SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

SEPTEMBER 28, 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

595

CA 11-01755

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

KATHLEEN P. MUELLER, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF NATALIE C. DRUZBIK, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

ELDERWOOD HEALTH CARE AT OAKWOOD AND OAKWOOD HEALTH CARE CENTER, INC., DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

DAMON MOREY LLP, BUFFALO (KATHLEEN M. REILLY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, LANCASTER (MICHAEL C. SCINTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John M. Curran, J.), entered December 1, 2010. The judgment awarded plaintiff money damages upon a jury verdict.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on August 8, 2012, and filed in the Erie County Clerk’s Office on August 14, 2012,

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

596

CA 11-01756

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

KATHLEEN P. MUELLER, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF NATALIE C. DRUZBIK, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

ELDERWOOD HEALTH CARE AT OAKWOOD AND OAKWOOD HEALTH CARE CENTER, INC., DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

DAMON MOREY LLP, BUFFALO (KATHLEEN M. REILLY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, LANCASTER (MICHAEL C. SCINTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered May 3, 2011. The order denied the motion of defendants to set aside the verdict pursuant to CPLR 4404 (a).

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on August 8, 2012, and filed in the Erie County Clerk’s Office on August 14, 2012,

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

856

KA 10-02075

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERMAINE J. GORDON, DEFENDANT-APPELLANT.

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

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (LYNN SCHAFFER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered August 30, 2010. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of assault in the second degree (Penal Law § 120.05 [1]). Defendant's contention "that his plea was not knowing, intelligent and voluntary 'because he did not recite the underlying facts of the crime but simply replied to County Court's questions with monosyllabic responses is actually a challenge to the factual sufficiency of the plea allocution' " (*People v Simcoe*, 74 AD3d 1858, 1859, *lv denied* 15 NY3d 778; *see People v Brown*, 66 AD3d 1385, 1385, *lv denied* 14 NY3d 839). "[D]efendant failed to preserve that challenge for our review by moving to withdraw the plea or . . . to vacate the judgment of conviction" (*People v Jamison*, 71 AD3d 1435, 1436, *lv denied* 14 NY3d 888; *see People v Lopez*, 71 NY2d 662, 665). In any event, "[d]efendant's monosyllabic responses to [the c]ourt's questions did not render the plea invalid. Moreover, there is no requirement that a defendant personally recite the facts underlying his or her crime[] during the plea colloquy, and, here, [t]he record establishes that defendant confirmed the accuracy of [the court's] recitation of the facts underlying the crime" (*People v Bullock*, 78 AD3d 1697, 1698, *lv denied* 16 NY3d 742 [internal quotation marks and citations omitted]; *see Jamison*, 71 AD3d at 1436; *People v Bailey*, 49 AD3d 1258, 1259, *lv denied* 10 NY3d 932).

Finally, the sentence is not unduly harsh or severe.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

857

KA 07-00321

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TONY L. IVEY, DEFENDANT-APPELLANT.

GANGULY BROTHERS, PLLC, ROCHESTER (ANJAN K. GANGULY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered April 24, 2003. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [2]). We reject defendant's contention that his conviction must be vacated because County Court failed to inform him of the length of the period of postrelease supervision. It is well settled that a defendant " 'must be aware of the postrelease supervision component of [his or her] sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action' " (*People v Louree*, 8 NY3d 541, 545, quoting *People v Catu*, 4 NY3d 242, 245). Here, the prosecutor informed defendant immediately prior to the plea colloquy that the period of postrelease supervision in the plea agreement was five years, and the court then explained to defendant that postrelease supervision was a mandatory component of his sentence. Thus, at the time defendant entered his plea, he was aware that a period of five years of postrelease supervision would be a part of his sentence (*cf. People v Cornell*, 75 AD3d 1157, 1158-1159, *affd* 16 NY3d 801; *People v Pett*, 77 AD3d 1281, 1281-1282).

Contrary to defendant's further contentions, we conclude that the court engaged in adequate fact-finding procedures in denying defendant's motion to withdraw his guilty plea and did not err in failing to conduct an evidentiary hearing on the motion. The record establishes that, during oral argument of the motion, the court afforded defendant "the requisite 'reasonable opportunity to present his contentions' in support of [the] motion" (*People v Strasser*, 83

AD3d 1411, 1411, quoting *People v Tinsley*, 35 NY2d 926, 927; *see People v Buske*, 87 AD3d 1354, 1355, *lv denied* 18 NY3d 882; *People v Harris*, 63 AD3d 1653, 1653). Additionally, the court "did not abuse its discretion in denying defendant's motion to withdraw the plea on the ground of coercion without conducting a hearing inasmuch as the record is devoid of 'a genuine question of fact as to the plea's voluntariness' " (*People v Campbell*, 62 AD3d 1265, 1266, *lv denied* 13 NY3d 795). Indeed, defendant's contention that his plea was coerced is belied by his statement during the plea colloquy that he had not been forced to plead guilty (*see People v Williams*, 90 AD3d 1546, 1547; *People v Wolf*, 88 AD3d 1266, 1267, *lv denied* 18 NY3d 863). In addition, defendant alleged, inter alia, that the prosecutor threatened defendant's wife and sister-in-law with incarceration if they did not testify, thereby forcing him to plead guilty. We note, however, that the prosecutor specifically denied threatening any witnesses, and defense counsel did not challenge the prosecutor's statement. Defendant's reliance on *People v Wheaton* (45 NY2d 769, 770-771) is misplaced inasmuch as the prosecutor herein effectively controverted defendant's allegations.

Finally, we note that the certificate of conviction incorrectly reflects that defendant was convicted of assault in the first degree, and it must therefore be amended to reflect that he was convicted of assault in the second degree (*see People v Saxton*, 32 AD3d 1286, 1286-1287).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

862

KA 08-00826

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VICTOR L. GILCHRIST, DEFENDANT-APPELLANT.

KIMBERLY J. CZAPRANSKI, CONFLICT DEFENDER, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered November 16, 2007. The judgment convicted defendant, upon a jury verdict, of attempted robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [2] [b]). The victim testified at trial that defendant entered his store, pointed a sawed-off shotgun at him, and demanded money. The victim and his friend (hereafter, main prosecution witnesses) struggled with defendant, and defendant eventually fled. Defendant contends that Supreme Court violated his constitutional right to present a defense, i.e., that he did not attempt to commit a robbery, but rather was involved in "a drug transaction gone bad," by precluding him from cross-examining a police witness concerning drug activity at the store and from calling two witnesses (defense witnesses) to testify concerning drug sales made by the main prosecution witnesses. We reject that contention. With respect to the police witness, the court properly determined that the question posed on cross-examination, i.e., whether the store had "been the focus of police attention prior to this date," was beyond the scope of direct examination and was premature because defendant had not presented any evidence that the incident stemmed from a drug transaction. "It is well settled that '[a]n accused's right to cross-examine witnesses . . . is not absolute,' " and "[t]he scope of cross-examination is within the sound discretion of the trial court" (*People v Hayes*, 17 NY3d 46, 53, *cert denied* ___ US ___, 132 S Ct 844). In addition, the court advised defendant that he could call the police witness as part of his direct case, but defendant chose not to do so.

With respect to the proposed testimony of the defense witnesses, the court did not err in precluding those witnesses from testifying. " 'Remote acts, disconnected and outside of the crime itself, cannot be separately proved' " (*People v Schulz*, 4 NY3d 521, 529). Defendant testified that he went to the store to purchase drugs, but he did not testify that he had purchased drugs from the main prosecution witnesses either on a prior occasion or on the day of this incident. Instead, he testified that one of the main prosecution witnesses attacked him as soon as that witness saw him enter the store because defendant had allegedly robbed that witness's brother. Because defendant did not testify that this incident was a "drug transaction gone bad," any testimony from the defense witnesses that they previously saw the main prosecution witnesses selling drugs somewhere other than the store was not relevant. In any event, we agree with the People that, even if the court erred in precluding the defense witnesses from testifying, such error is harmless. The evidence against defendant is overwhelming, and there is no reasonable possibility that the error might have contributed to the conviction (*see People v Crimmins*, 36 NY2d 230, 237).

Defendant next contends that the court should have granted his motion to dismiss the jury panel pursuant to the Sixth Amendment of the United States Constitution on the ground that there was systematic exclusion of African-Americans from criminal juries in Monroe County. We reject that contention. "The right to a jury chosen from a fair cross section is . . . protected by the Sixth Amendment guarantee of an impartial jury trial in the context of a petit jury challenge" (*People v Guzman*, 60 NY2d 403, 409 n 3, *cert denied* 466 US 951). "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process" (*Duren v Missouri*, 439 US 357, 364; *see Guzman*, 60 NY2d at 410). Here, defendant failed to establish a prima facie violation of the "fair-cross-section requirement" because, with respect to the third prong of the test, he failed to submit any facts demonstrating a systematic exclusion of African-Americans from the jury pool (*see People v Figgins*, 48 AD3d 1042, 1043, *lv denied* 10 NY3d 840; *People v Cotton*, 38 AD3d 1189, 1189, *lv denied* 8 NY3d 983).

Finally, defendant failed to preserve for our review his contention that the court failed to conduct the proper three-step analysis when he raised a *Batson* challenge (*see People v Scott*, 81 AD3d 1470, 1471, *lv denied* 17 NY3d 801; *People v Benjamin*, 35 AD3d 1185, 1185-1186, *lv denied* 8 NY3d 919). In any event, his contention is without merit (*see People v Carmack*, 34 AD3d 1299, 1301, *lv denied* 8 NY3d 879). Although defendant contends that the court failed to determine whether defendant made a prima facie showing of discrimination concerning a prospective juror under the first step of the three-step *Batson* analysis, the issue whether defendant made such a showing became moot once the prosecutor provided a race-neutral

reason for exercising the peremptory challenge in connection with that prospective juror (*see People v Hecker*, 15 NY3d 625, 652, *cert denied* ___ US ___, 131 S Ct 2117; *People v Scott*, 31 AD3d 1165, 1165, *lv denied* 7 NY3d 851).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

863

KA 10-00055

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANGELA WILLIAMS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (SUSAN C. AZZARELLI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered September 18, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for resentencing in accordance with the following Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of burglary in the third degree (Penal Law § 140.20). Defendant failed to preserve for our review her contention that the evidence is legally insufficient to support the conviction (*see People v Gray*, 86 NY2d 10, 19). 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 further contention that the verdict is against the weight of the evidence. Although an acquittal would not have been unreasonable, we cannot say 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).

We reject defendant's contention that County Court failed to exercise its discretion in its *Sandoval* ruling and that, in the event that the court in fact exercised its discretion, the court abused its discretion. " 'The extent to which prior convictions bear on the issue of a defendant's credibility is a question entrusted to the sound discretion of the court, reviewable only for clear abuse of discretion' " (*People v Nichols*, 302 AD2d 953, 953, *lv denied* 99 NY2d 657). When the convictions that the People seek to use are for crimes of individual dishonesty, the convictions should usually be admitted on a trial for similar charges, " 'notwithstanding the risk of possible prejudice, because the very issue on which the offer is made

is that of the veracity of the defendant as a witness in the case' " (*People v Arguinzoni*, 48 AD3d 1239, 1241, *lv denied* 10 NY3d 859; *see People v Sandoval*, 34 NY2d 371, 377; *People v Alston*, 27 AD3d 1141, 1142, *lv denied* 6 NY3d 892). The convictions the People sought to use here, i.e., convictions of petit larceny, grand larceny, and criminal possession of stolen property, are all convictions of crimes involving individual dishonesty. We conclude that the court properly exercised its discretion in ruling that, if defendant testified, the People could impeach defendant using the grand larceny conviction, two petit larceny convictions, and one criminal possession of stolen property conviction. With respect to defendant's remaining convictions, the court properly ruled that the People could generally ask defendant whether she had been convicted of any other misdemeanors.

Contrary to defendant's contention, she was not denied effective assistance of counsel. To establish that she received ineffective assistance of counsel, defendant was required to demonstrate "the absence of a strategic or other legitimate explanation for defense counsel's alleged shortcomings" (*People v Smith*, 93 AD3d 1345, 1346, *lv denied* 19 NY3d 967). Here, defendant failed to establish that defense counsel lacked a strategic or other legitimate reason for asserting during his opening statement that defendant would testify or for eliciting testimony that the individuals in the vehicle in which defendant was riding were using drugs. Indeed, it appears that it was defense counsel's strategy to elicit an admission of drug use from the driver of the vehicle so that defense counsel could impeach his testimony. Additionally, defendant was not denied effective assistance of counsel due to defense counsel's failure to make certain objections or arguments. Rather, viewing defense counsel's representation of defendant in its entirety, we conclude that defendant was afforded meaningful representation (*see generally People v Schulz*, 4 NY3d 521, 530). Defendant's contentions that she was denied effective assistance of counsel because defense counsel was unprepared for trial and did not present a clear and consistent theory of defense are not supported by the record.

We further reject defendant's contention that the court failed to make a sufficient inquiry into defendant's complaints about defense counsel and her request for new representation. Defendant did not make "specific factual allegations of 'serious complaints about counsel' " that required the court to conduct a minimal inquiry (*People v Porto*, 16 NY3d 93, 100). In any event, the court questioned defendant about her complaints against defense counsel, and defendant did not provide any further details about those complaints.

We agree with defendant, however, that she was improperly sentenced as a second felony offender. When the court asked defendant if she would admit to being convicted of grand larceny in the fourth degree on March 26, 2004, she stated that she would not do so, that she wanted a hearing, and that she did not remember the prior conviction. Under the circumstances, we agree with defendant that she sufficiently controverted the allegations to warrant a hearing (*see* CPL 400.21 [3], [5]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing

in compliance with the procedures set forth in CPL 400.21.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

864

CAE 12-00001

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

IN THE MATTER OF CHARLES BURKWIT,
PETITIONER-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL A. OLSON, AS CHAIRMAN OF WAYNE COUNTY REPUBLICAN COMMITTEE, DORIS COLE, AS CHAIR OF TOWN OF WILLIAMSON REPUBLICAN COMMITTEE, TOWN OF WILLIAMSON REPUBLICAN COMMITTEE, BARRY VANNOSTRAND, DEBORAH STRITZEL, RESPONDENTS-RESPONDENTS-APPELLANTS, ET AL., RESPONDENTS.

CHARLES BURKWIT, ROCHESTER, PETITIONER-APPELLANT-RESPONDENT PRO SE.

ANTHONY J. VILLANI, P.C., LYONS (MARY K. VILLANI OF COUNSEL), FOR RESPONDENTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Wayne County (John J. Ark, J.), entered September 22, 2011 in a proceeding pursuant to Election Law article 16. The order, among other things, scheduled a new caucus for the nomination of Republican Party candidates for the position of Williamson Town Justice.

It is hereby ORDERED that said appeal from the order insofar as it relates to the new caucus for the two offices of Town Justice is unanimously dismissed, the cross appeal is dismissed and those parts of the order denying petitioner's request for declaratory relief, punitive damages, attorney's fees and costs are affirmed without costs.

Memorandum: On a prior appeal, we concluded, inter alia, that respondents Daniel A. Olson, Chairman of the Wayne County Republican Committee, Doris Cole, Chair of the Town of Williamson Republican Committee, and Town of Williamson Republican Committee (Committee) violated Election Law § 6-120 (4) by passing a rule at a caucus held on July 28, 2011 (first caucus) that mandated that only registered Republicans could be nominated for office at that caucus (*Matter of Burkwit v Olson*, 87 AD3d 1264, 1265). We also granted petitioner's motion for leave to amend his order to show cause and petition to join the other candidates who appeared before the first caucus seeking a nomination for the two offices of Town Justice, and we remitted the matter to Supreme Court for further proceedings on the petition after the necessary parties were joined (*id.*).

Petitioner thereafter filed an amended order to show cause and amended petition, in which he joined the additional candidates and sought the same relief that he had requested in the original petition. According to the amended petition, the relief sought by petitioner included an order and judgment directing that a new Republican caucus be held for the two Town Justice positions at issue; declaring that the conduct of Olson, Cole and the Committee is prohibited by various sections of article 17 of the Election Law; and awarding petitioner costs, attorney's fees and punitive damages.

Olson, Cole, the Committee, and respondents Barry VanNostrand and Deborah Stritzel (collectively, respondents) subsequently moved to dismiss the amended order to show cause and amended petition. Petitioner opposed the motion, and the court, in apparent deference to our decision on the prior appeal, ordered that a new Republican caucus be held on September 30, 2011 (second caucus) at which "two candidates for Williamson Town Justice [were to] be designated by the same process used on July 28, 2011 (other than the exclusion of non-Republican candidates)" (order). Postorder submissions establish that the results of the second caucus were the same as those of the first caucus inasmuch as VanNostrand and Stritzel were again nominated for the offices of Town Justice. Petitioner appeals and respondents cross-appeal from the order.

Turning first to petitioner's appeal, we note that respondents contend that petitioner violated Election Law § 16-102 (2) by failing to commence another proceeding challenging the second caucus. Respondents contend that, as a result, this proceeding challenging the second caucus is a collateral attack on the order and thus is not properly before us (*see* Siegel, NY Prac § 8, at 11 n 4 [4th ed]; *see generally Rakosi v Perla Assoc.*, 3 AD3d 431, 431-432). Election Law § 16-102 (2) sets forth the procedure for commencing "[a] proceeding with respect to a . . . caucus." Here, petitioner had already commenced this Election Law article 16 proceeding to challenge the first caucus, which resulted in the order directing that the second caucus be held. On appeal, petitioner does not challenge the *results* of the second caucus and instead challenges the *order* on the ground that the court lacked the authority to direct that the second caucus be held (*see* Election Law § 6-158 [6]). Thus, petitioner properly appealed from the order and was not required by section 16-102 (2) to commence a separate Election Law proceeding challenging the court's authority to direct that the second caucus be held.

We agree with respondents, however, that petitioner's appeal from the order insofar as it relates to the new Republican caucus for the two offices of Town Justice is not properly before us. "The general rule is that a party who accepts the benefits of an order waives the right to appeal from that order" (*Carmichael v General Elec. Co.*, 102 AD2d 838, 839; *see Roffey v Roffey*, 217 AD2d 864, 865; *Reynolds v County of Onondaga*, 149 AD2d 986, 986, *lv denied* 74 NY2d 608). Having accepted the benefit of the second caucus, petitioner waived his right to appeal from that part of the order directing that the second caucus be held, and we therefore dismiss that part of petitioner's appeal. We also note that petitioner lacks standing to appeal from that part

of the order directing that the second caucus be held inasmuch as he was not aggrieved thereby (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544).

We next turn to petitioner's contention that the court erred in failing to determine questions of law and fact concerning the alleged violations of parts of Election Law article 17, as well as what we perceive to be petitioner's contention that the court erred in failing to award him the costs, attorney's fees and punitive damages sought in the amended petition. Preliminarily, we note that the court's failure to rule on petitioner's request for declaratory and pecuniary relief is "deemed a denial of th[ose] part[s] of the [amended petition]" (*Brown v U.S. Vanadium Corp.*, 198 AD2d 863, 864). Further, we conclude that, contrary to respondents' contention, petitioner has standing to appeal from that part of the order denying his request for declaratory and pecuniary relief inasmuch as petitioner is aggrieved thereby (*see Parochial Bus Sys.*, 60 NY2d at 544). With respect to the merits, however, we conclude that, even assuming, arguendo, that petitioner's contentions regarding the declaratory and pecuniary relief denied by the court are properly before us (*cf. Oakes v Patel*, 87 AD3d 816, 819), those contentions lack merit. While petitioner may be entitled to costs (*see Gage v Monescalchi*, 17 AD3d 770, 770-771), such an award is inappropriate in this case (*see* CPLR 8101, 8106, 8107). Attorney's fees are incidents of litigation in New York and "are not recoverable unless authorized by statute, court rule or the parties' written agreement" (*Gage*, 17 AD3d at 771). Here, petitioner cites no statutory or other authority entitling him to such fees in this Election Law proceeding (*see id.*). Petitioner's request for punitive damages is likewise baseless inasmuch as petitioner has made no claim for compensatory damages (*see Hubbell v Trans World Life Ins. Co. of N.Y.*, 50 NY2d 899, 901). Moreover, petitioner is not entitled to declaratory relief with respect to the alleged violations of certain parts of Election Law article 17 that criminalizes misconduct in connection with an election inasmuch as such relief relative to criminal liability is not available where, as here, questions of fact remain unsettled (*see Cayuga Indian Nation of N.Y. v Gould*, 14 NY3d 614, 634, *cert denied* ___ US ___, 131 S Ct 353; *Bunis v Conway*, 17 AD2d 207, 208-209, *lv dismissed* 12 NY2d 645, 882; *cf. People v Ianniello*, 36 NY2d 137, 142-143, *cert denied* 423 US 831).

We now turn to respondents' cross appeal. We note that in the conclusion to their brief, respondents seek affirmance of the order appealed from. "Generally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal" (*Parochial Bus Sys.*, 60 NY2d at 544). We thus dismiss the cross appeal, and we do not address the alternative grounds for affirmance advanced in the cross appeal inasmuch as they are academic.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

866

CA 11-01457

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

NANCY A. EATON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD M. EATON, DEFENDANT-APPELLANT.

EVANS & FOX LLP, ROCHESTER (JARED P. HIRT OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Cattaraugus County (Larry M. Himelein, A.J.), entered May 5, 2011. The order committed defendant to the Cattaraugus County Jail for 30 days for contempt of court.

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

Memorandum: After plaintiff commenced this action for divorce, the parties entered into a stipulated settlement (settlement agreement), the terms of which were placed on the record in open court on April 22, 2005. Pursuant to the terms of the settlement agreement, plaintiff was to retain two pieces of real property, and defendant had 30 days in which to execute deeds transferring those properties to plaintiff. Defendant failed to do so, and plaintiff moved by order to show cause to have defendant, inter alia, sign the transfer documents. At the July 15, 2005 appearance on that motion, defendant stated that he was not prepared to execute the transfer documents inasmuch as he believed that the property transfer would be illegal, and he therefore needed "input" from his accountant before taking any such action. Supreme Court found defendant "in contempt of the order" of April 22, 2005 and committed him to the Cattaraugus County Jail for 30 days. We now reverse.

The court issued a written order of commitment on July 15, 2005, but it was not filed at that time. Defendant therefore attempted to appeal from a transcript of the July 15, 2005 proceedings. We dismissed that appeal pursuant to CPLR 5512 (a), and we noted that defendant could "obtain an order of commitment or an order implementing the court's contempt finding and sentence and appeal from such order" (*Eaton v Eaton*, 46 AD3d 1432, 1432). The written order of commitment was finally filed on May 5, 2011.

We agree with defendant that the court erred in finding him "in contempt of the order" of April 22, 2005 because there was no such

order in effect on July 15, 2005, when the court found defendant in contempt. The judgment of divorce incorporating the April 22, 2005 settlement agreement was not signed until August 1, 2005 and was not entered until August 11, 2005. Therefore, on July 15, 2005, defendant was not in violation of any lawful mandate of the court and could not be found in criminal contempt (*see* Judiciary Law § 750 [A] [3], [4]) or civil contempt (*see* § 753 [A] [3]; *see generally McCain v Dinkins*, 84 NY2d 216, 226; *Matter of McCormick v Axelrod*, 59 NY2d 574, 583, *order amended* 60 NY2d 652).

Based on our resolution of this issue, we do not address defendant's remaining contentions.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

867

CA 12-00446

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

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

V ORDER

FRISCO MARKETING OF NY LLC, DOING BUSINESS AS SMARTBUY AND SMARTBUY COMPUTERS AND ELECTRONICS, ET AL., DEFENDANTS,
AND WILLIAM COLLINS, INDIVIDUALLY AND AS AN OFFICER AND/OR DIRECTOR OF ROME FINANCE CO., INC., ROME FINANCE CO. (GA), LLC AND BRITLEE, INC., DOING BUSINESS AS MILITARY ZONE AND SMARTBUY, DEFENDANT-RESPONDENT.

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

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (STEPHEN W. GEBO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), dated May 6, 2011. The order, insofar as appealed from, granted the motion of defendant William Collins to dismiss the complaint and dismissed the complaint against him.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied and the complaint is reinstated against defendant William Collins, individually and in his corporate capacity (*see People v Frisco Mktg. of NY LLC*, 93 AD3d 1352*).*

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

868

CA 12-00435

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

TOWN OF AMHERST,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

ROCKINGHAM ESTATES, LLC,
DEFENDANT-RESPONDENT-APPELLANT,
ET AL., DEFENDANTS.

LAW OFFICE OF J. MATTHEW PLUNKETT, AMHERST (J. MATTHEW PLUNKETT OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (HUGH C. CARLIN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered May 10, 2011. The order denied the motion of plaintiff for summary judgment and the cross motion of defendant Rockingham Estates, LLC for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of plaintiff in part and granting judgment in favor of plaintiff as follows:

> It is ADJUDGED and DECLARED that the final plat as filed in the Erie County Clerk's Office is null and void

and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, a judgment declaring that the final plat filed by Rockingham Estates, LLC (defendant) in the Erie County Clerk's Office is null and void. Plaintiff contends on its appeal that Supreme Court erred in denying its motion for summary judgment on the complaint, and defendant contends on its cross appeal that the court erred in denying its cross motion for summary judgment dismissing the complaint. We agree with plaintiff that the court erred in denying that part of its motion seeking a declaration that defendant's final plat is null and void, and we therefore modify the order accordingly. Plaintiff established, and defendant did not dispute, that the preliminary plat submitted by defendant and approved by the Town of Amherst Planning Board (Planning Board) included a public sanitary sewer easement. The final plat, however, described the sewer easement as private, rather than public. Town Law § 276 (4) (b) and (d) define a preliminary and final plat, as

do the pertinent provisions of the Town of Amherst Subdivision Regulations ([Regulations]; *see* Regulations former part II, §§ 1-16.5, 1-16.6). Those definitions support plaintiff's contention that a final plat should differ from the preliminary plat, if at all, only by any modifications that were required by the Planning Board at the time of approval of the preliminary plat. Indeed, " 'a planning board may not modify a preliminary plat and then disapprove of the layout of a final plat that conforms to the modifications prescribed by the board' and 'absent new information, a subsequent modification or rejection of a preliminarily approved subdivision layout is an arbitrary and capricious act subject to invalidation' " (*Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven*, 78 NY2d 608, 612, quoting *Matter of Sun Beach Real Estate Dev. Corp. v Anderson*, 98 AD2d 367, 373, *affd* 62 NY2d 965). In addition, former part III, section 5-1 of the Regulations provides that "[t]he final plat shall conform to the layout shown on the approved preliminary plat plus any recommendations made by the Planning Board." That was not the case here because the material submitted with the preliminary plat depicted a public easement, but the final plat depicted a private easement despite the absence of any Planning Board requirement for such a modification. We therefore agree with plaintiff that the Planning Board may rescind its approval of the final plat, which was approved in error (*see Matter of Reiss v Keator*, 150 AD2d 939, 941-942; *see generally Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 281-282, *rearg denied* 71 NY2d 995, *cert denied* 488 US 801).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

869.1

CA 12-00055

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

GENESEE/WYOMING YMCA, PLAINTIFF,

V MEMORANDUM AND ORDER

BOVIS LEND LEASE LMB, INC., DEFENDANT.

BOVIS LEND LEASE LMB, INC., THIRD-PARTY PLAINTIFF-RESPONDENT,

V

WHITNEY EAST, INC., THIRD-PARTY DEFENDANT, AND THOMAS ASSOCIATES ARCHITECTS & ENGINEERS, P.C., THIRD-PARTY DEFENDANT-APPELLANT. (APPEAL NO. 1.)

SUGARMAN LAW FIRM, LLP, SYRACUSE (DAVID C. BRUFFETT, JR., OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JAMES P. YOUNGS OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered November 17, 2011. The order, insofar as appealed from, denied that part of the motion of third-party defendant Thomas Associates Architects & Engineers, P.C. seeking to dismiss the fourth cause of action of third-party plaintiff's complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, that part of the motion of third-party defendant Thomas Associates Architects & Engineers, P.C. to dismiss the fourth cause of action in the third-party complaint is granted and the third-party complaint is dismissed in its entirety against it.

Memorandum: Plaintiff, Genesee/Wyoming YMCA (YMCA), commenced an action seeking damages for breach of contract and unjust enrichment against defendant-third-party plaintiff, Bovis Lend Lease LMB, Inc. (Bovis). Bovis in turn commenced a third-party action seeking contribution and common-law indemnification from third-party defendants, Thomas Associates Architects & Engineers, P.C. (Thomas) and Whitney East, Inc. (Whitney). In appeal No. 1, Thomas appeals from an order insofar as it denied that part of Thomas's motion seeking dismissal of the indemnification cause of action against it in

the third-party complaint. In appeal No. 2, Bovis appeals from an order denying its motion for summary judgment dismissing the complaint in the main action.

In 1999 the YMCA decided to construct a wellness facility, which included an indoor swimming pool, at its Wyoming County location (project). The YMCA entered into an agreement with Bovis calling for Bovis to oversee the project (hereafter, Agreement). The YMCA also hired Thomas as the architect and Whitney as the general contractor for the project. As relevant, Thomas designed a "standing seam roof" with a "flat (or near flat) pitch" and a "taped insulation system" using "fiberglass batt insulation" above the swimming pool (collectively, proposed design). In the spring of 2001, before construction commenced, Whitney questioned the proposed design. Bovis allegedly reviewed the proposed design and Thomas's selection of materials for the construction thereof and recommended that the YMCA move forward with the project as designed and with the materials selected. The project was completed during 2002. In January 2003, it was discovered that the roof and insulation system were defectively designed and that the materials used were improper or of inferior quality.

After expending significant funds to repair and eventually replace the roof and insulation system, the YMCA commenced an action against Bovis, alleging that, pursuant to the Agreement, Bovis "agreed to review and approve design, constructability and materials used to construct the roof and insulation systems." The YMCA further alleged that Bovis breached its contractural obligations to the YMCA by "approving" the defective proposed design and the inferior or improper materials for the construction thereof. The YMCA also alleged that Bovis was unjustly enriched inasmuch as the YMCA compensated Bovis in accordance with the Agreement even though Bovis did not "fully and effectively provide all of the services" set forth therein. Bovis then commenced a third-party action against Whitney and Thomas. As relevant, Bovis's fourth cause of action sought common-law indemnification from Thomas, alleging that, if Bovis is held liable to the YMCA in the main action, Thomas is in turn liable to Bovis based on Thomas's "affirmative action and primary negligence . . . without any active or primary negligence or active participation" by Bovis.

By the order in appeal No. 1, the court denied that part of Thomas's motion seeking dismissal of the fourth cause of action in the third-party complaint and otherwise granted Thomas's motion. Preliminarily, we note that Thomas's motion to dismiss was based solely on CPLR 3211 (a) (7), and we therefore must "accept the facts as alleged in the [third-party] complaint as true, accord [Bovis] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . '[T]he criterion is whether [Bovis] has a cause of action, not whether [it] has stated one' " (*Leon v Martinez*, 84 NY2d 83, 87-88; *see Burton v Matteliano*, 81 AD3d 1272, 1274, *lv denied* 17 NY3d 703). Applying that standard of review, we conclude that the court should have granted Thomas's motion in its entirety.

Indemnification is "[t]he right of one party to shift the entire loss to another" and "may be based upon an express contract or an implied obligation" (*Bellevue S. Assoc. v HRH Constr. Corp.*, 78 NY2d 282, 296, *rearg denied* 78 NY2d 1008). "The principle of common-law, or implied indemnification, permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party" (*17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80; *see D'Ambrosio v City of New York*, 55 NY2d 454, 460-461; *McDermott v City of New York*, 50 NY2d 211, 217, *rearg denied* 50 NY2d 1059). " 'Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine' " (*Great Am. Ins. Co. v Canandaigua Natl. Bank & Trust Co.*, 23 AD3d 1025, 1028, *lv dismissed* 7 NY3d 741).

Here, the liability of Bovis in the main action if any, is not vicarious or secondary, i.e., based solely on Thomas's breach of its obligations to the YMCA, but it is based on Bovis's alleged "failure to perform its own contractural obligations" pursuant to the Agreement (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 146 AD2d 190, 199, *lv denied* 75 NY2d 702). Thus, even viewing the allegations of the third-party complaint as true, we conclude that Bovis failed to state a cause of action for common-law indemnification against Thomas (*see Westbank Contr., Inc. v Rondout Val. Cent. School Dist.*, 46 AD3d 1187, 1189-1190; *Carter v Farmington Sportservice*, 233 AD2d 840, 840; *see also Great Am. Ins. Co.*, 23 AD3d at 1028; *Board of Educ. of Hudson City School Dist.*, 146 AD2d at 199-200).

We conclude in appeal No. 2 that the court erred in denying Bovis's motion in its entirety, and instead should have granted the motion in part. We reject Bovis's contention that the court erred in failing to dismiss the complaint as time-barred. As a general rule, a breach of contract action for defective construction and design accrues upon completion of performance, i.e., the completion of the actual physical work (*see City School Dist. of City of Newburgh v Stubbins & Assoc.*, 85 NY2d 535, 538; *Cabrini Med. Ctr. v Desina*, 64 NY2d 1059, 1061; *Phillips Constr. Co. v City of New York*, 61 NY2d 949, 951; *State of New York v Lundin*, 60 NY2d 987, 989). Bovis, however, failed to establish its entitlement to judgment dismissing the complaint as time-barred as a matter of law because there are issues of fact as to when construction of the project was completed and when Bovis satisfied its obligations under the Agreement (*see Caleb v Sevenson Envtl. Servs., Inc.*, 19 AD3d 1090, 1091; *City of Rochester v Holmsten Ice Rinks*, 155 AD2d 939, 939; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Contrary to Bovis's further contention, we conclude that the court properly determined that it is premature to grant Bovis's motion for summary judgment dismissing the YMCA's first cause of action, for breach of contract, because discovery has not been completed, including depositions concerning Bovis's performance of its

obligations under the Agreement (*see* CPLR 3212 [f]; *Coniber v Center Point Transfer Sta., Inc.*, 82 AD3d 1629, 1629; *Syracuse Univ. v Games 2002, LLC*, 71 AD3d 1531, 1531-1532). We agree with Bovis, however, that the court should have granted its motion insofar as it sought summary judgment dismissing the YMCA's second cause of action, for unjust enrichment. Recovery for unjust enrichment is barred by the existence of a valid and enforceable contract between the YMCA and Bovis (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388; *Leo J. Roth Corp. v Trademark Dev. Co., Inc.*, 90 AD3d 1579, 1581, *lv denied* 92 AD3d 1269). We therefore modify the order in appeal No. 2 accordingly.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

869

CA 12-00146

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

GENESEE/WYOMING YMCA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BOVIS LEND LEASE LMB, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

HANCOCK ESTABROOK, LLP, SYRACUSE (JOHN G. POWERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAMON MOREY LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered January 3, 2012 in a breach of contract action. The order denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion of Bovis Lend Lease LMB, Inc. for summary judgment dismissing the second cause of action in the complaint and as modified the order is affirmed without costs.

Same Memorandum as in *Genesee/Wyoming YMCA v Bovis Lend Lease LMB, Inc.* ([appeal No. 1] ___ AD3d ___ [Sept. 28, 2012]).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

870

CA 12-00429

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

STEWART M. BRENNER AND BARBARA BRENNER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

WILLIAM J. DIXON, DEFENDANT-RESPONDENT.

ARTHUR J. RUMIZEN, WILLIAMSVILLE, FOR PLAINTIFFS-APPELLANTS.

BAXTER SMITH & SHAPIRO, P.C., WEST SENECA (ARTHUR SMITH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered September 8, 2011 in a personal injury action. The order granted the motion of defendant for a directed verdict and dismissed the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries that Stewart M. Brenner (plaintiff) sustained when the bicycle he was riding was struck by a vehicle operated by defendant. Prior to the accident, both plaintiff and defendant were traveling south on Youngs Road, a two-lane roadway in the Town of Amherst. Plaintiff was riding his bicycle on the right shoulder of the road, and defendant was operating his vehicle on the roadway behind and to the left of plaintiff. The accident occurred near the intersection of Youngs Road and Renaissance Drive, which is not controlled by a stop sign or other traffic-control device. While plaintiff was in the process of turning left onto Renaissance Drive, defendant's vehicle struck the rear tire of plaintiff's bicycle, causing plaintiff to be thrown from the bicycle. On appeal, plaintiffs contend that Supreme Court erred in granting defendant's motion to dismiss the complaint pursuant to CPLR 4401 at the close of plaintiffs' case. We agree.

It is well settled that "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' " (*Bennice v Randall*, 71 AD3d 1454, 1455, quoting *Szczerbiak v Pilat*, 90 NY2d 553, 556; *see Matter of Radisson Community Assn., Inc. v Long*, 28 AD3d 88, 90). In determining whether

to grant a motion for a directed verdict pursuant to CPLR 4401, "the trial 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" (*Szczerbiak*, 90 NY2d at 556; *see Radisson Community Assn., Inc.*, 28 AD3d at 90). Often, "the better practice is to submit the case to the jury which, in some instances, may obviate defendant's CPLR 4401 motion by returning a defendant's verdict" (*Rosario v City of New York*, 157 AD2d 467, 472; *see Jacino v Sugerman*, 10 AD3d 593, 594-595). Here, accepting plaintiff's testimony as true and affording plaintiffs every favorable inference that may reasonably be drawn from the facts presented at trial (*see Murphy v Kendig*, 295 AD2d 946, 947; *Nicholas v Reason*, 84 AD2d 915, 915), we conclude that there is a "rational process by which the [jury] could [have] base[d] a finding in favor of [plaintiffs]" (*Szczerbiak*, 90 NY2d at 556). In support of his motion for a directed verdict, defendant contended that the accident was caused solely by plaintiff's negligence in, inter alia, failing to signal the left turn or to yield the right-of-way to defendant. With a few exceptions that are not relevant here, "a person riding a bicycle on a roadway is entitled to all of the rights and bears all of the responsibilities of a driver of a motor vehicle" (*Palma v Sherman*, 55 AD3d 891, 891; *see* Vehicle and Traffic Law § 1231). Vehicle and Traffic Law § 1163 (a) requires vehicles to signal before turning at an intersection, and section 1237 specifies the signal to be used by bicyclists when making a left turn (*see* § 1237 [1]). Here, plaintiff admitted that he did not signal before making his left turn.

Nonetheless, we conclude that plaintiffs submitted sufficient proof of negligence on the part of defendant to survive a CPLR 4401 motion (*see generally Leahy v Kontos*, 112 AD2d 356, 357). Vehicle and Traffic Law § 1146 (a) provides that, "[n]otwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist . . . upon any roadway and shall give warning by sounding the horn when necessary." "In general, a motorist is required to keep a reasonably vigilant lookout for bicyclists" (*Palma*, 55 AD3d at 891).

Here, plaintiffs submitted photographs establishing that the portion of Youngs Road where the collision occurred is straight, with a wide paved shoulder, and plaintiff testified at trial that, prior to making his left turn, he looked behind him and saw defendant's vehicle "well down Youngs Road." Thus, a trier of fact could reasonably infer that defendant likewise should have been able to see plaintiff's bicycle at that time, given the straight nature of the roadway on which the accident occurred. Plaintiff also testified that he began his turn from the right shoulder of the roadway and had reached or nearly reached the double yellow center line dividing the north and south lanes when the left front corner of defendant's vehicle struck his rear bicycle tire. At about the same time that the collision occurred, plaintiff heard the horn of a vehicle. The fact that plaintiff had crossed the southbound lane from the shoulder before defendant collided with the rear wheel of plaintiff's bicycle suggests that defendant had time to observe plaintiff's movement and react thereto by, inter alia, sounding the horn of his vehicle, swerving, or

braking before impact. Plaintiff, however, testified that he did not hear the horn until the time of impact and did not hear the vehicle skidding. We thus conclude that there is a "rational process by which the [jury] could [have found]" that defendant was negligent (*Szczerbiak*, 90 NY2d at 556), i.e., that defendant violated his "statutory duty to use due care to avoid colliding with [plaintiff] on the roadway . . ., as well as [his] common-law duty to see that which he should have seen through the proper use of his senses" (*Barbieri v Vokoun*, 72 AD3d 853, 856).

We therefore reverse the order, deny defendant's motion, reinstate the complaint, and grant a new trial.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

871

CA 11-02538

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

IRIC BURTON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DR. ANDREW MATTELIANO, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

FRANK S. FALZONE, BUFFALO (KATIE HARROD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered September 2, 2011. The order granted the motion of defendant Andrew Matteliano, M.D., incorrectly sued as Dr. Andrew Matteliano, to dismiss the complaint and denied the cross motion of plaintiff for reargument and vacatur of an order entered June 29, 2011.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is affirmed without costs.

Memorandum: Contrary to plaintiff's contention, Supreme Court properly granted the motion of Andrew Matteliano, M.D., incorrectly sued as Dr. Andrew Matteliano (defendant), seeking dismissal of the action against him pursuant to CPLR 3126 (3). Plaintiff commenced this action against, inter alia, defendant contending that he improperly and without authorization disclosed plaintiff's medical records to plaintiff's employer, resulting in plaintiff's termination from employment. Defendant made a pre-answer motion to dismiss the complaint pursuant to CPLR 3211 (a) (7). Although the court granted that motion in its entirety, we reinstated the first cause of action on a prior appeal (*Burton v Matteliano*, 81 AD3d 1272, *lv denied* 71 NY3d 703). Defendant thereafter filed an answer and submitted numerous discovery demands. Plaintiff failed to respond to any of those demands, and defendant moved for an order precluding plaintiff from producing any evidence at the time of trial due to the willful failure to provide discovery responses.

In support of that motion and as required by 22 NYCRR 202.7 (a) and (c), defendant's attorney outlined his good faith efforts to resolve the discovery dispute, which included contacting plaintiff's

attorney numerous times to request compliance with the demands and affording plaintiff's attorney an additional two weeks to comply with the demands. It was only after plaintiff's attorney failed to comply with the demands during that two-week period that defendant's attorney made the motion for preclusion. Although neither plaintiff nor his attorney responded to the motion for preclusion or appeared at oral argument of the motion, plaintiff's attorney responded to some of the demands. He did not, however, include the requested medical records, authorizations to obtain medical records, names of witnesses or authorizations requested in the demand for collateral sources. The court thereafter granted defendant's motion for preclusion "unless within thirty . . . days following service of this Order, [p]laintiff responds to the defendant's outstanding discovery demands."

On the same day that the court issued the preclusion order, defendant's attorney mailed to plaintiff's attorney a copy of that order and a letter delineating all of the deficiencies in the discovery responses. Defendant's attorney requested "full and complete responses to the . . . demands within thirty days . . . as directed" in the preclusion order. When plaintiff's attorney failed to respond, defendant filed the instant motion seeking dismissal of the action against him pursuant to CPLR 3126 (3). Plaintiff cross-moved for leave to reargue the motion for preclusion and sought vacatur of the underlying preclusion order.

As noted above, we conclude that the court properly granted defendant's motion. "[T]he conditional order [of preclusion] was self-executing and [plaintiff's] failure to produce [the requested] items on or before the date certain rendered it absolute" (*Wilson v Galicia Contr. & Restoration Corp.*, 10 NY3d 827, 830 [internal quotation marks omitted]; *see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 78; *Northway Eng'g v Felix Indus.*, 77 NY2d 332, 334; *Foster v Dealmaker*, SLS, LLC, 63 AD3d 1640, 1641, *lv denied* 15 NY3d 702). Contrary to plaintiff's contention, defendant was not required to comply with 22 NYCRR 202.7 (a) or (c) on the motion to dismiss the action inasmuch as he had already established his good faith attempts to resolve the discovery dispute in the initial motion for preclusion and, as noted above, the preclusion order became absolute upon plaintiff's failure to comply with its terms.

Plaintiff further contends that the court improperly denied his cross motion for leave to reargue the initial motion for preclusion and vacatur of the preclusion order. First, we note that no appeal lies from an order denying leave to reargue, and we therefore dismiss the appeal from the order insofar as it denied leave to reargue (*see generally Lindsay v Funtime, Inc.*, 184 AD2d 1036, 1036; *Empire Ins. Co. v Food City*, 167 AD2d 983, 984). Second, with respect to that part of the cross motion seeking vacatur of the preclusion order, plaintiff failed to establish any basis for that relief. The Court of Appeals has "made [it] clear that to obtain relief from the dictates of a conditional order that will preclude a party from submitting evidence in support of a claim or defense, the defaulting party must demonstrate (1) a reasonable excuse for the failure to produce the requested items and (2) the existence of a meritorious claim or

defense" (*Gibbs*, 16 NY3d at 80). Here, plaintiff offered no excuse for his failure to provide the requested items and failed to establish the existence of a meritorious claim.

Because the preclusion order is in effect, plaintiff is precluded from presenting evidence sufficient to establish a prima facie case, and defendant is therefore entitled to dismissal of the action against him (*see Foster*, 63 AD3d at 1641).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

873

CA 11-01793

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

VIVIAN STERN, DOING BUSINESS AS THE
JEWELER, PLAINTIFF-APPELLANT,

V ORDER

CHARTER OAK FIRE INSURANCE COMPANY,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

JAMES STERN, DENVER, COLORADO, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROBINSON & COLE LLP, HARTFORD, CONNECTICUT (JEFFREY J. WHITE, OF THE CONNECTICUT BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered November 18, 2010. The order held that defendant Charter Oak Fire Insurance Company had breached the insurance contract, that the business failure of plaintiff was not proximately caused by the breach, and that plaintiff is entitled to money damages of $7,887.19, plus interest, and denied the motion of plaintiff to correct the record.

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

874

CA 12-00312

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

IN THE MATTER OF THOMAS DIETZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION OF ROCHESTER CITY SCHOOL DISTRICT, JEAN-CLAUDE BRIZARD, SUPERINTENDENT, ROCHESTER CITY SCHOOL DISTRICT, ROCHESTER CITY SCHOOL DISTRICT AND EMEDE OZUNA,
RESPONDENTS-RESPONDENTS.

RICHARD E. CASAGRANDE, LATHAM (JAMES D. BILIK OF COUNSEL), FOR PETITIONER-APPELLANT.

CHARLES G. JOHNSON, ROCHESTER (MICHAEL E. DAVIS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered April 19, 2011 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking reinstatement of his employment with respondent Rochester City School District (District). Supreme Court denied the petition, and we affirm.

Petitioner contends that, based on the counseling and other social work duties he performed as a "school instructor/transition counselor" in the District's Incarcerated Youth Program, he was entitled to seniority rights within the "special subject tenure area" (tenure area) of school social worker pursuant to the Rules of the Board of Regents (8 NYCRR 30-1.8 [b] [9]; *see* 8 NYCRR 30-1.1 *et seq.*). He further contends that, inasmuch as he was not the person with the least seniority within that tenure area at the time his position was abolished, the District violated Education Law § 2585 (3) in terminating his employment. We reject those contentions.

At the outset, we note that the relief requested in the petition is in the nature of mandamus to compel (*see Matter of Gallagher v Board of Educ. for Buffalo City School Dist.*, 81 AD3d 1408, 1409;

Matter of Dorsey v Coleman, 40 AD3d 1187, 1187-1188; *Matter of Curtis v Board of Educ. of Lafayette Cent. School Dist.*, 107 AD2d 445, 446-447; *see generally Matter of De Milio v Borghard*, 55 NY2d 216, 220), and the applicable standard of review is thus whether petitioner established "a 'clear legal right' to the relief requested" (*Matter of Council of City of N.Y. v Bloomberg*, 6 NY3d 380, 388; *see Matter of Henriquez v New York State Dept. of Correctional Servs.*, 61 AD3d 1191, 1192). Here, the collective bargaining agreement (CBA) between the District and the union representing petitioner provided that layoffs of "school instructors" would be affected within the four separate categories of school instructors identified in the CBA rather than within tenure areas; that separate seniority lists for purposes of layoffs are maintained for school instructors; and that, "[i]n the event that positions are abolished, school instructors shall not have rights to displace teachers in regular school programs having less seniority, nor shall teachers have rights to displace school instructors having less seniority." We conclude that, by accepting employment as a school instructor and entering into the CBA as a result of his membership in the union, petitioner waived any right to be credited for seniority in the tenure area of school social worker (*see Antinore v State of New York*, 49 AD2d 6, 10-11, *affd* 40 NY2d 921; *Matter of Wiener v Board of Educ. of E. Ramapo Cent. School Dist.*, 90 AD2d 832, 833, *appeal dismissed* 58 NY2d 1115; *cf. Board of Educ., Lakeland Cent. School Dist. of Shrub Oak v Lakeland Fedn. of Teachers, Local 1760, Am. Fedn. of Teachers, AFL-CIO*, 51 AD2d 1033, 1034). Thus, the court properly denied the petition.

In view of our determination, we do not address respondents' contention with respect to an alternative ground for affirmance.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

876

KA 09-00188

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACK Z. SWEET, DEFENDANT-APPELLANT.

KATHLEEN E. CASEY, BARKER, FOR DEFENDANT-APPELLANT.

JACK Z. SWEET, DEFENDANT-APPELLANT PRO SE.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered October 31, 2008. The appeal was held by this Court by order entered December 30, 2010, decision was reserved and the matter was remitted to Supreme Court, Niagara County, for further proceedings (79 AD3d 1772). The proceedings were held and completed (Sara S. Sperrazza, A.J.).

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

Memorandum: We previously held this case, reserved decision and remitted the matter to Supreme Court for a hearing on defendant's CPL 440.10 motion to determine whether the People established " 'sufficient excludable time' " based upon our conclusion that defendant made a prima facie showing that the People failed to comply with CPL 30.30 (1) (a) (*People v Sweet*, 79 AD3d 1772, 1772). The evidence adduced at the hearing on remittal establishes that the criminal action was commenced on April 9, 2002 by the filing of the indictment in Niagara County Court, and that the People declared their readiness for trial on June 17, 2002, well within the six-month limit provided in CPL 30.30 (1) (a). We therefore reject defendant's contention that he was denied effective assistance of counsel based upon defense counsel's failure to seek dismissal of the indictment on the ground that defendant was denied his right to a speedy trial (*see generally People v Manning*, 52 AD3d 1295, 1295-1296, *lv denied* 14 NY3d 803).

We have reviewed defendant's remaining contentions in his main and pro se supplemental briefs and conclude that none requires

modification or reversal of the order denying defendant’s motion.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

877

KA 10-01262

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SALEH ABDULLA, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (John L. Michalski, A.J.), rendered June 10, 2009. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [3]). As defendant correctly contends, defense counsel erred in informing him that, despite his guilty plea, he reserved the right to argue on appeal that County Court erred in denying his pro se motion to dismiss the indictment based on the alleged violation of his statutory right to a speedy trial (*see People v Hansen*, 95 NY2d 227, 231 n 3). We conclude, however, that defendant's contention that he was thereby denied effective assistance of counsel "does not survive his guilty plea because '[t]here is no showing that the plea bargaining process was infected by any allegedly ineffective assistance or that defendant entered the plea because of his attorney[']s allegedly poor performance' " (*People v LaBar*, 16 AD3d 1084, 1085, *lv denied* 5 NY3d 764). The record establishes that defendant admitted at the plea and at sentencing that he pleaded guilty in order to avoid a lengthy prison sentence. Indeed, defendant was indicted on three class B violent felony offenses and thus faced the possibility of consecutive terms of imprisonment ranging from 5 to 25 years (*see* §§ 70.02 [3] [a]; 70.25 [1]). Defendant pleaded guilty to a class D violent felony offense and was sentenced to a determinate term of imprisonment of two years and a two-year period of postrelease supervision. In any event, we note that the record establishes that

defendant’s statutory speedy trial rights were not violated.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

878

KA 08-02526

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MERLIN G. SAGE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Elma A. Bellini, J.), rendered September 15, 2008. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that County Court erred in refusing to submit to the jury the issue whether a prosecution witness was an accomplice. We note at the outset that we do not agree with the People that defendant failed to preserve his contention for our review. We also note our agreement with defendant that, because the court did not refuse to submit to the jury the issue whether a prosecution witness was an accomplice on the basis that there was no evidence that the witness received or expected to receive a benefit from his testimony, we are barred by CPL 470.15 (1) from affirming the judgment on that ground (*see People v Concepcion*, 17 NY3d 192, 194-195).

Nevertheless, we conclude that defendant's contention lacks merit. The term accomplice "means a witness in a criminal action who, according to evidence adduced in such action, may reasonably be considered to have participated in . . . [t]he offense charged[] or . . . [a]n offense based upon the same or some of the same facts or conduct [that] constitute the offense charged" (CPL 60.22 [2] [a], [b]). " 'If the undisputed evidence establishes that a witness is an accomplice, the jury must be so instructed but, if different inferences may reasonably be drawn from the proof regarding complicity, according to the statutory definition, the question should be left to the jury for its determination' " (*People v Kaminski*, 90 AD3d 1692, 1692, quoting *People v Basch*, 36 NY2d 154, 157). The court

properly concluded herein "that the witness in question may not reasonably be considered to have participated in the offenses charged or offenses based upon the same or some of the same facts or conduct that constitute the offenses charged[, and thus that] . . . there was an insufficient basis upon which to submit [the witness's] accomplice status to the jury" (*People v McPherson*, 70 AD3d 1353, 1354, *lv denied* 14 NY3d 890 [internal quotation marks omitted]; *see People v Jones*, 73 NY2d 902, 903, *rearg denied* 74 NY2d 651; *People v Tucker*, 72 NY2d 849, 849-850). We note in any event that there was overwhelming evidence corroborating the testimony of that witness (*see People v Hill*, 236 AD2d 799, 800, *lv denied* 89 NY2d 1036; *People v Kimbrough*, 155 AD2d 935, 935, *lv denied* 75 NY2d 814; *see also Kaminski*, 90 AD3d at 1692; *see generally People v Reome*, 15 NY3d 188, 191-192).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

881

KA 10-02116

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONNIE DIGGS, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Supreme Court, Monroe County (David D. Egan, J.), rendered September 2, 2010. Defendant was resentenced upon his conviction of robbery in the first degree (four counts), robbery in the second degree (three counts), assault in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a resentence pursuant to which Supreme Court added various terms of postrelease supervision (PRS) to the sentence previously imposed on his conviction, following a jury trial, of four counts of robbery in the first degree (Penal Law § 160.15 [2], [4]), three counts of robbery in the second degree (§ 160.10 [1], [2] [a]), and one count each of assault in the second degree (§ 120.05 [2]), and criminal possession of a weapon in the second degree (§ 265.03 [former (2)]). Defendant contends that the over seven-year gap between his original sentencing and his resentencing divested the court of jurisdiction to resentence him pursuant to CPL 380.30 (1) (*see People v Williams*, 14 NY3d 198, 213). Defendant failed to preserve that contention for our review (*see People v Dissottle*, 68 AD3d 1542, 1543, *lv denied* 14 NY3d 799; *People v Cecere*, 39 AD3d 557, 558, *lv denied* 9 NY3d 873), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

882

KA 11-01496

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PETER J. MEHMEL, DEFENDANT-APPELLANT.

WAGNER & HART, LLP, OLEAN (JANINE C. FODOR OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Cattaraugus County Court (Larry M. Himelein, J.), rendered May 31, 2011. Defendant was resentenced upon his conviction of robbery in the second degree.

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

Memorandum: Defendant was convicted upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [2] [b]), and he appeals from a resentence imposing a period of postrelease supervision in addition to the determinate term of incarceration originally imposed. The record establishes that, although County Court had advised defendant at the time of the plea that the sentence would include a five-year period of postrelease supervision, the court neglected to impose the period of postrelease supervision at the time of sentencing. As defendant correctly concedes, there is no double jeopardy violation with respect to the resentence because he is still serving the sentence originally imposed (*see People v Lingle*, 16 NY3d 621, 630-631; *cf. People v Williams*, 14 NY3d 198, 217-220, *cert denied* ___ US ___, 131 S Ct 125). Defendant contends that the five-year period of postrelease supervision was illegal because there was an unreasonable delay between the date of the original sentence and that of the resentence, in violation of CPL 380.30 (1) (*see Williams*, 14 NY3d at 213). We conclude, however, that in resentencing defendant the court simply corrected the error it made at the time of the original sentence and thus that the resentence was proper (*see People v Sparber*, 10 NY3d 457, 469; *see generally People v Howard*, 96 AD3d 1691, 1692).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

883

CAF 12-00272

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

IN THE MATTER OF JOSE CEDENO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BONNIE KNOWLTON, RESPONDENT-RESPONDENT.

THOMAS N. MARTIN, ROCHESTER, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered April 25, 2011 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of petitioner to the order of the Support Magistrate.

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

Memorandum: Contrary to petitioner father's contention, Family Court properly denied his objections to the Support Magistrate's order that, after a hearing, determined that the parties' child was not emancipated and continued the father's child support obligation until the child turned 21 years of age. "A parent is obligated to support his or her child until the age of 21 (*see* Family Ct Act § 413) unless the child becomes emancipated, which occurs once the child becomes economically independent through employment and is self-supporting" (*Matter of Smith v Smith*, 85 AD3d 1188, 1188; *see Matter of Drumm v Drumm*, 88 AD3d 1110, 1112-1113; *Matter of Burr v Fellner*, 73 AD3d 1041, 1041-1042; *Matter of Thomas B. v Lydia D.*, 69 AD3d 24, 28). Here, although the parties' child worked on a full-time basis and filed individual income tax returns, the fact that respondent mother continued to pay for the child's food, gas, and cell phone demonstrates that the child was not economically independent and self-supporting (*see Drumm*, 88 AD3d at 1113; *Smith*, 85 AD3d at 1188-1189; *Thomas B.*, 69 AD3d at 31; *cf. Matter of Lowe v Lowe*, 67 AD3d 682, 683; *Matter of Fortunato v Fortunato*, 242 AD2d 720, 721).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

885

CAF 11-01184

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

IN THE MATTER OF BRADLEY M.M.

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

MICHAEL M., RESPONDENT-APPELLANT,
AND CINDY M., RESPONDENT.

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

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

A.J. BOSMAN, ATTORNEY FOR THE CHILD, ROME, FOR BRADLEY M.M.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered April 27, 2011 in a proceeding pursuant to Family Court Act article 10. The order, among other things, awarded custody of the subject child to Mr. and Mrs. Raymond M.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Oneida County, for further proceedings on the petition.

Memorandum: Respondent father appeals from an order of disposition, which brings up for review the order of fact-finding wherein Family Court found that the father neglected the subject child (*see* CPLR 5501 [a] [1]; *Matter of Chase F. [Michael G.]*, 91 AD3d 1057, 1058, *lv denied* 19 NY3d 801). We note that the order of fact-finding recites that it was entered upon the father's default, and it is well settled that no appeal lies from an order entered on default (*see Matter of Williams v Lewis*, 269 AD2d 841, 841). Nevertheless, we agree with the father that the court erred in entering the fact-finding order on his alleged default (*see id.*). Here, the father's failure to appear at the scheduled court appearance did not constitute a default inasmuch as the father's attorney advised the court that he was authorized to proceed in the father's absence, and the father's attorney objected to the entry of a default order (*see Matter of Shemeco D.*, 265 AD2d 860, 860; *Matter of Cassandra M.*, 260 AD2d 961, 962-963). On the merits, we conclude that the court erred in making a finding of neglect without first conducting a fact-finding hearing. "In the absence of a fact-finding hearing, there was no factual support for the finding that the [subject] child[ ] [was] neglected"

(*Shemeco D.*, 265 AD2d at 860). We therefore reverse the order and remit the matter to Family Court for further proceedings on the petition (*see Williams*, 269 AD2d at 841).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

887

CA 11-02196

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

JANET R. PELCHER, EXECUTOR OF THE ESTATE OF
DIANE C. CZEBATOL, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

J. MICHAEL CZEBATOL, DEFENDANT-APPELLANT.

MERKEL AND MERKEL, ROCHESTER (DAVID A. MERKEL OF COUNSEL), FOR DEFENDANT-APPELLANT.

GALLO & IACOVANGELO, LLP, ROCHESTER (SEEMA ALI RIZZO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Joanne M. Winslow, J.), entered February 8, 2011 in a divorce action. The order and judgment granted the motion of decedent for a determination of separate property.

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

Memorandum: Diane C. Czebatol (decedent) died during the pendency of this action for divorce commenced by her, whereupon her mother, as executor of her estate, was substituted as the plaintiff. Prior to her death, decedent moved for an order determining that the amount of $149,500 used for the purchase of the marital residence was her separate property, and that she was entitled to a credit in that amount from the proceeds of the sale of the marital residence. Supreme Court properly granted the motion. "It is well settled that a spouse is entitled to a credit for his or her contribution of separate property toward the purchase of the marital residence, including any contributions that are directly traceable to separate property" (*Juhasz v Juhasz*, 59 AD3d 1023, 1024, *lv dismissed* 12 NY3d 848 [internal citations omitted]), even where, as here, the parties held joint title to the marital residence. Here, decedent established in support of her motion that plaintiff transferred approximately $150,000 in mutual funds to decedent's mutual fund account and that decedent thereafter withdrew funds from that account and deposited the funds into her individual checking account, from which she paid $149,500 toward the purchase of the marital residence (*cf. Fields v Fields*, 15 NY3d 158, 165-167, *rearg denied* 15 NY3d 819; *Baker v Baker*, 32 AD3d 1275, 1275-1276). Contrary to defendant's contention, the court properly determined that, although the deed to the marital

residence establishes that decedent and defendant owned the property as tenants by the entirety, decedent did not contribute her separate property toward the purchase of the marital residence as a gift to defendant.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

888

CA 12-00499

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

FREDERICK W. ZABEL, PLAINTIFF-RESPONDENT,

V ORDER

M&T BANK, DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (JOSHUA FEINSTEIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHIACCHIA & FLEMING, LLP, HAMBURG (LISA A. POCH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered October 28, 2011. The order granted the motion of plaintiff to compel the production of documents.

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

890

CA 12-00304

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

J.N.K. MACHINE CORPORATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TBW, LTD., WOOLSCHLAGER INC., AND BERNARD C. WOOLSCHLAGER, DEFENDANTS-APPELLANTS.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (RICHARD F. GIOIA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered October 25, 2011. The order denied the motion of defendants for leave to serve an amended answer and counterclaim.

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

Memorandum: Supreme Court properly denied defendants' motion seeking leave to amend their answer to include additional allegations in their counterclaim for the breach of an agreement allowing defendants to use plaintiff's inventory computer program. The court previously issued an order granting in part an amended motion by plaintiff for partial summary judgment, and we modified the order by denying the amended motion "on the issue concerning defendants' use of the computer inventory program owned by plaintiff," determining that there was a triable issue of fact whether the parties' written contract was supplemented by an oral agreement concerning defendants' use of the computer inventory program (*J.N.K. Mach. Corp. v TBW, Ltd.*, 81 AD3d 1438, 1440). "Although leave to amend should be freely granted, it is properly denied where the proposed amendment is lacking in merit" (*Manufacturers & Traders Trust Co. v Reliance Ins. Co.*, 8 AD3d 1000, 1001; *see Christiano v Chiarenza*, 1 AD3d 1039, 1040). Here, the proposed amendment improperly sought relief that was inconsistent with this Court's decision in the prior appeal. "Our prior decision in [a] case is the law of the case until modified or reversed by a higher court, and the trial court is bound by our decision" (*Senf v Staubitz*, 11 AD3d 997, 997 [internal quotation marks

omitted]).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

891

CA 07-00015

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

WILLIAM J. BRONGO, AS ADMINISTRATOR OF THE ESTATE OF LOUIS M. BACCHETTA, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF GREECE, DEFENDANT-APPELLANT.

GALLO & IACOVANGELO, LLP, ROCHESTER (AMANDA INSALACO OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRENNA, BRENNA & BOYCE, PLLC, ROCHESTER (WILLIAM J. BRONGO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered December 4, 2006 in a personal injury action. The order granted decedent's motion to set aside the jury verdict in favor of defendant and against decedent and granted a directed verdict in favor of decedent and against defendant on the issue of proximate cause.

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

Memorandum: Louis M. Bacchetta (decedent) commenced this action seeking damages for injuries he sustained while riding his motorcycle. The administrator of his estate was substituted as the plaintiff after this appeal was perfected. According to decedent, he hit the curb of a "bump-out" in the road and was thrown from his motorcycle. Defendant appeals from an order that granted decedent's motion to set aside the jury verdict in favor of defendant and directed a verdict in favor of decedent on the issue of proximate cause. We reverse and reinstate the jury verdict. Preliminarily, we note that Supreme Court erred in directing a verdict in favor of decedent on the issue of proximate cause upon setting aside the verdict as against the weight of the evidence. The appropriate remedy where a verdict is against the weight of the evidence is a new trial, not a directed verdict (*see Levin v Carbone*, 277 AD2d 951, 951).

On the merits, we cannot agree with the court that the jury verdict was against the weight of the evidence. The jury found that defendant was negligent, but that its negligence was not a proximate cause of the accident. Such a finding is inconsistent and against the

weight of the evidence only when the issues are "so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" (*Rubin v Pecoraro*, 141 AD2d 525, 527; *see Cona v Dwyer*, 292 AD2d 562, 563). We conclude that the verdict with respect to the findings of negligence and proximate cause can be reconciled, i.e., those findings are not inconsistent with a reasonable view of the evidence, and defendant is entitled to the presumption that the jury adopted that view (*see Mascia v Olivia*, 299 AD2d 883, 883). At trial, the evidence established that decedent had made numerous pretrial statements describing the accident, including a statement in which he admitted to a police officer at the scene of the accident that, prior to striking the curb of the bump-out in the road, he had misjudged the curve or lost control of his motorcycle while attempting to negotiate the curve. That statement varied from other pretrial statements in which he asserted that he had never seen the bump-out in the road. Affording due deference to the jury's role as factfinder, particularly with regard to questions of proximate cause, we conclude that the jury's findings should be left intact (*see DaBiere v Craig*, 284 AD2d 885, 885).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

892

CA 12-00396

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

W.J. CAMPERLINO CUSTOM HOMES, INC. AND W. JAMES CAMPERLINO, PLAINTIFFS-APPELLANTS,

V ORDER

CHICAGO TITLE INSURANCE COMPANY, DEFENDANT-RESPONDENT.

LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL J. LONGSTREET OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (JOHN A. MANCUSO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered August 11, 2011. The judgment, among other things, granted defendant's motion for summary judgment, dismissed the complaint, declared that defendant has no duty to defend and indemnify plaintiffs and denied the cross motion of plaintiffs for partial summary judgment.

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

893

CA 12-00557

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

MARY ANNA WATKINS AND DONYHAL WATKINS,
PLAINTIFFS-RESPONDENTS,

V ORDER

MANSELL REAL ESTATE GROUP, LLP,
DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

WALSH, ROBERTS & GRACE, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE BALLOW LAW FIRM, P.C., BUFFALO (THOMAS R. ELLIOT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered September 2, 2011. The order denied the motion of defendant Mansell Real Estate Group, LLP for summary judgment.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on May 3, 2012,

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

902

KA 10-00693

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GUNTHER J. FLINN, DEFENDANT-APPELLANT.

MULDOON & GETZ, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (PATRICIA L. DZIUBA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered November 30, 2009. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree, intimidating a victim or witness in the first degree (two counts), assault in the second degree, obstructing governmental administration in the second degree, resisting arrest, harassment in the second degree and disorderly conduct.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant contends that he was denied his right to be present at all material stages of the trial, specifically, bench conferences involving defense counsel and potential jurors during the jury selection process. The right to be present during sidebar questioning of prospective jurors regarding matters of bias or prejudice may be waived, provided that the waiver is voluntary, knowing and intelligent (*see People v Lucious*, 269 AD2d 766, 767). Here, we conclude that defendant's failure to attend sidebar conferences after being fully informed of the right to do so constitutes a valid waiver of that right (*see People v Inskeep*, 272 AD2d 966, 966, *lv denied* 95 NY2d 866).

Defendant contends that County Court committed reversible error in refusing to charge as lesser included offenses the crime of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]) and the crime of assault in the second degree that requires only a reckless mental state (§ 120.05 [4]). We reject that contention because there is no reasonable view of the evidence to support a

finding that defendant committed those lesser offenses but not the greater offense of assault in the first degree (*see People v Van Norstrand*, 85 NY2d 131, 135). We note that, although at trial defendant contended that certain other lesser included offenses should be charged and he has summarized his requests with respect to those offenses in a table in his brief on appeal, his contention on appeal concerning lesser included offenses does not address those additional requests. We thus conclude that defendant has abandoned his contention with respect to those additional requests (*see generally People v Dombrowski*, 94 AD3d 1416, 1417, *lv denied* 19 NY3d 959). Defendant further contends that his conviction of attempted murder in the second degree and assault in the first and second degrees is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence with respect to those crimes. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), and according the benefit of every reasonable inference to the People (*see People v Ford*, 66 NY2d 428, 437), we conclude that the evidence is legally sufficient with respect to those crimes (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of those crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends in addition that he was unconstitutionally punished for exercising his right to a trial. It is well settled that a sentence imposed after trial "may be more severe than a promised sentence in connection with a plea agreement" (*People v Chapero*, 23 AD3d 492, 493, *lv denied* 6 NY3d 846). "The mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to [a] trial" (*People v Simon*, 180 AD2d 866, 867, *lv denied* 80 NY2d 838; *see People v Chappelle*, 14 AD3d 728, 729, *lv denied* 5 NY3d 786). Here, although defendant was sentenced following the trial to a greater term of imprisonment than that offered during plea negotiations, he did not raise his present contention at sentencing and thus has failed to preserve his contention for our review (*see People v Motzer*, 96 AD3d 1635, 1636). In any event, that contention lacks merit because there is no evidence in the record that the court was motivated by "retaliation or vindictiveness" in sentencing defendant following the trial (*People v Patterson*, 106 AD2d 520, 521). Defendant's sentence is not unduly harsh or severe. Finally, we have reviewed defendant's remaining contention and conclude that it does not require reversal or modification of the judgment.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

905

KA 10-02248

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT O'BRIEN, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (SUSAN C. AZZARELLI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered January 6, 2009. The judgment convicted defendant, upon his plea of guilty, of gang assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of gang assault in the first degree (Penal Law § 120.07). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). That valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *People v Hidalgo*, 91 NY2d 733, 737), including his contention that the sentence is unduly harsh and severe because it is directed to run consecutively to a prior undischarged term of incarceration (*cf. People v Springstead*, 57 AD3d 1397, 1397-1398, *lv denied* 12 NY3d 788).

Defendant further contends that County Court erred in imposing an enhanced sentence based upon his postplea conduct by directing that the term of incarceration for his gang assault conviction run consecutively with the prior undischarged term of incarceration. Although that contention survives defendant's valid waiver of the right to appeal (*see People v Dietz*, 66 AD3d 1400, 1400, *lv denied* 13 NY3d 906; *People v Ibrahim*, 48 AD3d 1095, 1095, *lv denied* 10 NY3d 864), defendant did not move to withdraw his plea and therefore failed to preserve his contention for our review. In any event, the record establishes that the court did not impose an enhanced sentence and thus defendant's contention lacks merit (*see Ibrahim*, 48 AD3d at 1095*; see also Dietz*, 66 AD3d at 1400). Indeed, the court advised defendant

at the plea proceeding that he should "expect" to receive and, "in all likelihood," would receive a consecutive sentence. Even assuming, arguendo, that the court enhanced defendant's sentence, we conclude that the record supports the court's determination that defendant's postplea conduct warranted the imposition of a consecutive sentence. Finally, we reject defendant's contention that the court was bound by the recommendation in the presentence report that defendant be sentenced to a concurrent term of incarceration (*see People v Mills*, 17 AD3d 712, 713, *lv denied* 5 NY3d 766; *People v LaMarche*, 253 AD2d 944, 944).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

908

CA 12-00480

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

MARK DMOCHOWSKI, PLAINTIFF-RESPONDENT,

V ORDER

PREFERRED MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT.

PREFERRED MUTUAL INSURANCE COMPANY,
PLAINTIFF-APPELLANT-RESPONDENT,

V

DAVID CLARK, MICHELLE CLARK,
DEFENDANTS-RESPONDENTS-APPELLANTS,
MARK DMOCHOWSKI AND ROBIN DMOCHOWSKI,
DEFENDANTS-RESPONDENTS.

BROWN & KELLY, LLP, BUFFALO (JOSEPH M. SCHNITTER OF COUNSEL), FOR DEFENDANT-APPELLANT AND PLAINTIFF-APPELLANT-RESPONDENT.

MYERS, QUINN & SCHWARTZ, LLP, WILLIAMSVILLE (JAMES I. MYERS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

THE LAW OFFICES OF WAYNE C. FELLE, P.C., WILLIAMSVILLE (WAYNE C. FELLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT AND DEFENDANTS-RESPONDENTS.

Appeal and cross appeal from a judgment of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered September 1, 2011. The judgment, insofar as appealed from, granted that part of the motion of defendants David Clark and Michelle Clark for summary judgment declaring that defendant-plaintiff Preferred Mutual Insurance Company shall provide them with a defense and indemnification for all claims asserted by plaintiff-defendant Mark Dmochowski and defendant Robin Dmochowski and otherwise denied their motion, and denied in part the cross motion of Preferred Mutual Insurance Company for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on April 26, 2012, and filed in the Erie County Clerk’s Office on May 7, 2012,

It is hereby ORDERED that said appeal and cross appeal are

unanimously dismissed without costs upon stipulation.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

912

CA 11-02349

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

JOSEPH D. RAYMOND, SR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TIMOTHY C. RYKEN, M.D., DEFENDANT-RESPONDENT.

COTE & VANDYKE, LLP, SYRACUSE (JOSEPH S. COTE, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (DAVID R. DUFLO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered March 1, 2011 in a medical malpractice action. The order, inter alia, denied that part of the motion of plaintiff seeking leave to amend the complaint and bill of particulars and conditionally granted that part of plaintiff's motion seeking an order of preclusion.

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

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries arising from defendant's alleged negligent performance of back surgery. Plaintiff thereafter moved, inter alia, for leave to amend the complaint and bill of particulars and for a conditional order of preclusion. Supreme Court denied that part of the motion seeking leave to amend and conditionally granted that part of the motion seeking to preclude defendant from offering certain proof at trial. We affirm.

We note at the outset that plaintiff's contention that he was entitled to amend his bill of particulars as of right is not properly before us. Plaintiff raised that contention for the first time in support of a motion for leave to reargue and the record on appeal does not include those motion papers, nor in any event would plaintiff be entitled to take an appeal from the order denying his motion for leave to reargue (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

We conclude that the court did not abuse its discretion in denying that part of the motion for leave to amend the complaint and bill of particulars. The decision whether to grant leave to amend pleadings rests within the court's sound discretion and will not be disturbed absent a clear abuse of that discretion (*see Cowsert v*

Macy's E., Inc., 74 AD3d 1444, 1444-1445). Here, both of plaintiff's proposed amended pleadings included a new cause of action, for lack of informed consent. That cause of action was time-barred, and the relation-back doctrine pursuant to CPLR 203 (f) does not apply because the original complaint failed to provide notice thereof (*see Rende v Cutrofello*, 226 AD2d 694, 695). " 'It is well settled that lack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence' " (*Parese v Shankman*, 300 AD2d 1087, 1088). In addition, defendant would be prejudiced by an amended complaint and bill of particulars that added a claim for lack of informed consent because the new theory of liability would necessarily depend on the recollections of the parties, which unavoidably diminish over time and, furthermore, plaintiff failed to present a reasonable excuse for the delay. "While delay alone is insufficient to deny [leave] to amend, when unexcused lateness is coupled with prejudice to the opposing party, denial of [leave to amend] is justified" (*Clark v MGM Textiles Indus., Inc.*, 18 AD3d 1006, 1006; *see Pagan v Quinn*, 51 AD3d 1299).

Finally, plaintiff contends that, beginning in July 2000, he served discovery demands upon defendant and that he has not received an adequate response to those demands. The court, however, granted that part of plaintiff's motion for a conditional order of preclusion, requiring defendant to provide plaintiff with his credentialing file. To the extent that plaintiff contends in his brief that defendant has not produced other documents in response to his discovery demands, we note that plaintiff's brief does not identify the specific documents that defendant has not produced. We therefore are unable to review the merits of his contention.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

921

TP 12-00274

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

IN THE MATTER OF TERRY CHAPMAN, PETITIONER,

V ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered February 3, 2012) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

922

KA 11-00452

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON BIBBES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE 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 (John L. Michalski, A.J.), rendered January 4, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that the conviction is not supported by legally sufficient evidence based on the alleged inadequacy of the evidence of his intent to commit a crime within the dwelling. That contention is unpreserved for our review inasmuch as defendant's motion for a trial order of dismissal was not specifically directed at the alleged deficiency in the People's proof (*see People v Gray*, 86 NY2d 10, 19; *People v Roman*, 85 AD3d 1630, 1630, *lv denied* 17 NY3d 821). Even if defendant had moved at the close of the People's proof for a trial order of dismissal directed at the alleged deficiency, his contention nevertheless would not be preserved for our review because he did not renew the motion after presenting proof (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). To the extent that defendant is in effect contending that the verdict was inconsistent, i.e., that his acquittal of the attempted rape and sexual abuse charges necessarily should have led to an acquittal of the burglary charge, his contention is likewise unpreserved for our review inasmuch as he failed to object to the alleged inconsistency before the jury was discharged (*see People v Carter*, 39 AD3d 1226, 1227, *lv denied* 9 NY3d 863).

In any event, we reject defendant's contention (*see generally People v Bleakley*, 69 NY2d 490, 495). A person is guilty of burglary in the second degree under Penal Law § 140.25 (2) when he or she "knowingly enters or remains unlawfully in a building with intent to

commit a crime therein, and when . . . [t]he building is a dwelling." Unless the People expressly limit their theory of liability to a specific crime based on the pleadings (*see People v Barnes*, 50 NY2d 375, 379 n 3; *People v Kolempear*, 267 AD2d 327, 327-328, *lv denied* 95 NY2d 799) or the People effectively are so limited based on a victim's trial testimony (*see People v Brown*, 251 AD2d 694, 695-696, *lv denied* 92 NY2d 1029), the People are required to allege and prove "only defendant's general intent to commit a crime in the [dwelling] . . ., not his [or her] intent to commit a specific crime" (*People v Lewis*, 5 NY3d 546, 552). Moreover, the People are not required to prove that the intended crime was in fact committed (*see People v Mackey*, 49 NY2d 274, 279; *People v Porter*, 41 AD3d 1185, 1186, *lv denied* 9 NY3d 963; *People v Collier*, 204 AD2d 1064, 1064, *lv denied* 84 NY2d 824).

Here, the victim testified that, after defendant knocked on her door and told her that he had an emergency and needed to use her telephone, she opened the door a crack. Defendant then "pushed the door in" and cornered the victim in the hallway, choking and slapping her. According to the victim, defendant made sexual comments to her and began fondling her breasts while his erect penis was visible through his pants. Defendant left the victim's residence only after she kneed him in the groin. The People did not limit themselves in their pleadings to the theory that defendant intended to commit a particular crime inside the victim's dwelling. Even if, as defendant contends, the People's evidence effectively limited their theory to an allegation that defendant intended to commit rape and sexual abuse, the People were required to prove only that defendant *intended* to commit those crimes (*see Porter*, 41 AD3d at 1186), and the jury could infer such intent "based upon the circumstances of the unlawful entry as well as [defendant's] other actions while inside the [dwelling]" (*People v Rivera*, 41 AD3d 1237, 1238, *lv denied* 10 NY3d 939). Thus, "[i]t is of no moment that the jury acquitted defendant of sexual abuse in the [first] degree . . . [T]hat crime requires proof of a completed act, whereas burglary only requires an intent to commit a crime" (*People v Williams*, 38 AD3d 327, 327-328, *lv denied* 9 NY3d 871). Here, the jury could have found that defendant intended to rape the victim, but that he did not come "dangerously close" to fruition (*People v Johnson*, 94 AD3d 1563, 1564, *lv denied* 19 NY3d 962 [internal quotation marks omitted]). In addition, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant's further contention that Supreme Court erred in permitting the victim to testify that, on the day after the incident, defendant told the victim that he would "cap her and her daughter" because he would not go to jail for a crime he did not commit, and that defendant then pulled up his shirt and revealed "like a little gun or something like that in his waist." It is well established that " '[e]vidence of threats made by the defendant against one of the People's witnesses, although evidence of prior bad acts, [is] admissible on the issue of consciousness of guilt' "

(*People v Pugh*, 236 AD2d 810, 812, *lv denied* 89 NY2d 1099; *see People v Arguinzoni*, 48 AD3d 1239, 1240, *lv denied* 10 NY3d 859; *People v Maddox*, 272 AD2d 884, 885, *lv denied* 95 NY2d 867) and, here, we conclude that the court did not abuse its discretion in determining that the probative value of that evidence outweighed any "unfair prejudice" (*People v Dorm*, 12 NY3d 16, 19). Defendant failed to preserve for our review his further contention that the court should have provided a contemporaneous limiting instruction inasmuch as he failed to request such an instruction (*see People v Burnell*, 89 AD3d 1118, 1121, *lv denied* 18 NY3d 922; *see generally People v Sommerville*, 30 AD3d 1093, 1094-1095). In any event, in its jury charge, the court properly instructed the jury that the evidence could be considered only as evidence of defendant's consciousness of guilt, and the jury is presumed to have followed that instruction (*see People v Wallace*, 59 AD3d 1069, 1070, *lv denied* 12 NY3d 861).

Contrary to the further contention of defendant, we conclude that he was not denied effective assistance of counsel based on defense counsel's failure to assert the right of defendant to testify before the grand jury. "In contrast to a defendant's right to testify at trial, a defendant's right to testify before the grand jury is a limited statutory right" (*People v Lasher*, 74 AD3d 1474, 1475, *lv denied* 15 NY3d 894), and the "failure of defense counsel to facilitate defendant's testimony before the grand jury does not, per se, amount to the denial of effective assistance of counsel" (*People v Simmons*, 10 NY3d 946, 949; *see People v Wiggins*, 89 NY2d 872, 873; *People v Perez*, 67 AD3d 1324, 1325, *lv denied* 13 NY3d 941). Here, defendant has not established that defense counsel was ineffective based on that single failure. In this case, as in *Simmons*, "defendant failed to establish that he was prejudiced by the failure of his attorney to effectuate his appearance before the grand jury" (*id.* at 949; *see also People v Ponder*, 42 AD3d 880, 881, *lv denied* 9 NY3d 925). Aside from defendant's contention that the error precluded him from "presenting testimony of what actually occurred at the [victim]'s home," "there is no claim that had he testified in the grand jury, the outcome would have been different" (*Simmons*, 10 NY3d at 949; *see People v Rojas*, 29 AD3d 405, 406, *lv denied* 7 NY3d 794). Notably, defendant did not testify at trial (*see People v Sutton*, 43 AD3d 133, 136, *affd sub nom. People v Simmons*, 10 NY3d 946, 947 n 1).

Finally, the sentence is not unduly harsh or severe.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

925

KA 08-01356

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. FAGAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Dennis F. Bender, A.J.), rendered June 23, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree (two counts) and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]) and one count of resisting arrest (§ 205.30). Contrary to defendant's contention, County Court properly refused to suppress the bag of cocaine seized by the police when it fell to the ground from his pant leg during a pat frisk. The officers lawfully stopped the vehicle in which defendant was a passenger because it had excessively tinted windows (*see People v Estrella*, 48 AD3d 1283, 1285, *affd* 10 NY3d 945, *cert denied* 555 US 1032), and lawfully directed defendant to exit the vehicle (*see People v Robinson*, 74 NY2d 773, 775, *cert denied* 493 US 966; *People v Henderson*, 26 AD3d 444, 445, *lv denied* 6 NY3d 895). Based on defendant's movements both inside and outside the vehicle, the officers suspected that defendant was attempting to conceal something (*see People v Batista*, 88 NY2d 650, 654; *People v Grant*, 83 AD3d 862, 863-864, *lv denied* 17 NY3d 795), and they reasonably suspected that defendant was armed and posed a threat to their safety because his actions were directed to the area of his waistband, which was concealed from their view (*see People v Bracy*, 91 AD3d 1296, 1297; *People v Nelson*, 67 AD3d 486, 487). In addition, defendant continued to move his hands toward his waistband despite the officers' repeated requests that he stop doing so (*see People v Mack*, 49 AD3d 1291, 1292, *lv denied* 10 NY3d 866; *People v Robinson*, 278 AD2d 808, 809, *lv denied* 96 NY2d 787). Based upon their reasonable belief

that defendant was armed, the officers lawfully conducted a pat frisk (*see Henderson*, 26 AD3d at 445), and were entitled to use handcuffs to ensure their safety while conducting the frisk (*see People v Allen*, 73 NY2d 378, 379-380; *Henderson*, 26 AD3d at 445). Contrary to defendant's contention, the use of handcuffs did not transform his detention into an arrest, requiring probable cause (*see Allen*, 73 NY2d at 380; *People v Tiribio*, 88 AD3d 534, 535, *lv denied* 18 NY3d 862). The officers thereafter acquired probable cause to arrest defendant, however, when the bag of cocaine fell to the ground from his pant leg (*see People v Schell*, 261 AD2d 422, 422-423, *lv denied* 94 NY2d 829).

Defendant contends that the court failed to exercise its discretion in denying defendant's request to speak to other counsel. Defendant previously made that same request to the judge first assigned to his case, and the request was denied. Defendant then renewed the request on the first day of trial, before a different judge, and he contends that the judge who presided over his trial mistakenly believed that he was bound by the prior ruling denying his request. We reject that contention, inasmuch as "we do not read any of the language employed by the court as meaning it misapprehended or failed to exercise its discretion" in denying that request (*People v Quinones*, 74 AD3d 494, 494, *lv denied* 15 NY3d 808). Finally, we reject defendant's contention that his sentence is unduly harsh and severe based on the disparity between the sentence imposed after trial and the sentence offers made during plea negotiations (*see People v Smith*, 21 AD3d 1277, 1278, *lv denied* 7 NY3d 763).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

926

KA 10-02198

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL CALDWELL, DEFENDANT-APPELLANT.

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

JEFFREY S. CARPENTER, ASSISTANT DISTRICT ATTORNEY, HERKIMER (JACQUELYN M. ASNOE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (Patrick L. Kirk, J.), rendered March 30, 2009. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and criminal possession of a weapon in the fourth degree (§ 265.01 [2]). Defendant's contention that he was denied due process when the People impeached a prosecution witness in violation of CPL 60.35 (3) and offered prior bad act testimony in violation of County Court's *Ventimiglia* ruling 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]). Defendant contends that the conviction of attempted murder and assault is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence. Defendant preserved his contention concerning the legal sufficiency of the evidence only insofar as he alleges that there was no evidence of his intent to cause death or serious physical injury (*see People v Gray*, 86 NY2d 10, 19). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that it is legally sufficient to establish defendant's intent to cause death and serious physical injury. Defendant's intent may be inferred from his conduct (*see People v Badger*, 90 AD3d 1531, 1532, *lv denied* 18 NY3d 991), and his statements to the 911 operator established his intent. The People presented evidence that defendant and the victim fought immediately before the shooting, and that defendant retreated to his

house to obtain a weapon and upon returning fired several shots at the victim. The People also presented evidence of defendant's 911 call after the fight, wherein he stated that emergency responders should "[h]urry up," that defendant was going to "shoot him," and that the victim would die. Viewing the evidence in light of the elements of the crimes of attempted murder and assault as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant's contention that he was denied a fair trial based on prosecutorial misconduct on summation is not preserved for our review (*see* CPL 470.05 [2]) and, in any event, we conclude that "[a]ny 'improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Johnson*, 303 AD2d 967, 968, *lv denied* 100 NY2d 583). Contrary to defendant's contention, the court properly denied his request for a justification charge (*see People v Hall*, 48 AD3d 1032, 1033, *lv denied* 11 NY3d 789). Viewing the record in the light most favorable to defendant (*see People v Reynoso*, 73 NY2d 816, 818; *People v McManus*, 67 NY2d 541, 549), we conclude that there is no reasonable view of the evidence that would permit the jury to determine that defendant's use of deadly physical force was justified (*see* Penal Law § 35.15 [2] [a]; *People v Hartman*, 86 AD3d 711, 712-713, *lv denied* 18 NY3d 859). The sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

927

KA 11-01262

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHRISTOPHER CRONK, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Onondaga County Court (Joseph E. Fahey, J.), entered June 7, 2011. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

928

KA 11-02031

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARAIN CRUZ, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, 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 April 15, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted promoting prison contraband in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [2]). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve for our review his contention that the plea allocution was factually insufficient based on County Court's failure to obtain a waiver of the defense of mental disease or defect (*see People v Trapp*, 15 AD3d 916, *lv denied* 4 NY3d 891). Nothing in the plea allocution raised the possibility of that defense (*cf. People v Lopez*, 71 NY2d 662, 666-668; *People v Costanza*, 244 AD2d 988, 989), and defendant's contention therefore does not fall within the rare case exception to the preservation rule (*see Lopez*, 71 NY2d at 666).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

935

CA 12-00518

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

ROBERT KIMBER, PLAINTIFF-APPELLANT,

V ORDER

BAILLIE LUMBER CO., DEFENDANT,
BROOKS FORESTRY AND RESEARCH MANAGEMENT
CORPORATION, DEFENDANT-RESPONDENT.

BRUCE R. BRYAN, SYRACUSE, FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (KEVIN R. VANDUSER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Lewis County (Charles C. Merrell, J.), entered February 3, 2012. The order, among other things, limited plaintiff's potential damages against defendant Brooks Forestry and Research Management Corporation.

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

936

CA 11-02347

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

LAURIE KASH, INDIVIDUALLY AND AS LIMITED ADMINISTRATOR OF THE ESTATE OF GERTRUDE KASH, DECEASED, PLAINTIFF-APPELLANT,

V ORDER

JEWISH HEALTH CARE SYSTEM OF ROCHESTER, INC. AND JEWISH HOME AND INFIRMARY OF ROCHESTER, N.Y., INC., DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

FARACI LANGE, LLP, ROCHESTER (STEPHEN G. SCHWARZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

UNDERBERG & KESSLER LLP, BUFFALO (THOMAS F. KNAB OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered August 12, 2011 in a declaratory judgment action. The order, inter alia, determined that defendants are entitled to a declaration that plaintiff breached a confidentiality agreement between the parties.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Laborers Intl. Union of N. Am., Local 210, AFL-CIO v Shevlin-Manning, Inc.*, 147 AD2d 977).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

937

CA 11-02348

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

LAURIE KASH, INDIVIDUALLY AND AS LIMITED ADMINISTRATOR OF THE ESTATE OF GERTRUDE KASH, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JEWISH HEALTH CARE SYSTEM OF ROCHESTER, INC. AND JEWISH HOME AND INFIRMARY OF ROCHESTER, N.Y., INC., DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

FARACI LANGE, LLP, ROCHESTER (STEPHEN G. SCHWARZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

UNDERBERG & KESSLER LLP, BUFFALO (THOMAS F. KNAB OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Monroe County (David Michael Barry, J.), entered November 4, 2011 in a declaratory judgment action. The judgment, inter alia, declared that plaintiff had breached a confidentiality agreement between the parties.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating those parts of the first through third decretal paragraphs concerning plaintiff's disclosure of the resolution of the prior action and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff's decedent commenced an action against defendants seeking damages for injuries she sustained as a result of defendants' alleged medical malpractice. When decedent died, plaintiff was appointed the representative of her estate and continued the action. On the eve of trial, the parties settled, and the settlement was confirmed by an agreement by the parties dated October 11, 2010 (agreement) and a subsequent release signed on December 10, 2010 (release). A week later, plaintiff, through her attorneys, issued a press release stating that the action had been resolved. The press release outlined the facts constituting the claim and revealed that Medicaid and Medicare liens would be reimbursed "as part of the resolution."

Defendants, by their attorneys, issued a press release in which they asserted that plaintiff's press release was "inappropriate" and that they have asked Supreme Court to "review the actions" of

plaintiff's attorneys. Plaintiff then commenced this action seeking a declaration that, inter alia, the agreement did not prohibit her or her family members from publicly disclosing the facts regarding the incidents that occurred when decedent was a resident of defendants' facility. Defendants asserted a counterclaim seeking a declaration that, inter alia, plaintiff breached the terms of the agreement and the release by publication of plaintiff's press release. Defendants then moved and plaintiff cross-moved for summary judgment. As relevant to this appeal by plaintiff, the court granted the motion in part, declaring, inter alia, that plaintiff had breached the agreement and release by revealing that a resolution was reached and by revealing the terms of the resolution in the press release. Plaintiff now appeals.

At the outset, we agree with the parties and the court that the agreement and release are unambiguous. It is well settled that the interpretation of an unambiguous contract is for the court (*see Chimart Assoc. v Paul*, 66 NY2d 570, 571-572). It is equally 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; *see R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32, *rearg denied* 98 NY2d 693). Here, the agreement provided that "the settlement is conditioned upon a covenant of confidentiality with respect to the terms of the resolution of the matter as to all parties and an agreement not to disclose the terms hereof to any publication, media, media source or outside party except for attorneys and tax advisors." The release provided that "this settlement is confidential and shall not be made public in any way. Specifically, plaintiff agrees to a covenant of confidentiality with respect to the terms of the above described resolution of this matter as to all parties, and agrees not to disclose the terms hereof to any publication, media, media source, or outside party except for tax advisors and attorneys." We agree with plaintiff that the agreement and release prohibited plaintiff from disclosing the *terms* of the settlement, but they did not prohibit plaintiff from stating that the action had been settled. To the extent that the court declared that plaintiff breached the agreement and release by revealing that a resolution was reached, that was error, and we therefore modify the judgment accordingly.

We conclude, however, that the court properly declared that the agreement and release prohibited plaintiff from disclosing the terms of the resolution, that plaintiff breached her confidentiality obligations contained in the agreement and release by disclosing terms of the resolution in the press release, and that plaintiff shall not in the future make public in any way the terms of the resolution contained in the agreement and release. Contrary to plaintiff's contention, defendants did not waive any rights they had based on plaintiff's breach. The record establishes that, when they paid the settlement amount and therefore performed their obligations under the agreement, defendants also made a specific reservation of their rights based on plaintiff's breach (*see Syracuse Orthopedic Specialists, P.C.*

v Hootnick, 42 AD3d 890, 892).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

945.1

KA 12-00928

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

MAXWELL CHARLES WYANT, DEFENDANT-RESPONDENT.

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

JAMES NOBLES, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an amended order of the Monroe County Court (Douglas A. Randall, J.), entered May 14, 2012. The amended order reduced the sole count of the indictment from murder in the second degree to assault in the first degree.

It is hereby ORDERED that the amended order so appealed from is unanimously reversed on the law, that part of defendant's omnibus motion seeking to dismiss or reduce the sole count of the indictment is denied, that count of the indictment is reinstated, and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: The People appeal from an amended order that granted that part of defendant's omnibus motion seeking to dismiss or reduce the sole count of the indictment based on the alleged legal insufficiency of the evidence before the grand jury by reducing that count from murder in the second degree (Penal Law § 125.25 [1] [intentional murder]) to assault in the first degree (§ 120.10 [1]). Initially, we note that County Court erred in reducing the count to assault in the first degree inasmuch as assault in the first degree is not a lesser included offense of intentional murder (*see* CPL 210.20 [1-a]; *People v Alvarez*, 38 AD3d 930, 934, *lv denied* 8 NY3d 981; *see generally People v Glover*, 57 NY2d 61, 63-65).

In any event, we agree with the People that the evidence is legally sufficient to support the count of intentional murder in the second degree. The grand jury "must have before it evidence legally sufficient to establish a prima facie case, including all the elements of the crime, and reasonable cause to believe that the accused committed the offense to be charged" (*People v Jensen*, 86 NY2d 248, 251-252). Legally sufficient evidence is defined as " 'competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof' " (*People v*

Swamp, 84 NY2d 725, 730, quoting CPL 70.10 [1]). The court "must consider whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted . . . would warrant conviction" (*id.*; *see Jensen*, 86 NY2d at 251).

Here, the People called as a grand jury witness a physician employed by the Monroe County Medical Examiner's Office to render an opinion as to the cause of the victim's death. In determining that the evidence was legally insufficient to establish that defendant caused the victim's death, the court concluded that the People did not properly qualify the witness as an expert. That was error. The witness's testimony establishes that she was qualified to provide expert opinion testimony (*see People v Stabell*, 270 AD2d 894, 895, *lv denied* 95 NY2d 804). It certainly may be inferred from her testimony that she was a licensed physician with the requisite training to render her qualified to testify as a forensic pathologist. Even assuming, arguendo, that those inferences could not be drawn from her testimony, we note that the witness further testified that she has conducted "just less than five hundred" autopsies. An "expert should be possessed of the requisite skill, training, education, knowledge *or* experience from which it can be assumed that the information imparted or the opinion rendered is reliable" (*Matott v Ward*, 48 NY2d 455, 459 [emphasis added]; *see People v McKinley*, 72 AD2d 470, 476). Indeed, "[p]ractical experience may properly substitute for academic training in determining whether an individual has acquired the training necessary to be qualified as an expert" (*People v Owens*, 70 AD3d 1469, 1470, *lv denied* 14 NY3d 890 [internal quotation marks omitted]; *see People v Hamilton*, 96 AD3d 1518, 1519; *see also People v Burt*, 270 AD2d 516, 518). Thus, the fact that the witness conducted almost 500 autopsies qualified her to give expert medical opinion as to the cause of the victim's death (*see People v Morehouse*, 5 AD3d 925, 928-929, *lv denied* 3 NY3d 644).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

946

KA 11-02059

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMETRIUS COOPERWOOD, DEFENDANT-APPELLANT.

WILLIAM H. GARDNER, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Erie County Court (Sheila A. DiTullio, J.), dated September 6, 2011. The order denied the CPL 440.10 motion of defendant.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Erie County Court for a hearing on the motion in accordance with the following Memorandum: Defendant appeals from an order summarily denying his motion pursuant to CPL 440.10 seeking to vacate the judgment convicting him, upon his plea of guilty, of two counts of robbery in the first degree (Penal Law § 160.15 [4]). According to defendant, defense counsel failed to advise him of the need for corroboration of a codefendant's testimony or a potentially viable affirmative defense related to the operability of the firearms used in the robberies (*see generally* CPL 60.22; Penal Law § 160.15 [4]). Defendant contended that he would not have pleaded guilty had he known of those legal issues (*see People v Liggins*, 56 AD3d 1265, 1265-1266). Here, as in *Liggins*, "[d]efendant further contended in support of his motion that the goal of defense counsel from the outset of the prosecution was to dispose of the charges by way of a plea of guilty, and that defense counsel consequently failed to pursue . . . viable [legal] challenge[s]" to the evidence against defendant (*id.* at 1266). We thus conclude that defendant raised issues of fact in support of his motion and that County Court erred in denying his motion without conducting a hearing. We therefore reverse the order and remit the matter to County Court for a hearing on defendant's motion consistent with our decision.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

947

KA 11-01832

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAMONT D. WILLIAMS, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (LIAM A. DWYER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered October 20, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts), menacing a police officer and loitering.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]), and one count each of menacing a police officer (§ 120.18) and loitering (§ 240.35 [2]). Defendant failed to preserve for our review his contention that the conviction of one of the two counts of criminal possession of a weapon and the conviction of menacing a police officer are not supported by legally sufficient evidence (*see 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 there is legally sufficient evidence to establish that defendant intended to use the revolver unlawfully against another (*see* § 265.03 [1] [b]; *see generally People v Hunter*, 46 AD3d 1417, 1417, *lv denied* 10 NY3d 812) and intended to place the officers in reasonable fear of physical injury, serious physical injury or death (*see* § 120.18; *People v McCottery*, 90 AD3d 1323, 1324-1325). The officers testified that defendant was ordered to drop his weapon and refused to comply, and that defendant pointed the gun or waved the gun at the officers as they pursued him. Viewing the evidence in light of the elements of the crimes of criminal possession of a weapon in the second degree and menacing a police officer 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 those three counts is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant's further contention that he was denied a fair trial by prosecutorial misconduct is not preserved for our review (*see People v Thomas*, 96 AD3d 1670, 1673) and, in any event, is without merit. Although defendant is correct that the prosecutor improperly cross-examined a defense witness regarding whether he had been arrested and the grounds for those arrests (*see People v Morrice*, 61 AD3d 1390, 1391-1392), that one instance of prosecutorial misconduct was not so egregious as to deprive defendant of a fair trial (*see People v Szyzskowski*, 89 AD3d 1501, 1503). We reject defendant's contention that the prosecutor engaged in misconduct during her summation inasmuch as the comments in question were fair response to the summation of defense counsel (*see People v Rivers*, 82 AD3d 1623, 1624, *lv denied* 17 NY3d 904; *People v Cunningham*, 12 AD3d 1131, 1132, *lv denied* 4 NY3d 829, *reconsideration denied* 5 NY3d 761). We reject defendant's further contention that he was denied effective assistance of counsel based on the failure of defense counsel to object to the alleged instances of prosecutorial misconduct (*see People v Tolliver*, 93 AD3d 1150, 1151, *lv denied* 19 NY3d 968; *see generally People v Baldi*, 54 NY2d 137, 147).

Finally, defendant contends that County Court failed to comply with CPL 270.35 in discharging a sworn juror, requiring reversal. Defendant, however, consented to the discharge of that juror and therefore has waived that contention (*see People v Barner*, 30 AD3d 1091, 1092, *lv denied* 7 NY3d 809; *see also People v Davis*, 83 AD3d 860, 861).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

948

TP 12-00311

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

IN THE MATTER OF ANTHONY MACK, PETITIONER,

V ORDER

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

ANTHONY MACK, 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, Seneca County [Dennis F. Bender, A.J.], entered February 8, 2012) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

950

CAF 11-01877

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

IN THE MATTER OF GREGORY A. KAIRIS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BELINDA A. SMITH KAIRIS, RESPONDENT-APPELLANT.

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

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

LISA A. GILELS, ATTORNEY FOR THE CHILD, SYRACUSE, FOR KIERRA A.K.

Appeal from an order of the Family Court, Onondaga County (Gina M. Glover, R.), entered May 12, 2011 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole legal custody of his daughter.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating ordering paragraphs one through six, granting primary physical custody to respondent, and granting those parts of the petition seeking joint legal custody and unsupervised visitation and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Onondaga County, to fashion an unsupervised visitation schedule for petitioner in accordance with the following Memorandum: Respondent mother appeals from an order modifying the parties' existing custody arrangement. Pursuant to the parties' 2008 judgment of divorce, which incorporated their 2001 settlement agreement, the parties had joint legal custody of their child, with primary physical custody with the mother and unsupervised visitation with petitioner father. Based on an incident involving substance abuse by the father, however, Family Court modified that custody arrangement 15 months prior to the instant hearing by granting the mother sole legal and physical custody, with supervised visitation with the father. By the order on appeal, based on a petition brought by the father approximately four months after the court's custody modification, the court again modified the custody arrangement, granting him sole legal and primary physical custody of the parties' child and visitation with the mother. We note that, in awarding the father sole legal and primary physical custody of the child, the court granted the father relief that was not sought in the petition. Rather, the father sought, at most, "50/50 custody" and

"50/50 unsupervised visit[ation]," which we construe as meaning joint legal and physical custody. We further note that, although the court failed "to set forth 'the facts it deems essential' and upon which its determination is based" (*Matter of Whitaker v Murray*, 50 AD3d 1185, 1186, quoting CPLR 4213 [b]; *see generally* Family Ct Act § 165 [a]), remittal of the matter is not required inasmuch as the record is sufficient to allow for effective appellate review (*cf. Matter of Bradbury v Monaghan*, 77 AD3d 1424, 1425).

We agree with the mother that the court erred in awarding sole legal and primary physical custody of the parties' child to the father. Although we conclude that the father made a sufficient evidentiary showing of a change in circumstances to warrant an inquiry into whether the existing custody arrangement should be modified (*see Matter of Hughes v Davis*, 68 AD3d 1674, 1675), we nevertheless conclude that it is in the best interests of the child for the mother to retain primary physical custody (*see generally Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947). The record establishes that, throughout the child's life, the mother has been the child's primary caregiver (*see Sitts v Sitts*, 74 AD3d 1722, 1723, *lv dismissed* 15 NY3d 833, *lv denied* 18 NY3d 801). There is no basis in the record to support the conclusion that the mother was unfit or less fit than the father, and " 'the relative fitness of the respective parents' " is a factor to consider in determining whether a change in physical custody is appropriate (*Matter of Maher v Maher*, 1 AD3d 987, 989). Evidence was presented that, at the time of the hearing, the mother and the child argue often and that the child desired to live with the father. However, there was evidence that the child relied on the mother when she was sick and that she did not rely on the father in the same way. Furthermore, as previously noted, the father was restricted to supervised visitation resulting from substance abuse (*see Matter of Kristi L.T. v Andrew R.V.*, 48 AD3d 1202, 1205, *lv denied* 10 NY3d 716). While the father submitted evidence sufficient to show that he has been sober and has sought help for his substance abuse issues, the record does not support the drastic change from supervised visitation to sole legal and primary physical custody. We conclude, however, that it is in the best interests of the child to modify the existing custody arrangement by granting joint legal custody to the parties, with unsupervised visitation with the father. We therefore modify the order accordingly, and we remit the matter to Family Court to fashion an appropriate unsupervised visitation schedule for the father.

We have examined the mother's remaining contention, i.e., that she was deprived of the right to counsel, and conclude that it lacks merit.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

951

CAF 11-00118

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

IN THE MATTER OF TIOSHA J., TAMARI J.,
AND KAMARI J.
---------- MEMORANDUM AND ORDER
ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

THOMAS J., RESPONDENT-APPELLANT.

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered December 21, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: Respondent father appeals from an order that, inter alia, terminated his parental rights with respect to his three children on the ground of permanent neglect. We previously affirmed the order with respect to the children's mother (*Matter of Tiosha J.*, 96 AD3d 1498), and we likewise affirm the order with respect to the father. Although the father completed parenting classes, one anger management class and substance abuse and mental health evaluations, he failed to attend a second anger management program following his arrest in connection with a domestic violence incident wherein he allegedly assaulted the mother and damaged the interior of her home. He also failed to cooperate with petitioner's employees when they attempted to gain access to his home, the condition of which was the basis of the removal of the oldest child, and he refused to verify his income (*see id.*). Thus, we conclude that the father did not adequately address the issues that caused the removal of the children (*see id.*; *Matter of Rachel N.*, 70 AD3d 1374, 1374, *lv denied* 15 NY3d 708). We note that, during the five years in which the children were in foster care prior to the entry of the order of disposition, the father had only supervised visitation with the children, two of whom had never been in the parents' care and one of whom had been in the parents' care for only 10 months. We therefore conclude that the court properly determined that it was in the best interests of the

children to terminate the father's parental rights.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

957

CA 12-00629

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

PAUL D. ALLEN, PLAINTIFF-APPELLANT,

V ORDER

MICHAEL FRANCIOSA AND MOLLY MCBRIDE,
DEFENDANTS-RESPONDENTS.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SCHIANO LAW OFFICE, P.C., ROCHESTER (CHARLES A. SCHIANO, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered July 13, 2011. The order granted the motion of defendants for summary judgment dismissing the amended complaint.

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

958

CA 11-01979

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

KIMBERLY MITCHELL CONVERSE, PLAINTIFF,

V ORDER

DOLE FOOD COMPANY, INC., DOLE FRESH FRUIT COMPANY, DEFENDANTS-APPELLANTS, AND LEONARD'S EXPRESS, INC., DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA, LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

RUBIN, FIORELLA & FRIEDMAN LLP, NEW YORK CITY (STEWART B. GREENSPAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered December 15, 2010 in a personal injury action. The order, inter alia, denied the motion of defendants Dole Food Company, Inc. and Dole Fresh Fruit Company for summary judgment on contractual indemnification against defendant Leonard's Express, Inc.

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: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

959

CA 12-00663

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

KIMBERLY MITCHELL CONVERSE, PLAINTIFF,

V MEMORANDUM AND ORDER

DOLE FOOD COMPANY, INC., DOLE FRESH FRUIT COMPANY, DEFENDANTS-APPELLANTS, AND LEONARD'S EXPRESS, INC., DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA, LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

RUBIN, FIORELLA & FRIEDMAN LLP, NEW YORK CITY (STEWART B. GREENSPAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order and final judgment) of the Supreme Court, Steuben County (Thomas M. Van Strydonck, J.), entered December 30, 2011 in a personal injury action. The judgment, among other things, dismissed all cross claims asserted against defendant Leonard's Express, Inc.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the second cross claim of defendants Dole Food Company, Inc. and Dole Fresh Fruit Company and as modified the judgment is affirmed without costs.

Memorandum: Defendants Dole Food Company, Inc. and Dole Fresh Fruit Company (collectively, Dole defendants) appeal from an "order and final judgment" (judgment) denying their motion for summary judgment on their cross claim for contractual indemnification against defendant Leonard's Express, Inc. (Leonard's Express) and granting the cross motion of Leonard's Express for summary judgment dismissing that cross claim. Plaintiff commenced this action seeking damages for injuries she sustained when the tractor-trailer she was operating overturned while she was transporting a shipment of bananas. Plaintiff alleged, inter alia, that the Dole defendants were negligent with respect to the manner in which the cargo was loaded and that their negligence was a proximate cause of the accident. In a related appeal (*Converse v Dole Food Co., Inc.* [appeal No. 3], ___ AD3d ___ [Sept. 28, 2012]), we affirmed the order denying the motion of the Dole defendants for summary judgment dismissing the complaint against them.

Pursuant to the terms of the container interchange agreement (agreement) between the Dole defendants and Leonard's Express, Leonard's Express is obligated to indemnify the Dole defendants "against any and all claims . . . actions . . ., damages and liability of any nature whatsoever, including . . . bodily injuries, . . . in any manner arising out of, connected with, or resulting from the possession, use, operation, maintenance or return of the Units by [Leonard's Express] or any other person from delivery until return thereof." We agree with the Dole defendants that the agreement covers the alleged negligence here inasmuch as the claimed injuries for which plaintiff seeks damages occurred in connection with the possession and use of the trailer and chassis unit by Leonard's Express. We nevertheless conclude that the Dole defendants failed to establish their entitlement to summary judgment on their cross claim for contractual indemnification from Leonard's Express based on their liability to plaintiff. We further conclude, however, that Leonard's Express failed to establish its entitlement to summary judgment dismissing the cross claim, and we therefore modify the judgment accordingly.

The agreement expressly provides that it is to be "construed and enforced under the laws of the State of California." The California Supreme Court has explained that "the parties to an express indemnity provision may, by the use of sufficiently specific language, establish a duty in the indemnitor to save the indemnitee harmless from the results of even active negligence on the part of the latter . . . [I]n the absence of this[,] a provision will be construed to provide indemnity to the indemnitee only if [the indemnitee] has been no more than passively negligent" (*E.L. White, Inc. v City of Huntington Beach*, 21 Cal 3d 497, 507; *see Crawford v Weather Shield Mfg., Inc.*, 44 Cal 4th 541, 551-552, 187 P3d 424, 430; *Rossmoor Sanitation, Inc. v Pylon, Inc.*, 13 Cal 3d 622, 628-629, 532 P2d 97, 100-101). Indeed, in order for an indemnitee "to be indemnified for [its] own negligence . . . language on the point must be particularly clear and explicit, and will be construed strictly against the indemnitee" (*Crawford*, 44 Cal 4th at 552, 187 P3d at 431). We conclude that the language of the agreement herein is comparable to the language considered by the Court in *E.L. White, Inc.* (21 Cal 3d at 506), and that it is not "sufficiently specific" to require Leonard's Express to indemnify the Dole defendants for their own negligence (*id.* at 507). We note in particular that the agreement provides for indemnification regardless of whether Leonard's Express is negligent, but it is silent with respect to the effect of the Dole defendants' negligence on the right to indemnification. Thus, we conclude that the Dole defendants failed to establish their entitlement to judgment on the second cross claim.

The California Supreme Court has also explained that "[w]hether conduct constitutes active or passive negligence depends upon the circumstances of a given case and is ordinarily a question for the trier of fact; active negligence may be determined as a matter of law, however, when the evidence is so clear and undisputed that reasonable persons could not disagree" (*Rossmoor*, 13 Cal 3d at 629, 532 P2d at 101). As we have held in *Converse v Dole Food Co., Inc.* ([appeal No. 3] ___ AD3d at ___), that is not the case here. We therefore further

conclude that Leonard's Express failed to establish its entitlement to summary judgment dismissing the cross claim because there is an issue of fact whether, pursuant to the laws of California, any negligence on the part of the Dole defendants was active or passive.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

960

CA 12-00325

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

SCOTT WOODWARD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS M. CHAPMAN, ET AL., DEFENDANTS,
CAROL A. CONKLIN AND TERRY E. REED,
DEFENDANTS-APPELLANTS.

THOMAS P. DURKIN, ROCHESTER, FOR DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered June 24, 2011 in a personal injury action. The order denied the motion of defendants Carol A. Conklin and Terry E. Reed to dismiss the complaint for failure to prosecute.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained as the result of two motor vehicle accidents. Plaintiff alleged that, in the accident that occurred on April 7, 2004, Terry E. Reed, who was driving a vehicle owned by Carol A. Conklin with her permission (collectively, defendants), negligently operated his vehicle and collided head-on with plaintiff's vehicle, causing plaintiff to sustain a serious injury within the meaning of Insurance Law § 5102 (d). Supreme Court did not abuse its discretion in denying defendants' motion to dismiss the complaint against them pursuant to CPLR 3216, for failure to prosecute. Although defendants met their initial burden on the motion, in opposition thereto plaintiff established a justifiable excuse for the delay in filing the note of issue by submitting evidence that his attorney was in active discussion with the attorneys for defendants about mediation (*see Guenther v Wilson Mem. Hosp.*, 93 AD2d 957, 958, *lv denied* 60 NY2d 553, *rearg denied* 60 NY2d 861). In addition, plaintiff submitted the deposition transcripts of plaintiff and Reed, which established that plaintiff's action against defendants has merit (*see Zabari v City of New York*, 242 AD2d 15, 17). In any event, even assuming, arguendo, that plaintiff failed to establish a justifiable excuse for the delay and a meritorious cause of action, we note that "[a] court retains discretion to deny a motion to dismiss pursuant to CPLR 3216 even [under those circumstances]" (*Rust v Turgeon*, 295 AD2d 962, 963; *see Strathearn v Star Land & Dev. Co., LLC*, 28 AD3d 1250, 1250). We conclude that it was appropriate for the court to exercise such discretion under the facts of this case (*see*

Strathearn, 28 AD3d at 1250).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

964

CA 11-02438

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

KIMBERLY MITCHELL CONVERSE,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DOLE FOOD COMPANY, INC., DOLE FRESH
FRUIT COMPANY, DEFENDANTS-APPELLANTS,
AND LEONARD'S EXPRESS, INC., DEFENDANT.
(APPEAL NO. 3.)

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CANTOR, DOLCE & PANEPINTO, P.C., BUFFALO (STEPHEN C. HALPERN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Thomas M. Van Strydonck, J.), entered September 6, 2011 in a personal injury action. The order denied the motion of defendants Dole Food Company, Inc. and Dole Fresh Fruit Company for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when the tractor-trailer she was operating was involved in a one-vehicle rollover accident. Plaintiff alleged, inter alia, that Dole Food Company, Inc. and Dole Fresh Fruit Company (collectively, defendants) were negligent in the manner in which they loaded the cargo that she was hauling, i.e., approximately 40,000 pounds of bananas. Supreme Court properly denied defendants' motion for summary judgment dismissing the complaint against them. Although defendants established their entitlement to judgment by establishing that the load was less than the maximum allowable weight under federal law and that the contents were secured to prevent shifting during transit, we nevertheless conclude that plaintiff raised an issue of fact based on expert opinion sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We reject defendants' contention that the affidavit of one of plaintiff's experts, a mechanical engineer, is speculative and conclusory. That expert opined that the static stability level of the tractor-trailer was "unusually low," thereby creating a high center of gravity and an increased risk of a rollover accident. Although there

are no industry standards regarding the static stability level, he relied on the results of tilt-table tests conducted at the University of Michigan Transportation Research Institute (Institute), which evaluated the static stability level of the vehicle that plaintiff was operating, and, inter alia, research conducted at the Institute regarding the increased potential for rollover accidents involving vehicles with a static stability level below a certain level (*see Edwards v St. Elizabeth Med. Ctr.*, 72 AD3d 1595, 1596). In light of our determination that plaintiff raised an issue of fact, we need not address defendants' remaining contentions with respect to the affidavit of plaintiff's second expert.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

965

CA 11-02301

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

TILTCRETE, LLC, PLAINTIFF-APPELLANT,

V ORDER

WIDEWATERS CONSTRUCTION, INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL J. LONGSTREET OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (ALAN R. PETERMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered July 15, 2011 in a breach of contract action. The order dismissed the complaint and awarded money damages to defendant after a nonjury trial.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Laborers Intl. Union of N. Am., Local 210, AFL-CIO v Shevlin-Manning, Inc.*, 147 AD2d 977).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

966

CA 11-02302

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

TILTCRETE, LLC, PLAINTIFF-APPELLANT,

V ORDER

WIDEWATERS CONSTRUCTION, INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL J. LONGSTREET OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (ALAN R. PETERMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered August 25, 2011 in a breach of contract action. The order awarded attorney's fees to defendant.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Laborers Intl. Union of N. Am., Local 210, AFL-CIO v Shevlin-Manning, Inc.*, 147 AD2d 977).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

967

CA 11-02303

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

TILTCRETE, LLC, PLAINTIFF-APPELLANT,

V ORDER

WIDEWATERS CONSTRUCTION, INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL J. LONGSTREET OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (ALAN R. PETERMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered August 29, 2011 in a breach of contract action. The judgment awarded money damages to defendant.

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

968

CA 10-02460

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

IN THE MATTER OF JESSIE JAMES BARNES,
PETITIONER-APPELLANT,

V ORDER

JULIE FINOCCHIO, ASSISTANT DISTRICT ATTORNEY,
MONROE COUNTY SHERIFF PROPERTY CLERK, AND
BRIGHTON POLICE DEPARTMENT PROPERTY CLERK,
RESPONDENTS-RESPONDENTS.

JESSIE JAMES BARNES, PETITIONER-APPELLANT PRO SE.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (PAUL D. FULLER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered November 30, 2010 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

970

CA 11-02294

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

CHARLOTTE KREGG, AS GUARDIAN OF CHRISTOPHER M. WILLIAMS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EILEEN MALDONADO, ET AL., DEFENDANTS, AMERICAN SUZUKI MOTOR CORPORATION AND SUZUKI MOTOR CORPORATION OF JAPAN, DEFENDANTS-RESPONDENTS.

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

WEBSTER SZANYI LLP, BUFFALO (THOMAS S. LANE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered August 5, 2011. The order, insofar as appealed from, granted that part of the motion of defendants American Suzuki Motor Corporation and Suzuki Motor Corporation of Japan seeking to compel plaintiff to disclose computer records regarding the use of social media.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and that part of the motion seeking disclosure of all social media account records maintained by or on behalf of Christopher M. Williams is denied in accordance with the following Memorandum: Plaintiff, as limited by her brief, appeals from an order insofar as it granted that part of the motion of defendants Suzuki Motor Corporation of Japan and American Suzuki Motor Corporation (collectively, Suzuki defendants) to compel the disclosure of all social media account records concerning plaintiff's son (hereafter, injured party), who was involved in a motor vehicle accident while driving a motorcycle manufactured and distributed by the Suzuki defendants. After initial disclosure exchanges, the Suzuki defendants learned that family members of the injured party had established Facebook and MySpace accounts for him and had made Internet postings on his behalf in connection with those accounts. The Suzuki defendants moved, inter alia, to compel the disclosure of the "entire contents" of those and any other social media accounts maintained by or on behalf of the injured party. Plaintiff objected to such disclosure on the grounds of relevance and burden, contending that the demand for disclosure was a "fishing expedition." Supreme Court agreed with the Suzuki defendants that

they were entitled to such disclosure. That was error.

Although CPLR 3101 (a) provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action," it is well settled that a party need not respond to discovery demands that are overbroad (*see Optic Plus Enters., Ltd. v Bausch & Lomb Inc.*, 35 AD3d 1263, 1263). Where discovery demands are overbroad, " 'the appropriate remedy is to vacate the entire demand rather than to prune it' " (*Board of Mgrs. of the Park Regent Condominium v Park Regent Assoc.*, 78 AD3d 752, 753). In *McCann v Harleysville Ins. Co. of N.Y.* (78 AD3d 1524, 1525), we addressed a similar discovery demand and concluded that the request for access to social media sites was made without "a factual predicate with respect to the relevancy of the evidence" (*see Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 421). Here, as in *McMann*, there is no contention that the information in the social media accounts contradicts plaintiff's claims for the diminution of the injured party's enjoyment of life (*cf. Romano v Steelcase, Inc.*, 30 Misc 3d 426, 427). As in *McCann*, the proper means by which to obtain disclosure of any relevant information contained in the social media accounts is a narrowly-tailored discovery request seeking only that social-media-based information that relates to the claimed injuries arising from the accident. Thus, we deny that part of the Suzuki defendants' motion to compel the disclosure of the entire contents of the injured party's social media accounts, without prejudice to the service of a more narrowly-tailored disclosure request.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

987

CA 12-00576

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

JOSHUA JOHNSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JORGE DEL VALLE, DEFENDANT-RESPONDENT.

THE MATHEWS LAW FIRM, SYRACUSE (DANIEL F. MATHEWS, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ROBERT P. CAHALAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered November 3, 2011 in a personal injury action. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained at work when defendant, plaintiff's coemployee, allegedly threw a baseball that struck plaintiff's face. Defendant moved for summary judgment dismissing the complaint on the ground that workers' compensation is plaintiff's exclusive remedy, and Supreme Court granted the motion. We reverse. Workers' compensation is the exclusive remedy of an employee injured "by the negligence or wrong of another in the same employ" (Workers' Compensation Law § 29 [6]). "[T]he words 'in the same employ' as used in the Workers' Compensation Law are not satisfied simply because both plaintiff and defendant have the same employer; a defendant, to have the protection of the exclusivity provision, must . . . have been acting within the scope of his [or her] employment and not have been engaged in a willful or intentional tort" (*Maines v Cronomer Val. Fire Dept.*, 50 NY2d 535, 543). Even assuming, arguendo, that defendant met his initial burden on the motion, we conclude that plaintiff raised a triable issue of fact with respect thereto (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Here, plaintiff raised a triable issue of fact "whether the actions of defendant were within the scope of his employment by submitting evidence that defendant's conduct was neither common nor condoned" in their workplace (*Cloutier v Longo*, 288 AD2d 942, 942; *see Maines*, 50 NY2d at 544-545; *Shumway v Kelley*, 60 AD3d 1457, 1459; *cf. generally Lowe v Kinn*, 199 AD2d 743, 744-745, *lv*

denied 83 NY2d 753).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

990

CA 11-01782

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

IN THE MATTER OF THE APPLICATION OF MAUREEN BOSCO, ACTING EXECUTIVE DIRECTOR OF CENTRAL NEW YORK PSYCHIATRIC CENTER, PETITIONER-RESPONDENT, FOR AN ORDER AUTHORIZING THE INVOLUNTARY TREATMENT OF MICHAEL C., A PATIENT AT CENTRAL NEW YORK PSYCHIATRIC CENTER, RESPONDENT-APPELLANT.

ORDER

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (NICHOLE M. HINMAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ANDREW B. AYERS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered June 2, 2011. The order, among other things, determined that respondent lacked the capacity to make a reasoned decision concerning his own treatment and adjudged that certain medication may be administered to respondent over his objection.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 16, 2012,

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

991

CA 12-00558

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

DIANE TORRENCE AND GEORGE TORRENCE,
PLAINTIFFS-RESPONDENTS,

V ORDER

SHEILA M. ELDRIDGE, DEFENDANT-APPELLANT.

DIXON & HAMILTON, LLP, GETZVILLE (MICHAEL B. DIXON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered June 27, 2011. The order denied the motion of defendant for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties and filed on July 27, 2012,

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

992

CA 11-02202

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

LAURIE J. GERACE-MURDENT, PLAINTIFF-APPELLANT,

V ORDER

LARKIN L. KIMMERER AND ROBIN W. KIMMERER,
DEFENDANTS-RESPONDENTS.

JAMES B. FLECKENSTEIN, SYRACUSE, FOR PLAINTIFF-APPELLANT.

MELVIN & MELVIN, PLLC, SYRACUSE (MICHAEL R. VACCARO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered March 15, 2011 in a personal injury action. The order denied the motion of plaintiff for partial summary judgment on the issue of negligence.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on June 27 and 28, 2012,

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

995.1

TP 12-00266

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

IN THE MATTER OF MANUEL MOSLEY, PETITIONER,

V ORDER

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

MANUEL MOSLEY, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY 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, Chautauqua County [James H. Dillon, J.], entered April 29, 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 confirmed without costs and the petition is dismissed.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

997

KA 11-00629

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESUS MUNDO, DEFENDANT-APPELLANT.

SETH M. AZRIA, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Onondaga County Court (Joseph E. Fahey, J.), entered February 7, 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 unanimously affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level two risk under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). We reject defendant's contention that County Court's assessment of 15 points for a history of drug or alcohol abuse, which was based upon the recommendation in the risk assessment instrument prepared by the Board of Examiners of Sex Offenders, is not supported by the requisite clear and convincing evidence (*see generally* § 168-n [3]). Although defendant testified at the SORA hearing that he did not have a history of drug or alcohol abuse, the court was entitled to reject that testimony inasmuch as it was contradicted by defendant's statements regarding his marihuana and alcohol use that were set forth in the presentence report (*see People v Longtin*, 54 AD3d 1110, 1111, *lv denied* 11 NY3d 714). Furthermore, the record establishes that defendant was required to attend drug and alcohol treatment while incarcerated, thus further supporting the court's assessment of points for a history of drug or alcohol abuse.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

998

KA 09-01625

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JIMMY L. MONROE, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered January 28, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court abused its discretion in denying his motion to withdraw his guilty plea on the ground that the plea was not knowing, voluntary, and intelligent based, inter alia, on the court's failure to inform him of certain constitutional rights set forth in *Boykin v Alabama* (395 US 238, 243). We reject that contention. We note at the outset that, although defendant is correct that the court did not address certain rights that he waived by pleading guilty, the court was not required to do so (*see People v Harris*, 61 NY2d 9, 16, 18-19; *People v Johnson*, 60 AD3d 1496, 1496, *lv denied* 12 NY3d 926). Instead, "[t]he seriousness of the crime, the competency, experience and actual participation by counsel, the rationality of the 'plea bargain[,'] and the pace of the proceedings in the particular criminal court are among the many factors which the Trial Judge must consider in exercising discretion" during a plea colloquy (*Harris*, 61 NY2d at 16, citing *People v Nixon*, 21 NY2d 338, 353, *cert denied sub nom. Robinson v New York*, 393 US 1067).

Contrary to defendant's contention, we conclude that the plea was knowing, voluntary, and intelligent (*see generally Harris*, 61 NY2d at 16-19), and thus the court properly denied his motion. The record establishes that the court properly exercised its discretion during

defendant's plea colloquy in light of defendant's criminal history, his representation by counsel, and his statements during the plea colloquy. Defendant had pleaded guilty five times in New York prior to the current case, thus indicating that defendant was familiar with the plea process and aware of the rights that he waived by pleading guilty (*see Nixon*, 21 NY2d at 350). Defendant was represented by counsel in the current case, who actively advocated for defendant, and defendant confirmed that defense counsel had explained his rights to him. Defendant also indicated that he understood that he had the right to a trial. Although he did not explicitly waive that right, his statements demonstrated that he understood that he would not have a trial.

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1001

OP 12-00495

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

IN THE MATTER OF SAMUEL E. MESSER, PETITIONER,

V ORDER

MONROE COUNTY WATER AUTHORITY, RESPONDENT.

UNDERBERG & KESSLER LLP, ROCHESTER (DAVID M. TANG OF COUNSEL), FOR PETITIONER.

BOYLAN CODE LLP, ROCHESTER (SHEILA M. CHALIFOUX OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to EDPL 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul the determination of respondent.

Now, upon reading and filing the stipulation to discontinue signed by the attorneys for the parties on June 20, 2012,

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1002

CAF 11-00799

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

IN THE MATTER OF TERRENCE G.

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

TERRENCE M.M., RESPONDENT,
AND YVONNE C.G., RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered March 17, 2011 in a proceeding pursuant to Family Court Act article 10. The order granted the motion of petitioner for summary judgment with respect to Yvonne C.G.

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

Memorandum: Petitioner commenced this neglect proceeding pursuant to Family Court Act article 10 alleging, inter alia, that respondent mother derivatively neglected the subject child based upon her alleged use of opiates and her prior neglect of her other children. Initially, we note that the mother's notice of appeal recites that she is appealing from an "Order of Dismissal" entered March 17, 2011. Although no document with that title appears in the record, there is in fact a document entitled "Order on Motion #2" that grants summary judgment on the petition in favor of petitioner and against the mother, and it is entered on that date. Furthermore, the mother contends on appeal that Family Court erred in granting petitioner's motion for summary judgment. Therefore, we exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the "Order on Motion #2" granting summary judgment to petitioner (*see generally* CPLR 5520 [c]; *Matter of Ariel C.W.-H. [Christine W.]*, 89 AD3d 1438, 1438).

Although it is well settled that summary judgment may be appropriate in the context of a Family Court Act article 10 proceeding

(*see Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 182-183), the movant bears the burden of establishing its entitlement to the relief sought as a matter of law and eliminating all triable issues of fact (*see Matter of Devon B.*, 37 AD3d 1120, 1120-1121; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

We agree with the mother that the court erred in granting petitioner's motion for summary judgment. In support of its motion, petitioner attached only a petition and a psychological assessment from a termination of parental rights proceeding involving one of the mother's other children, without any evidence establishing the outcome of that proceeding. Although the court indicated its familiarity with the prior proceedings involving the mother's other children, the record before us is silent with regard to those proceedings. Consequently, based on the record before us, we conclude that there are triable issues of fact that preclude summary judgment (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1003

CAF 11-00067

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

IN THE MATTER OF YVONNE STEWARD,
PETITIONER-APPELLANT,

V ORDER

CARMELL V. LUCAS, RESPONDENT-RESPONDENT.

ELIZABETH CIAMBRONE, BUFFALO, FOR PETITIONER-APPELLANT.

AYOKA A. TUCKER, ATTORNEY FOR THE CHILD, BUFFALO, FOR PAULETTE L.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered December 30, 2010 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Kelly F. v Gregory A.F.*, 34 AD3d 1277).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1006

CAF 11-01526

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

IN THE MATTER OF ALISA E.

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

WENDY F., RESPONDENT-APPELLANT.

JEANNIE D. MICHALSKI, CONFLICT DEFENDER, GENESEO (P. ADAM MILITELLO OF COUNSEL), FOR RESPONDENT-APPELLANT.

DAVID J. MORRIS, COUNTY ATTORNEY, GENESEO (WENDY S. SISSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

JAMES W. CAMPBELL, JR., ATTORNEY FOR THE CHILD, LIMA, FOR ALISA E.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered July 12, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, suspended judgment until May 13, 2012.

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

Memorandum: We reject respondent mother's contention in this permanent neglect proceeding that she was denied effective assistance of counsel at the fact-finding stage of the proceeding. "A parent alleging ineffective assistance of counsel has the burden of demonstrating both that he or she was denied meaningful representation and that the deficient representation resulted in actual prejudice" (*Matter of Michael C.*, 82 AD3d 1651, 1652, *lv denied* 17 NY3d 704; *see Matter of James R.*, 238 AD2d 962, 962-963). Here, the mother failed to demonstrate that any of her attorney's shortcomings resulted in actual prejudice. While we agree with the mother that her attorney should have objected to the use of leading questions, any error with respect thereto did not affect the outcome of the hearing and thus is harmless. The mother also contends that her attorney should have objected to the admission of hearsay. While the mother's attorney would have had grounds to object to some of the statements made during petitioner's direct case, the mother has failed to show that her attorney's failure to object was not strategic, i.e., an effort to establish leniency for his own line of questioning. Indeed, later in the hearing, Family Court allowed the mother's attorney to elicit hearsay during his examination, reasoning, "there has been a lot of hearsay in this hearing so far." Lastly, contrary to the mother's

contention, her attorney did not admit on summation that the subject child was neglected.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1007

CA 12-00354

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

IN THE MATTER OF SONBYRNE SALES, INC.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TOWN BOARD OF TOWN OF ONONDAGA AND THOMAS
ANDINO AS SUPERVISOR OF TOWN OF ONONDAGA,
RESPONDENTS-RESPONDENTS.

GOLDBERG SEGALLA LLP, SYRACUSE (KENNETH M. ALWEIS OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered November 10, 2011 in a proceeding pursuant to CPLR article 78. The judgment denied and dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition is granted and the determination of respondent Town Board of Town of Onondaga to rescind the Agreement for Mutual Conveyance is annulled.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of respondent Town Board of Town of Onondaga (Board) rescinding the Agreement for Mutual Conveyance (Agreement) executed by petitioner's President and respondent Thomas Andino, as Supervisor of the Town of Onondaga. Petitioner further seeks to compel the Town of Onondaga (Town) to comply with the terms and conditions of the Agreement. We conclude that Supreme Court should have granted the petition.

Pursuant to a resolution dated April 4, 2011 (Resolution), the Board resolved, inter alia, to "discontinue and abandon" the southern terminus of East Avenue in the Town and to convey to petitioner that land "together with portions of Town-owned property" adjacent thereto (collectively, the Premises). In exchange, petitioner would convey to the Town an adjoining parcel of property on East Avenue. The Board also resolved that the conveyances would be "in accordance with a conditional contract to be entered into between [the Town and petitioner] and dated April 4, 2011"; that Andino was "authorized to sign the conditional contract . . . [and] . . . to sign any and all

documents and take any necessary action to give full force and effect to th[e] resolution"; and, finally, "that the abandonment of the southern terminus of East Avenue and the sale of the Premises to [petitioner] [were] subject to permissive referendum."

Following the adoption of the Resolution, petitioner's President and Andino executed the Agreement, which contained four contingencies. The first three contingencies related to petitioner's obtaining the zoning approvals, easements and utilities necessary for its proposed development of the Premises. Petitioner agreed to use its "best efforts" to satisfy those contingencies "in a timely fashion" but, even "if any one or more of [the first three contingencies] [was] not satisfied or waived by [petitioner], [petitioner] . . . nevertheless ha[d] the option, for a period of two years from the date of th[e] Agreement, to acquire title to the [Premises] under the remaining terms and conditions of th[e] Agreement." The fourth contingency provided that the obligations of the parties to the Agreement were contingent upon "[a]doption of a [r]esolution of the . . . Board . . . consenting to this Agreement, such [r]esolution to be subject to a permissive referendum pursuant to Town Law."

On May 4, 2011, petitions were filed protesting the Resolution and Agreement and seeking a permissive referendum. A Town Councilman challenged those petitions. While that challenge was pending, Andino moved at a Board meeting on June 20, 2011 for the Board to rescind the Agreement. The Board passed that motion unanimously.

We agree with petitioner that its failure to present a proposal for zoning approval within two months of the Agreement did not violate the Agreement's provision requiring petitioner to use its "best efforts to satisfy [the first three contingencies] in a timely fashion" and did not justify rescission of the Agreement. During the two-month period between the execution of the Agreement and the Board's vote to rescind the Agreement, petitions for a permissive referendum had been filed and were in the process of being challenged by the Town. In our view, it was not unreasonable for petitioner to wait for the merits of that challenge to be determined before submitting formal applications related to its proposed development of the Premises. In any event, the Agreement specifically provided that petitioner could proceed with the property conveyances even if none of the first three contingencies was satisfied. Thus, to the extent that respondents relied on the first three contingencies in determining to rescind the Agreement, that determination was arbitrary and capricious (*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, 231-232).

We further agree with petitioner that the fourth contingency in the Agreement was fulfilled except to the extent that respondents prevented it from being fulfilled when they rescinded the Agreement before a permissive referendum could be held. As noted, that contingency provided that the Agreement was contingent upon "[a]doption of a [r]esolution of the . . . Board . . . consenting to this Agreement, such [r]esolution to be subject to a permissive

referendum pursuant to Town Law." Respondents contend that the fourth contingency requires the Board to "adopt a resolution wherein its *consent* to the Agreement is subject to permissive referendum" (emphasis in original). According to respondents, the Resolution "does not, and cannot, satisfy the [fourth] contingency" because it "unequivocally states that the only matter subject to permissive referendum is the 'abandonment of the southern terminus of East Avenue and the sale of the Premises to [petitioner].' " In short, respondents contend that the fourth contingency requires a permissive referendum on the Board's actual consent to the Agreement. In our view, respondents' interpretation of the fourth contingency is illogical.

The Resolution is "a Resolution of the . . . Board . . . consenting to th[e] Agreement," and thus the first prong of the fourth contingency was satisfied. Respondents correctly note that, while the Resolution contains many "resolved and determined" paragraphs, the only paragraph discussing a permissive referendum is the one stating that "the abandonment of the southern terminus of East Avenue and the sale of the Premises to [petitioner] [were] subject to permissive referendum." In our view, the fact that this one paragraph does not specifically state that the Board's "consent" to the Resolution would be subject to a permissive referendum is not dispositive. The fourth contingency required that the "[r]esolution [was] to be subject to a permissive referendum *pursuant to Town Law*" (emphasis added). The Town Law requires a permissive referendum for the conveyance of land (*see* § 64 [2]). Inasmuch as the Town Law does not require a permissive referendum for "consent" to a contract, the Agreement must be construed as providing that the subject matter of the permissive referendum would be the abandonment of the southern terminus of East Avenue and the conveyance of the Premises, not the Board's consent to the actual contract. We thus conclude that the Resolution satisfied the second prong of the fourth contingency.

Finally, contrary to the contention of respondents, the fact that the resolution discussed in the contingency was adopted before the Agreement was actually executed is of no moment. The Agreement required the adoption of a resolution consenting to the Agreement, and such a resolution was adopted. The permissive referendum never occurred, however, because respondents rescinded the Agreement before the referendum could occur. We thus agree with petitioner that respondents impermissibly " 'frustrated or prevented the occurrence of the condition' " (*ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 490, quoting *Kooleraire Serv. & Installation Corp. v Board of Educ. of City of N.Y.*, 28 NY2d 101, 106).

Inasmuch as the Agreement was a valid and binding contract and none of the contingencies was unfulfilled, we agree with petitioner that respondents' determination rescinding the Agreement was arbitrary and capricious (*see Village of Lake George v Town of Caldwell*, 3 AD2d 550, 554-555, *affd* 5 NY2d 727; *see generally Matter of 4M Holding Co.*

v Town Bd. of Town of Islip, 81 NY2d 1053, 1055; *Pell*, 34 NY2d at 231-232).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1008

CA 12-00276

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

LARRY SHOWERS, PLAINTIFF-RESPONDENT,

V ORDER

THE DELANEY GROUP, INC., DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (KYLE C. REEB OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROBERT E. LAHM, PLLC, SYRACUSE (ROBERT E. LAHM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered August 23, 2011 in a personal injury action. The order, insofar as appealed from, denied that part of defendant's motion seeking summary judgment dismissing plaintiff's Labor Law § 200 and negligence causes of action.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on July 20 and 23, 2012,

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1009

CA 11-00477

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

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

V MEMORANDUM AND ORDER

JODY JAMES TROMBLEY, RESPONDENT-APPELLANT.

DONALD R. GERACE, UTICA, FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered November 5, 2010 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order pursuant to Mental Hygiene Law article 10 determining, following a jury trial, that he is a detained sex offender who has a mental abnormality within the meaning of Mental Hygiene Law § 10.03 (i) and determining, following a dispositional hearing, that he is a dangerous sex offender requiring confinement in a secure treatment facility. We reject respondent's contention that the evidence is legally insufficient to establish that his assault convictions were sexually motivated, i.e., that they "were committed in whole or in substantial part for the purpose of direct sexual gratification of the actor" (§ 10.03 [s]). Petitioner's expert opined that respondent is a sexual sadist, inasmuch as he is sexually aroused by another person's physical or psychological suffering and has acted on his urges with a nonconsenting person. The expert explained that sadistic acts involve activities of dominance over a victim, and that many of those acts had involved the victim of the assaults. He opined that respondent engaged in acts of "gratuitous violence," which were one of the most common types of acts among sexual sadists, that he became sexually gratified by the victim's pain and suffering, and that the two assaults to which he pleaded guilty were sexually motivated. We therefore conclude that the evidence is legally sufficient to support the jury verdict (*see Matter of State of New York v Gierszewski*, 81 AD3d 1473, 1473, *lv denied* 17 NY3d 702). We reject respondent's further contention that the verdict is against the weight of the evidence (*see id.* at 1473-1474). Although

respondent's expert opined that the assaults were not sexually motivated, " '[t]he jury verdict is entitled to great deference based on the jury's opportunity to evaluate the weight and credibility of conflicting expert testimony' " (*id.* at 1474).

Also contrary to respondent's contention, the evidence is legally sufficient to establish that he "is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (Mental Hygiene Law § 10.07 [f]). Again, there was conflicting expert testimony, and Supreme Court credited the testimony of petitioner's expert. We perceive no basis to disturb that determination (*see Matter of State of New York v Timothy EE.*, 97 AD3d 996, 998-999; *Matter of State of New York v Harland*, 94 AD3d 1558, 1559).

Respondent's contention that the court erred in admitting in evidence documents and testimony regarding two prior assault convictions committed by respondent is without merit inasmuch as that evidence was relevant on the issue whether the assault convictions were sexually motivated (*see Matter of State of New York v Lester*, 94 AD3d 1492, 1492). With respect to the admission in evidence of a prior victim's unsworn statement, we conclude that any error in its admission is harmless (*see Matter of State of New York v Fox*, 79 AD3d 1782, 1784). Respondent failed to preserve for our review his contention that he was denied due process by the failure to hold the trial within 60 days of the probable cause determination (*see* Mental Hygiene Law § 10.07 [a]; *see generally Matter of State of New York v Reeve*, 87 AD3d 1378, 1378, *lv denied* 18 NY3d 804). That contention is without merit in any event inasmuch as the delay was attributable to his own requests for adjournments. We have reviewed respondent's remaining contentions and conclude that they are without merit.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1010

CA 12-00462

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

PHYLLIS TIRADO, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF BILLY TIRADO, AN INFANT, PLAINTIFF-RESPONDENT,

V ORDER

DANIEL STEINBERG, DEFENDANT-APPELLANT, DAVID L. CROWE AND DONALD L. CROWE, DEFENDANTS.

GOLDBERG SEGALLA LLP, SYRACUSE (LISA M. ROBINSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

STANLEY LAW OFFICES, LLP, SYRACUSE (ROBERT A. QUATTROCCI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered January 25, 2012 in a personal injury action. The order denied the motion of defendant Daniel Steinberg for summary judgment.

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1012

CA 12-00454

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

DONALD BRAASCH CONSTRUCTION, INC. AND CNA INSURANCE COMPANY, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

STATE INSURANCE FUND, DEFENDANT-RESPONDENT.

CARROLL MCNULTY & KULL, LLC, NEW YORK CITY (KRISTIN V. GALLAGHER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 29, 2011. The order denied plaintiffs' motion for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking a judgment declaring, inter alia, that defendant is "conditionally obligated" to indemnify them in the underlying personal injury lawsuit (*see e.g. Puckett v County of Erie* [appeal No. 3], 262 AD2d 966; *Puckett v County of Erie* [appeal No. 2], 244 AD2d 865). The accident that is the subject of the underlying lawsuit occurred in March 1994 and, in April 1995, the personal injury plaintiffs commenced that lawsuit against, inter alia, plaintiff Donald Braasch Construction, Inc. (DBC). It is undisputed that DBC did not notify defendant of the accident or the personal injury lawsuit until May 1997, at which time defendant disclaimed coverage on the ground that the notice was untimely. Plaintiffs moved for summary judgment seeking a declaration that defendant must reimburse plaintiffs for one half of the settlement amount and one half of their defense costs in the underlying lawsuit. Supreme Court denied the motion, concluding that "questions of fact exist, particularly with respect to whether the delay was reasonable." Plaintiffs appeal from the order denying their motion and, notwithstanding the fact that defendant did not move or cross-move for affirmative relief and also did not cross-appeal from the order, defendant contends that we should dismiss plaintiffs' complaint in its entirety. Although we recognize that defendant is entitled to seek such relief on this appeal by plaintiff (*see Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110-111), we now affirm.

"Notice provisions in insurance policies afford the insurer an opportunity to protect itself . . ., and the giving of the required notice is a condition to the insurer's liability . . . Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy" (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440). " 'The burden of justifying the delay by establishing a reasonable excuse is upon the insured' " (*Philadelphia Indem. Ins. Co. v Genesee Val. Improvement Corp.*, 41 AD3d 44, 46), and such excuses include the lack of knowledge of an accident (*see Security Mut. Ins. Co. of N.Y.*, 31 NY2d at 441); a good-faith and reasonable basis for a belief in nonliability (*see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743; *Security Mut. Ins. Co. of N.Y.*, 31 NY2d at 441; *Philadelphia Indem. Ins. Co.*, 41 AD3d at 46); and a good-faith and reasonable basis for a belief in noncoverage (*see Strand v Pioneer Ins. Co.*, 270 AD2d 600, 600-601; *Seemann v Sterling Ins. Co.*, 267 AD2d 677, 678; *Reynolds Metal Co. v Aetna Cas. & Sur. Co.*, 259 AD2d 195, 200-201; *see generally Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21).

The issue on this appeal is whether DBC had a good-faith and reasonable belief that its Workers' Compensation and Employers' Liability Policy with defendant did not cover the accident and resultant litigation. DBC submitted evidence that the injured plaintiff was not DBC's employee, rendering defendant's policy inapplicable, and that the claims for contractual indemnification were excluded from coverage under defendant's policy. Additionally, DBC submitted evidence that the first claim against DBC that would arguably be covered under its policy was made in April 1997. Defendant, however, submitted evidence that DBC knew of the facts implicating coverage on the date of the accident or, at the very latest, when it moved for summary judgment in 1996 on the ground that the injured plaintiff was a special employee of DBC. "Of course, there is no inflexible test of reasonableness. As with most questions whose answers are heavily dependent on the factual contexts in which they arise, rules of general application are hard to come by" (*Mighty Midgets*, 47 NY2d at 19-20). We thus conclude that there are triable issues of fact whether DBC's belief in noncoverage was reasonable (*see Reynolds Metal Co.*, 259 AD2d at 201; *Seemann v Sterling Ins. Co.*, 234 AD2d 672, 673).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1013

CA 12-00556

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

PHILIP F. HANLON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL D. HEALY, DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (ELIZABETH A. OLLINICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

FESSENDEN, LAUMER & DEANGELO, JAMESTOWN (MARY B. SCHILLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered September 22, 2011 in a personal injury action. The order granted the motion of plaintiff for partial summary judgment on the issue of liability.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that he sustained when he fell from a roof while fighting a fire at defendant's property in the City of Jamestown. Defendant appeals from an order granting plaintiff's motion for partial summary judgment on the issue of liability. We agree with defendant that Supreme Court erred in granting the motion.

Plaintiff seeks to recover damages pursuant to, inter alia, General Municipal Law § 205-a, which is a legislative abrogation of the common-law "firefighter's rule" that formerly barred firefighters from recovering in negligence for injuries sustained in the performance of their duties (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 79). To meet his burden of establishing his entitlement to summary judgment on the General Municipal Law § 205-a cause of action, plaintiff was required to "identify the statute or ordinance with which the defendant failed to comply, describe the manner in which the firefighter was injured, and [establish] those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm to the firefighter" (*Zanghi v Niagara Frontier Transp. Commn.*, 85 NY2d 423, 441; *see Kenavan v City of New York*, 267 AD2d 353, 355, *lv denied* 95 NY2d 756). Inasmuch as "the Legislature intended to broaden a firefighter's cause of action under section 205-a to encompass situations where the alleged violation was not the

'direct' cause of the injuries" (*Giuffrida*, 100 NY2d at 80), plaintiff was required to establish only a " 'practical or reasonable connection' " between the violation of the ordinance and the injury he sustained (*Mullen v Zoebe, Inc.*, 86 NY2d 135, 142; *see Zanghi*, 85 NY2d at 441; *Donna Prince L. v Waters*, 48 AD3d 1137, 1139).

Here, plaintiff alleges that defendant violated four sections of the National Fire Prevention Association (NFPA) Fire Code, as adopted in the NFPA Life Safety Code §§ 2.1, 2.2, that are applicable to defendant's property pursuant to Jamestown City Code § 140-2. Those NFPA Fire Code sections prohibit connecting an ungrounded extension cord to a grounded appliance (§ 11.1.7.4), running an extension cord under a door (§ 11.1.7.5), using a damaged extension cord (§ 11.1.7.3), and connecting the extension cord to an appliance that exceeds the maximum amperage for that extension cord (§ 11.1.7.2). We agree with defendant that plaintiff failed to meet his burden with respect to two of the four sections, i.e., section 11.1.7.4 because plaintiff failed to establish that the space heater that allegedly caused the fire was a grounded appliance, and section 11.1.7.5 because he failed to establish that running the cord under the door caused the fire to occur. Even assuming, arguendo, that plaintiff met his initial burden with respect to the four Fire Code sections, we conclude that defendant raised a triable issue of fact whether there is a " 'practical or reasonable connection' " between those Fire Code violations and plaintiff's injury (*Mullen*, 86 NY2d at 142).

We have considered defendant's remaining contentions and conclude that they are without merit, or are academic in light of our determination.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1014

CA 11-01741

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

MICHAEL MCALEER AND KRISTI MCALEER,
PLAINTIFFS-APPELLANTS,

V ORDER

CHARLES G. QUILL, JR. AND CHARLES G. QUILL,
DOING BUSINESS AS ROYAL PHEASANT SUPPER CLUB,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

HOGAN WILLIG, PLLC, AMHERST (TAMMY L. RIDDLE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, BUFFALO (MICHAEL A. RIEHLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 25, 2011 in a personal injury action. The order denied plaintiffs' motion for an order setting aside the jury verdict and granting a new trial.

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], [2]).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1015

CA 11-01742

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

MICHAEL MCALEER AND KRISTI MCALEER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CHARLES G. QUILL, JR. AND CHARLES G. QUILL,
DOING BUSINESS AS ROYAL PHEASANT SUPPER CLUB,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

HOGAN WILLIG, PLLC, AMHERST (TAMMY L. RIDDLE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, BUFFALO (MICHAEL A. RIEHLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 23, 2011 in a personal injury action. The judgment, among other things, dismissed plaintiffs' complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Michael McAleer (plaintiff) when he slipped and fell on ice outside a bar and restaurant operated by defendants. The jury returned a verdict finding that defendants were not negligent, and Supreme Court denied plaintiffs' motion seeking to set aside the verdict as against the weight of the evidence and seeking a new trial. We affirm.

A verdict should not be set aside as against the weight of the evidence " 'unless the preponderance of the evidence in favor of the moving party is so great that the verdict could not have been reached upon any fair interpretation of the evidence' " (*Ruddock v Happell*, 307 AD2d 719, 720; *see Krieger v McDonald's Rest. of N.Y., Inc.*, 79 AD3d 1827, 1828, *lv dismissed* 17 NY3d 734), and that cannot be said here. Plaintiffs' expert engineer testified that, upon considering the records of the National Weather Bureau for the day preceding plaintiff's fall, he determined that it was above freezing during the daytime, which would have caused melting snow and runoff. He further testified that, by 1:00 a.m. the following morning, the temperature was 32 degrees. The accident occurred at 3:00 a.m., and plaintiff and witnesses to the accident testified that there was black

ice on the sidewalk where plaintiff fell. Plaintiffs, however, did not present evidence "concerning the timing of the formation of the icy areas that caused the accident[] . . . [and thus] a fair interpretation of the evidence supports the jury's verdict, i.e., that the specific icy areas at issue 'formed so close in time to the accident[] that [defendants] could not reasonably have been expected to notice and remedy [them]' " (*Krieger*, 79 AD3d at 1828-1829; *see Jordan v Musinger*, 197 AD2d 889, 890). Indeed, plaintiffs' expert testified that the air temperature and the pavement temperature could vary, and thus the jury would have been compelled to engage in speculation concerning when the ice formed.

We reject plaintiffs' contention that defendants had constructive notice of the dangerous condition because they should have known that the temperature was going to drop, and they therefore should have applied salt to the sidewalk before that occurred. A " '[g]eneral awareness that snow or ice may be present is legally insufficient to constitute notice of the particular condition that caused a plaintiff to fall' " (*Krieger*, 79 AD3d at 1829; *see Boucher v Watervliet Shores Assoc.*, 24 AD3d 855, 857). "[W]hen weather conditions cause property to become dangerous by reason of the accumulation of ice, the law affords the landowner *a reasonable time after* the . . . temperature fluctuation which caused the hazardous condition to take corrective action" (*Bullard v Pfohl's Tavern, Inc.*, 11 AD3d 1026, 1027 [emphasis added and internal quotation marks omitted]).

Finally, we reject plaintiffs' contention that the court erred in its charge to the jury. The court properly charged the jury on possessor liability in the context of a slip and fall case pursuant to PJI 2:91 rather than the more general standard on possessor liability pursuant to PJI 2:90 (*see generally Revill v Boston Post Rd. Dev. Corp.*, 293 AD2d 138, 141, *appeal dismissed* 98 NY2d 725). The court also properly gave an intoxication charge inasmuch as there was evidence before the jury to support that charge (*see Johnson v White*, 85 AD3d 977, 978).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1023

KA 12-00346

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V ORDER

ALEXSANDER TRIFUNOVSKI, DEFENDANT-RESPONDENT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JOSEPH J. CENTRA OF COUNSEL), FOR APPELLANT.

MCGRAW LAW OFFICE, SYRACUSE (ANNALEIGH E. PORTER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), dated August 22, 2011. The order granted the motion of defendant to suppress certain physical evidence.

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1028

KAH 11-01817

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ANDRIQUE BARON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES AND EKPE D. EKPE, SUPERINTENDENT,
WATERTOWN CORRECTIONAL FACILITY,
RESPONDENTS-RESPONDENTS.

KATHLEEN P. REARDON, ROCHESTER, FOR PETITIONER-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered May 26, 2011 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Inasmuch as petitioner has been released to parole supervision, this appeal by him from the judgment dismissing his petition for a writ of habeas corpus has been rendered moot (*see People ex rel. Baron v New York State Dept. of Corrections*, 94 AD3d 1410, 1410, *lv denied* 19 NY3d 807; *see also People ex rel. Graham v Fischer*, 70 AD3d 1381, 1381-1382; *People ex rel. Mitchell v Unger*, 63 AD3d 1591, 1591; *People ex rel. Hampton v Dennison*, 59 AD3d 951, 951, *lv denied* 12 NY3d 711), and the exception to the mootness doctrine does not apply herein (*see Graham*, 70 AD3d at 1381-1382; *Hampton*, 59 AD3d at 951; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). Contrary to petitioner's contention, *People ex rel. Phillips v LaClair* (84 AD3d 1606, 1606) does not compel a different result. Although the Third Department concluded therein that the petitioner's appeal was moot because the petitioner was "no longer incarcerated or subject to the jurisdiction of the Board of Parole" (*id.*), the Court subsequently made clear that a petitioner on parole supervision may not maintain a habeas corpus claim (*see People ex rel. Speights v McKoy*, 88 AD3d 1039, 1040; *People ex rel. Howard v Yelich*, 87 AD3d 772, 773). Petitioner's reliance on *Speights* and *Howard* is misplaced. Unlike this case, *Speights* and *Howard* called into question the calculation of the maximum expiration date of the petitioner's sentence and, thus, the Court decided to convert those habeas corpus

proceedings to proceedings pursuant to CPLR article 78 (*see Speights*, 88 AD3d at 1040; *Howard*, 87 AD3d at 773). Here, by contrast, the calculation of the maximum expiration date of petitioner's sentence is not affected by the issue presented.

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1042

CA 11-02551

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

GROVE PLACE TOWNHOMES, LLC,
PLAINTIFF-APPELLANT,

V ORDER

WOODLARK PROPERTIES, II, LP,
DEFENDANT-RESPONDENT.

FIX SPINDELMAN BROVITZ & GOLDMAN, P.C., FAIRPORT (REUBEN ORTENBERG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (THOMAS R. CHIAVETTA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered March 1, 2011 in a breach of contract action. The order, among other things, granted defendant's motion for summary judgment.

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1046

KA 11-00189

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD DOCKERY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered December 8, 2010. The judgment convicted defendant, upon a nonjury verdict, of criminal contempt in the first degree and false personation.

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

Memorandum: Defendant appeals from a judgment convicting him after a nonjury trial of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]) and false personation (§ 190.23). Defendant failed to preserve for our review his contention that the allegations in the People's bill of particulars varied materially from the evidence adduced by them at trial (*see People v Inocencio*, 173 AD2d 732, *lv denied* 78 NY2d 967; *see generally People v Gray*, 86 NY2d 10, 19), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant also failed to preserve for our review his contentions that the evidence is legally insufficient to support the conviction of criminal contempt because the victim was not properly named in the order of protection and because that order was improperly issued pursuant to CPL 530.13 rather than CPL 530.11 (1) (e). Even assuming, arguendo, that his motion for a trial order of dismissal was timely despite having been made after he rested, we conclude that defendant's motion was not " 'specifically directed' at" the alleged deficiencies raised on appeal (*Gray*, 86 NY2d at 19). In any event, the evidence, viewed in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), and affording appropriate deference to County Court's

credibility determinations (*see People v White*, 43 AD3d 1407, 1408, *lv denied* 9 NY3d 1010), we conclude that the alleged deficiencies in the evidence are not so substantial as to render the verdict against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Defendant's further contention that the court erred in admitting in evidence the certified copy of the order of protection and thus that the evidence is legally insufficient with respect to the existence of a valid order is lacking in merit, inasmuch as the record establishes that the copy was properly certified (*see* CPLR 4540 [b]; *cf. People v Smith*, 258 AD2d 245, 249-250, *lv denied* 94 NY2d 829).

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1047

KA 12-00143

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN J. GOSEK, DEFENDANT-APPELLANT.

MULDOON & GETZ, ROCHESTER (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (COURTNEY E. PETTIT OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Oswego County Court (Walter W. Hafner, Jr., J.), dated August 24, 2009. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

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 County Court's upward departure from his presumptive classification as a level one risk to a level two risk is not supported by clear and convincing evidence (*see* § 168-n [3]). We reject that contention, inasmuch as the People presented the requisite evidence of aggravating factors " 'of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines' " to warrant the upward departure (*People v McCollum*, 41 AD3d 1187, 1188, *lv denied* 9 NY3d 807). Here, the People presented clear and convincing evidence that defendant used the telephone to induce underage females to engage in sexual activity with him; that on one occasion he met with an undercover officer to arrange for the provision of drugs in exchange for sex; and that, on another occasion, he made arrangements to meet two females for sex, believing that they were 15 years of age, and he was arrested at the hotel where they were to meet. We further conclude that the court's "oral findings are supported by the record and sufficiently detailed to permit intelligent review; thus, remittal is not required despite defendant's accurate assertion regarding the court's failure to render an order setting forth the findings of fact . . . upon which its determination is based" (*People v Farrell*, 78

AD3d 1454, 1455).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1049

KA 09-00341

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARL CAMPBELL, DEFENDANT-APPELLANT.

KIMBERLY J. CZAPRANSKI, INTERIM CONFLICT DEFENDER, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered November 20, 2008. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him, following a bench trial, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that the conviction is not supported by legally sufficient evidence because the People failed to establish that he had actual or constructive possession of the weapon. We reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). The People presented evidence that the police found a loaded gun on the floor of the rear passenger seat of the automobile in which defendant was a passenger. The statutory presumption of possession set forth in Penal Law § 265.15 (3) provides that "[t]he presence in an automobile, other than a stolen one or a public omnibus, of any firearm [or] defaced firearm . . . is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon . . . is found . . . ." The statutory presumption establishes a prima facie case against a defendant, which presumption he or she may rebut by offering evidence (*see People v Lemmons*, 40 NY2d 505, 510).

In *People v Wilt* (105 AD2d 1089, 1090), this Court concluded that there was no " 'rational connection' " between the discovery of the gun in the trunk of the vehicle in which the defendant was riding and his presumed possession of the gun. We noted that defendant had

testified in his own defense that he had only been in the vehicle for five or six minutes to look for his girlfriend and did not know that a gun was inside the trunk. Defendant also testified that he had never looked in the trunk of the vehicle, which was missing its trunk lock. We further noted that defendant's testimony was corroborated by several witnesses (*see id.* at 1090). Here, unlike in *Wilt*, the weapon was found on the floorboards of the right rear passenger seat, and defendant was in that passenger seat. Defendant chose not to testify in his own defense and did not call any witnesses in order to rebut the presumption. In our view, it was rational to presume that defendant had both the ability and the intent to exercise dominion and control over the weapon, and thus the evidence is legally sufficient to establish that there was a " 'rational connection' " between the discovery of the weapon and defendant's presumed possession of the weapon (*id.*; *see Leary v United States*, 395 US 6, 33-34; *People v Glenn*, 185 AD2d 84, 89-90).

Also contrary to defendant's contention, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Even assuming, arguendo, that a different finding would not have been unreasonable, we conclude that Supreme Court did not fail to give the evidence the weight it should be accorded (*see id.*).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1051

KAH 11-02306

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
MANUEL MARTINEZ, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered August 18, 2011 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Supreme Court properly dismissed the petition in this habeas corpus proceeding. Petitioner sought that relief based on his contention that the court in which he was convicted lacked personal jurisdiction over him. "Habeas corpus relief is not an appropriate remedy for asserting claims that were or could have been raised on direct appeal or in a CPL article 440 motion, even if they are jurisdictional in nature . . . CPL 440.10 (1) (a) specifically authorizes a motion to vacate a judgment upon the ground that the court did not have jurisdiction of the defendant" (*People ex rel. Burr v Rock*, 93 AD3d 977, 977-978, *lv denied* 19 NY3d 806; *see People ex rel. Forsythe v Poole*, 56 AD3d 1239, 1239-1240, *lv denied* 12 NY3d 701; *People ex rel. Minter v Eisenschmidt*, 294 AD2d 939, 939-940, *lv denied* 98 NY2d 609).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1055

CAF 11-01399

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

IN THE MATTER OF SAMAJ B.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TOWANDA H.-B., RESPONDENT-APPELLANT,
AND WADE B., RESPONDENT.

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

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

KIMBERLY WHITE WEISBECK, ATTORNEY FOR THE CHILD, ROCHESTER, FOR SAMAJ B.

Appeal from an order of the Family Court, Monroe County (Gail A. Donofrio, J.), entered June 30, 2011 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Towanda H.-B. had neglected the subject child.

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

Memorandum: Respondent mother appeals from an order adjudging her child to be neglected. We reject the mother's contention that petitioner failed to prove by a preponderance of the evidence that the subject child was neglected. Pursuant to Family Court Act § 1046 (a) (iii), "proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child except that such drug or alcoholic beverage misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program." Thus, "neglect may in some circumstances be presumed if the parent chronically and persistently misuses alcohol and drugs which, in turn, substantially impairs his or her judgment while [the] child is entrusted to his or her care" (*Matter of Chassidy CC. [Andrew CC.]*, 84 AD3d 1448, 1449; *see Matter*

of Arthur S. [Rose S.], 68 AD3d 1123, 1123-1124). "In other words, '[t]he presumption contained in Family [Court] Act § 1046 (a) (iii) operates to eliminate a requirement of specific parental conduct vis-a-vis the child and neither actual impairment nor specific risk of impairment need be established' " (*Matter of Paolo W.*, 56 AD3d 966, 967, *lv dismissed* 12 NY3d 747).

Here, petitioner met its burden of proof by establishing that the mother admittedly used the drug Suboxone on numerous occasions; that she purchased the drug on the street whenever she was able; and that she was prostituting herself in order to obtain money to purchase the drug. Additionally, the mother failed to rebut the presumption created by Family Court Act § 1046 (a) (iii). Although the mother contends that petitioner failed to establish that Suboxone is a "drug" within the meaning of section 1012 (d), "[t]hat contention . . . is not preserved for our review inasmuch as the [mother] failed to move to dismiss the petition on that ground" (*Matter of Lydia C. [Albert C.]*, 89 AD3d 1434, 1435-1436).

Based on our determination, we see no need to address the mother's remaining challenges to the sufficiency of petitioner's proof. We reject the mother's final contention that Family Court erred by admitting in evidence an intake report filed with the Office of Children and Family Services. That report was admissible pursuant to Family Court Act § 1046 (a) (v) inasmuch as the person making the report was a police officer, who is a mandated reporter under Social Services Law § 413 (1) (a) (*see Matter of Lauryn H. [William A.]*, 73 AD3d 1175, 1177; *Matter of Michael G.*, 300 AD2d 1144, 1145; *Matter of Shawn P.*, 266 AD2d 907, 908, *lv denied* 94 NY2d 760).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1057

CAF 12-00319

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

IN THE MATTER OF SYSAMOUTH D.,
RESPONDENT-APPELLANT.

ONEIDA COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

WILLIAM L. KOSLOSKY, ATTORNEY FOR THE CHILD, UTICA, FOR RESPONDENT-APPELLANT.

GREGORY J. AMOROSO, COUNTY ATTORNEY, UTICA (RAYMOND F. BARA OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered October 27, 2011 in a proceeding pursuant to Family Court Act article 3. The order, inter alia, placed respondent with the Office of Children and Family Services through April 26, 2012.

It is hereby ORDERED that said appeal from the order insofar as it concerned placement is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: Respondent appeals from an order of disposition that, inter alia, placed him in the custody of the Office of Children and Family Services through April 26, 2012. According to respondent, Family Court deprived him of his equal protection and due process rights as well as his rights pursuant to Family Court Act §§ 352.2 and 353.3 in determining placement, and the court assumed a prosecutorial role with respect thereto. We dismiss as moot respondent's appeal from the order insofar as it concerned placement inasmuch as the period of placement has expired (*see Matter of Haley M.T.*, 96 AD3d 1549, 1549; *Matter of Julia R.*, 52 AD3d 1310, 1311, *lv denied* 11 NY3d 709). Respondent's contentions with respect to placement do not fall within the exception to the mootness doctrine (*see Matter of Kale F.*, 269 AD2d 832; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). Respondent's contention that his admission was insufficient because the court did not follow certain requirements set forth in Family Court Act § 321.3 is not moot "because there may be collateral consequences resulting from the adjudication of delinquency" (*Matter of Stanley F.*, 76 AD3d 1069, 1069). We conclude, however, that it lacks merit (*see Matter of William VV.*, 42 AD3d 710,

711-712).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1063

CA 11-02564

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

JUDITH M. JAROSZ, PLAINTIFF-APPELLANT,

V ORDER

KATHARINA M. DOYLE, M.D., CHRISTOPHER J. WERTH, M.D., BUFFALO ANESTHESIA ASSOCIATES AND KALEIDA HEALTH, DEFENDANTS-RESPONDENTS.

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

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOEL J. JAVA, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CHRISTOPHER J. WERTH, M.D. AND KALEIDA HEALTH.

CONNORS & VILARDO, LLP, BUFFALO (MICHAEL J. ROACH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS KATHARINA M. DOYLE, M.D. AND BUFFALO ANESTHESIA ASSOCIATES.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered March 18, 2011 in a medical malpractice action. The order granted the motions of defendants for summary judgment and dismissed the amended complaint.

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1065

CA 12-00488

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

IN THE MATTER OF THE ARBITRATION BETWEEN
NEW YORK CENTRAL MUTUAL FIRE INSURANCE
COMPANY ("NYCM"), PETITIONER-APPELLANT,

AND ORDER

JASMINE MENDEZ, RESPONDENT-RESPONDENT.

BROWN & KELLY, LLP, BUFFALO (MARK J. SCHAEFER OF COUNSEL), FOR PETITIONER-APPELLANT.

LAW OFFICES OF JAMES MORRIS, BUFFALO (NADEEN C. SINGH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered August 19, 2011. The order, insofar as appealed from, denied the application of petitioner for a permanent stay of arbitration and denied the application of petitioner for an evidentiary hearing.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on August 7, 2012,

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1066

CA 12-00482

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

TALIA M. ROTH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DEFENDANT-RESPONDENT.
(ACTION NO. 1.)

PHILLIP LANDI, PLAINTIFF-APPELLANT,

V

KALEIDA HEALTH, DEFENDANT-RESPONDENT.
(ACTION NO. 2.)

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFF-APPELLANT PHILLIP LANDI.

LAW OFFICES OF EUGENE C. TENNEY, BUFFALO (COURTNEY G. SCIME OF COUNSEL), FOR PLAINTIFF-APPELLANT TALIA M. ROTH.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered September 30, 2011 in personal injury actions. The order denied the motion of plaintiff Talia M. Roth for summary judgment, granted the motion and cross motion of defendant for summary judgment and dismissed the complaints.

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

Memorandum: Plaintiffs commenced these actions seeking damages for injuries they sustained when they were struck by a motor vehicle while they were crossing the street at an intersection. The vehicle was driven by defendant's employee, an "on-call" nurse who was traveling home from the hospital at the time of the accident. Supreme Court properly granted defendant's "motion and cross motion" for summary judgment dismissing the complaint in action No. 2 and the complaint in action No. 1, respectively. " 'An employer generally is not liable for an employee's negligence while the employee is traveling to or from work because the element of control is lacking' " (*Cicatello v Sobierajski*, 295 AD2d 974, 975; *see D'Amico v Christie*, 71 NY2d 76, 88). In cases such as this, involving allegedly

employment-related travel, " 'the crucial test is whether the employment created the necessity for the travel' " (*Swartzlander v Forms-Rite Bus. Forms & Print. Serv.*, 174 AD2d 971, 972, *affd* 78 NY2d 1060), i.e., the need to be on the particular route on which the accident occurred (*see Greer v Ferrizz*, 118 AD2d 536, 538). Under the dual purpose principle, "[i]f the travel would still have occurred even [if] the business purpose [had been] canceled, then the employer cannot be held liable" (*Matos v Michele Depalma Enters.*, 160 AD2d 1163, 1164). Here, while defendant may have been able to exercise some degree of control over its employee at the time of the accident because he was "on-call," defendant did not create the necessity for the employee to take any particular route home after leaving the hospital. We thus conclude as a matter of law that the employee's activities were not being controlled by defendant, nor was the employee acting in furtherance of any duties owed to defendant by returning home (*see Lundberg v State of New York*, 25 NY2d 467, 471-472, *rearg denied* 26 NY2d 883; *Swartzlander*, 174 AD2d at 972; *Matos*, 160 AD2d at 1164; *see generally Tenczar v Richmond*, 172 AD2d 952, 952-953, *lv denied* 78 NY2d 859).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1067

CA 12-00500

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

DEIDRE SNIATECKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VIOLET REALTY, INCORPORATED AND MAIN PLACE LIBERTY GROUP, LLG, DEFENDANTS-APPELLANTS.

VIOLET REALTY, INCORPORATED AND MAIN PLACE LIBERTY GROUP, LLG, THIRD-PARTY PLAINTIFFS-APPELLANTS-RESPONDENTS,

V

L. FANARA'S PLUMBING & HEATING, INC., THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT, ROY'S PLUMBING, INC., THIRD-PARTY DEFENDANT-RESPONDENT.

BROWN & KELLY, LLP, BUFFALO (KENNETH KRAJEWSKI OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS-RESPONDENTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JOSHUA M. HENRY OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (DENNIS GLASCOTT OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

LAW OFFICE OF JOSEPH A. ABLES, JR., ORCHARD PARK (NORMAN E.S. GREENE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered September 9, 2011. The order, among other things, denied the cross motion of defendants for summary judgment dismissing plaintiff's complaint and denied the motion of third-party defendant L. Fanara's Plumbing & Heating, Inc. for summary judgment dismissing the third-party complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of third-party defendant L. Fanara's Plumbing & Heating, Inc. and dismissing the third-party complaint and all cross claims against it and by granting that part of the cross motion of defendants for summary judgment dismissing the complaint, as amplified by the bill of particulars,

insofar as it alleges that defendants were negligent in failing to warn plaintiff of the dangerous condition at issue and dismissing the complaint to that extent and as modified the order is affirmed without costs.

Memorandum: Defendants-third-party plaintiffs, Violet Realty, Incorporated and Main Place Liberty Group, LLG (hereafter, defendants), appeal and third-party defendant L. Fanara's Plumbing & Heating, Inc. (Fanara's) cross-appeals from an order that, inter alia, denied Fanara's motion for summary judgment dismissing the third-party complaint and all cross claims against it, denied defendants' cross motion for summary judgment dismissing the complaint against them and granted the cross motion of third-party defendant Roy's Plumbing, Inc. (Roy's Plumbing) for summary judgment dismissing the third-party complaint and all cross claims against it. We conclude that Supreme Court properly granted the cross motion of Roy's Plumbing, but that the court erred in denying Fanara's motion and in denying that part of defendants' cross motion for summary judgment dismissing the complaint, as amplified by the bill of particulars, insofar as it alleges that defendants were negligent in failing to warn plaintiff of the dangerous condition at issue. We therefore modify the order accordingly.

Plaintiff commenced this action to recover damages for injuries she sustained when she fell on the wet kitchen floor of a food stand area located on property owned by defendants. At the time of the incident, plaintiff was working for her employer, who had leased the food stand area, including the kitchen area, from defendants. It is undisputed that the kitchen floor was wet because two floor drains in the kitchen had begun backing up the day before plaintiff's accident, causing water to pool on the kitchen floor. In her bill of particulars, plaintiff contended, among other things, that defendants were negligent in failing to maintain the premises in a safe and suitable condition; in failing to repair the plumbing to prevent the clog; in allowing access to an unsafe area; in failing to properly supervise the area of the dangerous condition; and in failing to warn plaintiff of the dangerous condition. Defendants subsequently commenced a third-party action against Fanara's, a contractor hired by defendants to repair the clogged drains, and Roy's Plumbing, a contractor hired by Fanara's after Fanara's was unable to repair the clogged drains. Ultimately, employees of Roy's Plumbing were able to resolve the problem by flushing the piping from two separate access points.

Addressing first the cross motion of defendants, we conclude that they were not entitled to summary judgment dismissing the complaint in its entirety against them. "A landowner is liable for a dangerous or defective condition on his or her property when the landowner 'created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it' " (*Anderson v Weinberg*, 70 AD3d 1438, 1439; *see Pommerenck v Nason*, 79 AD3d 1716, 1716). Defendants failed to establish that they cleaned the pipes at any time between February 2004 and December 28, 2004, the date on which the drains became clogged. It is undisputed that, in a January 2004

proposal for flushing the pipes, defendants' head of maintenance had written a note to the employee in charge of sewer lines asking him to "Pls. arrange for the sewer to be cleaned every 6 mos." We thus conclude that there is a triable issue of fact whether defendants created the dangerous condition by negligently maintaining the pipes (*see Reimold v Walden Terrace, Inc.*, 85 AD3d 1144, 1145-1146; *cf. Chi-Ming Tang v Village of Geneseo*, 303 AD2d 987, 987). We note in any event that, although it is undisputed that defendants acted promptly to remedy the condition, " '[e]ven where the relevant facts are uncontested, summary judgment is rarely appropriate in negligence cases, inasmuch as the issue of whether the defendant . . . acted reasonably under the circumstances can rarely be resolved as a matter of law' " (*Rubin v Reality Fashions*, 229 AD2d 1026, 1027; *see generally Andre v Pomeroy*, 35 NY2d 361, 364).

Defendants correctly contend that the violation of their own internal policy would not constitute evidence that they were negligent if their internal policy "require[s] a standard that transcends reasonable care" (*Gilson v Metropolitan Opera*, 5 NY3d 574, 577; *see Lesser v Manhattan & Bronx Surface Tr. Operating Auth.*, 157 AD2d 352, 356, *order amended* 176 AD2d 463, *affd sub nom. Fishman v Manhattan & Bronx Surface Tr. Operating Auth.*, 79 NY2d 1031, *rearg denied* 80 NY2d 893). Inasmuch as flushing or cleaning of the pipes is "part of the service that [defendants] provide[] and for which [they are] responsible" (*Haber v Cross County Hosp.*, 37 NY2d 888, 889), we conclude that it is for the jury to determine whether "observance of [the internal policy] fell within the orbit of what is required by reasonable care" (*Danbois v New York Cent. R.R. Co.*, 12 NY2d 234, 240; *see Juiditta v Bethlehem Steel Corp.*, 75 AD2d 126, 135-136).

Defendants also correctly contend that they have no duty to warn of a dangerous condition that is open and obvious (*see Tagle v Jakob*, 97 NY2d 165, 169; *Koval v Markley*, 93 AD3d 1171, 1172; *Mazurek v Home Depot U.S.A.*, 303 AD2d 960, 962). Although the issue whether a dangerous condition is open and obvious is generally one of fact for a jury, courts "may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion" (*Tagle*, 97 NY2d at 169). The facts of this case compel such a conclusion. Defendants established as a matter of law that the dangerous condition was open and obvious and that plaintiff "fully appreciated the danger [the wet floor] presented" (*Duclos v County of Monroe*, 258 AD2d 925, 926). Inasmuch as "a plaintiff's theory of negligence based upon the claim that the property owner violated its duty to warn of the claimed hazard may be dismissed upon a demonstration that the hazard was open and obvious" (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71), the court should have granted that part of defendants' cross motion for summary judgment dismissing the complaint, as amplified by the bill of particulars, insofar as it alleges that defendants were negligent in failing to warn plaintiff of the dangerous condition.

We further conclude, however, that defendants failed to establish as a matter of law that plaintiff's conduct was the sole proximate

cause of her fall (*see Mooney v Petro, Inc.*, 51 AD3d 746, 747), and thus that defendants are not entitled to summary judgment dismissing the complaint in its entirety on that additional ground. "[U]nder the circumstances presented, it cannot be said that plaintiff's conduct in [walking across the wet floor] was unforeseeable . . . [and rose] to such a level of culpability as to replace [defendants'] negligence as the legal cause of the accident" (*Oliver v Tanning Bed, Inc.*, 50 AD3d 1259, 1261-1262 [internal quotation marks omitted]; *cf. Tkeshelashvili v State of New York*, 18 NY3d 199, 205-207). We also conclude that defendants failed to establish as a matter of law that they lacked any authority to prohibit plaintiff or others from being present in the kitchen on the day of plaintiff's accident, and we therefore conclude that they are not entitled to summary judgment dismissing the complaint, as amplified by the bill of particulars, insofar as it alleges that defendants were negligent in permitting access to the kitchen area.

With respect to the motion of Fanara's and the cross motion of Roy's Plumbing, we note that there were no written contracts requiring them to indemnify defendants or to procure insurance in favor of defendants. Thus, we conclude that they established their entitlement to summary judgment dismissing the contractual indemnification and breach of contract causes of action in the third-party complaint. We also conclude that they established their entitlement to summary judgment dismissing the causes of action for common-law indemnification in the third-party complaint inasmuch as they both established as a matter of law that "plaintiff's accident was not attributable to [their] negligent performance or nonperformance of an act solely within [their] province" (*Bermingham v Peter, Sr. & Mary L. Liberatore Family Ltd. Partnership*, 94 AD3d 1424, 1425; *see Littleton v Amberland Owners, Inc.*, 94 AD3d 953, 953-954; *cf. Trzaska v Allied Frozen Stor., Inc.*, 77 AD3d 1291, 1293). Defendants failed to raise a triable issue of fact with respect to any of those causes of action in the third-party complaint.

Finally, we conclude that Fanara's and Roy's Plumbing established their entitlement to summary judgment dismissing the remaining causes of action in the third-party complaint, which sought common-law contribution. It is well established that there are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm' . . .; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties . . . and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140; *see Anderson v Jefferson-Utica Group, Inc.*, 26 AD3d 760, 760-761). Because there are no allegations in the pleadings that would establish the applicability of any of the three exceptions set forth in *Espinal*, Fanara's and Roy's Plumbing, "in establishing [their] prima facie entitlement to judgment as a matter of law, [were] 'not required to negate the possible applicability of any of [those] exceptions' "

(*Brathwaite v New York City Hous. Auth.*, 92 AD3d 821, 824, *lv denied* 19 NY3d 804). In any event, we conclude that Fanara's and Roy's Plumbing established that none of the exceptions applies. They established as a matter of law that they did not launch a force or instrument of harm by creating or exacerbating a dangerous condition (*see Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257; *Achtziger v Merz Metal & Mach. Corp.*, 27 AD3d 1137, 1138; *Anderson*, 26 AD3d at 761); that plaintiff did not detrimentally rely on their continued performance of any repairs (*see Vushaj v Insignia Residential Group, Inc.*, 50 AD3d 393, 394*; Anderson*, 26 AD3d at 761); and that the oral plumbing repair contracts at issue in this case were "not so comprehensive and exclusive that [they] 'entirely displaced [defendants'] duty to maintain the premises safely' " (*Anderson*, 26 AD3d at 761, quoting *Espinal*, 98 NY2d at 140; *see Bermingham*, 94 AD3d at 1425).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

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

1069

TP 12-00298

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

IN THE MATTER OF WALTER BALKUM, PETITIONER,

V MEMORANDUM AND ORDER

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

WALTER BALKUM, 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 [Thomas G. Leone, A.J.], entered February 8, 2012) 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 so appealed from is unanimously modified on the law and the petition is granted in part by annulling those parts of the determination finding that petitioner violated inmate rules 100.13 (7 NYCRR 270.2 [B] [1] [iv]) and 104.13 (7 NYCRR 270.2 [B] [5] [iv]) 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 those rules, 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 hearing, that he had violated various inmate rules, including inmate rules 100.13 (7 NYCRR 270.2 [B] [1] [iv] [fighting]) and 104.13 (7 NYCRR 270.2 [B] [5] [iv] [creating a disturbance]). As respondent correctly concedes, the determination with respect to those two inmate rules is not supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139). We therefore modify the determination and grant the petition in part by annulling those parts of the determination finding that petitioner violated those two inmate rules, and we direct respondent to expunge from petitioner's institutional record all references to the violation of those rules. "Although there is no need to remit the matter to respondent for reconsideration of those parts of the penalty already served by petitioner, we note that there was also a recommended loss of good time, and the record does not reflect the relationship between the

violations and that recommendation" (*Matter of Monroe v Fischer*, 87 AD3d 1300, 1301). We therefore further modify the determination by vacating the recommended loss of good time, and we remit the matter to respondent for reconsideration of that recommendation (*see id.*).

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

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1845/88) KA 12-01214. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HUBERT ALLEN, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, FAHEY, PERADOTTO, AND SCONIERS, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (175/94) KA 10-01955. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KHARYE JARVIS, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis granted. Memorandum: Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal that would have resulted in reversal, specifically, in failing to argue ineffective assistance of trial counsel. Upon our review of the trial court proceedings, we conclude that the issue may have merit. Therefore, the order of March 11, 1994 is vacated and this Court will consider the appeal de novo (*see People v LeFrois*, 151 AD2d 1046 [1989]). Defendant is directed to file and serve his records and briefs with this Court on or before December 28, 2012. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (843/95) KA 06-00150. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIE IVY, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND LINDLEY, JJ. (Filed Sept. 28, 2012.)

MOTION NOS. (1546-1547/98) KA 12-01290. –- THE PEOPLE OF THE STATE OF NEW

YORK, RESPONDENT, V FRANKLIN B. BROWN, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 12-01291. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FRANKLIN B. BROWN, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (1752/00) KA 99-05535. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL SHAW, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (931/02) KA 01-00350. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD DOUYON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (894/06) KA 05-01409. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KENNETH G. JONES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (586/07) KA 03-02060. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SERGIO PONDER, DEFENDANT-APPELLANT. -- Motion for writ of

error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, AND MARTOCHE, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (738/07) KA 03-00814. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT A. GRIFFIN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, AND MARTOCHE, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (804/07) KA 04-02820. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KELVIN ROBINSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis granted. Memorandum: Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal that would have resulted in reversal, specifically, in failing to argue that defendant's guilty plea was involuntary and unknowing because the plea colloquy negated the elements of the crime. Upon our review of the trial court proceedings, we conclude that the issue may have merit. Therefore, the order of June 8, 2007 is vacated and this Court will consider the appeal de novo (*see People v LeFrois*, 151 AD2d 1046 [1989]). Defendant is directed to file and serve his records and briefs with this Court on or before December 28, 2012. PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND LINDLEY, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (1011/07) KA 06-00940. -- THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V EDUNDABIRA O. OJO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND SCONIERS, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (1513/07) KA 05-01734. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DALE F. LEESON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND PERADOTTO, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (333/08) KA 06-01520. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KEYONTAY C. RICKS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (1370/08) KA 05-02072. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAVID M. LORET, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, AND SCONIERS, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (58/09) KA 07-01927. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ERIC D. CARR, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND LINDLEY, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (77/09) KA 07-00590. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES J. CARNCROSS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (1384/09) KA 08-00519. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CODY BACKUS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., FAHEY, CARNI, AND MARTOCHE, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (647/10) TP 09-02312. -- IN THE MATTER OF CHARLES K. STODOLKA, PETITIONER, V STARPOINT CENTRAL SCHOOL DISTRICT AND BOARD OF EDUCATION OF STARPOINT CENTRAL SCHOOL DISTRICT, RESPONDENTS. -- Motion for reargument or reconsideration denied. PRESENT: SMITH, J.P., FAHEY, PERADOTTO, AND MARTOCHE, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (1408/10) KA 07-01506. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CARLOS PICHARDO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (1409/10) KA 10-01349. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V GORDON GROSS, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion

for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (104/11) KA 08-00201. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BENJAMIN RIVERA, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (320/12) CA 11-02133. -- DEBORAH VOSS, PROP-CO, LLC, CLASSI PEOPLE, INC., DOING BUSINESS AS SERTINO'S CAFÉ AND DREAM PEOPLE, INC., DOING BUSINESS AS SHIVER MODEL, PLAINTIFFS-APPELLANTS, V THE NETHERLANDS INSURANCE COMPANY, ET AL., DEFENDANTS, AND CH INSURANCE BROKERAGE SERVICES, CO., INC., DEFENDANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, AND SCONIERS, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (396/12) CA 11-00950. -- ROBERT K. MONETTE AND SHARON M. MONETTE, PLAINTIFFS-RESPONDENTS, V CHRISTINA L. TRUMMER, DAVID LEEDERMAN, JESSE L. BALL, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (439/12) KA 10-01481. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DUANE COBLE, DEFENDANT-APPELLANT. -- Motion for reargument and reconsideration denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (452/12) CA 11-01968. -- JOHN GISEL, PLAINTIFF-APPELLANT, ET AL., PLAINTIFF, V CLEAR CHANNEL COMMUNICATIONS, INC. AND ROBERT LONSBERRY, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (454/12) CA 09-00404. -- IN THE MATTER OF THE ARBITRATION BETWEEN ADAM BOBAK, PETITIONER-RESPONDENT, AND AIG CLAIMS SERVICES, INC., NEW HAMPSHIRE INSURANCE COMPANY AND AMERICAN INTERNATIONAL GROUP, INC., RESPONDENTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND MARTOCHE, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (572.1/12) CA 11-02058. -- IN THE MATTER OF FFT SENIOR COMMUNITIES, INC., PETITIONER-RESPONDENT, V TOWN OF CANANDAIGUA, BOARD OF ASSESSMENT REVIEW FOR TOWN OF CANANDAIGUA AND COUNTY OF ONTARIO, RESPONDENTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY,

SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (587/12) CA 11-02517. -- HUGO RAFAEL RAMIREZ GABRIEL, ALSO KNOWN AS CESAR MENDEZ, ET AL., PLAINTIFFS-APPELLANTS-RESPONDENTS, V JOHNSTON'S L.P. GAS SERVICE, INC., DEFENDANT-RESPONDENT-APPELLANT, ET AL., DEFENDANTS. (ACTION NO. 1.) -- HUGO RAFAEL RAMIREZ GABRIEL, ALSO KNOWN AS CESAR MENDEZ, ET AL., PLAINTIFFS-APPELLANTS, V ANTHONY A. DEMARCO, ANTHONY W. DEMARCO, ANTHONY DEMARCO & SONS, INC., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (ACTION NO. 2.) -- HUGO RAFAEL RAMIREZ GABRIEL, ALSO KNOWN AS CESAR MENDEZ, ET AL., PLAINTIFFS-APPELLANTS-RESPONDENTS, V RAYTHEON COMPANY, DEFENDANT-RESPONDENT-APPELLANT. (ACTION NO. 3.) -- Motion for reargument granted to the extent that the parties shall file and serve briefs regarding whether Supreme Court's order entered August 5, 2011, was properly made insofar as it ordered that plaintiffs must return to the United States for independent medical examinations, if requested by defendants 60 days prior to trial, and whether this Court's opinion and order entered June 15, 2012, properly determined that plaintiffs abandoned that issue. Motion and cross motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, PERADOTTO, AND LINDLEY, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (610/12) CA 11-00035. -- IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE INTERMEDIATE ACCOUNT OF W.A. READ KNOX, SUCCESSOR TRUSTEE, AND JEAN R. KNOX AND HSBC BANK USA, N.A., AS TRUSTEES OF THE TRUST

UNDER ARTICLE SEVENTH OF THE WILL OF SEYMOUR H. KNOX, III, DECEASED, FOR THE BENEFIT OF JEAN R. KNOX (MARITAL TRUST) FOR THE PERIOD JUNE 3, 1996 TO NOVEMBER 3, 2005. HSBC BANK USA, N.A., PETITIONER-APPELLANT; JEAN R. KNOX, W.A. READ KNOX, SEYMOUR H. KNOX, IV, AVERY KNOX AND HELEN KEILHOLTZ, OBJECTANTS-RESPONDENTS. (PROCEEDING NO. 2.) (APPEAL NO. 5.) -- Motion for leave to appeal to the Court of Appeals or, in the alternative, reargument denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (615/12) CA 11-00038. -- IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE INTERMEDIATE ACCOUNT OF HSBC BANK USA, N.A. AND SEYMOUR H. KNOX, IV, AS TRUSTEES OF THE TRUST UNDER AGREEMENT DATED DECEMBER 23, 1975 AND RESTATED AUGUST 15, 1990 FOR THE BENEFIT OF SEYMOUR H. KNOX, IV, ET AL., SEYMOUR H. KNOX, IV, GRANTOR FOR THE PERIOD DECEMBER 23, 1975 TO NOVEMBER 3, 2005. HSBC BANK USA, N.A., PETITIONER-APPELLANT; SEYMOUR H. KNOX, IV, OBJECTANT-RESPONDENT. (PROCEEDING NO. 3.) (APPEAL NO. 6.) -- Motion for leave to appeal to the Court of Appeals or, in the alternative, reargument denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (618/12) CA 11-02559. -- MICHELLE GALETTA, PLAINTIFF-APPELLANT, V GARY GALETTA, DEFENDANT-RESPONDENT. -- Motion insofar as it sought reargument denied. Motion insofar as it sought leave to appeal to the

Court of Appeals granted. PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (621/12) CA 11-01692. -- IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE INTERMEDIATE ACCOUNT OF HSBC BANK USA, N.A. AS TRUSTEE OF THE TRUST UNDER AGREEMENT DATED JANUARY 21, 1957, SEYMOUR H. KNOX, GRANTOR, FOR THE BENEFIT OF THE ISSUE OF SEYMOUR H. KNOX, III FOR THE PERIOD JANUARY 21, 1957 TO NOVEMBER 3, 2005. HSBC BANK USA, N.A., PETITIONER-APPELLANT; W.A. READ KNOX, SEYMOUR H. KNOX, IV, AVERY KNOX, HELEN KEILHOLTZ, AND DANIEL C. OLIVERIO, AS GUARDIAN AD LITEM FOR SEYMOUR H. KNOX, V, JOHN CLAYTON KNOX, AND GEORGIA BROWN KNOX, OBJECTANTS-RESPONDENTS. (PROCEEDING NO. 1.) (APPEAL NO. 2.) -- Motion for leave to appeal to the Court of Appeals or, in the alternative, reargument denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (626/12) TP 11-01936. -- IN THE MATTER OF CARLOS ABREU, PETITIONER, V BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT. -- Motion for reargument or reconsideration denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (642/12) CA 11-02239. -- ERIE COUNTY SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS, PLAINTIFF-APPELLANT, V BETH HOSKINS,

DEFENDANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (659/12) CAF 11-01859. -- IN THE MATTER OF DANIEL TARRANT, PETITIONER-RESPONDENT, V SHANNON OSTROWSKI, RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND MARTOCHE, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (695/12) CA 11-02579. -- REGENT FINANCIAL GROUP, LLC, PLAINTIFF-RESPONDENT, V ROSALEE BEDIAN, DEFENDANT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, PERADOTTO, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (715/12) CA 11-02521. -- JEFFREY CONSTANTINE, M.D., PLAINTIFF-RESPONDENT, V STELLA MARIS INSURANCE COMPANY, LTD., DEFENDANT-APPELLANT, MARY SERIO, NICHOLAS SERIO, AS PARENTS AND NATURAL GUARDIANS OF NICOLE SERIO, A MINOR, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (731/12) CAF 11-01515. -- IN THE MATTER OF MAURICE REEVES,

PETITIONER-APPELLANT, V ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT-RESPONDENT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (818/12) KA 09-02177. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOHN KELLY, DEFENDANT-APPELLANT. -- Motion for reargument and reconsideration denied. PRESENT: SCUDDER, P.J., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 28, 2012.)

MOTION NO. (835/12) KAH 11-01134. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. ALBERT WILLIAMS, PETITIONER-APPELLANT, V HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Sept. 28, 2012.)

KAH 11-02328. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL., EDWARD BROWN, PETITIONER-APPELLANT, V NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT-RESPONDENT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Supreme Court, Wyoming County, Mark H. Dadd, J. - Habeas Corpus). PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Sept. 28, 2012.)

KA 12-01673. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL IANNETTONI, DEFENDANT-APPELLANT. –- Motion to dismiss granted. Memorandum: Appeal dismissed and the matter is remitted to Onondaga County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745). PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Sept. 28, 2012.)

KA 10-01369. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EDWARD A. JOHNS, DEFENDANT-APPELLANT. –- Motion to dismiss granted. Memorandum: Appeal dismissed and the matter is remitted to Oneida County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745). PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Sept. 28, 2012.)

KA 11-01149. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL J. JUDD, JR., DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted by plea of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). County Court found defendant to be a "second felony offender" and sentenced him to a determinate term of imprisonment of five years and five years postrelease supervision. Defendant appealed and his assigned counsel now

moves to be relieved of the assignment, alleging that there are no nonfrivolous grounds for appeal (*see People v Crawford*, 71 AD2d 38). The record reveals that during the plea proceeding, defendant was informed by the court that a five year determinate sentence was "mandatory." Given that the mandatory minimum determinate sentence for a second felony offender convicted of a class D violent felony is three years (Penal Law § 70.06 [6] [c]), we conclude that a nonfrivolous issue exists as to whether defendant's guilty plea was knowing, voluntary and intelligent. We therefore relieve counsel of his assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Orleans County Court, James P. Punch, J. - Attempted Burglary, 2nd Degree). PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 28, 2012.)

KA 11-00968. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V STANLEY POBLOCKI, III, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Erie County Court, Michael F. Pietruszka, J. - Attempted Grand Larceny, 4th Degree). PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Sept. 28, 2012.)