SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 9, 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. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

900

KA 11-00860

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEJUAN LONG, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered August 12, 2010. The judgment convicted defendant, upon a jury 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: Defendant appeals from a judgment convicting him upon a jury verdict 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 [3]). Defendant contends that the People failed to establish that he possessed the weapon, i.e., a handgun, that was seized by the police during a search of his mother's apartment (apartment) and thus that the evidence is legally insufficient to support the conviction. We reject that contention. The legal sufficiency of the evidence supporting defendant's conviction "must be viewed in light of [Supreme C]ourt's charge as given without exception" (*People v Ford*, 11 NY3d 875, 878). Here, the court charged the jury that to "[p]ossess means to have physical possession or otherwise to exercise dominion or control over tangible property" (*see* Penal Law § 10.00 [8]; CJI2d[NY] Physical and Constructive Possession). The People presented evidence that, when the officers executed the warrant to search the apartment, only defendant and his mother were present. The mother was in one bedroom, and the weapon was found in the pocket of a man's jacket in another bedroom, which defendant ran toward when the police entered the apartment. That evidence is sufficient to allow a jury to infer that defendant had dominion and control over the place where the handgun was found (*see People v Shoga*, 89 AD3d 1225, 1227, *lv denied* 18 NY3d 886; *see also People v Edwards*, 39 AD3d 1078, 1079-1080). In

addition, "[t]he People . . . presented evidence that DNA samples taken from the handgun were consistent with defendant's DNA, from which an inference could be made that defendant had physically possessed the gun at some point in time" (*People v Robinson*, 72 AD3d 1277, 1278, *lv denied* 15 NY3d 809). Thus, the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish that defendant possessed the handgun. Further, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict finding that defendant possessed the handgun is not against the weight of the evidence (*see Robinson*, 72 AD3d at 1278).

Defendant failed to preserve for our review his contention that the court erred in failing to define "dominion" and "control" in that part of its jury charge relating to the weapon possession counts inasmuch as he did not request that the court define those terms or object to the charge as given (*see People v Perez*, 89 AD3d 1393, 1394, *lv denied* 18 NY3d 961; *People v Smith*, 32 AD3d 1318, 1319, *lv denied* 7 NY3d 929; *People v Pross*, 302 AD2d 895, 897, *lv denied* 99 NY2d 657). 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]).

As defendant correctly contends, his Sixth Amendment right of confrontation was violated when the prosecutor referred to an unidentified confidential informant in her opening statement and elicited testimony concerning the informant during the People's case. We agree with the People, however, that any error resulting in the violation of defendant's right of confrontation is harmless beyond a reasonable doubt inasmuch as "there is no reasonable possibility that the error affected the jury's verdict" (*People v Porco*, 17 NY3d 877, 878, *cert denied* ___ US ___, 132 S Ct 1860; *see People v Morrison*, 90 AD3d 1554, 1557; *see generally People v Crimmins*, 36 NY2d 230, 237).

Contrary to defendant's further contention, in deciding defendant's suppression motion the court properly denied discovery of the identity of the confidential informant and the warrant application papers without holding a *Darden* hearing (*see People v Serrano*, 93 NY2d 73, 76-77). A *Darden* hearing is not always required "when a defendant has been denied discovery of the identity of the informant and of the warrant application papers" (*id.*). Rather, a *Darden* hearing "is required 'where there is insufficient evidence to establish probable cause apart from the testimony of the arresting officer as to communications received from an informer' " (*id.* at 77). Indeed, it is well settled that, "where the suppression court has before it the warrant papers and the transcript of the informant's testimony before the issuing Judge, '[t]he court [is] left with the relatively uncomplicated task of deciding whether, based on [the warrant papers and testimony] . . . , the issuing Judge reasonably could have concluded that probable cause existed' " (*id.* at 76, quoting *People v Castillo*, 80 NY2d 578, 585). Here, in making the determination that probable cause existed for the issuance of the warrant authorizing the police to search the apartment, the court had before it the warrant application and the "in-camera testimony or notes" of the issuing

court, and thus a *Darden* hearing was not required.

We also reject defendant's contention that the search warrant was not supported by probable cause. The court properly concluded that "[t]he warrant was valid as it was based on firsthand information from the officer who conducted the monitored, controlled drug buy [at the apartment] with a confidential informant, thereby establishing the informant's reliability" (*People v Lamont*, 21 AD3d 1129, 1130-1131, *lv denied* 6 NY3d 835; *see People v Morton*, 288 AD2d 557, 558, *lv denied* 97 NY2d 758, *cert denied* 537 US 860), and the court "properly relied upon the ability of [the issuing court] to assess the credibility of the confidential informant" (*People v Demus*, 82 AD3d 1667, 1667, *lv denied* 17 NY3d 815; *see People v Park*, 266 AD2d 913, 913). Finally, defendant's contention that the information on which the warrant was based was stale is unpreserved for our review (*see* CPL 470.05 [2]) and, in any event, that contention lacks merit (*see People v Ming*, 35 AD3d 962, 964, *lv denied* 8 NY3d 883).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

910

CA 11-02281

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

IN THE MATTER OF JOHN DOE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE COMMISSION ON JUDICIAL
CONDUCT, RESPONDENT-APPELLANT.

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

ZIMMERMAN LAW OFFICE, SYRACUSE (AARON MARK ZIMMERMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered October 6, 2011 in a proceeding pursuant to CPLR article 78. The order granted petitioner's motion for leave to reargue and renew regarding the judgment entered May 17, 2011, reversed that judgment, and ordered that the parties conduct discovery.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the judgment entered May 17, 2011 is reinstated and the petition is thereby dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, a writ of prohibition barring respondent from investigating and disciplining him for alleged acts of judicial misconduct on the ground that respondent lacks subject matter jurisdiction (*see* CPLR 7803 [2]). Respondent answered and, in its first objection in point of law, sought dismissal of the petition on the grounds that petitioner had not established a clear right to prohibition and had an adequate remedy at law inasmuch as respondent's determination is directly appealable to the Court of Appeals as of right. Based upon respondent's first objection in point of law, Supreme Court, inter alia, dismissed the petition (prior judgment). Petitioner thereafter moved for leave to renew and reargue regarding the prior judgment (*see* CPLR 2221). The court granted leave to renew and reargue, reversed the prior judgment and ordered that the parties conduct discovery. We reverse and reinstate the prior judgment that, inter alia, dismissed the petition.

Even assuming, arguendo, that the court properly granted leave to

renew and reargue regarding the prior judgment, we conclude that the court erred in reversing the prior judgment upon renewal/reargument. "Prohibition will not ordinarily be warranted where the grievance can be adequately addressed by alternative proceedings at law or in equity, such as by motion, appeal, or other applications" (*Matter of Feldman v Marcus*, 23 AD3d 559, 560, *lv denied* 7 NY3d 703; *see Matter of Town of Huntington v New York State Div. of Human Rights*, 82 NY2d 783, 786; *Matter of Eberhardt v City of Yonkers*, 305 AD2d 501, 502). Here, petitioner has an adequate remedy at law because he is entitled to appeal as of right to the Court of Appeals any determination of respondent (*see* NY Constitution, art VI, § 22 [a], [d]; Judiciary Law § 44 [7], [9]; *see generally Matter of Gilpatric [State Commn. on Jud. Conduct]*, 13 NY3d 586, 589), and thus petitioner is not entitled to prohibition (*see Matter of Molea v Marasco*, 64 NY2d 718, 720; *Matter of Arcuri v Kirk*, 231 AD2d 962, 964). Moreover, prohibition is available only when a court or quasi-judicial body exceeds its jurisdiction in a manner that implicates the legality of the proceeding itself (*see Matter of Rush v Mordue*, 68 NY2d 348, 353; *Matter of State of New York v King*, 36 NY2d 59, 64), which is not the case here. Indeed, respondent has jurisdiction to investigate and discipline petitioner for the alleged judicial misconduct (*see generally Gilpatric*, 13 NY3d at 588-590).

In light of our determination, we need not reach respondent's remaining contentions.

Frances E. Cafarell

Entered: November 9, 2012

Clerk of the Court

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

913

CA 11-02308

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

KEITH V. WILLIAMS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TAWNY B. WILLIAMS, NOW KNOWN AS TAWNY M. BIRMINGHAM, DEFENDANT-APPELLANT.

WALTER J. BURKARD, FAYETTEVILLE, FOR DEFENDANT-APPELLANT.

BUCCI LAW FIRM, PLLC, BALDWINSVILLE (LINDA M. COOK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

KELLY M. CORBETT, ATTORNEY FOR THE CHILDREN, FAYETTEVILLE, FOR DAKOTA W. AND JENNIKA W.

Appeal from an order of the Supreme Court, Onondaga County (Michael L. Hanuszczak, A.J.), entered February 18, 2011. The order, among other things, awarded plaintiff sole legal and physical custody of the subject children.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by awarding defendant an additional day of visitation each week on a specific weekday, which visitation shall begin at the completion of the children's school day and shall continue until such time in the evening that they are able to return to plaintiff's home for their regular bedtime, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following Memorandum: Defendant mother appeals from an order modifying the custody provisions of the parties' judgment of divorce and granting sole legal and physical custody of the parties' two children to plaintiff father and visitation to the mother. Supreme Court properly determined that joint custody is inappropriate "inasmuch as the parties have an acrimonious relationship and are unable to communicate with each other in a civil manner" (*Matter of Christopher J.S. v Colleen A.B.*, 43 AD3d 1350, 1351). Contrary to the mother's contention, the court properly determined that the best interests of the children warranted the award of sole custody to the father. "The best interests of a child, which is the foremost consideration in matters of custody and visitation, is within the discretion of the hearing court whose determination will not be set aside unless it lacks a sound and substantial evidentiary basis" (*Matter of Arelis Carmen S. v Daniel H.*, 78 AD3d 504, 504, *lv denied* 16 NY3d 707; *see Dubuque v Bremiller*, 79 AD3d 1743, 1744). Here, we

see no reason to disturb the court's custody determination inasmuch as it is supported by the requisite "sound and substantial basis in the record" (*Dubuque*, 79 AD3d at 1744 [internal quotation marks omitted]). We agree with the court's conclusion that, although both parties appear to be fit and loving parents, the evidence presented at the hearing establishes that the father is better able to provide for the children's educational and medical needs.

We further conclude, however, that the court erred in limiting the mother's visitation to alternate weekends. Although there was a sound and substantial basis in the record for the court's determination to modify the prior visitation schedule (*see generally Matter of Nicole J.R. v Jason M.R.*, 81 AD3d 1450, 1451, *lv denied* 17 NY3d 701; *Matter of Flood v Flood*, 63 AD3d 1197, 1198), we agree with the mother and the Attorney for the Children that the court erred in eliminating visitation between the mother and the children during the week. Thus, we conclude that the court "improvidently exercised its discretion in determining the amount of visitation for the [mother], which did not include an award of weekday . . . visitation" (*Matter of Solovay v Solovay*, 94 AD3d 898, 900, *lv denied* 19 NY3d 808; *see Matter of Brown v Brown*, 97 AD3d 673, 674; *see generally Matter of Roody v Charles*, 283 AD2d 945, 946).

Based on the record before us, we conclude that the best interests of the children would be served by awarding the mother an additional day of visitation each week on a specific weekday, which visitation shall begin at the completion of the children's school day and shall continue until such time in the evening that they are able to return to the father's home for their regular bedtime. We therefore modify the order accordingly, and we remit the matter to Supreme Court to set a specific day of the week and the specific times during which such visitation should occur, either upon agreement of the parties or after a hearing if they are unable to agree.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

940

CA 11-01676

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

IN THE MATTER OF THE TRUSTS FOR STEPHANIE MCDONALD AND KELLY MCDONALD CREATED IN THE WILL OF IGNATIUS S. LUPPINO, DECEASED.

STEPHANIE MCDONALD AND KELLY MCDONALD, PETITIONERS-RESPONDENTS;
IDALYNN LUPPINO MCDONALD, TRUSTEE, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

MEMORANDUM AND ORDER

BARRY J. DONOHUE, TONAWANDA, FOR RESPONDENT-APPELLANT.

KEVIN T. STOCKER, TONAWANDA, FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered December 20, 2010. The order found that Idalynn Luppino McDonald had abused her fiduciary responsibilities as trustee.

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

Memorandum: In appeal No. 1, respondent (hereafter, trustee) appeals from an order determining that she failed to observe the terms of two testamentary trusts and abused her fiduciary responsibilities with respect to each trust and setting forth a date upon which the matter would be deemed finally submitted, whereupon Surrogate's Court would determine the affirmative relief to be granted. In appeal No. 2, the trustee appeals from an order that denied her motion for leave to renew or reargue the "conclusion [of the Surrogate] that [she] 'abused her fiduciary responsibilities.' " In appeal No. 3, she appeals from an order that, following an evidentiary hearing, removed her as trustee, bypassed the alternate trustee named in the subject last will and testament and appointed a successor trustee. In appeal No. 4, she appeals from an order that, inter alia, awarded attorney fees to petitioners in the amount of $14,600.

Petitioners, who are twin sisters, commenced this proceeding seeking, inter alia, to remove their mother as the trustee of each testamentary trust created for them by the last will and testament of their grandfather, who was the trustee's father. Petitioners were 19 years of age when the petition was filed. Petitioners' central claim is that the trustee refused to make discretionary distributions from

the trusts for payment of their college expenses and for the purchase of an automobile for each of them.

Insofar as relevant to these appeals, the trusts provide that "[t]he Trustee shall pay or apply to or for the use of each such living grandchild of mine so much of the income, accumulated income and principal of such share at any time and from time to time as the Trustee deems advisable in [the Trustee's] sole discretion not subject to judicial review, to provide for such grandchild's maintenance, support, education, health and welfare, even to the point of exhausting the same." The trusts also provide for periodic fractional distributions of principal and accumulated income when the beneficiaries reach the ages of 30, 32 and 35, at which time the trusts terminate. On the return date of the order to show cause that initiated the proceeding, the trustee appeared with counsel who served a letter response to the petition and made a representation in court that it was to be considered as the trustee's answer. No objection was raised by petitioners thereto, and we thus conclude that they "proceeded on the theory that [they] had to prove [their] claim as if it stood controverted. [They] did not seek to proceed as if upon a default" (*Matter of Bemis v Larkin*, 249 App Div 762, 763). Petitioners further waived any objection to the lack of verification by failing to reject the trustee's pleading pursuant to CPLR 3022 in a timely manner (*see Matter of Rouson*, 32 AD3d 956, 959). Thus, we conclude that the Surrogate erred in sua sponte determining that the trustee was in default in pleading and in proceeding to decide the merits of the petition as if it was uncontroverted (*see generally DiPietro v Seth Rotter, P.C.*, 267 AD2d 1, 2).

Turning to the merits of the orders in appeal Nos. 1 and 3, we conclude on this record that the Surrogate erred in determining in appeal No. 1 that the trustee had failed to observe the terms of the trusts and had abused her fiduciary responsibilities with respect to each trust. The Surrogate further erred in appeal No. 3 in granting affirmative relief, i.e., ultimately removing the trustee and summarily bypassing the alternate trustee named by the testator, petitioners' grandfather, in order to appoint a successor trustee not named in the will. We therefore reverse the order in appeal No. 1 and dismiss the petition, and we vacate the order in appeal No. 3 inasmuch as the petition has been dismissed. "As a general rule the courts of this State will respect and not interfere with a trustee's decision unless it can be shown that the decision constituted an abuse of the discretion given the trustee by the testator" (*Matter of Hoelzer v Blum*, 93 AD2d 605, 612). The judicial deference afforded trustees under this rule is particularly broad where the testator has manifested an intention to grant the trustee greater than ordinary latitude in exercising discretionary judgment (*see* Restatement [Third] of Trusts § 50, Comment *c* on Subsection [1]). Here, the testator manifested a clear intention to grant the trustee the greatest latitude permitted by law in exercising discretionary judgment. While the phrase used by the testator, "as the Trustee deems advisable in [the Trustee's] sole discretion not subject to judicial review," does not relieve the trustee of all accountability, it manifests the testator's clear intent to grant the trustee the broadest extended

discretion in making discretionary distributions of income and/or principal (*see Matter of Maul v Fitzgerald*, 78 AD2d 706, 707-708; *Matter of Damon*, 71 AD2d 916, 916-917; *Matter of Moloshok v Blum*, 109 Misc 2d 660, 661; Restatement [Third] of Trusts § 50).

Notwithstanding the extended discretion granted to the trustee by the testator, the exercise of the trustee's judgment in making discretionary distributions should be evaluated in light of the availability of other resources, including public benefits and the parental duty of support (*see* Restatement [Third] of Trusts § 50, Comment *e* on Subsection [2]; *Matter of Roberts [New York City Health & Hosps. Corp.]*, 61 NY2d 782, 783-784; *Matter of Escher*, 52 NY2d 1006, 1008). Here, the record establishes that the trustee, in her capacity as petitioners' parent, was the custodian of a New York 529 College Savings account for each petitioner and that the account balances were more than adequate to provide for petitioners' college expenses. We also note that the college costs of petitioner Kelly McDonald for the 2010-2011 academic year were fully paid by public benefits and that, notably, Stephanie McDonald failed to complete the necessary applications for public college benefits and tuition assistance for that academic year. We thus conclude that the trustee did not abuse the extended discretion granted to her by the testator by declining to make distributions from the trust for college costs payable through other sources or in furtherance of the desires of petitioners to purchase automobiles. While we are mindful of the friction between the teenaged petitioners and their mother, we nonetheless adhere to the sound rule that mere friction or disharmony between a trustee and one or more beneficiaries is not a sufficient ground to justify the removal of the trustee (*see Burke v Baudouine*, 190 App Div 186, 187, *affd* 232 NY 532; *Matter of Edwards*, 274 App Div 244, 247-248; *Matter of Graves*, 110 NYS2d 763, 767 [Sur Ct]). "If it were, an obstreperous malintentioned beneficiary could cause the removal of a competent trustee through no fault on the latter's part" (*Graves*, 110 NYS2d at 767).

Finally, we dismiss the appeal from the order in appeal No. 2, and we reverse the order in appeal No. 4. Insofar as the order in appeal No. 2 denied that part of the motion for leave to reargue, no appeal lies from the order (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984) and, insofar as the order in appeal No. 2 denied that part of the motion for leave to renew, the appeal is moot in view of our determination in appeal No. 1 (*see McCabe v CSX Transp., Inc.*, 27 AD3d 1150, 1151). With respect to the award of, inter alia, attorney fees to petitioners in appeal No. 4, we note that "it is well settled that a Surrogate has the discretion to order a fiduciary to pay [attorney] fees" (*Matter of Manufacturers & Traders Trust Co. [Adams]*, 72 AD3d 1573, 1574; *see generally Matter of Garvin*, 256 NY 518, 521-522), but such fees are not awarded "where there is no agreement, statute or rule providing for such fees and where the losing party has not acted maliciously or in bad faith" (*Matter of Saxton*, 274 AD2d 110, 121). In light of our determination in appeal Nos. 1 and 3, we conclude that

petitioners are not entitled to an award of attorney fees.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

941

CA 11-01677

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

IN THE MATTER OF THE TRUSTS FOR STEPHANIE MCDONALD AND KELLY MCDONALD CREATED IN THE WILL OF IGNATIUS S. LUPPINO, DECEASED.

STEPHANIE MCDONALD AND KELLY MCDONALD, PETITIONERS-RESPONDENTS;
IDALYNN LUPPINO MCDONALD, TRUSTEE, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

MEMORANDUM AND ORDER

BARRY J. DONOHUE, TONAWANDA, FOR RESPONDENT-APPELLANT.

KEVIN T. STOCKER, TONAWANDA, FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered April 13, 2011. The order, inter alia, denied the motion of Idalynn Luppino McDonald for leave to renew or reargue.

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

Same Memorandum as in *Matter of Luppino* ([appeal No. 1] ___ AD3d ___ [Nov. 9, 2012]).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

942

CA 11-01678

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

IN THE MATTER OF THE TRUSTS FOR STEPHANIE MCDONALD AND KELLY MCDONALD CREATED IN THE WILL OF IGNATIUS S. LUPPINO, DECEASED.

STEPHANIE MCDONALD AND KELLY MCDONALD, PETITIONERS-RESPONDENTS;
IDALYNN LUPPINO MCDONALD, TRUSTEE, RESPONDENT-APPELLANT.

THOMAS F. HEWNER, ESQ., COURT APPOINTED SUCCESSOR TRUSTEE, RESPONDENT.
(APPEAL NO. 3.)

MEMORANDUM AND ORDER

BARRY J. DONOHUE, TONAWANDA, FOR RESPONDENT-APPELLANT.

KEVIN T. STOCKER, TONAWANDA, FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered July 5, 2011. The order, inter alia, removed Idalynn Luppino McDonald as trustee and appointed Thomas F. Hewner, Esq. as successor trustee.

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

Same Memorandum as in *Matter of Luppino* ([appeal No. 1] ___ AD3d ___ [Nov. 9, 2012]).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

943

CA 11-02382

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

IN THE MATTER OF THE TRUSTS FOR STEPHANIE MCDONALD AND KELLY MCDONALD CREATED IN THE WILL OF IGNATIUS S. LUPPINO, DECEASED.

STEPHANIE MCDONALD AND KELLY MCDONALD, PETITIONERS-RESPONDENTS;
IDALYNN LUPPINO MCDONALD, TRUSTEE, RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

MEMORANDUM AND ORDER

BARRY J. DONOHUE, TONAWANDA, FOR RESPONDENT-APPELLANT.

KEVIN T. STOCKER, TONAWANDA, FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered August 29, 2011. The order, inter alia, directed Idalynn Luppino McDonald to pay attorney fees to Kevin T. Stocker, Esq.

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

Same Memorandum as in *Matter of Luppino* ([appeal No. 1] ___ AD3d ___ [Nov. 9, 2012]).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

963

CA 12-00326

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

BARBARA SMALL, AS ADMINISTRATRIX OF THE ESTATE
OF MICHAEL SMALL, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FRANCIS CAPRARA, ET AL., DEFENDANTS,
SUNDANCE POOL & PATIO, INC., DEFENDANT-APPELLANT,
TRAVIS INDUSTRIES, INC. AND ROBERTSHAW CONTROLS
COMPANY, DEFENDANTS-RESPONDENTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KNYCH & WHRITENOUR, LLC, SYRACUSE (BRENDAN J. REAGAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (MATTHEW D. GUMAER OF COUNSEL), FOR DEFENDANT-RESPONDENT TRAVIS INDUSTRIES, INC.

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

Appeals from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered April 29, 2011. The order, among other things, granted the motions of defendants Travis Industries, Inc. and Robertshaw Controls Company for summary judgment.

Now, upon reading and filing the stipulation withdrawing appeals signed by the attorneys for the parties and filed on October 9, 2012,

It is hereby ORDERED that said appeal taken by defendant Sundance Pool & Patio, Inc. is unanimously dismissed upon stipulation, said appeal taken by plaintiff insofar as it concerns defendant Travis Industries, Inc. is dismissed upon stipulation and the order is affirmed without costs.

Memorandum: Plaintiff commenced this action as administratrix of the estate of decedent, who was killed while lighting a pilot on a fireplace. While decedent was lighting the pilot, an explosion shattered the front glass enclosure of the fireplace and severed decedent’s left carotid artery, and he bled to death. Defendant Travis Industries, Inc. manufactured the fireplace, defendant Robertshaw Controls Company (Robertshaw) manufactured the valve in the fireplace that stops the flow of gas in the event of a pilot outage,

and defendant Sundance Pool & Patio, Inc. sold and installed the fireplace. Robertshaw moved for summary judgment dismissing the amended complaint against it on the ground that plaintiff could not establish that any defect in its valve was a substantial cause of the accident. Specifically, Robertshaw submitted evidence that the valve in question was tested and there was no evidence of any failure or malfunction. Supreme Court granted the motion, determining that Robertshaw had submitted proof establishing that the accident was not caused by a defect in its valve, and that plaintiff did not controvert that proof with any proof of her own that the valve was defective, but instead relied "solely upon the occurrence of the accident." We affirm. Robertshaw submitted proof in admissible form establishing, as a matter of law, that its product was not defective (*see generally Schlanger v Doe*, 53 AD3d 827, 830). Thus, "[i]n order to proceed in the absence of evidence identifying a specific flaw, . . . plaintiff [was required to] prove that the product did not perform as intended and exclude all other causes for the product's failure that [were] not attributable to" Robertshaw, and here plaintiff failed to raise a triable issue of fact whether the product did not perform as intended (*Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 41). Plaintiff could not meet her burden by relying solely on the occurrence of the accident, or through mere conclusions or unsubstantiated assertions (*see Rachlin v Volvo Cars of N. Am.*, 289 AD2d 981, 982-983).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

971

TP 12-00005

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

IN THE MATTER OF WILLIAM B. JOHNSTON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

GALEN D. KIRKLAND, COMMISSIONER, NEW YORK
STATE DIVISION OF HUMAN RIGHTS,
RESPONDENT-PETITIONER,
SCOTT GEHL, HOUSING OPPORTUNITIES MADE
EQUAL, INC., STEPHANIE M. GILLIAM, ERIC T.
SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL,
MAYOR BYRON W. BROWN AND ERIE COUNTY EXECUTIVE
CHRISTOPHER C. COLLINS, RESPONDENTS.

WILLIAM B. JOHNSTON, PETITIONER-RESPONDENT PRO SE.

CAROLINE J. DOWNEY, BRONX (TONI ANN HOLLIFIELD OF COUNSEL), FOR RESPONDENT-PETITIONER.

JENNIFER METZGER KIMURA, BUFFALO, FOR RESPONDENTS SCOTT GEHL AND HOUSING OPPORTUNITIES MADE EQUAL, INC. AND STEPHANIE M. GILLIAM.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT ERIE COUNTY EXECUTIVE CHRISTOPHER C. COLLINS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (CINDY T. COOPER OF COUNSEL), FOR RESPONDENT MAYOR BYRON W. BROWN.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ANDREW B. AYERS OF COUNSEL), RESPONDENT PRO SE.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Timothy J. Walker, A.J.], entered September 2, 2011) to annul a determination of the New York State Division of Human Rights. The determination found that petitioner had engaged in unlawful discriminatory practices with respect to housing.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition is dismissed, the cross petition is granted, and petitioner-respondent is directed to pay respondent Stephanie M. Gilliam the sum of $2,500 as damages for mental anguish and humiliation, with interest at the rate of 9% per annum commencing

February 3, 2011; to pay respondent Housing Opportunities Made Equal, Inc. the sum of $4,281 for economic damages, with interest at the rate of 9% per annum commencing March 31, 2009, and the sum of $8,000 for punitive damages, with interest at the rate of 9% per annum commencing February 3, 2011; and to pay the Comptroller of the State of New York the sum of $15,000 for a civil fine and penalty, with interest at the rate of 9% per annum commencing February 3, 2011.

Memorandum: Petitioner-respondent, William B. Johnston (petitioner), commenced this proceeding pursuant to Executive Law § 298 seeking to annul the determination of the New York State Division of Human Rights (Division) that petitioner had engaged in unlawful discriminatory practices with respect to housing. The determination confirmed the recommended order of the Administrative Law Judge, which was issued after a hearing, and ordered, inter alia, that petitioner pay various damages, penalties and fines. Respondent-petitioner Commissioner of the Division filed a cross petition seeking an order confirming the determination and directing petitioner to comply with the determination. In addition, in their answer, respondents Scott Gehl of Housing Opportunities Made Equal, Inc. and Stephanie M. Gilliam raised the affirmative defense that the proceeding is time-barred. The proceeding was transferred to this Court pursuant to Executive Law § 298 and 22 NYCRR 202.57 (c) (2).

We agree with respondents Gehl and Gilliam that the proceeding is time-barred, and we therefore dismiss the petition. Executive Law § 298 requires that a proceeding challenging a determination of the Division must be brought "within sixty days after the service of such an order," and the determination contains a notice that petitioner must comply with that requirement. Here, the proceeding was commenced 63 days after service of the determination, and it is well settled that "[t]he provisions of CPLR 2103 (subd [c]) prescribing extensions of time where service on a party is made by mail do not apply to administrative proceedings" (*Matter of Fiedelman v New York State Dept. of Health*, 58 NY2d 80, 81; *see generally Matter of Lester v New York State Off. of Parks, Recreation & Historic Preserv.*, 60 AD3d 680, 681, *lv denied* 12 NY3d 712).

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

972

TP 12-00592

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

IN THE MATTER OF MARSEAN JOHNSON, PETITIONER,

V MEMORANDUM AND ORDER

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

MARSEAN JOHNSON, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered March 22, 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 modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 121.14 (7 NYCRR 270.2 [B] [22] [v]) and vacating the penalty and as modified the determination is confirmed without costs, respondent is directed to expunge from petitioner's institutional record all references to the violation of that inmate rule and the matter is remitted to respondent for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a Tier III hearing, that he violated various inmate rules as charged in a misbehavior report. We conclude that there is substantial evidence to support the determination that petitioner violated inmate rules 113.25 (7 NYCRR 270.2 [B] [14] [xv] [drug possession]), 114.10 (7 NYCRR 270.2 [B] [15] [i] [smuggling]), 121.11 (7 NYCRR 270.2 [B] [22] [ii] [third-party call]) and 180.10 (7 NYCRR 270.2 [B] [26] [i] [facility visitation violation]). The misbehavior report, together with the unusual incident report, petitioner's admissions at the hearing, the confidential testimony and information considered by the Hearing Officer, the tape recordings of the telephone conversations at issue and the hearing testimony of two investigators, constitute substantial evidence that petitioner violated those inmate rules (*see generally Matter of Colon v Fischer*, 83 AD3d 1500, 1501; *Matter of Sanders v Haggett*, 72 AD3d 1372, 1372-1373). Contrary to petitioner's contention, he was not entitled to access the confidential information

(*see Sanders*, 72 AD3d at 1373). Further, given the ongoing criminal investigation related to the confidential information, the Hearing Officer properly maintained the confidentiality of that information (*see Matter of Williams v Goord*, 23 AD3d 872, 872). There is no merit to petitioner's additional contention that the misbehavior report failed to provide him with sufficient detail to prepare a defense (*see Matter of Robinson v Herbert*, 269 AD2d 807, 807).

As respondent correctly concedes, however, the determination that petitioner violated inmate rule 121.14 (7 NYCRR 270.2 [B] [22] [v] [exchanging PINs]) is not supported by the record. We therefore modify the determination and grant the petition in part by annulling that part of the determination finding that petitioner violated inmate rule 121.14, and we direct respondent to expunge from petitioner's institutional record all references to the violation of that rule. Inasmuch as a single penalty was imposed for all five rule violations charged and the record fails to specify any relation between the violations and that penalty, we further modify the determination by vacating the penalty, and we remit the matter to respondent for imposition of an appropriate penalty on the remaining violations (*see Colon*, 83 AD3d at 1502).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

973

TP 12-00443

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

IN THE MATTER OF VIOLET A. HALL, PETITIONER,

V MEMORANDUM AND ORDER

NIRAV R. SHAH, M.D., COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, AND PHILIP BAUSO, DIRECTOR, CAYUGA COUNTY HUMAN SERVICES, MEDICAID DIVISION, RESPONDENTS.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (JOSEPHINE YANG-PATYI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT NIRAV R. SHAH, M.D., COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered February 27, 2012) to review a determination of the New York State Department of Health. The determination found that petitioner was eligible for chronic care Medicaid benefits as of July 1, 2009.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding challenging the determination of the New York State Department of Health (DOH) after a hearing that she was not eligible for chronic care Medicaid benefits (Medicaid benefits) until July 1, 2009. The DOH's determination modified the determination of Cayuga County Human Services (agency) that petitioner was not eligible for Medicaid benefits until August 1, 2009. The matter was transferred to this Court pursuant to CPLR 7804 (g).

Petitioner contends that she was not required to submit a Medicaid application in order to receive Medicaid benefits because she had previously provided the agency with an attestation of her resources as part of her application for Medicare Savings Program benefits, which she had been receiving since February 2003. We reject that contention. "In reviewing a Medicaid eligibility determination made after a fair hearing, [a] court must review the record, as a whole, to determine if the agency's decisions are supported by

substantial evidence and are not affected by an error of law" (*Matter of Barbato v New York State Dept. of Health*, 65 AD3d 821, 822-823, *lv denied* 13 NY3d 712 [internal quotation marks omitted]; *see Matter of Peterson v Daines*, 77 AD3d 1391, 1392-1393). Where, as here, there is an issue concerning an agency's application of Medicaid regulations and directives, "the fact that the agency's interpretation might not be the most natural reading of [its] regulation [or directive], or that the regulation [or directive] could be interpreted in another way, does not make the interpretation irrational" (*Matter of Sisters of Charity Hosp. v Daines*, 84 AD3d 1757, 1758, *lv denied* 87 AD3d 1415 [internal quotation marks omitted]).

Insofar as relevant here, the regulations that govern eligibility for medical assistance provide that "[a]ll departmental regulations relating to public assistance and care apply to medical assistance except those that are inconsistent with the laws and regulations governing the medical assistance program" (18 NYCRR 360-1.2). Those regulations further provide that persons applying for such assistance "must complete and sign a State-prescribed form," i.e., a Medicaid application (18 NYCRR 360-2.2 [d] [1]). In support of her contention that she was not required to submit a Medicaid application, petitioner relies on 18 NYCRR 350.4 (b), which pertains to eligibility for public assistance generally and states that "[t]he State-prescribed form is not required to be completed under the following circumstances: For a person continuously in receipt of some form of assistance or care from the same district, the application form completed at the time of original application will suffice. Transfers or reclassifications, except as required under subdivision (a) of this section, need not be confirmed by completion of a new State-prescribed form." The DOH determined that section 350.4 (b), which relates to public assistance, is inconsistent with section 360-2.2 (d) (1) because the latter section, which relates to medical assistance, contains no exceptions. The DOH thus determined that, pursuant to section 360-1.2, the medical assistance regulation controls. We cannot say that the DOH's interpretation of those regulations is irrational (*see Sisters of Charity Hosp.*, 84 AD3d at 1758). We thus conclude that the DOH's determination that petitioner was required to submit a formal Medicaid application in order to receive Medicaid benefits was "not arbitrary and capricious, or irrational, and is therefore entitled to deference" (*Matter of Elcor Health Servs. v Novello*, 100 NY2d 273, 276).

We reject petitioner's further contention that the effective date of her benefits should be May 22, 2008, the date when the nursing home sent a letter to the agency with supporting documentation for petitioner's Medicaid application. According to petitioner, that was the date when the agency received "process" concerning petitioner's need for Medicaid benefits. The Medicaid Reference Guide (MRG) provides that "[t]he date of application is the date that a signed State-prescribed application form, or a State-approved equivalent form *or process* is received by the facilitated enroller or the local district" (emphasis added). The DOH has interpreted that language to mean that "process" must be "State-approved," and the DOH therefore determined that the 2008 letter did not constitute "process" as that term is used in the MRG. We conclude that such an interpretation is

reasonable.

We also reject petitioner's contention that, under the MRG, the agency was required to treat the date of her Medicaid application as the date the agency received notice of her request for Medicaid benefits, i.e., May 22, 2008, and thus that the agency was required to treat that date as the effective date of her Medicaid benefits. The relevant portion of the MRG provides that, "[i]f a *recipient* who attested to his/her resources subsequently requests coverage for long-term care services, the date of the request shall be treated as the date of the new application for purposes of establishing the effective date and the three-month retroactive period for increased coverage" (emphasis added). As the DOH determined, petitioner was not a recipient of Medicaid as of May 2008 and consequently that provision does not apply to her. Indeed, petitioner's 2003 application for benefits clearly indicates that it was for Medicare Savings Program benefits only. We therefore conclude that the DOH's determination that petitioner was not eligible for chronic care Medicaid benefits as of May 2008 is supported by substantial evidence.

Finally, we conclude that the DOH did not err in rejecting petitioner's contention that she and the nursing home reasonably relied on the agency's representations that petitioner had a pending Medicaid application as of May 22, 2008 and that the agency did not notify either petitioner or the nursing home prior to June 2009 that a Medicaid application was required. To the extent that petitioner's contention amounts to an estoppel argument, "estoppel generally 'cannot be invoked against a governmental agency to prevent it from discharging its statutory duties' " (*Matter of Shelton v Wing*, 256 AD2d 1143, 1144, quoting *Matter of New York State Med. Transporters Assn. v Perales*, 77 NY2d 126, 130). In any event, we conclude that the DOH's rejection of petitioner's reasonable reliance argument is "supported by substantial evidence and [is] not affected by an error of law" (*Barbato*, 65 AD3d at 823 [internal quotation marks omitted]). The agency presented evidence that, on May 28, 2008 and February 24, 2009, it sent letters to petitioner's son indicating that the enclosed Medicaid application required completion. Although the wife of petitioner's son, who is petitioner's power of attorney, denied that she received those letters, the DOH discredited that testimony. "Issues of witness credibility are . . . for the administrative agency to resolve in the exercise of its exclusive fact-finding authority" (*Matter of Barhite v Village of Medina*, 23 AD3d 1114, 1115).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

976

KA 11-01058

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN ZIMMERMAN, DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SHAWN ZIMMERMAN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered April 27, 2011. The judgment convicted defendant, upon his plea of guilty, of kidnapping in the second degree and 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 kidnapping in the second degree (Penal Law § 135.20) and assault in the first degree (§ 120.10 [1]). Contrary to the contention of defendant in his main brief, his waiver of the right to appeal is valid. The record establishes that County Court " 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Glasper*, 46 AD3d 1401, 1401, *lv denied* 10 NY3d 863; *see People v Korber*, 89 AD3d 1543, 1543, *lv denied* 19 NY3d 864; *cf. People v Adger*, 83 AD3d 1590, 1591, *lv denied* 17 NY3d 857). We have considered defendant's remaining contentions in his main brief with respect to the waiver of the right to appeal and conclude that they are without merit.

Defendant's contention in his main brief that the court erred in failing sua sponte to inquire into his state of intoxication at the time of the commission of the crime is actually a challenge to the factual sufficiency of the plea allocution, and it is well settled that defendant's valid waiver of the right to appeal encompasses that challenge (*see People v Gleen*, 73 AD3d 1443, 1444, *lv denied* 15 NY3d 733; *People v Grimes*, 53 AD3d 1055, 1056, *lv denied* 11 NY3d 789; *People v McKay*, 5 AD3d 1040, 1041, *lv denied* 2 NY3d 803). Defendant's

valid waiver of the right to appeal also encompasses the challenge in his main brief to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256).

The further contention of defendant in his main brief, pro se supplemental brief and pro se reply brief that the court erred in denying his motion to withdraw his plea of guilty is based on the "contention of defendant that the plea was not voluntarily entered[, and thus it] survives his waiver of the right to appeal" (*People v Poleun*, 75 AD3d 1109, 1109, *lv denied* 15 NY3d 923; *see People v Irvine*, 42 AD3d 949, 950, *lv denied* 9 NY3d 962). We conclude, however, that defendant's contention is without merit. "Permission to withdraw a guilty plea rests solely within the court's discretion . . ., and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Robertson*, 255 AD2d 968, 968, *lv denied* 92 NY2d 1053; *see People v Wolf*, 88 AD3d 1266, 1266-1267, *lv denied* 18 NY3d 863). Here, "[t]he court was presented with a credibility determination when defendant moved to withdraw his plea and advanced his belated claim[] of [intoxication] . . ., and it did not abuse its discretion in discrediting th[at] claim[]" (*People v Sparcino*, 78 AD3d 1508, 1509, *lv denied* 16 NY3d 746). We reject defendant's further contention that a hearing was required on the motion. "Only in the rare instance will a defendant be entitled to an evidentiary hearing; often a limited interrogation by the court will suffice. The defendant should be afforded [a] reasonable opportunity to present his contentions and the court should be enabled to make an informed determination" (*People v Tinsley*, 35 NY2d 926, 927; *see People v Strasser*, 83 AD3d 1411, 1411). The record establishes that defendant was afforded such an opportunity and that the court was able to make an informed determination of the motion.

In addition, although defendant's further contention in his main brief that his plea was not knowing, voluntary and intelligent because he was coerced into pleading guilty "survives his valid waiver of the right to appeal and he preserved that contention for our review" by moving to withdraw the plea (*People v Phillips*, 56 AD3d 1168, 1169, *lv denied* 11 NY3d 928), we reject that contention. Defendant contends that he was coerced because he had no choice but to accept the plea bargain offered by the People. Defendant is not entitled to the plea bargain of his choosing, and "defendant's fear that a harsher sentence would be imposed if defendant were convicted after trial does not constitute coercion" (*People v Newman* [appeal No. 1], 231 AD2d 875, 875, *lv denied* 89 NY2d 944; *see People v Jackson*, 90 AD3d 1692, 1693, *lv denied* 18 NY3d 958; *People v Boyde*, 71 AD3d 1442, 1443, *lv denied* 15 NY3d 747).

We have considered defendant's remaining contentions in his pro se briefs, and we conclude that they are without merit.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

977

KA 10-00399

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALAN L. JONES, DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO, FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered November 16, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of murder in the second degree (Penal Law § 125.25 [2]) to manslaughter in the second degree (§ 125.15 [1]) and vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Oswego County Court for sentencing on the conviction of manslaughter in the second degree.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [2] [depraved indifference murder]), defendant contends, inter alia, that the evidence is legally insufficient to support the conviction. We agree.

Turning first to defendant's legal sufficiency contention, we conclude that, contrary to the People's assertion, this issue is preserved for our review because the Trial Judge "plainly was aware of, and expressly decided, the question raised on appeal" concerning whether the evidence is legally sufficient to support the conviction (*People v Eduardo*, 11 NY3d 484, 493; *see* CPL 470.05 [2]; *People v Prado*, 4 NY3d 725, 726, *rearg denied* 4 NY3d 795). With regard to the merits, Penal Law § 125.25 (2) provides that "[a] person is guilty of murder in the second degree when[,] . . . [u]nder circumstances evincing a depraved indifference to human life, he [or she] recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person." That crime " 'is best understood as an utter disregard for the value of human life—a willingness to act not because one intends harm, but because one simply doesn't care whether grievous harm results or not' "

(*People v Feingold*, 7 NY3d 288, 296). "The culpable mental state, contrasting it from the intent to take one's life, is such that one is 'recklessly indifferent, depravedly so, to whether' the injury to or death of another occurs" (*People v Bussey*, 19 NY3d 231, 236, quoting *People v Gonzalez*, 1 NY3d 464, 468).

It is well settled " 'that, except in rare and extraordinary circumstances, . . . one person's attack on another, no matter how violent or how great the risk of harm it creates, does not rise to the level of depravity and indifference to life contemplated by the statutes defining crimes committed under circumstances evincing a depraved indifference to human life' " (*People v Boutin*, 81 AD3d 1399, 1400, *lv denied* 17 NY3d 792; *see People v Taylor*, 15 NY3d 518, 522; *People v Suarez*, 6 NY3d 202, 210-211). Indeed, "where a defendant's conduct endangers only a single person, to sustain a charge of depraved indifference there must be proof of 'wanton cruelty, brutality or callousness directed against a particularly vulnerable victim, combined with utter indifference to the life or safety of the helpless target of the perpetrator's inexcusable acts' " (*People v Coon*, 34 AD3d 869, 870, quoting *Suarez*, 6 NY3d at 213; *see Boutin*, 81 AD3d at 1400). The Court of Appeals has explained that there are two recurring "fact patterns in which a one-on-one killing could result in a depraved indifference conviction" (*Taylor*, 15 NY3d at 522). "The first is 'when the defendant intends neither to seriously injure, nor to kill, but nevertheless abandons a helpless and vulnerable victim in circumstances where the victim is highly likely to die' " (*id.*, quoting *Suarez*, 6 NY3d at 212). "The second is when the 'defendant—acting with a conscious objective not to kill but to harm—engages in torture or a brutal, prolonged and ultimately fatal course of conduct against a particularly vulnerable victim' " (*id.* at 523, quoting *Suarez*, 6 NY3d at 212).

The facts of this case do not fit within either of the aforementioned fact patterns. The first fact pattern is inapposite here inasmuch as the evidence at trial established that defendant did not abandon the victim and, instead, demonstrated that defendant called 911 regarding the victim's asphyxiation, administered CPR and was present at the scene when the authorities arrived. The second fact pattern is likewise inapposite to this case inasmuch as the evidence did not establish that defendant "engage[d] in torture or a brutal, prolonged and ultimately fatal course of conduct against a particularly vulnerable victim" (*id.* [internal quotation marks omitted]). Indeed, a treating emergency medical technician (EMT) testified that he conducted a "head to toe" examination of the victim, but found no injuries of note other than marks to her neck. Another EMT and a flight paramedic each testified that they did not see any injuries other than the marks on the victim's neck. Moreover, although the Medical Examiner testified that she noticed bruising on the victim's left forearm, left knee and left leg, she opined that those injuries "occurred at or about the time [the victim] was found unresponsive" and further testified that the victim could not have been strangled for a period of more than five minutes. Based on the above, we conclude that the conviction of depraved indifference murder is not supported by legally sufficient evidence (*see id.*; *see also*

Bussey, 19 NY3d at 236; *see generally People v Bleakley*, 69 NY2d 490, 495).

We now turn to the issue of the remedy. Here, the jury convicted defendant of depraved indifference murder, and as stated above one is guilty of that crime when, "[u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person" (Penal Law § 125.25 [2]). In convicting defendant, the jury concluded that defendant acted recklessly in causing the victim's death, i.e., that he was "aware of and consciously disregard[ed] a substantial and unjustifiable risk that [death would] occur" (§ 15.05 [3]). Recklessness is also an element of manslaughter in the second degree (*see* § 125.15 [1]). Thus, because the evidence supports the conclusion that "defendant's actions, although not depraved, were reckless" (*People v Atkinson*, 7 NY3d 765, 767), "reducing the depraved indifference murder conviction to manslaughter in the second degree is appropriate" (*Bussey*, 19 NY3d at 236; *see Atkinson*, 7 NY3d at 766-767; *People v Little*, 83 AD3d 1389, 1392; *see also* CPL 470.15 [2] [a]). We therefore modify the judgment accordingly.

Defendant's further contention that the verdict is against the weight of the evidence lacks merit. Preliminarily, we note that, given our determination that the evidence is legally insufficient to support the depraved indifference murder conviction, defendant's contention with regard to that conviction is moot. However, viewing the evidence in light of the elements of the lesser included offense of manslaughter in the second degree (*see People v Danielson*, 9 NY3d 342, 349), we conclude that a verdict convicting defendant of that crime would not be against the weight of the evidence (*see generally People v Pallagi*, 91 AD3d 1266, 1270; *People v Lettley*, 64 AD3d 901, 903, *lv denied* 13 NY3d 836; *see generally People v Bleakley*, 69 NY2d 490, 495). "Generally, [w]e accord great deference to the resolution of credibility issues by the trier of fact because those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record" (*People v Vanlare*, 77 AD3d 1313, 1315, *lv denied* 15 NY3d 956 [internal quotation marks omitted]; *see People v Curry*, 82 AD3d 1650, 1651, *lv denied* 17 NY3d 805). Under these circumstances, we see no reason to disturb the jury's credibility determinations.

Additionally, we reject defendant's contention that he was denied a fair trial by the cumulative effect of alleged errors at trial, i.e., courtroom outbursts and various actions of County Court, defense counsel and the prosecutor. Defendant's contention that the court abused its discretion by inadequately addressing four outbursts by spectators is unpreserved for our review (*see* CPL 470.05 [2]), and in any event lacks merit (*see People v Pantoliano*, 127 AD2d 857, 857, *lv denied* 70 NY2d 715; *People v Manners*, 120 AD2d 680, 680). The further contention of defendant that the court should have granted his motion for recusal is unpreserved for our review inasmuch as defendant did not raise before the motion court the ground for recusal that he

asserts on appeal (*see* CPL 470.05 [2]; *People v Strohman*, 66 AD3d 1334, 1335-1336, *lv dismissed* 13 NY3d 911), 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 failed to preserve for our review his challenge to the jury instructions (*see* CPL 470.05 [2]), and in any event that contention lacks merit inasmuch as " 'the jury, hearing the whole charge, would gather from its language the correct rules [that] should be applied in arriving at [a] decision' " (*People v Ladd*, 89 NY2d 893, 895, quoting *People v Russell*, 266 NY 147, 153; *see People v Bartlett*, 89 AD3d 1453, 1454, *lv denied* 18 NY3d 881). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we reject defendant's further contention that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). We also conclude that any alleged prosecutorial misconduct has not "caused . . . substantial prejudice to the defendant" (*People v Rubin*, 101 AD2d 71, 77, *lv denied* 63 NY2d 711).

Finally, we reject the contention of defendant that the judgment should be reversed because of the improper conduct of the jury. Defendant's contentions that the jury was confused with respect to the court's instructions regarding depraved indifference murder, that certain jurors considered evidence not introduced at trial, and that one juror was "browbeaten" into his verdict are properly before us (*see People v Gibian*, 76 AD3d 583, 587, *lv denied* 15 NY3d 920), but they lack merit inasmuch as " 'a jury verdict [generally] may not be impeached by probes into the jury's deliberative process' " (*People v Jerge*, 90 AD3d 1486, 1486, quoting *People v Maragh*, 94 NY2d 569, 573). A verdict, however, may be impeached by a showing of improper influence (*see id.*). Nevertheless, defendant's further contention that the jury was improperly swayed by outside influences is not properly before us inasmuch as defendant did not move to set aside the verdict based on that alleged jury misconduct (*see People v Bautista*, 25 AD3d 341, 341, *lv denied* 6 NY3d 809). In any event, defendant's complaints of alleged outside influence are unsupported by the record.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

978

KA 10-01801

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WALTER SNYDER, ALSO KNOWN AS BUTCH SNYDER,
DEFENDANT-APPELLANT.

KELLEY PROVO, ROCHESTER, FOR DEFENDANT-APPELLANT.

JASON L. COOK, DISTRICT ATTORNEY, PENN YAN (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered March 30, 2010. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence to a determinate term of imprisonment of seven years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]). Defendant failed to preserve for our review his contention that the indictment is facially duplicitous (*see People v Becoats*, 71 AD3d 1578, 1579, *affd* 17 NY3d 643, *cert denied* ___ US ___, 132 S Ct 1970; *People v Filer*, 97 AD3d 1095, 1096). In any event, that contention is without merit inasmuch as "[e]ach count of [the] indictment . . . charge[s] one offense only" (CPL 200.30 [1]; *see People v Wright*, 85 AD3d 1642, 1642, *lv denied* 17 NY3d 863; *see generally People v Keindl*, 68 NY2d 410, 417, *rearg denied* 69 NY2d 823), i.e., assault with a dangerous instrument (*see* Penal Law §§ 120.10 [1]; 120.05 [4]). Although defendant's contention that the indictment was rendered duplicitous by the trial testimony need not be preserved for our review (*see Filer*, 97 AD3d at 1096; *People v Boykins*, 85 AD3d 1554, 1555, *lv denied* 17 NY3d 814), that contention is likewise without merit. The evidence establishes that the multiple punches and/or kicks delivered by defendant constitute a single uninterrupted assault rather than a series of distinct criminal acts (*see People v Alonzo*, 16 NY3d 267, 270; *People v Kaid*, 43 AD3d 1077, 1079-1080; *cf. Boykins*, 85 AD3d at 1555), and the assault "occurred over a short time frame, without apparent abeyance, and was triggered by a single incident of anger" (*People v Hines*, 39 AD3d 968, 969-970, *lv denied* 9 NY3d 876).

Defendant also failed to preserve for our review his contention that the trial evidence is legally insufficient to establish his intent to cause serious physical injury to the victim or his use of a dangerous instrument inasmuch as he did not raise those specific grounds in his motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19; *People v Latorre*, 94 AD3d 1429, 1429-1430, *lv denied* 19 NY3d 998). In any event, defendant's intent to cause serious physical injury may be inferred from, inter alia, his conduct, the surrounding circumstances, and the medical evidence (*see People v Nicholson*, 97 AD3d 968, 969; *People v Moore*, 89 AD3d 769, 769, *lv denied* 18 NY3d 926; *People v White*, 216 AD2d 872, 873, *lv denied* 86 NY2d 805). Additionally, "under the circumstances in which [they were] used, attempted to be used or threatened to be used," defendant's boots were "readily capable of causing death or other serious physical injury" and thus qualify as a "dangerous instrument" (Penal Law § 10.00 [13]; *see People v Ingram*, 95 AD3d 1376, 1377, *lv denied* 19 NY3d 974; *People v Richardson*, 95 AD3d 791, 791-792, *lv denied* 19 NY3d 1000).

We reject defendant's further contention that the evidence is legally insufficient to establish that the victim sustained a serious physical injury. As relevant here, the Penal Law defines "[s]erious physical injury" as, inter alia, "physical injury which . . . causes . . . serious and protracted disfigurement" (§ 10.00 [10]). Here, the record establishes that, as a result of the assault, five of the victim's teeth were significantly damaged. The victim's dentist testified that one of the victim's teeth was broken off at the gum line, another tooth was broken in half, and three other teeth were badly fractured. According to the dentist, three of the victim's teeth were damaged so extensively that they could not be restored and had to be extracted. The remaining damaged teeth were fractured so badly that they required crowns. In addition, the People introduced in evidence photographs of the victim's teeth and copies of his dental X rays that showed the extent of the damage to his teeth. We thus conclude that the evidence is legally sufficient to establish that the victim suffered "serious and protracted disfigurement" (*id.*; *see People v Heier*, 90 AD3d 1336, 1337, *lv denied* 18 NY3d 994; *People v Crawford*, 200 AD2d 683, 684, *lv denied* 83 NY2d 870; *Matter of Patrick W.*, 166 AD2d 652, 653; *People v Howard*, 79 AD2d 1064, 1065). Because "the evidence at trial is legally sufficient to support the conviction, defendant's further contention that the evidence presented to the grand jury was legally insufficient is not reviewable on appeal" (*People v Brown*, 96 AD3d 1561, 1562; *see* CPL 210.30 [6]; *People v Johnson*, 94 AD3d 1408, 1409, *lv denied* 19 NY3d 998). Contrary to the further contention of defendant, we conclude that, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contention that the admission in evidence of hospital and dental records violated his right of confrontation inasmuch as he failed to object to the

admission of those records (*see People v Snyder*, 91 AD3d 1206, 1213, *lv denied* 19 NY3d 968; *People v Myers*, 87 AD3d 826, 829, *lv denied* 17 NY3d 954), 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 contention that County Court erred in admitting expert testimony without an adequate foundation (*see People v Scott*, 93 AD3d 1193, 1195, *lv denied* 19 NY3d 967, *reconsideration denied* 19 NY3d 1001; *People v Nguyen*, 66 AD3d 1367, 1367, *lv denied* 13 NY3d 909). In any event, defendant's contention goes to the weight of the testimony, not its admissibility (*see Scott*, 93 AD3d at 1195; *People v Hayes*, 33 AD3d 403, 404, *lv denied* 7 NY3d 902).

Contrary to defendant's further contention, there was no *Rosario* violation. "There is no requirement that a prosecutor record in any fashion his [or her] interviews with a witness. If the prosecutor chooses to do so, *Rosario* and its progeny require that the recording be furnished to the defense. But nothing in the *Rosario* line of cases in any way imposes an obligation on the prosecutor to create *Rosario* material in interviewing witnesses. Nor do these cases or any related authority hold that a defendant's right of cross-examination is unfairly frustrated by the failure to record the witness's statement" (*People v Steinberg*, 170 AD2d 50, 76, *affd* 79 NY2d 673; *see People v Littles*, 192 AD2d 314, 315, *lv denied* 81 NY2d 1016).

We also reject the contention of defendant that he received ineffective assistance of counsel. With respect to defense counsel's failure to request a *Huntley* hearing, "[d]efendant failed to show that, had [defense] counsel moved for [such] a . . . hearing, his statements would have been suppressed" (*People v Hill*, 281 AD2d 917, 918, *lv denied* 96 NY2d 902; *see generally People v Salsbery*, 78 AD3d 1624, 1625-1626, *lv denied* 16 NY3d 836). Thus, defendant did not establish that defense counsel was ineffective in failing to make such a motion (*see generally People v Tolliver*, 93 AD3d 1150, 1151, *lv denied* 19 NY3d 968). Further, defendant failed to demonstrate the absence of a strategic or other legitimate explanation for defense counsel's failure to seek suppression of defendant's statements to the police, particularly given that those statements were consistent with his justification defense (*see generally People v Jurjens*, 291 AD2d 839, 840, *lv denied* 98 NY2d 652). Contrary to defendant's contention that defense counsel did not engage in an examination of prospective jurors, the record establishes that defense counsel in fact questioned each of the three panels of prospective jurors (*cf. People v Bell*, 48 NY2d 933, 934, *rearg denied* 49 NY2d 802). With respect to defendant's contention that defense counsel allegedly engaged in an "unsuccessful" cross-examination of the victim, "[t]hat contention constitutes a disagreement with the strategies and tactics of [defense] counsel [that], in hindsight, may have been unsuccessful but, nonetheless, do not rise to a level of ineffective assistance of counsel" (*People v Ocasio*, 81 AD3d 1469, 1469, *lv denied* 16 NY3d 898, *cert denied* ___ US___, 132 S Ct 318 [internal quotation marks omitted]; *see generally People v Flores*, 84 NY2d 184, 187). With respect to the remaining instances of ineffective assistance of counsel alleged by defendant,

we conclude based on the record before us that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Contrary to the further contention of defendant, he was "not denied a fair trial by the cumulative effect of the alleged errors" set forth herein (*People v McKnight*, 55 AD3d 1315, 1317, *lv denied* 11 NY3d 927; *see generally People v Gramaglia*, 71 AD2d 441, 445).

We agree with defendant, however, that the sentence is unduly harsh and severe under the circumstances of this case, and we therefore modify the sentence as a matter of discretion in the interest of justice to a determinate term of imprisonment of seven years.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

983

CA 12-00559

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

ANTHONY SALIM, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF KATHRYN SALIM, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WESTERN REGIONAL OFF-TRACK BETTING CORPORATION, BATAVIA DOWNS, DEFENDANT-APPELLANT.

ROEMER WALLENS GOLD & MINEAUX, LLP, ALBANY (MATTHEW J. KELLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

NICHOLAS, PEROT, SMITH, BERNHARDT & ZOSH, P.C., AKRON (CRAIG H. BERNHARDT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered December 30, 2011 in a personal injury action. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action, individually and on behalf of his infant daughter, seeking damages for injuries sustained by his daughter on defendant's premises when she tripped on a 2 x 4 piece of wood affixed to bleachers used by patrons of defendant's racetrack. The piece of wood, which was placed there in order to keep the bleachers level, extended on the ground from the back of the bleachers to a wall, creating a gap between the bleachers and the wall. Plaintiff's daughter was emerging from the gap behind the bleachers when she tripped on the piece of wood and fell. Contrary to the contention of defendant, we conclude that Supreme Court did not err in denying its motion for summary judgment dismissing the complaint.

It is well established that "New York landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition" (*Tagle v Jakob*, 97 NY2d 165, 168; *see Basso v Miller*, 40 NY2d 233, 241). "The duty of a landowner to maintain its property in a safe condition extends to persons whose presence is reasonably foreseeable by the landowner" (*Brown v Rome Up & Running, Inc.*, 68 AD3d 1708, 1708 [internal quotation marks omitted]). "[I]t is for the court first to determine

whether any duty exists" (*Tagle*, 97 NY2d at 168). In determining the scope of the duty, "courts look to whether the relationship of the parties is such as to give rise to a duty of care . . ., whether the plaintiff was within the zone of foreseeable harm . . . and whether the accident was within the reasonably foreseeable risks" (*Di Ponzio v Riordan*, 89 NY2d 578, 583).

Here, defendant failed to meet its burden of establishing that it owed no duty to plaintiff's daughter (*see generally Tagle*, 97 NY2d at 168; *Basso*, 40 NY2d at 241). Specifically, defendant failed to establish that it was an "unforeseeable" or "remote possibility" that a child would trip over the 2 x 4 affixed to the bleachers while playing in the gap (*Hennigan v Johnson*, 245 AD2d 1130, 1131; *see generally Watson v Hillside Hous. Corp.*, 232 AD2d 252, 253, *lv dismissed* 89 NY2d 1030). Indeed, although the racetrack superintendent was unaware of any prior problems with individuals entering the area behind the bleachers, defendant's security guard testified at his deposition that he had seen children playing in the vicinity of the bleachers and that, on previous occasions, he had directed children to stop running and jumping in the area. Further, although the size of the space was disputed, there was no dispute that a gap existed. In support of the motion, defendant submitted the deposition testimony of the racetrack superintendent in which he stated that the gap ranged from one to two feet; plaintiff's deposition testimony in which plaintiff testified that "someone could walk back [there] and not have a problem"; and an affidavit of a witness to the accident in which he averred that the gap was large enough to allow a person to move around in the space. Thus, defendant's own submissions established that the gap was readily accessible to racetrack patrons and that defendant was aware that children played on or near the bleachers (*cf. Gustin v Association of Camps Farthest Out*, 267 AD2d 1001, 1002).

Defendant also failed to establish that it maintained the subject premises in a reasonably safe condition (*see generally Tagle*, 97 NY2d at 168; *Basso*, 40 NY2d at 241). "[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" (*Pommerenck v Nason*, 79 AD3d 1716, 1716 [internal quotation marks omitted]). Here, defendant's own submissions establish that it created the allegedly dangerous condition by installing the piece of wood to keep the bleachers level after they developed a small crack, and defendant failed to establish that the 2 x 4 did not present a tripping hazard. Defendant's failure to meet its initial burden necessitated denial of the motion "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

984

CA 10-02023

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

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

V MEMORANDUM AND ORDER

STEVEN LASHAWAY, ALSO KNOWN AS STEVEN LASHWAY,
RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Oneida County (William D. Walsh, A.J.), entered July 19, 2010 in a proceeding pursuant to Mental Hygiene Law article 10. The order determined that respondent shall remain subject to civil management.

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

Memorandum: Respondent appeals from an order determining, inter alia, that he remains subject to civil management pursuant to Mental Hygiene Law article 10 and suspending his right to annual review of his civil management status under section 10.09. In 2008, respondent was determined to be a dangerous sex offender requiring civil management and was committed to a secure treatment facility. Three months into his civil commitment, respondent violated the conditions of his parole and was returned to the custody of the New York State Department of Correctional Services (DOCS). Notwithstanding respondent's incarceration, in 2010 petitioner sought an order of continued confinement after annual review pursuant to section 10.09 (h). Respondent moved to dismiss the petition, contending, inter alia, that he was no longer in the custody of the Commissioner of Mental Health as a result of his incarceration and thus the petition was moot. Supreme Court denied respondent's motion and concluded that, although respondent should remain subject to civil management, his annual review under section 10.09 should be suspended until his release from incarceration.

We reject respondent's contention that the court lacked subject matter jurisdiction. Inasmuch as respondent had been determined to be a "[d]angerous sex offender requiring confinement" (Mental Hygiene Law

§ 10.03 [e]), the court has subject matter jurisdiction of all subsequent Mental Hygiene Law article 10 proceedings (§§ 10.06 [a]; 10.09 [c] - [h]). Additionally, contrary to respondent's contention, the petition states a cause of action. We further conclude that respondent remained subject to civil management during his incarceration (*see generally People v Arroyo*, 27 Misc 3d 192, 193-194). Because of his parole violation, incarceration with DOCS supplanted respondent's civil commitment in a secure treatment facility. Nevertheless, that change in circumstances did not affect respondent's status as a dangerous sex offender requiring civil management. Moreover, we conclude that, because any annual review conducted pursuant to section 10.09 would have no effect given respondent's current incarceration, the court properly suspended all such proceedings pending respondent's release from incarceration.

Finally, respondent contends that he did not receive meaningful representation on the grounds that his attorney made errors regarding his DIN number, did not communicate effectively with him and was abusive toward him. That contention is based on matters outside the record on appeal, however, and thus is not properly before us (*see Matter of State of New York v Campany*, 77 AD3d 92, 99-100, *lv denied* 15 NY3d 713; *Matter of Gray v Kirkpatrick*, 59 AD3d 1092, 1093-1094).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

986

CA 11-02234

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

LARINDA WATSON, INDIVIDUALLY AND AS LIMITED ADMINISTRATOR OF THE ESTATE OF TUCKER S. WATSON, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JONES MEMORIAL HOSPITAL, ET AL., DEFENDANTS, AND FITZGERALD A. HUDSON, M.D., DEFENDANT-APPELLANT.

NOTARO, LAING & NAVARRO P.C., BUFFALO (LINDA C. LAING OF COUNSEL), FOR DEFENDANT-APPELLANT.

DWYER, BLACK & LYLE, LLP, OLEAN (JEFFREY A. BLACK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered May 27, 2011. The order, inter alia, denied the cross motion of defendant Fitzgerald A. Hudson, M.D. to dismiss plaintiff's claim for punitive damages.

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

Memorandum: In this medical malpractice action, Fitzgerald A. Hudson, M.D. (defendant) appeals from an order that, inter alia, denied his cross motion to dismiss plaintiff's claim for punitive damages. Contrary to defendant's contention, Supreme Court properly denied the cross motion. "Punitive damages may be awarded when a defendant's conduct is so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others" (*Dumesnil v Proctor & Schwartz*, 199 AD2d 869, 870; *see Gauger v Ghaffari*, 8 AD3d 968, 968). Here, plaintiff alleged in the complaint, as amplified by the certificate of merit and the bill of particulars, that defendant practiced medicine with a fraudulently-obtained license that had been issued based upon his misrepresentations that he had graduated from college and completed a medical residency program, from which he had in fact been expelled; that, after providing medical care to decedent, he was barred from the practice of medicine because he had been found to be grossly negligent and grossly incompetent in his treatment of other patients; and that he had prescribed a drug to decedent with a reckless disregard of its side effects and its danger to a person with decedent's medical history. "Punitive or exemplary damages have been allowed in cases where the wrong complained of is morally culpable, or

is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, as well as others who might otherwise be so prompted, from indulging in similar conduct in the future" (*Walker v Sheldon*, 10 NY2d 401, 404). Here, the allegations are sufficient to state a claim for such damages (*cf. Cygan v Kaleida Health*, 51 AD3d 1373, 1375).

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

993

CA 12-00564

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

MICHAEL LIMARDI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BARBARA M. MCLEOD AND LESLIE S. MCLEOD,
DEFENDANTS-APPELLANTS.

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

SPADAFORA & VERRASTRO, LLP, BUFFALO (JOSEPH C. TODORO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered August 2, 2011 in a personal injury action. The order, insofar as appealed from, granted that part of the motion of plaintiff for summary judgment on the issue of negligence and denied the cross motion of defendants for summary judgment on the issue of serious injury.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when his vehicle was struck by a vehicle operated by defendant Barbara M. McLeod (defendant) and owned by defendant Leslie S. McLeod. Plaintiff moved for partial summary judgment on liability (*see Ruzycki v Baker*, 301 AD2d 48, 51), and defendants cross-moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Supreme Court granted that part of plaintiff's motion on the issue of negligence, denied that part of plaintiff's motion on the issue of serious injury, and denied the cross motion.

We reject defendants' contention that there is an issue of fact with respect to plaintiff's comparative negligence. Plaintiff met his initial burden on the motion of establishing that defendant was negligent as a matter of law and that her negligence was the sole

proximate cause of the accident (*see Whitcombe v Phillips*, 61 AD3d 1431, 1431; *Pomietlasz v Smith*, 31 AD3d 1173, 1174). Specifically, plaintiff established that defendant violated Vehicle and Traffic Law § 1141 by turning left at an intersection directly into the path of plaintiff's vehicle and that defendant's failure to yield the right-of-way was the sole proximate cause of the accident (*see Waltz v Vink*, 78 AD3d 1621, 1621-1622; *Pomietlasz*, 31 AD3d at 1174; *Gabler v Marly Bldg. Supply Corp.*, 27 AD3d 519, 520). In opposition to the motion, defendants failed to raise a triable issue of fact whether plaintiff was also negligent (*see Pomietlasz*, 31 AD3d at 1174; *Berner v Koegel*, 31 AD3d 591, 592; *Maloney v Niewender*, 27 AD3d 426, 426-427). Defendants' sole contention is that, because defendant could see plaintiff's vehicle approaching from two blocks away, plaintiff should likewise have been able to observe defendant's vehicle and to take evasive action when defendant turned in front of him. However, "[t]he record does not support [defendants'] contention that a triable issue of fact exists as to whether the plaintiff was comparatively negligent in the operation of [his] vehicle because []he failed to brake, sound [his] horn, or otherwise try to avoid the collision" (*Berner*, 31 AD3d at 592). "As . . . plaintiff had the right-of-way, []he was entitled to anticipate that . . . defendant would obey the traffic laws, which required . . . defendant to yield to . . . plaintiff's vehicle" (*id.* at 592-593; *see Gabler*, 27 AD3d at 520).

Although the fact that defendant made a left turn in front of plaintiff's vehicle does not absolve plaintiff of the duty to exercise reasonable care in proceeding through the intersection (*see Halbina v Brege*, 41 AD3d 1218, 1219; *Cooley v Urban*, 1 AD3d 900, 900), there is no evidence in this case that plaintiff failed to exercise such care (*cf. Halbina*, 41 AD3d at 1219; *Strasburg v Campbell*, 28 AD3d 1131, 1132; *Cooley*, 1 AD3d at 900-901). Instead, plaintiff testified at his deposition that he was not speeding, that his view of the intersection was unobstructed, and that he did not see defendant's vehicle until the collision, and defendants offered only mere speculation to the contrary (*see Pomietlasz*, 31 AD3d at 1174; *Maloney*, 27 AD3d at 427). We thus conclude that the court properly granted that part of plaintiff's motion on the issue of negligence (*see Waltz*, 78 AD3d at 1621).

Contrary to the further contention of defendants, we conclude that there is an issue of fact whether plaintiff sustained a serious injury under the significant limitation of use, permanent consequential limitation of use, and 90/180 day categories. Even assuming, arguendo, that defendants met their initial burden on the cross motion with respect to each of those three categories of serious injury, we conclude that plaintiff raised an issue of fact in opposition. With respect to the permanent consequential limitation of use and significant limitation of use categories, plaintiff submitted objective evidence of injury to his neck and back, i.e., X rays, MRI reports, and doctors' observations of muscle spasms upon palpation of his cervical and lumbar spine (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353; *Nitti v Clerrico*, 98 NY2d 345, 358; *see also Mancuso v Collins*, 32 AD3d 1325, 1326). Among other things, an MRI of

plaintiff's lumbar spine revealed a disc herniation at L4-L5, which plaintiff's treating chiropractor opined was "100% causally related" to the accident. Plaintiff further submitted records from several medical providers quantifying range of motion losses in his cervical and lumbar spine (*see Austin v Rent A Ctr. E., Inc.*, 90 AD3d 1542, 1544).

With respect to the 90/180 day category, plaintiff submitted evidence establishing that he was out of work for approximately nine months after the accident at the direction of his treating physicians, after which he returned to work light duty. Additionally, plaintiff testified at his deposition and averred in an affidavit that, after the accident, he was unable to perform his customary job duties, including lifting five-gallon buckets of paint, climbing ladders or scaffolds, or kneeling, stooping, crouching, or extending his arms over his head. Plaintiff further stated that he was "unable to do the physical types of things that [he] could before th[e accident]," including cleaning the house, shopping for groceries, doing laundry, cutting the grass, and taking the garbage out. We thus conclude that plaintiff raised an issue of fact whether he was prevented from performing his usual and customary activities during the requisite time period as a result of the accident (*see Rissew v Smith*, 89 AD3d 1383, 1384; *see also Downs v Kehoe*, 39 AD3d 1152, 1153; *Zeigler v Ramadhan*, 5 AD3d 1080, 1081).

We agree with defendants, however, that they established as a matter of law that plaintiff did not sustain a serious injury under the permanent loss of use category, i.e., that plaintiff did not sustain a " 'total loss of use' of a body organ, member, function or system" (*Schreiber v Krehbiel*, 64 AD3d 1244, 1245, quoting *Oberly v Bangs Ambulance*, 96 NY2d 295, 297), and that plaintiff failed to raise a triable issue of fact in opposition (*see Paveljack v Cirino*, 93 AD3d 1286, 1286; *Harris v Carella*, 42 AD3d 915, 917). We therefore modify the order accordingly.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

995

CA 12-00543

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

DONALD C. QUIGLEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SHERYN BURNETTE, INDIVIDUALLY AND DOING BUSINESS AS COUNTRY CORNER STORE, DEFENDANT-APPELLANT.

WILLIAMSON, CLUNE & STEVENS, ITHACA (ALLAN C. VANDEMARK OF COUNSEL), FOR DEFENDANT-APPELLANT.

DEVALK, POWER, LAIR & WARNER, P.C., SODUS (RICHARD L. DEVALK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered June 27, 2011. The order denied the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint to the extent that the complaint, as amplified by the bill of particulars, alleges that defendant had actual notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained when he fell near the gasoline pumps in the parking lot of defendant's store. Plaintiff alleges that he slipped and fell on an icy puddle that was formed by water running off the canopy above the fuel pumps onto the pavement below. Defendant moved for summary judgment dismissing the complaint on the grounds that she did not have actual or constructive notice of the allegedly dangerous condition or create the condition. We conclude that Supreme Court erred in denying the motion with respect to the allegation that defendant had actual notice of the allegedly dangerous condition but otherwise properly denied the motion. We therefore modify the order accordingly.

Defendant met her initial burden with respect to actual notice by submitting evidence that she was not aware of the allegedly dangerous condition, and plaintiff failed to raise a triable issue of fact in opposition (*see Robertson v Masiello*, 21 AD3d 1259, 1260). Defendant failed to meet her initial burden with respect to constructive notice, however, and thus the court properly denied her motion to that extent

(*see generally Monroe v New York State Elec. & Gas Corp.*, 186 AD2d 1019, 1020). In support of her motion, defendant submitted, inter alia, the deposition testimony of an employee who stated that there were no inspection procedures in place at the time of the accident and that he could not recall whether there had been any maintenance of the parking lot that day. "Thus, [d]efendant submitted no evidence to establish that the ice formed so close in time to the accident that [she] could not reasonably have been expected to notice and remedy the condition" (*Rogers v Niagara Falls Bridge Commn.*, 79 AD3d 1637, 1638 [internal quotation marks omitted]; *see Kimpland v Camillus Mall Assoc., L.P.*, 37 AD3d 1128, 1129). Even assuming, arguendo, that defendant met her initial burden, we conclude that plaintiff raised a triable issue of fact sufficient to defeat that part of the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Finally, we conclude that defendant failed to meet her initial burden of establishing that she did not create the allegedly dangerous condition (*see Kimpland*, 37 AD3d at 1128), and thus the court also properly denied her motion to that extent.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

996

KA 11-02286

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON HICKS, DEFENDANT-APPELLANT.

LEIGH E. ANDERSON, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered November 3, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of marihuana in the second degree and operating a motor vehicle with excessively tinted windows.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of criminal possession of marihuana in the second degree (Penal Law § 221.25) and operating a motor vehicle with excessively tinted windows (Vehicle and Traffic Law § 375 [12-a] [b] [2]), defendant contends that the evidence is legally insufficient to support the conviction of criminal possession of marihuana because the People failed to establish that he possessed the bags of marihuana at issue. We reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). We agree with defendant, however, that he was denied a fair trial by prosecutorial misconduct.

We note at the outset that, as the People correctly conceded at oral argument, the prosecutor engaged in misconduct by asking defendant on cross-examination to characterize prosecution witnesses as liars (*see People v Washington*, 89 AD3d 1516, 1516-1517, *lv denied* 18 NY3d 963; *People v McClary*, 85 AD3d 1622, 1624) and, indeed, the record establishes that she repeatedly did so. Defense counsel eventually objected to that line of questioning, but Supreme Court overruled the objection and the improper questions continued. The prosecutor then exacerbated the harm arising from the prior misconduct by stating during her summation that the defense theory was that “the police are liars.”

Unlike the dissent, we cannot conclude that defendant opened the

door to the prosecutor's conduct by clearly suggesting that the prosecution witnesses had fabricated their testimony (*cf. People v Head*, 90 AD3d 1157, 1158; *People v Buel*, 53 AD3d 930, 931-932). At no time during his direct testimony did defendant suggest that the police officers fabricated their testimony and, when asked on cross-examination whether he believed that the police had a reason to frame him, defendant responded, "I don't know the reason, I don't know what's - - I don't know why I'm here today." Although defendant's testimony with respect to several matters was at odds with the police officers' testimony, it does not necessarily follow that he was thereby suggesting that the police officers had fabricated their testimony.

We further conclude that the prosecutor also engaged in misconduct during her summation by stating that "there's been no evidence that there was any plea bargain available in this case." The record demonstrates that a plea bargain had in fact been offered in writing to defendant by that same prosecutor, and that defendant rejected the offer. Although the prosecutor was technically correct that no evidence of the plea offer had been admitted at trial, it may be readily inferred that the prosecutor intended to mislead the jury on this point and was successful in doing so. We also agree with defendant that the prosecutor engaged in misconduct by asking defendant on cross-examination whether he knew about the criminal past of his companion (*see People v Cheatham*, 158 AD2d 934, 935; *People v Shivers*, 63 AD2d 708, 709). Again, defense counsel's objection to that questioning was overruled.

We conclude that "the cumulative effect of the prosecutor's cross-examination and summation errors deprived defendant of a fair trial" (*People v Ortiz*, 69 AD3d 490, 491; *see People v Calabria*, 94 NY2d 519, 523). We therefore reverse the judgment of conviction and grant a new trial, " 'without regard to any evaluation as to whether the errors contributed to the defendant's conviction. The right to a fair trial is self-standing and proof of guilt, however overwhelming, can never be permitted to negate this right' " (*People v Fredrick*, 53 AD3d 1088, 1089, quoting *People v Crimmins*, 36 NY2d 230, 238).

All concur except SCUDDER, P.J., and SMITH, J., who dissent and vote to affirm in the following Memorandum: We respectfully dissent. While we agree with the majority that the prosecutor engaged in misconduct by questioning defendant about his companion's prior criminal history (*see People v Cheatham*, 158 AD2d 934, 935; *People v Shivers*, 63 AD2d 708, 709), we do not agree that the prosecutor engaged in misconduct by asking defendant whether prosecution witnesses were lying. Indeed, we conclude that the People were incorrect in conceding at oral argument of this appeal that the prosecutor thereby engaged in misconduct. Rather, "[i]nasmuch as defendant's testimony during both direct and cross-examination clearly suggested that the People's witnesses had fabricated their testimony, it was not improper for the prosecutor to ask him whether he believed that the People's witnesses had lied during their testimony" (*People v Head*, 90 AD3d 1157, 1158; *see People v Buel*, 53 AD3d 930, 931-932). We also conclude that the prosecutor did not engage in misconduct by

stating, in response to defendant's summation, that there had been "no evidence that there was any plea bargain available in this case." As the majority acknowledges, that statement was "technically correct" and, because the jurors are required to make their determination based solely "on the evidence presented at . . . trial" (CJI2d[NY] Reasonable Doubt), we cannot conclude that the prosecutor's statement was improper.

Even assuming, arguendo, that the majority is correct that all of the prosecutor's challenged conduct was improper, we conclude that such conduct was not so pervasive or egregious as to deny defendant his right to a fair trial (*see generally People v Kims*, 96 AD3d 1595, 1598). Inasmuch as none of defendant's remaining contentions has merit, we would affirm.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1004

CAF 11-02082

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

IN THE MATTER OF ANGELA N.S.

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

JOSHUA S., RESPONDENT-APPELLANT.

PATRICIA M. MCGRATH, LOCKPORT, FOR RESPONDENT-APPELLANT.

SUSAN M. SUSSMAN, NIAGARA FALLS, FOR PETITIONER-RESPONDENT.

THOMAS J. CASERTA, JR., ATTORNEY FOR THE CHILD, NIAGARA FALLS, FOR ANGELA N.S.

Appeal from an order of the Family Court, Niagara County (David E. Seaman, J.), entered September 27, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred respondent's guardianship and custody rights of the subject child to petitioner.

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

Memorandum: On appeal from an order terminating his parental rights with respect to his daughter on the ground of abandonment, respondent father contends that the order must be reversed because he demonstrated that he was committed to parenting his daughter and that his efforts in that regard were frustrated by petitioner. We reject that contention. "A child is abandoned if his or her parent 'evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or [petitioner], although able to do so and not prevented or discouraged from doing so by [petitioner]' " (*Matter of Joseph E.*, 16 AD3d 1148, 1148, quoting Social Services Law § 384-b [5] [a]). A child is deemed abandoned when the parent engages in such behavior "for the period of six months immediately prior to the date on which the petition [for abandonment] is filed" (§ 384-b [4] [b]; *see Matter of Michael B.*, 284 AD2d 946, 946; *Matter of Christina W.*, 273 AD2d 918, 918). "In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed" (§ 384-b [5] [a]).

Here, it is undisputed that the father had no contact with the child during the relevant six-month period, i.e., from September 19, 2009 to March 19, 2010, when the abandonment petition was filed. In

fact, the father admitted at the hearing that he had no contact with the child since he left the residence of the child's mother in July 2008 and moved to Ohio. Although the father testified that he spoke regularly with the mother and asked about the child, the record establishes that he made no attempts to visit the child, not even when he returned several times to visit friends in the Niagara Falls area, where the child resided. Even assuming, arguendo, that the father did not realize that the child was in foster care until September 2009, as he testified at the hearing, we note that he had previously been served with a copy of the neglect petition and did not respond to it or appear in court with respect to that proceeding. Additionally, the father made no efforts to see the child at the mother's house where he purportedly believed the child was living.

We reject the father's contention that his failure to contact the child was justified because petitioner's caseworker failed to return numerous telephone calls he allegedly made seeking information about the child. Although petitioner does not appear to have done anything to facilitate contact between the father and the child, "petitioner was not required to show that it made diligent efforts to encourage [the father] to maintain contact with his daughter in order to prevail on the abandonment petition" (*Matter of Christina S.*, 251 AD2d 982, 983). We agree with the court that the father's telephone calls to petitioner's office do not rise to the level of effort required " 'to defeat an otherwise viable claim of abandonment' " (*Matter of Maddison B. [Kelly L.]*, 74 AD3d 1856, 1857). We also note that, although the father was served with the abandonment petition in or about March 2010, he failed to appear in court until approximately 11 months later, on the day that the evidentiary hearing was scheduled to commence against the child's mother. There is no reason apparent in the record for the father's 11-month delay in responding to the abandonment petition.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1011

CA 12-00595

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

JAQUANDA NERO AND LAQUESHA NERO, INFANTS BY
THE PARENT AND NATURAL GUARDIAN, FELICIA NERO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ISAAC KENDRICK, ELIZABETH KENDRICK,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

BURGIO, KITA & CURVIN, BUFFALO (STEVEN P. CURVIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ATHARI & ASSOCIATES, LLC, UTICA (MO ATHARI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered December 8, 2011. The order, insofar as appealed from, denied the motion of defendants Isaac Kendrick and Elizabeth Kendrick for a protective order.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the motion is granted.

Memorandum: Isaac Kendrick and Elizabeth Kendrick (defendants), as limited by their brief, appeal from that part of an order that denied their motion for a protective order. Specifically, defendants sought an order "requiring provision of a report by [Jaquanda Nero (plaintiff)] . . . causally relating an injury to plaintiff's ingestion of lead based paint . . . ." Defendants also sought an order that would allow them "120 days within which to conduct a defense [medical examination] on behalf of the defendants . . . and serve any such reports measured from the date of receipt of a report from an expert retained on behalf of the plaintiff detailing any injuries sustained by the plaintiff . . . as a result of elevated blood lead levels . . . ." In denying defendants' motion, Supreme Court concluded that it was not authorized pursuant to CPLR 3103 to order plaintiff to be examined by an expert. We reverse the order insofar as appealed from and grant defendants' motion.

Trial courts have broad discretion in supervising disclosure (*see Carpenter v Browning-Ferris Indus.*, 307 AD2d 713, 715-716), and CPLR 3103 (a) affords the court the authority to deny, limit, condition or

regulate the use of any disclosure device to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." Here, the protective order sought by defendants was appropriate relief. Defendants had previously sought medical reports from plaintiffs pursuant to 22 NYCRR 202.17 and plaintiffs responded to that request, but none of the material provided contained any information concerning any condition, symptom or problem that plaintiff was experiencing as the result of elevated blood lead levels, "the physical . . . condition in issue" (*Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 457). Indeed, the plaintiff in a personal injury action is under an obligation both to procure and to produce medical reports relating the claimed injury to the allegations being made in the litigation (*see Kelly v Tarnowski*, 213 AD2d 1054). Furthermore, the court had already issued a scheduling order requiring, inter alia, defendants to conduct a medical examination of plaintiff by a date certain, and we conclude that defendants should not be put to the time, expense and effort of arranging for and conducting a medical examination of plaintiff without the benefit of reports linking the symptoms or conditions of plaintiff to defendants' alleged negligence (*see Adams v Rizzo*, 13 Misc 3d 1235[A], 2006 NY Slip Op 52135[U], 47-48; *see generally Matter of Andrews v Trustco Bank, Natl. Assn.*, 289 AD2d 910, 912-913).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1018

CA 11-02534

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

JOHN MAZZARELLA, INDIVIDUALLY AND AS FATHER OF FOUR MINOR CHILDREN OF AGES 5, 7, 9, AND 11, PLAINTIFF-APPELLANT,

V ORDER

SYRACUSE DIOCESE, BISHOP JAMES M. MOYNIHAN, BISHOP THOMAS J. COSTELLO AND FR. JOHN W. BRODERICK, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

JEFF ANDERSON & ASSOCIATES PA, ST. PAUL, MINNESOTA, THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (MAUREEN E. MANEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS SYRACUSE DIOCESE, BISHOP JAMES M. MOYNIHAN AND BISHOP THOMAS J. COSTELLO.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered February 28, 2011. The order and judgment directed defendants Syracuse Diocese, Bishop James M. Moynihan and Bishop Thomas J. Costello to produce certain documents for in camera review and otherwise granted the motion of those defendants for a protective order.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Nugent*, 26 AD3d 892, 893).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1019

CA 11-02535

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

JOHN MAZZARELLA, INDIVIDUALLY AND AS FATHER OF FOUR MINOR CHILDREN OF AGES 5, 7, 9, AND 11, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SYRACUSE DIOCESE, BISHOP JAMES M. MOYNIHAN, BISHOP THOMAS J. COSTELLO AND FR. JOHN W. BRODERICK, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

JEFF ANDERSON & ASSOCIATES PA, ST. PAUL, MINNESOTA, THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (MAUREEN E. MANEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS SYRACUSE DIOCESE, BISHOP JAMES M. MOYNIHAN AND BISHOP THOMAS J. COSTELLO.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered February 28, 2011. The order and judgment granted the motion of defendants Syracuse Diocese, Bishop James M. Moynihan and Bishop Thomas J. Costello for partial summary judgment dismissing plaintiff's fourth through sixth causes of action and any individual claims of plaintiff and denied plaintiff's cross motion for partial summary judgment.

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

Memorandum: Plaintiff commenced this action, individually and as the father of four children who allegedly were sexually abused, seeking damages arising from that abuse. In appeal No. 2, plaintiff appeals from an order and judgment granting the motion of defendants Syracuse Diocese, Bishop James M. Moynihan, and Bishop Thomas J. Costello (collectively, Church defendants) for partial summary judgment dismissing the fourth through sixth causes of action and any individual claims of plaintiff and denying plaintiff's cross motion for partial summary judgment on liability on those causes of action. In appeal No. 3, plaintiff appeals from an order directing the Church defendants to disclose only certain documents sought by plaintiff, following Supreme Court's in camera review of those documents and appropriate redaction thereof.

With respect to the order in appeal No. 2, we note that the fourth and fifth causes of action assert the commission of intentional torts under the theory of respondeat superior. Under that theory, an employer is " 'vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment' " (*Burlarley v Wal-Mart Stores, Inc.*, 75 AD3d 955, 956). Although the issue whether a particular act is within the scope of employment is usually one of fact for the jury (*see Riviello v Waldron*, 47 NY2d 297, 302-303), there is no liability as a matter of law if the employee was "acting solely for personal motives unrelated to the furtherance of the employer's business" (*Xin Tang Wu v Ng*, 70 AD3d 818, 819). It is well settled in New York that sexual abuse by clergy is not within the scope or furtherance of the employment (*see Wende C. v United Methodist Church, N.Y. W. Area*, 6 AD3d 1047, 1052-1052, *affd* 4 NY3d 293, *cert denied* 546 US 818; *Paul J.H. v Lum*, 291 AD2d 894, 895; *Joshua S. v Casey*, 206 AD2d 839, 839).

With respect to the sixth cause of action, sounding in breach of fiduciary duty, the Church defendants established that there was no fiduciary relationship between them and plaintiff's family (*see Mars v Diocese of Rochester*, 6 AD3d 1120, 1121, *lv denied* 3 NY3d 608, *rearg dismissed* 5 NY3d 850). Finally, the court properly granted that part of the Church defendants' motion with respect to plaintiff's individual claims inasmuch as plaintiff has not demonstrated any direct harm as a result of the negligence of the Church defendants (*see Dana v Oak Park Marina*, 230 AD2d 204, 207).

In appeal No. 3, plaintiff contends that the court should have ordered disclosure of defendant Father John W. Broderick's complete personnel file rather than only portions of it, following the court's in camera review of the file. Preliminarily, we note that plaintiff does not ask this Court to review the documents in camera but, rather, plaintiff seeks a broad ruling that he was denied due process because of the "method and manner" used by the court in precluding disclosure of some of the documents in the personnel file. Plaintiff's present contention concerning the court's procedure in reviewing the personnel file is unpreserved for our review inasmuch as plaintiff made no objection on the record to that procedure (*see generally Atkins v Guest*, 201 AD2d 411, 411). In any event, we have conducted our own independent review of the documents and conclude that the court did not abuse its discretion in precluding disclosure of portions of the personnel file for the various reasons set forth in the court's decision.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1020

CA 11-02536

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

JOHN MAZZARELLA, INDIVIDUALLY AND AS FATHER OF FOUR MINOR CHILDREN OF AGES 5, 7, 9, AND 11, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SYRACUSE DIOCESE, BISHOP JAMES M. MOYNIHAN, BISHOP THOMAS J. COSTELLO AND FR. JOHN W. BRODERICK, DEFENDANTS-RESPONDENTS. (APPEAL NO. 3.)

JEFF ANDERSON & ASSOCIATES PA, ST. PAUL, MINNESOTA, THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (MAUREEN E. MANEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS SYRACUSE DIOCESE, BISHOP JAMES M. MOYNIHAN AND BISHOP THOMAS J. COSTELLO.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered July 18, 2011. The order directed the disclosure to plaintiff of certain documents after an in camera review.

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

Same Memorandum as in *Mazzarella v Syracuse Diocese* ([appeal No. 2] ___ AD3d ___ [Nov. 9, 2012]).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1029

KA 10-02513

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FERNANDO P. GUANTERO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered July 29, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [c]) and, in appeal No. 2, he appeals from a judgment convicting him upon a plea of guilty of attempted burglary in the second degree (§§ 110.00, 140.25 [2]). With respect to both appeals, defendant contends that his waiver of the right to appeal was not knowingly, voluntarily, and intelligently entered. We reject that contention (*see generally People v Lopez*, 6 NY3d 248, 256; *People v Hidalgo*, 91 NY2d 733, 735). "The responses of defendant to County Court's questions during the plea colloquy establish that he understood the consequences of waiving the right to appeal and voluntarily waived that right" (*People v Ruffins*, 78 AD3d 1627, 1628; *see People v Dunham*, 83 AD3d 1423, 1424, *lv denied* 17 NY3d 794). Further, the court " 'made clear that the waiver of the right to appeal was a condition of [the] plea, not a consequence thereof' " (*People v McCarthy*, 83 AD3d 1533, 1533-1534, *lv denied* 17 NY3d 819), and we note that defendant executed a written waiver of the right to appeal (*see People v Jones*, 96 AD3d 1637, 1637; *People v Colucci*, 94 AD3d 1419, 1420, *lv denied* 19 NY3d 959).

Although the contention of defendant with respect to both appeals that his plea was not voluntarily entered survives his valid waiver of the right to appeal (*see Dunham*, 83 AD3d at 1424), defendant failed to move to withdraw his plea or to vacate the judgment of conviction on

that ground and thus failed to preserve that contention for our review (*see People v Oldshield*, 93 AD3d 1238, 1238; *Dunham*, 83 AD3d at 1424). Contrary to defendant's contention in each appeal, this case does not fall within the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666). Finally, defendant contends in each appeal that the court erred in refusing to assign him new counsel without inquiring into the grounds for substitution. We note at the outset that defendant's contention is encompassed by his plea and his valid waiver of the right to appeal in each appeal except to the extent that it implicates the voluntariness of the plea (*see People v Morris*, 94 AD3d 1450, 1451, *lv denied* 19 NY3d 976; *People v Phillips*, 56 AD3d 1163, 1164, *lv denied* 12 NY3d 761). In any event, defendant abandoned his request for new counsel when he "decid[ed] . . . to plead guilty while still being represented by the same attorney" (*People v Hobart*, 286 AD2d 916, 916, *lv denied* 97 NY2d 683; *see Morris*, 94 AD3d at 1451; *People v Munzert*, 92 AD3d 1291, 1292).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1030

KA 11-01525

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FERNANDO P. GUANTERO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered July 29, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Same Memorandum as in *People v Guantero* ([appeal No. 1] ___ AD3d ___ [Nov. 9, 2012]).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1032

CA 12-00539

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

LINETTE RUIZ, BY THE GUARDIAN OF HER PERSON AND PROPERTY MARIA RODRIGUEZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, DEFENDANT-RESPONDENT.

HANDELMAN, WITKOWICZ & LEVITSKY, LLP, ROCHESTER (STEVEN M. WITKOWICZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered May 31, 2011 in a personal injury action. The order granted the motion of defendant to dismiss the complaint and dismissed the complaint.

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

Memorandum: Plaintiff, by the guardian of her person and property, commenced this action alleging that she suffered injuries as a result of the failure of defendant's Police Department to follow its own ministerial protocol when responding to a 911 telephone call from her roommate providing the information that plaintiff was attempting suicide. Plaintiff's roommate called 911 after receiving a text message from plaintiff stating that she was at that moment committing suicide. The police went to plaintiff's residence but awaited the arrival of her roommate before entering the premises. Plaintiff alleges that the delay in entering the premises was a violation of police procedures and that such violation caused or contributed to her injuries. Supreme Court properly granted defendant's motion seeking dismissal of the complaint for failure to state a cause of action based on the absence of a special relationship between plaintiff and the police giving rise to a special duty (*see McLean v City of New York*, 12 NY3d 194, 199). We reject plaintiff's contention that the alleged failure of defendant's Police Department to comply with its ministerial duties provides a basis for liability despite the absence of a special relationship. "Under the public duty rule, although a municipality owes a general duty to the public at large to furnish police protection, this does not create a duty of care running to a specific individual sufficient to support a negligence claim, unless

the facts demonstrate that a special duty was created" (*Valdez v City of New York*, 18 NY3d 69, 75). Even where there is a ministerial failure directly related to a specific incident, "ministerial acts may support liability only where a special duty is found" (*McLean*, 12 NY3d at 202; *see Carson v Town of Oswego*, 77 AD3d 1321, 1322). A complaint is properly dismissed for failure to state a cause of action where the plaintiff has "not set forth facts that would create the necessary direct contact and justifiable reliance required under the special relationship test" (*Rogers v State of New York*, 288 AD2d 926, 926; *see Laratro v City of New York*, 8 NY3d 79, 83). Given that there is no allegation that plaintiff had direct contact with the police or even that she was aware that the police had been notified, the direct contact requirement of the special relationship test is not satisfied (*see Laratro*, 8 NY3d at 83).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1034

CA 12-00305

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

MICHELLE STEWART, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SUZANNE KIER, CHARLENE HAUSER,
DEFENDANTS-RESPONDENTS,
ANNIE WALDRON AND SAMMIE HANNAH,
DEFENDANTS-APPELLANTS.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GARY J. GIANFORTI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GALLO & IACOVANGELO, LLP, ROCHESTER (DAVID D. SPOTO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

LAW OFFICES OF LAURIE G. OGDEN, ROCHESTER (DAVID F. BOWEN OF COUNSEL), FOR DEFENDANT-RESPONDENT CHARLENE HAUSER.

BARTH SULLIVAN BEHR, BUFFALO (ANDREW J. KOWALEWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT SUZANNE KIER.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered November 18, 2011 in a personal injury action. The order denied the motion of defendants Annie Waldron and Sammie Hannah for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint and cross claims against defendants Annie Waldron and Sammie Hannah are dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained in a motor vehicle accident when she was a passenger in a vehicle operated by Annie Waldron and owned by Sammie Hannah (defendants). The accident occurred when a vehicle operated by defendant Suzanne Kier collided with the vehicle operated by Waldron. Kier and Waldron were driving in opposite directions on a two-lane highway, and the vehicle driven by Kier entered Waldron's lane of travel. Immediately after the collision, a vehicle driven by defendant Charlene Hauser, who had been traveling behind Waldron, collided with the back of Waldron's vehicle. Defendants moved for summary judgment dismissing the complaint and cross claims against them, contending that the emergency doctrine applied and that Waldron's actions were reasonable under the circumstances. We agree

with defendants that Supreme Court erred in denying their motion.

Under the emergency doctrine, " 'when [a driver] is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the [driver] to be reasonably so disturbed that [he or she] must make a speedy decision without weighing alternative courses of conduct, the [driver] may not be negligent if the actions taken are reasonable and prudent in the emergency context' . . . , provided the [driver] has not created the emergency" (*Caristo v Sanzone*, 96 NY2d 172, 174, quoting *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327, *rearg denied* 77 NY2d 990). It is also well established that a driver is "not required to anticipate that [another driver's] vehicle, traveling in the opposite direction, would cross over into his [or her] lane of travel" (*Cardot v Genova*, 280 AD2d 983, 983).

Here, defendants met their initial burden by establishing as a matter of law that the emergency doctrine applied, inasmuch as Kier's vehicle unexpectedly crossed over into Waldron's lane of travel and deposition testimony established that Waldron had little or no time to react or avoid the collision (*see Caristo*, 96 NY2d at 174). In response, plaintiff failed to raise an issue of fact with respect to the applicability of the emergency doctrine or the reasonableness of Waldron's actions. Although "it generally remains a question for the trier of fact to determine whether an emergency existed and, if so, whether the [driver's] response thereto was reasonable" (*Schlanger v Doe*, 53 AD3d 827, 828), summary judgment is appropriate where, as here, " 'the driver presents sufficient evidence to establish the reasonableness of his or her actions [in an emergency situation] and there is no opposing evidentiary showing sufficient to raise a legitimate question of fact' " (*McGraw v Glowacki*, 303 AD2d 968, 969; *see Ward v Cox*, 38 AD3d 313, 314). The contentions of plaintiff, Kier, and Hauser that Waldron may have had sufficient time to react to the crossover vehicle or that Waldron was driving at an excessive rate of speed for the road conditions are speculative and thus are insufficient to raise an issue of fact to defeat the motion (*see generally Bellassai v Roberts Wesleyan Coll.*, 59 AD3d 1125, 1126).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1035

CA 12-00004

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

KEN-VIL ASSOCIATES LIMITED PARTNERSHIP,
AFFINITY RENEWAL DEVELOPMENT LLC,
VILLA MARIA COLLEGE OF BUFFALO AND
ATLANTIC HOUSING FOUNDATION, INC.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS
AND GALEN D. KIRKLAND, DEFENDANTS-APPELLANTS.

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

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (DENNIS C. VACCO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS KEN-VIL ASSOCIATES LIMITED PARTNERSHIP AND AFFINITY RENEWAL DEVELOPMENT LLC.

CONNORS & VILARDO LLP, BUFFALO (RANDALL D. WHITE OF COUNSEL), FOR PLAINTIFF-RESPONDENT ATLANTIC HOUSING FOUNDATION, INC.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered March 14, 2011. The order denied defendants' motion to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of defendants' motion to dismiss the first and third causes of action and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking, inter alia, a judgment declaring that the settlement agreement (Agreement) that they entered into with defendant New York State Division of Human Rights (Division) is void and unenforceable and a permanent injunction prohibiting defendants from enforcing that Agreement. In lieu of an answer, defendants moved to dismiss the complaint pursuant to CPLR 3211 (a) (2) and (7) on the ground that, inter alia, Executive Law § 298 provides the exclusive means for reviewing a final determination of the Division and plaintiffs failed to seek judicial review of the determination within the statute's 60-day limitations period. Supreme Court denied the motion.

We agree with defendants that, insofar as the complaint challenges the Division's authority to enter into the Agreement and

the circumstances surrounding the execution of the Agreement, it should be dismissed as untimely pursuant to Executive Law § 298. That statute provides, in relevant part, that "[a]ny complainant, respondent or other person aggrieved by . . . an order of the [D]ivision which makes a final disposition of a complaint may obtain judicial review thereof . . . in a proceeding as provided in this section" (*id.*). Such a proceeding "must be instituted within sixty days after the service of such order" (*id.*; *see Matter of Lester v New York State Off. of Parks, Recreation & Historic Preserv.*, 60 AD3d 680, 681, *lv denied* 12 NY3d 712; *Matter of Gil v New York State Div. of Human Rights*, 17 AD3d 365, 366). Executive Law § 298 provides the "exclusive means" for reviewing a determination of the Division (*Matter of Baust v New York State Div. of Human Rights*, 70 AD3d 1107, 1108, *lv denied* 15 NY3d 710).

Here, the Division filed an administrative complaint against, inter alia, plaintiffs Ken-Vil Associates Limited Partnership (Ken-Vil), Affinity Renewal Development LLC (Affinity), and Villa Maria College of Buffalo (Villa Maria), alleging that they were in violation of Executive Law §§ 296 (2-a) and 296 (5) "by developing and renting housing accommodations designed to and with the effect of denying housing to individuals based on, inter alia, their familial status, race, and/or age, and which unlawfully perpetuates segregation and separation in the State of New York." Ken-Vil, Affinity, Villa Maria and the Division executed a stipulated agreement pursuant to which the Division agreed to withdraw the complaint without prejudice in order to facilitate settlement discussions. Thereafter, plaintiffs and the Division entered into the Agreement at issue herein, the terms of which were incorporated into an order of the Division (Order). Pursuant to the terms of the Agreement, the Division agreed to terminate its investigation of plaintiffs and to amend the stipulated agreement to provide that the complaint was dismissed "with prejudice". We thus agree with the Division that the Order "final[ly] dispos[ed] of [the] complaint" (§ 298), and that the statute's 60-day limitations period therefore began to run on the date the Order was served.

We further agree with the Division that plaintiffs are precluded from challenging the Order, the underlying Agreement, and the circumstances surrounding the execution of the Agreement because they failed to commence a proceeding pursuant to Executive Law § 298 within the 60-day limitations period (*see id.*), and because they could have, but did not, raise those issues in such a proceeding (*see Matter of Tessy Plastics Corp. v State Div. of Human Rights*, 47 NY2d 789, 791). Notably, a declaratory judgment action may not be used to extend the relevant limitations period (*see New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194, 201, *rearg denied* 84 NY2d 865). We therefore modify the order by dismissing the first cause of action, which alleges that the Agreement is void because the Division lacked the authority to enter into a settlement agreement without first determining that there was probable cause to believe that plaintiffs engaged in an unlawful discriminating practice, and the third cause of action, which alleges that the Agreement is void because it was entered into under duress.

Contrary to the contention of defendants, however, we conclude that the court properly denied the Division's motion to dismiss the complaint insofar as it challenges the validity of the Agreement based upon events occurring after execution of the Agreement. Initially, we note that defendants' primary jurisdiction and ripeness contentions are not properly before us inasmuch as they are raised for the first time on appeal (*see Avraham v Allied Realty Corp.*, 8 AD3d 1079, 1079). In any event, those contentions are without merit.

The doctrine of primary jurisdiction applies when the determination of an action " 'requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body' . . . The doctrine is intended to coordinate the relationship between courts and administrative agencies so that, among other things, the agency's views on factual and technical issues are made available where the matter before the court is within the agency's specialized field" (*Matter of Donato v Board of Educ. of Plainview, Old Bethpage Cent. School Dist.*, 286 AD2d 388, 388, quoting *United States v Western Pac. R.R. Co.*, 352 US 59, 64). Thus, "in such a case[,] the judicial process is suspended pending referral of such issues to the administrative body for its views" (*Matter of Langston v Iroquois Cent. School Dist.*, 291 AD2d 845, 845 [internal quotation marks omitted]).

Here, plaintiffs allege in their second, fourth, and fifth causes of action that the Agreement is void for failure of conditions precedent, frustration of purpose, and impossibility of performance based upon their failure to obtain anticipated tax-exempt bond financing. There is nothing in the Human Rights Law (Executive Law § 290 *et seq.*) or the Division's Rules of Practice (9 NYCRR 465.1 *et seq.*) that places a determination of whether a settlement agreement is void on those grounds within the special competence of the Division (*cf. Langston*, 291 AD2d at 845). Instead, such a determination requires the application of general contract principles rather than the use of any "specialized knowledge [or] expertise" of the Division (*Donato*, 286 AD2d at 388; *see generally Neumann v Wyandanch Union Free School Dist.*, 84 AD3d 816, 818).

We further conclude that plaintiffs' challenges to the Agreement are ripe for judicial review inasmuch as the Order is final, and there is no administrative proceeding available to raise the issues set forth in the second, fourth, and fifth causes of action (*see generally Matter of Gordon v Rush*, 100 NY2d 236, 242). While plaintiffs theoretically could raise those issues as defenses in a compliance proceeding brought by the Division, the Division has not commenced such a proceeding (*see* Executive Law § 297 [7]; 9 NYCRR 465.18). In light of the fact that an action for a declaratory judgment is "governed by equitable principles" (*Krieger v Krieger*, 25 NY2d 364, 370), we conclude that plaintiffs, by reason of the Division's delay in seeking compliance with the Order, should not be foreclosed from obtaining judicial review of the second, fourth, and fifth causes of

action.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1036

CA 12-00489

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

MARTIN OZOG AND AMANDA OZOG,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

WESTERN NEW YORK MOTOCROSS ASSOCIATION AND
PALMYRA RACING ASSOCIATION, DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA, LLP, SYRACUSE (KENNETH M. ALWEIS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (JULIA M. HILLIKER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wayne County (Daniel G. Barrett, A.J.), entered June 21, 2011 in a personal injury action. The order denied the motion of defendants for summary judgment.

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

Memorandum: Martin Ozog (plaintiff), an experienced motocross driver, commenced this action seeking damages for injuries that he sustained while he was participating in a motocross race organized and sponsored by defendants. According to plaintiff, he was injured when one or more race participants collided with him on the track after he was thrown from his motocross vehicle. Supreme Court properly denied defendants' motion for summary judgment dismissing the complaint. Although defendants met their initial burden on the motion by establishing that plaintiff assumed the risk of his injury, we conclude that plaintiffs raised an issue of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiffs presented evidence that the flag person at the location where plaintiff was injured either was not trained properly or did not act appropriately to warn oncoming racers that plaintiff had fallen from his vehicle and was on the track. Plaintiffs thereby raised an issue of fact whether an allegedly improperly trained or negligent flag person is a risk inherent in the sport of motocross racing (*see Owen v R.J.S. Safety Equip.*, 79 NY2d 967, 969-970; *Rosati v Hunt Racing, Inc.*, 13 AD3d 1129, 1130).

Defendants' further contention that any negligence attributable to them was not a proximate cause of plaintiff's injuries is raised for the first time in defendants' reply papers and thus is not

properly before us (*see Farnham v Meder*, 45 AD3d 1315, 1316; *Whitley v Buffalo Mun. Hous. Auth.*, 34 AD3d 1368, 1369).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1041

CA 11-02437

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

PEAK DEVELOPMENT, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CONSTRUCTION EXCHANGE AND CIEA,
DEFENDANTS-RESPONDENTS.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (WILLIAM H. BAAKI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered July 5, 2011. The order, among other things, granted defendants' motion for summary judgment.

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 arising from defendants' alleged breach of a commercial lease agreement. Specifically, plaintiff alleged that defendants failed to pay as "additional rent" its pro rata share of common area maintenance (CAM) charges consisting of snow removal, common area janitorial services, and lavatory maintenance. We agree with plaintiff that Supreme Court erred in granting defendants' motion for summary judgment dismissing the complaint.

We note at the outset that, when plaintiff purchased the property in June 2003, it took the property subject to the month-to-month tenancy with defendants governed by the lease and lease extension. After the expiration of the lease extension in October 1997, defendants became holdover tenants of plaintiff's predecessor subject to a month-to-month tenancy with the same terms and conditions set forth in the lease and lease extension (*see* Real Property Law § 232-c; *City of New York v Pennsylvania R.R. Co.*, 37 NY2d 298, 300-301; *U.S. Underwriters Ins. Co. v Greenwald*, 82 AD3d 411, 412; *Logan v Johnson*, 34 AD3d 758, 759). Plaintiff and defendants continued that month-to-month tenancy until April 1, 2006, when the terms of the letter lease became effective. We note in addition the well-established principle that "a successor-in-interest to real property takes the premises subject to the conditions as to the tenancy, including any waiver of rights, that [its] predecessor in title has established if the

successor-in-interest has notice of the existence of the leasehold and of the waiver" (*Tehan v Thos. C. Peters Print. Co.*, 71 AD2d 101, 104; *see Bank of N.Y., Albany v Hirschfeld*, 37 NY2d 501, 505-506; *52 Riverside Realty Co. v Ebenhart*, 119 AD2d 452, 453). It is undisputed that plaintiff had notice of the leasehold with defendants and, in any event, possession of the premises constitutes constructive notice to a purchaser of the rights of the possessor (*see Tehan*, 71 AD2d at 104).

With respect to defendants' motion, we conclude that defendants failed to meet their burden with respect to the breach of contract cause of action inasmuch as they failed to establish that they did not breach the terms of the lease and lease extension. It is well established that, in interpreting a written contract, we should " 'give effect to the intent of the parties as revealed by the language and structure of the contract, and should ascertain such intent by examining the document as a whole . . . Moreover, the contract must be interpreted so as to give effect to, not nullify, its general or primary purpose' " (*Niagara Frontier Transp. Auth. v Euro-United Corp.*, 303 AD2d 920, 921, *amended on rearg* 306 AD2d 952; *see generally Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548). Here, the express terms of the lease provided that monthly rent includes a base rent amount as well as additional rent consisting of defendants' share of taxes and insurance, and the CAM charges. The CAM charges were to be "pro-rated on a monthly basis according to the amount of space occupied by [defendants] to the total building space." In support of their motion, defendants submitted, inter alia, the lease, the lease extension, and an affidavit from defendant CIEA's executive vice president, who averred that defendants paid no CAM charges to plaintiff's predecessor between September 1987 and October 1997. To the extent that defendants contend that plaintiff waived the right to collect such charges because plaintiff's predecessor did not collect CAM charges under the lease and lease extension (*see Radcliffe Assoc., Inc. v Greenstein*, 274 App Div 277, 278), we note that the lease contains a "no waiver" clause. Although the existence of such a clause does not, by itself, preclude waiver of a contractual right, the issue whether waiver has occurred is generally one of fact (*see Dice v Inwood Hills Condominium*, 237 AD2d 403, 404) and, here, defendants failed to establish as a matter of law that plaintiff's predecessor waived his entitlement to CAM charges.

We further conclude that defendants failed to meet their burden of establishing their entitlement to summary judgment dismissing the unjust enrichment cause of action inasmuch as they failed to establish that they had not "received money or a benefit at the expense of" plaintiff (*City of Syracuse v R.A.C. Holding*, 258 AD2d 905, 906). Defendants' contention that the unjust enrichment cause of action is time-barred is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1044.1

CA 11-02000

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

MICHAEL JAMES OLSEN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LOUIS F. KOZLOWSKI, DEFENDANT,
AND SHIRLEY F. KOZLOWSKI, DEFENDANT-APPELLANT.

FELT EVANS, LLP, CLINTON (KENNETH L. BOBROW 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, Oneida County (Samuel D. Hester, J.), entered April 25, 2011 in a personal injury action. The order, insofar as appealed from, denied that part of the cross motion of defendants seeking summary judgment dismissing the complaint against defendant Shirley F. Kozlowski and granted the motion of plaintiff for partial summary judgment on liability pursuant to Labor Law § 240 (1) against Shirley F. Kozlowski.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell from the second floor of a residence that was being constructed by his employer, L & A Builders, Inc. (L & A). Plaintiff moved for partial summary judgment on liability under Labor Law § 240 (1), and defendants, the owners of the property where the accident occurred, cross-moved for summary judgment dismissing the complaint. Supreme Court granted that part of the cross motion for summary judgment dismissing the complaint against defendant Louis F. Kozlowski, which was unopposed. The court also denied that part of defendants' cross motion and granted that part of plaintiff's motion with respect to Shirley F. Kozlowski (defendant). We conclude that the court properly denied that part of the cross motion with respect to defendant but erred in granting that part of plaintiff's motion against her. "[A] worker, such as the plaintiff, who is injured during the course of his employment cannot maintain an action to recover damages for personal injuries against the owner of premises where the accident occurred when the owner is also an officer of the corporation that employed the worker" (*Lovario v Vuotto*, 266 AD2d 191, 192; *see Kent v Younis*, 265

AD2d 889, 890). Although plaintiff met his initial burden on his motion with respect to defendant (*see Russell v Baker Rd. Dev.*, 278 AD2d 790, 790, *lv dismissed* 96 NY2d 824; *Skinner v Oneida-Herkimer Solid Waste Mgt. Auth.*, 275 AD2d 890, 890-891), defendant submitted evidence raising a triable issue of fact whether she was an officer of L & A at the time of the accident, and thus whether the action against her is barred by the exclusivity provisions of Workers' Compensation Law § 29 (6) (*cf. Melson v Sebastiano*, 32 AD3d 1259, 1260-1261; *see generally Mesa v Violante*, 204 AD2d 610, 610, *lv denied* 85 NY2d 803). We therefore modify the order accordingly.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1044.2

KA 12-00690

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

ANDREW R. WHITE, DEFENDANT-RESPONDENT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR APPELLANT.

JAMES NOBLES, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas E. Moran, J.), dated March 19, 2012. The order, on the motion of defendant, dismissed count three of the indictment and reduced counts one and five of the indictment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of defendant's motion seeking to dismiss the first count of the indictment and reinstating that count, and as modified the order is affirmed and the matter is remitted to Supreme Court, Monroe County, for further proceedings on the indictment.

Memorandum: The People appeal from an order that granted in part defendant's motion to dismiss the indictment based on the alleged legal insufficiency of the evidence before the grand jury by, inter alia, reducing the first and fifth counts of the indictment. We agree with the People that Supreme Court erred in reducing the first count from sexual abuse in the first degree (Penal Law § 130.65 [1]) to sexual abuse in the third degree (§ 130.55), and we therefore modify the order accordingly. 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).

Contrary to the court's determination, the evidence before the grand jury, viewed most favorably to the People, establishes that

defendant subjected the victim identified in the first count of the indictment to sexual contact by forcible compulsion. " 'Forcible compulsion' means to compel by . . . use of physical force" (Penal Law § 130.00 [8] [a]). The victim testified that she was unable to get away from defendant because he was straddling her mid-section while she was lying on the floor. We conclude that her testimony is legally sufficient to establish that defendant used force to subject the victim to sexual contact (*see People v Ferrer*, 209 AD2d 714, 715; *see also People v Val*, 38 AD3d 928, 929, *lv denied* 9 NY3d 852).

We agree with the court, however, that the evidence before the grand jury is not legally sufficient to establish a prima facie case with respect to the fifth count of the indictment, strangulation in the second degree (Penal Law § 121.12), and the court therefore properly reduced that count to criminal obstruction of breathing or blood circulation (§ 121.11). A person commits criminal obstruction of breathing or blood circulation when he or she, "with intent to impede the normal breathing or circulation of the blood of another person[,] . . . applies pressure on the throat or neck of such person; or . . . blocks the nose or mouth of such person" (§ 121.11). A person commits strangulation in the second degree when he or she commits the crime of criminal obstruction of breathing or blood circulation as defined in section 121.11, "and thereby causes stupor, loss of consciousness for any period of time, or any other physical injury or impairment" (§ 121.12). Initially, as the court properly held, there was no evidence that defendant caused stupor or loss of consciousness, and thus to support the count of strangulation in the second degree the evidence must establish a "physical injury or impairment" (§ 121.12). The victim who was the subject of the fifth count of the indictment testified that defendant squeezed his throat for about three seconds, and that it was painful. He further testified that, during the remainder of that night as well as during the next day, his throat was "tingly," but there was no testimony that he needed medical assistance. Upon considering the various factors set forth in *People v Chiddick* (8 NY3d 445, 447-448) concerning the evidence required to establish that the victim experienced substantial pain and thus sustained a physical injury, we conclude that the evidence, viewed in the light most favorable to the People, did not establish that the victim sustained a physical injury within the meaning of section 10.00 (9) (*cf. People v Cannon*, 300 AD2d 407, 407, *lv denied* 99 NY2d 613).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1050

KA 12-00345

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHESTER W. WARREN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered May 27, 2011. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (two counts) and endangering the welfare of a child (three counts).

It is hereby ORDERED that the judgment so appealed from is reversed on the law, the recusal motion is granted and a new trial before a different judge is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of sexual abuse in the first degree (Penal Law § 130.65 [3]) and three counts of endangering the welfare of a child (§ 260.10 [1]), resulting from four separate incidents. Before trial, defendant moved for recusal on the ground that County Court (Hafner, J.) had a personal bias or prejudice against defendant and his girlfriend as a result of a confrontation between the Judge and the girlfriend, as well as a complaint filed by the prosecutor against the Judge that referenced the confrontation.

"Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal . . . [and a] court's decision in this respect may not be overturned unless it was an abuse of discretion" (*People v Moreno*, 70 NY2d 403, 405-406; *see People v Williams*, 66 AD3d 1440, 1441-1442, *lv denied* 13 NY3d 911). "Yet, . . . it may be the better practice in some situations for a court to disqualify itself in a special effort to maintain the appearance of impartiality" (*Moreno*, 70 NY2d at 406).

This is one of those situations. In support of his motion for recusal, defendant submitted an affidavit from defendant's girlfriend in which she alleged as follows: "During July 2008, I was wearing a support Robert Genant for County Court Judge t-shirt at the Oswego

County Fair. Mr. Genant was running against [Judge Hafner] in his bid for reelection to the bench . . . Judge Hafner, without my permission, took numerous photographs of me wearing the Genant t-shirt over the course of approximately an hour as I moved around the fairgrounds . . . While I was at a picnic table at the fair, Judge Hafner approached me, yelled at me, and told me that I was going to go to jail for wearing the t-shirt. He apparently believed that I was using my position as a Director of the fair to improperly support the Genant candidacy. I became so frightened that I immediately removed the shirt . . . Subsequently, Judge Hafner visited the home I share with [defendant] presumably to apologize for the incident. I refused to speak to him, and instead sent [defendant] outside to tell Judge Hafner that I was not willing to listen to what he might have to say . . . In the summer of 2009, I was contacted by Gregory Oakes, Esq. [the prosecutor who ultimately tried defendant's case] regarding the incident with Judge Hafner. Attorney Oakes asked if I would be willing to provide information in support of a grievance that was being prepared against Judge Hafner. I answered in the affirmative . . . Upon information and belief, my recollection of the details of the incident that occurred between me and Judge Hafner during 2008 was included in a grievance filed against Judge Hafner."

Although the grievance was ultimately denied, defendant contended in support of his motion for recusal that his ability to present a defense would be hindered because Judge Hafner's status as the presiding judge might affect defendant's decision whether to call his girlfriend as a witness. The prosecutor confirmed the accuracy of the facts set forth in the affidavit of defendant's girlfriend. Critically, however, the prosecutor added that defendant's girlfriend and defendant were "specifically referenced . . . by name" in the grievance and that the court had been provided with a copy of that grievance. The prosecutor did not oppose the recusal motion.

At argument of the recusal motion, defense counsel contended that defendant was considering a bench trial, and that defendant's constitutional right to present a defense at a bench trial would be impaired because he might not call his girlfriend as a witness if Judge Hafner continued to preside over the case. In continuing to preside over the case, Judge Hafner left himself in the position to impose sentence on defendant, shortly after defendant was referenced in a grievance filed against Judge Hafner. We note that the grievance was provided to Judge Hafner before he determined the recusal motion. Under these circumstances, we conclude the court should have granted the recusal motion, and we thus reverse the judgment, grant the recusal motion and grant a new trial before a different judge.

We now turn to defendant's remaining contentions. Although defendant contends that reversal is warranted based on the alleged misconduct of the prosecutor in referring to religion, he failed to object to any of those references and thus failed to preserve his contention for our review (*see People v Rawleigh*, 89 AD3d 1483, 1484, *lv denied* 18 NY3d 961; *People v Weinberg*, 75 AD3d 612, 613-614, *lv denied* 15 NY3d 896). In any event, defendant's contention lacks merit because defense counsel opened the door to those references by

initially questioning defendant's girlfriend on religious issues and the prosecutor did not thereby denigrate anyone's religion, nor were his questions prejudicial or inflammatory (*see People v Caicedo*, 173 AD2d 630, 631, *lv denied* 78 NY2d 963; *cf. People v Forchalle*, 88 AD2d 645, 646). Defendant's remaining contentions related to prosecutorial misconduct are not preserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that discrepancies in the date on which one incident occurred warrant reversal. Where, as here, there is a distinct variance between a date in the indictment and the proof at trial, reversal is not required when the defense "consist[s] of a categorical denial that the incident[] even occurred" (*People v Stevens*, 176 AD2d 997, 998; *see also People v Morgan*, 246 AD2d 686, 687, *lv denied* 91 NY2d 975). "Moreover, the discrepancies did not hamper the ability of defendant to present a defense and are excusable" (*People v Holman*, 249 AD2d 947, 947, *lv denied* 92 NY2d 899). We note in addition that the court's charge clarified the date on which the incident in question occurred, and thus "there was no danger that the jury convicted defendant of an unindicted act or that different jurors convicted defendant based on different acts" (*People v Whitfield*, 255 AD2d 924, 924, *lv denied* 93 NY2d 981; *see People v Caballero*, 23 AD3d 1031, 1032, *lv denied* 6 NY3d 846).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "The credibility of the witnesses was an issue for the jury to determine, and we perceive no basis for disturbing that determination" (*People v Newman*, 87 AD3d 1348, 1350, *lv denied* 18 NY3d 926; *see People v Burgos*, 90 AD3d 1670, 1671, *lv denied* 19 NY3d 862; *People v Kalen*, 68 AD3d 1666, 1667, *lv denied* 14 NY3d 842). We further conclude that defendant received meaningful representation (*see generally People v Schulz*, 4 NY3d 521, 530-531; *People v Baldi*, 54 NY2d 137, 147).

We reject defendant's contention that the court erred at sentencing when it permitted the victim of the sexual abuse counts to make a statement via electronic recording. Where, as here, a defendant has been convicted of a felony, the court upon proper notice "shall accord the victim the right to make a statement" (CPL 380.50 [2] [b]). CPL 380.50 does not specifically permit or prohibit the presentation of an electronically recorded statement; it merely requires that the victim's statement precede statements from defendant or defense counsel made pursuant to CPL 380.50 (1) (*see* CPL 380.50 [2] [c]). CPL 380.50 (2) was enacted to "elevate[] what had previously been a privilege . . . 'to a right' " (*People v Hemmings*, 2 NY3d 1, 6, *rearg denied* 2 NY3d 824). Inasmuch as a defendant has no right of confrontation or cross-examination at sentencing (*see People v Leon*, 10 NY3d 122, 125-126, *cert denied* 554 US 926; *People v Gilbert*, 17 AD3d 1164, 1164-1165, *lv denied* 5 NY3d 762), no right of a defendant

is violated when a victim's statement is submitted in the form of an electronic recording. "Aside from parameters of punishment defined by the statute which defines the offense, the only real limit to the court's discretion in imposing sentence is the defendant's right to be sentenced on reliable and accurate information (*United States v Atkins*, 480 F2d 1223). This right, in turn, is protected by the procedural right to a reasonable opportunity to 'refute the aggravating factors which might have negatively influenced the court' " (*People v Bolson*, 185 Misc 2d 753, 755-756, *affd* 284 AD2d 340, *lv denied* 96 NY2d 898, quoting *People v Redman*, 148 AD2d 966, 966, *lv denied* 74 NY2d 745; *see People v May*, 263 AD2d 215, 220-221, *lv denied* 94 NY2d 950).

In view of our determination to grant a new trial, we need not address defendant's remaining contention concerning the severity of the sentence.

All concur except SCUDDER, P.J., and SMITH, J., who dissent and vote to affirm in the following Memorandum: We respectfully dissent. While we agree with the majority that recusal may have been the better practice inasmuch as the allegations of "personal bias or prejudice" created a reasonable basis upon which to question the Trial Judge's impartiality (22 NYCRR 100.3 [E] [1] [a] [i]; *see People v Moreno*, 70 NY2d 403, 405-406), we cannot agree that reversal is required. Where, as here, there is no statutory basis to prevent a Trial Judge from hearing the case (*see* Judiciary Law § 14), the decision on a recusal motion is a matter addressed to the discretion and personal conscience of the Trial Judge (*see Moreno*, 70 NY2d at 405-406). A Trial Judge's "decision in this respect may not be overturned unless it was an abuse of discretion" (*id*. at 406; *see People v Strohman*, 66 AD3d 1334, 1336, *lv dismissed* 13 NY3d 911; *People v Williams*, 57 AD3d 1440, 1441, *lv denied* 12 NY3d 789). We perceive no such abuse of discretion in this case.

Several years before defendant was arrested and this case was tried, the Trial Judge allegedly had a verbal altercation with defendant's girlfriend. The prosecutor who tried this case filed a grievance against the Trial Judge based in part on that alleged altercation. As the majority notes, the grievance was ultimately denied. In *Strohman* (66 AD3d at 1335-1336), we held that it was not an abuse of discretion for a Trial Judge to deny a defendant's recusal motion even though it was the defendant himself who had filed a complaint against the Trial Judge with the Judicial Conduct Commission. Here, the grievance was filed by the prosecutor, and it was based on an alleged altercation between the Trial Judge and defendant's girlfriend that had occurred years earlier.

Contrary to defendant's contention, there is no evidence that " '[t]he alleged bias and prejudice . . . result[ed] in an opinion on the merits on some basis other than what the [Trial J]udge learned from his participation in the case' " (*Moreno*, 70 NY2d at 407, quoting *United States v Grinnell Corp*., 384 US 563, 583), or that "any alleged bias or prejudice on the part of the [Trial] Judge unjustly affected

the result of the case" (*People v Nenni*, 269 AD2d 785, 786, *lv denied* 95 NY2d 801; *see Moreno*, 70 NY2d at 407). Defendant does not, and indeed cannot, point to any evidentiary ruling or sentencing decision that resulted from the alleged bias or prejudice. Rather, the only basis for defendant's contention that the alleged bias and prejudice potentially affected the result is the statement of defense counsel that defendant was "considering" a bench trial and questioned whether the Trial Judge could remain unbiased. That statement, however, establishes only that *defendant* questioned whether the Trial Judge could be impartial if he were to sit as the fact-finder. It does not establish that the Trial Judge, i.e., "the sole arbiter of recusal," questioned his own ability to be impartial (*Moreno*, 70 NY2d at 405).

Because we agree with the majority that there is no other basis for reversal, we would affirm.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1054

CAF 11-01627

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

IN THE MATTER OF JAKOB D.K.B.-K. AND
NIKOLY M.B.-K.

CAYUGA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER-RESPONDENT; ORDER

SHERRY M.B., RESPONDENT-APPELLANT.

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

FREDERICK R. WESTPHAL, COUNTY ATTORNEY, AUBURN (CHRISTOPHER M. PALERMO OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, ATTORNEY FOR THE CHILDREN, MANLIUS, FOR JAKOB D.K.B.-K. AND NIKOLY M.B.-K.

Appeal from an order of the Family Court, Cayuga County (Thomas G. Leone, J.), entered July 11, 2011 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.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1058

CAF 11-01091

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

IN THE MATTER OF KENDALL L. DANNER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHAD NEPAGE, RESPONDENT-RESPONDENT.

THEODORE W. STENUF, ESQ., ATTORNEY
FOR THE CHILD, APPELLANT.
(APPEAL NO. 1.)

LINDA M. CAMPBELL, SYRACUSE (H. DANA VAN HEE OF COUNSEL), FOR PETITIONER-APPELLANT.

THEODORE W. STENUF, ATTORNEY FOR THE CHILD, MINOA, APPELLANT PRO SE.

SHIRLEY A. GORMAN, BROCKPORT, FOR RESPONDENT-RESPONDENT.

Appeals from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered March 24, 2011 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Same Memorandum as in *Danner v NePage* ([appeal No. 3] ___ AD3d ___ [Nov. 9, 2012]).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1059

CAF 11-01092

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

IN THE MATTER OF KENDALL L. DANNER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHAD NEPAGE, RESPONDENT-RESPONDENT.

THEODORE W. STENUF, ESQ., ATTORNEY
FOR THE CHILD, APPELLANT.
(APPEAL NO. 2.)

LINDA M. CAMPBELL, SYRACUSE (H. DANA VAN HEE OF COUNSEL), FOR PETITIONER-APPELLANT.

THEODORE W. STENUF, ATTORNEY FOR THE CHILD, MINOA, APPELLANT PRO SE.

SHIRLEY A. GORMAN, BROCKPORT, FOR RESPONDENT-RESPONDENT.

Appeals from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered March 24, 2011 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Same Memorandum as in *Danner v NePage* ([appeal No. 3] ___ AD3d ___ [Nov. 9, 2012]).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1060

CAF 11-01093

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

IN THE MATTER OF KENDALL L. DANNER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHAD NEPAGE, RESPONDENT-RESPONDENT.

THEODORE W. STENUF, ESQ., ATTORNEY
FOR THE CHILD, APPELLANT.
(APPEAL NO. 3.)

LINDA M. CAMPBELL, SYRACUSE (H. DANA VAN HEE OF COUNSEL), FOR PETITIONER-APPELLANT.

THEODORE W. STENUF, ATTORNEY FOR THE CHILD, MINOA, APPELLANT PRO SE.

SHIRLEY A. GORMAN, BROCKPORT, FOR RESPONDENT-RESPONDENT.

Appeals from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered March 24, 2011 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: In these appeals, petitioner mother and the Attorney for the Child appeal from an order dismissing each petition that she filed against respondent father, her ex-husband, with respect to the custody of the parties' daughter. We note at the outset that, although the mother and the Attorney for the Child each filed notices of appeal with respect to the dismissal of all three petitions, in their briefs on appeal they raise issues only concerning the order in appeal No. 3. They therefore are deemed to have abandoned any issues concerning the orders in appeal Nos. 1 and 2 (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

By the petition in appeal No. 3, the mother sought to modify a prior custody order pursuant to which she had primary physical custody and the father had visitation, based upon allegations that the father had sexually abused the child. The mother requested an award of sole custody to her, with supervised visitation to the father. Following a fact-finding hearing on all three petitions, Family Court, as relevant to appeal No. 3, determined that the mother failed to establish a

change of circumstances sufficient to warrant an inquiry into whether it is in the best interests of the child to modify the existing custody order, and dismissed the petition.

The mother and the Attorney for the Child contend that the mother proved at the hearing that the father had sexually abused the child, and that the court therefore erred in determining that she failed to establish the requisite change of circumstances. We reject that contention. Although several witnesses testified that the then four-year-old child reported to them that the father had touched her private parts, to which she referred as her "poo" and "pee," the police investigated the incident and determined that criminal charges were not warranted due to a "lack of credible evidence." A police investigator testified that, when he interviewed the child outside the presence of the mother, the child said that the touching of her "privates" occurred when the father wiped her after she used the toilet. The investigator then spoke to the mother, who acknowledged that the child needed help wiping herself. Similarly, the mother's 14-year-old daughter testified at the hearing that the child needed help wiping herself and that both she and the mother assisted the child in this regard. There was also evidence at the hearing that the allegations of sexual abuse against the father had been investigated by the Department of Social Services and were determined to be unfounded.

"Generally, a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Stilson v Stilson*, 93 AD3d 1222, 1223 [internal quotation marks omitted]). Here, based on the evidence presented at the hearing, as well as the child's statements at the *Lincoln* hearing (*see Matter of Lincoln v Lincoln*, 24 NY2d 270, 272-274), we perceive no basis to disturb the court's implicit finding that the mother failed to prove that the father sexually abused the child. Aside from the unproven allegations of sexual abuse, there was no basis to award sole custody to the mother or to limit the father to supervised visitation. We thus conclude that the court properly dismissed the petition seeking a change in custody "inasmuch as [the mother] failed to establish a change in circumstances which reflects a real need for change to ensure the best interest[s] of the child" (*Matter of James D. v Tammy W.*, 45 AD3d 1358, 1358 [internal quotation marks omitted]).

We reject the further contentions of the mother and the Attorney for the Child that the court should have drawn an adverse inference against the father based on his failure to deny the allegations of sexual abuse at the hearing. "A trier of fact *may* draw the strongest inference that the opposing evidence permits against a witness who fails to testify in a civil proceeding" (*Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [emphasis added]). Here, although the father testified at the hearing, he was not questioned by anyone concerning the allegations of sexual abuse. Under the circumstances, the court did not abuse its discretion in failing to

draw an adverse inference against the father.

Based on our review of the record, we reject the further contention of the mother that the child was deprived of effective assistance of counsel (*see generally Matter of Sharyn PP. v Richard QQ.*, 83 AD3d 1140, 1143).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1068

CA 12-00528

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

ROSALYN JOBSON AND W. CHARLES JOBSON,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MICHAEL PROGNO, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

HARRIS BEACH PLLC, PITTSFORD (TERESA BAIR OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MICHAEL PROGNO, DEFENDANT-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered May 11, 2011. The order granted the motion of defendant Michael Progno to dismiss the amended complaint.

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

Memorandum: Plaintiffs appeal from an order granting the motion of Michael Progno (defendant) to dismiss the amended complaint. Initially, we note that plaintiffs address only claims made by Rosalyn Jobson (plaintiff), and thus they are deemed to have abandoned any contention that Supreme Court erred in granting defendant's motion with respect to claims made by plaintiff W. Charles Jobson (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984). With respect to plaintiff's claims, it is well settled that an individual shareholder may not maintain an action for a wrong done to the corporation (*see Citibank v Plapinger*, 66 NY2d 90, 93 n, *rearg denied* 67 NY2d 647), unless the shareholder alleges that the tortfeasor has breached a duty owed to the shareholder independent of any duty owed to the corporation (*see e.g. Behrens v Metropolitan Opera Assn., Inc.*, 18 AD3d 47, 51). It is equally well settled that "allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually . . . A complaint the allegations of which confuse a shareholder's derivative and individual rights will, therefore, be dismissed" (*Abrams v Donati*, 66 NY2d 951, 953, *rearg denied* 67 NY2d 758). Consequently, we conclude that the court properly granted defendant's motion with respect to plaintiff because "none of the [claims asserted by her] arise from an independent duty owed to [her] individually, unrelated to [her] status as a shareholder" (*Albany–Plattsburgh United*

Corp. v Bell, 307 AD2d 416, 420, *lv dismissed in part and denied in part* 1 NY3d 620; *cf. Craven v Rigas*, 85 AD3d 1524, 1527, *lv dismissed* 17 NY3d 932).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1070

TP 12-00637

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

IN THE MATTER OF TROY BRITT, PETITIONER,

V MEMORANDUM AND ORDER

HEARING OFFICER WILLIAM EVANS, RESPONDENT.

TROY BRITT, 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, Livingston County [Dennis S. Cohen, A.J.], dated January 23, 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 modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 113.11 (7 NYCRR 270.2 [B] [14] [ii]) and vacating the recommended loss of good time and as modified the determination is confirmed without costs, respondent is directed to expunge from petitioner's institutional record all references to the violation of that rule, and the matter is remitted to respondent for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a Tier III hearing, that petitioner had violated various inmate rules, including inmate rules 108.13 (7 NYCRR 270.2 [B] [9] [iv] [possession of escape paraphernalia]), 113.10 (7 NYCRR 270.2 [B] [14] [i] [possession of weapon]), and 113.11 (7 NYCRR 270.2 [B] [14] [ii] [possession of altered item]). As respondent correctly concedes, the determination with respect to inmate rule 113.11 (7 NYCRR 270.2 [B] [14] [ii]) is not supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139). We conclude, however, that there is substantial evidence to support the determination with respect to the remaining inmate rules. The misbehavior report, together with the hearing testimony of the correction officers, constituted substantial evidence that, inter alia, petitioner was in possession of escape items and a weapon (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966; *Smith*, 66 NY2d at 139). Petitioner's testimony denying his guilt of all violations merely presented issues of credibility that the Hearing Officer was entitled to resolve

against him (*see Foster*, 76 NY2d at 966).

Petitioner's remaining contentions were not raised at the Tier III hearing and therefore are not preserved for our review (*see Matter of Reeves v Goord*, 248 AD2d 994, 995, *lv denied* 92 NY2d 804). Moreover, petitioner failed to raise the following contentions in his administrative appeal: he was denied the right to observe the search of his cell; the time of the incident listed on the misbehavior report was too vague; the Hearing Officer had no right to call or cross-examine the correction officers who testified; the Hearing Officer was biased; the misbehavior report and charges were too poorly drafted for petitioner to understand the charges; the Hearing Officer erred in allowing a certain correction officer to remain in the hearing room; petitioner did not receive adequate employee assistance; the Hearing Officer suppressed evidence in order to find petitioner guilty; petitioner never received a written statement of the disposition and the evidence relied upon; and he was improperly precluded from the remainder of the Tier III hearing. Petitioner thus failed to exhaust his administrative remedies with respect to those contentions, "and this Court has no discretionary authority to reach [them]" (*Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071, *appeal dismissed* 81 NY2d 834).

We therefore modify the determination and grant the petition in part by annulling that part of the determination finding that petitioner violated inmate rule 113.11 (7 NYCRR 270.2 [B] [14] [ii]), and we direct respondent to expunge from petitioner's institutional record all references to the violation of that inmate rule. Although we need not 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 violation and that recommendation. 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 Matter of Monroe v Fischer*, 87 AD3d 1300, 1301).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1071

TP 11-01906

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

IN THE MATTER OF RONNIE COVINGTON, PETITIONER,

V ORDER

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

RONNIE COVINGTON, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET 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 September 19, 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: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1072

KA 10-01127

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

GERRI L. BUNNELL, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), entered May 4, 2010. The order determined defendant to be responsible for restitution in the amount of $8,358.99.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the amount of restitution ordered and as modified the order is affirmed, and the matter is remitted to Genesee County Court for a new restitution hearing (*see People v Weber*, 93 AD3d 1217; *People v Joseph*, 90 AD3d 1646, 1647).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1074

TP 11-01700

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

IN THE MATTER OF VICTOR MEDINA, PETITIONER,

V ORDER

WILLIAM F. HULIHAN, SUPERINTENDENT, MID-STATE CORRECTIONAL FACILITY, RESPONDENT.

VICTOR MEDINA, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [David A. Murad, J.], entered July 11, 2011) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1076

KA 10-01834

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MURAD BEYAH, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Onondaga County Court (Anthony F. Aloi, J.), entered June 30, 2010. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1077

KA 11-01007

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD M. MAY, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO (JEREMY D. SCHWARTZ 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 (M. William Boller, A.J.), rendered May 13, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, criminal possession of a controlled substance in the third degree (three counts), criminal possession of a controlled substance in the fourth degree, criminally using drug paraphernalia in the second degree (two counts) and criminal possession of a weapon in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a weapon in the second degree (Penal Law §§ 265.03 [3]), defendant contends that Supreme Court erred in denying his motion to suppress certain physical evidence because he was subjected to an unlawful seizure. We reject that contention. Even assuming, arguendo, that defendant was unlawfully detained when the police positioned their vehicle perpendicular to defendant's vehicle in a parking lot, we conclude that defendant's subsequent conduct severed any causal connection between the unlawful detention and the subsequently-acquired evidence (*see People v Rogers*, 52 NY2d 527, 533-534, *rearg denied* 54 NY2d 753, *cert denied* 454 US 898, *reh denied* 459 US 898; *see also People v Evans*, 289 AD2d 994, 994, *lv denied* 97 NY2d 728).

After the police officer approached his vehicle, defendant drove backward over a concrete parking barrier and into the roadway, evaded a police vehicle stopped across the roadway by maneuvering his vehicle over the curb of the roadway and onto several lawns, and sped away at approximately twice the posted speed limit. At the very least, defendant's conduct constituted a violation of the misdemeanor of

reckless driving (Vehicle and Traffic Law § 1212), or reckless endangerment in the second degree (Penal Law § 120.20). It is well established that "[a] person who is stopped or detained illegally is not immunized from prosecution for crimes committed during his [or her] detention period" (*United States v Garcia-Jordan*, 860 F2d 159, 160; *see Rogers*, 52 NY2d at 531-532). Here, inasmuch as defendant's response to the police approach was "unjustified and criminal in nature . . . and unrelated to the initial [allegedly] unlawful action on the part of the police," suppression of the subsequently-acquired evidence was not required (*People v Townes*, 41 NY2d 97, 102; *People v Ellis*, 4 AD3d 877, 878, *lv denied* 3 NY3d 639, *reconsideration denied* 3 NY3d 673; *cf. People v Felton*, 78 NY2d 1063, 1065).

Contrary to the further contention of defendant, we conclude that the court did not err in determining, based upon the totality of the circumstances, that he voluntarily consented to the search of his residence (*see Schneckloth v Bustamonte*, 412 US 218, 226; *People v Gonzalez*, 39 NY2d 122, 128; *People v Hyla*, 291 AD2d 928, 929, *lv denied* 98 NY2d 652). The fact that defendant was in custody when he signed the consent to search form does not require suppression of the evidence seized from his apartment (*see People v McCray*, 96 AD3d 1480, 1481). Defendant contends that, based upon the time recorded on the consent to search form, the form was signed before the administration of *Miranda* warnings, and thus the record establishes that the consent to search form was not voluntarily signed. However, " '[t]he voluntariness of a consent to search is not vitiated, per se, by the failure to give *Miranda* warnings to an accused while subject to custodial interrogation' " (*id.*). In any event, the People presented evidence at the suppression hearing establishing that the time recorded on the consent to search form was erroneous and that the police did not request defendant's consent to search his apartment until *Miranda* warnings had been administered. "It is well settled that the suppression court's credibility determinations and choice between conflicting inferences to be drawn from the proof are granted deference and will not be disturbed unless unsupported by the record" (*People v Esquerdo*, 71 AD3d 1424, 1424, *lv denied* 14 NY3d 887 [internal quotation marks omitted]) and, here, we see no basis to disturb the court's determination that defendant did not sign the consent form until he had waived his *Miranda* rights.

We reject the further contention of defendant that the court erred in refusing to suppress his statements on the ground that he was interrogated prior to the administration of *Miranda* warnings. Contrary to defendant's contention, the police officer's general statements concerning cooperation were not " 'reasonably likely to elicit an incriminating response' " and thus did not constitute interrogation (*People v Brown*, 52 AD3d 1175, 1176, *lv denied* 11 NY3d 923, quoting *Rhode Island v Innis*, 446 US 291, 301; *see People v Adams*, 244 AD2d 897, 898-899, *lv denied* 91 NY2d 887).

Finally, we conclude that the court did not abuse its discretion in denying defendant's motion to dismiss the indictment in the interest of justice pursuant to CPL 210.40. "Dismissal of an

indictment in the interest of justice must be exercised sparingly . . ., that is, only in those rare cases where there is a compelling factor which clearly demonstrates that prosecution of the indictment would be an injustice" (*People v Quadrozzi*, 55 AD3d 93, 103, *lv denied* 12 NY3d 761 [internal quotation marks omitted]; *see People v Hudson*, 217 AD2d 53, 55, *lv denied* 87 NY2d 1020), and this is not "one of those rare cases in which failure to dismiss [the indictment] would constitute an injustice" (*People v Hirsch*, 85 AD2d 902, 902).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1080

CAF 12-00124

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

IN THE MATTER OF RAYGEN D.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TIMOTHY H., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC./SOUTHERN TIER LEGAL SERVICES, OLEAN (JESSICA L. ANDERSON OF COUNSEL), FOR RESPONDENT-APPELLANT.

STEPHEN J. RILEY, OLEAN, FOR PETITIONER-RESPONDENT.

WENDY A. TUTTLE, ATTORNEY FOR THE CHILD, ALLEGANY, FOR RAYGEN D.

Appeal from an order of the Family Court, Cattaraugus County (Larry M. Himelein, J.), entered January 4, 2012 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent abused the subject child.

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

Memorandum: In appeal No. 1, respondent appeals from an order of fact-finding and disposition determining that he sexually abused a five-year-old girl for whom he acted as a parent substitute. In appeal No. 2, he appeals from an order of fact-finding and disposition determining that he derivatively neglected his two-year-old daughter. Contrary to respondent's contentions in each appeal, Family Court's findings of sexual abuse are supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]; *Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490, *lv denied* 17 NY3d 708). The out-of-court statements of the child who was allegedly sexually abused "were sufficiently corroborated by the testimony of an evaluating psychologist who opined that the child's statements made both to the psychologist and to a caseworker for child protective services during a videotaped interview were credible" (*Nicholas J.R.*, 83 AD3d at 1490; *see Matter of Annastasia C. [Carol C.]*, 78 AD3d 1579, 1580, *lv denied* 16 NY3d 708). Moreover, the court properly drew "a strong inference against [respondent] for failing to testify" (*Matter of Iyonte G. [Charles J.R.]*, 82 AD3d 765, 767).

Contrary to respondent's further contention, the evidence

established that respondent "demonstrated a total lack of understanding of the parental role so as to place [his daughter] in imminent danger of harm and accordingly support a finding of neglect" (*Matter of Amanda LL. [David NN.]*, 195 AD2d 708, 710; *see Matter of Kennedie M. [Douglas M.]*, 89 AD3d 1544, 1545, *lv denied* 18 NY3d 808; *Matter of Jovon J.*, 51 AD3d 1395, 1396).

Finally, we conclude that respondent has failed to demonstrate any basis for modifying the terms of the disposition.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1081

CAF 12-00125

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

IN THE MATTER OF KYLEE H.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TIMOTHY H., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC./SOUTHERN TIER LEGAL SERVICES, OLEAN (JESSICA L. ANDERSON OF COUNSEL), FOR RESPONDENT-APPELLANT.

STEPHEN J. RILEY, OLEAN, FOR PETITIONER-RESPONDENT.

WENDY A. TUTTLE, ATTORNEY FOR THE CHILD, OLEAN, FOR KYLEE H.

Appeal from an order of the Family Court, Cattaraugus County (Larry M. Himelein, J.), entered January 4, 2012 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

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

Same Memorandum as in *Matter of Raygen D.* (___ AD3d ___ [Nov. 9, 2012]).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1082

CAF 11-02228

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

IN THE MATTER OF BORN I. DIVINE,
PETITIONER-APPELLANT,

V ORDER

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES,
ON BEHALF OF SABRINA M. BUSH,
RESPONDENT-RESPONDENT.

BORN I. DIVINE, PETITIONER-APPELLANT PRO SE.

LAL, GINGOLD & FRANKLIN, PLLC, SYRACUSE (SUJATA LAL OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Bryan R. Hedges, J.), entered September 19, 2011 in a proceeding pursuant to Family Court Act article 4. The order denied the objection of petitioner and affirmed an order of the Support Magistrate.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1083

CA 12-00886

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

BENJAMIN K. BAKER, PLAINTIFF-APPELLANT,

V ORDER

DANA E. BAKER, DEFENDANT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (SHARI JO REICH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ANGE & ANGE, BUFFALO (GRACE MARIE ANGE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered August 8, 2011 in a divorce action. The judgment, insofar as appealed from, directed plaintiff to pay to defendant weekly child support of $252.22.

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: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1089

CA 12-00812

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

CHRISTOPHER GILL AND LINDA GILL,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DONALD J. BRAASCH AND DONALD J. BRAASCH
CONSTRUCTION, INC., DEFENDANTS-APPELLANTS.

BROWN & TARANTINO, LLC, BUFFALO (NICOLE D. SCHREIB OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DIFILIPPO, FLAHERTY & STEINHAUS PLLC, EAST AURORA (ROBERT D. STEINHAUS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Michael F. Griffith, A.J.), entered October 17, 2011 in a personal injury action. The order granted plaintiffs' motion for partial summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Christopher Gill (plaintiff) when a vehicle operated by Donald J. Braasch (defendant) and owned by defendant Donald J. Braasch Construction, Inc. struck plaintiff and pinned him against a tractor-trailer. Contrary to defendants' contention, Supreme Court properly granted those parts of plaintiffs' motion for partial summary judgment on liability and dismissal of the affirmative defense of comparative negligence.

Plaintiffs met their initial burden by establishing as a matter of law that the sole proximate cause of the accident was defendant's negligence in, inter alia, backing his pickup truck into plaintiff without properly looking behind him (*see* Vehicle and Traffic Law §§ 1146 [a]; 1211 [a]; *Pries-Jones v Time Warner Cable, Inc.*, 93 AD3d 1299, 1301). Plaintiff, a delivery driver, testified at his deposition that, after he transferred freight from his tractor-trailer to defendant's pickup truck, he observed defendant get into the pickup truck and pull away from the tractor-trailer. Plaintiff then descended from the back of the trailer compartment of the tractor-trailer and was standing on the ground behind it, latching the door of the trailer compartment, when defendant backed his pickup truck into plaintiff, pinning him against the tractor-trailer. Plaintiff was

facing the back of the tractor-trailer and did not see defendant backing toward him. Defendant similarly testified at his deposition that, when he pulled the pickup truck forward, away from the tractor-trailer, plaintiff was situated in the trailer compartment. Defendant testified that he did not turn his head to look behind him before putting the truck in reverse and backing toward the tractor-trailer. Based on the deposition testimony of plaintiff and defendant, we conclude that plaintiffs established as a matter of law that defendant was negligent in failing to see that which, under the circumstances, he should have seen and in backing his pickup truck toward the tractor-trailer before ascertaining that it was safe to do so (*see generally Waltz v Vink*, 78 AD3d 1621, 1621-1622). Further, contrary to the contention of defendants, plaintiffs established as a matter of law that plaintiff "was free from fault in the occurrence of the accident" (*Hillman v Eick*, 8 AD3d 989, 991), and defendants failed to raise an issue of fact with respect thereto (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiff was not required to anticipate that defendant would back his vehicle toward plaintiff or the tractor-trailer, and "defendants' speculation that plaintiff might have done something to avoid the accident is insufficient to raise an issue of fact concerning plaintiff's comparative fault" (*Whitfield v Toense*, 273 AD2d 877, 878; *see Garcia v Verizon N.Y., Inc.*, 10 AD3d 339, 340; *Irwin v Mucha*, 154 AD2d 895, 896).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1090

CA 12-00150

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

BONN, DIOGUARDI & RAY, LLP, FORMERLY KNOWN AS BONN, SHORTSLEEVE & RAY, LLP, KENNETH BONN, JR., MICHAEL S. RAY AND JOSEPH P. DIOGUARDI, JR., PLAINTIFFS-RESPONDENTS,

V ORDER

THOMASYORK, LLP, THOMASYORK, LLP, DOING BUSINESS AS TYS, LLP, CHRISTOPHER YORK AND GLEN A. THOMAS, DEFENDANTS-APPELLANTS.

UNDERBERG & KESSLER LLP, ROCHESTER (COLIN D. RAMSEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HARRIS CHESWORTH, ROCHESTER (KAREN R. SANDERS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered February 25, 2011. The order denied the motion of defendants to disqualify counsel for plaintiffs.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 25 and 27, 2012,

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1092

TP 11-00775

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

IN THE MATTER OF WILLIAM J. THYGESEN, PETITIONER,

V MEMORANDUM AND ORDER

NORTH BAILEY VOLUNTEER FIRE COMPANY, INC. AND WARREN HOMES, PRESIDENT, NORTH BAILEY VOLUNTEER FIRE COMPANY, INC., RESPONDENTS.

HOGAN WILLIG, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR PETITIONER.

UNDERBERG & KESSLER LLP, ROCHESTER (ELIZABETH A. CORDELLO OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Donna M. Siwek, J.], entered January 10, 2011) to review a determination of respondents. The determination terminated petitioner from respondent North Bailey Volunteer Fire Company, Inc.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding challenging respondents' determination, following a hearing, to expel him from membership in respondent North Bailey Volunteer Fire Company, Inc. (Fire Company). Contrary to petitioner's contention, respondents did not violate CPL 160.50 either when they admitted in evidence media reports related to petitioner's two arrests or when they presented the testimony of a police investigator who was involved in the criminal investigations. It is undisputed that petitioners' charges were deemed dismissed following adjournments in contemplation of dismissal (*see* CPL 170.55) and, therefore, the records of those criminal prosecutions were sealed (*see* CPL 160.50 [1]). We note, however, that the media reports concerning petitioner's arrests do not constitute "official records and papers . . . relating to [petitioner's] arrest or prosecution" under CPL 160.50 (1) (c) and, because it is " 'permissible to consider the independent evidence of the conduct leading to the criminal charges' " (*Matter of New York State Dept. of Mental Hygiene v State Div. of Human Rights*, 103 AD2d 546, 549, *affd* 66 NY2d 752, quoting *Matter of Skyline Inn Corp. v New York State Liq. Auth.*, 44 NY2d 695, 696), the police investigator was "free to testify from memory" concerning the conduct that led to petitioner's arrests (*Matter of 53rd St. Rest. Corp. v New York State Liq. Auth.*, 220 AD2d

588, 588; *see Matter of Kenner v Coughlin*, 105 AD2d 1130, 1130-1131, *lv dismissed in part and denied in part* 65 NY2d 760).

Contrary to the further contention of petitioner, we conclude that there is substantial evidence establishing that he had exhibited a lack of "good moral character" in violation of article II, § 2 of the Fire Company's Constitution and By-laws and had committed misconduct under General Municipal Law § 209-*l* (*see Matter of Pawlowski v Big Tree Volunteer Fireman's Co., Inc.*, 12 AD3d 1030, 1032; *see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182). We have reviewed petitioner's remaining contentions and conclude that they lack merit.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1093

TP 12-00831

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

IN THE MATTER OF LEONARD HINTON, PETITIONER,

V ORDER

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

LEONARD HINTON, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Samuel D. Hester, J.], entered October 27, 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: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1094

TP 12-00754

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

IN THE MATTER OF ALBERTO RODRIGUEZ, PETITIONER,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK K. WALSH 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 April 20, 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 that part of the determination finding that petitioner violated inmate rule 102.10 (7 NYCRR 270.2 [B] [3] [i]) and vacating the recommended loss of good time and as modified the determination is confirmed without costs, respondent is directed to expunge from petitioner's institutional record all references to the violation of that rule, and the matter is remitted to respondent for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a Tier III hearing, that he had violated various inmate rules, including inmate rules 102.10 (7 NYCRR 270.2 [B] [3] [i] [threats]), 104.11 (7 NYCRR 270.2 [B] [5] [ii] [violent conduct]), and 107.11 (7 NYCRR 270.2 [B] [8] [ii] [harassment]). As respondent correctly concedes, the determination that petitioner violated inmate rule 102.10 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 that part of the determination finding that petitioner violated inmate rule 102.10, and we direct respondent to expunge from petitioner's institutional record all references to the violation of that rule. "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: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1095

KA 10-00505

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN J. CONNOLLY, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), dated January 20, 2010. The order adjudged that defendant must pay the sum of $31,403.49 in restitution.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the amount of restitution ordered and as modified the order is affirmed, and the matter is remitted to Genesee County Court for a new hearing in accordance with the following Memorandum: Defendant appeals from an order of restitution that was entered following a hearing. We note at the outset that, because County Court bifurcated the sentencing proceeding by severing the issue of restitution for a separate hearing, defendant properly appeals as of right from the order of restitution (*see People v Brusie*, 70 AD3d 1395, 1396). As the People correctly concede, the court erred in delegating its responsibility to conduct the restitution hearing to a judicial hearing officer (JHO) (*see People v Joseph*, 90 AD3d 1646, 1647). We therefore modify the order by vacating the amount of restitution ordered, and we remit the matter to County Court for a new hearing to determine the amount of restitution (*see id.*). Defendant further contends that the People should not be given another opportunity to present evidence in support of the victim's request for restitution. We reject that contention. Penal Law § 60.27 (1) provides that, where "the victim seeks restitution or reparation, the court *shall* require, unless the interests of justice dictate otherwise, . . . that the defendant make restitution of the fruits of the offense and reparation for the actual out-of-pocket loss" (emphasis added). The mandatory language of that statute expresses the longstanding policy of "seeking to ensure that an offender's punishment includes making the victim whole" (*People v Tzitzikalakis*, 8 NY3d 217, 220). We conclude that it would be contrary to that policy and fundamentally unfair to the People and the victim to deprive the People of the opportunity to present evidence in support of the victim's request for restitution based upon the error

of the court in delegating its responsibility to conduct a restitution hearing to the JHO. Defendant's further challenges to the JHO's findings and the sufficiency of the People's evidence are not preserved for our review (*see* CPL 470.05 [2]; *People v Snyder*, 38 AD3d 1068, 1069), and we decline to exercise our power to address those challenges as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1098

KA 10-01949

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LINDA CAMPANELLA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered August 11, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1] [intentional murder]). Viewing the evidence in the light most favorable to the People, we conclude that the evidence is legally sufficient to establish defendant's intent to kill the victim (*see generally People v Bleakley*, 69 NY2d 490, 495). Moreover, viewing the evidence in light of the element of intent as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to that element is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's contention, Supreme Court did not err in permitting the Medical Examiner to testify regarding the victim's cause of death, i.e., that the victim died from complications resulting from a stab wound to the abdomen (*see People v Odell*, 26 AD3d 527, 529, *lv denied* 7 NY3d 760; *People v Klosin*, 281 AD2d 951, 951-952, *lv denied* 96 NY2d 864; *see also People v McCart*, 157 AD2d 194, 197, *lv denied* 76 NY2d 861). "It is axiomatic that expert testimony is admissible where, as here, the conclusions drawn from the facts depend upon professional knowledge not within the ken of the ordinary juror" (*Odell*, 26 AD3d at 529). Indeed, expert medical testimony generally is required to establish that the defendant's conduct was a cause of death (*see People v Eberle*, 265 AD2d 881, 882; *McCart*, 157 AD2d at 197).

Defendant's further contention that the court erred in allowing the Medical Examiner to testify that the victim's death was a homicide is not preserved for our review (*see* CPL 470.05 [2]). In any event, although we note that the People correctly concede that "it was error to allow the [Medical Examiner] to . . . opine that the death was a homicide, since '[s]uch characterization improperly invaded the province of the jury' " (*People v Heath*, 49 AD3d 970, 973, *lv denied* 10 NY3d 959; *see People v Lluveres*, 15 AD3d 848, 849, *lv denied* 5 NY3d 807), we conclude that the error is harmless. The Medical Examiner stated that he was not making a legal determination by characterizing the victim's death as a homicide and added that he used the term "homicide" only to indicate that the victim died at the hands of another person (*see Odell*, 26 AD3d at 529; *cf. Lluveres*, 15 AD3d at 849). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we also reject defendant's contention that she was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

We further conclude that the court properly denied defendant's challenges for cause to two prospective jurors. "It is well settled that a prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the [prospective] juror states unequivocally on the record that he or she can be fair and impartial" (*People v Baker*, 89 AD3d 1431, 1431, *lv denied* 18 NY3d 856 [internal quotation marks omitted]; *see People v Chambers*, 97 NY2d 417, 419). We conclude that the first prospective juror at issue, who owned a security business, never expressed any doubt concerning his ability to be fair and impartial (*see People v Odum*, 67 AD3d 1465, 1465, *lv denied* 14 NY3d 804, 15 NY3d 755, *cert denied* ___ US ___, 131 S Ct 326; *People v Smith*, 48 AD3d 489, 489, *lv denied* 10 NY3d 870). We reach the same conclusion with respect to the second prospective juror at issue, who acknowledged having a friend and an acquaintance in law enforcement (*see People v Pickren*, 284 AD2d 727, 727, *lv denied* 96 NY2d 923; *see also People v Colon*, 71 NY2d 410, 418, *cert denied* 487 US 1239). In any event, "[e]ven assuming, arguendo, that the initial statements of the [second] prospective juror raised a serious doubt regarding his ability to be impartial, we conclude that [he] ultimately stated unequivocally that he could be fair" (*Baker*, 89 AD3d at 1432 [internal quotation marks omitted]; *see Chambers*, 97 NY2d at 419). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1100

KA 10-01866

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD MCCOY, DEFENDANT-APPELLANT.

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

RONALD MCCOY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered July 7, 2010. The judgment convicted defendant, upon a nonjury verdict, of burglary in the second degree, robbery 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 modified on the law by vacating the sentence imposed for criminal possession of a weapon in the third degree under the third count of the indictment and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for resentencing on that count of the indictment.

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of burglary in the second degree (Penal Law § 140.25 [1] [d]), robbery in the second degree (§ 160.10 [2] [b]), and criminal possession of a weapon in the third degree (§ 265.02 [1]). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference" (*People v Van Akin*, 197 AD2d 845, 845). County Court was entitled to reject defendant's version of the events "and, upon our review of the record, we cannot say that the court failed to give the evidence the weight that it should be accorded" (*People v Britt*, 298 AD2d 984, 984, *lv denied* 99 NY2d 556).

Defendant's contention in his main and pro se supplemental briefs

regarding the legal sufficiency of the evidence before the grand jury is not properly before us. "Having failed to challenge the [legal] sufficiency of the trial evidence, defendant may not now challenge the [legal] sufficiency of the evidence before the grand jury" (*People v Wimberly*, 86 AD3d 806, 807, *lv denied* 18 NY3d 863; *see People v Smith*, 4 NY3d 806, 808; *see also* CPL 210.30 [6]). Additionally, by affirmatively requesting that the court charge criminal possession of a weapon in the third degree as a lesser included offense of criminal possession of a weapon in the second degree, defendant waived the contention in his main brief that the court erred in doing so (*see People v Richardson*, 88 NY2d 1049, 1051; *People v Carter*, 38 AD3d 1291, 1292).

We reject defendant's contention in his main brief that the five-year period of postrelease supervision imposed by the court for the robbery and burglary conviction renders his sentence unduly harsh and severe. As the People correctly concede, however, the determinate sentence and period of postrelease supervision imposed by the court for the conviction of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), a nonviolent class D felony, is illegal (*see* §§ 70.45 [1]; 70.06 [3] [d]; [4] [b]; *People v Winfield*, 83 AD3d 745, 746). We therefore modify the judgment by vacating the sentence imposed for that conviction, and we remit the matter to County Court for resentencing on count three of the indictment.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1103

CAF 11-02548

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

IN THE MATTER OF DEBORAH D. NAJARRO,
PETITIONER-RESPONDENT,

V ORDER

JON T. FONTAINE, RESPONDENT-APPELLANT.

ROBERT A. DINIERI, CLYDE, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Wayne County (Daniel G. Barrett, J.), entered November 1, 2011 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1110

CAF 11-01925

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

IN THE MATTER OF PATRICIA PETRIE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DONALD PETRIE, JR., RESPONDENT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Yates County (W. Patrick Falvey, J.), entered August 11, 2011 in a proceeding pursuant to Family Court Act article 8. The order granted a protective order to petitioner.

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

Memorandum: Respondent husband appeals from an order of protection entered upon a finding that he committed the family offenses of harassment in the second degree (Penal Law § 240.26 [1]) and menacing in the third degree (§ 120.15) against petitioner wife. Initially, we note that the order of protection has expired, and we thus generally would dismiss the appeal as moot (*see Matter of Kristine Z. v Anthony C.*, 43 AD3d 1284, 1284-1285, *lv denied* 10 NY3d 705). Here, however, the husband challenges only Family Court's finding that he committed two family offenses and, " 'in light of enduring consequences which may potentially flow from an adjudication that a party has committed a family offense,' the appeal from so much of the order . . . as made that adjudication is not academic" (*Matter of Hunt v Hunt*, 51 AD3d 924, 925; *see Matter of Samora v Coutsoukis*, 292 AD2d 390, 391, *lv denied* 99 NY2d 506).

Contrary to the husband's contention, however, we conclude that the wife established by a preponderance of the evidence that he engaged in acts constituting harassment in the second degree and menacing in the third degree (*see Matter of Baginski v Rostkowski*, 96 AD3d 1051, 1051-1052; *see also Matter of Chase-Triou v Triou*, 96 AD3d 1699, 1699; *Matter of Beck v Butler*, 87 AD3d 1410, 1411, *lv denied* 18 NY3d 801). The court's "assessment of the credibility of the witnesses is entitled to great weight, and the court was entitled to credit the testimony of the wife over that of the husband" (*Matter of*

Scroger v Scroger, 68 AD3d 1777, 1778, *lv denied* 14 NY3d 705).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1112

CA 11-02561

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

TIMOTHY A. RUDNIK, ET AL., PLAINTIFFS,

V ORDER

GLADSTON C. PETINAUD, DEFENDANT.

GLADSTON C. PETINAUD, THIRD-PARTY PLAINTIFF-RESPONDENT,

V

SARAH C. JOYCE, THIRD-PARTY DEFENDANT-APPELLANT.

O'NEILL, GROSSO & BROWNELL, WILLIAMSVILLE (KEVIN M. O'NEILL OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

LAW OFFICES OF DANIEL R. ARCHILLA, BUFFALO (JILL FLORKOWSKI OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

COLLINS & COLLINS, LLP, BUFFALO (ROMAN J. FONTANA OF COUNSEL), FOR PLAINTIFFS.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered March 24, 2011 in a personal injury action. The order, among other things, denied the motion of third-party defendant for summary judgment dismissing the third-party complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on June 19, 2012, and filed in the Erie County Clerk's Office on July 12, 2012,

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1120

KA 10-02300

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE MARTINEZ, ALSO KNOWN AS “GORDO,”
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered March 24, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree.

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

Memorandum: Defendant appeals from three judgments convicting him upon his plea of guilty of, respectively, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), criminal possession of a weapon in the second degree (§ 265.03 [1] [b]), and assault in the second degree (§ 120.05 [2]). We note that the plea was entered in satisfaction of three separate indictments. 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), and the valid waiver forecloses his challenge to the severity of the sentence in each appeal (*see id.* at 255).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1121

KA 10-02299

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE MARTINEZ, ALSO KNOWN AS “GORDO,”
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered March 24, 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.

Same Memorandum as in *People v Martinez* ([appeal No. 1] ___ AD3d ___ [Nov. 9, 2012]).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1122

KA 10-02298

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE MARTINEZ, ALSO KNOWN AS “GORDO,”
DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered March 24, 2009. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Same Memorandum as in *People v Martinez* ([appeal No. 1] ___ AD3d ___ [Nov. 9, 2012]).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1123

KA 11-00141

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

GARY DRAPER, ALSO KNOWN AS GARY E. DRAPER,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered December 15, 2010. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree (two counts).

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1124

KA 11-00292

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KENNETH W. NEUER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered December 15, 2010. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1125

KA 11-02444

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHAD WELLINGTON, DEFENDANT-APPELLANT.

TRACY L. PUGLIESE, CLINTON, FOR DEFENDANT-APPELLANT.

JEFFREY CARPENTER, ASSISTANT DISTRICT ATTORNEY, HERKIMER, FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (Patrick L. Kirk, J.), rendered October 26, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in the fifth degree.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 28, 2012,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1126

KA 11-02132

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY S. MOLARO, DEFENDANT-APPELLANT.

PAUL J. VACCA, JR., ROCHESTER, FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL 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 Genesee County Court (Mark H. Dadd, J.), dated September 27, 2011. The order denied the motion of defendant to vacate his conviction pursuant to CPL 440.10.

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

Memorandum: Defendant appeals from an order denying his CPL article 440 motion to vacate the judgment convicting him of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Defendant contends that Judge Noonan, who accepted his plea of guilty and thereafter recused himself, was disqualified from taking any part in the action under Judiciary Law § 14 based upon his relationship with the prosecutor (*see People v Berry*, 23 AD2d 955, 955; *see also La Pier v Deyo*, 100 AD2d 710, 710). We agree with County Court (Dadd, J.), however, that Judiciary Law § 14 did not require Judge Noonan's disqualification. The statute mandates disqualification where, inter alia, the judge "is related by consanguinity or affinity to any party to the controversy within the sixth degree." The Assistant District Attorney who prosecuted defendant was not a party to the controversy but, rather, was a public servant representing the People in the criminal action (*see* CPL 1.20 [31], [32]; *see generally People v Robinson*, 27 Misc 3d 635, 637). Judge Dadd also properly concluded that recusal of Judge Noonan was not required under Rules of the Chief Administrator of the Courts (22 NYCRR) § 100.3 (E) (1) (e) inasmuch as the prosecutor was not "within the fourth degree of relationship" to Judge Noonan. As Judge Noonan's first cousin once removed, the prosecutor was within the fifth degree of relationship (*see* Advisory Comm on Jud Ethics Ops 07-06 [2007]). "Absent a legal disqualification under Judiciary Law § 14, [Judge Noonan was] the sole arbiter of recusal" (*People v Moreno*, 70 NY2d 403, 405; *see People v*

Patrick, 183 NY 52, 54).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1127

KA 10-00816

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WELDON YOUNG, DEFENDANT-APPELLANT.

WAYNE C. FELLE, P.C., WILLIAMSVILLE (WAYNE C. FELLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered February 19, 2010. 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: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention, Supreme Court properly determined, following a *Cardona* hearing (*see People v Cardona*, 41 NY2d 333), that a prosecution witness was not an agent of the prosecution when he obtained incriminating information from defendant with respect to the victim's death. Although the witness had testified in three prior trials after advising the prosecution, while he was incarcerated, that he had information about those respective crimes (*see id.* at 335), the record supports the court's determination that the prosecution did not seek information from the witness, but instead passively received the information the day before the trial began (*see People v Davis*, 38 AD3d 1170, 1171, *lv denied* 9 NY3d 842, *cert denied* 552 US 1065; *People v Keith*, 23 AD3d 1133, 1134, *lv denied* 6 NY3d 815). We reject defendant's further contention that the prosecution suborned perjury with respect to the testimony of that witness (*see generally People v Casillas*, 289 AD2d 1063, 1064, *lv denied* 97 NY2d 752). Although we agree with defendant that the credibility of the witness was challenged with taped telephone calls from the witness to an acquaintance of the victim that were admitted in evidence during defendant's cross-examination of the witness, we nevertheless conclude that the record does not support a determination that the People knowingly presented false testimony (*see generally People v Dwyer*, 234 AD2d 942, 943). Rather, the credibility of the

witness was properly an issue for the jury, which had the opportunity to hear his testimony and the taped telephone calls (*see generally People v Bleakley*, 69 NY2d 490, 495).

By failing to object during summation, defendant failed to preserve for our review his further contention that the prosecutor committed reversible error by vouching for the credibility of the witness during summation (*see* CPL 470.05 [2]; *People v Hill*, 82 AD3d 1715, 1715, *lv denied* 17 NY3d 806). In any event, we conclude that the prosecutor's remarks were a fair response to defendant's summation, which attacked the credibility of the witness (*see People v Foster*, 59 AD3d 1008, 1009, *lv denied* 12 NY3d 816), and a fair comment on the evidence (*see Hill*, 82 AD3d at 1715).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1128

KA 08-01315

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERVIN J. SMALLS, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

ERVIN J. SMALLS, JR., DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered April 22, 2008. 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: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (§ 140.20). We agree with defendant in appeal No. 1 that Supreme Court erred in allowing the People to present the testimony of a police officer that bolstered the complainant's identification testimony, because such testimony "provid[ed] official confirmation of the complainant's identification of the defendant" (*People v German*, 45 AD3d 861, 862, *lv denied* 9 NY3d 1034; *see People v McCullen*, 63 AD3d 1708, 1709, *lv denied* 13 NY3d 747). We further conclude, however, that the error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242). "[T]he bolstering testimony . . . confirmed only the bald fact of the identification. It went into no particulars of such identification or the means by which the victim reached her conclusion. Beyond the fact that she did identify him, there was nothing to shore up the reliability or probative worth of her identification. Unquestionably defendant had been identified; the erroneously admitted bolstering testimony went no further than to corroborate that uncontroverted fact" (*People v Johnson*, 57 NY2d 969, 971). We further note that defense counsel conceded those facts in

his opening statement and stated that the complainant told the officer that defendant was the perpetrator.

Contrary to the further contention of defendant in appeal No. 1, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "The credibility of the victim and the weight to be accorded her testimony were matters for the jury" (*People v Halwig*, 288 AD2d 949, 949, *lv denied* 98 NY2d 710; *see People v McCray*, 96 AD3d 1480, 1480; *People v Gray*, 15 AD3d 889, 890, *lv denied* 4 NY3d 831). Furthermore, "[d]efendant was identified by the victim, who was acquainted with defendant and knew him by name" (*People v Ortiz*, 50 AD3d 336, 336, *lv denied* 10 NY3d 962; *see People v Noakes*, 57 AD3d 280, 281, *lv denied* 12 NY3d 786).

Defendant also contends in appeal No. 1 that the court erred in admitting evidence of consciousness of guilt and in failing to give a proper jury instruction with respect to that evidence. Defendant failed to object on the grounds raised on appeal, and he thus failed to preserve those contentions for our review (*see People v Smith*, 90 AD3d 1565, 1567, *lv denied* 18 NY3d 998; *see generally People v McMillon*, 77 AD3d 1375, 1375-1376, *lv denied* 16 NY3d 897; *People v Smith*, 24 AD3d 1253, 1253, *lv denied* 6 NY3d 818). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Although we agree with the further contention of defendant in appeal No. 1 that the prosecutor improperly shifted the burden of proof to him based on a comment on summation, we conclude that the prosecutor's "single improper comment was not so egregious that defendant was thereby deprived of a fair trial" (*People v Willson*, 272 AD2d 959, 960, *lv denied* 95 NY2d 873). We note in particular that the court sustained defendant's objection to the improper comment and instructed the jury to disregard it, and the jury is presumed to have followed the court's instructions (*see generally People v Wallace*, 59 AD3d 1069, 1070, *lv denied* 12 NY3d 861). Moreover, "the court clearly and unequivocally instructed the jury that the burden of proof on all issues remained with the prosecution" (*People v Pepe*, 259 AD2d 949, 950, *lv denied* 93 NY2d 1024; *see People v Matthews*, 27 AD3d 1115, 1116).

The sentences imposed in appeal Nos. 1 and 2 are not unduly harsh or severe. We have considered defendant's remaining contentions, including those raised in his pro se supplemental brief, and conclude that they are without merit.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1129

KA 08-01498

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERVIN J. SMALLS, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

ERVIN J. SMALLS, JR., DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered May 21, 2008. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Same Memorandum as in *People v Smalls* ([appeal No. 1] ___ AD3d ___ [Nov. 9, 2012]).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1131

CAF 12-00142

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

IN THE MATTER OF THOMAS E. WHITE,
PETITIONER-RESPONDENT,

V ORDER

KIM A. MACRAE, RESPONDENT-APPELLANT.

KELLY M. CORBETT, FAYETTEVILLE, FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Onondaga County (Thomas Benedetto, R.), entered December 15, 2011 in a proceeding pursuant to Family Court Act article 8. The order directed respondent to, inter alia, stay away from the home of petitioner until December 15, 2012.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1134

CAF 11-01353

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

IN THE MATTER OF JEAN MUKURALINDA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOLIE KINGOMBE, RESPONDENT-RESPONDENT.

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

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

MARY E. FEINDT, ATTORNEY FOR THE CHILDREN, ROCHESTER, FOR JOSHUA K., RACHEL K., RUTH K. AND STEVEN K.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered May 31, 2011 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded sole legal custody of the subject children to respondent.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion is denied, the petition is reinstated and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following Memorandum: Petitioner, the alleged father of the children in question, appeals from an order that, inter alia, dismissed his petition seeking a modification of visitation as set forth in the prior order granting the parties joint custody, granted respondent mother's cross petition seeking sole custody of the children, and vacated all prior orders. Family Court determined that, because the parties were not married and there were no acknowledgments of paternity with respect to the children (*see* Family Ct Act § 516-a [a]), petitioner lacked standing to seek relief or to oppose the mother's cross petition seeking sole custody. That was error.

As a preliminary matter, we note that petitioner's first language is Swahili and an interpreter appeared on his behalf. Although petitioner responded "no" to the court's questions "so you are not married" and "you did not do the marriage, right," he previously stated unequivocally that he and the mother were married in Africa in a "cultural ceremony" before they emigrated to the United States. The court interrupted petitioner's explanation of the "cultural ceremony" to ask questions before he had completed his response to the court's

request to describe the ceremony. In response to the court's questions, the mother testified that the parties were not married in Africa or in the United States. Although the court's determination that petitioner lacked standing should not be disturbed absent a sound and substantial basis in the record (*see generally Matter of Garland v Goodwin*, 13 AD3d 1059, 1059-1060), we conclude that the determination is not supported by the requisite sound and substantial basis in the record in view of petitioner's contradictory testimony through the interpreter.

In any event, based upon the doctrine of judicial estoppel, we conclude that the court erred in granting the mother's motion seeking to dismiss the petition to modify visitation and to vacate all prior orders. In opposition to the motion, petitioner provided the court with prior sworn petitions wherein the mother asserted that petitioner was the father of the children. Indeed, the mother swore in one petition that she and petitioner were "married in Africa on 6/28/98," which is in direct contravention of her sworn testimony that she and petitioner were never married. We conclude that judicial estoppel is properly applied here, where "a party to an action has secured a[n order] in his or her favor by adopting a certain position and then has sought to assume a contrary position in another action simply because his [or her] interests have changed" (*Anonymous v Anonymous*, 137 AD2d 739, 741; *see generally Secured Equities Invs. v McFarland*, 300 AD2d 1137, 1138; *Abramovich v Harris*, 227 AD2d 1000, 1001). In light of our decision, we further conclude that the court erred in granting the cross petition. We therefore reverse the order, deny the motion, reinstate the petition and remit the matter to Family Court, Monroe County, for further proceedings on the petition and cross petition before a different judge.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1135

CAF 11-02483

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

IN THE MATTER OF WILLIAM M. HILGENBERG,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER A. HERTEL, RESPONDENT,
AND HEIDI D. HILGENBERG, RESPONDENT-APPELLANT.

KELLY M. CORBETT, FAYETTEVILLE, FOR RESPONDENT-APPELLANT.

KARIN H. MARRIS, ATTORNEY FOR THE CHILD, SYRACUSE, FOR KAMERI M.H.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered October 25, 2011. The order, among other things, awarded petitioner visitation with the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the first and second ordering paragraphs and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following Memorandum: Petitioner grandfather, the father of respondent mother, commenced this proceeding seeking visitation with his granddaughter (hereafter, grandchild). The mother appeals from an order that, inter alia, granted the petition and awarded the grandfather one weekend per month of overnight visitation with the grandchild. Initially, we reject the mother's contention that the grandchild was deprived of effective assistance of counsel in Family Court (*see generally Matter of Ferguson v Skelly*, 80 AD3d 903, 906, *lv denied* 16 NY3d 710; *Matter of Sarah A.*, 60 AD3d 1293, 1294-1295; *Matter of West v Turner*, 38 AD3d 673, 674). The record does not support the mother's allegation that the Attorney for the Child failed to make a recommendation in accordance with the grandchild's wishes, or the mother's implicit contention that the Attorney for the Child was biased against her (*see generally Matter of Nicole VV.*, 296 AD2d 608, 614, *lv denied* 98 NY2d 616).

We reject the mother's conclusory assertion that Family Court erred in concluding that the grandfather had standing to seek visitation. A grandparent has standing to seek visitation with his or her grandchildren pursuant to Domestic Relations Law § 72 (1) where, inter alia, "circumstances show that conditions exist [in] which equity would see fit to intervene." The factors that a court must consider in determining whether the grandparent made such a showing

include the "nature and basis of the parents' objection to visitation . . . [and] the nature and extent of the grandparent-grandchild relationship" (*Matter of Emanuel S. v Joseph E.*, 78 NY2d 178, 182; *see Matter of Morgan v Grzesik*, 287 AD2d 150, 154). Here, the court properly concluded that the grandfather had demonstrated a long-standing and loving relationship with the grandchild sufficient to seek visitation with her.

Upon demonstrating standing to seek visitation, however, a grandparent must then establish that visitation is in the best interests of the grandchild (*see Emanuel S.*, 78 NY2d at 181). Among the factors to be considered are whether the grandparent and grandchild have a preexisting relationship, whether the grandparent supports or undermines the grandchild's relationship with his or her parents, and whether there is any animosity between the parents and the grandparent (*see Matter of E.S. v P.D.*, 8 NY3d 150, 157-158). Animosity alone is insufficient to deny visitation. " 'It is almost too obvious to state that, in cases where grandparents must use legal procedures to obtain visitation rights, some degree of animosity exists between them and the party having custody of the [grandchildren]. Were it otherwise, visitation could be achieved by agreement' " (*id.* at 157, quoting *Lo Presti v Lo Presti*, 40 NY2d 522, 526). Furthermore, "the decision whether . . . an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision . . . becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination" (*Troxel v Granville*, 530 US 57, 70; *see Morgan*, 287 AD2d at 151). Thus, "the courts should not lightly intrude on the family relationship against a fit parent's wishes. The presumption that a fit parent's decisions are in the [grand]child's best interests is a strong one" (*E.S.*, 8 NY3d at 157).

Inasmuch as the court made no finding that the mother was not fit, and the grandfather did not take a cross appeal from the order, we must therefore begin by according "some special weight" to the mother's decision that the grandchild's best interests are not served by visitation with the grandfather (*Troxel*, 530 US at 70). Furthermore, the court's determination concerning whether to award visitation " 'depends to a great extent upon its assessment of the credibility of the witnesses and upon the assessments of the character, temperament, and sincerity of the parents' " and grandparents (*Matter of Thomas v Thomas*, 35 AD3d 868, 869; *see Matter of Steinhauser v Haas*, 40 AD3d 863, 864). The court's determination concerning visitation will not be disturbed unless it lacks a sound and substantial basis in the record (*see Thomas*, 35 AD3d at 869; *Matter of Keylikhes v Kiejliches*, 25 AD3d 801, 801, *lv denied* 7 NY3d 710).

Here, we conclude that the court's determination lacks a sound and substantial basis in the record insofar as it grants visitation to the grandfather. The mother and the grandmother testified to serious wrongdoing by the grandfather, including, inter alia, illegal drug use and sales, and vehicular assault upon the mother's boyfriend. The

court failed to make any finding regarding the credibility of those allegations, and thus we have no basis upon which to determine how those allegations, which include serious misconduct, would impact the determination whether visitation with the grandfather is in the grandchild's best interests. Furthermore, there is no evidence in the record establishing that the grandfather previously has cared for the grandchild overnight, or for as extensive a time as the full weekend of visitation awarded by the court. "Given the . . . deficiencies in the record . . . , this Court can neither conclude that a sound and substantial basis exists for Family Court's award of [visitation] to the [grand]father . . . , nor can we accord appropriate weight to the [court's credibility determinations] in conducting our own independent review" (*Matter of Rivera v LaSalle*, 84 AD3d 1436, 1440). We therefore modify the order by vacating the first two ordering paragraphs, and we remit the matter to Family Court for further proceedings on the petition.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1136

CA 12-00801

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

DAVID L. CLARK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THRUWAY FASTENERS, INC., DEFENDANT-APPELLANT.

BENDER & BENDER, LLP, BUFFALO (BRENDA J. JOYCE 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, Niagara County (Catherine R. Nugent Panepinto, J.), entered December 20, 2011. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Supreme Court properly denied defendant's motion for summary judgment seeking dismissal of the complaint in this employment discrimination action. According to plaintiff, defendant unlawfully discriminated against him because of his disability resulting from the death of his daughter. An at-will employee such as plaintiff may lawfully be discharged for any reason other than a statutorily impermissible reason or, indeed, for no reason (*see Matter of State Div. of Human Rights v County of Onondaga Sheriff's Dept.*, 71 NY2d 623, 630). Executive Law § 296 (1) (a) makes it an "unlawful discriminatory practice" to discharge an individual "because of" his or her disability.

To prevail on its motion, defendant was required to "demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for [its] challenged actions, the absence of a material issue of fact as to whether [its] explanations were pretextual" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305). Here, although defendant met its burden on the motion of offering a legitimate, nondiscriminatory reason for firing plaintiff, i.e., a failed drug test, we agree with plaintiff that on the record before us there are triable issues of fact concerning whether the reason proffered by defendant was a pretext for discrimination (*see generally id.*). Plaintiff established that defendant's substance abuse policy was

discretionary as to the discipline imposed for the violation of that policy, and plaintiff testified at his deposition that defendant's president assured him after he failed the drug test that it was not a problem and not to worry. In addition, plaintiff testified at his deposition that defendant's president did not discuss the failed drug test at the meeting when plaintiff was fired. Plaintiff established that his supervisor and defendant's president were aware that he was seeing therapists and taking medication for depression and anxiety since the death of his daughter 14 months earlier. Further, plaintiff testified at his deposition that defendant's president told him at the meeting when he was fired that he was not the same person he had been before his daughter died. We conclude that plaintiff established that there are triable issues of fact "both [whether] the stated reasons were false and [whether] discrimination was the real reason" (*id.*; *see Ferrante v American Lung Assn.*, 90 NY2d 623, 629-630).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1138

CA 11-01346

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

LYNN M. DELBELLO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS M. DELBELLO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THOMAS M. DELBELLO, DEFENDANT-APPELLANT PRO SE.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (LAURA J. EMERSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), dated January 21, 2010 in a divorce action. The order directed defendant to pay plaintiff's counsel fees of $3,982.73.

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

Memorandum: These consolidated appeals arise from a matrimonial action. In appeal No. 1, defendant contends that Supreme Court erred in awarding counsel fees to plaintiff without conducting a hearing. "That contention is not preserved for our review inasmuch as defendant failed to request a hearing with respect to the ability of plaintiff to pay her own counsel fees or the extent and value of the legal services rendered to her" (*Sharlow v Sharlow*, 77 AD3d 1430, 1432).

In appeal No. 2, defendant contends that the court erred by increasing the weekly award of maintenance from $75, the amount recommended by the Referee, to $200. We reject defendant's contention that the court erred in imputing income to him, inasmuch as the court in fact declined to impute income to him, and the record fails to support defendant's further contention that the court erred in failing to consider his living expenses when it increased the amount of maintenance recommended by the Referee. We agree with defendant, however, that the court failed to "set forth the factors it considered and the reasons for its decision" to increase the amount of maintenance (Domestic Relations Law § 236 [B] [6] [b]). In view of the court's rejection of the Referee's recommendation with respect to the amount of maintenance, the court's statement that it was making the increased award of maintenance "[f]or the same reasons outlined by the [R]eferee" is not sufficient to satisfy the statutory requirement (*cf. Boardman v Boardman*, 300 AD2d 1110, 1110; *McCanna v McCanna*, 274 AD2d 949, 949). We therefore modify the judgment in appeal No. 2

accordingly, and we remit the matter to Supreme Court for a new determination of the amount of maintenance, following a hearing if necessary.

With respect to appeal No. 3, we conclude that the court erred in disbursing the funds remaining in the escrow account of plaintiff's attorney to plaintiff and plaintiff's attorney. The judgment in appeal No. 2 provided that the funds remaining in that account were to be divided equally between the parties. Further, in view of defendant's objections, the court erred in adopting the disbursement proposed by plaintiff's attorney without conducting a hearing (*see generally Pordum v Pordum* [appeal No. 2], 248 AD2d 953, 954). We therefore modify the order in appeal No. 3 accordingly, and we remit the matter to Supreme Court for a hearing concerning the parties' respective shares of the funds in the escrow account.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1139

CA 11-01347

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

LYNN M. DELBELLO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS M. DELBELLO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THOMAS M. DELBELLO, DEFENDANT-APPELLANT PRO SE.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (LAURA J. EMERSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John F. O'Donnell, J.), entered December 2, 2010 in a divorce action. The judgment, inter alia, directed defendant to pay maintenance to plaintiff in the amount of $200 per week.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the amount of maintenance awarded and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the same Memorandum as in *Delbello v Delbello* ([appeal No. 1] ___ AD3d ___ [Nov. 9, 2012]).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1140

CA 11-01348

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

LYNN M. DELBELLO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS M. DELBELLO, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

THOMAS M. DELBELLO, DEFENDANT-APPELLANT PRO SE.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (LAURA J. EMERSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered May 12, 2011 in a divorce action. The order, among other things, disbursed funds in the escrow account of plaintiff's attorney.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second ordering paragraph and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the same Memorandum as in *Delbello v Delbello* ([appeal No. 1] ___ AD3d ___ [Nov. 9, 2012]).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1141

CA 11-02087

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

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

V MEMORANDUM AND ORDER

JAMES R. CARTER, RESPONDENT-APPELLANT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered March 30, 2011 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, granted the motion of petitioner for a change of venue.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion and vacating the first and second ordering paragraphs and as modified the order is affirmed without costs.

Memorandum: Respondent appeals from an order granting petitioner's motion for a change of venue from Livingston County to Broome County in this Mental Hygiene Law article 10 proceeding. In support of its motion, petitioner provided the affirmation of its attorney stating that numerous victims and law enforcement witnesses would be "greatly inconvenienced" if required to travel from Broome County to Livingston County. Petitioner also argued in support of the motion that the underlying crimes, which were committed more than 20 years before the petition was filed, were committed in Broome County and that respondent had the greatest ties to that county. In opposition, respondent's attorney asserted in an affirmation that petitioner failed to establish good cause for a change of venue, as required by Mental Hygiene Law § 10.08 (e), because the underlying crimes are "deemed established and shall not be relitigated" in an article 10 proceeding and thus the convenience of victims and law enforcement witnesses does not constitute good cause for a change of venue (§ 10.07 [c]; *see* § 10.08 [e]). Respondent's attorney further asserted that respondent had lived outside of New York State his entire life before relocating to Broome County with a codefendant and had no ties to that county. In reply, petitioner provided the redacted affidavits of two victims and the affidavit of a police witness stating that they had been advised that they may be subpoenaed

to testify and that it would be inconvenient to travel to Livingston County. Supreme Court granted the motion, determining that the testimony of the proposed witnesses, "if necessary, may be an integral part of the hearing."

We conclude that petitioner failed to establish good cause for a change of venue (*see* Mental Hygiene Law § 10.08 [e]). Although the convenience of witnesses may constitute good cause (*see id.*), here petitioner failed to "set forth specific facts sufficient to demonstrate a sound basis for the transfer" (*Matter of State of New York v Williams*, 92 AD3d 1271, 1271-1272; *see Matter of State of New York v Zimmer* [appeal No. 2], 63 AD3d 1562, 1562-1563). Instead, petitioner's attorney stated that the victims and law enforcement witnesses "may" be called, "if necessary," and further stated in a conclusory manner that respondent had the greatest ties to Broome County (*see Zimmer*, 63 AD3d at 1563).

Respondent further contends that he was denied effective assistance of counsel because, in opposition to the motion, his attorney failed to identify respondent's proposed witnesses and the nature of the expected testimony. We reject that contention. We note that because respondent is subject to civil confinement, the standard for determining whether effective assistance of counsel was provided in criminal matters is applicable here (*see Matter of State of New York v Campany*, 77 AD3d 92, 98, *lv denied* 15 NY3d 713). Nevertheless, respondent failed to "demonstrate the absence of strategic or other legitimate explanations" for his attorney's alleged deficiency (*People v Caban*, 5 NY3d 143, 154), and we conclude that his attorney provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1144

CA 12-00642

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

BOBBIE D. BROWN AND JOSEPH BROWN,
CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, RESPONDENT-RESPONDENT.

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

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered July 5, 2011. The order denied the application of claimants for leave to serve a late notice of claim.

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

Memorandum: Supreme Court properly denied claimants' application for leave to serve a late notice of claim (*see* General Municipal Law § 50-e [5]; *Santana v Western Regional Off-Track Betting Corp.*, 2 AD3d 1304, 1304, *lv denied* 2 NY3d 704). Bobbie D. Brown (claimant) allegedly suffered personal injuries when she drove off the roadway up an embankment at the dead end of Titus Avenue in respondent, City of Buffalo. Thirteen months after the accident, claimants sought leave to serve a late notice of claim that alleged that claimant's injuries resulted from respondent's negligence in failing to provide adequate lighting, signs, and/or guardrails at the dead end of Titus Avenue. Claimants asserted that respondent had actual knowledge of the claim through its police response to the accident and the police accident report.

"It is well settled that key factors for the court to consider in determining an application for leave to serve a late notice of claim are whether the claimant[s] [have] demonstrated a reasonable excuse for the delay, whether [respondent] acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or within a reasonable time thereafter, and whether the delay would substantially prejudice [respondent]" (*Le Mieux v Alden High School*, 1 AD3d 995, 996). Here, the court did not abuse its discretion in denying the application inasmuch as claimants failed to establish a reasonable excuse for the delay or that respondent had " 'actual

knowledge of the essential facts constituting the claim' " (*Folmar v Lewiston-Porter Cent. School Dist.*, 85 AD3d 1644, 1645).

Here, claimants asserted as an excuse for their failure to serve a timely notice of claim only that they were unaware of the notice of claim requirement. Thus, claimants did not establish a reasonable excuse for their delay (*see Le Mieux*, 1 AD3d at 996). With respect to actual knowledge, we note that, "for a [police] report to provide actual knowledge of the essential facts, one must be able to readily infer from that report that a potentially actionable wrong had been committed by the public corporation" (*Matter of Taylor v County of Suffolk*, 90 AD3d 769, 770; *see Matter of Devivo v Town of Carmel*, 68 AD3d 991, 992). Here, however, claimants failed to demonstrate that respondent had "actual knowledge of the essential facts constituting the claim" through the police accident report, which stated that claimant was injured after she failed to "realize" that the street came to a dead end (*Wencek v County of Chautauqua*, 132 AD2d 950, 951; *see Washington v City of New York*, 72 NY2d 881, 883; *cf. Innes v County of Genesee*, 99 AD2d 642, 643, *affd* 62 NY2d 779). Furthermore, "[t]he fact that [respondent's Police Department] had knowledge of this incident, without more, cannot be considered actual knowledge of the claim against [respondent]" (*Matter of Mitchell v Town of Greenburgh*, 96 AD3d 852, 852-853; *see generally Williams v Town of Irondequoit*, 59 AD2d 1049, 1050).

Finally, although we agree with claimants that respondent "failed to substantiate [its] conclusory assertions that [it was] substantially prejudiced by the [13-month] delay" (*Terrigino v Village of Brockport*, 88 AD3d 1288, 1288 [internal quotation marks omitted]), we nevertheless conclude that the court properly denied claimants' application inasmuch as they failed to present a reasonable excuse for the delay and respondent lacked timely knowledge of the facts constituting the claim (*see Santana*, 2 AD3d at 1304-1305).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1151

KA 11-01991

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TIMOTHY P. MEYERS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 12, 2011. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1152

TP 12-00871

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

IN THE MATTER OF CHRISTOPHER HYNES, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH RENE NOWOTARSKI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS 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 May 8, 2012) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1159

CAF 11-01576

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

IN THE MATTER OF JAKOB B.-K. AND NIKOLY B.-K.

CAYUGA COUNTY DEPARTMENT OF SOCIAL SERVICES, ORDER
PETITIONER-RESPONDENT;

STEPHEN K., RESPONDENT-APPELLANT.

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN JAMES MULDOON OF COUNSEL), FOR RESPONDENT-APPELLANT.

FREDERICK R. WESTPHAL, COUNTY ATTORNEY, AUBURN (CHRISTOPHER M. PALERMO OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, ATTORNEY FOR THE CHILDREN, MANLIUS, FOR JAKOB B.-K. AND NIKOLY B.-K.

Appeal from an order of the Family Court, Cayuga County (Thomas G. Leone, J.), entered July 11, 2011 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.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1160

CAF 12-00126

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

IN THE MATTER OF HERKIMER COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF MICHAEL S., PETITIONER-RESPONDENT;

ORDER

RACHEL W., RESPONDENT-RESPONDENT.

SIMONE M. SHAHEEN, ESQ., ATTORNEY FOR THE CHILD, APPELLANT.

SIMONE M. SHAHEEN, ATTORNEY FOR THE CHILD, UTICA, APPELLANT PRO SE.

ROBERT J. MALONE, COUNTY ATTORNEY, HERKIMER (JACQUELYN M. ASNOE OF COUNSEL), FOR PETITIONER-RESPONDENT.

ALBERT F. LAWRENCE, GREENFIELD CENTER, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Herkimer County (John J. Brennan, J.), dated December 15, 2011. The order, among other things, directed that the subject child be returned to respondent.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1161

CAF 11-02138

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

IN THE MATTER OF ALAN V. NERBER,
PETITIONER-RESPONDENT,

V ORDER

LEIGH M. BUELL, RESPONDENT-APPELLANT.

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

LEIGH E. ANDERSON, ATTORNEY FOR THE CHILD, BUFFALO, FOR ANTHONY N.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered September 2, 2011 in a proceeding pursuant to Family Court Act article 6. The order awarded petitioner sole custody of the parties' child.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1170

TP 12-00799

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

IN THE MATTER OF NEW YORK STATE DIVISION OF HUMAN RIGHTS, ON THE COMPLAINT OF WILLIAM R. JOHNSON, PETITIONER,

V ORDER

JOHN BRYSON AND NATIONAL HOTEL, RESPONDENTS.

CAROLINE J. DOWNEY, BRONX (TONI ANN HOLLIFIELD OF COUNSEL), FOR PETITIONER.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Steuben County [Marianne Furfure, A.J.], entered April 3, 2011) to enforce a determination of the New York State Division of Human Rights.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1171

KA 11-02025

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAWRENCE J. WALTER, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Barry M. Donalty, A.J.), entered August 8, 2011. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that Supreme Court erred in considering unreliable hearsay when making its SORA determination. "Because defendant's evidentiary objection[s] . . . [were] made on a different ground than the 'unreliable hearsay' ground he raises on appeal, his contention that the court erred in [considering the challenged] evidence is not preserved for our review" (*People v Law*, 94 AD3d 1561, 1562, *lv denied* 19 NY3d 809; *see People v Wragg*, 41 AD3d 1273, 1273-1274, *lv denied* 9 NY3d 809; *People v Smith*, 17 AD3d 1045, 1045, *lv denied* 5 NY3d 705).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1172

TP 12-00755

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF EDWARD SUMMERS, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK K. WALSH 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 April 20, 2012) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1173

TP 12-00873

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF ALBERTO RODRIGUEZ, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

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

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, Wyoming County [Mark H. Dadd, A.J.], entered May 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: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1174

KA 11-01478

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CORI L. HUBERT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered June 1, 2011. The judgment convicted defendant, upon her plea of guilty, of criminal sale of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of criminal sale of a controlled substance in the fifth degree (Penal Law § 220.31). Contrary to defendant's contention, the record establishes that she knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1177

KA 11-00576

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES WILLIAMS, 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 (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered January 5, 2011. The judgment convicted defendant, upon a nonjury verdict, of attempted arson 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 nonjury verdict of attempted arson in the second degree (Penal Law §§ 110.00, 150.15). Contrary to defendant's contention, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crime 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).

Finally, defendant contends that County Court erred in sentencing him as a second felony offender based upon a prior conviction in the State of South Carolina. By consenting to the use of that conviction as a predicate for sentencing enhancement purposes, defendant waived his right to appellate review of his contention (*see generally People v Walker*, 96 AD3d 1481, 1482; *People v Hicks*, 12 AD3d 1044, 1045, *lv denied* 4 NY3d 799).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1178

KA 10-01213

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LARRY J. WILLIAMS, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered July 8, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: Defendant was convicted following a jury trial of robbery in the second degree (Penal Law § 160.10 [2] [b]) for robbing a bank while holding his hand in his sweatshirt pocket and informing a teller that he had a gun. Defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish that the victim perceived the "display" of a weapon (*see People v Gray*, 86 NY2d 10, 19). In any event, there is no merit to that contention. To establish the "display" element of the robbery statute, "[t]he People must show that the defendant consciously displayed something that could reasonably be perceived as a firearm, with the intent of forcibly taking property, and that the victim actually perceived the display" (*People v Lopez*, 73 NY2d 214, 220; *see People v Baskerville*, 60 NY2d 374, 381). "[T]he display requirement has been broadly construed to cover a wide range of actions which might reasonably create the impression in the mind of the victim that the robber is armed with a firearm" (*Lopez*, 73 NY2d at 220-221; *see Baskerville*, 60 NY2d at 381-382). Thus, it has been held that a hand consciously concealed in clothing may satisfy the display requirement "if under all the circumstances the defendant's conduct could reasonably lead the victim to believe that a gun is being used during the robbery" (*Lopez*, 73 NY2d at 220; *see People v Middleton*, 247 AD2d 713, 713, *lv denied* 92 NY2d 856). Upon our review of the record, we conclude that the evidence is legally sufficient to establish that the victim perceived that defendant displayed what appeared to be a

firearm during the course of the robbery (*see Lopez*, 73 NY2d at 221-222; *Middleton*, 247 AD2d at 713-714). Furthermore, although a finding that defendant did not display a firearm would not have been unreasonable (*see generally People v Bleakley*, 69 NY2d 490, 495), we conclude that, upon viewing the evidence in light of the elements of the crime of robbery in the second degree, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally People v Danielson*, 9 NY3d 342, 349; *Bleakley*, 69 NY2d at 495).

We further conclude that the sentence is not unduly harsh or severe. Contrary to defendant's contention, "the fact that [Supreme Court] imposed a more severe sentence after trial than that offered during plea negotiations does not demonstrate that defendant was punished for exercising his right to a trial" (*People v McCallum*, 96 AD3d 1638, 1640).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1188

CA 12-00377

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

RAYMOND PINK AND MICHELLE PINK,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MATTHEW RICCI, DEFENDANT-APPELLANT,
MARK WILBUR, CHRISTIN WILBUR, ROME YOUTH
HOCKEY ASSOCIATION, INC., WHITESTOWN YOUTH
HOCKEY ASSOCIATION, INC., CITY OF ROME,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

HISCOCK & BARCLAY, LLP, SYRACUSE (MATTHEW J. LARKIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CONWAY & KIRBY, LLP, LATHAM (ANDREW W. KIRBY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

GOLDBERG SEGALLA LLP, SYRACUSE (CORY DECRESENZA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS MARK WILBUR AND CHRISTIN WILBUR.

ROEMER WALLENS GOLD & MINEAUX, LLP, ALBANY (BENJAMIN D. HEFFLEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ROME YOUTH HOCKEY ASSOCIATION, INC. AND WHITESTOWN YOUTH HOCKEY ASSOCIATION, INC.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered July 18, 2011 in a personal injury action. The order and judgment denied the motion of defendant Matthew Ricci for leave to amend his answer, granted the cross motion of plaintiffs for partial summary judgment on liability against Matthew Ricci and granted the cross motions of defendants Rome Youth Hockey Association, Inc., Whitestown Youth Hockey Association, Inc., Mark Wilbur and Christin Wilbur for summary judgment on their cross claims for contribution against Matthew Ricci.

It is hereby ORDERED that said appeal from the order and judgment insofar as it granted the cross motions of defendants Mark Wilbur and Christin Wilbur and defendants Rome Youth Hockey Association, Inc. and Whitestown Youth Hockey Association, Inc. for summary judgment on their cross claims for contribution against defendant Matthew Ricci is unanimously dismissed and the order and judgment is modified on the law by denying the cross motion of plaintiffs for partial summary judgment on the issue of liability with respect to defendant Matthew

Ricci and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Raymond Pink (plaintiff) when Matthew Ricci (defendant) allegedly struck him during a fight that also involved fellow spectators at a youth hockey game. Defendant thereafter pleaded guilty to assault in connection with the fight. On a prior appeal, we concluded, inter alia, that Supreme Court properly granted plaintiffs' motion to compel defendant to respond both to their discovery demands, which included requests for copies of all court and police records from the criminal proceedings against defendant, and to questioning during his deposition concerning those records (*Pink v Ricci*, 74 AD3d 1773, 1774). We also concluded that defendant, through cross claims he asserted against the remaining defendants, waived his statutory privilege of confidentiality with respect to those records (*id.*).

In appeal No. 1, defendant appeals from an order and judgment that denied defendant's motion for leave to amend his answer to assert an affirmative defense based on the emergency doctrine, and granted plaintiffs' cross motion for partial summary judgment on liability against defendant. The order and judgment also granted the cross motions of defendants Mark Wilbur and Christin Wilbur (collectively, Wilburs), and defendants Rome Youth Hockey Association, Inc. and Whitestown Youth Hockey Association, Inc. (collectively, hockey associations) for summary judgment on their respective cross claims against defendant for contribution. In appeal No. 2, defendant appeals from an order that, upon reargument, adhered to the prior rulings granting the cross motions of the Wilburs and the hockey associations.

We note at the outset that we dismiss the appeal from the order and judgment in appeal No. 1 insofar as it granted the respective cross motions of the Wilburs and the hockey associations for summary judgment (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985; *see also Griffith Oil Co., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 15 AD3d 982, 983). Turning to the merits of plaintiffs' cross motion for partial summary judgment in appeal No. 1 and the cross motions of the Wilburs and the hockey associations for summary judgment, upon reargument, in appeal No. 2, we reject defendant's contention that the court erred in failing to deny the cross motions as premature. " '[T]he fact that discovery has not been completed does not provide a basis to defeat [the cross] motion[s] . . . inasmuch as [defendant] failed to establish that facts essential to justify opposition [to the cross motions] may exist but cannot then be stated' " (*Newman v Regent Contr. Corp.*, 31 AD3d 1133, 1134-1135; *see* CPLR 3212 [f]).

We further conclude in appeal No. 1, however, that the court erred in granting plaintiffs' cross motion for summary judgment on liability. We therefore modify the order and judgment in that appeal accordingly. "A criminal conviction may be given collateral estoppel effect in a subsequent civil litigation if there is an identity of

issues and a full and fair opportunity to litigate in the first action" (*Hooks v Middlebrooks*, 99 AD2d 663, 663). "A youthful offender adjudication is not a judgment of conviction for a crime or any other offense" (CPL 720.35 [1]) but, because defendant affirmatively placed his conduct at issue by his cross claims against the remaining defendants (*Pink*, 74 AD3d at 1774), his youthful offender adjudication may be used for collateral estoppel purposes (*see Green v Montgomery*, 95 NY2d 693, 701; *cf. Royal Globe Ins. Co. v Mottola*, 89 AD2d 907, 907-908). Here, plaintiffs established the requisite " 'identity of issue,' " and defendant had a full and fair opportunity to litigate the issue of his conduct in the underlying criminal matter (*see Captain v Hamilton*, 178 AD2d 938, 939). Nevertheless, we further conclude that the court erred in granting plaintiffs' cross motion for partial summary judgment on liability, i.e., negligence and proximate cause (*see Stevens v Zukowski*, 55 AD3d 1400, 1401), because plaintiffs failed to establish that defendant's conduct was the sole proximate cause of plaintiff's injuries (*see Strychalski v Dailey*, 65 AD3d 546, 547; *cf. Kramer v Griffin*, 156 AD2d 973, 973-974).

We also conclude in appeal No. 2 that the court, upon reargument, erred in adhering to its prior decision granting the cross motions of the Wilburs and the hockey associations for summary judgment on their cross claims against defendant for contribution. "The right to contribution exists among persons who are subject to liability for the same injury" (Vincent C. Alexander, Practice Commentaries, McKinneys Cons Laws of NY, Book 7B, CPLR C1401:2, at 504), and reflects a "right of apportionment among tortfeasors based on their actual degrees of fault as determined by the fact-finder" (CPLR C1401:1, at 502; *see* CPLR 1401, 1402). Here, there has been no apportionment of fault and, in view of the triable issues of fact as to the fault of the various parties, we conclude that the court should have denied the cross motions for summary judgment on the contribution cross claims against defendant (*see generally Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1188; *Anderson v Jefferson-Utica Group, Inc.*, 26 AD3d 760, 761; *Young v Buffalo Color Corp.*, 255 AD2d 920, 921). We specify, however, that our denial of the cross motions seeking summary judgment on the cross claims for contribution is without prejudice to renewal at an appropriate time.

Finally, contrary to defendant's contention in appeal No. 1, we conclude that the court properly denied his motion seeking leave to assert an affirmative defense based on the emergency doctrine. " 'Generally, leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court' " (*Carro v Lyons Falls Pulp & Paper, Inc.*, 56 AD3d 1276, 1277; *see* CPLR 3025 [b]; *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959). Here, the proposed amendment is lacking in merit (*see generally Manufacturers & Traders Trust Co. v Reliance Ins. Co.*, 8

AD3d 1000, 1001; *Christiano v Chiarenza*, 1 AD3d 1039, 1040).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1189

CA 12-00379

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

RAYMOND PINK AND MICHELLE PINK, PLAINTIFFS,

V MEMORANDUM AND ORDER

MATTHEW RICCI, DEFENDANT-APPELLANT,
MARK WILBUR, CHRISTIN WILBUR, ROME YOUTH HOCKEY ASSOCIATION, INC., WHITESTOWN YOUTH HOCKEY ASSOCIATION, INC., CITY OF ROME, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

HISCOCK & BARCLAY, LLP, SYRACUSE (MATTHEW J. LARKIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, SYRACUSE (CORY DECRESENZA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS MARK WILBUR AND CHRISTIN WILBER.

ROEMER WALLENS GOLD & MINEAUX, LLP, ALBANY (BENJAMIN D. HEFFLEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ROME YOUTH HOCKEY ASSOCIATION, INC. AND WHITESTOWN YOUTH HOCKEY ASSOCIATION, INC.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered November 21, 2011 in a personal injury action. The order, upon reargument, reaffirmed a prior order granting the cross motions of defendants Rome Youth Hockey Association, Inc., Whitestown Youth Hockey Association, Inc., Mark Wilbur and Christin Wilbur for summary judgment on their cross claims for contribution against defendant Matthew Ricci.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the cross motions of defendants Mark Wilbur and Christin Wilbur and defendants Rome Youth Hockey Association, Inc. and Whitestown Youth Hockey Association, Inc. for summary judgment on their cross claims for contribution against defendant Matthew Ricci are denied.

Same Memorandum as in *Pink v Ricci* ([appeal No. 1] ___ AD3d ___ [Nov. 9, 2012]).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1193

KA 10-00420

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NELSON VILLANEUVA, DEFENDANT-APPELLANT.

DAVID M. PALMIERE, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered February 3, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted burglary 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 burglary in the first degree (Penal Law §§ 110.00, 140.30 [3]). Defendant's contention that he was denied effective assistance of counsel does not survive the guilty plea where, as here, " 'there 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 Jackson*, ___ AD3d ___, ___ [Oct. 5, 2012], quoting *People v Burke*, 256 AD2d 1244, 1244, *lv denied* 93 NY2d 851). We reject defendant's further contention that the sentence is unduly harsh and severe.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1194

KA 06-02436

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY TURNER, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON 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 (Richard A. Keenan, J.), rendered July 6, 2006. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, criminal sale of a controlled substance in the third degree and operating a motor vehicle without a license.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Hernandez*, 288 AD2d 489, 490, *lv denied* 97 NY2d 729; *see People v Sorrentino*, 12 AD3d 1197, 1197-1198, *lv denied* 4 NY3d 748; *People v Hernandez*, 288 AD2d 489, 490, *lv denied* 97 NY2d 729).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1196

KA 09-00748

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSE D. PARSONS, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered December 23, 2008. 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: On appeal from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [1]), defendant contends that his waiver of the right to appeal is not valid and challenges the severity of the sentence. Although we agree with defendant that the waiver of the right to appeal is invalid because the perfunctory inquiry made by County Court was "insufficient to establish that the court 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767; *see People v Hamilton*, 49 AD3d 1163, 1164), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1197

KA 11-02037

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TAMARA L. BUTLER, ALSO KNOWN AS TAMARA LYNN BUTLER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered September 15, 2011. The judgment convicted defendant, upon her plea of guilty, of driving while intoxicated, a misdemeanor, and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1200

KA 09-01058

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY HARVEY, DEFENDANT-APPELLANT.

JOHN A. HERBOWY, ROME, FOR DEFENDANT-APPELLANT.

GREGORY HARVEY, DEFENDANT-APPELLANT PRO SE.

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 June 14, 2007. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, assault in the third degree and unlawful imprisonment 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 rape in the first degree (Penal Law § 130.35 [1]), assault in the third degree (§ 120.00 [1]), and unlawful imprisonment in the second degree (§ 135.05). We reject the contention of defendant that County Court erred in keeping him shackled during trial. The court ordered defendant to wear shackles at trial after conducting a hearing on the issue and making "findings on the record" concerning the necessity for such restraints (*People v Buchanan*, 13 NY3d 1, 4). We conclude that the court's articulated concern with the level of security in the courtroom and courtroom decorum, based on defendant's prior conduct, justified the court's decision to keep defendant shackled during trial (*see People v Rouse*, 79 NY2d 934, 935). The court minimized the possibility of prejudice by instructing the jury, during its preliminary instructions, to disregard the restraints (*see id.*).

Upon our review of the record, we further conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Moreover, although a finding that defendant did not commit the crimes of which he was convicted would not have been unreasonable (*see generally id.*), we conclude that, upon viewing the evidence in light of the elements of the crimes as charged to the jury, it cannot be said that the jury

failed to give the evidence the weight it should be accorded (*see generally People v Danielson*, 9 NY3d 342, 349). We further conclude that the sentence is not unduly harsh or severe. Finally, we have considered the contentions raised by defendant in his pro se supplemental brief and conclude that none warrants modification or reversal of the judgment.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1201

KA 09-02240

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANA BROWN, DEFENDANT-APPELLANT.

JEANNIE MICHALSKI, CONFLICT DEFENDER, GENESEO, FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered November 6, 2008. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree, attempted grand larceny in the fourth degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [1]), attempted grand larceny in the fourth degree (§§ 110.00, 155.30 [1]) and endangering the welfare of a child (§ 260.10 [1]). 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 encompasses his further contention that County Court erred in refusing to suppress his statement to the police (*see People v Kemp*, 94 NY2d 831, 833). We note, however, that the certificate of conviction incorrectly reflects that defendant was sentenced under the second count of the indictment to a term of incarceration of two years for attempted grand larceny in the fourth degree. The certificate of conviction must therefore be amended to reflect that he was sentenced to a definite term of incarceration of one year under that count (*see People v Saxton*, 32 AD3d 1286, 1286-1287).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1204

CA 12-00382

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

JACKIE D. SCIPIO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WAL-MART STORES EAST, L.P. AND ANTHONY DESANTIS,
DEFENDANTS-RESPONDENTS.

LESLIE H. COHEN, EAST SYRACUSE (KATHLEEN STEVENSON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

O'CONNOR, O'CONNOR, BRESEE & FIRST, P.C., ALBANY (MICHAEL P. CAVANAGH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered April 27, 2011. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: In this personal injury action, plaintiff appeals from an order granting the motion of defendants for leave to amend the answer to assert the affirmative defenses of res judicata and collateral estoppel and for summary judgment dismissing the complaint based on those doctrines. We reject plaintiff's contention that those doctrines do not apply to the facts before us. We note at the outset that the doctrines of res judicata and collateral estoppel "are applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 499; *see Yoonessi v State of New York*, 289 AD2d 998, 1000, *lv denied* 98 NY2d 609, *cert denied* 537 US 1047). Furthermore, contrary to plaintiff's contention, defendants " 'demonstrate[d] the identicality and decisiveness of the issue' " decided in the prior administrative proceeding, and plaintiff failed to establish " 'the absence of a full and fair opportunity to litigate the issue in [the] prior . . . proceeding' " (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349, quoting *Ryan*, 62 NY2d at 501).

Contrary to plaintiff's further contention, Supreme Court did not abuse or improvidently exercise its discretion in granting that part of defendants' motion for leave to amend the answer. "Leave to amend the pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay" (*McCaskey, Davies & Assoc. v New*

York City Health & Hosps. Corp., 59 NY2d 755, 757, quoting CPLR 3025 [b]; *see Bryndle v Safety-Kleen Sys., Inc*., 66 AD3d 1396, 1396) and, here, plaintiff failed to establish either prejudice or surprise resulting from the delay.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1206

CA 12-00689

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

CHRISTINE L. PALERMO, PLAINTIFF-RESPONDENT,

V ORDER

JOSEPH A. PALERMO, DEFENDANT-APPELLANT.

MAUREEN A. PINEAU, ROCHESTER, FOR DEFENDANT-APPELLANT.

HURWITZ LAW, P.C., ROCHESTER (JAYME HURWITZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered November 15, 2011. The order, inter alia, denied the motion of defendant to dismiss the complaint.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1207

CA 12-00653

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

KENNETH L. CRACAS,
PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

KERRI A. CRACAS,
DEFENDANT-APPELLANT-RESPONDENT.

LISA BETH OLDER, NEW YORK CITY, FOR DEFENDANT-APPELLANT-RESPONDENT.

ROSS & GOULD-ROSS, ROCHESTER (DAVID G. ROSS OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

STEPHEN R. WARNER, ATTORNEY FOR THE CHILDREN, SODUS, FOR RYAN C. AND DYLAN C.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered November 23, 2011. The order, inter alia, granted plaintiff sole legal custody of the parties' children.

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: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1208

CA 12-00676

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

DANIEL P. SZCZUKOWSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PROGRESSIVE NORTHEASTERN INSURANCE COMPANY,
DEFENDANT-APPELLANT.

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

SAKOWSKI & MARKELLO, LLP, ELMA (JOSEPH A. SAKOWSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered December 13, 2011 in a declaratory judgment action. The judgment, inter alia, declared that defendant is obligated to provide coverage to its insured in the underlying action.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and judgment is granted in favor of defendant as follows:

> It is ADJUDGED AND DECLARED that defendant is not obligated to provide coverage to its insured in the underlying action.

Memorandum: Defendant appeals from a judgment declaring that it is obligated to provide insurance coverage to its insured in the underlying personal injury action. Plaintiff was involved in a one-vehicle accident on April 22, 2005 when he tried to avoid colliding with a vehicle driven by defendant's insured. It is undisputed that defendant's insured did not provide notice of the accident to defendant and that defendant received notice of the accident from its agent when the insured provided the agent with the summons and complaint in the underlying action, which was commenced on December 6, 2005. Supreme Court erred, following a nonjury trial, in implicitly determining that the insured was justified in failing to provide defendant with notice because she reasonably believed that she was not liable (*cf. Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748, 751). The insured or the party otherwise seeking to impose the obligation to provide coverage "bears the burden of establishing the reasonableness of the proffered excuse" (*Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 744) and, here, neither the insured nor plaintiff

alleged that the insured's failure to report the accident to defendant was reasonable. In any event, we note that the insured was issued a citation for failure to yield the right of way and she was aware that plaintiff had sustained serious injuries. We therefore conclude that the insured was not justified in believing that there would not be a lawsuit, and thus the delay in notifying defendant was not reasonable.

It is also undisputed that plaintiff did not exercise his "independent right" to notify defendant of the accident (*Potter v North Country Ins. Co.*, 8 AD3d 1002, 1004). "[T]he injured party has the burden of proving that he, she, or counsel, acted diligently in attempting to ascertain the identity of the insurer, and thereafter expeditiously notified the insurer" (*Spentrev Realty Corp. v United Natl. Specialty Ins. Co.*, 90 AD3d 636, 637). Here, although plaintiff promptly sought legal counsel, he admitted that he did not attempt to ascertain the identity of the insurer and that he did not notify defendant of the accident.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1209

CA 11-02246

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

IN THE MATTER OF RICHARD ROBLES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANDREA W. EVANS, CHAIRWOMAN, NEW YORK STATE
DIVISION OF PAROLE, RESPONDENT-RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered June 23, 2011 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition seeking to annul the Parole Board's determination denying him parole release. "This appeal must be dismissed as moot because the determination expired during the pendency of this appeal, and the Parole Board denied petitioner's subsequent request for parole release" (*Matter of Patterson v Berbary*, 1 AD3d 943, 943, *appeal dismissed and lv denied* 2 NY3d 731; *see Matter of Ansari v Travis*, 9 AD3d 901, 901, *lv denied* 3 NY3d 610).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1213

CA 12-00915

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

STILLWATER HYDRO PARTNERS, LP,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STILLWATER HYDRO ASSOCIATES, LLC,
DEFENDANT-RESPONDENT.

MELVIN & MELVIN, PLLC, SYRACUSE (ELIZABETH A. GENUNG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JOSHUA A. SABO, TROY, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered August 15, 2011 in a declaratory judgment action. The order, insofar as appealed from, denied plaintiff's motion for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted, and judgment is granted in favor of plaintiff as follows:

> It is ADJUDGED AND DECLARED that defendant is not entitled to the use of the escrow funds to pay for the cost of replacing the trash rack cleaner.

Memorandum: Plaintiff appeals from an order denying its motion seeking summary judgment in this declaratory judgment action. We agree with plaintiff that Supreme Court erred in denying the motion. The parties entered into an asset purchase agreement (APA) for defendant's purchase of a hydroelectric plant from plaintiff. The APA included an escrow agreement as security for the performance of the APA. At issue is whether defendant is entitled to the use of the escrow funds of $75,000 to pay for the cost of replacing the trash rack cleaner, which became inoperable within six months after the closing. It is axiomatic that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569; *see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162). Here, although the parties correctly agree that the APA is unambiguous, they disagree with respect to the "plain meaning of its terms" (*Greenfield*, 98 NY2d at 569). Paragraph 3.2 states in relevant part: "**Suitability of Assets: Disclaimer.** *Subject to matters set forth in Schedule 3.2*, the Purchased Assets . . . are suitable for the purposes for which

they have been operated . . . and to Seller's Knowledge are not currently in need of replacement or material repair" (italicized emphasis added). Schedule 3.2 states in relevant part: "Trash rack cleaner is also wearing out and may need replacement." We conclude that, by its terms, the APA excludes from the warranty of suitability the matters set forth in schedule 3.2, including the trash rack cleaner at issue.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1216

KAH 11-02050

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JAMAR GILMORE, PETITIONER-APPELLANT,

V ORDER

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

TIMOTHY J. BRENNAN, AUBURN, 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 (Thomas G. Leone, A.J.), entered June 29, 2011 in a habeas corpus proceeding. The judgment denied and dismissed the petition.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1217

KA 11-02319

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CORDDEREAL M. TOMPKINS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered June 9, 2011. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1226

CA 12-00916

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

KIM M. COCO, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF JOSEPH COCO, DECEASED, PLAINTIFF-APPELLANT,

V ORDER

TOWN OF IRONDEQUOIT, TOWN OF IRONDEQUOIT HISTORIC PRESERVATION COMMISSION, PATRICIA WAYNE, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

KNAUF SHAW LLP, ROCHESTER (AMY K. KENDALL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARTER SECREST & EMERY LLP, ROCHESTER (JULIA GREEN SEWRUK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered July 22, 2011. The order and judgment granted the motion of defendants Town of Irondequoit, Town of Irondequoit Historic Preservation Commission and Patricia Wayne to dismiss the complaint and dismissed the complaint against those defendants.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1229

CA 11-02582

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

JOHN D. JUSTICE, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 116230.)

JOHN D. JUSTICE, CLAIMANT-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PAUL GROENWEGEN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarek, J.), entered November 17, 2011. The order denied claimant's motions to compel disclosure and granted defendant's motion for a protective order.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1236

KA 11-01631

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACOB STUMP, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered July 28, 2011. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the DNA databank fee and sex offender registration fee and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him as a juvenile offender upon his guilty plea of rape in the first degree (Penal Law § 130.35 [1]), defendant contends that his bargained-for sentence of imprisonment of 3 to 9 years is unduly harsh and severe and that County Court erred in directing him to pay a DNA databank fee and a sex offender registration fee. Based on our review of the record, we conclude that there is no basis upon which to modify the sentence of imprisonment in the interest of justice (*see* CPL 470.15 [2] [c]), but we agree with defendant that the sentence should be vacated insofar as it directed him to pay those fees.

"Penal Law § 60.00 (2) provides that the 'sole provision' of article 60 'that shall apply in the case of an offense committed by a juvenile offender is section 60.10 . . . and no other provisions of this article shall be deemed or construed to apply in any such case.' Where statutory language is clear and unambiguous, a court is constrained to give effect to the plain meaning of the words used" (*People v McFadden*, 205 AD2d 560, 560; *see People v Hurd*, 220 AD2d 454, 454; William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 60.10). Section 60.10 (1) provides that a juvenile offender who is convicted of a crime may be sentenced to a term of imprisonment in accordance with section 70.05 or may be sentenced upon a youthful offender finding in accordance with section 60.02. Here, it is undisputed that there was no youthful offender

finding. Section 60.10 (2) provides that subdivision 60.10 (1) applies when sentencing a juvenile offender "notwithstanding the provisions of any other law that deals with the authorized sentence for persons who are not juvenile offenders" other than when considering the use of a juvenile offender conviction as a predicate offense. Although neither *Hurd* nor *McFadden* involved DNA databank or sex offender registration fees, the reasoning of those cases applies herein. Section 60.10 (1) does not permit the imposition of any fines or fees on a juvenile offender and, because section 60.10 is the sole provision that applies to juvenile offenders, the court erred in imposing the DNA databank and sex offender registration fees. We therefore modify the judgment accordingly.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1237

KA 10-01927

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REGINALD ABRAMS, DEFENDANT-APPELLANT.

REGINALD ABRAMS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered July 6, 2010. 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 his pro se 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 erred in denying those parts of his omnibus motion seeking suppression of the weapon and his statements to the police. Although the court's bench decision denying defendant's suppression requests is an order within the meaning of CPL 710.70 (2) and thus it is the proper subject of appellate review (*see People v Elmer*, 19 NY3d 501, 507-509), we reject defendant's contentions.

We analyze defendant's contentions pursuant to the four-tiered framework for citizen-police encounters set forth in *People v De Bour* (40 NY2d 210, 223; *see People v Moore*, 6 NY3d 496, 498-499; *People v Hollman*, 79 NY2d 181, 184-185). In addition, we "accord great weight to the determination of the hearing court with its particular advantage of having seen and heard the witnesses" (*People v Williams*, 202 AD2d 976, 976, *lv denied* 83 NY2d 916). Consequently, where, as here, the hearing court's findings are supported by the record, they will not be disturbed (*see People v McLee*, 249 AD2d 995, 995, *lv denied* 92 NY2d 901).

The evidence at the suppression hearing establishes that two Syracuse police officers were patrolling an area in which there had recently been a series of burglaries involving the theft of electronics equipment. They observed defendant, who appeared to be

carrying a laptop computer under his arm. The officers stopped their vehicle and began to walk toward defendant, but had not yet spoken to him. At that point, the officers had engaged in, at most, a level one intrusion by approaching defendant in order to seek information based on some objective credible reason not necessarily indicative of criminality (*see Hollman*, 79 NY2d at 185; *De Bour*, 40 NY2d at 223; *People v Rodriguez*, 82 AD3d 1614, 1615, *lv denied* 17 NY3d 800). Before the officers took any other action, however, defendant said "[t]hey're just jeans," and held up the object he was carrying. As he did so, the officers clearly observed the outline of a handgun in defendant's sweatshirt. Furthermore, as they continued to approach defendant but before they spoke, defendant turned and ran, dropping the handgun as he fled. The officers pursued him and took him into custody. Consequently, when the officers seized defendant, they had reasonable suspicion to believe that he had committed a crime (*see People v Leung*, 68 NY2d 734, 736-737; *De Bour*, 40 NY2d at 223; *People v Lowe*, 237 AD2d 903, 904, *lv denied* 89 NY2d 1096).

Contrary to defendant's further contention, the court did not abuse its discretion in denying his request for a new attorney without conducting a hearing. "The decision to allow a defendant to substitute counsel is largely within the discretion of the court to which the application is made . . . [Furthermore, c]ontrary to defendant's implicit contention, he did not establish that there was a complete breakdown in communication with h[is] attorney" (*People v Jackson*, 85 AD3d 1697, 1699, *lv denied* 17 NY3d 817 [internal quotation marks omitted]; *see People v Kobza*, 66 AD3d 1387, 1388-1389, *lv denied* 13 NY3d 939; *see generally People v Linares*, 2 NY3d 507, 510-511).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1238

KA 10-00694

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

YUSUF HASSEM, ALSO KNOWN AS YUSUF A. HASSEM, ALSO KNOWN AS LOUIS L. REED, ALSO KNOWN AS LOUIS REED, ALSO KNOWN AS YUSEF HASSEM, ALSO KNOWN AS ANTE L. DAVIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered March 17, 2010. The judgment convicted defendant, upon a jury verdict, of grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of grand larceny in the fourth degree (Penal Law § 155.30 [1]). We reject defendant's contention that the conviction is not supported by legally sufficient evidence. "[E]ven in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is 'whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Hines*, 97 NY2d 56, 62, *rearg denied* 97 NY2d 678), a standard that was met here. Defendant was found guilty of stealing $2,000 in cash from a woman whom he had just met. The victim testified that she had the cash in her lap when defendant was present in her car and hugged her, and she realized almost immediately after he had left the car that it was gone. 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 (*see generally People v Bleakley*, 69 NY2d 490, 495). Even assuming, arguendo, that a different verdict would not have been unreasonable (*see Danielson*, 9 NY3d at 348), we conclude that the jury did not fail to give the evidence the weight it should be accorded (*see People v Johnson*, 94 AD3d 1563, 1564, *lv denied* 19 NY3d 962; *see generally Bleakley*, 69 NY2d at 495). Upon our review,

we "must give [g]reat deference . . . [to the factfinder's] opportunity to view the witnesses, hear the testimony and observe demeanor" (*People v Flagg*, 59 AD3d 1003, 1004, *lv denied* 12 NY3d 853 [internal quotation marks omitted]).

Defendant failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct on summation (*see People v Wright*, 85 AD3d 1642, 1643, *lv denied* 17 NY3d 863) and, in any event, that contention is without merit. Contrary to defendant's contention, the prosecutor did not impermissibly shift the burden of proof to defendant or vouch for a police officer who testified. " 'The prosecutor made no reference to defendant's failure to testify, and the comments he did make were not of such character as would naturally and reasonably be interpreted by the jury as adverse comment on defendant's failure to take the stand' " (*People v Spagnualo*, 5 AD3d 995, 997, *lv denied* 2 NY3d 807, quoting *People v Burke*, 72 NY2d 833, 836, *rearg denied* 72 NY2d 953). Moreover, the prosecutor's comment that the officer investigated the case "rather well" was "a fair response to the summation of defense counsel, who had attacked the credibility [of the officer]" (*People v West*, 4 AD3d 791, 792).

Finally, the sentence is not unduly harsh or severe in light of defendant's extensive criminal history involving similar crimes.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1241

KA 10-01835

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACKSON SHOL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered September 1, 2010. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree and criminal contempt 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 following a jury trial of burglary in the first degree (Penal Law § 140.30 [3]) and criminal contempt in the first degree (§ 215.51 [b] [vi]), defendant contends that County Court should have granted his motion to dismiss the indictment because the integrity of the grand jury proceeding was impaired. That contention, however, is "not preserved for our review because defendant did not move to dismiss the indictment pursuant to CPL 210.35 (5)" (*People v Workman*, 277 AD2d 1029, 1031, *lv denied* 96 NY2d 764; *see People v Beyor*, 272 AD2d 929, 930, *lv denied* 95 NY2d 832; *People v Sheltray*, 244 AD2d 854, 854, *lv denied* 91 NY2d 897). In any event, defendant's contention lacks merit. A grand jury proceeding is defective when it "fails to conform to the requirements of article one hundred ninety [concerning grand jury proceedings] to such degree that the integrity thereof is impaired and prejudice to the defendant *may* result" (CPL 210.35 [5] [emphasis added]; *see People v Darby*, 75 NY2d 449, 454). Although a "defendant need not demonstrate actual prejudice under this statutory scheme to prevail" (*People v Sayavong*, 83 NY2d 702, 709), " 'dismissal of an indictment under CPL 210.35 (5) must meet a high test and is limited to instances of prosecutorial misconduct, fraudulent conduct or errors which potentially prejudice the ultimate decision reached by the [g]rand [j]ury' " (*Sheltray*, 244 AD2d at 855; *see People v Huston*, 88 NY2d 400, 409). Here, there was no "articulable 'likelihood of' or . . . 'potential for' prejudice" (*People v Adessa*, 89 NY2d 677, 686).

The brief reference to a prior incident of domestic violence between defendant and the complainant did not impair the integrity of the proceedings or result in potential prejudice to defendant "in light of the overwhelming evidence before the grand jury that he committed the crimes charged" (*People v Ramirez*, 298 AD2d 413, 413, *lv denied* 99 NY2d 563; *see People v Rivas*, 260 AD2d 583, 583-584, *lv denied* 93 NY2d 1025; *People v McCreary*, 186 AD2d 1070, 1071, *lv denied* 80 NY2d 1028). Furthermore, we conclude that the prosecutor conducted an adequate voir dire of the grand juror who indicated that she was possibly aware of the prior incident (*see e.g. People v Monserrate*, 24 Misc 3d 1229[A], 2009 NY Slip Op 51665[U], *5-6; *cf. People v Revette*, 48 AD3d 886, 887-888).

Although defendant contends that the People failed to establish that he used or threatened to use a dangerous instrument during the commission of the burglary and thus that the evidence is legally insufficient to support the burglary conviction, he "made only a general motion to dismiss and thus failed to preserve his contention for our review" (*People v Johnson*, 43 AD3d 1422, 1422, *lv denied* 9 NY3d 1035; *see People v Gray*, 86 NY2d 10, 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 with respect to the use or threatened use of a dangerous instrument. The evidence at trial established that, when defendant broke into the complainant's apartment, he possessed a wooden or metal "baseball cue," which he used to "smash[]" through various doors in the residence, including a wooden bedroom door. Such evidence is legally sufficient to establish that the object used by defendant was an "instrument, article or substance . . . which, under the circumstances in which it [was] used . . . or threatened to be used, [was] readily capable of causing death or other serious physical injury" (Penal Law § 10.00 [13]; *see People v Carter*, 53 NY2d 113, 116; *Matter of Shakiea B.*, 53 AD3d 1057, 1059; *People v Griffin*, 24 AD3d 972, 973, *lv denied* 6 NY3d 834; *see generally People v Bleakley*, 69 NY2d 490, 495). "Viewing the evidence in light of the elements of the crimes as charged to the jury . . . , and affording the appropriate deference to the jury's credibility determinations . . . , we reject defendant's [further] contention that the verdict is against the weight of the evidence" (*People v Miller*, 93 AD3d 1305, 1305-1306; *see People v Danielson*, 9 NY3d 342, 348-349; *Bleakley*, 69 NY2d at 495).

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1242

KA 11-00810

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

GEORGE E. JOHNSON, DEFENDANT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Genesee County Court (Robert C. Noonan, J.), rendered March 15, 2011. Defendant was resentenced upon his conviction of assault in the first degree and attempted assault in the first degree.

It is hereby ORDERED that the resentence so appealed from is unanimously affirmed (*see People v Lingle*, 16 NY3d 621).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1243

KA 10-01594

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VICTOR GASTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered May 5, 2010. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient because the testimony of the victim was incredible as a matter of law (*see People v Holloway*, 97 AD3d 1099, 1099, *lv denied* 19 NY3d 1026; *People v Brown*, 67 AD3d 1369, 1369-1370, *lv denied* 14 NY3d 886) and, in any event, that contention is without merit. The victim's testimony "was not incredible as a matter of law inasmuch as it was not impossible of belief, i.e., it was not manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Harris*, 56 AD3d 1267, 1268, *lv denied* 11 NY3d 925). 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 (*see generally People v Bleakley*, 69 NY2d 490, 495). "Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, [we] must give '[g]reat deference . . . [to the factfinder's] opportunity to view the witnesses, hear the testimony and observe demeanor' " (*People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831, quoting *Bleakley*, 69 NY2d at 495). Although an acquittal would not have been unreasonable given the inconsistencies in the victim's testimony (*see People v Kilbury*, 83 AD3d 1579, 1580-1581, *lv denied* 17 NY3d 860; *People v Hill*, 74 AD3d 1782, 1782, *lv denied* 15 NY3d 805), it cannot be said that the jury failed to give the evidence

the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant's contention that County Court erred in denying his motion to sever the two assault counts. The two counts both charged assault in the second degree, although under different subdivisions, and involved the same victim. Even assuming, arguendo, that those counts were not properly joinable pursuant to CPL 200.20 (2) (b), we nevertheless conclude that they were properly joinable pursuant to CPL 200.20 (2) (c) because they "are defined by the same or similar statutory provision and consequently are the same or similar in law," and defendant failed to show good cause for severance (*see* CPL 200.20 [3]; *see generally People v Mahboubian*, 74 NY2d 174, 183). Indeed, the fact that defendant was acquitted of one count indicates that the jury was able to consider the proof concerning each count separately (*see People v Davis*, 19 AD3d 1007, 1007).

Contrary to defendant's contention, he was not denied a fair trial by erroneous evidentiary rulings. The court properly sustained two objections to irrelevant questions that defense counsel asked the victim during cross-examination (*see generally People v Baker*, 294 AD2d 888, 889, *lv denied* 98 NY2d 708). Defendant failed to preserve for our review his further contention that certain comments in the prosecutor's opening and closing statements deprived him of a fair trial (*see* CPL 470.05 [2]; *People v Brown*, 94 AD3d 1461, 1462, *lv denied* 19 NY3d 995), and in any event his contention is without merit. "Absent bad faith or undue prejudice, reversal is not required because the prosecutor fails to prove every statement or representation made during an opening statement" (*People v Evans*, 242 AD2d 948, 949, *lv denied* 91 NY2d 834). The majority of the prosecutor's comments on summation to which defendant objects on appeal were within the " 'broad bounds of rhetorical comment permissible in closing argument' " (*People v Williams*, 28 AD3d 1059, 1061, *affd* 8 NY3d 854, quoting *People v Galloway*, 54 NY2d 396, 399) and, in any event, they were " 'either a fair response to defense counsel's summation or fair comment on the evidence' " (*People v Green*, 60 AD3d 1320, 1322, *lv denied* 12 NY3d 915). Those comments that were arguably beyond those bounds and were not fair response or fair comment were not so egregious as to deprive defendant of a fair trial (*see People v Figgins*, 72 AD3d 1599, 1600, *lv denied* 15 NY3d 893; *People v Rivera*, 281 AD2d 927, 928, *lv denied* 96 NY2d 906).

We reject the contention of defendant that he was denied effective assistance of counsel. Inasmuch as defendant was not denied a fair trial by any alleged instances of prosecutorial misconduct, defense counsel's failure to object to those comments does not constitute ineffective assistance of counsel (*see People v Lyon*, 77 AD3d 1338, 1339, *lv denied* 15 NY3d 954). In addition, defendant failed to "demonstrate the absence of strategic or other legitimate explanations" for defense counsel's motion to preclude the People from introducing certain evidence that defendant now claims would have helped his defense (*People v Garcia*, 75 NY2d 973, 974). Defendant's contention that defense counsel was ineffective in failing to inform

him in a timely manner of his right to appear and testify before the grand jury is based on matters outside the record and thus must be raised by way of a motion pursuant to CPL 440.10 (*see People v Bryant*, 1 AD3d 966, 966). We have reviewed the remaining instances of alleged ineffective assistance of counsel raised by defendant and conclude that he received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, the sentence is not unduly harsh or severe.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1246

CAF 11-00946

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

IN THE MATTER OF JESSICA LEIGH MARSH,
PETITIONER-APPELLANT,

V ORDER

JASON MICHAEL HARDY, RESPONDENT-RESPONDENT.

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

MULDOON & GETZ, ROCHESTER (MARGARET MCMULLEN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

MARK P. MALAK, ATTORNEY FOR THE CHILD, CLINTON, FOR EVAN M.H.

Appeal from an order of the Family Court, Oneida County (Brian M. Miga, J.H.O.), entered April 8, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded primary physical custody of the parties' child to respondent.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1247

CAF 11-01626

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

IN THE MATTER OF COMMISSIONER OF CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF KAREN E. JORDAN, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ERIC M. JORDAN, RESPONDENT-APPELLANT.

SCHAVON R. MORGAN, MACHIAS, FOR RESPONDENT-APPELLANT.

STEPHEN D. MILLER, OLEAN, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered July 18, 2011 in a proceeding pursuant to Family Court Act article 4. The order denied respondent's written objections to an order issued by the Support Magistrate.

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

Memorandum: Petitioner commenced this proceeding seeking to recover child support arrears, and respondent father cross-petitioned for a downward modification of his support obligation. Contrary to the father's contention, Family Court properly denied his objections to the Support Magistrate's order that, after a hearing, granted the petition and denied the cross petition.

With respect to the petition, "[t]here is a presumption that a [parent] has sufficient means to support his or her . . . minor children . . . , and the evidence that [the parent] failed to pay support as ordered constitutes 'prima facie evidence of a willful violation' " (*Matter of Christine L.M. v Wlodek K.* [appeal No. 2], 45 AD3d 1452, 1452; *see* Family Ct Act §§ 437, 454 [3] [a]; *Matter of Powers v Powers*, 86 NY2d 63, 68-69), "shifting to [the parent] the burden of going forward" (*Powers*, 86 NY2d at 69). To meet that burden, the father was required to "offer some competent, credible evidence of his inability to make the required payments" (*id.* at 69-70). Where, as here, a parent "testifie[s] that he [or she] was unable to meet [the] support obligation because physical [or mental] disabilities interfered with his [or her] ability to maintain employment, . . . [the parent must] offer competent medical evidence to substantiate that testimony" (*Matter of Fogg v Stoll*, 26 AD3d 810, 810-811; *see Matter of Yamonaco v Fey*, 91 AD3d 1322, 1323, *lv denied* 19 NY3d 803). The father failed to offer such evidence, and further

failed to establish that the disability that allegedly prevented him from working continued to exist at the time of the hearing. Consequently, the court properly confirmed that part of the Support Magistrate's order that granted the petition.

The court also properly confirmed that part of the Support Magistrate's order that denied the father's cross petition. When a party seeking to modify a support obligation alleges that " 'the change in circumstances is the loss of employment, a party seeking a downward modification must make a good-faith effort at seeking re-employment commensurate with his or her qualifications and experience' " (*Matter of Gray v Gray*, 52 AD3d 1287, 1288, *lv denied* 11 NY3d 706). Additionally, when a party loses a job due to injury or illness, " 'the party has the same obligation to find some other type of employment, unless that party can demonstrate that he or she is unable to perform other work' " (*id.*). Here, the father failed to establish either that he made a good faith effort to seek other employment or that he is unable to perform other work, and he thus failed to meet his burden on the cross petition.

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1248

CA 12-00668

PRESENT: CENTRA, J.P., CARNI, WHALEN, AND MARTOCHE, JJ.

WILLIAM F. WHITE, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF BONNIE L. WHITE, DECEASED, PLAINTIFF-APPELLANT,

V ORDER

FRANK B. IACOVANGELO, AS ADMINISTRATOR OF THE ESTATE OF THAD BOSS, M.D., DECEASED, ET AL., DEFENDANTS, AND TARA J. MAHAR, M.D., DEFENDANT-RESPONDENT.

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

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (DANIEL P. PURCELL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered June 30, 2011. The order granted the motion of defendants for summary judgment dismissing all claims against defendant Tara J. Mahar, M.D.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1251

CA 12-00631

PRESENT: SMITH, J.P., CENTRA, LINDLEY, AND WHALEN, JJ.

DANIEL MANCUSO, AS EXECUTOR OF THE ESTATE OF ROSE M. KIJ, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DOING BUSINESS AS MILLARD FILLMORE GATES HOSPITAL, ET AL., DEFENDANTS, AND TWIN CITY AMBULANCE CORPORATION, DEFENDANT-APPELLANT.

MACDONALD & HAFNER, ESQS., BUFFALO (PHYLISS A. HAFNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, LANCASTER (DAVID W. OLSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered July 13, 2011. The order, insofar as appealed from, denied that part of the motion of defendant Twin City Ambulance Corporation seeking dismissal of plaintiff's seventh cause of action.

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

Memorandum: Plaintiff commenced this action against numerous defendants alleging, inter alia, that their negligence caused the wrongful death of Rose M. Kij (decedent). In addition, plaintiff alleged in the seventh cause of action that Twin City Ambulance Corporation (defendant) "was negligent in the medical transportation services that it provided to [decedent]." Defendant moved pursuant to CPLR 3211 and 3212 for an order dismissing the amended complaint against it based upon the statute of limitations and plaintiff's failure to attach a certificate of merit to the amended complaint (*see* CPLR 3012-a). Supreme Court granted that part of the motion seeking dismissal of the claim for wrongful death against defendant in the fourth cause of action, but it denied that part of the motion seeking dismissal of the seventh cause of action, concluding that such cause of action sounded in ordinary negligence. We now affirm.

Plaintiff's sole basis for liability against defendant in the seventh cause of action is that defendant failed to deliver to the hospital a medication list that was prepared by a member of decedent's family and given to defendant's employees by that family member. While we agree with defendant that a mistake in taking a patient's

medical history is a claim that sounds in medical malpractice (*see generally Bleiler v Bodnar*, 65 NY2d 65, 72), the claim here concerns the "failure to communicate significant medical findings to a . . . treating physician," and that claim sounds in ordinary negligence (*Mosezhnik v Berenstein*, 33 AD3d 895, 898; *see Glasheen v Long Is. Diagnostic Imaging*, 306 AD2d 515, 515, *lv denied* 3 NY3d 612; *Yaniv v Taub*, 256 AD2d 273, 274). Because the seventh cause of action sounds in ordinary negligence, it is governed by the three-year statute of limitations found in CPLR 214 and is thus timely. Furthermore, "[i]n ordinary negligence, a medical affidavit setting out merit is unnecessary" *(Matter of Caracci v State of New York*, 178 AD2d 876, 877; *see generally* CPLR 3012-a).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1253

CA 12-00514

PRESENT: SMITH, J.P., CENTRA, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF ONTARIO SQUARE REALTY CORP.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ASSESSOR OF THE TOWN OF FARMINGTON, DONNA
LAPLANT, RESPONDENT-RESPONDENT.

PANZARELLA & COIA, P.C., ROCHESTER (CHAD M. HUMMEL OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Ontario County (Kenneth R. Fisher, J.), entered January 26, 2011 in a proceeding pursuant to RPTL article 7. The order granted the motion of respondent to dismiss the petition.

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

Memorandum: Petitioner commenced this RPTL article 7 proceeding seeking review of the real property tax assessment of its property. Supreme Court properly granted respondent's motion to dismiss the petition on the ground that petitioner failed to serve the notice of petition and petition within the applicable time period provided in CPLR 306-b. In opposing the motion, petitioner's attorney submitted an affirmation seeking an extension of time for service in the interest of justice. Contrary to petitioner's contention, it "was required to serve a notice of cross motion in order to obtain the affirmative relief of an extension of time to serve the [petition with a notice of petition or an order to show cause] upon [respondent] pursuant to CPLR 306-b" (*Lee v Colley Group McMontebello, LLC*, 90 AD3d 1000, 1000-1001; *see DeLorenzo v Gabbino Pizza Corp.*, 83 AD3d 992, 993). In any event, the court properly considered all of the relevant factors in determining whether to extend the time for service in the interest of justice (*see* CPLR 306-b; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106; *Brown v Wilson Farms, Inc.*, 52 AD3d 1324, 1324-1325), and the court properly denied petitioner's request for that relief (*see Eggleston v A.C. & S., Inc.*, 17 AD3d 1167, 1167-1168).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1256.1

CA 12-00679

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

IN THE MATTER OF NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

AMALGAMATED TRANSIT LOCAL UNION 1342 AND VINCENT G. CREHAN, RESPONDENTS-RESPONDENTS.

DAVID J. STATE, BUFFALO (WAYNE R. GRADL OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment and order (one paper) of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered January 6, 2012 in a proceeding pursuant to CPLR article 75. The judgment and order denied the petition to stay arbitration.

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

Memorandum: Petitioner and Amalgamated Transit Local Union 1342 (respondent) are parties to a series of successive collective bargaining agreements governing the terms and conditions of employment of bargaining unit employees. Here, one of those employees began employment with petitioner as a bus operator in 2004, and in 2010 was involved in an accident following which she submitted a workers' compensation benefits claim. In the course of processing the claim, petitioner learned that, in September 2000, the employee had been involved in an automobile accident, resulting in cervical and lumbar spine injuries that carried a diagnosis of total disability for approximately one year, and a "permanent partial disability" thereafter. The employee did not disclose those injuries in the medical history portion of her employment application in 2004. Petitioner annulled her employment on the ground that she had provided false information in her application, whereupon respondent filed a grievance on behalf of the employee. Petitioner then commenced this proceeding under CPLR article 75 seeking a stay of arbitration on the ground that the employee's employment was void ab initio based on material omissions in her employment application, and there was no agreement between the parties to arbitrate the dismissal of an employee whose employment was void ab initio.

Supreme Court properly denied the petition. Contrary to petitioner's contention, it did not have a common-law right to void the employee's employment ab initio. Any preexisting injuries that the employee had would not automatically disqualify her from her position; rather, any such preexisting injuries must actually "interfere[] with the ability to control and safely operate a bus" (15 NYCRR 6.10; *see generally Matter of Richie v Coughlin*, 148 AD2d 178, 182-183, *appeal dismissed* 75 NY2d 765, *lv denied* 75 NY2d 707, *cert denied* 498 US 824). Thus, because any disqualification would be discretionary, the employee "must be afforded 'a meaningful opportunity to invoke the discretion of the decision maker [as] a precondition to his [or her] termination' " (*Prue v Hunt*, 157 AD2d 160, 165, *affd* 78 NY2d 364).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1256

CA 11-02245

PRESENT: SMITH, J.P., CENTRA, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF PHILIP TAYLOR,
PETITIONER-APPELLANT,

V ORDER

ANDREA W. EVANS, CHAIRWOMAN, NEW YORK STATE
DIVISION OF PAROLE, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH RENE NOWOTARSKI OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered July 14, 2011 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Ansari v Travis*, 9 AD3d 901, *lv denied* 3 NY3d 610).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1270

CA 11-02243

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

IN THE MATTER OF UELL T. NORMAN,
PETITIONER-APPELLANT,

V ORDER

ANDREA W. EVANS, CHAIRWOMAN, NEW YORK STATE
DIVISION OF PAROLE, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH RENE NOWOTARSKI OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered June 17, 2011 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Ansari v Travis*, 9 AD3d 901, *lv denied* 3 NY3d 610).

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

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

1271

CA 12-00731

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

IN THE MATTER OF THE ESTATE OF PERCY PERRY,
DECEASED.

REV. BARNEY B. PERRY, SR., ORDER
PETITIONER-APPELLANT;

TRACEE MEGNA, EXECUTRIX OF THE ESTATE OF
PERCY PERRY, DECEASED, RESPONDENT-RESPONDENT.

REV. BARNEY B. PERRY, SR., PETITIONER-APPELLANT PRO SE.

GARY R. GAFFNEY, BUFFALO, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered July 15, 2011. The order denied the petition seeking to have petitioner designated the administrator of the estate of Percy Perry.

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

Entered: November 9, 2012

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1985/95) KA 12-01735. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOHN SESSION, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ. (Filed Nov. 9, 2012.)

MOTION NO. (1090/08) KA 05-02009. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER L. POOLE, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., FAHEY, PERADOTTO, SCONIERS, AND WHALEN, JJ. (Filed Nov. 9, 2012.)

MOTION NO. (1585/09) KA 07-02429. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V AHMIR COLE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, AND LINDLEY, JJ. (Filed Nov. 9, 2012.)

MOTION NO. (713/10) KA 08-01142. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT E. ANTHONY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, SCONIERS, AND MARTOCHE, JJ. (Filed Nov. 9, 2012.)

MOTION NO. (150/12) KA 11-00148. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DARNELL CARTER, DEFENDANT-APPELLANT. -- Motion for reargument of the appeal is granted and, upon reargument, the memorandum and order

entered June 15, 2012 (96 AD3d 1520) is amended by deleting the ordering paragraph and substituting the following ordering paragraph, “It is hereby ORDERED that the judgment so appealed from is affirmed,” and by deleting the third paragraph of the memorandum and substituting the following paragraph, “The sentence is not unduly harsh or severe.” PRESENT: SCUDDER, P.J., SMITH, SCONIERS, AND MARTOCHE, JJ. (Filed Nov. 9, 2012.)

MOTION NO. (774/12) KA 11-00357. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JUSTIN T. WOODARD, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, FAHEY, LINDLEY, AND MARTOCHE, JJ. (Filed Nov. 9, 2012.)

MOTION NO. (922/12) KA 11-00452. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BRANDON BIBBES, DEFENDANT-APPELLANT. -- Motion for reargument of the appeal is granted to the extent that, upon reargument, the memorandum and order entered September 28, 2012 (98 AD3d 1267) is amended by deleting the first sentence of the fourth paragraph of the memorandum and substituting the following sentence: “We reject defendant’s further contention that Supreme Court erred in permitting a prosecution witness to testify that, on the day after the incident, defendant told her that he would ‘cap [the victim] 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.’ ” PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

(Filed Nov. 9, 2012.)

MOTION NO. (934/12) CA 11-01650. -- IN THE MATTER OF THE ESTATE OF STEVEN MAKITRA, SR., DECEASED. WILLIAM T. MAKITRA, AS EXECUTOR OF THE ESTATE OF STEVEN MAKITRA, SR., DECEASED, PETITIONER-RESPONDENT; STEVEN A. MAKITRA, JR., OBJECTANT-APPELLANT; PATRICK MCALLISTER, ESQ., GUARDIAN AD LITEM FOR SHANEGLASS, RESPONDENT. -- Motion for reargument granted to the extent that a new oral argument of this appeal is added to this Court's day calendar at 9:30 a.m. on Wednesday, December 5, 2012. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Nov. 9, 2012.)