the transfer of defendant's interest in PMC to him, plaintiff would "indemnify and hold [defendant] harmless from any claim or liability associated with or arising out of PMC . . . ."

According to defendant, the transfer of her shares in PMC caused her to incur federal and state income tax liability in the amount of $227,915. By order to show cause, defendant sought, inter alia, to enforce that part of the separation agreement requiring plaintiff to indemnify defendant for any claim or liability associated with or arising out of PMC. The court granted the motion, and we affirm. " '[A] separation agreement that is incorporated into but not merged with a [judgment of divorce] is an independent contract binding on the parties' " (*Makarchuk v Makarchuk*, 59 AD3d 1094, 1094, quoting *Merl v Merl*, 67 NY2d 359, 362; *see Matter of Gravlin v Ruppert*, 98 NY2d 1, 5). After giving effect and meaning to every term of the separation agreement (*see Village of Hamburg v American Ref-Fuel Co. of Niagara*,

284 AD2d 85, 89, *lv denied* 97 NY2d 603), we conclude that the broad language of that agreement required plaintiff to indemnify defendant for the federal and state income tax liability at issue.

All concur except CENTRA, J.P., and CARNI, J., who dissent and vote to modify in accordance with the following Memorandum: We respectfully disagree with the conclusion of our colleagues that the terms and conditions of the parties' separation agreement, when read as a whole, require plaintiff to indemnify defendant for her personal income tax liability. We therefore dissent.

There are two provisions in the separation agreement that control our analysis. The first requires defendant "to indemnify and hold [plaintiff] harmless from any liability arising out of her income or any joint tax return." The second requires plaintiff "to indemnify and hold [defendant] harmless from any claim or liability associated with or arising out of PMC Gage, Inc. . . ." In 2006, defendant owned 100% of the shares of PMC Gage, Inc. (PMC), a subchapter S corporation, for approximately 45% of the tax year. Pursuant to the separation agreement, defendant transferred all of her shares of PMC to plaintiff, who then owned 100% of the shares for approximately 55% of the 2006 tax year. As a result of her ownership of the shares of PMC, defendant received a Schedule K-1 from PMC reflecting business income of $669,752. That income resulted in a personal income tax liability to defendant of $227,915 for the 2006 tax year. It is undisputed that such tax liability does not constitute a claim by the federal and state government against PMC, and it cannot be said that it is a liability of PMC. Instead, it is a personal income tax liability of defendant for the 2006 tax year in which defendant filed individually and not jointly with plaintiff. Notably, plaintiff also received a Schedule K-1 from PMC for his pro rata share of the income, and he reported that income on his 2006 tax return. It is further worth noting that defendant was employed by PMC in 2006 and received wages. Thus, in applying the interpretation of the separation agreement set forth by defendant and the majority, we would be led to the untenable conclusion that plaintiff was responsible for the personal income tax on the wages paid to defendant by PMC simply because they were "associated with or aris[e] out of PMC . . . ."

The separation agreement unequivocally requires defendant "to indemnify and hold [plaintiff] harmless from any liability arising out of her income or any joint tax return." The majority fails to explain how defendant's personal income tax liability is not expressly encompassed by that provision of the agreement but, rather, the majority concludes, without analyzing or referencing that provision, that the "broad language" of the separation agreement requires plaintiff to indemnify defendant for her personal income tax liability. We cannot agree and conclude that Supreme Court erred in granting that part of defendant's motion seeking to enforce the separation agreement insofar as it allegedly requires plaintiff to indemnify defendant for her personal income tax liability. We

therefore would modify the order accordingly.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

176

KA 08-00131

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN R. LEWIS, DEFENDANT-APPELLANT.

LORENZO NAPOLITANO, ROCHESTER, FOR DEFENDANT-APPELLANT.

KEVIN R. LEWIS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered January 4, 2008. The judgment convicted defendant, upon jury verdicts, of murder in the second degree, criminal possession of a weapon in the second degree (two counts), criminal possession of a weapon in the third degree (two counts), attempted murder in the second degree, assault in the first degree (two counts), robbery in the first degree (two counts) and burglary in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him of, inter alia, murder in the second degree (Penal Law § 125.25 [1]) and attempted murder in the second degree (§§ 110.00, 125.25 [1]) following two jury trials. The charges at issue in the first trial arose from an incident in which defendant shot and injured a woman after forcing his way into her home. The charges at issue in the second trial arose from an incident in which defendant shot and killed a man on a bicycle after the man had spoken with defendant's girlfriend.

Based on our review of the record, including the October 19, 2007 transcript of County Court's decision on those parts of the omnibus motion of defendant seeking to suppress certain evidence, we conclude that the court properly denied that part of the motion seeking to suppress his statements to the police during an interview. "The evidence at the suppression hearing establishes that, after receiving . . . *Miranda* warnings, defendant indicated that he understood his [*Miranda*] rights and agreed to speak with the [police]" (*People v Jacobson*, 60 AD3d 1326, 1327, *lv denied* 12 NY3d 916). The fact that

defendant was taken to a county jail booking area and then returned to the police station after his interview commenced but before he made the statements at issue is inconsequential. "It is well settled that where a person in police custody has been issued *Miranda* warnings and voluntarily and intelligently waives [his or her *Miranda*] rights, it is not necessary to repeat the warnings prior to subsequent questioning within a reasonable time thereafter, so long as the custody has remained continuous" (*People v Glinsman*, 107 AD2d 710, 710, *lv denied* 64 NY2d 889, *cert denied* 472 US 1021; *see People v Peterkin*, 89 AD3d 1455; *Jacobson*, 60 AD3d at 1327).

Defendant further contends that one of his statements to the police was involuntary inasmuch as it was obtained as a result of police deception, i.e., the use of a videotape as a prop, and as a result of the conduct of the police in attempting to capitalize on the potential criminal liability of defendant's girlfriend. We reject that contention. "Deceptive police stratagems in securing a statement 'need not result in involuntariness without some showing that the deception was so fundamentally unfair as to deny due process or that a promise or threat was made that could induce a false confession' " (*People v Dishaw*, 30 AD3d 689, 690, *lv denied* 7 NY3d 787, quoting *People v Tarsia*, 50 NY2d 1, 11). Under the circumstances of this case, the fact that the police used a videotape as a prop does not warrant suppression (*see id.* at 690-691). Moreover, although threats by the police to arrest a person's loved ones may result in suppression (*see People v Keene*, 148 AD2d 977, 978-979), "[i]t is not an improper tactic for police to capitalize on a defendant's sense of shame or reluctance to involve his [loved ones] in a pending investigation absent circumstances [that] create a substantial risk that a defendant might falsely incriminate himself [or herself]" (*People v Balkum*, 71 AD3d 1594, 1597, *lv denied* 14 NY3d 885 [internal quotation marks omitted]). Here, there is no evidence "that the police promised not to arrest defendant's girlfriend if defendant talked . . ., and there were no other circumstances creating a substantial risk that defendant would falsely incriminate himself" (*id.* [internal quotation marks omitted]).

In addition, there is no merit to the contention of defendant that the length of his interrogation negated the voluntariness of his statements to the police. The length of an interrogation does not necessarily render a statement obtained during that time involuntary, and there is no evidence here that the duration of defendant's interviews with the police, which we note totaled approximately four hours over a six-hour time period, contributed to the statements in question (*see e.g. People v McWilliams*, 48 AD3d 1266, 1267, *lv denied* 10 NY3d 961; *People v Weeks*, 15 AD3d 845, 846-847, *lv denied* 4 NY3d 892). In any event, we conclude that any error in the admission in evidence of the statements in question is harmless (*see generally People v Crimmins*, 36 NY2d 230, 237).

Defendant further contends that the court erred in refusing to suppress an eyewitness identification of him from a photo array because the witness was shown a prior photo array that also contained

defendant's photograph. Even assuming, arguendo, that defendant's contention is preserved for our review, we conclude that it is without merit. " 'Multiple photo identification procedures are not inherently suggestive' " (*People v Dickerson*, 66 AD3d 1371, 1372, *lv denied* 13 NY3d 859). "While 'the inclusion of a single suspect's photograph in successive arrays is not a practice to be encouraged' " (*People v Beaty*, 89 AD3d 1414, ___), an "identification [is] not rendered unduly suggestive merely because the witness was shown more than one photo array and defendant's photograph was the only photograph shown in both photo arrays" (*Dickerson*, 66 AD3d at 1372). Here, although defendant's photograph appeared in the same sequence in each photo array, the record establishes that different photographs of defendant were used in each presentation to the witness (*see id.*), that there was a two-day lapse of time between the presentations (*see generally id.*; *People v Quinones*, 228 AD2d 796, 796-797), and that the witness appears to have identified defendant after the police addressed her fears with respect to the safety of her family. Considering the circumstances of the photo arrays, we conclude that there is nothing unduly suggestive in the procedure used to identify defendant as the shooter in the second incident (*see generally Dickerson*, 66 AD3d at 1372).

Defendant failed to preserve for our review his contention that the murder conviction is not supported by legally sufficient evidence (*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 the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that defendant's intent to kill the victim was inferable from his conduct, i.e., approaching and shooting the victim in the stomach and chest at close range (*see People v Green*, 74 AD3d 1899, 1900, *lv denied* 15 NY3d 852; *People v Colon*, 275 AD2d 797, *lv denied* 95 NY2d 904; *see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime of murder in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict with respect to that count is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We conclude that "defense counsel's failure to call an expert [ballistics] witness [at either of the two trials] did not constitute ineffective assistance of counsel inasmuch as defendant failed to demonstrate 'that the expert's testimony would have assisted the trier of fact or that defendant was prejudiced by the absence of such testimony' " (*People v Powell*, 81 AD3d 1307, 1307, *lv denied* 17 NY3d 799; *see People v Loret*, 56 AD3d 1283, *lv denied* 11 NY3d 927). "[W]ith respect to defendant's challenge to the sentence imposed, along with an alleged trial tax imposed by the court, we note that [t]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial . . . Indeed, the record here shows no retaliation or vindictiveness against the defendant for electing to proceed to trial" (*People v Russell*, 83 AD3d

1463, 1465, *lv denied* 17 NY3d 800 [internal quotation marks omitted]). The sentence is not unduly harsh or severe.

Defendant's remaining contentions are raised in his pro se supplemental brief. Defendant contends that the court erred in admitting in evidence the statement of the murder victim to a police officer shortly after the shooting under the excited utterance exception to the hearsay rule. That contention lacks merit inasmuch as the victim was under extraordinary stress when the statement was made (*see People v Jones*, 66 AD3d 1442, *lv denied* 13 NY3d 939). Defendant's further contention "that he was denied his right to testify before the [g]rand [j]ury is based on material dehors the record, and thus not susceptible of review . . . In any event, defendant waived that contention by failing to move to dismiss the indictment pursuant to CPL 190.50 (5) (c)" (*People v Sachs*, 280 AD2d 966, 966, *lv denied* 96 NY2d 834, 97 NY2d 708). Finally, we reject the contention of defendant that he was denied a prompt preliminary hearing. " '[T]here is no constitutional or statutory right to a preliminary hearing . . ., nor is it a jurisdictional predicate to indictment' " (*People v Caswell*, 56 AD3d 1300, 1302, *lv denied* 11 NY3d 923, 12 NY3d 781, *cert denied* ___ US ___, 129 S Ct 2775). Even assuming, arguendo, that defendant was entitled to be released on his own recognizance based on the court's failure to afford him a preliminary hearing, we conclude that such failure does not require dismissal of the indictment or a new trial (*see People v Bensching*, 117 AD2d 971, *lv denied* 67 NY2d 939; *see also People v Russ*, 292 AD2d 862, *lv denied* 98 NY2d 713, 99 NY2d 539).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

197

TP 11-01963

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

IN THE MATTER OF REGINALD MCFADDEN, PETITIONER,

V MEMORANDUM AND ORDER

ALBERT PRACK, DIRECTOR, SPECIAL
HOUSING/INMATE DISCIPLINARY, RESPONDENT.

REGINALD MCFADDEN, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered September 22, 2011) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 113.27 (7 NYCRR 270.2 [B] [14] [xvii]) and vacating the recommended loss of good time and as modified the determination is confirmed without costs, respondent is directed to expunge from petitioner's institutional record all references to the violation of that inmate rule, and the matter is remitted to respondent for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a Tier III disciplinary hearing, that he violated inmate rules 103.20 (7 NYCRR 270.2 [B] [4] [ii] [soliciting goods or services]), 113.27 (7 NYCRR 270.2 [B] [14] [xvii] [soliciting, possessing or exchanging other inmate crime and sentence information]), 180.11 (7 NYCRR 270.2 [B] [26] [ii] [violating facility correspondence guidelines]), and 180.17 (7 NYCRR 270.2 [B] [26] [vii] [providing legal assistance to another inmate without prior approval]). We note at the outset that respondent correctly concedes that petitioner lacked adequate notice of the alleged violation of inmate rule 113.27. We therefore modify the determination and grant the petition in part by annulling that part of the determination that petitioner violated inmate rule 113.27, and we direct respondent to expunge from petitioner's institutional record all references to the violation of that inmate rule (*see generally Matter of Edwards v Fischer*, 87 AD3d 1328, 1330). Inasmuch as it appears from the record

that petitioner has already served his administrative penalty, the appropriate remedy is expungement of all references to the violation of that rule from his institutional record (*see Matter of Brown v Fischer*, 91 AD3d 1336, 1337). We note, however, that there was also a recommended loss of good time, and the record does not reflect the relationship between the violations of the inmate rules and that recommendation. We therefore further modify the determination by vacating that recommendation, and we remit the matter to respondent for reconsideration of the recommended loss of good time (*see Matter of Cross v Goord*, 2 AD3d 1425, 1426).

Contrary to petitioner's further contention, the determination that he violated the remaining inmate rules is supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139). Petitioner failed to exhaust his administrative remedies with respect to his contention that respondent improperly intercepted letters addressed to him inasmuch as he failed to raise that contention at his Tier III hearing, "and this Court has no discretionary authority to reach that contention" (*Matter of Fuentes v Fischer*, 89 AD3d 1468; *see Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071, *appeal dismissed* 81 NY2d 834). We have reviewed petitioner's remaining contentions and conclude that they are without merit.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

198

KA 10-01224

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY LOWERY, DEFENDANT-APPELLANT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERIC R. SCHIENER, ACTING DISTRICT ATTORNEY, GENESEO, FOR RESPONDENT.

Appeal from an order of the Livingston County Court (Dennis S. Cohen, J.), entered July 25, 2008. 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: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). We reject defendant's contention that County Court erred in assessing 15 points under risk factor 11, for having a history of alcohol abuse. Defendant's presentence investigation report (PSR) from 1986 was admitted in evidence at the SORA hearing, and it stated that defendant acknowledged that he had "a problem with alcohol." The PSR also stated that defendant had been referred to an alcohol rehabilitation program, but that he was discharged from that program due to his noncompliance therewith. In addition, at least one of defendant's prison disciplinary charges while incarcerated involved the use of alcohol.

Although an assessment of points under risk factor 11 is unjustified where the defendant's "more recent history is one of prolonged abstinence" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 15 [2006]; *see People v Wilbert*, 35 AD3d 1220, 1221; *People v Abdullah*, 31 AD3d 515, 516), defendant's purported abstinence occurred while he was incarcerated. "The fact that defendant may have abstained from the use of alcohol and drugs while incarcerated is 'not necessarily predictive of his behavior when [he is] no longer under such supervision' " (*People v Urbanski*, 74 AD3d 1882, 1883, *lv denied* 15 NY3d 707; *see People v Vangorder*, 72 AD3d 1614). We therefore conclude that the court properly assessed

points against defendant under risk factor 11.

We reject defendant's further contention that the court erred in assessing points against him under risk factor 13, based on his "unsatisfactory" conduct while confined and supervised. The evidence at the SORA hearing established that, while on parole for his sex offense, defendant violated the terms and conditions of his release on at least two occasions, and was returned to prison on both of those occasions. The first revocation arose from a fight during which defendant extinguished a cigarette in a man's eye. The second revocation arose from defendant's perjury conviction, for lying to the grand jury with respect to a friend's criminal case. Defendant was sentenced to an additional prison term on the perjury charge. In addition, while awaiting transfer to state prison following the perjury conviction, defendant escaped from the Livingston County jail and assaulted a jail deputy in the process. The deputy sustained a fractured skull in the course of the assault. Finally, during his extended period of incarceration defendant accumulated 29 Tier II infractions and 14 more serious Tier III infractions. Four of those latter infractions involved the possession of a weapon. The above evidence, none of which was disputed by defendant, justified the court's assessment of points under risk factor 13.

Finally, we conclude that the court did not err in granting the People's request for an upward departure from a risk level two to a risk level three, inasmuch as there existed aggravating factors " 'of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines' " (*People v McCollum*, 41 AD3d 1187, 1188, *lv denied* 9 NY3d 807).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

208

CAF 11-01578

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

IN THE MATTER OF WILLARD SAPERSTON,
PETITIONER–RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

HEATHER HOLDAWAY,
RESPONDENT-PETITIONER-APPELLANT.

JENNIFER M. LORENZ, LANCASTER, FOR RESPONDENT-PETITIONER-APPELLANT.

CARNEY & GIALLANZA, BUFFALO (MARY G. CARNEY OF COUNSEL), FOR PETITIONER-RESPONDENT-RESPONDENT.

EMILIO COLAIACOVO, ATTORNEY FOR THE CHILD, BUFFALO, FOR WES H.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, A.J.), entered July 1, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the parties joint custody of their child and designated petitioner-respondent the primary residential parent.

It is hereby ORDERED that the order so appealed from is modified on the law and the facts by awarding primary physical custody of the child to respondent-petitioner and as modified the order is affirmed without costs and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following Memorandum: Respondent-petitioner mother appeals from an order that, inter alia, awarded the parties joint custody of their child and granted petitioner-respondent father primary physical custody of the child. We agree with the mother that Family Court's determination with respect to primary physical custody lacks a sound and substantial basis in the record (*see generally Sitts v Sitts*, 74 AD3d 1722, 1723, *lv dismissed* 15 NY3d 833, *lv denied* 18 NY3d 801; *Fox v Fox*, 177 AD2d 209, 211-212). We therefore modify the order by awarding primary physical custody to the mother and remitting the matter to Family Court to fashion an appropriate visitation schedule.

We note at the outset that, inasmuch as this case involves an initial custody determination, it cannot properly be characterized as a relocation case to which the application of the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741) need be strictly applied (*see Matter of Moore v Kazacos*, 89 AD3d 1546, 1546, *lv denied* 18 NY3d 806; *Matter of Baker v Spurgeon*, 85 AD3d 1494, 1496, *lv dismissed* 17 NY3d 897; *Matter of Schneider v Lascher*, 72 AD3d 1417,

1417, *lv denied* 15 NY3d 708). Although a court may consider the effect of a parent's relocation as part of a best interests analysis, relocation is but one factor among many in its custody determination (*see Verity v Verity*, 107 AD2d 1082, 1084, *affd* 65 NY2d 1002; *Matter of Torkildsen v Torkildsen*, 72 AD3d 1405, 1406; *Malcolm v Jurow-Malcolm*, 63 AD3d 1254, 1255-1256). Stated differently, "[i]n cases involving the geographic relocation of the custodial parent, as in all other custody proceedings, the primary focus of the court is the best interests of the child, not the mere fact of relocation" (*Matter of Donald C.O. v Carolyn D. v B.*, 224 AD2d 930, 930). Here, the mother's relocation to Brooklyn was seemingly the predominant factor upon which the court based its custody determination. Indeed, despite acknowledging that this case is not a " 'relocation case[],' " the court nonetheless proceeded to apply the *Tropea* factors, and concluded that the mother failed to prove that her relocation was in the child's best interests. We conclude that the court erred. Inasmuch as this case involves an initial custody determination, the court improperly required the mother to establish by a preponderance of the evidence that her move to Brooklyn was in the best interests of the child (*see Tropea*, 87 NY2d at 741). Rather, the relevant issue is whether it is in the best interests of the child to reside primarily with the mother or the father (*see generally Eschbach v Eschbach*, 56 NY2d 167, 172-174). We note in any event that the mother's "relocation is not a proper basis upon which to award primary physical custody to [the father] . . . inasmuch as the child[] will need to travel between the parties' two residences regardless of which parent is awarded primary physical custody" (*Sitts*, 74 AD3d at 1723).

In addition to placing undue emphasis on the mother's relocation, we conclude that the court's best interests determination is flawed and lacks a sound and substantial basis in the record (*see generally Matter of Moran v Cortez*, 85 AD3d 795, 796-797; *Matter of Michael P. v Judi P.*, 49 AD3d 1158, 1159). The court indicated that it considered the following factors in rendering its determination: (1) the continuity and stability of the existing custodial arrangement, including the relative fitness of the parents and the length of time the custodial arrangement has continued; (2) the quality of each parent's home environment; (3) the ability of each parent to provide for the child's emotional and intellectual development; and (4) the financial status and ability of each parent to provide for the child (*see Fox*, 177 AD2d at 210).

With respect to the first factor, it is undisputed that, prior to the commencement of this proceeding, when the child was approximately 14 months old, the mother was the child's primary caregiver. The father testified that, from the child's birth until the commencement of this proceeding, the mother was the primary caretaker of the child, took the child to doctor appointments, and provided health insurance for the child. There are no indications in the record that the mother is unfit to care for the child and, indeed, the court specifically found that there were no issues with respect to the mother's ability to care for the child. Significantly, the father testified that the mother "taught [him] . . . almost everything [he] know[s] about how to care for [the child]." We thus conclude that the first factor is in

the mother's favor.

As for the second factor, i.e., the quality of each parent's home environment, the record reflects that both parents' homes are satisfactory to raise a child, and thus this factor does not favor either party. The father resides in a four-bedroom farmhouse with his parents in a rural community in Western New York, while the mother lives in an apartment with 2½ bedrooms in the Park Slope neighborhood of Brooklyn. With respect to the third factor, we conclude that the mother demonstrated the greater ability to provide for the child's intellectual and emotional development. The mother is 35 years old, holds a master's degree in mental health counseling, and is a New York State licensed mental health counselor. The father is 26 years old with a bachelor's degree in the entertainment business. The father admitted that, when the child was a few months old, he became so frustrated with the child's crying that he "felt like throwing [the child] against the wall." In addition, the father testified that, when the child was born, he did not know how to care for an infant, nor did he take a parenting course until after he filed the custody petition, when the child was 14 months old. Prior to commencing this proceeding, the father lived in an apartment that, by his own admission, was inadequate for a child. The father did not make his apartment "baby ready" or seek alternate housing until the child was 14 months old. The father also testified that he voluntarily ceased all contact with the child during the four months preceding the commencement of this proceeding as a result of an argument he had with the mother.

With respect to the fourth factor, i.e., the financial status and ability of each parent to provide for the child, the court concluded that such factor weighs in favor of the father. We disagree, and conclude that the court's determination in that regard is unsupported by the record. The evidence establishes that the mother is employed by the University of Pittsburgh Medical Center and earns a salary of approximately $69,000. Although the mother lives in Brooklyn, she owns a home in Western New York and applies the rental income from that home to her lease in Brooklyn. By contrast, the father works for his family's real estate business as an office manager and real estate agent, and he testified that he earns approximately $10,000 a year. The father acknowledged that his parents "subsidize [his] existence," and that they "pay pretty much [his] way through life." The father also admitted that, without the financial assistance of his parents, he would struggle to pay child care and would have difficulty supporting himself and the child. Although the father and the Attorney for the Child emphasized the father's alleged "earning capacity," we conclude on the record before us that the father's earning potential is entirely speculative. At the time of trial, the father had been working as a real estate agent for more than three years, yet he estimated that his income was $10,000 a year. The father testified that he had three multimillion dollar commercial listings that, if sold, would yield commissions of $150,000, $75,000 and $100,000, respectively. The father admitted, however, that two of those properties had been on the market for approximately a year. To the extent that the court's findings concerning the father's financial

stability and earning capacity are based on the financial status of the father's parents, we note that the record contains no proof of the financial status of the paternal grandparents.

We further agree with the mother that the court erred in admitting the father's journal in evidence. There is no question that the journal constitutes hearsay, i.e., "out-of-court statements offered for the truth of the matter asserted" (*Howard v Codick*, 55 AD3d 1376, 1377), and the father failed to establish that the journal fell within any recognized exception to the hearsay rule. In order to admit a document as a past recollection recorded (*see generally* Prince, Richardson on Evidence § 6-220 [Farrell 11th ed]), the proponent must establish "that the document relates to matters the witness observed, the matters were fairly fresh when recorded or adopted, the witness testifies that the document accurately represented his or her recollection and knowledge when it was made and the witness is presently unable to recall the facts of the matter" (*Morse v Colombo*, 31 AD3d 916, 917). Here, the father did not testify that he could not recall the events that he recorded in the journal (*see Landsman v Village of Hancock*, 296 AD2d 728, 732, *appeal dismissed* 99 NY2d 529). Further, although the father testified that he made the entries contemporaneously with the events contained therein, a review of the journal reflects that the father later added commentary and/or observations on the events discussed. In addition, the journal contains alleged re-creations of texts and e-mails between the parties, which were not produced. Those portions of the journal violate the best evidence rule, which "requires the production of an original writing where its contents are in dispute and sought to be proven" (*Kliamovich v Kliamovich*, 85 AD3d 867, 869). We thus conclude that, while counsel for the father could have utilized the journal to refresh the father's recollection as to specific dates or events, the court erred in allowing the admission of the entire document in evidence (*see Matter of Smith v Miller*, 4 AD3d 697, 697-698). Finally, we reject the contention of the father and the Attorney for the Child that any error in the admission of the journal is harmless. The journal contains numerous prejudicial "notes" concerning the father's impressions of the mother and justifications for his conduct, and the court referred to the journal in its decision.

All concur except CENTRA and MARTOCHE, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent. "An award of custody is a matter that rests within the sound discretion of the hearing court" (*Matter of Donald C.O. v Carolyn D. v B.*, 224 AD2d 930, 930). Because "Family Court's determination in a custody dispute is based upon a first-hand assessment of the parties, as well as their credibility, character and temperament, and the [court's] determinations are to be accorded great weight on appeal, such a determination should not be disturbed unless it lacks a sound and substantial basis in the record" (*Matter of Demeter v Alayon*, 90 AD3d 1045, 1045; *see Matter of Sweetser v Willis*, 91 AD3d 963, 963-964). Contrary to the majority's determination, we conclude that the court's decision to award primary physical custody to petitioner-respondent father has a sound and substantial basis in the record and should not be disturbed.

In this initial custody determination, "the overriding priority is the best interests of the child" (*Matter of Lynch v Gillogly*, 82 AD3d 1529, 1530; *see Donald C.O.*, 224 AD2d at 930). While a strict application of the relocation factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741) was not required, nevertheless respondent-petitioner "mother's relocation was 'a very important factor' among all factors to be considered in making a best interests determination, as was the effect of the move on the child's relationship with the father if the mother were awarded custody" (*Matter of Sullivan v Sullivan*, 90 AD3d 1172, 1173; *see Matter of Schneider v Lascher*, 72 AD3d 1417, 1417, *lv denied* 15 NY3d 708).

Here, the record establishes that both parents are loving and fit, able to care for the child and capable of providing financial support and a suitable and stable home for the child. The record supports the court's finding, however, that the mother is "distrustful, somewhat [overreactive] and chooses to dictate rather than cooperate and communicate." For example, the mother did not notify the father of her planned move and did not provide a forwarding address. Additionally, after the father learned of the relocation, he brought an order to show cause to have the child returned, which was granted, and the mother avoided service of the order. The court also found that "[v]arious allegations in [the m]other's petition proved to be unfounded, exaggerated or without merit."

Each parent has bonded with the child and is capable of fostering his intellectual and emotional development. Although the mother was the child's primary caretaker during the child's first year, the father has the advantage of an extended family support network in Western New York, and the child would have increased access to his extended family if he resides with the father (*see Matter of Torkildsen v Torkildsen*, 72 AD3d 1405, 1407). The relevant factors do not weigh significantly on the side of either party. Thus, "[a]ccording the appropriate great deference to the court's opportunity to hear the testimony and assess the credibility of witnesses, we find a sound and substantial basis for its conclusions in this record . . . and conclude that the custody award in this difficult case was based upon careful consideration of the appropriate factors and the child's best interests" (*Schneider*, 72 AD3d at 1419 [internal quotation marks omitted]). Finally, contrary to the view of the majority, we conclude that any error in the admission of the father's journal in evidence is harmless inasmuch as the father testified and the admissible evidence at the hearing, without consideration of the father's journal, supports the court's determination (*see Matter of Matthews v Matthews*, 72 AD3d 1631, 1632, *lv denied* 15 NY3d 704; *Matter of Garrett D. v Kevin L.*, 56 AD3d 1183, 1183-1184, *lv denied* 12 NY3d 702). We would therefore affirm the order.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

210

CA 11-01309

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

IN THE MATTER OF ERIC J. KOCH, D.O.,
PETITIONER-RESPONDENT,

V OPINION AND ORDER

JAMES G. SHEEHAN, NEW YORK STATE MEDICAID
INSPECTOR GENERAL, RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENT-APPELLANT.

BROWN & TARANTINO, LLC, BUFFALO (SUSAN A. EBERLE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered August 24, 2010 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

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

Opinion by MARTOCHE, J.: Respondent, the New York State Medicaid Inspector General, appeals from a judgment granting the CPLR article 78 petition, thereby vacating respondent's determination excluding petitioner from participating in the New York State Medicaid Program and reinstating petitioner retroactively to March 10, 2010 as a participating physician in the Medicaid Program. We are called upon to consider for the first time the scope of the authority of the Office of the Medicaid Inspector General (OMIG) insofar as it relates to physician conduct not involving Medicaid patients.

OMIG

The Department of Health (DOH) is the state agency responsible for administering the state's Medicaid Program (*see* Social Services Law § 363-a; 18 NYCRR 504.1 [d] [12]). Within the DOH, the OMIG was established in 2006 as an independent entity responsible for detecting and preventing fraud, waste, and abuse in the Medicaid Program (Public Health Law §§ 30, 30-a, 31, 32). Among other things, respondent is authorized to exclude enrolled health care providers from the Medicaid Program (*see* § 32 [6]), and to "perform any other functions that are necessary or appropriate to fulfill the duties and responsibilities of the office in accordance with federal and state law" (§ 32 [24]).

In order to provide medical care, services, and supplies to Medicaid recipients and to receive Medicaid reimbursement, a person must enroll as a provider in the Medicaid Program (*see* 18 NYCRR 504.1 [b] [1]). The relationship between the DOH and the provider is an at-will contractual relationship, and there is no inherent entitlement to being a Medicaid provider (*see Matter of Bora v New York State Dept. of Social Servs*., 152 AD2d 10, 12-13).

The federal Medicaid regulations permit the Office of the Inspector General to exclude a Medicaid provider who furnishes substandard services to patients, whether or not they are Medicaid patients (*see* 42 CFR 1001.701 [a] [2]), and further require that the state agency have the same authority to do so (*see* 42 CFR 1002.210). The DOH regulations provide several bases for terminating or excluding a provider from the Medicaid Program. Indeed, pursuant to 18 NYCRR 504.7 (a), the provider's participation may be terminated by the DOH on 30 days' notice without cause. In certain circumstances, termination is mandatory, such as when the provider is excluded or terminated from participating in the federal Medicare program (*see* 18 NYCRR 515.8 [a] [1]), or when the provider's license is terminated, revoked or suspended (*see* 18 NYCRR 504.7 [d] [1]). In addition, the OMIG has the authority to exclude a provider for "unacceptable practices" within the meaning of 18 NYCRR 515.2. Such "unacceptable practices" include, among other things, the failure to meet professionally recognized standards for health care (*see* 18 NYCRR 515.2 [b] [12]).

The regulations authorize the DOH to exclude a provider found to have committed professional misconduct, as follows:

> "Upon receiving notice that a person has been found to have violated a State or Federal statute or regulation pursuant to a final decision or determination of an agency having the power to conduct the proceeding and after an adjudicatory proceeding has been conducted, in which no appeal is pending, or after resolution of the proceeding by stipulation or agreement, and where the violation resulting in the final decision or determination would constitute an act described as professional misconduct or unprofessional conduct by the rules or regulations of the State Commissioner of Education or the State Board of Regents, or an unacceptable practice under this Part, or a violation of article 33 of the Public Health Law, the department may immediately sanction the person and any affiliate" (18 NYCRR 515.7 [e]).

The OMIG regularly receives, for its review, copies of consent agreements and orders from the Office of Professional Medical Conduct (OPMC). The Board of Professional Medical Conduct and the OPMC

(collectively, OPMC) serve, respectively, as the investigatory and adjudicatory arms of the DOH concerning allegations of professional misconduct by physicians (*see* Public Health Law § 230 *et seq*.; Education Law § 6530). In the event that the OPMC enters into a consent agreement and order (Consent Order), the OMIG's Exclusions Unit reviews such Consent Orders to determine whether the provider should be allowed to continue as a Medicaid provider or should be excluded from the Medicaid Program.

The DOH Proceeding against Petitioner

Petitioner has been licensed to practice medicine in New York State since 2003, and has specialized in the field of internal medicine. The OPMC investigated petitioner's involvement in the care of two patients who were not receiving Medicaid, and ultimately filed a statement of charges alleging that petitioner failed to meet accepted standards of care in nine respects with regard to the two patients. Thus, petitioner was charged with committing misconduct under Education Law § 6530 (3), erroneously referred to by the DOH in its Specifications of Charges as section 6230 (3). Negotiations ensued, and petitioner entered into a Consent Order. According to the terms of the Consent Order, petitioner was pleading "no contest to the specifications, in full satisfaction of the charges" against him in exchange for an agreement to a specified penalty. He agreed to be placed on probation for a period of 36 months and to comply with various conditions. He further agreed that his failure to comply with any conditions of the Consent Order would constitute misconduct under Education Law § 6530 (29). The Consent Order further provided that, if the OPMC did not adopt the Consent Order, none of the terms of the Consent Order would bind petitioner "or constitute an admission of any of the acts of alleged misconduct." The OPMC adopted the Consent Order effective June 9, 2009.

The CPLR Article 78 Proceeding

On March 4, 2010, the OMIG issued a notice of immediate agency action, excluding petitioner as a provider from the Medicaid Program and placing him on the "OMIG list of persons disqualified from Medicaid." According to the affidavit of a registered nurse in the OMIG, the Exclusions Unit regularly reviews penalties imposed by OPMC against health care providers over whom OPMC has jurisdiction. The nurse averred that she reviews OPMC consent orders and the associated charges, "to determine if the conduct of the individual that led to the imposition of a penalty by OPMC rises to the level that would warrant the individual's exclusion as a provider in the Medicaid Program." She reviewed the Consent Order at issue here and stated that "[a]mong the findings" in the Consent Order were those involving the two patients and, based on OPMC's findings, she "believed" that petitioner's conduct was so negligent that the OMIG should exercise its discretion under 18 NYCRR 515.7 (e) and exclude petitioner from participating as a provider in the Medicaid Program. She made that recommendation to the Exclusions Unit, which adopted her recommendation. The exclusion became effective on March 10, 2010. Petitioner submitted a response to the termination dated July 1, 2010

and argued that the sanction was unreasonable and that he should be reinstated immediately as a participant in the Medicaid Program. By letter dated July 28, 2010, OMIG rejected as untimely what it deemed to be an appeal of its decision. In the interim, however, petitioner commenced this CPLR article 78 proceeding on July 9, 2010, contending that the OMIG's determination was arbitrary and capricious and that the penalty imposed shocked one's sense of fairness. We deem it important to address petitioner's apparent failure effectively to exhaust his administrative remedies, inasmuch as his administrative appeal was dismissed as untimely and it does not appear that he challenged that dismissal. It is seemingly inevitable that petitioner's administrative appeal would have been denied on the merits even in the event that it had been timely submitted given respondent's avid opposition to this CPLR article 78 proceeding. As we noted in *Matter of Caso v New York State Pub. High School Athletic Assn.* (78 AD2d 41, 45-46), "[t]he Court of Appeals has held . . . that the exhaustion rule is not inflexible and need not be followed when[, inter alia,] . . . resort to an administrative remedy would be futile" (*see generally* Siegel, NY Prac § 560, at 966 [4th ed]). In addition, it does not appear on the record before us that respondent has ever raised any issue concerning petitioner's failure to exhaust his administrative remedies, thus casting a shadow of doubt on the merits of respondent's dismissal of the administrative appeal, which has never been litigated. We thus shall consider the merits of the CPLR article 78 proceeding.

In a supporting affidavit, petitioner averred that, since being excluded from the Medicaid Program, he has "been unable to completely fulfill [his] duties as both [his] internist and hospitalist practices with respect to [his] patients who are Medicaid patients." In addition, he averred that the decision to exclude him from Medicaid benefits was causing immediate harm to his patients and his career and could "substantially impact [his] ability to earn an income now and into the future." Respondent submitted a verified answer asserting that the determination was not arbitrary and capricious. Supreme Court granted the petition without writing and ordered petitioner retroactively reinstated to the Medicaid Program as a participating physician.

Discussion

Respondent contends that the OMIG's determination excluding petitioner from the Medicaid Program is not arbitrary and capricious or unlawful. Specifically, respondent contends that the OMIG has the authority to exclude petitioner from the Medicaid Program pursuant to 18 NYCRR 515.7 (e) based on the Consent Order in which petitioner did not contest having committed misconduct by practicing medicine with negligence in the treatment of two elderly emergency room patients. According to respondent, the OMIG has a duty to ensure that quality care is provided to Medicaid patients, even though petitioner pleaded no contest to the charges and the charges did not involve Medicaid patients. Respondent views the authority of the OMIG broadly and cites in support of its position various New York State Supreme Court decisions involving similar circumstances (*see e.g. Matter of Blab v*

Sheehan, Sup Ct, Albany County, Sept. 30, 2010, Sackett, J., index No. 4275-10; *Matter of Halliday v State of New York Off. of Medicaid Inspector Gen.*, Sup Ct, Albany County, July 2, 2010, Connolly, A.J., index No. 2575-10). Addressing *Halliday* first, we note that the court stated that the petitioner was charged by OPMC with charges of, inter alia, "negligence, which constituted acts of professional misconduct under the Education Law," and that there was no dispute that the petitioner entered into a settlement agreement with OPMC in which the petitioner pleaded no contest to at least one of the specifications alleging negligence. The court then extrapolated therefrom that, because Education Law § 6530 (3) provides that "practicing the profession with negligence on more than one occasion" constitutes "professional misconduct," the OMIG had the authority to exclude the petitioner from the Medicaid Program. Similarly, the court in *Blab*, relying on *Halliday*, concluded that the Consent Agreement and Order under which the petitioner pleaded no contest to two of the specifications therein gave the OMIG authority under 18 NYCRR 515.7 (e), incorrectly cited by the court in *Blab* as 517.7 (e), to exclude the petitioner from participation as a provider in the Medicaid Program.

On the other hand, in *Matter of Mihailescu v Sheehan* (25 Misc 3d 258), Supreme Court (Figueroa, J.) reached a contrary result under similar facts. There, the petitioner executed a Consent Agreement waiving her right to contest OPMC's formal charges and agreed to a 12-month suspension of her medical license. Because the petitioner's license was suspended, the OMIG automatically terminated the petitioner from participation as a Medicaid provider pursuant to 18 NYCRR 504.7 (d) (1). The petitioner's license subsequently was reactivated, but the OMIG denied her application for reinstatement to the Medicaid Program. The court in *Mihailescu* concluded that the OMIG's refusal to reinstate the petitioner was arbitrary and capricious, relying in part on the fact that the OMIG did not investigate or independently evaluate the petitioner, but instead automatically denied the petitioner's application for reinstatement based on the content of the Consent Agreement. The court concluded that, because the DOH was satisfied that after the 12-month penalty the petitioner could be safely returned to hospital employment under stipulated conditions, the OMIG's "perfunctory refusal" to reinstate the petitioner was baseless (*id.* at 266).

Likewise, in *Napoli v Sheehan* (Sup Ct, Erie County, May 25, 2010, Drury, J., index No. I2009-14524), the petitioner entered into a Consent Agreement in which the petitioner did not contest one specification of committing professional misconduct pursuant to Education Law § 6530 (3). The penalty to which the petitioner agreed in the Consent Agreement subjected him to censure and reprimand, completion of a continuing education program, and a single review of his medical and office records. The penalty allowed the petitioner to continue in his professional practice, provided that he fulfilled the conditions of the Consent Agreement, as is the case here. The OMIG reviewed the Consent Agreement and notified the petitioner that he was being excluded from the Medicaid Program. The court held that the "real issue" was that the petitioner would not have entered into the

Consent Agreement not to contest the charges of professional misconduct if the petitioner was not to be permitted to carry on with the practice of medicine. The court thus wrote that the admission of no contest to the charges and the agreed on sanction "must be considered together and the admission alone should not be used as a basis to deny the petitioner his ability to practice medicine." The court concluded that the respondent's determination to exclude the petitioner from the Medicaid Program based solely on his decision not to contest a charge of professional misconduct, without any independent review of the underlying facts and a disregard of OPMC's related sanctions that would allow the petitioner to continue practicing medicine, was without a rational basis and was arbitrary and capricious.

We conclude that the analysis of those courts that have invalidated the OMIG's determination excluding physicians from the Medicaid Program based on Consent Agreements with OPMC are persuasive, and we therefore adopt a similar analysis here.

Where, as here, a petition does not raise a substantial evidence issue, a court's inquiry is "limited to whether denial of petitioner's application was arbitrary, capricious or affected by an error of law" (*Matter of Senior Care Servs., Inc. v New York State Dept. of Health*, 46 AD3d 962, 965; *see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231-232). Further, a court "may not substitute its judgment for that of the [agency] where . . . the determination is neither irrational nor arbitrary and capricious" (*Matter of Sacandaga Park Civic Assn. v Zoning Bd. of Appeals of Town of Northhampton*, 296 AD2d 807, 809). It is also axiomatic that administrative agencies are to be afforded great deference with regard to the construction given statutes and regulations by the agency responsible for their administration, provided that such construction is not irrational or unreasonable (*see Matter of Howard v Wyman*, 28 NY2d 434, 435, *rearg denied* 29 NY2d 749).

Applying those standards, we conclude that the OMIG's determination was arbitrary and capricious. The initial charges of negligence were investigated by the OPMC, the appropriate arm of the DOH, and ultimately petitioner agreed to plead no contest to the specifications in full satisfaction of the charges against him. The penalty imposed did not include any suspension, but rather was akin to censure or reprimand with conditions. To adopt respondent's view would create an irrational result that would allow petitioner to continue to treat non-Medicaid patients, but be prohibited from treating Medicaid patients. Additionally, as the court noted in *Napoli*, it seems unlikely that petitioner would have agreed to the Consent Order had he known that he effectively would not be allowed to continue to practice medicine, because the charges to which he pleaded no contest would be used against him factually to exclude him from the Medicaid Program. We adopt the reasoning of Supreme Court in *Mihailescu* (25 Misc 3d 258), as follows:

"The instant proceeding illustrates the

> point. Here, the Department of Health, through OPMC and the Board, was indisputably responsible for protecting non-Medicaid and Medicaid patients alike by determining whether their health and safety could be entrusted to petitioner's care, and, if so, on what terms. Given the obvious importance of avoiding duplicative departmental work and potentially inconsistent intra-departmental results, the [L]egislature did not likely intend that the [OMIG] in such a case might second-guess the Department by also investigating or evaluating whether the physician in question would present a potential danger to a subset of the patient population, i.e., Medicaid recipients. The [OMIG] was likelier meant instead to defer to the conclusions of his [or her] sister departmental units in such regard . . . *To be sure, the agreement contained petitioner's concession that she would not contest the two charges against her. But it also in effect contained, as noted above, the Department's conclusion that, after the 12-month penalty, she could safely be returned to hospital employment under the stipulated conditions. In the face of such acknowledgment by departmental staff who had directly and at length been involved in the review of petitioner's case, the [OMIG]'s perfunctory refusal to reinstate petitioner—thus hampering her return to such employment—was baseless. In other words, it was arbitrary and capricious*" (*id.* at 266 [emphasis added]).

As in *Mihailescu* and *Napoli*, there is no indication in the record that the OMIG investigated or independently evaluated petitioner, but instead it simply excluded him from the Medicaid Program based upon the Consent Order. Accordingly, under the circumstances presented here, we conclude that the determination was arbitrary and capricious and that the judgment should be affirmed. In light of our conclusion, there is no need to address petitioner's contention that the penalty was so disproportionate to the offense as to shock one's sense of fairness.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

211

CA 11-01940

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

JOSEPH TUPPER, AS PRESIDENT AND ON BEHALF OF SYRACUSE PROPERTY OWNERS ASSOCIATION, STAMPEDE VI, LLC, HAMR, INC., AVON, INC., 867 SUMNER AVE, L.L.C., JAKE AND BUCK, LLC, OCOMSTOCK COMPANY, LLC, NORMAN ROTH, WILLIAM OSUCHOWSKI, DAVID EADE, DAVID PATRUNO, JENNIFER PATRUNO, BARBARA HUMPHREY, RENEE MURRAY, YAJAIRA BRIZUELA, PAUL WALSH, CAROL STONE AND BENJAMIN TUPPER, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, COMMON COUNCIL OF CITY OF SYRACUSE AND PLANNING COMMISSION OF CITY OF SYRACUSE, DEFENDANTS-RESPONDENTS.

HOCHERMAN TORTORELLA & WEKSTEIN, LLP, WHITE PLAINS (ADAM L. WEKSTEIN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MARY ANNE DOHERTY, CORPORATION COUNSEL, SYRACUSE (MEGHAN P. MCLEES CRANER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Onondaga County (James P. Murphy, J.), entered May 19, 2011 in a declaratory judgment action. The judgment, among other things, dismissed plaintiffs' complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying those parts of defendants' motion to dismiss the first, second, fourth and fifth causes of action except with respect to the claims of plaintiff Benjamin Tupper, reinstating those causes of action for all plaintiffs except Benjamin Tupper, and granting those parts of plaintiffs' cross motion, with the exception of Benjamin Tupper, for summary judgment on the first, second, fourth and fifth causes of action and judgment is granted in favor of plaintiffs, with the exception of Benjamin Tupper, as follows:

> It is ADJUDGED and DECLARED that General Ordinances 20 and 21 of 2010 of the City of Syracuse are invalid,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs are the owners of non-owner occupied houses within the Syracuse University Special Neighborhood District (District) in defendant City of Syracuse (City), as well as an unincorporated association of owners of those properties, and the president of that association. They commenced this action seeking, inter alia, to declare invalid General Ordinances 20 and 21 of 2010 of the City and to recover damages and attorneys' fees for alleged violations of their rights to due process under the Fifth and Fourteenth Amendments of the United States Constitution and article 1 (§ 6) of the New York Constitution. General Ordinance 20 established, inter alia, the requisite amount of space for workable parking spaces and the maximum square footage allowed for open surface parking areas for one- and two-family residences. That ordinance applied to all one- and two-family residences within the District. General Ordinance 21, inter alia, imposed parking requirements for one- and two-family residences that were owned by absentee owners. Those properties were required to have one off-street parking space for each potential bedroom. Although existing absentee-owner properties were exempt from the new requirements, the owners of those properties would be required to meet the new parking requirements if they made any "material changes" to the properties.

In their complaint plaintiffs alleged, inter alia, that defendants had failed to comply with Second Class Cities Law § 35 and Syracuse City Charter § 4-103 (2) when the Common Council adopted the ordinances on the same day on which they were introduced without unanimous consent; that defendant Planning Commission of City of Syracuse, as the lead agency, failed to follow the dictates of article 8 of the Environmental Conservation Law ([SEQRA] State Environmental Quality Review Act); that defendants had violated General City Law § 20 (24) and Syracuse City Charter § 5-1302 because General Ordinance 21 treats absentee-owner properties differently from owner-occupied properties; and that defendants violated their constitutional due process rights in adopting the ordinances.

Defendants moved to dismiss the complaint pursuant to, inter alia, CPLR 3211 (a) (1), (5) and (7). Plaintiffs cross-moved, inter alia, to convert defendants' motion to dismiss to one for summary judgment and to grant plaintiffs summary judgment declaring invalid the ordinances and awarding them damages and attorneys' fees. Supreme Court granted the cross motion in part, by converting the motion to one for summary judgment. Although the court determined that all plaintiffs except Benjamin Tupper had standing to maintain the action, the court granted defendants' "motion to dismiss the complaint." On this appeal, we conclude that the court erred in part, and that plaintiffs were entitled to summary judgment declaring General Ordinances 20 and 21 of 2010 invalid. We therefore modify the judgment accordingly.

Contrary to plaintiffs' contention, defendants adhered to the procedural requirements of SEQRA (*see generally* ECL article 8; *Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 306-307). "[O]ur review is limited to whether the lead agency . . . identified the relevant areas of environmental concern,

took a hard look at them, and made a reasoned elaboration of the basis for its determination" (*Matter of Mombaccus Excavating, Inc. v Town of Rochester, N.Y.*, 89 AD3d 1209, 1210, *lv denied* ___ NY3d ___ [Feb. 21, 2012] [internal quotation marks omitted]; *see Matter of Neville v Koch*, 79 NY2d 416, 424-425). In our view, defendants fulfilled their obligations under SEQRA.

We likewise reject plaintiffs' contention that defendants violated their due process rights under the federal and state constitutions. "In order for a zoning ordinance to be a valid exercise of the police power it must survive a two-part test: (1) it must have been enacted in furtherance of a legitimate governmental purpose, and (2) there must be a 'reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end' " (*McMinn v Town of Oyster Bay*, 66 NY2d 544, 549). We note at the outset that we agree with plaintiffs that their contention that defendants violated their due process rights is not barred by res judicata inasmuch as neither plaintiffs nor defendants have had an opportunity to litigate those precise issues insofar as they concern the ordinances at issue herein (*see generally Ryan v New York Tel. Co.*, 62 NY2d 494, 500-501).

A city ordinance, as a legislative enactment, is presumed constitutional and the burden is on plaintiffs to establish that "defendant[s] acted in an arbitrary and irrational way" (*Welch Foods v Wilson*, 277 AD2d 882, 886; *see generally Duke Power Co. v Carolina Envtl. Study Group*, 438 US 59, 83; *McMinn*, 66 NY2d at 548-549). "An [ordinance that] has been carefully studied, prepared and considered meets the general requirement for a well-considered plan . . . The court will not pass on its wisdom" (*Asian Ams. for Equality v Koch*, 72 NY2d 121, 132). Although plaintiffs contend that defendants are not entitled to summary judgment at this juncture of the litigation because plaintiffs need additional disclosure, the "[m]ere hope that somehow [plaintiffs] will uncover evidence that will prove a case provides no basis pursuant to CPLR 3212 (f) for postponing a determination of a summary judgment motion" (*Wright v Shapiro*, 16 AD3d 1042, 1043 [internal quotation marks omitted]; *see Rowland v Wilmorite, Inc.*, 68 AD3d 1770, 1771). Plaintiffs were afforded voluminous documentation pursuant to a request under the Freedom of Information Law (Public Officers Law art 6), and they have failed to establish that additional discovery will enable them to prove their case. We thus conclude that defendants met their burden of establishing that "the provision[s are] reasonably related to the legitimate governmental purposes of eliminating traffic congestion due to on-street parking . . . and serve[] to enhance traffic safety by removing cars from the [City's] streets" (*Adar v Incorporated Vil. of Lake Success*, 160 AD2d 829, 830, *lv denied* 76 NY2d 712). Plaintiffs failed to raise a triable issue of fact or to establish that they could do so with additional discovery.

We agree with plaintiffs, however, that defendants violated Second Class Cities Law § 35 and Syracuse City Charter § 4-103 (2) when the Common Council adopted the ordinances on the same day on which they were introduced. The statute provides in relevant part

that "[n]o ordinance shall be passed by the common council on the same day in which it is introduced, except by unanimous consent," and the charter section contains language to the same effect. The statute and charter do not specify whether the "unanimous consent" required is consent to the ordinance itself or consent to the procedure of taking the vote on the same day on which the ordinance is introduced. We need not resolve that ambiguity because, under either interpretation, there was not the requisite unanimous consent.

It is undisputed that three of the nine councilors voted "nay" to the ordinances. Thus, if the unanimous consent required is consent to the merits of the ordinances (*see Board of Educ. of City of Syracuse v Common Council of City of Syracuse*, 50 AD2d 138, 140 n 1, *lv denied* 38 NY2d 709; *Yonkers R.R. Co. v Hume*, 225 App Div 313, 318; *Andrello v Dulan*, 49 Misc 2d 17, 20), then there was not unanimous consent. If the unanimous consent required is consent to the procedure of taking the vote on the same day on which the ordinances were introduced (*see Matter of Hushion v Barker*, 253 App Div 376, 378), then we also conclude that there was not unanimous consent. Indeed, one of the councilors objected to taking the vote that day, noting that, "without question, we have been asked to vote on [the ordinances] in a hasty manner." That same councilor stated that a neighborhood planning body was meeting the next day to discuss the ordinances, and he questioned what kind of message would be sent to them if the Common Council voted before their meeting was held. He further questioned why the Common Council could not have scheduled a meeting for after that of the planning body. We thus conclude that those comments constitute an objection to the procedure of taking the vote that day.

We further agree with plaintiffs that General Ordinance 21 was enacted in violation of General City Law § 20 (24) and Syracuse City Charter § 5-1302 because the ordinance is not uniform for each class of buildings within the District. The statute and charter provide in relevant part that the City has the power "[t]o regulate and limit the height, bulk and location of buildings hereafter erected, to regulate and determine the area of yards, courts and other open spaces, and to regulate the density of population in any given area, and for said purposes to divide the city into districts. *Such regulations shall be uniform for each class of buildings throughout any district, but the regulations in one or more districts may differ from those in other districts*" (General City Law § 20 [24] [emphasis added]; *see* Syracuse City Charter § 5-1302).

Contrary to defendants' contention, the statute and charter section apply to General Ordinance 21 inasmuch as that ordinance regulates open spaces. The creation of off-street parking regulations is included in the authority to regulate the use of land and open spaces (*see* Salkin, *New York Zoning Law and Practice* § 7:45 [4th ed 2011]). The uniformity required by the statute and charter is uniformity "for each *class* of buildings throughout any district" (General City Law § 20 [24] [emphasis added]; *see* Syracuse City Charter § 5-1302). To avoid the uniformity requirements, defendants contend that absentee-owner properties are in a different "class" from owner-occupied properties. That contention lacks merit inasmuch as

" '[t]he uniformity requirement is intended to assure property holders that all *owners* in the same district will be treated alike and that there will be no improper discrimination' " (Rice, Practice Commentaries, McKinney's Cons Laws of NY, Book 61, Town Law § 262, at 64 [emphasis added], quoting *Augenblick v Town of Cortlandt*, 104 AD2d 806, 814 [1984] [Lazer, J.P., dissenting]). Uniformity provisions protect against legislative overreaching by requiring regulations to be passed without reference to the particular owners (*see id.*). General Ordinance 21 treats buildings within the same class differently based solely on the status of the property owner, i.e., absentee property owners as opposed to owners who occupy the property. Even though such a distinction may be constitutionally valid, it is invalid under the uniformity requirements of the General City Law and the City of Syracuse Charter.

We thus declare General Ordinances 20 and 21 of 2010 of the City invalid. In view of our determination, we see no need to address plaintiffs' remaining contentions.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

212

CA 11-01364

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

IN THE MATTER OF THE ARBITRATION BETWEEN
GRANDE' VIE, LLC, GRANDE' VIE REALTY, LLC,
ANTHONY J. MARASCO AND ANTHONY M. DIMARZO,
PETITIONERS-APPELLANTS-RESPONDENTS,

AND MEMORANDUM AND ORDER

ESTATE OF MICHAEL PANAGGIO, DECEASED,
RESPONDENT-RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

GATES & ADAMS, P.C., ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR PETITIONERS-APPELLANTS-RESPONDENTS.

PHILLIPS LYTLE LLP, BUFFALO (ALAN J. BOZER OF COUNSEL), FOR RESPONDENT-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered April 13, 2011. The judgment, among other things, granted the motion of petitioners to stay arbitration, and denied the motion of respondent to compel arbitration.

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs, petitioners' motion is denied, and respondent's motion seeking to compel arbitration is granted.

Memorandum: Petitioners Anthony J. Marasco and Anthony M. DiMarzo and Michael Panaggio (decedent), whose estate is the respondent herein, were equal members of petitioners Grande' Vie, LLC and Grande' Vie Realty, LLC. The operating agreements of the companies provided that the purchase price of a deceased member's interests would be paid to his estate. When decedent died in 2008, respondent sought arbitration on the value of decedent's interest in the companies. Petitioners filed a petition to stay arbitration, which was granted. After an appraiser selected by petitioners rendered his written appraisal of the value of decedent's interest in the companies, petitioners moved by order to show cause to confirm the appraisal and to stay arbitration of any issues resolved by that appraisal. Respondent moved for an order compelling arbitration or for alternative relief.

Supreme Court erred in granting petitioners' motion to confirm the appraisal and to stay arbitration, and in denying respondent's

motion to compel arbitration. The operating agreements had both an appraisal and an arbitration clause, which gives rise to an issue of arbitration (*see Matter of Dimson [Elghanayan]*, 19 NY2d 316, 324). The arbitration clause provided that all controversies or claims arising out of the operating agreements shall be submitted to arbitration. Indeed, the arbitration clause also noted that, if the matter submitted to arbitration involved a dispute as to the value of a member's interest, one of the arbitrators shall be a certified public accountant. The appraisal clause provided that the parties were to notify a certain individual "(the 'Appraiser'), to calculate the Fair Value of the Company. In the event the Appraiser or its successor in interest is no longer in business then the purchasing member shall notify [another named individual] or if he is no longer in business, any MAI appraiser (the 'Successor Appraiser')." When the two named individuals in the appraisal clause declined to appraise decedent's interest, petitioners asked an MAI appraiser to value the companies and decedent's interest therein. The appraisal clause further provided that "[t]he Fair Value of the Membership Interest being purchased shall be determined by the Appraiser, . . . and] the Appraiser's final determination shall be binding on the selling Member and the purchasing Member(s)."

It is well settled that, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162). "Where an agreement is clear and unambiguous, a court is not free to alter it and impose its personal notions of fairness" (*Welsbach Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 629). By the plain wording of the appraisal clause, the MAI appraiser was the "Successor Appraiser," but only the "Appraiser's" determination would be final and binding on the parties. We therefore conclude that the parties intended that, where the "Appraiser" was not available to value the companies and the member's interest, the matter should be submitted to arbitration (*cf. Dimson*, 19 NY2d at 323). In light of our determination, we do not address the remaining contentions of the parties.

All concur except LINDLEY, J., who dissents and votes to modify in accordance with the following Memorandum: I respectfully dissent. In my view, Supreme Court properly determined that respondent is bound by the appraisal submitted by the Member Appraisal Institute (MAI) appraiser selected by petitioners to calculate the value of decedent's membership interest. I cannot agree with respondent's contention, raised for the first time on appeal, that the appraisal clause of the operating agreements clearly and unambiguously provides that the only appraisal that shall be binding is that offered by Richard Bellows, who declined to prepare an appraisal. The appraisal clause reads: "For purposes of this Agreement, within ten (10) days after the expiration of the thirty (30) day period set forth in Section 8.2 (a) (ii) above, the selling Member (either the selling Member or the legal representative of the Deceased Member, as the case may be) and the purchasing Members shall notify Richard Bellows, (the 'Appraiser'), to calculate the Fair Value of the Company. In the event the Appraiser or its successor in interest is no longer in business then the

purchasing member shall notify Bob Pogel or if he is no longer in business, any MAI appraiser (the 'Successor Appraiser'). The Fair Value of the Membership Interest being purchased shall be determined by the Appraiser, in accordance with such valuation techniques and appropriate methodologies as the Appraiser deems appropriate, all in accordance with Generally Accepted Accounting Principles, and the policies and rules of MAI (Member Appraisal Institute). In all cases, the Appraiser's final determination shall be binding on the selling Member and the purchasing Member(s). The Appraiser shall deliver a written report of its determination of Fair Value to all interested parties, and the cost of such appraisal shall be borne equally Fifty percent (50%) by said selling Member and Fifty Percent (50%) by the Purchasing Member(s)."

As illustrated above, the instructions as to how the Fair Value of the Membership Interest is to be determined refers only to the Appraiser, as does the provision directing that a written report of the appraisal be delivered to all interested parties. Thus, if the appraisal clause is interpreted as respondent suggests (so as to distinguish between the Appraiser and the Successor Appraiser), the Successor Appraiser would play no role in the appraisal process upon being "notif[ied]" by the purchasing member. In other words, to construe the appraisal clause as giving binding effect to an appraisal submitted by *only* Bellows would render meaningless the provisions for selecting another appraiser in the event that Bellows declines to perform an appraisal. That construction of the appraisal clause is contrary to the well-established rule that courts should "avoid an interpretation that would leave contractual clauses meaningless" (*Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403). As the Court of Appeals has advised, "[i]t is a cardinal rule of construction that a court should not adopt an interpretation which will operate to leave a provision of a contract . . . without force and effect" (*Corhill Corp. v S.D. Plants, Inc.*, 9 NY2d 595, 599 [internal quotation marks omitted]; *see Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46-47).

Although not dispositive, it is worth noting that both petitioners and respondent apparently proceeded with the understanding that an appraisal submitted by an MAI appraiser, i.e., a Successor Appraiser, would be binding, and that may explain why respondent did not contend otherwise in Supreme Court. After Bellows and Bob Pogel declined to perform an appraisal, the parties, in an attempt to reach a settlement, selected Midtown Valuation Group, LLC (Midtown) to perform a nonbinding appraisal. Midtown prepared an appraisal, but the parties still could not agree on the value of decedent's membership interest. Petitioners therefore selected a Successor Appraiser, in accordance with the appraisal clause. If, as respondent contends, the appraisal from the Successor Appraiser is not binding, there was no need for the parties to select Midtown to prepare a nonbinding appraisal for settlement purposes.

It is true, as respondent points out, that the operating agreements also contain a general arbitration clause. It provides that any "controversy or claim arising out of or relating to" the

agreements shall be submitted to arbitration and that, "if the matter submitted to arbitration shall involve a dispute as to the value of a Membership Interest, one of the arbitrators shall be a certified public accountant and shall have no prior affiliation with any Member or the Company." Contrary to respondent's contention, however, the arbitration clause does not compel a finding that the parties' dispute over the value of decedent's membership interest must be arbitrated. As a preliminary matter, I note that respondent's contention with respect to the arbitration clause applies with equal force to an appraisal submitted by the Appraiser, which respondent concedes would be binding. In any event, the presence of both the appraisal clause and the arbitration clause gives rise to an issue of arbitrability, which was properly resolved by the court (*see United Steelworkers of Am. v American Mfg. Co.*, 363 US 564, 570-571 ["(S)ince arbitration is a creature of contract, a court must always inquire . . . whether the parties have agreed to arbitrate the particular dispute"]; *Matter of Dimson [Elghanayan]*, 19 NY2d 316, 324). In my view, the provision of the appraisal clause directing the Appraiser or Successor Appraiser definitively to determine the value of a membership interest removed that subject from the purview of the arbitrator (*see Dimson*, 19 NY2d at 325).

In addition, it is a well-settled proposition that, "[w]here a contract . . . employs contradictory language, specific provisions control over general provisions" (*Green Harbour Homeowners' Assn., Inc. v G.H. Dev. & Constr., Inc*., 14 AD3d 963, 965; *see Muzak Corp.*, 1 NY2d at 46). Here, the appraisal clause is far more specific than the arbitration clause, which is contained in a section of the agreements merely entitled "General Provisions." There is thus no merit to respondent's contention that the dispute over the value of decedent's membership must be arbitrated. Having reviewed respondent's remaining challenges to the court's confirmation of the appraisal submitted by the Successor Appraiser and the court's staying of arbitration on the issue of the purchase price, I conclude that those challenges similarly are without merit.

Finally, I conclude that the court erred in awarding interest to respondent on the entire amount of the purchase price. In my view, interest should be awarded only on the 10% down payment and any monthly payments that accrued as of the closing date, March 7, 2011 (*see* CPLR 5001 [a]). I would therefore modify the judgment only with respect to the amount of the award of interest.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

214

CA 11-02105

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

AMELIA L. PAVELJACK,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

DAVID P. CIRINO,
DEFENDANT-APPELLANT-RESPONDENT.

BURGIO, KITA & CURVIN, BUFFALO (WILLIAM J. KITA OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

HOGAN WILLIG, GETZVILLE (JOHN B. LICATA OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered March 23, 2011 in a personal injury action. The order granted in part and denied in part the motion of defendant for summary judgment and denied the cross motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in its entirety and dismissing the complaint and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when a vehicle driven by defendant ran a red light and struck the front driver's side of a vehicle driven by plaintiff. According to plaintiff, she sustained a serious injury under four categories set forth in Insurance Law § 5102 (d), i.e., permanent loss of use, permanent consequential limitation of use, significant limitation of use and the 90/180-day category. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury under any of those categories, and plaintiff cross-moved for partial summary judgment on liability and on the ground that she sustained a serious injury to her cervical spine. Supreme Court granted that part of defendant's motion for summary judgment with respect to the permanent loss of use and 90/180-day categories, but determined that there were triable issues of fact with respect to the permanent consequential limitation of use and significant limitation of use categories. The court denied plaintiff's cross motion in its entirety. Defendant appeals, and plaintiff cross-appeals.

We agree with the court that defendant met his initial burden of demonstrating that plaintiff did not sustain a serious physical injury under the four categories set forth in Insurance Law § 5102 (d) and that plaintiff failed to raise an issue of fact with respect to the permanent loss of use and 90/180-day categories. We further conclude, however, that plaintiff also failed to submit the requisite objective proof of injury to raise an issue of fact with respect to the two remaining categories, and we therefore modify the order by granting defendant's motion in its entirety. The records of plaintiff's own treating physician and physical therapist establish that any complaints that plaintiff had immediately following the accident had fully resolved within approximately 1½ months. Although an MRI later showed a slight disc herniation in plaintiff's neck, that MRI was not performed until six months after the accident.

Similarly, while plaintiff had renewed complaints of pain with accompanying loss of range of motion in her cervical spine approximately four months after the accident, she offered no explanation for the cessation of her symptoms and absence of treatment therefor with respect to the gap of approximately 2½ months following the initial full resolution of her complaints (*see generally Pommells v Perez*, 4 NY3d 566, 572; *McCarthy v Bellamy*, 39 AD3d 1166, 1166-1167). Moreover, although evidence of a disc herniation combined with objective proof of limitation of range of motion may be sufficient to raise an issue of fact with respect to serious injury (*see e.g. Ellithorpe v Marion* [appeal No. 2], 34 AD3d 1195, 1196-1197; *Ejzerman v Cruz*, 309 AD2d 893), the records upon which plaintiff relies fail to "recite the tests used to ascertain the degree of plaintiff's loss of range of motion" (*Weaver v Town of Penfield*, 68 AD3d 1782, 1785).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

217

CA 11-01367

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

IN THE MATTER OF THE ARBITRATION BETWEEN THE
ESTATE OF MICHAEL PANAGGIO, DECEASED,
PETITIONER-RESPONDENT-RESPONDENT,

AND ORDER

GRANDE' VIE, LLC, GRANDE' VIE REALTY, LLC,
ANTHONY J. MARASCO AND ANTHONY M. DIMARZO,
RESPONDENTS-PETITIONERS-APPELLANTS.
(APPEAL NO. 2.)

GATES & ADAMS, P.C., ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR RESPONDENTS-PETITIONERS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (ALAN J. BOZER OF COUNSEL), FOR PETITIONER-RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered April 13, 2011 in a proceeding pursuant to CPLR article 75. The judgment confirmed in part the award of the arbitrator.

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

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

227

KA 08-01680

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WESLEY L. WOODS, JR., DEFENDANT-APPELLANT.

SHIRLEY A. GORMAN, BROCKPORT, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered July 23, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3] [felony murder]) and robbery in the first degree (§ 160.15 [4]). Defendant failed to preserve for our review his contention that County Court erred in refusing to suppress his oral and written statements to the police based on an unnecessary delay in his arraignment (*see People v Fuentes*, 52 AD3d 1297, 1298, *lv denied* 11 NY3d 736; *People v Hayward*, 48 AD3d 209, 210, *lv denied* 10 NY3d 840). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's further contention, the court properly determined that those statements were voluntary. Although defendant was detained and questioned by the police for approximately 10 hours, "that [fact] does not, by itself, render the statement[s] involuntary" (*People v Weeks*, 15 AD3d 845, 847, *lv denied* 4 NY3d 892). Here, there is no indication in the record of the suppression hearing that defendant sought to end the interrogation or that his alleged lack of sleep left him " 'so . . . fatigued that he was incapable of intelligently waiving his rights or comprehending the meaning of his statement[s]' " (*People v Towndrow*, 236 AD2d 821, 822, *lv denied* 89 NY2d 1016). In addition, the police officer's generalized comment to defendant regarding the benefits of cooperating with the police did not constitute a promise of leniency that created "a substantial risk that the defendant might falsely incriminate himself" (CPL 60.45 [2] [b] [i]; *see People v Lugo*, 60 AD3d 867, 868). We conclude that probable cause for

defendant's arrest and detention was established by the circumstances of his capture (*see People v Conner*, 15 AD3d 843, 844, *lv denied* 4 NY3d 885).

The court also properly refused to suppress the clothes that defendant was wearing when he was arrested and interviewed by the police. Police officers may properly seize an object in plain view without a warrant in the event that they are lawfully in the position from which the object is viewed, they have lawful access to the object and the object's incriminating nature is immediately apparent (*see People v Brown*, 96 NY2d 80, 88-89). Here, the clothes worn by defendant were in plain view when the police captured and arrested him, and brought him to the police station for questioning. The clothing fit the general description given by a witness to the crimes and as depicted in a video tape recovered by the police from a security camera in the store at which the crimes occurred. "Under the circumstances, the officers had the authority, [pursuant to] the plain view doctrine, to seize defendant's [clothing]" (*People v Stein*, 306 AD2d 943, 943, *lv denied* 100 NY2d 599, 1 NY3d 581). Defendant's contention that he was denied effective assistance of counsel involves matters outside the record on appeal and thus is properly raised by way of a motion pursuant to CPL article 440 (*see People v Borcyk*, 60 AD3d 1489, 1490, *lv denied* 12 NY3d 923; *People v Barnes*, 56 AD3d 1171). Finally, the sentence is not unduly harsh or severe.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

233

CA 11-01807

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

IN THE MATTER OF PETER S. DUCHMANN AND DUKE DISTRIBUTING COMPANY, INC., DOING BUSINESS AS ADVANCED AUTO ELECTRONICS, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF HAMBURG, TOWN OF HAMBURG TOWN BOARD, TOWN OF HAMBURG BOARD OF ZONING APPEALS, KURT ALLEN, ENFORCEMENT OFFICER, BUILDINGS INSPECTIONS AND CODE ENFORCEMENT, RESPONDENTS-RESPONDENTS, LAMAR ADVERTISING OF PENN, LLC, TLC PROPERTIES, INC., LAMAR COMPANY, LLC, AND LAMAR TEXAS LIMITED PARTNERSHIP, RESPONDENTS.

HARTER SECREST & EMERY LLP, BUFFALO (MARC A. ROMANOWSKI OF COUNSEL), FOR PETITIONERS-APPELLANTS.

HISCOCK & BARCLAY, LLP, BUFFALO (NICHOLAS J. DICESARE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (John A. Michalek, J.), entered August 22, 2011 in a proceeding pursuant to CPLR article 78. The judgment, among other things, dismissed the petition against respondents Town of Hamburg, Town of Hamburg Town Board, Town of Hamburg Board of Zoning Appeals and Kurt Allen, Enforcement Officer, Buildings Inspections and Code Enforcement.

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

Memorandum: Petitioners appeal from a judgment in this CPLR article 78 proceeding that, inter alia, dismissed the petition against respondents Town of Hamburg (Town), Town of Hamburg Town Board, Town of Hamburg Board of Zoning Appeals and Kurt Allen, Enforcement Officer, Buildings Inspections and Code Enforcement. All but one of petitioners' contentions herein were previously before us on their appeal from the judgment that, inter alia, dismissed the petition in this proceeding against respondents Lamar Advertising of Penn, LLC, TLC Properties, Inc., Lamar Company, LLC and Lamar Texas Limited Partnership. We affirm the judgment for the reasons stated in our

decision in *Matter of Duchmann v Town of Hamburg* (90 AD3d 1642), in which we affirmed the judgment in that prior appeal.

We add only that petitioners' remaining contention that the Town failed to provide "a certified transcript of the record of the proceedings under consideration" pursuant to CPLR 7804 (e) is without merit inasmuch as the Town "provided Supreme Court with sufficient material necessary to render a decision in this matter" (*Matter of Argyle Conservation League v Town of Argyle*, 223 AD2d 796, 798).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

237

CA 11-00813

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

MARGUERITE JAMES, PLAINTIFF-APPELLANT,

V ORDER

DAVID WORMUTH, M.D. AND CNY THORACIC SURGERY, P.C., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

WOODRUFF LEE CARROLL, SYRACUSE, FOR PLAINTIFF-APPELLANT.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (DANIEL P. LARABY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered January 11, 2011 in a medical malpractice action. The order granted the motion of defendants at the close of plaintiff's proof to dismiss the amended complaint.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1]).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

238

CA 11-00814

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

MARGUERITE JAMES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID WORMUTH, M.D. AND CNY THORACIC SURGERY, P.C., DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

WOODRUFF LEE CARROLL, SYRACUSE, FOR PLAINTIFF-APPELLANT.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (DANIEL P. LARABY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered January 19, 2011 in a medical malpractice action. The judgment dismissed the amended complaint.

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

Memorandum: Plaintiff commenced this medical malpractice action seeking damages arising from an operative procedure to remove a node from her lung. On a prior appeal, we reversed the order insofar as appealed from, denied defendants' motion for summary judgment dismissing the complaint and reinstated the complaint (*James v Wormuth*, 74 AD3d 1895). Supreme Court thereafter granted plaintiff's motion seeking to amend the complaint, and a jury trial followed. Plaintiff appeals from a judgment granting the motion of defendants at the close of plaintiff's case to dismiss the amended complaint pursuant to CPLR 4401. We affirm.

Plaintiff contends that reversal is required because this Court's prior order is the law of the case. We reject that contention. "[T]he denial of defendants' motion for summary judgment did not serve as law of the case precluding the subsequent motion to dismiss" the amended complaint at the close of plaintiff's case (*Bukowski v Clarkson Univ.*, 86 AD3d 736, 739; *see Smith v Hooker Chem. & Plastics Corp.*, 125 AD2d 944, 945, *affd* 70 NY2d 994, *rearg denied* 71 NY2d 995).

Contrary to plaintiff's further contention, we conclude, based on the record before us, that the court properly granted defendants' motion and dismissed the amended complaint. In her direct case, plaintiff submitted no expert testimony and limited her proof of causation to the testimony of David Wormuth, M.D. (defendant), who

testified that a fragment of thin wire was intentionally left inside plaintiff's thorax after it became separated from the tissue to which it was attached during the procedure. In opposition to defendants' motion, plaintiff's attorney contended that plaintiff had made a prima facie case of medical malpractice based on the doctrine of res ipsa loquitur and thus that the case should be submitted to the jury. Plaintiff's theory of recovery was limited, however, to the failure of defendant to remove the wire from plaintiff's thorax.

"The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice, and evidence that such deviation or departure was a proximate cause of injury or damage" (*Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 1006; *see Elias v Bash*, 54 AD3d 354, 357, *lv denied* 11 NY3d 711). Furthermore, it is well settled that, where the "theory of liability necessarily involves matters of medical science requiring professional skill and knowledge and, therefore, constitute[s] a medical malpractice theory of liability, [it] must be supported by expert medical testimony that there was a deviation from the standard of care" (*Lidge v Niagara Falls Mem. Med. Ctr.* [appeal No. 2], 17 AD3d 1033, 1036). Inasmuch as plaintiff failed to establish the applicable standard of care or defendants' breach of it, plaintiff failed to make out a prima facie case and thus the court properly granted defendants' motion.

Under the unique factual and pleading status of this case, we reject plaintiff's further contention that she submitted sufficient evidence to submit the case to the jury under the theory of res ipsa loquitur. "In New York it is the general rule that submission of the case on the theory of res ipsa loquitur is warranted only when the plaintiff can establish the following elements: (1) the event must be of a kind [that] ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff" (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [internal quotation marks omitted]). Thus, res ipsa loquitur "is an evidentiary doctrine that merely permits the jury to infer negligence based on a well-founded understanding that the injury-causing event would not normally occur unless someone was negligent" (*States v Lourdes Hosp.*, 100 NY2d 208, 213-214, *rearg denied* 100 NY2d 577). Although plaintiff is correct that "[r]es ipsa loquitur is applicable where . . . a foreign body is unintentionally left in a patient following an operative procedure" (*LaPietra v Clinical & Interventional Cardiology Assoc.*, 6 AD3d 1073, 1074), plaintiff neither established at trial nor argued in opposition to defendants' motion that the wire fragment was unintentionally left inside her thorax. To the contrary, she elicited testimony from defendant that he purposely left the wire inside plaintiff because he determined, in the exercise of his medical judgment, that there was a lower risk of harm to plaintiff by taking that course of action than by making a larger incision to remove the wire. In addition, in opposition to the motion, plaintiff specifically disavowed any reliance upon a theory that defendant was negligent in losing the wire

in plaintiff prior to his decision to leave it inside her. Consequently, she was required to establish that defendants breached the applicable standard of care and failed to do so.

All concur except FAHEY and SCONIERS, JJ., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent. In our view, Supreme Court erred in granting defendants' motion for a directed verdict pursuant to CPLR 4401 dismissing the amended complaint at the close of plaintiff's case, and we therefore would reverse the judgment, deny defendants' motion for a directed verdict, reinstate the amended complaint and grant a new trial.

"[A] directed verdict is 'appropriate where the . . . court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party' . . . In considering a motion for a directed verdict pursuant to CPLR 4401, 'the . . . court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant' " (*Bennice v Randall*, 71 AD3d 1454, 1455, quoting *Szczerbiak v Pilat*, 90 NY2d 553, 556).

Plaintiff contends that she established a prima facie case of medical malpractice under the doctrine of res ipsa loquitur. "Under appropriate circumstances, the evidentiary doctrine of res ipsa loquitur may be invoked to allow the factfinder to infer negligence from the mere happening of an event" (*States v Lourdes Hosp.*, 100 NY2d 208, 211, *rearg denied* 100 NY2d 577). Application of that "ancient" doctrine (*id.*) "is warranted only when the plaintiff can establish the following elements: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff" (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [internal quotation marks omitted]; *see Morejon v Rais Constr. Co.*, 7 NY3d 203, 209; *Kambat v St. Francis Hosp.*, 89 NY2d 489, 494). In the context of a medical malpractice case, "[r]es ipsa loquitur is applicable where, as here, a foreign body is unintentionally left in a patient following an operative procedure" (*LaPietra v Clinical & Interventional Cardiology Assoc.*, 6 AD3d 1073, 1074; *see Kambat*, 89 NY2d at 495-496).

The evidence presented by plaintiff at trial established that David Wormuth, M.D. (defendant) performed a thoracopic lung biopsy procedure in which a wire was inserted into plaintiff's body and "hooked" or secured near or on the region of the lung that was to be biopsied. Defendant trimmed the wire to facilitate its passage through plaintiff's chest wall, ostensibly after the subject lung was deflated and, using a camera inserted into plaintiff's body, expected to find a fragment of the wire protruding from that lung. Defendant, however, was unable to locate a four-centimeter piece of wire that remained in plaintiff's body and searched for that object for 20 minutes before stopping, in part to minimize the amount of time that plaintiff was under general anesthesia, in part because he did not

think the object would cause any harmful effects and in part because a bigger incision to remove it would be deleterious to plaintiff.

Under the circumstances of this case, we respectfully disagree with the majority that the failure to remove the subject part of the wire was solely purposeful. The record establishes that the loss of that part of the wire was unintentional and, in our view, the fact that defendant realized the foreign body at issue had been lost before closing the incision does not change the fact that plaintiff presented evidence that the operation had the unplanned and inadvertent result of leaving an implement inside plaintiff's body. Even though a medical decision was made to abandon the lost implement and close the incision before it was recovered, the loss of that foreign body at the surgical site speaks for itself and satisfies the element of res ipsa loquitur at issue in this appeal (*see generally Kambat*, 89 NY2d at 497; *LaPietra*, 6 AD3d at 1074-1075). Put differently, on the facts before us, although the *search* for the foreign object lost inside plaintiff was intentionally abandoned, it cannot be said that the object itself was intentionally left in plaintiff during that procedure.

We also respectfully disagree with the majority's conclusion that plaintiff disavowed her theory that defendant was negligent in losing the wire inside of her body prior to deciding to abandon the wire inside plaintiff. At trial, plaintiff opposed defendant's motion for a directed verdict by arguing, inter alia, "that [the doctrine of] res ipsa [loquitur] applies here, in that a foreign object [that] should not have been left in the plaintiff was left there . . . ." In our view, through that argument, plaintiff contended that this case is one in which a foreign body was unintentionally left inside of plaintiff's body and thus one in which the doctrine of res ipsa loquitur applies.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

240

CA 11-02046

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

THOMAS BANNISTER AND LAURA BANNISTER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

LPCIMINELLI, INC., CITY OF BUFFALO, BUFFALO PUBLIC SCHOOLS AND BOARD OF EDUCATION OF CITY OF BUFFALO, DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (RYAN J. LUCINSKI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MAXWELL MURPHY, LLC, BUFFALO (ALAN D. VOOS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 6, 2011 in a personal injury action. The order denied defendants' 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 defendants' motion for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action insofar as they are based on defendants' alleged supervision and control of plaintiff's work and the Labor Law § 241 (6) cause of action, and dismissing those causes of action to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Thomas Bannister (plaintiff) when he slipped on ice and fell while working in an open courtyard at a school renovation project. We agree with defendants that Supreme Court erred in denying those parts of their motion seeking summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action insofar as they are based on defendants' alleged supervision and control over plaintiff's work, and we therefore modify the order accordingly. Defendants established as a matter of law that they did not have the authority to supervise or control the methods and manner of plaintiff's work (*see Ortega v Puccia*, 57 AD3d 54, 61-63; *Wade v Atlantic Cooling Tower Servs., Inc.*, 56 AD3d 547, 549-550), and plaintiffs failed to raise a triable issue of fact sufficient to defeat those parts of the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We further conclude, however, that the court properly denied defendants' motion with

respect to those causes of action insofar as they are based on the defective condition of the property where the project was located. Plaintiffs "need not establish that defendants had supervisory control over the work being performed in the event that the accident was caused by a defective condition on the premises and defendants had actual [or] constructive notice of such defect" (*McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1582; *see also Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1416). Where, as here, the plaintiff slipped and fell on ice, the defendants "were required to establish 'that the ice formed so close in time to the accident that [they] could not reasonably have been expected to notice and remedy the condition' " (*Sullivan v RGS Energy Group, Inc.*, 78 AD3d 1503, 1503). Although defendants submitted plaintiff's deposition testimony that he did not inform defendants of the icy condition, we conclude that such evidence alone is insufficient to establish that they did not have actual or constructive notice of the icy condition.

We agree with defendants that the court erred in denying that part of their motion seeking summary judgment dismissing the Labor Law § 241 (6) cause of action, and we therefore further modify the order accordingly. To recover pursuant to Labor Law § 241 (6), plaintiffs "must allege a violation of an applicable regulation 'mandating compliance with concrete specifications,' as opposed to 'those that establish general safety standards' " (*Motyka v Ogden Martin Sys. of Onondaga Ltd. Partnership*, 272 AD2d 980, 981, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505). Although the complaint, as amplified by the bill of particulars, alleges multiple violations of the Industrial Code, plaintiffs conceded at oral argument on defendants' motion that the section 241 (6) cause of action was premised solely upon a violation of 12 NYCRR 23-1.7 (d). Thus, the court erred in denying those parts of defendants' motion seeking summary judgment dismissing the Labor Law § 241 (6) cause of action insofar as it was based on the alleged violation of the remaining regulations.

Pursuant to 12 NYCRR 23-1.7 (d), "[e]mployers shall not . . . permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." We conclude, however, that the regulation is inapplicable here based on the circumstances of plaintiff's fall. Although that regulation "proscribes slipping hazards" (*Farrell v Blue Circle Cement, Inc.*, 13 AD3d 1178, 1179, *lv denied* 4 NY3d 708), it does not apply where "the accident occurred in an open area and not on a defined walkway, passageway or path" (*Bale v Pyron Corp.*, 256 AD2d 1128, 1128). In support of their motion, defendants established that the open courtyard in which plaintiff slipped does not constitute a walkway, passageway or path sufficient to support a cause of action based on an alleged violation of 12 NYCRR 23-1.7 (d) (*see Hertel v Hueber-Breuer Constr. Co., Inc.*, 48 AD3d 1259, 1260; *Ramski v Zappia*

Enters., 229 AD2d 990).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

253

KA 11-01852

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS L. JULIUS, DEFENDANT-APPELLANT.

KATHLEEN P. REARDON, ROCHESTER, 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 (Victoria M. Argento, J.), rendered June 30, 2011. The judgment convicted defendant, upon a nonjury verdict, of driving while intoxicated, a class D felony.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of felony driving while intoxicated ([DWI] Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [ii]). Contrary to defendant's contention, the evidence is legally sufficient to establish that he operated a motor vehicle in an intoxicated condition (*see People v Rawleigh*, 89 AD3d 1483, 1483; *see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention, County Court did not err in permitting the arresting officer to testify regarding a horizontal gaze nystagmus field sobriety test (HGN test) without conducting a *Frye* hearing (*see People v Tetrault*, 53 AD3d 558, 558-559, *lv denied* 11 NY3d 835; *People v Hammond*, 35 AD3d 905, 907, *lv denied* 8 NY3d 946; *People v Grune*, 12 AD3d 944, 945, *lv denied* 4 NY3d 831). As the Second and Third Departments have stated, and we agree, " '[HGN] tests have been found to be accepted within the scientific community as a reliable indicator of intoxication and, thus, a court may take judicial notice of the HGN test's acceptability' " (*Tetrault*, 53 AD3d at 559, quoting *Hammond*, 35 AD3d at 907). "Here, the People laid a proper foundation; the officer who conducted the HGN test testified regarding his qualifications to administer the test and the

techniques he employed" (*Hammond*, 35 AD3d at 907; *see Tetrault*, 53 AD3d at 559).

Contrary to defendant's additional contention, the sentence is not unduly harsh or severe. Finally, we note that defendant has not taken an appeal from the judgment revoking the sentence of probation imposed in connection with a prior DWI conviction and imposing a sentence of incarceration, and thus his challenge to the severity of the sentence imposed upon the revocation of probation is not properly before us (*see* CPL 460.10; *see generally People v Kuras*, 49 AD3d 1196, 1197, *lv denied* 10 NY3d 866).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

255

KA 10-01958

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONNELL STEPNEY, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO 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 June 9, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and assault in the second degree (§ 120.05 [3]), defendant contends that County Court erred in failing to excuse for cause a prospective juror who stated that he had a friend who was a former police officer and that he would probably be more likely than not to credit the testimony of law enforcement officials. By failing to raise that challenge in the trial court, however, defendant failed to preserve it for our review (*see* CPL 470.05 [2]; *People v Chatman*, 281 AD2d 964, 964-965, *lv denied* 96 NY2d 899). We reject defendant's further contention that the court's failure to discharge the prospective juror sua sponte constitutes a mode of proceedings error that does not require preservation (*see generally People v Rosen*, 96 NY2d 329, 335, *cert denied* 534 US 899). In any event, even if defendant had challenged the prospective juror on that ground and his challenge had merit, it nevertheless would not be properly before us because he failed to exhaust his peremptory challenges prior to the completion of jury selection (*see* CPL 270.20 [2]; *People v Arguinzoni*, 48 AD3d 1239, 1241, *lv denied* 10 NY3d 859; *cf. People v Lynch*, 95 NY2d 243, 248).

To the extent that defendant contends that defense counsel was ineffective for failing to challenge the prospective juror, we note that the transcript of voir dire shows that one or more unidentified

prospective jurors on the same panel as that prospective juror made comments that could be construed as being highly favorable to the defense, and it is possible that the prospective juror in question made some of those comments. We thus conclude that defendant "failed to show the absence of a strategic explanation for defense counsel's" failure to challenge that prospective juror (*People v Mendez*, 77 AD3d 1312, 1312-1313, *lv denied* 16 NY3d 799; *see People v Benevento*, 91 NY2d 708, 712-713). "[M]ere disagreement with trial strategy is insufficient to establish that defense counsel was ineffective" (*People v Henry*, 74 AD3d 1860, 1862, *lv denied* 15 NY3d 852).

By making only a general motion for a trial order of dismissal, defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish his commission of either crime charged (*see People v Gray*, 86 NY2d 10, 19; *People v Washington*, 89 AD3d 1516, 1517). "However, we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence" (*People v Caston*, 60 AD3d 1147, 1148-1149; *see People v Danielson*, 9 NY3d 342, 349-350; *People v Francis*, 83 AD3d 1119, 1120, *lv denied* 17 NY3d 806; *People v Loomis*, 56 AD3d 1046, 1046-1047). We nevertheless conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury, the People proved beyond a reasonable doubt all elements of the crimes charged (*see Danielson*, 9 NY3d at 349; *see generally People v Bleakley*, 69 NY2d 490, 495).

With respect to the weapon conviction, the People proved that defendant constructively possessed the loaded firearm found in the vehicle in which he was a passenger. The firearm was found by the police on the floorboard in the vehicle directly beneath the location where defendant was seated, and the firearm was adjacent to a blank gun that defendant admittedly owned. Although defendant's fingerprints were not found on the loaded firearm, they were also not found on the blank gun that he undisputedly possessed. The fact that the codefendant's fingerprint was found on the loaded gun does not preclude the possibility that defendant possessed it as well, inasmuch as "more than one person may possess an object simultaneously" (*People v Myers*, 265 AD2d 598, 600).

With respect to the assault conviction, we conclude that the People proved beyond a reasonable doubt that defendant intended to prevent the arresting officer from performing a lawful duty when the officer injured his knee (*see* Penal Law § 120.05 [3]). Although defendant contends that the arresting officer was not engaged in a lawful duty when he attempted to frisk him, the suppression court determined following a hearing that the officer acted lawfully during every step of his encounter with defendant, and defendant does not challenge the suppression ruling on appeal. Because the evidence at trial was consistent with that presented at the suppression hearing, we perceive no basis for overturning the assault conviction on the grounds advanced by defendant.

Defendant failed to preserve for our review his contention that the court erred in admitting in evidence a postarrest photograph of

him depicting him in handcuffs and shirtless. In any event, the photograph was relevant and admissible to show defendant's condition at the time of his arrest (*see People v Logan*, 25 NY2d 184, 195, *cert denied* 396 US 1020, *rearg dismissed* 27 NY2d 733, 737; *People v Lakram*, 207 AD2d 360, 361, *lv denied* 84 NY2d 1034, 86 NY2d 737). We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

262

CA 11-02044

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

LISA-ANN PRIES-JONES AND CLAYTON JONES,
INDIVIDUALLY AND AS HUSBAND AND WIFE,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

TIME WARNER CABLE, INC., ALSO KNOWN AS TIME
WARNER, INC., AND JONATHAN T. JOSEPH,
DEFENDANTS-RESPONDENTS-APPELLANTS.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

HARRIS BEACH PLLC, PITTSFORD (MICHAEL J. MASINO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered July 26, 2011 in a personal injury action. The order granted the motion of plaintiffs for partial summary judgment on the issue of negligence, but denied the motion with respect to comparative negligence.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Lisa-Ann Pries-Jones (plaintiff) when a truck operated by defendant Jonathan T. Joseph (defendant) and owned by defendant Time Warner Cable, Inc., also known as Time Warner, Inc. (Time Warner), backed into the front of a vehicle operated by plaintiff. Defendant was a “preventative line maintenance technician” for Time Warner, and his job duties included traveling to inspect cable lines on poles along the side of the road. At approximately 3:00 P.M. on December 15, 2008, a clear sunny day, defendant was driving on a country road in Orleans County when he noticed a problem with the lines. By the time he stopped the truck, defendant had passed the problem area, so he put his truck in reverse. Although defendant claimed that he looked at his side view mirrors and saw no one behind him, plaintiff’s vehicle in fact was there, and a collision ensued. Plaintiff had been driving behind the truck on the two-way road and came to a stop when defendant stopped.

Plaintiffs alleged in the complaint that defendant negligently operated the truck, and that Time Warner was vicariously liable for

the ensuing damages. In their answer, defendants asserted as an affirmative defense that plaintiff engaged in culpable conduct that contributed to the happening of the accident. Following discovery, plaintiffs moved for partial summary judgment on the issues of negligence and proximate cause, as well as dismissal of the affirmative defense alleging her culpable conduct. In opposition to the motion, defendants submitted the affidavit of a witness to the accident who essentially stated that plaintiff could easily have avoided the accident by taking evasive action. Supreme Court granted only that part of the motion on the issue of defendant's negligence. Plaintiffs appeal from the order insofar as it denied that part of their motion to dismiss the affirmative defense concerning plaintiff's culpable conduct, and defendants cross-appeal from the order insofar as it granted that part of plaintiffs' motion on the issue of defendant's negligence. We affirm.

With respect to plaintiffs' appeal, we conclude that the court properly determined that there is an issue of fact concerning plaintiff's alleged culpable conduct and thus properly denied that part of her motion seeking dismissal of that affirmative defense. We agree with plaintiffs that there was no foundation for the opinions offered by the eyewitness in his affidavit. Nevertheless, his factual assertions alone are sufficient to raise an issue of fact whether, if in fact plaintiff faced an emergency situation, she had a sufficient opportunity to take evasive action to avoid the accident (*see Gaeta v Morgan*, 178 AD2d 732, 734; *see generally McGraw v Glowacki*, 303 AD2d 968, 969).

Finally, we conclude that the court properly determined that defendant was negligent as a matter of law. Plaintiffs met their initial burden of proof by submitting evidence that defendant backed the truck into plaintiff's vehicle on a public roadway (*see* Vehicle and Traffic Law § 1211 [a]; *Garcia v Verizon N.Y., Inc.*, 10 AD3d 339, 340; *Pressner v Serrano*, 260 AD2d 458). In opposition to the motion, defendants failed to raise an issue of fact with respect to negligence. Although defendant testified at his deposition that he "[g]lanced" at his side view mirrors before putting the truck in reverse and did not see plaintiff's vehicle, we conclude that his testimony is insufficient to raise an issue of fact regarding his negligence (*see Garcia*, 10 AD3d at 339-340).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

267

CA 11-01303

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

ERNEST SINGLETON, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF HIS MINOR DAUGHTER, ESSENCE SINGLETON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CAROL GIBSON, AS EXECUTRIX OF THE ESTATE OF MASON LEWIS, DECEASED, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS.

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

BURDEN, GULISANO & HICKEY, LLC, BUFFALO (SARAH E. HANSEN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered January 6, 2011 in a personal injury action. The order granted the motion of defendant Carol Gibson, as executrix of the estate of Mason Lewis, deceased, for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action, individually and on behalf of his infant daughter, seeking damages for third degree burns sustained by his daughter when her lower back came into contact with a hot radiator pipe in an apartment owned by Mason Lewis "and/or" his estate (hereafter, decedent). Carol Gibson (defendant) is the executrix of decedent's estate, and the apartment was leased to plaintiff's wife. The accident occurred in an upstairs bedroom when the child, who was then 13 months old, fell from a mattress while sleeping. According to plaintiff, the child apparently rolled into a pipe that was uninsulated and was attached to a steam radiator in the room. The bill of particulars alleges that decedent was negligent in "allowing extremely hot pipes to be exposed and uninsulated," thereby subjecting tenants to a significant risk of "burn injuries." Following discovery, defendant moved for summary judgment dismissing the complaint and any cross claims against her, as executrix of decedent's estate, and Supreme Court granted the motion. We affirm.

As a general rule, "a landlord is not liable to a tenant for dangerous conditions on the leased premises, unless a duty to repair

the premises is imposed by statute, by regulation or by contract" (*Rivera v Nelson Realty, LLC*, 7 NY3d 530, 534). Here, there was no such duty set forth in the lease signed by plaintiff's wife, and plaintiff cites no statute or regulation imposing a duty upon landlords to protect tenants from exposed radiator pipes. Plaintiff's reliance on *Hughes v Concourse Residence Corp.* (62 AD3d 463) is misplaced, inasmuch as in that case the landlord had a duty under the Administrative Code of the City of New York to insulate pipes carrying steam or water exceeding 165 degrees. There is no such regulation in the City of Rochester, where the leased apartment is located. Thus, in the absence of a statute, regulation or contractual provision requiring a landlord to repair the leased premises, decedent's estate cannot be held liable in negligence for the child's injuries (*see Rivera*, 7 NY3d at 536-537; *Isaacs v West 34th Apts. Corp.*, 36 AD3d 414, *lv denied* 8 NY3d 810).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

273

TP 11-01893

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

IN THE MATTER OF MARY SCHERZ AND PACE CNY, A PROGRAM OF ALL-INCLUSIVE CARE FOR THE ELDERLY, PETITIONERS,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH AND ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PETITIONERS.

PAULA MALLORY ENGEL, SYRACUSE, FOR RESPONDENT ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENT NEW YORK STATE DEPARTMENT OF HEALTH.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [John C. Cherundolo, A.J.], entered June 28, 2011) to review a determination of respondent New York State Department of Health. The determination denied petitioners' application for Medicaid benefits.

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

Memorandum: Petitioner Mary Scherz commenced this CPLR article 78 proceeding challenging the determination of the New York State Department of Health (respondent) to deny the claims for Medicaid reimbursement for medical care that was provided to Scherz by PACE CNY, a Program of All-Inclusive Care for the Elderly (PACE). After Supreme Court granted the cross motion of Scherz to amend the petition to add PACE as a necessary party, PACE and Scherz, now the two petitioners, submitted an amended petition seeking the same relief. The matter was transferred to this Court pursuant to CPLR 7804 (g).

Initially, we note that this proceeding does not involve a substantial evidence issue, and thus the court erred in transferring the proceeding to this Court (*see* CPLR 7803 [4]; 7804 [g]; *Matter of Panek v Bennett*, 38 AD3d 1251, 1252). A substantial evidence issue "arises only where a quasi-judicial hearing has been held and evidence

[has been] taken pursuant to law" (*Matter of Gigliotti v Bianco*, 82 AD3d 1636, 1638 [internal quotation marks omitted]) and no hearing was held or required in this case (*see id.*). We nevertheless address the merits of petitioners' contentions in the interest of judicial economy (*see Panek*, 38 AD3d at 1252).

" '[J]udicial review of an administrative determination is limited to whether the administrative action is arbitrary and capricious or lacks a rational basis' " (*Matter of Walker v State Univ. of N.Y. [Upstate Med. Univ.]*, 19 AD3d 1058, 1059, *lv denied* 5 NY3d 713; *see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231), and an administrative agency's interpretation "of its own regulations is entitled to substantial deference and should be upheld unless it is without a rational basis" (*Matter of Choices Women's Med. Ctr. v McBarnette*, 217 AD2d 623, 624; *see generally Matter of Violet Realty, Inc. v City of Buffalo Planning Bd.*, 20 AD3d 901, 902, *lv denied* 5 NY3d 713).

Insofar as relevant here, respondent's regulations require that all claims for reimbursement of payments made by PACE must be finally submitted to respondent within two years from the date upon which the care, services or supplies were furnished (*see* 18 NYCRR 540.6 [a] [3] [i]), hereinafter referred to as the two-year rule. Furthermore, respondent's publications indicated that respondent would consider waiving the two-year rule in cases where, as here, it had erroneously denied a claim, but only in the event that a request for such a waiver was submitted within 90 days of the issuance of respondent's "remittance statement" establishing that the claim had been improperly denied. Here, respondent initially denied PACE's claims due to a computer coding error, and when PACE continued to resubmit the claims after two years had passed, respondent relied upon the two-year rule in denying PACE's re-submitted claims. Respondent eventually conceded the error and issued a "remittance statement" in June 2009. PACE concedes that it did not resubmit the claims with a request for a waiver of the two-year rule until approximately March 2010. The evidence in the record establishes that petitioners had notice of respondent's rules and exceptions thereto.

Contrary to the contention of petitioners, respondent's determination was neither erroneous nor arbitrary and capricious. The record establishes that PACE did not, inter alia, submit its request for a waiver of the two-year rule within the requisite 90 days after it received the "remittance statement" in which respondent conceded that its prior denial had been erroneous. Consequently, we conclude that respondent's determination was in conformance with its regulation and thus was not arbitrary and capricious or without a rational basis. We need not address the parties' remaining contentions in light of our determination.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

281

KA 10-01367

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH HOLT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 7, 2010. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and assault 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 assault in the second degree (Penal Law § 120.05 [3]) and assault in the third degree (§ 120.00 [1]). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence supporting the conviction of assault in the second degree inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, we reject defendant's contention that the evidence is legally insufficient to establish the element of intent with respect to that crime (*see generally People v Bleakley*, 69 NY2d 490, 495). It is well established that "[i]ntent may be inferred from conduct as well as the surrounding circumstances" (*People v Steinberg*, 79 NY2d 673, 682; *see People v Smith*, 79 NY2d 309, 315). Viewing the evidence in light of the elements of the crime of assault in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to that crime is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that he was denied effective assistance of counsel based solely on defense counsel's failure to renew the motion for a trial order of dismissal with respect to the count of assault in the second degree. We reject that contention.

Here, inasmuch as we have concluded that the evidence is legally sufficient to support the conviction of that count, it cannot be said that defense counsel's failure to renew the motion with respect thereto constitutes ineffective assistance of counsel (*see People v Washington*, 60 AD3d 1454, *lv denied* 12 NY3d 922; *see generally People v Baldi*, 54 NY2d 137, 147). Defendant's challenge to the legal sufficiency of the evidence before the grand jury is not properly before us. "It is well settled that, 'when a judgment of conviction has been rendered based upon legally sufficient trial evidence, appellate review of a claim alleging insufficiency of [g]rand [j]ury evidence is barred' " (*People v Bastian*, 294 AD2d 882, 883, *lv denied* 98 NY2d 694, quoting *People v Wiggins*, 89 NY2d 872, 874; *see* CPL 210.30 [6]). We have reviewed defendant's remaining contention and conclude that it is without merit.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

283

KA 10-01962

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ETHAN MILLER, DEFENDANT-APPELLANT.

TERRENCE BAXTER, BATH, FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH, FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered April 28, 2010. The judgment convicted defendant, upon a jury verdict, of assault in the second degree (two counts) and falsifying business records in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, two counts of assault in the second degree (Penal Law § 120.05 [2], [9]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), and affording the appropriate deference to the jury's credibility determinations (*see People v Hill*, 74 AD3d 1782, 1782-1783, *lv denied* 15 NY3d 805), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's contention, scalding hot water constitutes a "dangerous instrument" (§ 120.05 [2]; *see People v Mableton*, 17 AD3d 383, 383, *lv denied* 4 NY3d 888; *People v Cruz*, 257 AD2d 664; *People v Holden*, 188 AD2d 757, 760, *lv denied* 81 NY2d 887), and the People were not required to establish the precise temperature of the water or the length of exposure that caused second degree immersion burns to the feet and ankles of the child victim.

Defendant further contends that County Court violated his constitutional right to present a defense when it precluded him from offering hearsay testimony regarding the fact that children of the victim's mother were previously removed from her custody and placed in foster care (*see generally Chambers v Mississippi*, 410 US 284, 302). That contention is not preserved for our review (*see People v Gonzalez*, 54 NY2d 729, 730; *People v Simmons*, 283 AD2d 306, 306, *lv denied* 96 NY2d 924) and, in any event, it is without merit inasmuch as

defendant made no effort to establish such fact by a means other than inadmissible hearsay.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

288

CA 11-01354

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

DANIEL J. SMITH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS CASSIDY AND MICHAEL UNDERWOOD, DOING BUSINESS AS CASSIDY & UNDERWOOD CONSTRUCTION, DEFENDANTS-APPELLANTS.

ALLSTATE INSURANCE CO., AS SUBROGEE OF DANIEL SMITH, PLAINTIFF-RESPONDENT,

V

THOMAS CASSIDY AND MICHAEL UNDERWOOD, DOING BUSINESS AS CASSIDY & UNDERWOOD CONSTRUCTION, DEFENDANTS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (MARK T. WHITFORD, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SCOTT AND GILBERT, LLP, CANANDAIGUA (JOHN J. GILBERT OF COUNSEL), FOR PLAINTIFF-RESPONDENT ALLSTATE INSURANCE CO., AS SUBROGEE OF DANIEL SMITH.

PHILLIPS LYTLE LLP, ROCHESTER (RICHARD T. TUCKER OF COUNSEL), FOR PLAINTIFF-RESPONDENT DANIEL J. SMITH.

Appeal from an order of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered March 29, 2011. The order, inter alia, granted the motions of plaintiffs for leave to renew and reargue, and upon renewal and reargument, granted the prior cross motions of plaintiffs for summary judgment.

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

Memorandum: Plaintiff Daniel J. Smith commenced an action seeking damages resulting from the petroleum spill that occurred when defendants punctured the oil line on his property while installing vinyl skirting around the perimeter of his residence. Plaintiff Allstate Insurance Co. (Allstate), as subrogee of Smith, commenced a subsequent action seeking damages arising out of the petroleum spill, and the actions were consolidated. Supreme Court granted Smith's motion seeking, inter alia, leave to renew and reargue his prior cross

motion for summary judgment on liability and his opposition to defendants' amended motion seeking sanctions for spoliation of evidence, and the court also granted Allstate's motion seeking leave to renew and reargue its prior cross motion for summary judgment on its complaint and its opposition to defendants' amended spoliation motion. Upon renewal and reargument, the court granted plaintiffs' prior cross motions.

Contrary to defendants' contention, we conclude that the court did not abuse its discretion in granting plaintiffs' respective motions for leave to renew and reargue (*see generally Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 376-377; *Dixon v New York Cent. Mut. Fire Ins. Co.*, 265 AD2d 914, 914). With respect to renewal, the court properly exercised its discretion in determining that plaintiffs were justified in not offering the newly discovered evidence in support of the prior cross motions (*see* CPLR 2221 [e] [3]). Such evidence was discovered as a result of Smith's investigation conducted subsequent to the prior cross motions and included the fuel tank removed from Smith's property following the petroleum spill, as well as the missing sections of oil line that were discovered in the crawl space under his home. With respect to reargument, the court recognized that it had "misapprehended [certain facts] in determining the prior [cross] motion[s]" (CPLR 2221 [d] [2]), which had led the court to conclude that there was an issue of fact regarding whether Smith may have contributed to the petroleum discharge.

We reject defendants' further contention that the court, upon renewal and reargument, erred in granting plaintiffs' respective cross motions for summary judgment. Plaintiffs met their initial burdens with respect to their Navigation Law § 181 (5) causes of action by establishing that defendants discharged petroleum when they punctured the oil line while installing the vinyl skirting around Smith's home (*see Tifft v Bigelow's Oil Serv., Inc.*, 70 AD3d 1248, 1249; *see also State of New York v Green*, 96 NY2d 403, 408). In opposition, defendants failed to raise a triable issue of fact with respect to either their role in discharging the petroleum or whether Smith caused or contributed to the petroleum spill (*see Tifft*, 70 AD3d at 1249; *see also White v Long*, 85 NY2d 564, 569).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

292

CA 11-01605

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

GAIL L. HARRIS, PLAINTIFF-APPELLANT,

V ORDER

ROBERT SEAGER, JAMES BRIGANTI AND MARIE BRIGANTI,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

LAW OFFICE OF RONALD D. ANTON, NIAGARA FALLS (SCOTT A. STEPIEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF LAURIE G. ODGEN, BUFFALO (DANIEL J. CAFFREY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered March 29, 2011 in a personal injury action. The order granted the motion of defendants to preclude the testimony of Guy A. Bax at trial.

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 23, 2012

Frances E. Cafarell
Clerk of the Court

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

293

CA 11-01606

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

GAIL L. HARRIS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT SEAGER, JAMES BRIGANTI AND MARIE BRIGANTI,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LAW OFFICE OF RONALD D. ANTON, NIAGARA FALLS (SCOTT A. STEPIEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF LAURIE G. ODGEN, BUFFALO (DANIEL J. CAFFREY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Niagara County (Sara S. Sperrazza, A.J.), entered April 21, 2011 in a personal injury action. The judgment dismissed the complaint upon a directed verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, defendants' motion for a directed verdict is denied, the complaint is reinstated and a new trial is granted.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she tripped over a raised threshold in a doorway while exiting a store owned by defendants James Briganti and Marie Briganti and operated by defendant Robert Seager. The door through which plaintiff exited the store led directly to an exterior stairway with a handrail on one side only. According to plaintiff, as she was falling down the stairs after tripping on the threshold, she reached for a railing on the side of the stairway where there was none, and she therefore tumbled down the stairs and injured her right foot and leg. Shortly before trial, Supreme Court granted the motion of defendants to preclude plaintiff's proposed expert witness from testifying at trial. After plaintiff rested at trial, defendants moved for a directed verdict dismissing the complaint, contending, inter alia, that plaintiff failed to establish that they had actual or constructive notice that the alleged defects in the property were dangerous. The court granted the motion, stating that "there is no way that there [is] any legal basis to put before the jury the issue of notice or causation," and entered judgment dismissing the complaint.

We conclude that the court erred in granting defendants' motion

for a directed verdict. The evidence proffered by plaintiff clearly established that defendants had constructive, if not actual, notice of the allegedly dangerous conditions on the property, i.e., the raised threshold and the absence of a handrail on one side of the stairway. Indeed, as defendants conceded, those conditions had existed on the property for years prior to plaintiff's accident. Contrary to defendants' contention, plaintiff was not required to establish that defendants had notice of the allegedly dangerous nature of the threshold and stairway. To establish the notice element of her negligence claim, plaintiff was required to demonstrate that defendants had notice of conditions that she alleged were dangerous, but she was not required to demonstrate that defendants knew that those conditions were dangerous (*see generally* PJI 2:90; *Tanguma v Yakima County*, 18 Wash Ct App 555, 563, 569 P2d 1225, 1230, *review denied* 90 Wash 2d 1001). To the extent that defendants rely on dicta in the decision of the Third Department in *Richardson v Rotterdam Sq. Mall* (289 AD2d 679, 682) that suggests otherwise, we decline to follow it. We note that, in support of their motion for a directed verdict, defendants did not contend the alleged defects in the property were "trivial as a matter of law" (*Sokolovskaya v Zemnovitsch*, 89 AD3d 918, 918; *see generally Gafter v Buffalo Med. Group, P.C.*, 85 AD3d 1605, 1606; *Tully v Anderson's Frozen Custard, Inc.* [appeal No. 2], 77 AD3d 1474, 1475), nor do they advance that contention on appeal.

Finally, we reject plaintiff's contention that the court abused its discretion in granting the motion of defendants to preclude the testimony of plaintiff's expert based on her failure to comply with CPLR 3101 (d) (1). "It is within the sound discretion of the trial court to determine whether a witness may testify as an expert and that determination should not be disturbed 'in the absence of serious mistake, an error of law or abuse of discretion' " (*Saggese v Madison Mut. Ins. Co.*, 294 AD2d 900, 901, quoting *Werner v Sun Oil Co.*, 65 NY2d 839, 840). Given the deficiencies in plaintiff's expert disclosure, we perceive no abuse of the court's discretion in this case.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

295

CA 11-01125

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

PAMELA MCFADDEN AND WILLIAM CURRAN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ONEIDA, LTD., DEFENDANT-RESPONDENT.

LADUCA LAW FIRM, LP, ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (ROBERT M. SHADDOCK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, A.J.), entered February 15, 2011 in a personal injury action. The order denied plaintiffs' motion for judgment notwithstanding the verdict.

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

Memorandum: Plaintiffs purport to appeal from a decision "dated" February 4, 2011 denying their motion for, inter alia, judgment notwithstanding the verdict. Although no appeal lies from a mere decision (*see Kuhn v Kuhn*, 129 AD2d 967), we nevertheless note that the order was "entered" February 4, 2011, and we exercise our discretion to treat the notice of appeal as valid and deem the appeal taken from the order (*see generally* CPLR 5520 [c]). Plaintiffs were injured when a shelving unit that they were disassembling in defendant's store collapsed. Plaintiffs had purchased six shelving units from defendant's store when it was going out of business. The units were purchased "as is." The day after the accident, plaintiff William Curran called the store manager on two occasions and left messages, but he never received a return telephone call. Inasmuch as the shelving units were no longer available and Curran did not know who manufactured them, he visited another one of defendant's stores and observed nearly identical shelving units, which he photographed. Curran also purchased additional shelving units from the company that he believed to be the manufacturer of the shelving units in defendant's store and, when he assembled those units, he observed that "everything was the same" as the units that collapsed.

At trial, Supreme Court permitted plaintiffs to assemble a unit that Curran had purchased from the manufacturer and present it to the

jury as a demonstrative exhibit. The parties presented the testimony of experts supporting competing theories of the way in which the accident occurred. The jury answered the first question on the verdict sheet, "Was [defendant's] premises reasonably safe?" in the affirmative, and thus the court entered judgment in favor of defendant. Plaintiffs moved for, inter alia, judgment notwithstanding the verdict on the grounds that the jurors misapprehended the first question on the verdict sheet and that at least two jurors expressed confusion after the verdict regarding that question. The court denied the motion.

Plaintiffs' contention with respect to the jury charge is not preserved for our review because they failed to object when the court discussed PJI 2:90 prior to charging the jury or at any other time before the jury began deliberations (*see* CPLR 4110-b; *Garris v K-Mart, Inc.*, 37 AD3d 1065, 1066). Plaintiffs also failed to preserve for our review their further contention with respect to the verdict sheet because, although plaintiffs requested that the court use different language for the first question on the verdict sheet, they did not object to the proposed language on the ground they now raise on appeal (*see Schmidt v Buffalo Gen. Hosp.*, 278 AD2d 827, 828, *lv denied* 96 NY2d 710; *see generally* CPLR 5501 [a] [3]). In any event, plaintiffs failed to demonstrate any prejudice arising from the alleged inadequacies of the jury charge (*see Blanchard v Whitlark*, 286 AD2d 925, 926), nor did plaintiffs establish that "there was 'substantial confusion among the jurors' " based on the language in the verdict sheet (*Lopez v Kenmore-Tonawanda School Dist.*, 275 AD2d 894, 896).

Plaintiffs contend that the court erred in denying their pretrial cross motion seeking sanctions for defendant's spoliation of evidence, i.e., disposing of the shelving units that collapsed before they could be examined or photographed. Plaintiffs requested that the court either strike the answer or strike the affirmative defense of comparative negligence. The court's determination denying the cross motion is not properly before us because the appeal is taken from an order denying plaintiffs' post-trial motion, rather than the judgment (*see generally Fleiss v South Buffalo Ry. Co.*, 280 AD2d 1004, 1005). In any event, trial courts have "broad discretion in determining what, if any, sanction[s] should be imposed for spoliation of evidence" (*Iannucci v Rose*, 8 AD3d 437), and "the sanction of striking a pleading . . . 'should be granted only where it is conclusively shown that the discovery default was deliberate or contumacious' " (*Wetzler v Sisters of Charity Hosp.*, 17 AD3d 1088, 1089, *amended on rearg* 20 AD3d 944). Here, plaintiffs were not precluded from establishing a prima facie case of negligence, and thus the remedy of striking the answer or an affirmative defense was not an appropriate sanction (*see id.* at 1090).

Contrary to plaintiffs' further contention, we conclude that the verdict is supported by legally sufficient evidence inasmuch as "there is a valid line of reasoning and permissible inferences that could lead rational persons to the conclusion reached by the jury based upon the evidence presented at trial" (*Guthrie v Overmyer*, 19 AD3d 1169,

1170; *see generally Cohen v Hallmark Cards*, 45 NY2d 493, 499). Finally, we conclude that the verdict is not against the weight of the evidence (*see Wesolek v Tops Mkts.*, 255 AD2d 972, 973; *see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

296

CA 11-01257

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

ELLEN J. GALLAGHER,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

EDWARD R. GALLAGHER,
DEFENDANT-APPELLANT-RESPONDENT.
(APPEAL NO. 1.)

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

GETNICK, LIVINGSTON, ATKINSON & PRIORE, LLP, UTICA (THOMAS L. ATKINSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an amended judgment of the Supreme Court, Oneida County (David A. Murad, J.), entered May 26, 2011 in a divorce action. The amended judgment, among other things, dissolved the marriage between the parties and determined the equitable distribution of the marital assets.

It is hereby ORDERED that the amended judgment so appealed from is unanimously modified on the law by reducing the distributive award in the amount of $586,065 set forth in the 3rd decretal paragraph to $543,227 and reducing the lump sum partial distributive award in the amount of $260,000 set forth in the 4th, 5th, and 10th decretal paragraphs to $217,162, and as modified the amended judgment is affirmed without costs.

Memorandum: Plaintiff wife commenced this divorce action in August 2007 seeking, inter alia, equitable distribution of the marital property and child support. In appeal No. 1, defendant husband appeals and the wife cross-appeals from an amended judgment following a trial and, in appeal No. 2, the husband appeals from a subsequent order that, inter alia, restricted him from entering into contracts for real property. The parties have owned and operated a dairy farm since 1983. The parties' second oldest son (hereafter, son) started working full-time on the farm in early 2002, at approximately the same time that the wife no longer had any involvement in the farm. The husband and son proceeded to expand the farm by increasing the size of the cattle herd and acquiring additional real property, some of which was titled in the son's name. In August 2008, the son commenced an action against the parties seeking an interest in the farm, and the actions were consolidated for a joint trial. At the conclusion of

testimony with respect to the son's action, Supreme Court concluded that the son and the husband had not formed a partnership and dismissed the son's complaint.

With respect to the amended judgment in appeal No. 1, the husband contends on appeal that, in determining the value of the farm for equitable distribution purposes, the court should not have included the value of the real property that was titled in the son's name. Contrary to the wife's contention on her cross appeal, the husband is not collaterally estopped from raising that contention inasmuch as the order dismissing the son's complaint did not address his entitlement to possession of real property that was titled in his name (*see Zayatz v Collins*, 48 AD3d 1287, 1290). We conclude, however, that the husband's contention is without merit. Pursuant to Domestic Relations Law § 236 (B) (5) (d) (13), a court may consider "any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration" when making its equitable distribution determination. Here, the court properly determined that the value of the real property that was titled in the son's name constituted marital property inasmuch as that property was purchased using farm income (*see Niland v Niland*, 291 AD2d 876, 876-877). The record supports the court's determination that the purchases of property titled in the name of the son were part of the husband's scheme to divest the wife of her interest in the farm.

Contrary to the husband's further contention on appeal in appeal No. 1, the court did not abuse its discretion in denying that part of his motion to retain and offer testimony from different expert witnesses than those he had listed in his expert disclosure. The court properly determined that the husband failed to demonstrate "good cause" for the late disclosure, which was not made until the middle of the trial, and that permitting the late disclosure would be prejudicial to the wife (CPLR 3101 [d] [1] [i]; *see Caccioppoli v City of New York*, 50 AD3d 1079, 1080; *see also Saggese v Madison Mut. Ins. Co.*, 294 AD2d 900, 901; *cf. Peck v Tired Iron Transp.*, 209 AD2d 979, 979). Contrary to the husband's contention, "[t]he court did not err in failing to take into account the tax impacts of the distributive award because there was no evidence that any assets would have to be sold" (*Atwal v Atwal* [appeal No. 2], 270 AD2d 799, 799, *lv denied* 95 NY2d 761; *see Kudela v Kudela*, 277 AD2d 1015, 1015).

With respect to the equitable distribution of the farm, the husband contends on appeal in appeal No. 1 that the court improperly calculated the value thereof, and the wife contends on her cross appeal that the court erred in its valuation date. In addition, both parties contend that the court's determination to award the wife 45% of that asset was inequitable. First, we conclude that the court did not abuse its discretion in valuing the farm as of the date of the commencement of the action (*see George v George*, 237 AD2d 894, 894). As the court noted, the farm "had not undergone the type of radical alteration subsequent to the commencement of the action that would warrant a valuation of the [farm] at the time of trial" (*Grunfeld v Grunfeld*, 94 NY2d 696, 708). Second, we reject the husband's contention that the court erred in its valuation of the real property

of the farm, but we agree with the husband that the court erred in failing to decrease that amount by a debt on a portion of the real property in the amount of $46,201 (*see Loria v Loria*, 46 AD3d 768, 770). We further agree with the husband that the value of the farm should be decreased by the amount of the open accounts, which was $48,995. It was undisputed that the wife's expert appraised the farm personalty on a liquidation basis, which the court adopted, and a liquidation of the business would apply the debts on those open accounts. We therefore modify the amended judgment by reducing the distributive award to the wife in the amount of $586,065 set forth in the 3rd decretal paragraph to $543,227 and reducing the lump sum partial distributive award in the amount of $260,000 set forth in the 4th, 5th, and 10th decretal paragraphs to $217,162. We further conclude that the court did not abuse its discretion in awarding the wife 45% of the value of the farm (*see generally Oliver v Oliver*, 70 AD3d 1428, 1428-1429). Contrary to the husband's contention, "the relevant factors were taken into consideration by the court and the reasons for its decision are articulated" (*Butler v Butler*, 256 AD2d 1041, 1042, *lv denied* 93 NY2d 805).

We reject the husband's further contention on appeal in appeal No. 1 that the court abused its discretion in awarding him 15% of the value of the wife's enhanced earnings from teaching based on her attainment of a master's degree (*see Martinson v Martinson*, 32 AD3d 1276, 1277). " '[W]here only modest contributions are made by the nontitled spouse toward the other spouse's attainment of a degree . . . and the attainment is more directly the result of the titled spouse's own ability, tenacity, perseverance and hard work, it is appropriate for courts to limit the distributed amount of that enhanced earning capacity' " (*Higgins v Higgins*, 50 AD3d 852, 853). Contrary to the contentions of the husband on appeal and the wife on her cross appeal, the court did not abuse its discretion in awarding the wife $40,000 in counsel fees, which was less than half the amount she was seeking (*see Blake v Blake* [appeal No. 1], 83 AD3d 1509). The court properly considered, inter alia, "the financial circumstances of both parties . . . [and] the existence of any dilatory or obstructionist conduct" (*id.*; *see Johnson v Chapin*, 12 NY3d 461, 467, *rearg denied* 13 NY3d 888). Although the wife had the financial ability to pay for her own counsel fees, the husband had engaged in some obstructionist conduct during the trial. We have considered the parties' remaining contentions in appeal No. 1 and conclude that they are without merit.

With respect to the order in appeal No. 2, we agree with the husband that the court erred in restricting him from entering into or closing on any real property contracts inasmuch as the wife did not seek that relief in her order to show cause (*cf. Tirado v Miller*, 75 AD3d 153, 158). We therefore modify the order in appeal No. 2 by vacating the fifth ordering paragraph.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

297

CA 11-01744

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

ELLEN J. GALLAGHER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD R. GALLAGHER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

GETNICK, LIVINGSTON, ATKINSON & PRIORE, LLP, UTICA (THOMAS L. ATKINSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered August 8, 2011 in a divorce action. The order, among other things, denied defendant's motion for recusal and held defendant in contempt of court.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the fifth ordering paragraph and as modified the order is affirmed without costs.

Same Memorandum as in *Gallagher v Gallagher* ([appeal No. 1] ___ AD3d ___ [Mar. 23, 2012]).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

298

CA 11-02179

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

ELLEN J. GALLAGHER, PLAINTIFF-RESPONDENT,

V ORDER

EDWARD R. GALLAGHER, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

GETNICK, LIVINGSTON, ATKINSON & PRIORE, LLP, UTICA (THOMAS L. ATKINSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), dated April 28, 2011 in a divorce action. The order, among other things, required defendant to maintain plaintiff as co-insured on all property and liability insurance until he has removed her name from all instruments of liability.

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 23, 2012

Frances E. Cafarell
Clerk of the Court

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

300

TP 11-01956

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

IN THE MATTER OF PUTNAM COMPANIES, DOING BUSINESS AS ACORN MARKETS, INC., PETITIONER,

V MEMORANDUM AND ORDER

NIRAV R. SHAH, M.D., M.P.H., COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENT.

LAW OFFICE OF DAVID H. JACOBS, CORNING (SHAWN M. SAURO 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, Steuben County [Marianne Furfure, A.J.], entered September 2, 2011) to review a determination of respondent. The determination, among other things, adjudged that petitioner violated Public Health Law § 1399-cc (2).

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination that a clerk in one of its stores sold cigarettes to a person under the age of 18 in violation of Public Health Law § 1399-cc (2) and that petitioner's registration to sell cigarettes and lottery tickets must be suspended for six months. The sale was made to a minor employed by respondent, and the transaction was supervised and observed by one of respondent's investigators. We note at the outset that Supreme Court should have transferred the entire proceeding to this Court, rather than disposing of petitioner's contention that it was deprived of due process when the Administrative Law Judge (ALJ) refused to compel the minor who purchased the cigarettes to testify at the hearing (*see* CPLR 7804 [g]). In cases in which a substantial evidence issue is raised, the court must dispose of "such other objections [in point of law] as could terminate the proceeding" (*id.*). "[A]n 'objection in point of law' is one raised either by respondent in the answer or by petitioner in response to 'new matter contained in the answer' " (*Matter of Hoch v New York State Dept. of Health*, 1 AD3d 994, 994; *see also Matter of G & G Shops v New York City Loft Bd.*, 193 AD2d 405, 405). Here, petitioner's due process contention does not fall into either of those categories.

In any event, reviewing the matter de novo (*see Hoch*, 1 AD3d at 995), we conclude that the ALJ's refusal to compel the minor to testify did not violate petitioner's right to due process. The right to cross-examine witnesses in an administrative proceeding is a limited one (*see Matter of Gordon v Brown*, 84 NY2d 574, 578), and "[t]he ALJ properly determined that cross-examination [of the minor] in this instance was neither necessary nor required" (*Matter of Friendly Convenience, Inc. v New York City Dept. of Consumer Affairs*, 71 AD3d 577, 577). We further conclude that the determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182). The investigator who observed the sale of cigarettes to the minor testified at the hearing that she was standing directly behind the minor when she requested and paid for the cigarettes, and the investigator verified the age of the minor through her driver's license and birth certificate, copies of which were admitted in evidence (*see Matter of Genovese Drug Stores, Inc. v Harper*, 49 AD3d 735, 735-736; *cf. Hoch*, 1 AD3d at 995). In addition, respondent produced documentary evidence that petitioner had violated Public Health Law § 1399-cc (2) once before in the previous 36 months, and the director of retail centers for petitioner testified at the hearing that its employees had not completed a "state certified tobacco sales training program" (§ 1399-ee [3] [a]). The documents and testimony constituted substantial evidence supporting the determination that petitioner had accumulated "three points or more" on its record, requiring a six-month suspension of petitioner's registration to sell cigarettes and lottery tickets (§ 1399-ee [3] [e]).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

311

KA 11-02069

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

DESMOND JOHNSON, DEFENDANT-RESPONDENT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS TEXIDO OF COUNSEL), FOR APPELLANT.

ANDREW C. LOTEMPIO, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), dated June 16, 2011. The order granted the motion of the People for leave to reargue and, upon reargument, adhered to the prior order granting that part of defendant's motion seeking to suppress a handgun.

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

Memorandum: Upon the motion of defendant seeking, inter alia, to suppress a handgun seized by police following an allegedly unlawful pursuit of defendant, Supreme Court granted that part of the motion to suppress the handgun. Following entry of the order granting that part of defendant's motion, the People moved for leave to reargue with respect thereto. The court granted the People's motion insofar as it sought leave to reargue and adhered to its prior determination. The People appealed from the original order and failed to appeal from the subsequent order entered on reargument, which superseded the original order (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985). We exercise our discretion to treat the notice of appeal as one taken from the subsequent order (*see* CPLR 5520 [c]; *see e.g. Kanter v Pieri*, 11 AD3d 912, 912), and now reverse.

The People do not contend that the court erred in determining that the pursuit of defendant by the police was unlawful (*see generally People v Holmes*, 81 NY2d 1056, 1057-1058; *People v De Bour*, 40 NY2d 210, 223). They do contend, however, and we agree, that the unlawful pursuit of defendant does not require suppression of the handgun. The undisputed testimony established that defendant "abandoned the [hand]gun . . . before any contact with police, and thus it cannot be said that the abandonment was 'coerced or

precipitated by unlawful police activity' " (*People v Stevenson*, 273 AD2d 826, 827, quoting *People v Ramirez-Portoreal*, 88 NY2d 99, 110; *see generally People v Boodle*, 47 NY2d 398, 404-405, *cert denied* 444 US 969). The court therefore erred in rejecting the People's contention that the handgun was abandoned and in suppressing it (*see e.g. Stevenson*, 273 AD2d at 827; *see generally Ramirez-Portoreal*, 88 NY2d at 110; *Boodle*, 47 NY2d at 402-404).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

312

KA 10-01159

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH D. DASH, ALSO KNOWN AS JOSEPH DASH,
DEFENDANT-APPELLANT.

JOSEPH T. JARZEMBEK, 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 April 12, 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: Defendant appeals from a judgment convicting him, upon a guilty plea, of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Defendant failed to preserve for our review his contention that his plea was not voluntarily entered "because . . . he failed to move to withdraw the plea or to vacate the judgment of conviction" (*People v Connolly*, 70 AD3d 1510, 1511, *lv denied* 14 NY3d 886). In any event, that contention lacks merit. The record of the plea colloquy establishes that defendant stated that he had not consumed drugs or alcohol, that he had not been coerced into entering the plea, and that he was not promised anything in exchange for his guilty plea. Indeed, he expressly stated that he was entering the plea voluntarily after having sufficient time to consult with his attorney. "[T]he record [thus] establishes that defendant understood the nature and consequences of his actions" (*People v Watkins*, 77 AD3d 1403, 1403-1404, *lv denied* 15 NY3d 956). Defendant also failed to preserve for our review his challenge to the factual sufficiency of the plea allocution (*see People v Lopez*, 71 NY2d 662, 665). That challenge lacks merit in any event, inasmuch as his factual admissions during the plea colloquy, coupled with his written confession that was admitted in evidence during the plea proceeding, sufficiently established his guilt of the crime to which he pleaded guilty.

Finally, we reject defendant's contention that County Court erred in refusing to suppress an identification of defendant based on an

allegedly suggestive photo array identification procedure. The People met their initial burden of establishing the reasonableness of the police conduct with respect to the identification procedure in question, and defendant failed to meet his ultimate burden of proving that the procedure was unduly suggestive (*see generally People v Chipp*, 75 NY2d 327, 335, *cert denied* 498 US 833).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

332

KA 11-00554

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY JABLONSKI, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered February 2, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentence shall run concurrently with the previously imposed definite sentences and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the third degree (Penal Law §§ 110.00, 140.20). As defendant contends and the People correctly concede, Supreme Court erred in directing that the indeterminate term of imprisonment that it imposed be served consecutively to two definite sentences that had been previously imposed (*see* former § 70.35). "The offense[s] underlying the definite sentence[s were] committed prior to the date on which the [indeterminate] sentence was imposed, and thus the definite sentence[s] must run concurrently" with the indeterminate sentence (*People v Glinski* [appeal No. 2], 37 AD3d 1188, 1189; *see People v Leabo*, 84 NY2d 952, 953). We therefore modify the judgment accordingly.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

337

KA 11-01926

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FELIX NOGUEL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered May 31, 2006. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: Defendant was convicted following a jury trial of assault in the second degree (Penal Law § 120.05 [2]), arising from an incident in which he struck a homeless panhandler in the head with a brick. Defendant contends that County Court should have discharged a sworn juror who disclosed at trial that he knew the victim from a homeless shelter at which the juror volunteered. As defendant correctly concedes, he waived that contention by agreeing with the prosecutor that the juror was not "grossly unqualified" to continue serving within the meaning of CPL 270.35 (1) (*see People v Hinton*, 302 AD2d 1008, 1008-1009, *lv denied* 100 NY2d 539).

We reject defendant's further contention that he was deprived of effective assistance of counsel based on, inter alia, defense counsel's failure to challenge the juror in question. Although the juror disclosed during voir dire that he volunteered at a homeless shelter, he did not realize that he knew the victim until he saw a photograph of him at trial. The juror promptly notified the court that he recognized the victim from the photograph and, during a subsequent in camera interview, he stated that he might have "sensitivity" to the victim, whom he had met "a number of times" at the homeless shelter. The juror unequivocally stated, however, that he could disregard what he knew about the victim and render a verdict based solely on the evidence at trial. The juror further stated without equivocation that he could follow the court's instructions to render a verdict free from sympathy to anyone. It is well settled

that defense counsel cannot be deemed ineffective for failing to "make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702; *see People v Caban*, 5 NY3d 143, 152). Under the circumstances of this case, we conclude that a challenge to the fitness of the sworn juror in question would not have been successful.

Defendant's reliance on *People v Wlasiuk* (90 AD3d 1405) in support of his ineffective assistance of counsel contention is misplaced. The juror in that case, a physician, failed to disclose during voir dire that he had been interviewed by the police during their investigation of the case, that he worked with the victim, that the defendant's children were his patients and that he knew of the defendant's reputation for subjecting the victim, his wife, to prior acts of violence (*id.* at 1408-1409). Here, in contrast, the juror in question did not withhold any information during voir dire and did not know anything about the case before the trial commenced. Further, the defense attorney in *Wlasiuk* made an additional error that the Third Department determined to have greatly prejudiced the defendant (*id.* at 1412-1413). We cannot conclude that any of defendant's remaining complaints concerning defense counsel's performance have merit.

We note that defense counsel successfully moved to suppress defendant's inculpatory statement to the police, in which he admitted that he threw a brick at the victim and might have punched and kicked him as well. Defense counsel also obtained an acquittal for defendant on the top count of the indictment, charging him with assault in the first degree (Penal Law § 120.10 [1]), a class B violent felony offense that carries a mandatory minimum determinate sentence of at least 5 years in prison and a maximum determinate sentence of 25 years in prison (§ 70.02 [1] [a]; [3] [a]). Defendant was convicted of a lesser included felony offense and sentenced to only five months in jail and a term of probation. When viewed as a whole, the record demonstrates that defense counsel provided meaningful representation (*see People v Martinez*, 73 AD3d 1432, 1433, *lv denied* 15 NY3d 807; *see generally People v Baldi*, 54 NY2d 137, 147).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Indeed, we conclude that an acquittal on the lesser included offense of assault in the second degree would have been unreasonable (*see People v Peters*, 90 AD3d 1507, 1508). The victim was rendered unconscious by the assault and was taken by ambulance to the hospital, where it was determined that he suffered a right lateral orbital wall fracture, a subdural hematoma and a subarachnoid hemorrhage, as well as a left temporal bone transverse fracture. Contrary to defendant's contention, those injuries rise to the level of physical injury (*see* Penal Law § 10.00 [9]). We further note that a witness to the assault testified that he observed defendant strike the victim with a brick, and the police found a brick a few feet from the victim's head shortly after defendant fled the scene. In any event, even assuming, arguendo, that an acquittal on assault in the second degree would not

have been unreasonable, we cannot conclude that the jury failed to give the evidence the weight it should be accorded (*see People v Smith*, 46 AD3d 1458, 1458-1459, *lv denied* 10 NY3d 817; *see generally Bleakley*, 69 NY2d at 495).

Finally, although the prosecutor made several improper remarks during his summation, we conclude that the potential prejudice arising from those remarks was alleviated by the court's curative instruction (*see People v Perrington*, 89 AD3d 529, 530; *People v Moore*, 32 AD3d 1354, 1354, *lv denied* 8 NY3d 847, 9 NY3d 848). In any event, they were not so egregious as to deprive defendant of his fundamental right to a fair trial (*see People v Hatten*, 28 AD3d 1247, 1248, *lv denied* 7 NY3d 813).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

338

KA 11-02070

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

KYLA A. ROGALSKI, DEFENDANT-RESPONDENT.

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), dated July 11, 2011. The order, insofar as appealed from, dismissed count three of the indictment.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law, that part of defendant's omnibus motion seeking to dismiss count three of the indictment is denied and that count is reinstated.

Memorandum: The People appeal from an order insofar as it granted that part of defendant's omnibus motion seeking to dismiss count three of the indictment, charging defendant with endangering the welfare of a child (Penal Law § 260.10 [1]). Based on our review of the sealed grand jury minutes, we conclude that the evidence before the grand jury was legally sufficient to support a prima facie case of endangering the welfare of a child. "A person is guilty of [that crime] when . . . [h]e or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than [17] years old" (*id.*). "Actual harm to the child need not result for criminal liability [to be imposed. Rather,] it is 'sufficient that the defendant act in a manner which is *likely* to result in harm to the child, *knowing* of the likelihood of such harm coming to the child' " (*People v Johnson*, 95 NY2d 368, 371, quoting *People v Simmons*, 92 NY2d 829, 830 [emphasis added]). We conclude that the evidence presented to the grand jury, "viewed in the light most favorable to the People, if unexplained and uncontradicted, [was] sufficient to warrant conviction by a trial jury" of the count charging defendant with endangering the welfare of a child (*People v Manini*, 79 NY2d 561, 568-569; *see People v Pelchat*, 62 NY2d 97, 105), based on a determination that defendant's conduct was likely to be injurious to the physical welfare of the subject child.

All concur except CENTRA, J.P., and LINDLEY, J., who dissent and vote to affirm in the following Memorandum: We respectfully dissent and would affirm the order granting that part of defendant's omnibus

motion seeking to dismiss count three of the indictment, charging her with endangering the welfare of a child (Penal Law § 260.10 [1]). "A person is guilty of [that crime] when . . . [h]e or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than [17] years old" (*id.*). We conclude, and the majority apparently does not dispute, that the evidence before the grand jury, viewed in the light most favorable to the People (*see People v Manini*, 79 NY2d 561, 568-569; *People v Pelchat*, 62 NY2d 97, 105), did not establish that defendant's conduct was likely to be injurious to the mental or moral welfare of the infant child in question (*cf. People v Engelsen*, 92 AD3d 1289, ___). Contrary to the conclusion of the majority, we further conclude that the evidence before the grand jury did not establish that defendant's conduct was likely to be injurious to the physical welfare of the child. "The People . . . must establish that the harm was likely to occur, and not merely possible" (*People v Hitchcock*, 98 NY2d 586, 591). Here, the police approached defendant's vehicle after she made a wide turn and stopped in a parking lot, and she thereafter was charged with, inter alia, aggravated felony driving while intoxicated (Vehicle and Traffic Law § 1192 [2-a] [b]; § 1193 [1] [c] [i] [B]). We conclude that the evidence before the grand jury was legally insufficient to establish that " 'defendant act[ed] in a manner which is *likely* to result in harm to the child' " (*People v Johnson*, 95 NY2d 368, 371, quoting *People v Simmons*, 92 NY2d 829, 830 [emphasis added]). We reject the People's contention that a defendant's conduct in driving while intoxicated with a child in the vehicle, by itself, is enough to support a charge of endangering the welfare of a child (*see generally People v Chase*, 186 Misc 2d 487, 489, *lv denied* 95 NY2d 962).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

339

KA 11-00548

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAURICE JOHNSON, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered January 14, 2011. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that Supreme Court erred in assessing 20 points against him under risk factor 7, for his relationship with the victim. We agree. Points may be assessed under risk factor 7 in the event that the underlying crime "was directed at a stranger," the crime was directed at a person with whom the offender "established or promoted [a relationship] for the primary purpose of victimization," or the crime "arose in the context of a professional or avocational relationship between the offender and the victim and was an abuse of such relationship" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 12 [2006]; *see People v Stein*, 63 AD3d 99, 101).

Here, the court determined that the victim was a stranger to defendant. That was error. Pursuant to the presentence report, defendant "was *acquainted* with [the victim] as a consequence of going to church with [the victim's] mother and aunt" (emphasis added), and the Risk Assessment Guidelines and Commentary provide that "the term 'stranger' includes anyone who is not an actual acquaintance of the victim" (Risk Assessment Guidelines and Commentary, at 12; *see People v Helmer*, 65 AD3d 68, 70). The People nevertheless contend that the

court properly assessed points against defendant under risk factor 7 because they established by clear and convincing evidence that defendant established or promoted the relationship with the victim for the primary purpose of victimizing him. We reject that contention. The only evidence considered by the court was the presentence report and risk assessment instrument (RAI), and there is nothing in those documents indicating that defendant's purpose in meeting or developing a relationship with the victim was to subject him to sexual contact or otherwise abuse him. Further, because it is undisputed that defendant did not have a professional or avocational relationship with the victim, we conclude that there was no basis for the court to assess points against defendant under risk factor 7.

As a result of the error of the court, defendant's score on the RAI must be reduced by 20 points, rendering him a presumptive level one risk. The People did not seek an upward departure based on defendant's HIV status or his surreptitious videotaping of the sexual acts that he engaged in with the victim. We therefore modify the order accordingly.

All concur except SCONIERS and MARTOCHE, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent and would affirm the order determining that defendant is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). We cannot agree with the majority that Supreme Court erred in assessing 20 points against defendant under the risk factor for his relationship with the victim. In our view, the People established by clear and convincing evidence that defendant established or promoted the relationship with the victim for the primary purpose of victimization (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 12 [2006]). The relationship between defendant and the victim was not familial in nature but was predatory, based upon the age of the victim, the age difference between defendant and the victim and the circumstances under which they met. Thus, we conclude that the facts, as presented to the court, established that it was " 'highly probable' " that defendant befriended the victim for the purpose of victimizing him through the sexual relationship (*People v Dominie*, 42 AD3d 589, 590).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

341

CAF 11-00218

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

IN THE MATTER OF JOSEPH DINGELDEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ARLENE B. DINGELDEY, RESPONDENT-RESPONDENT.

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-RESPONDENT.

JEFFREY M. HARRINGTON, ATTORNEY FOR THE CHILD, WEST SENECA, FOR ANGELA N.D.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered December 14, 2010 in a proceeding pursuant to Family Court Act article 6. The order denied the petition in part.

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

Memorandum: In this custody proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order denying that part of his petition seeking to modify the prior custody arrangement with respect to the parties' daughter. Pursuant to the judgment of divorce, respondent mother had sole custody of both the daughter and the parties' son. During the course of the evidentiary hearing on the petition, the parties agreed that custody of the son would be transferred to the father, and the hearing continued with respect to the daughter. After the father rested, the mother moved for a directed verdict on the ground that the father had failed to establish a sufficient change of circumstances to modify custody of the daughter. The daughter's Attorney for the Child joined in the motion, stating that the teenage daughter strongly preferred to continue living with the mother in Erie County, rather than moving to Tennessee to live with the father and his new wife. Family Court granted the motion based on the father's failure to establish a change of circumstances, but the court nevertheless went on to state that, based on the evidence presented by the father, it was not in the best interests of the daughter to change custody to the father.

Even assuming, arguendo, that the father established "a change in circumstances sufficient to warrant an inquiry into whether the best interests of the [daughter] warranted a change in custody" (*Matter of*

York v Zullich, 89 AD3d 1447, 1448), "we conclude on the record before us that a change in custody would not be in the best interests of the [daughter]" (*Matter of VanDusen v Riggs*, 77 AD3d 1355, 1355; *see Matter of Walker v Cameron*, 88 AD3d 1307, 1308; *Matter of Yaddow v Bianco*, 67 AD3d 1430, 1431). As the court stated in its decision granting the mother's motion for a directed verdict, although both parties have problems, the mother is taking active steps to deal with her problems, and, more importantly, the daughter is doing very well while under her care. We also note that, "[w]hile the express wishes of [the] child[ ] are not controlling, they are entitled to great weight, particularly where [the child's] age and maturity would make [his or her] input particularly meaningful" (*Matter of Stevenson v Stevenson*, 70 AD3d 1515, 1516, *lv denied* 14 NY3d 712 [internal quotation marks omitted]; *see Matter of O'Connor v Dyer*, 18 AD3d 757, 757). Here, the daughter, who is now 15 years old, expressed a strong desire to remain with her mother. We therefore conclude that the court's custody determination is supported by a sound and substantial basis in the record and will not be disturbed (*see Matter of Messimore v Messimore*, 89 AD3d 1547; *Matter of McLeod v McLeod*, 59 AD3d 1011, 1011).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

347

CA 11-01231

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

IN THE MATTER OF JAMES D. PECK,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN BOARD OF TOWN OF AMHERST,
RESPONDENT-DEFENDANT-RESPONDENT,
ET AL., RESPONDENT-DEFENDANT.

TRONOLONE & SURGALLA, P.C., BUFFALO (GERARD A. STRAUSS OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

E. THOMAS JONES, TOWN ATTORNEY, WILLIAMSVILLE (PATRICK M. KELLY OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated decision and order) of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), dated May 24, 2010 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment dismissed the petition/complaint.

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

Memorandum: Petitioner-plaintiff (petitioner) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul the determination of respondent-defendant Town Board of Town of Amherst (Board) to terminate his employment with the Town of Amherst (Town) based on his failure to satisfy the residency requirements set forth in Chapter 45 of the Code of the Town of Amherst (Town Code). Pursuant to Town Code § 45-3, "any person who enters Town service . . . shall be a resident of the Town on the date that the employee enters Town service and shall thereafter maintain residence in the Town as a condition of employment . . . Failure to establish or maintain Town residence as required by this section shall constitute a forfeiture of employment . . . ." The Town Code defines "[r]esidence" as "[d]omicile" and "[r]esident" as "[d]omiciliary" (§ 45-2).

The first cause of action alleged that the Board's determination was arbitrary and capricious, and the third cause of action alleged that the Board failed to make findings of fact in support of its determination. Supreme Court, inter alia, dismissed various causes of action "and/or" declared that they were without merit and, with respect to the first and third causes of action, held the case in

abeyance and remitted the matter to the Board "for a fuller explication of its rationale for determining that petitioner" failed to satisfy the residency requirements. The Town thereafter invited petitioner to appear before the Board and present evidence of his domicile within the Town, but neither petitioner nor his attorney appeared at that meeting. Petitioner's attorney subsequently submitted documentary evidence that allegedly established petitioner's domicile in the Town. Upon receipt of the amplified findings of fact made by the Board, the court dismissed the remaining causes of action, determining that the Board's determination was not arbitrary and capricious.

Petitioner contends that the court erred in remitting the matter to the Board for further findings of fact. According to petitioner, the court was instead required to annul the determination when it concluded that the Board failed to make sufficient findings of fact. We reject that contention (*see e.g. Matter of Snyder Dev. Co. v Town of Amherst Town Bd.*, 2 AD3d 1383, 1384; *Matter of Baker v Town of Mt. Pleasant*, 92 AD2d 611). Petitioner was not prejudiced by the remittal inasmuch as, in doing so, the court effectively extended the date for him to establish a domicile in the Town. The remittal also afforded petitioner another opportunity to answer questions from the Board concerning his claim that he was domiciled within the Town and to submit additional evidence in support of that claim.

We further conclude that the Board's determination that petitioner was not domiciled within the Town was not arbitrary and capricious. "An existing domicile, whether of origin or selection, continues until a new one is acquired, and a party, [such] as petitioner here, alleging a change in domicile has the burden to prove the change by clear and convincing evidence" (*Matter of Hosley v Curry*, 85 NY2d 447, 451, *rearg denied* 85 NY2d 1033). "For a change to a new domicile to be effected, there must be a union of residence in fact and an 'absolute and fixed intention' to abandon the former and make the new locality a fixed and permanent home" (*id.*, quoting *Matter of Newcomb*, 192 NY 238, 251; *see Matter of Johnson v Town of Amherst*, 74 AD3d 1896, 1897, *lv denied* 15 NY3d 712).

Here, it is undisputed that petitioner was not domiciled in the Town when he was hired, nor was he domiciled there for at least two years after that time. The Town granted petitioner two six-month extensions to meet the residency requirements, but it denied his requests for further extensions. When the Town indicated that it intended to enforce the residency requirements against him, petitioner asserted that he had established domicile by renting a room in a house located within the Town. Petitioner, however, had previously acknowledged that renting that room would not satisfy the Town's residency requirements. In any event, the documentary evidence submitted to the Board by petitioner failed to establish that he had changed his domicile to the Town. After the matter was remitted to the Board for further findings of fact, the Board invited petitioner to its next meeting and requested that he submit certain evidence establishing his residency, including a copy of the lease for the room he was renting in the Town, a letter from his landlord describing the

premises and the portion rented to petitioner, any utility bills indicating his new address, and interior and exterior photographs of the premises and his living quarters. Petitioner failed to submit any of the requested evidence and, as noted, he did not appear at the Board meeting.

Petitioner places great emphasis on the facts that he informed the Town that he instructed his bankruptcy attorney to assist him in surrendering his home in the City of Buffalo to his creditors, and that he thereafter informed the Town that he was "losing" his home to creditors. According to petitioner, those facts demonstrate that he intended to make the single room that he rented in a house in the Town his domicile. There is no evidence in the record, however, supporting petitioner's assertions that he was in the process of losing his home in Buffalo to creditors. Indeed, petitioner failed to submit any such evidence to the Board when the matter was remitted and he was given the opportunity to provide any "documentation relevant" to his residency within the Town. In any event, the mere fact that petitioner may have been losing his home in Buffalo did not standing alone establish that his domicile was in the Town.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

348

CA 11-01610

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

VICTORIA J. CANNON AND MICHAEL CANNON,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TINA M. GIORDANO, ET AL., DEFENDANTS,
LARRY SNYDER, PAM SNYDER AND LESLIE SNYDER,
DEFENDANTS-RESPONDENTS.

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (THOMAS P. CUNNINGHAM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered May 6, 2011 in a personal injury action. The order granted the motion of defendants Larry Snyder, Pam Snyder and Leslie Snyder for summary judgment dismissing the complaint against them.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Victoria J. Cannon (plaintiff) when she was hit in the face with a beer bottle thrown by defendant Tina M. Giordano, an allegedly intoxicated 20 year old, at a bar. Several hours prior to the incident, Giordano attended a party hosted by defendants Larry Snyder, Pam Snyder and Leslie Snyder (Snyder defendants) at a restaurant in the same area. We reject plaintiffs' contention that Supreme Court erred in granting the Snyder defendants' motion for summary judgment dismissing the General Obligations Law § 11-100 cause of action against them. Inasmuch as plaintiffs do not challenge that part of the order granting the Snyder defendants' motion for summary judgment dismissing the negligence cause of action against them, we conclude that plaintiffs have abandoned any issues with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

The record establishes that defendants Larry and Pam Snyder purchased two or three pitchers of beer for the party to celebrate Leslie Snyder's 21st birthday and that the beer was placed on a table where guests could help themselves. Giordano was the only person under the age of 21 who attended the party. Larry Snyder testified at

his deposition that he never observed Giordano at the party. Although Pam and Leslie Snyder testified at their depositions that they knew Giordano was present at the party and was under the age of 21, neither of them observed Giordano drinking beer at any time during the party. Moreover, a waitress was assigned to the party and Pam Snyder testified that she believed that the waitress would regulate access to the beer. Also, Leslie Snyder testified that she believed the restaurant was responsible for checking identification of the guests. Giordano testified at her deposition that she helped herself to "a beer or two" during the party, and that she thereafter had several drinks in the bar area of the same restaurant before proceeding to the bar where she threw the beer bottle that injured plaintiff.

Based on the record before us, we conclude that the Snyder defendants were entitled to summary judgment dismissing the General Obligations Law § 11-100 cause of action against them. Contrary to plaintiffs' contention, the court applied the proper standard in determining that the Snyder defendants did not unlawfully furnish alcohol to Giordano within the meaning of section 11-100 (1) by considering whether they "were part of a deliberate plan to provide alcohol or played an indispensable role in a scheme to make alcohol available to" Giordano (*see Rust v Reyer*, 91 NY2d 355, 360-361). Inasmuch as the evidence presented by the Snyder defendants in support of the motion established that they never "deliberate[ly] plan[ned] to provide, supply or give alcohol to" Giordano (*id.* at 360), we conclude that they did not unlawfully furnish alcohol to her. We further conclude that the Snyder defendants did not "unlawfully assist[ ] in procuring alcoholic beverages for" Giordano (§ 11-100 [1]). The record establishes that Leslie Snyder played no role in procuring beer and that, although Larry and Pam Snyder purchased beer for the party, they did not do so for Giordano. Moreover, given that the Snyder defendants were unaware that Giordano drank beer at the party, they did not "knowingly cause[her] intoxication or impairment of ability" pursuant to General Obligations Law § 11-100 (1) (*see Lombart v Chambery*, 19 AD3d 1110, 1111; *Dodge v Victory Mkts.*, 199 AD2d 917, 920-921). Finally, plaintiffs failed to raise a triable issue of fact with respect to the section 11-100 (1) cause of action against the Snyder defendants (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

349

CA 11-01572

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

M&T REAL ESTATE TRUST, SUCCESSOR BY MERGER TO
M&T REAL ESTATE, INC., PLAINTIFF-RESPONDENT,

V ORDER

JAMES J. DOYLE, II, AND JIM DOYLE FORD, INC.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (JOHN K. ROTTARIS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (HOWARD S. ROSENHOCH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Michael L. D'Amico, A.J.), entered June 29, 2011 in a proceeding pursuant to RPAPL article 13. The order, among other things, granted plaintiff's motion for leave to enter a deficiency judgment against defendants.

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 23, 2012

Frances E. Cafarell
Clerk of the Court

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

350

CA 11-01573

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

M&T REAL ESTATE TRUST, SUCCESSOR BY MERGER TO
M&T REAL ESTATE, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES J. DOYLE, II, AND JIM DOYLE FORD, INC.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (JOHN K. ROTTARIS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (HOWARD S. ROSENHOCH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Michael L. D'Amico, A.J.), entered July 20, 2011 in a proceeding pursuant to RPAPL article 13. The order and judgment, insofar as appealed from, granted plaintiff a deficiency judgment against defendants.

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs and that part of the motion for leave to enter a deficiency judgment is denied.

Memorandum: Plaintiff commenced this action seeking, inter alia, to foreclose certain commercial mortgages and obtain a judgment of foreclosure and sale. Plaintiff was the successful bidder when the property in question was sold at public auction, and it thereafter assigned its successful bid. According to the report of sale dated May 11, 2010, the Referee appointed to conduct the sale executed a deed prepared by counsel for plaintiff naming plaintiff's assignee as the grantee. The Referee mailed the deed to plaintiff's counsel, who also represented the assignee. After the deed was mailed but before it was received, plaintiff's counsel telephoned the Referee and advised him that the assignee was negotiating with a prospective purchaser and would not accept the deed at that time. Plaintiff's counsel subsequently returned the deed with a cover letter dated May 17, 2010, directing the Referee to hold the deed in his file until further notice. By letter dated July 26, 2010, plaintiff's counsel requested that the Referee send him the deed and other closing documents. After receiving the deed, plaintiff's counsel further requested that the Referee "re-execute the . . . deed" so that it

would be "dated concurrently with its delivery." The Referee's deed indicates that it was executed August 9, 2010.

On September 3, 2010 plaintiff moved, inter alia, to confirm the Referee's report of sale and for leave to enter a deficiency judgment against defendants pursuant to RPAPL 1371 (2). Supreme Court erred in granting that part of the motion seeking leave to enter a deficiency judgment inasmuch as the motion was not "made within [90] days after the date of the consummation of the [foreclosure] sale by the delivery of the proper deed of conveyance to the purchaser" (RPAPL 1371 [2]). That 90-day period is a statute of limitations that was timely raised by defendants in opposition to the motion (*see Mortgagee Affiliates Corp. v Jerder Realty Servs.*, 62 AD2d 591, 593, *affd* 47 NY2d 796; *Voss v Multifilm Corp. of Am.*, 112 AD2d 216, 217).

We agree with defendants that the foreclosure sale was consummated and the 90-day period commenced in May 2010 upon the delivery of the Referee's deed. Such delivery occurred within the meaning of the statute at that time inasmuch as the Referee, acting as grantor on behalf of the court (*see Lennar Northeast Partners Ltd. Partnership v Gifaldi*, 258 AD2d 240, 243, *lv denied* 94 NY2d 754), executed and parted with control of the deed prepared by plaintiff's counsel with the intention to pass title (*see National Bank of Sussex County v Betar*, 207 AD2d 610, 611-612). "When the Referee[] signed the deed[] presented by [plaintiff's] counsel, [he was] left with no title to convey to any other party," and thus the sale was consummated upon the delivery of that deed in May 2010, notwithstanding the refusal of plaintiff's counsel to accept and retain physical possession of the deed at that time (*Lennar Northeast Partners Ltd. Partnership*, 258 AD2d at 243; *see Cicero v Aspen Hills II, LLC*, 85 AD3d 1411, 1412). Thus, plaintiff's motion was untimely.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

354

TP 11-01955

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

IN THE MATTER OF DEBBIE TEFFT, PETITIONER,

V MEMORANDUM AND ORDER

STEPHANIE HUTCHINSON, EXECUTIVE DIRECTOR, AUBURN HOUSING AUTHORITY, WILLIAM KIERST, JR., CHAIRMAN AND MEMBER, AUBURN HOUSING AUTHORITY BOARD OF REVIEW, RODNEY RICHARDSON, TREASURER AND MEMBER, AUBURN HOUSING AUTHORITY BOARD OF REVIEW, SUE GRONAU, TENANT REPRESENTATIVE AND MEMBER, AUBURN HOUSING AUTHORITY BOARD OF REVIEW, AND AUBURN HOUSING AUTHORITY, RESPONDENTS.

LEGAL SERVICES OF CENTRAL NEW YORK, INC., SYRACUSE (RUSSELL W. DOMBROW OF COUNSEL), FOR PETITIONER.

BOYLE & ANDERSON, P.C., AUBURN (ROBERT K. BERGAN OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered September 16, 2011) to review a determination of respondents. The determination terminated the tenancy of petitioner.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination terminating her tenancy at a low-income housing project operated by respondent Auburn Housing Authority (AHA). We note at the outset that, to the extent that the petition seeks relief in the nature of mandamus to compel respondents to afford petitioner certain procedural safeguards before terminating her tenancy (*see* CPLR 7803 [1]), "the extraordinary remedy of mandamus does not lie . . . because petitioner has failed to establish a clear legal right to the relief sought or that the relief sought involves the performance of a purely ministerial act" (*Matter of Platten v Dadd*, 38 AD3d 1216, 1217, *lv denied* 9 NY3d 802). Contrary to petitioner's contention, respondents were not required to comply with the procedures set forth in the State Administrative Procedure Act because it applies only to agencies of the State government, not to local housing authorities such as AHA (*see Matter of 1777 Penfield Rd.*

Corp. v Morrison-Vega, 116 AD2d 1035, 1037).

We further conclude that, in light of the evidence that petitioner violated the provision of her lease prohibiting unauthorized persons from residing in her apartment, the determination terminating her tenancy was not arbitrary, capricious or an abuse of discretion (*see generally Matter of Delgado v New York City Hous. Auth.*, 88 AD3d 521). Contrary to petitioner's further contention, we conclude that the determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182). We reject petitioner's contention that a rental application signed by the unauthorized tenant may not constitute substantial evidence supporting respondents' determination on the ground that it was hearsay (*see generally Matter of S & S Pub, Inc. v New York State Liq. Auth.*, 49 AD3d 654, 654-655; *Matter of Danielle G. v Schauseil*, 292 AD2d 853, 853-854). The unauthorized tenant listed petitioner's apartment as his current address on that application and indicated that he was paying monthly rent to petitioner.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

357

KA 11-00398

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARMEN C. BURNEY, DEFENDANT-APPELLANT.

JAMES L. DOWSEY, III, ELLICOTTVILLE, FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered January 31, 2011. The judgment convicted defendant, upon her plea of guilty, of attempted assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]). Contrary to defendant's contention, the record shows that she entered a valid waiver of indictment, and freely and voluntarily consented to be prosecuted by way of a superior court information (*see* CPL 195.10, 195.20; *see generally People v Davis*, 84 AD3d 1645, 1646, *lv denied* 17 NY3d 815; *People v McKenzie*, 51 AD3d 823). Although the contention of defendant that her guilty plea was not knowingly, voluntarily and intelligently entered survives her waiver of the right to appeal, defendant did not move to withdraw the plea or to vacate the judgment of conviction and thus failed to preserve that contention for our review (*see People v Russell*, 55 AD3d 1314, 1314-1315, *lv denied* 11 NY3d 930; *People v Harrison*, 4 AD3d 825, *lv denied* 2 NY3d 740). Defendant's further contention that she was denied effective assistance of counsel does not survive either the plea of guilty or the waiver by defendant of the right to appeal because she failed to demonstrate that "the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [her] attorney['s] allegedly poor performance" (*People v Robinson*, 39 AD3d 1266, 1267, *lv denied* 9 NY3d 869 [internal quotation marks omitted]).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

364

KA 09-02238

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LORENZO R. RODRIGUEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered August 24, 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 his waiver of the right to appeal is invalid. We reject that contention. The record establishes that defendant knowingly, intelligently and voluntarily waived his right to appeal as a condition of the plea bargain (*see generally People v Lopez*, 6 NY3d 248, 256). Supreme Court "engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v James*, 71 AD3d 1465, 1465 [internal quotation marks omitted]), and the court did not conflate defendant's waiver of the right to appeal with those rights that are automatically forfeited by a guilty plea (*see People v Bentley*, 63 AD3d 1624, 1625, *lv denied* 13 NY3d 742; *cf. People v Moyett*, 7 NY3d 892). Contrary to defendant's contention, the court was not required to specify during the colloquy which specific claims survive the waiver of the right to appeal (*see Lopez*, 6 NY3d at 256). Defendant's remaining contentions are encompassed by his valid waiver of the right to appeal (*see generally id.* at 255).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

368

CAF 11-01516

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

IN THE MATTER OF JANIECE B., JAYME B.-S.,
AND JOVAN B.-S.

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

JAMES D.B., 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 JANIECE B., JAYME B.-S., AND JOVAN B.-S.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 14, 2011 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had abused the subject children.

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

Memorandum: Respondent father appeals from a dispositional order determining, following a hearing, that he abused the subject children. Contrary to the father's contention, the out-of-court statements of the children "were sufficiently corroborated by other evidence tending to support their reliability" (*Matter of Lydia C.*, 89 AD3d 1434, 1435; *see* Family Ct Act § 1046 [a] [vi]; *Matter of Nicole V.*, 71 NY2d 112, 117-118; *Matter of Nicholas J.R.*, 83 AD3d 1490, 1490, *lv denied* 17 NY3d 708). The cross-corroborating accounts of the children with respect to the nature and progression of the sexual abuse "[gave] sufficient indicia of reliability to each [child's] out-of-court statements" (*Nicole V.*, 71 NY2d at 124; *see Matter of Breanna R.*, 61 AD3d 1338, 1340; *Matter of Rebecca S.*, 269 AD2d 833). The allegations of sexual abuse were further corroborated by the fact that the children "had age-inappropriate knowledge of sexual matters" (*Breanna R.*, 61 AD3d at 1340; *see Matter of Yorimar K.-M.*, 309 AD2d 1148, 1149).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

369

CA 11-01942

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

MARGARET M. FREMMING AND KENNETH W. FREMMING,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

PAUL E. NIEDZIALOWSKI AND ANNE M. NIEDZIALOWSKI,
DEFENDANTS-RESPONDENTS.

HAMSHER & VALENTINE, BUFFALO (RICHARD P. VALENTINE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICE OF LAURIE G. OGDEN, BUFFALO (PAMELA S. SCHALLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered December 13, 2010 in a personal injury action. The order denied the motion of plaintiffs to vacate the order granting the motion of defendants for summary judgment.

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

Memorandum: In this personal injury action arising out of a motor vehicle accident, plaintiffs appeal from an order denying their motion pursuant to CPLR 5015 (a) to vacate a prior order granting defendants' motion for summary judgment dismissing the complaint. The prior order was entered upon plaintiffs' default, when plaintiffs failed to file papers in opposition to the motion and their attorney at that time failed to appear in court on the return date of the motion. Plaintiffs thereafter retained new counsel, who moved to vacate the order granting defendants' motion (*see id.*). In support of their motion, plaintiffs submitted an affidavit from their former attorney, who stated that he failed to oppose defendants' motion in a timely manner due to mental health issues he was experiencing at the time. Plaintiffs also submitted an affidavit from their former attorney's psychiatrist, who averred that he had been treating counsel for depression and for attention deficit/hyperactivity disorder (ADHD) for approximately 8½ years. Defendants opposed the motion, contending that plaintiffs' explanations for the default were unreasonable and amounted to law office failure, and Supreme Court denied the motion without explanation.

We conclude that the court properly refused to vacate the default pursuant to CPLR 5015 (a). "To vacate their default in opposing the

defendants' motion for summary judgment, the plaintiffs were required to demonstrate both a reasonable excuse for the default and a potentially meritorious opposition to the motion" (*Walker v Mohammed*, 90 AD3d 1034, 1034; *see Counsel Fin. Servs., LLC v David McQuade Leibowitz, P.C.*, 81 AD3d 1421, 1422). Here, plaintiffs failed to establish a reasonable excuse for the default, and we therefore need not determine whether they had a potentially meritorious opposition to the motion (*see Buja v Shepard Niles, Inc.*, 45 AD3d 1391).

Although an attorney's illness may under certain circumstances constitute a reasonable excuse for a default (*see Weitzenberg v Nassau County Dept. of Recreation & Parks*, 29 AD3d 683, 684-685), that is not the case here. The fact that plaintiffs' former attorney suffered from depression and ADHD does not constitute a reasonable excuse for failing to submit papers in opposition to defendants' motion and for failing to appear in court on the return date thereof. Plaintiffs' former attorney had been practicing law under a psychiatrist's care for over eight years, and there is no indication in the record that his mental health issues had previously interfered with his ability to meet his responsibilities. Indeed, the claim of plaintiffs' former attorney that his mental health problems caused the default are belied by the fact that, during the same time frame, he participated in various other aspects of the litigation without apparent difficulty. Finally, we note that the court granted plaintiffs multiple adjournments with respect to the return date of defendants' motion, and made clear on the record that no further adjournments would be granted.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

373

CA 11-01999

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

THOMAS R. NICHTER AND DOROTHY NICHTER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION,
UNIVERSITY AT BUFFALO SURGEONS, INC., AND
JAMES K. LUKAN, M.D., DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MELISSA L. ZITTEL OF COUNSEL), FOR DEFENDANTS-APPELLANTS UNIVERSITY AT BUFFALO SURGEONS, INC. AND JAMES K. LUKAN, M.D.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOEL J. JAVA, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT ERIE COUNTY MEDICAL CENTER CORPORATION.

ROSENTHAL, SIEGEL & MUENKEL, LLP, BUFFALO (RICHARD P. VALENTINE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (John M. Curran, J.), entered January 19, 2011 in a medical malpractice action. The order denied the motions of defendants to compel plaintiffs to provide certain medical authorizations.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the ordering paragraph denying defendants' motions in their entirety and by directing plaintiff Thomas R. Nichter to submit to Supreme Court, Erie County, for an in camera review, a certified complete copy of his medical, surgical and diagnostic records from the Erie County Medical Center and Buffalo General Hospital for the period beginning June 13, 2005 through the present and from Arvind Wadhwa, M.D. from the first date of service in 1995 through the present and as modified the order is affirmed without costs.

Memorandum: In this action to recover damages for personal injuries allegedly sustained as a result of medical malpractice, defendants appeal from an order denying their respective motions to compel Thomas R. Nichter (plaintiff) to provide medical authorizations permitting defendants to obtain his records from the Erie County Medical Center and Buffalo General Hospital for the three-year period before the first date of the alleged medical malpractice, which was on June 13, 2008, through the present. They also sought an authorization

from plaintiff for his records from his primary medical physician, Arvind Wadhwa, M.D. from the first date of service in 1995, through the present. We conclude, based upon the record before us, that the records sought are "material and necessary" to the defense of this action (CPLR 3101 [a]), inasmuch as they may contain information "reasonably calculated to lead to relevant evidence" (*Grieco v Kaleida Health* [appeal No. 2], 79 AD3d 1764, 1765). Indeed, the records are likely to include prior medical conditions that may be relevant to the defense of this action. We further conclude, however, that the records should not be released to defendants until the court has conducted an in camera review thereof, so that irrelevant information is redacted (*see Tirado v Koritz*, 77 AD3d 1368, 1369; *see generally Tabone v Lee*, 59 AD3d 1021, 1022; *Mayer v Cusyck*, 284 AD2d 937, 938). We therefore modify the order accordingly.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

374

CA 11-01460

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

IN THE MATTER OF ROYAL MANAGEMENT, INC.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF WEST SENECA, WEST SENECA TOWN BOARD,
WALLACE C. PIOTROWSKI, AND SHEILA M. MEEGAN
AND DALE F. CLARKE, SAID PERSONS CONSTITUTING
WEST SENECA TOWN BOARD, RESPONDENTS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (ASHLEY WESTBROOK OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (RALPH C. LORIGO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Timothy J. Drury, J.), entered April 1, 2011 in a proceeding pursuant to CPLR article 78. The judgment granted the petition, annulled and vacated the determination of respondent West Seneca Town Board and directed respondents to issue a special permit to petitioner.

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

Memorandum: In this proceeding pursuant to CPLR article 78, respondents appeal from a judgment annulling the determination of respondent West Seneca Town Board (Town Board) and directing respondents to issue a special use permit to petitioner authorizing the construction of a two-story apartment building on Orchard Park Road in respondent Town of West Seneca (Town). As a preliminary matter, we note that respondents contend that this proceeding is time-barred because it was not commenced within 30 days after the filing of the Town Board's determination in the Town Clerk's office, as required by Town Law § 274-b (9). We reject that contention. "Because the petition seeks to review the determination of the Town Board, the four-month limitation period of CPLR 217 applies" (*Matter of Sucato v Town Bd. of Boston*, 187 AD2d 1045), not the shorter limitations period set forth in Town Law § 274-b (9) (*see Matter of Young Dev., Inc. v Town of W. Seneca*, 91 AD3d 1350).

With respect to the merits, we conclude that Supreme Court properly determined that the denial by the Town Board of petitioner's

application for a special use permit was arbitrary and capricious and an abuse of discretion. Following several public hearings, the Town Board denied petitioner's application on two grounds, namely, that the "sewer system in the area . . . is in very poor shape," having recently experienced severe failures and backups and that, "[d]ue to the shape of the lot, the proposed project does not conform to the existing properties in the immediate adjacent area." Regarding the first ground, petitioner correctly notes that there is no evidence in the record supporting the Town Board's purported concern about the sewer system. In fact, the record demonstrates that, shortly before petitioner's application was denied, the Town Engineer engaged in a discussion with the Town Board with respect to a substantially larger construction project in that same area and stated that the sewer had the capacity to handle the larger project.

There is similarly no support in the record for the Town Board's determination with respect to the second ground, i.e., that the proposed apartment building would not be in conformance with the existing properties in the immediate adjacent area. Indeed, the record reflects that the Town's Code Enforcement Officer informed the Town Board that the property was properly zoned for the project, that the lot was large enough for the building, and that the use would be in conformance with the Town Code. Notably, the Town's Code Enforcement Officer also stated that there were multiple dwellings within 200 feet of the project with a similar orientation, inasmuch as they too were perpendicular to the road. It is well settled that the inclusion of a permitted use in a zoning code "is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood" (*Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d 238, 243). We therefore conclude that there was no basis for the Town Board's determination that the proposed building would be aesthetically out of character with the existing properties in the immediate adjacent area.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

381

KA 11-00057

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT J. FULLEN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered December 9, 2010. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Defendant failed to preserve for our review his contention that he was entitled to a downward departure from his presumptive risk level on the ground that his release from jail without supervision was mitigated by the fact that he did not serve a long prison sentence (*see People v Gilbert*, 78 AD3d 1584, 1585-1586, *lv denied* 16 NY3d 704; *People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708). In any event, there is no basis to disturb the court's determination inasmuch as defendant "failed to present clear and convincing evidence of special circumstances justifying a downward departure from his presumptive risk level" (*People v Ferrara*, 38 AD3d 1302, 1303, *lv denied* 8 NY3d 815).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

382

KA 10-01179

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES J. ALLEN, ALSO KNOWN AS CJ,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered December 10, 2009. The judgment convicted defendant, upon his plea of guilty, of arson in the third 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 arson in the third degree (Penal Law § 150.10 [1]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (§ 140.20). We note at the outset that defendant's contentions on appeal concern only the judgment in appeal No. 1, and we therefore dismiss appeal No. 2.

With respect to the judgment in appeal No. 1, we reject the contention of defendant that his sentence violated the terms of the plea agreement (*see People v Abdallah*, 50 AD3d 1312, 1313; *see also People v Tatro*, 8 AD3d 823, 824, *lv denied* 3 NY3d 682). During the plea proceeding, the prosecutor stated that the People "would consider" any cooperation by defendant with respect to uncharged burglaries in determining whether to recommend a reduced sentence. The prosecutor, however, clearly indicated that defendant "should not plead [guilty] expecting anything other than" the promised maximum sentence, and County Court advised defendant of that maximum sentence before accepting his plea. The record belies the further contention of defendant that the People and the court failed to consider the extent of his cooperation with law enforcement prior to sentencing.

Finally, we agree with defendant that his valid waiver of the right to appeal does not encompass his challenge to the severity of

the sentence, inasmuch as he waived his right to appeal before he was advised of the maximum possible sentence (*see People v Farrell*, 71 AD3d 1507, *lv denied* 15 NY3d 804). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

383

KA 10-01180

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES J. ALLEN, ALSO KNOWN AS CJ,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered December 10, 2009. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same Memorandum as in *People v Allen* ([appeal No. 1] ___ AD3d ___ [Mar. 23, 2012]).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

384

KA 09-01504

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN G. GLYNN, DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (PAUL V. MULLIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (MICHAEL G. CIANFARANO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered May 18, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of marihuana in the second degree, criminal sale of marihuana in the second degree, criminal possession of marihuana in the fourth degree and criminal sale of marihuana in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, criminal possession of marihuana in the second degree (Penal Law § 221.25) and criminal sale of marihuana in the second degree (§ 221.50). Contrary to defendant's contention, County Court (Hafner, Jr., J.) was not required to recuse itself based on the fact that Judge Hafner had previously represented defendant on an unrelated matter and may have previously prosecuted him on another unrelated matter (*see People v Moreno*, 70 NY2d 403, 406; *People v Casey*, 61 AD3d 1011, 1014, *lv denied* 12 NY3d 913; *People v Lerario*, 43 AD3d 492, 492-493). "Moreover, none of [the c]ourt's remarks . . . was indicative of bias against defendant and, therefore, recusal was not warranted on [that] basis" (*Casey*, 61 AD3d at 1014; *see People v Johnson*, 294 AD2d 908, 908, *lv denied* 98 NY2d 677; *see also People v Grier*, 273 AD2d 403, 405-406).

Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Defendant's general motion for a trial order of dismissal was insufficient to preserve for our review his further contention that the conviction is not supported by legally sufficient evidence (*see People v Hawkins*, 11 NY3d 484, 492; *People v*

Gray, 86 NY2d 10, 19). In any event, that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant's further contention that the imposition of consecutive sentences for criminal possession of marihuana in the second degree and criminal sale of marihuana in the second degree is harsh and excessive (*cf. People v Hutzler*, 270 AD2d 934, 936, *lv denied* 94 NY2d 948; *People v Tovar*, 258 AD2d 943, *lv denied* 93 NY2d 930). Defendant failed to preserve for our review his contention that he was penalized for exercising his right to a jury trial inasmuch as he failed to raise that contention at the time of sentencing (*see e.g. People v Stubinger*, 87 AD3d 1316, 1317; *People v Brink*, 78 AD3d 1483, 1485, *lv denied* 16 NY3d 742, 828). In any event, that contention is without merit. "[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial" (*Brink*, 78 AD3d at 1485 [internal quotation marks omitted]).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

385

KA 10-01386

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY PEARSON, 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 (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered June 22, 2010. The judgment convicted defendant, upon a nonjury verdict, of attempted murder in the second degree, aggravated criminal contempt and aggravated harassment in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), aggravated criminal contempt (§ 215.52 [1]) and aggravated harassment in the second degree (§ 240.30 [1]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish his intent to kill the victim inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention is without merit (*see generally People v Danielson*, 9 NY3d 342, 349). County Court reasonably could have inferred such intent from defendant's numerous threats to kill the victim and his subsequent conduct of stabbing the victim five times in the chest (*see People v Massey*, 61 AD3d 1433, 1433-1434, *lv denied* 13 NY3d 746; *People v Ortiz*, 212 AD2d 444, 445, *lv denied* 85 NY2d 941). Contrary to defendant's further contention, the court was not empowered to consider the lesser included offense of assault in the second degree (§ 120.05 [1]) because there is no "reasonable view of the evidence . . . that would support a finding that" defendant intended to cause serious physical injury to the victim but did not intend to kill her (*People v Glover*, 57 NY2d 61, 63). Viewing the evidence in light of the elements of the crime of attempted murder in the second degree in this nonjury trial (*see Danielson*, 9 NY3d at 349), we conclude that

the verdict with respect to that crime is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Although defendant contends that the court erred in refusing to suppress statements that he made to police after he was arrested, such statements were never used at trial, and thus defendant's contention is moot. The sentence is not unduly harsh or severe. We have considered defendant's remaining contention and conclude that it is without merit.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

386

KA 08-01316

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HOWARD L. BRYANT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered May 5, 2008. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the second degree, sexual abuse in the second degree and sexual abuse in the third degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [b]). As defendant contends and the People correctly concede, reversal is required because County Court erred in denying defendant's challenge for cause to a prospective juror. "We note at the outset that defendant[, after the challenge at issue was determined,] exhausted his peremptory challenges, and thus his contention is properly before us" (*People v Payne*, 49 AD3d 1154, 1154; *see* CPL 270.20 [2]; *People v Nicholas*, 98 NY2d 749, 752).

After responding to the court's general questions appropriately, a prospective juror in the first pass stated that there was a possibility that she would presume that defendant was guilty if he chose not to testify. There was no further questioning of that prospective juror. Consequently, the statements of that prospective juror "cast serious doubt on [her] ability to render a fair verdict under the proper legal standards. The trial court therefore was required to elicit some unequivocal assurance from [that] prospective juror[] that [she was] able to reach a verdict based entirely upon the court's instructions on the law. The jury panel's earlier collective acknowledgment that they would follow the court's instructions was insufficient to constitute such an unequivocal declaration" (*People v*

Bludson, 97 NY2d 644, 646). We therefore reverse the judgment, and we grant a new trial on the indictment.

Defendant failed to preserve for our review his further contention that he was deprived of his constitutional right to confront witnesses against him by the court's limitation of his cross-examination of the victim. "Although . . . defendant [took exception to the court's ruling], he did not specify the [constitutional] ground now raised on appeal. Therefore, the issue of whether he was deprived of his right of confrontation is unpreserved for appellate review" (*People v Perez*, 9 AD3d 376, 377, *lv denied* 3 NY3d 710; *see People v Rivera*, 33 AD3d 450, 450-451, *lv denied* 7 NY3d 928). In any event, that contention is without merit. " '[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 Smith*, 12 AD3d 1106, 1106, *lv denied* 4 NY3d 767; *see People v Gross*, 71 AD3d 1526, 1527, *lv denied* 15 NY3d 774). Here, however, the court's final ruling permitted defendant to bring out significant details with respect to the victim's prior bad acts, and thus it did not constitute an improvident exercise of the court's discretion.

Defendant's remaining contentions are academic in light of our determination.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

387

KA 09-01088

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY JAMES TAYLOR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered November 6, 2008. The judgment convicted defendant, upon a jury verdict, of 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 criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]). 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 defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

388

KA 08-00143

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN T. SMITH, DEFENDANT-APPELLANT.

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

BRIAN T. SMITH, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered November 2, 2007. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentences imposed shall run concurrently and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [former (2)]). We agree with defendant that the sentence imposed for criminal possession of a weapon in the second degree must run concurrently with the sentence imposed for manslaughter in the first degree, and we therefore modify the judgment accordingly (*see People v Green*, 72 AD3d 1601, 1601).

We otherwise affirm the judgment. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), and affording appropriate deference to the jury's credibility determinations (*see People v Hill*, 74 AD3d 1782, 1782-1783, *lv denied* 15 NY3d 805), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant contends in his pro se supplemental brief that he was denied effective assistance of counsel. We reject that contention inasmuch as defendant failed to establish the absence of a strategic or other legitimate explanation for defense counsel's alleged shortcomings (*see generally People v Benevento*, 91

NY2d 708, 712-713). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). The further contention of defendant in his pro se supplemental brief that County Court erred in issuing a protective order concealing the identity of a witness is moot because that witness never testified at trial (*see People v Poventud*, 300 AD2d 223, 223-224, *lv denied* 1 NY3d 578; *People v Pena*, 300 AD2d 132). In any event, defendant failed to provide a factual record sufficient to permit us to review his contention (*see generally People v Kinchen*, 60 NY2d 772, 773-774).

The remaining contention of defendant in his main brief is not preserved for our review (*see* CPL 470.05 [2]), 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]). We have reviewed defendant's remaining contention in his pro se supplemental brief and conclude that it is lacking in merit.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

389

KA 06-02432

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER RUMPH, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTOPHER RUMPH, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered July 19, 2006. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (three counts) and 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 following a jury trial of three counts of robbery in the first degree (Penal Law § 160.15 [4]) and one count of robbery in the second degree (§ 160.10 [3]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention in his main and pro se supplemental briefs that the verdict is against the weight of the evidence. Although an acquittal would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally Danielson*, 9 NY3d at 348; *People v Bleakley*, 69 NY2d 490, 495). Defendant was identified by both the victim and another witness, and the jury was entitled to reject the alibi testimony (*see People v Phong T. Le*, 277 AD2d 1036, 1036, *lv denied* 96 NY2d 762). Although there were discrepancies between the victim's description of the perpetrator to the police and the physical appearance of defendant, the victim's identification of defendant was not "incredible and unbelievable, that is, impossible of belief because it [was] manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Wallace*, 306 AD2d 802, 802-803 [internal quotation marks omitted]), and the jury's resolution of credibility issues is entitled to great deference (*see People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942; *People v*

Harris, 15 AD3d 966, 967, *lv denied* 4 NY3d 831; *see generally Bleakley*, 69 NY2d at 495). Defendant failed to preserve for our review his further contention in his main and pro se supplemental briefs that he was deprived of a fair trial based on prosecutorial misconduct during summation inasmuch as he did not object to any of the alleged improprieties (*see People v Smith*, 90 AD3d 1565, 1567; *People v Mull*, 89 AD3d 1445, 1446). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to the contention of defendant in his main brief, "there was no error under *People v Trowbridge* (305 NY 471) because the [investigator's] testimony describing the lineup procedure and stating that the victim viewed a lineup in which defendant was included, without stating that the [victim] actually identified defendant, does not constitute bolstering" (*People v James*, 262 AD2d 139, *lv denied* 93 NY2d 1020; *see People v Tucker*, 25 AD3d 419, 419-420, *lv denied* 6 NY3d 839; *People v Jiminez*, 22 AD3d 423, 424). We conclude that defendant was not denied a fair trial based upon cumulative error (*see People v Lucie*, 49 AD3d 1253, 1253, *lv denied* 10 NY3d 936).

Defendant failed to preserve for our review his further contention in his main brief that County Court's *Allen* charge was coercive inasmuch as defendant failed to object to the charge on that ground (*see People v Vassar*, 30 AD3d 1051, 1051, *lv denied* 7 NY3d 796). In any event, we conclude that the charge as a whole was not coercive (*see People v Ford*, 78 NY2d 878, 880; *see e.g. People v Harrington*, 262 AD2d 220, 220, *lv denied* 94 NY2d 823; *People v Gonzalez*, 259 AD2d 631, 632, *lv denied* 93 NY2d 970). We reject defendant's contention in his main brief that the court abused its discretion in denying defendant's motion for a mistrial on the ground that the jury was deadlocked (*see* CPL 310.60 [1] [a]; *People v Love*, 307 AD2d 528, 530-531, *lv denied* 100 NY2d 643; *People v Novak*, 179 AD2d 1053, 1054, *lv denied* 79 NY2d 922). Contrary to the further contention of defendant in his main brief, he was not denied his statutory right to testify before the grand jury, and thus the court properly refused to dismiss the indictment on that ground (*see e.g. People v Perez*, 67 AD3d 1324, 1325, *lv denied* 13 NY3d 941; *People v Smith*, 18 AD3d 888, *lv denied* 5 NY3d 794). A defendant has the right to testify before the grand jury "if, prior to the filing of any indictment . . ., he [or she] serves upon the district attorney of the county a written notice making such request" (CPL 190.50 [5] [a]; *see People v Evans*, 79 NY2d 407, 409; *Perez*, 67 AD3d at 1325; *Smith*, 18 AD3d 888) and, here, "[t]here is no evidence in the record that defendant or his attorney gave the requisite written notice to the District Attorney that defendant intended to testify before the grand jury" (*Perez*, 67 AD3d at 1325).

Finally, we reject the contention of defendant in his pro se supplemental brief that he was denied effective assistance of counsel (*see generally People v Caban*, 5 NY3d 143, 152; *People v Baldi*, 54

NY2d 137, 147).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

390

KA 09-01812

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES A. RIOS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered April 17, 2009. The judgment convicted defendant, upon his plea of guilty, of burglary in the third 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 his plea of guilty of burglary in the third degree (Penal Law § 140.20) and criminal possession of a weapon in the second degree (§ 265.03 [2]). We reject defendant's contention that he did not knowingly, voluntarily and intelligently waive his right to appeal. Taking into account "the nature and terms of the [plea] agreement and the age, experience and background of [defendant]" (*People v Seaberg*, 74 NY2d 1, 11), we conclude that the record of the plea colloquy "establish[es] that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256; *cf. People v Moyett*, 7 NY3d 892, 893). Defendant's further contention that his plea was not knowingly and voluntarily entered is actually a challenge to the factual sufficiency of the plea allocution. That challenge "is encompassed by the valid waiver of the right to appeal and is unpreserved for our review inasmuch as [defendant] did not move to withdraw the plea or to vacate the judgment of conviction on that ground" (*People v Bryant*, 87 AD3d 1270, 1271, *lv denied* 18 NY3d 881). In addition, "the waiver by defendant of the right to appeal encompasses his contention that the sentence is unduly harsh and severe" (*People v Ruffins*, 78 AD3d 1627, 1628).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

391

CAF 11-00914

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

IN THE MATTER OF ANGELLYNN S.H.W.

CHARLES V., SR., AND DEBRA A.V., PETITIONERS;

MEMORANDUM AND ORDER

VIVIAN N.V., RESPONDENT-APPELLANT,
AND ALLEGANY COUNTY DEPARTMENT OF SOCIAL
SERVICES, RESPONDENT-RESPONDENT.

IN THE MATTER OF CHARLES V., SR., AND
DEBRA A.V., PETITIONERS,

V

VIVIAN N.V., RESPONDENT-APPELLANT,
AND ALLEGANY COUNTY DEPARTMENT OF SOCIAL
SERVICES, RESPONDENT-RESPONDENT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR RESPONDENT-APPELLANT.

THOMAS A. MINER, COUNTY ATTORNEY, BELMONT (CARISSA M. KNAPP OF COUNSEL), FOR RESPONDENT-RESPONDENT.

DAVID C. BRAUTIGAM, ATTORNEY FOR THE CHILD, HOUGHTON, FOR ANGELLYNN S.H.W.

Appeal from an order of the Family Court, Allegany County (Thomas P. Brown, J.), entered April 7, 2011 in a proceeding pursuant to Family Court Act articles 6 and 10. The order, inter alia, continued placement of the child with the Allegany County Department of Social Services.

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

Memorandum: The Allegany County Department of Social Services (DSS) commenced a neglect proceeding against the parents of the subject child. During the pendency of the proceeding, the father agreed to the termination of his parental rights and, pursuant to Family Court Act § 1021, the mother agreed to the temporary removal of the child from the home where the child had been living with the mother and the mother's parents (hereafter, grandparents). The mother later stipulated to an order awarding DSS custody of the child, and DSS placed the child with a foster family. The grandparents then

commenced a proceeding seeking custody of the child and to modify the order of disposition in the neglect proceeding by terminating the placement of the child pursuant to Family Court Act § 1062. The petition was supported by the mother, who was named as a respondent in that proceeding. The mother appeals from an order in which Family Court denied the grandparents' petition, maintained custody of the child with DSS pursuant to the order in the neglect proceeding and continued the child's placement in foster care.

Initially, we note that, inasmuch as the mother stipulated to the prior order awarding DSS custody of the child, she would not be aggrieved by an order maintaining custody of the child with DSS pursuant to the prior order (*see* CPLR 5511; *Matter of Cherilyn P.*, 192 AD2d 1084, *lv denied* 82 NY2d 652). Here, however, the mother supported the grandparents' petition seeking to modify that prior order. We therefore deem the mother's support of the petition to be a motion to set aside her stipulation (*see generally Hopkins v Hopkins*, 97 AD2d 457, 458), and we conclude that she therefore may appeal from the order maintaining custody of the child with DSS because she is aggrieved by the court's implicit denial of her motion.

We further conclude that the court properly determined that it is in the best interests of the child to deny the grandparents' petition. The mother contends that the court erred in awarding custody to the foster parents and that the grandparents should be awarded custody of the child based on their familial relationship with her. We reject that contention. "[N]onparent relative[s] of the child [do] not have 'a greater right to custody' than the child's foster parents" (*Matter of Matthew E. v Erie County Dept. of Social Servs.*, 41 AD3d 1240, 1241; *see Matter of Gordon B.B.*, 30 AD3d 1005, 1006; *see generally Matter of Thurston v Skellington*, 89 AD3d 1520, 1520-1521). In any event, the court did not award custody of the child to the foster parents but, rather, it continued custody with DSS, which placed the child with the foster parents.

We reject the mother's further contention that the court applied an incorrect standard in continuing custody of the child with DSS. In making a custody determination, "the court must consider all factors that could impact the best interests of the child, including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of [the parties] to provide for the child's emotional and intellectual development and the wishes of the child . . . No one factor is determinative because the court must review the totality of the circumstances" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695; *see Eschbach v Eschbach*, 56 NY2d 167, 172-174).

Here, the court properly concluded, based upon its analysis of the relevant factors, that continued placement of the child outside of the mother's home is in her best interests. Further, the court properly concluded that it was not in the child's best interests to award custody to the grandparents. The evidence in the record before us establishes, inter alia, that the grandparents are already overwhelmed by the demands of raising four of their other

grandchildren and that several of those other grandchildren were troubled and difficult to control. In addition, there was a pending child protective services investigation of the grandparents, and the grandmother was dealing with mental challenges of her own. "We thus conclude that, '[although] continued placement in foster care is not ideal, it is not in the best interests of the[ ] child[ ] to have custody awarded to [the grandparents]' " (*Thurston*, 89 AD3d at 1521).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

392

CAF 10-02394

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

IN THE MATTER OF MARIA F. AND EDUARDO F.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JAMES F., RESPONDENT-APPELLANT.

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

JOHN A. HERBOWY, COUNTY ATTORNEY, UTICA (DEANA D. PREVITE OF COUNSEL), FOR PETITIONER-RESPONDENT.

JOHN S. WILK, ATTORNEY FOR THE CHILDREN, UTICA, FOR MARIA F. AND EDUARDO F.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered October 25, 2010 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petitions of respondent for, inter alia, increased visitation with the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order granting the motion of the Attorney for the Children for summary judgment dismissing the father's petitions seeking, inter alia, increased visitation with the children. We conclude that Family Court properly granted the motion. Contrary to the contention of the father, "once [his] parental rights were terminated following an adversarial proceeding in which [he] was found to have permanently neglected [his] children . . ., [he] no longer had . . . standing to commence a legal proceeding seeking [increased visitation]" (*Matter of Carrie B. v Josephine B.*, 81 AD3d 1009, 1009, *lv dismissed* 17 NY3d 773; *see also Matter of Saafir A.M.*, 28 AD3d 1217, 1218). Contrary to the further contention of the father and the contention of the Attorney for the Children, the matter should not be remitted for a dispositional hearing because " 'the standing issue must be resolved in [the father's] favor before the issue of the best interests of the [children] can be considered' " (*Matter of Joseph*, 286 AD2d 995, 995).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

397

CA 11-01982

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

THE PEOPLE OF THE STATE OF NEW YORK, BY ERIC SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FRISCO MARKETING OF NY LLC, DOING BUSINESS AS SMARTBUY AND SMARTBUY COMPUTERS AND ELECTRONICS, ET AL., DEFENDANTS,
STUART L. JORDAN, INDIVIDUALLY AND AS CHAIRMAN AND/OR CEO OF FRISCO MARKETING OF NY LLC AND AS AN OFFICER AND/OR DIRECTOR OF INTEGRITY FINANCIAL OF NORTH CAROLINA, INC., AND OF BRITLEE, INC., REBECCA WIRT, INDIVIDUALLY AND AS AN OFFICER AND/OR DIRECTOR OF INTEGRITY FINANCIAL OF NORTH CAROLINA, INC., AND OF BRITLEE, INC., AND JOHN PAUL JORDAN, INDIVIDUALLY AND AS AN OFFICER AND/OR DIRECTOR OF INTEGRITY FINANCIAL OF NORTH CAROLINA, INC., DEFENDANTS-RESPONDENTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (MARK MCNAMARA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered November 17, 2010. The order granted the amended motions of defendants Stuart L. Jordan, individually and as chairman and/or CEO of Frisco Marketing of NY LLC and as an officer and/or director of Integrity Financial of North Carolina, Inc., and of Britlee, Inc., Rebecca Wirt, individually and as an officer and/or director of Integrity Financial of North Carolina, Inc., and of Britlee, Inc., and John Paul Jordan, individually and as an officer and/or director of Integrity Financial of North Carolina, Inc., to dismiss plaintiff’s complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the amended motions and reinstating the complaint against defendants Stuart L. Jordan, Rebecca Wirt and John Paul Jordan, individually and in their corporate capacities, and as modified the order is affirmed without costs.

Memorandum: In this action seeking, inter alia, to enjoin

allegedly fraudulent business conduct, plaintiff appeals from an order that granted the amended motions of defendants Stuart L. Jordan, Rebecca Wirt and John Paul Jordan, individually and in their corporate capacities (collectively, the individual defendants), to dismiss the complaint against them on the ground that Supreme Court lacked personal jurisdiction over them. We agree with plaintiff that the court erred in granting the motions. We therefore modify the order by denying the motions and reinstating the complaint against the individual defendants. In addition, we note that plaintiff cross-moved to dismiss the affirmative defenses of lack of personal jurisdiction, and that the court's failure to rule on the cross motion is deemed a denial thereof (*see Brown v U.S. Vanadium Corp.*, 198 AD2d 863, 864). Inasmuch as plaintiff does not address the denial of the cross motion in its brief on appeal, we conclude that it has abandoned any contentions with respect to that issue (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Pursuant to the New York long-arm statute, "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR 302 [a] [1]). "As the party seeking to assert personal jurisdiction, the plaintiff bears the burden of proof on [that] issue" (*Castillo v Star Leasing Co.*, 69 AD3d 551, 551; *see Joseph v Siebtechnik, G.M.B.H.*, 172 AD2d 1056) but, "[i]n order to defeat a motion to dismiss based upon lack of personal jurisdiction, a plaintiff need only demonstrate that facts may exist to exercise personal jurisdiction over the defendant[s]" (*Tucker v Sanders*, 75 AD3d 1096, 1096 [internal quotation marks omitted], *see Peterson v Spartan Indus.*, 33 NY2d 463, 467; *Castillo*, 69 AD3d at 552).

Here, we conclude that plaintiff "demonstrate[d] that facts may exist to exercise personal jurisdiction over the [individual] defendant[s]" (*Tucker*, 75 AD3d at 1096 [internal quotation marks omitted]). In opposition to the motions, plaintiff submitted documents establishing that the individual defendants were three siblings who controlled the businesses at issue. They signed the leases for the stores where the allegedly fraudulent sales took place, they were officers of the corporations that made those sales, and they were also officers of the corporations that financed those sales at deceptive and usurious rates. Furthermore, the complaint alleges that the stores did not make any legitimate sales, but rather the sole purpose of the stores was to engage in deceptive, usurious and fraudulent sales to members of the armed services. Considering all of the evidence and accepting the allegations in the complaint as true, as we must on a motion to dismiss (*see Leon v Martinez*, 84 NY2d 83, 87-88; *Tucker*, 75 AD3d at 1097), we conclude that "CPLR 302 (a) (1) jurisdiction is proper 'even though the [individual] defendant[s] never enter[ed] New York, [inasmuch as their] activities here were purposeful and there is a substantial relationship between the transaction[s] and the claim[s] asserted' " (*Fischbarg v Doucet*, 9 NY3d 375, 380, quoting *Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71, *cert denied* 549 US 1095; *cf. SPCA of Upstate N.Y., Inc. v American Working Collie Assn.*, ___ NY3d ___, ___ [Feb. 9,

2012]).

In addition, "[s]o long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there, due process is not offended if that party is subjected to jurisdiction even if not 'present' in that State" (*Kreutter v McFadden Oil Corp*., 71 NY2d 460, 466). Based upon the aforementioned contacts that the individual defendants had with New York, we agree with plaintiff that due process is not offended by subjecting the individual defendants to the jurisdiction of the New York courts.

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

398

CA 11-01905

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

SARAH RADFORD, DOING BUSINESS AS DEWITT CELLULAR,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PEERLESS INSURANCE COMPANY, ET AL., DEFENDANTS,
AND LADD'S AGENCY, INC., DEFENDANT-RESPONDENT.

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR PLAINTIFF-APPELLANT.

KEIDEL, WELDON & CUNNINGHAM, LLP, SYRACUSE (LORI A. EATON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered June 6, 2011. The order granted the motion of defendant Ladd's Agency, Inc. for summary judgment dismissing the amended complaint against it.

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

Memorandum: In this action seeking damages for, inter alia, breach of contract, plaintiff contends that Supreme Court erred in granting the motion of defendant Ladd's Agency, Inc. (Ladd) for summary judgment dismissing the amended complaint against it. We reject that contention.

The amended complaint contains claims against Ladd under theories of negligence, breach of contract, negligent misrepresentation and breach of fiduciary duty, arising from Ladd's alleged failure to procure certain insurance coverage on plaintiff's behalf. Addressing first the negligent misrepresentation claim, it is well settled that "liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Kimmell v Schaefer*, 89 NY2d 257, 263; *see Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 578; *Murphy v Kuhn*, 90 NY2d 266, 270). Here, plaintiff does not contend that Ladd possessed unique or specialized expertise. We conclude that the court properly granted Ladd's motion with respect to the negligent misrepresentation and breach of fiduciary duty claims because Ladd met its initial burden by establishing that it did not have a special relationship with plaintiff and that it did not owe a fiduciary duty to plaintiff (*see*

Murphy, 90 NY2d at 270-272; *Sawyer v Rutecki*, 92 AD3d 1237, ___; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562), and plaintiff failed to raise a triable issue of fact in opposition (*see Obomsawin v Bailey, Haskell & Lalonde Agency, Inc.*, 85 AD3d 1566, 1567, *lv denied* 17 NY3d 710; *see generally Zuckerman*, 49 NY2d at 562).

The court also properly granted those parts of the motion with respect to the negligence and breach of contract claims against Ladd because there was no special relationship between plaintiff and Ladd (*see Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152, 158, *affg* 19 AD3d 1056; *Sawyer*, 92 AD3d at ___; *Obomsawin*, 85 AD3d at 1567). Furthermore, plaintiff did not make a specific request for coverage beyond that which Ladd procured for her (*see Obomsawin*, 85 AD3d at 1567). Contrary to plaintiff's contention, her "general request for [additional] coverage will not satisfy the requirement of a specific request for a certain type of coverage" (*Hoffend & Sons, Inc.*, 7 NY3d at 158). Finally, those claims are barred by plaintiff's receipt of the amended insurance policy prior to the loss (*see Gui's Lbr. & Home Ctr., Inc. v Pennsylvania Lumbermens Mut. Ins. Co.*, 55 AD3d 1389, 1390; *Hoffend & Sons, Inc.*, 19 AD3d at 1057-1058; *cf. Page One Auto Sales, Inc. v Brown & Brown of N.Y.*, 83 AD3d 1482, 1483).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

399

CA 11-01861

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

THE BRIGHTONIAN NURSING HOME, BAYBERRY NURSING HOME, MAPLEWOOD NURSING AND REHABILITATION CENTER, LEROY VILLAGE GREEN, ELDERWOOD HEALTH CARE AT BIRCHWOOD AND NEW YORK STATE HEALTH FACILITIES ASSOCIATION, INDIVIDUALLY AND ON BEHALF OF ITS RESIDENTIAL HEALTH CARE FACILITY MEMBERS IN NEW YORK STATE, PLAINTIFFS-PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

RICHARD F. DAINES, M.D., COMMISSIONER OF HEALTH, STATE OF NEW YORK AND DAVID A. PATERSON, GOVERNOR, STATE OF NEW YORK, DEFENDANTS-RESPONDENTS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

HARTER SECREST & EMERY LLP, ROCHESTER (THOMAS G. SMITH OF COUNSEL), FOR PLAINTIFFS-PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered November 10, 2010 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment denied the cross motion of defendants-respondents, inter alia, to dismiss the amended complaint/petition and declared unconstitutional Public Health Law § 2808 (5) (c).

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

Memorandum: Plaintiffs-petitioners (plaintiffs) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, a declaration that the version of Public Health Law § 2808 (5) (c) in effect at that time was unconstitutional on its face. We note at the outset that this is properly only a declaratory judgment action inasmuch as plaintiffs challenge the constitutionality of a statute, rather than the specific action of the administrative agency (*see Greece Town Mall, LP v Mullen*, 87 AD3d 1408, 1408). Supreme Court denied the cross motion of defendants-respondents (defendants), inter alia, to dismiss the amended complaint/petition pursuant to CPLR 3211 (a) (7) and entered judgment in favor of plaintiffs declaring that Public Health Law § 2808 (5) (c) is unconstitutional. We affirm.

It is well settled that "[l]egislative enactments enjoy a strong presumption of constitutionality" (*LaValle v Hayden*, 98 NY2d 155, 161; *see Schulz v State of New York*, 84 NY2d 231, 241, *rearg denied* 84 NY2d 851, *cert denied* 513 US 1127). Where, as here, the challenge is to a statute on its face, the challenger "bears the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment" (*Matter of Moran Towing Corp. v Urbach*, 99 NY2d 443, 448 [internal quotation marks omitted]; *see Cohen v State of New York*, 94 NY2d 1, 8). In this case, we conclude that plaintiffs met the heavy burden of establishing the unconstitutionality of Public Health Law § 2808 (5) (c) beyond a reasonable doubt (*see generally Bordeleau v State of New York*, 18 NY3d 305, 313, *rearg denied* ___ NY3d ___ [Feb. 21, 2012]; *Matter of New York Charter Schools Assn., Inc. v DiNapoli*, 13 NY3d 120, 130; *Schulz*, 84 NY2d at 241).

Public Health Law § 2808 (5) (c) prohibits private residential health care facilities, i.e., nursing homes, from withdrawing equity or transferring assets that in the aggregate exceed 3% of their total annual revenue for patient care services without the prior written approval of the Commissioner of Health (Commissioner). The statute affords the Commissioner 60 days to determine whether to approve a request for withdrawal of equity or assets (*see id.*). In reviewing such requests, the statute provides that the Commissioner "shall consider the facility's overall financial condition, any indications of financial distress, whether the facility is delinquent in any payment owed to the [D]epartment [of Health], whether the facility has been cited for immediate jeopardy or substandard quality of care, and such other factors as the [C]ommissioner deems appropriate" (*id.*).

Contrary to defendants' contention, we conclude that Public Health Law § 2808 (5) (c) as written is unconstitutionally vague and improperly delegates legislative authority to the Commissioner. It is axiomatic that "the legislative branch may not constitutionally cede its fundamental policymaking responsibility to a regulatory agency" (*Matter of Medical Socy. of State of N.Y. v Serio*, 100 NY2d 854, 864; *see Boreali v Axelrod*, 71 NY2d 1, 9-10; *see also Matter of Citizens For An Orderly Energy Policy v Cuomo*, 78 NY2d 398, 410, *rearg denied* 79 NY2d 851, 852). Thus, "[t]he Legislature may constitutionally confer discretion upon an administrative agency only if it limits the field in which that discretion is to operate and provides standards to govern its exercise" (*Matter of Levine v Whalen*, 39 NY2d 510, 515). We agree with plaintiffs and the court that the provision in Public Health Law § 2808 (5) (c) permitting the Commissioner to consider "such other factors as [he or she] deems appropriate" (hereafter, catchall provision) constitutes an unconstitutional delegation of legislative authority because it grants the Commissioner unfettered discretion in assessing equity withdrawal requests. The statute provides no standards to guide the Commissioner in determining what factors are "appropriate" in reviewing such requests (§ 2808 [5] [c]; *see generally Dur-Bar Realty Co. v City of Utica*, 57 AD2d 51, 55, *affd* 44 NY2d 1002; *Levine*, 39 NY2d at 515). As a result, it is left to the sole discretion of the Commissioner to determine which additional factors to consider.

Defendants contend that the catchall provision is properly construed not as conferring unlimited discretion upon the Commissioner, but rather as allowing the Commissioner to consider other factors of the same type or kind as the first four factors listed in the statute, i.e., factors relating to the nursing home's financial condition and quality of care. In support of that contention, defendants rely on the ejusdem generis rule of statutory construction, which "requires the court to limit general language of a statute by specific phrases which have preceded the general language" (McKinney's Cons Laws of NY, Book 1, Statutes § 239 [b], at 407; *see 242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100, 103-104). The rule of ejusdem generis, however, "applies only where the specific words preceding the general expression are all of the same nature, and where they are of different genera the meaning of the general words remains unaffected by its connection with them . . . [I]n applying the rule, care must be taken to see that the words supposed to be particular or specific, and which precede the general term, really are an enumeration of individual things, for if the preceding terms are general as well as that which follows, there is no place for the application of the rule" (§ 239 [b], at 409). Here, the preceding factors are general in nature and are not all of the same kind or type (*see* Public Health Law § 2808 [5] [c]; McKinney's Cons Laws of NY, Book 1, Statutes § 239 [b], at 409). Thus, ejusdem generis does not apply to circumscribe the otherwise limitless discretion the statute affords to the Commissioner (*cf. Miranda v Norstar Bldg. Corp.*, 79 AD3d 42, 47).

We also agree with plaintiffs and the court that the catchall provision of Public Health Law § 2808 (5) (c) is unconstitutionally vague (*see Russell v Town of Pittsford*, 94 AD2d 410, 414), inasmuch as it does not " 'contain[] sufficient standards to afford a reasonable degree of certainty so that a person of ordinary intelligence is not forced to guess at its meaning and to safeguard against arbitrary enforcement' " (*Matter of Morrissey v Apostol*, 75 AD3d 993, 996; *see Matter of Kaur v New York State Urban Dev. Corp.*, 15 NY3d 235, 256, *cert denied* 131 S Ct 822). Because the Commissioner may consider "such other factors as [he or she] deems appropriate" (§ 2808 [5] [c]), the statute does not adequately apprise nursing home owners and operators of the standards used to assess their equity withdrawal requests and precludes meaningful judicial review (*cf. Matter of Slocum v Berman*, 81 AD2d 1014, 1015-1016, *lv denied* 54 NY2d 602, *appeal dismissed* 54 NY2d 752).

Although defendants contend that we may sever the catchall provision and otherwise leave the statute intact (*see generally St. Joseph Hosp. of Cheektowaga v Novello*, 43 AD3d 139, 146, *appeal dismissed* 9 NY3d 988, *lv denied* 10 NY3d 702), we agree with plaintiffs and the court that Public Health Law § 2808 (5) (c), in its entirety, violates substantive due process. "To establish a claim for violation of substantive due process, a party 'must establish a cognizable . . . vested property interest' . . . and 'that the governmental action was wholly without legal justification' " (*Matter of Raynor v Landmark Chrysler*, 18 NY3d 48, 59; *see Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 627). With respect to the first part of that test, we

conclude that plaintiffs have a vested property interest in the equity of their businesses and the disposition of that valuable asset (*see generally Dickman v Commissioner of Internal Revenue*, 465 US 330, 336, *reh denied* 466 US 945; *Federal Home Loan Mtge. Corp. v Commissioner of Internal Revenue*, 121 TC 254, 259-260; *Passailaigue v United States*, 224 F Supp 682, 686). As the United States Supreme Court stated, "the use of valuable property[, including money] is itself a legally protectible property interest. Of the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order" (*Dickman*, 465 US at 336).

With respect to the second part of the test for a substantive due process claim, plaintiffs must demonstrate that the statutory provision at issue is "without legal justification and not supported by a rational legislative purpose" (*Raynor*, 18 NY3d at 59). As plaintiffs correctly concede, ensuring the financial viability of nursing homes and protecting the welfare of their vulnerable residents constitutes a legitimate governmental purpose (*see generally Port Jefferson Health Care Facility v Wing*, 94 NY2d 284, 292, *cert denied* 530 US 1276; *Matter of Hodes v Axelrod*, 70 NY2d 364, 371-372; *Village of Herkimer v Axelrod*, 88 AD2d 704, 706, *affd* 58 NY2d 1069).

The question therefore becomes whether Public Health Law § 2808 (5) (c) bears a reasonable relationship to the objective of safeguarding a nursing home's finances for the protection of its residents (*see Rochester Gas & Elec. Corp. v Public Serv. Commn. of State of N.Y.*, 71 NY2d 313, 321; *Montgomery v Daniels*, 38 NY2d 41, 54; *Russell*, 94 AD2d at 412-413). "The Federal and State Due Process Clauses condition government regulation by requiring that it not be unreasonable, arbitrary or capricious, and that the means selected have a reasonable relation to the object sought to be attained" (*Rochester Gas & Elec. Corp.*, 71 NY2d at 321). We agree with plaintiffs and the court that section 2808 (5) (c) is not reasonably related to the governmental purpose and thus that it violates due process (*see generally Fred F. French Inv. Co. v City of New York*, 39 NY2d 587, 596, *rearg denied* 40 NY2d 846, *appeal dismissed and cert denied* 429 US 990).

Public Health Law § 2808 (5) (c) requires all nursing homes, regardless of financial viability, to obtain the approval of the Commissioner for all expenditures that, in the aggregate in a given year, exceed 3% of their annual revenue from patient care. We conclude that it is manifestly unfair and unreasonable to freeze the equity of all nursing homes in excess of 3% of their respective annual revenues in order to protect nursing home residents and the public from the possibility that "unscrupulous or incompetent owners [will] place their facilities in a financially unsound position by withdrawing excessive amounts of working capital" (Budget Report on Bills, Bill Jacket, L 1977, ch 521). We note that subdivision (5) (a) of section 2808 provides that "[a]ny operator withdrawing equity or assets from a hospital operated for profit so as to create or increase a negative net worth or when the hospital is in a negative net worth position . . . must obtain the prior approval of the [C]ommissioner . . . ." Subdivision (5) (b) further provides that no nursing home

facility "may withdraw equity or transfer assets which in the aggregate exceed [3%] of such facility's total reported annual revenue for patient care services . . . without prior written notification to the [C]ommissioner." In our view, those subdivisions sufficiently protect nursing home residents and the public from excessive withdrawals of equity that may endanger a nursing home's financial health. We conclude that subdivision (5) (c) sweeps so broadly as to be irrational and arbitrary in view of the objective to be accomplished, i.e., ensuring the financial viability of nursing homes for the protection of their residents (*see generally Rochester Gas & Elec. Corp.*, 71 NY2d at 321; *Fred F. French Inv. Co.*, 39 NY2d at 596).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court

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

402

CAF 11-00665

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

IN THE MATTER OF WYQUANZA J. AND SINCERE J.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LISA J., 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 WYQUANZA J. AND SINCERE J.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered March 7, 2011 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had abused and neglected the subject children.

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

Memorandum: Respondent mother appeals from an order determining that she abused and neglected her two-month-old child and derivatively abused and neglected her two-year-old child. We reject the mother's contention that the evidence is legally insufficient to support the determination. Petitioner presented evidence, including the testimony of a physician, establishing that the younger child sustained fractures of his left humerus, right humerus, left tibia and several ribs, and that the injuries were inflicted at different times. Petitioner thereby established a prima facie case of child abuse and neglect with respect to the younger child pursuant to Family Court Act § 1046 (a) (ii), "and the mother failed to rebut the presumption of parental responsibility" (*Matter of Seth G.*, 50 AD3d 1530, 1531; *see Matter of Michael I.*, 276 AD2d 839, 840-841, *lv denied* 96 NY2d 701; *see generally Matter of Philip M.*, 82 NY2d 238, 245-247).

Petitioner also established by a preponderance of the evidence that the older child was derivatively abused and neglected, inasmuch as the abuse and neglect of the younger child "is so closely connected with the care of [the older] child as to indicate that [he] is equally at risk" (*Matter of Marino S.*, 100 NY2d 361, 374, *cert denied* 540 US 1059). Indeed, the abuse and neglect of the younger child

"demonstrates such an impaired level of judgment by the [mother] as to create a substantial risk of harm for any child in her care" (*Matter of Aaron McC.*, 65 AD3d 1149, 1150).

Entered: March 23, 2012

Frances E. Cafarell
Clerk of the Court