SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 22, 2013

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

1319

CA 11-02215

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

CHASITY PRESNELL, PLAINTIFF-RESPONDENT,

V ORDER

NEW YORK CENTRAL MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT.

BAXTER SMITH & SHAPIRO, P.C., WEST SENECA (LOUIS B. DINGELDEY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), entered September 26, 2011. The order, among other things, granted that part of the motion of plaintiff seeking to compel a further deposition of Jean Ostrander.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties,

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

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

1382

CA 12-00986

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

DAVID E. KUNTZ, SR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WNYG HOUSING DEVELOPMENT FUND COMPANY INC.
AND WNY GROUP L.P., DEFENDANTS-RESPONDENTS.

WNYG HOUSING DEVELOPMENT FUND COMPANY INC.,
AND WNY GROUP L.P., THIRD-PARTY
PLAINTIFFS-RESPONDENTS,

V

CATENARY CONSTRUCTION CORP., THIRD-PARTY
DEFENDANT-RESPONDENT.

MODICA & ASSOCIATES, ATTORNEYS, PLLC, ROCHESTER (STEVEN V. MODICA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE LAW FIRM OF JANICE M. IATI, P.C., ROCHESTER (JANICE M. IATI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS-RESPONDENTS.

LAW OFFICE OF LAURIE G. OGDEN, ROCHESTER (GARY J. O'DONNELL OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered February 24, 2012. The order, insofar as appealed from, denied plaintiff's motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from 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 a scaffold at a construction site owned by defendants-third-party plaintiffs (defendants). The accident occurred while plaintiff was attempting to attach an outrigger to the scaffold. As he reached over the side of the scaffold to attach the outrigger, plaintiff fell from the scaffold and landed on the ground some 30 feet below, sustaining a broken femur, among other injuries. Following discovery, plaintiff moved for partial summary judgment on liability on his Labor Law § 240 (1) cause of action, and defendants cross-moved for summary judgment dismissing that claim. Supreme Court denied the motion and

cross motion, and plaintiff appeals. We now affirm.

To establish a violation of Labor Law § 240 (1), a plaintiff must show not only that he fell at a construction site, but also that he or she did so because of the absence or inadequacy of a safety device (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288-289; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267; *Felker v Corning Inc.*, 90 NY2d 219, 224; *see generally Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340). Here, plaintiff contends that he is entitled to judgment on liability under Labor Law § 240 (1) as a matter of law because defendants failed to provide him with adequate safety devices that could have prevented his fall, namely, a safety belt and lanyard. Plaintiff further contends that it is irrelevant whether a wood safety railing and cross braces were present on the scaffold when he fell because those items are not safety devices and, in any event, they would not have prevented him from falling even if they were in place.

We agree with defendants, however, that the scaffold itself and the safety railing and cross braces on it constitute safety devices, and that the evidence submitted by plaintiff raises an issue of fact whether the safety devices provided by defendants afforded him proper protection, or whether additional devices were necessary (*see generally Brown v Concord Nurseries, Inc.*, 37 AD3d 1076, 1077). The evidence submitted by plaintiff also raises an issue of fact whether he intentionally removed the safety railing and cross braces from the scaffold and whether such conduct by plaintiff was the sole proximate cause of his injuries (*see generally Grove v Cornell Univ.*, 17 NY3d 875, 877; *Lovall v Graves Bros., Inc.*, 63 AD3d 1528, 1530). Although plaintiff asserts that he could not have attached the outrigger in the manner suggested by defendants, there was evidence to the contrary, including the testimony of a worker at the site who claimed to have seen plaintiff install outriggers in that manner approximately 50 times before the accident (*see Traver v Valente Homes, Inc.*, 20 AD3d 856, 857-858). In any event, the evidence submitted by defendants in opposition to the motion raises triable issues of fact to defeat the motion, “i.e., ‘there is a plausible view of the evidence—enough to raise a fact question—that there was no statutory violation and that plaintiff’s own acts or omissions were the sole cause of the accident’ ” (*Miller v Spall Dev. Corp.*, 45 AD3d 1297, 1298, quoting *Blake*, 1 NY3d at 289 n 8).

Finally, even assuming, arguendo, that the court should have considered the demonstrative evidence submitted by plaintiff in reply, we conclude that the error is harmless because that evidence would not have changed the outcome of plaintiff’s motion (*see generally Matter of Chautauqua County Dept. of Social Servs. v Rita M.S.*, 94 AD3d 1509, 1514).

All concur except WHALEN, J., who dissents and votes to reverse the order insofar as appealed from in accordance with the following Memorandum: Respectfully, I disagree with the majority that plaintiff’s motion for partial summary judgment on liability on the Labor Law § 240 (1) cause of action was properly denied. I therefore

dissent, and would grant plaintiff's motion. Plaintiff was at risk of falling in two distinct ways here. First, he was at risk of falling off the scaffold while he assisted the masons and performed his general work duties. Second, he was at risk of falling from the specific task of placing the outriggers. While the wooden safety railing and cross braces may have been adequate to protect plaintiff during his general work duties, they were not adequate to protect him from the risks associated with installing the outriggers, especially given the placement of the pallet in his work area. There is an issue of fact whether the cross braces and wooden railing were in place when plaintiff fell. However, even if they were then in place, we note that plaintiff testified at his deposition that he was working below the railing height when installing the outriggers. Plaintiff testified that he would not have fallen while installing the outriggers had he been given a safety net, safety harness or at least a belt with a lanyard.

The Court of Appeals' analysis in *Felker v Corning Inc.* (90 NY2d 219) is instructive here. There, the Court wrote that the injured plaintiff was exposed to two distinct elevation-related risks associated with the painting task he was directed to perform. The first was having to paint at an elevated height over eight feet off the ground, and the Court determined that a stepladder was adequate as a safety device for the injured plaintiff with respect to this risk (*id.* at 224). The Court then wrote that a second risk was created when the injured plaintiff was required to reach over an eight-foot alcove wall and work over an elevated, open area. The Court held that it was the contractor's complete failure to provide any safety device to the injured plaintiff to protect him from this second risk of falling over the alcove wall that led to liability under Labor Law § 240 (1).

As previously stated, in the present case before this Court plaintiff was also exposed to two distinct elevation-related risks. The first was his general work assisting the masons on the scaffold and carrying supplies. The second risk was the specific task of leaning out over the scaffold to install the outriggers. It is undisputed that a pallet was placed in plaintiff's work area which forced him to install the outriggers in an awkward manner. It is also undisputed he was not provided a harness or lanyard to protect him from the risk of leaning out over the scaffold to install the outriggers. Plaintiff was not provided with a safety device to protect him from the risk of falling from the scaffolding to the ground and thus was entitled to partial summary judgment on liability on his Labor Law § 240 (1) cause of action (*see Yost v Quartararo*, 64 AD3d 1073, 1074-1075).

I also respectfully disagree with the majority that an issue of fact exists whether plaintiff's conduct was the sole proximate cause of his injuries because he may have removed the railing and cross braces. Whether or not the railing and/or cross braces were there when plaintiff fell is irrelevant because plaintiff could not use them as safety devices due to the location of the pallet. Plaintiff's conduct cannot possibly be found to be the sole proximate cause of

this accident because he did not place the pallet in his work area, and the pallet caused him to be in a precarious position while attempting to install the outrigger.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

1483

CAF 11-01763

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

IN THE MATTER OF RAFAEL A. MERCADO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KATHY R. FRYE, RESPONDENT-APPELLANT.

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

LIPSITZ GREEN SCIME CAMBRIA, LLP, BUFFALO (MELISSA A. CAVAGNARO OF COUNSEL), FOR PETITIONER-RESPONDENT.

JENNIFER M. LORENZ, ATTORNEY FOR THE CHILD, LANCASTER, FOR JESSICA M.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered August 1, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the subject child to petitioner.

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

Memorandum: Petitioner father commenced this proceeding seeking to modify the parties' joint custody arrangement pursuant to which respondent mother had primary physical residence of the parties' children in California. The father resides in New York. The mother appeals from an order modifying that custody arrangement by awarding the father sole custody of the parties' youngest child (child).

Contrary to the mother's contention, we conclude that Family Court had exclusive, continuing jurisdiction to determine custody pursuant to Domestic Relations Law § 76-a. It is undisputed that the initial child custody determination was rendered in New York, and we conclude that there is "ample evidence of a significant connection by the child with this state for Family Court to retain jurisdiction" (*Matter of Hissam v Mancini*, 80 AD3d 802, 803, *lv denied in part and dismissed in part* 16 NY3d 870; *see* Domestic Relations Law § 76-a [1] [a]). The father's extensive parenting time took place in New York, the child has extended family in this state, and her medical and dental providers are located here (*see Hissam*, 80 AD3d at 803; *Matter of Sutton v Sutton*, 74 AD3d 1838, 1839).

We also reject the mother's contention that the court should have dismissed the modification petition on the ground that New York is an

inconvenient forum (*see* Domestic Relations Law § 76-f). There was substantial evidence in this state from which to make a custody determination inasmuch as the father, the child, the child's treating therapist, the child's extended family, and the child's medical and dental providers are located in New York (*see Sutton*, 74 AD3d at 1839-1840). In addition, the New York courts were more familiar with the parties and the child than the California courts, and the court permitted the mother to appear electronically for all proceedings except the fact-finding hearing (*see Matter of Belcher v Lawrence*, 98 AD3d 197, 202; *Sutton*, 74 AD3d at 1840; *see generally Matter of Anthony B. v Priscilla B.*, 88 AD3d 590, 590).

Contrary to the contention of the mother, we conclude that the court properly determined that "the father established the requisite change in circumstances to warrant an inquiry into whether the best interests of the child would be served by modifying the existing custody arrangement" (*Matter of Burrell v Burrell*, 100 AD3d 1545, 1545). We further conclude that there is a sound and substantial basis in the record to support the court's determination that it was in the child's best interests to award sole custody to the father (*see generally Matter of Deborah E.C. v Shawn K.*, 63 AD3d 1724, 1725, *lv denied* 13 NY3d 710; *Matter of Jeremy J.A. v Carley A.*, 48 AD3d 1035, 1036; *Matter of Khaykin v Kanayeva*, 47 AD3d 817, 817). Although the child lived in California with her mother for approximately five years, the quality of the parties' respective home environments, the parties' ability to provide for the child's emotional and intellectual development, the financial status of the parties, and the needs and expressed desires of the child all support the court's custody determination (*see Eschbach v Eschbach*, 56 NY2d 167, 172-173; *Fox v Fox*, 177 AD2d 209, 210). The child, who was 13 years old at the time of the hearing, expressed her desire to reside with the father and, given her age and relative maturity, her wishes "were entitled to substantial weight" (*Matter of Louis M. v Administration for Children's Servs.*, 69 AD3d 633, 634; *see Matter of Samuel S. v Dayawathie R.*, 63 AD3d 746, 747). We thus conclude that the court's best interests determination was "based on [a] careful weighing of the appropriate factors . . . , including the court's firsthand assessment of the character and credibility of the parties and their witnesses," and we see no basis to disturb that determination (*Matter of Armstrong v Robinson*, 66 AD3d 1365, 1365, *lv denied* 13 NY3d 713 [internal quotation marks omitted]; *see Matter of Tisdale v Anderson*, 100 AD3d 1517, 1517-1518).

The mother further contends that the court's finding that she willfully violated the divorce judgment is not supported by the weight of the evidence. Initially, we note that there is no finding of contempt against the mother in the order appealed from, and there is no other order in the record containing such a finding. Rather, in its bench decision on the father's modification and contempt petitions, the court found the mother in contempt of court, and stated that it would consider the mother's violation of the divorce judgment as "relevant to [its] findings in the custody and visitation matter." There is thus no appealable civil contempt determination (*see Matter*

of Culton v Culton, 277 AD2d 935, 936; *see generally Fang v Home Depot USA, Inc.*, 99 AD3d 1236, 1236; *Geddes Fed. Sav. & Loan Assn. v Ferrante*, 244 AD2d 965, 965).

In any event, we reject the mother's contention that the court's finding of a willful violation is not supported by the weight of the evidence. Indeed, the evidence, including the mother's own testimony, supported the court's finding that the mother failed to comply with that part of the divorce judgment regarding travel expenses for visitation (*see Matter of Keefe v Adam*, 85 AD3d 1225, 1227; *Matter of Brown v Marr*, 23 AD3d 1029, 1030-1031). To the extent that the mother challenges the court's consideration of her violation of the divorce judgment in making its custody determination, we conclude that the court had discretion to consider that violation as part of its best interests analysis (*see West v Vanderhorst*, 92 AD3d 615, 616; *Matter of Seacord v Seacord*, 81 AD3d 1101, 1103-1104).

Finally, the father's contention that the court should have imposed contempt sanctions against the mother and awarded him attorney's fees is not properly before us inasmuch as he abandoned his cross appeal (*see generally Bennett v McGorry*, 34 AD3d 1290, 1291; *Matijiw v New York Cent. Mut. Fire Ins. Co.*, 292 AD2d 865, 866).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

19

CA 12-00861

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

RHONDA WILLIAMS, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF ALEXANDRA WILLIAMS, AN INFANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SHARON T. WEATHERSTONE, DEFENDANT, AND JORDAN-ELBRIDGE CENTRAL SCHOOL DISTRICT, DEFENDANT-APPELLANT.

PETRONE & PETRONE, UTICA, CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (CHRISTINE GASSER OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered March 2, 2012 in a personal injury action. The order denied the motion of defendant Jordan-Elbridge Central School District for summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion in part and dismissing the complaint against defendant Jordan-Elbridge Central School District, as amplified by the bill of particulars, insofar as it alleges negligence based upon violations of the Vehicle and Traffic Law and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries sustained by her 12-year-old daughter when she was struck by a vehicle owned and operated by defendant Sharon T. Weatherstone. Shortly before the accident, plaintiff's daughter, a student in sixth grade at Jordan-Elbridge Central School District (defendant), was waiting at her school bus stop at the end of her driveway when the school bus driver mistakenly passed her. The bus continued a short distance and then turned around and approached the child on the opposite side of the road. The bus driver testified at his deposition that he intended to turn around again and pick up the child at her stop. The child, however, crossed the road in an effort to catch the bus on the opposite side of the road, and Weatherstone's vehicle struck her. Following discovery, defendant moved for summary judgment dismissing the complaint and cross claim against it, contending, inter alia, that it owed no duty of care to the child because she was not in

defendant's custody or control when the accident occurred, and that its alleged negligence was not a proximate cause of the accident. Supreme Court denied the motion, concluding that, under the "unique and extraordinary facts and circumstances" of this case, defendant owed a duty to the child and that issues of fact exist with respect to proximate cause. We agree and conclude that, under the facts presented here, defendant breached its duty to transport the child to school in a safe manner.

It is axiomatic that a school district that undertakes to transport children to school "must perform [that undertaking] in a careful and prudent manner" (*Pratt v Robinson*, 39 NY2d 554, 561; *see McDonald v Central Sch. Dist. No. 3 of Towns of Romulus, Varick & Fayette, Seneca County*, 179 Misc 333, 335, *affd* 264 App Div 943, *affd* 289 NY 800). We recognize the well-established principle that "the duty owed by a school to its students . . . stems from the fact of its physical custody over them" (*Pratt*, 39 NY2d at 560; *see Dalton v Memminger*, 67 AD3d 1350, 1350-1351). We reject plaintiff's contention that defendant owed the child a duty of care in these circumstances by virtue of her status as a special education student with an individualized education program (IEP). With respect to her special transportation needs, the child's IEP required only that defendant provide transportation to school. The IEP did not place her within defendant's " 'orbit of authority' " while she waited for the school bus (*Troy v North Collins Cent. Sch. Dist.*, 267 AD2d 1023, 1023), nor did the IEP give rise to a duty on the part of defendant to ensure that the child was safe while waiting for the bus outside her home (*cf. id.*). We nevertheless conclude under the facts presented here that the child was within the orbit of defendant's authority such that defendant owed a duty to the child based upon the actions of defendant; i.e., the bus arrived at the bus stop, passed it, and the driver turned around to pick up the child. Thus, "the injury occurred during the act of busing itself, broadly construed" (*Pratt*, 39 NY2d at 561; *cf. Norton v Canandaigua City Sch. Dist.*, 208 AD2d 282, 286, *lv denied* 85 NY2d 812, *rearg denied* 86 NY2d 839). " '[T]he risk reasonably to be perceived defines the duty to be obeyed, *and risk imports relation*' " (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 585, quoting *Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 344, *rearg denied* 249 NY 511). Where, as here, it was reasonably foreseeable that the child would be placed "into a foreseeably hazardous setting [defendant] had a hand in creating," defendant owed a duty to the child (*Ernest v Red Cr. Cent. Sch. Dist.*, 93 NY2d 664, 672, *rearg denied* 93 NY2d 1042; *cf. Pratt*, 39 NY2d at 560-561; *Norton*, 208 AD2d at 287).

We further conclude that the court properly denied the motion on the ground that there is an issue of fact whether defendant's alleged negligence was a proximate cause of the accident. " 'Proximate cause is a question of fact for the jury where[, as here,] varying inferences are possible' " (*Ernest*, 93 NY2d at 674).

We agree with defendant, however, that the court erred in denying that part of its motion seeking to dismiss the complaint against it, as amplified by the bill of particulars, insofar as it alleges that

defendant was negligent based on its violation of various Vehicle and Traffic Law sections. Defendant established its entitlement to judgment in that respect, and plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 57 NY2d 557, 561). We therefore modify the order accordingly.

All concur except CARNI and LINDLEY, JJ., who dissent in part and vote to reverse in accordance with the following Memorandum: We respectfully dissent in part. We agree with the majority that Supreme Court properly determined that issues of fact exist with respect to negligence and proximate cause. We further agree that the court erred in denying that part of the motion of Jordan-Elbridge Central School District (defendant) seeking dismissal of the complaint, as amplified by the bill of particulars, to the extent that the complaint alleges that defendant was negligent based on its violation of various provisions of the Vehicle and Traffic Law. Unlike the majority, however, we conclude that defendant owed no duty of care to plaintiff's daughter. We therefore would reverse the order and grant in its entirety defendant's motion for summary judgment dismissing the complaint and cross claim against it.

It is well settled that the duty owed by defendant to the child was "coextensive with and concomitant to its physical custody of and control over the child" (*Pratt v Robinson*, 39 NY2d 554, 560; *see Norton v Canandaigua City Sch. Dist.*, 208 AD2d 282, 285-286, *lv denied* 85 NY2d 812, *rearg denied* 86 NY2d 839). At the time of the accident, defendant had not assumed physical custody of the child and she thus remained "out of the orbit of its authority" (*Pratt*, 39 NY2d at 560). Defendant thus owed no duty to the child in this situation, "and, absent duty, there can be no liability" (*Norton*, 208 AD2d at 288).

We reject plaintiff's contention that defendant assumed a duty to the child as a consequence of the "potentially hazardous situation" allegedly created by the school bus driver in turning the bus around after missing the bus stop (*Ernest v Red Cr. Cent. Sch. Dist.*, 93 NY2d 664, 671, *rearg denied* 93 NY2d 1042). Unlike the defendant school district in *Ernest*, here defendant did not release the child from its custody and control into a situation of immediate and foreseeable danger (*cf. id.* at 671-672; *McDonald v Central School Dist. No. 3 of Towns of Romulus, Varick & Fayette, Seneca County*, 179 Misc 333, 335-336, *affd* 264 App Div 943, *affd* 289 NY 800). In fact, the child was never in defendant's custody or control on the day of the accident. Instead, the child was and remained in the custody and care of plaintiff, her mother, who was at home at the time of the accident. Plaintiff has cited no cases, and we could find none, where a school district was found to owe a duty of care to a child who was not in its custody at the time of the injury or who was not released from the school district's custody into a hazardous condition that caused the child's injury.

Finally, as the majority concludes, the child's individualized education program did not give rise to a duty on the part of defendant to ensure that she was safe while waiting outside her home for the bus to arrive in the morning (*cf. Troy v North Collins Cent. Sch. Dist.*,

267 AD3d 1023, 1023).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

37

CA 12-00802

PRESENT: SMITH, J.P., FAHEY, VALENTINO, WHALEN, AND MARTOCHE, JJ.

TOWN OF AMHERST AND GRANITE STATE
INSURANCE COMPANY, PLAINTIFFS-RESPONDENTS,

V ORDER

ARTHUR HILGER, SALLY BISHER,
DEFENDANTS-APPELLANTS,
AND AARON HILGER, DEFENDANT.
(APPEAL NO. 1.)

SMITH, MURPHY & SCHOEPPERLE, LLP, BUFFALO, MAURO LILLING NAPARTY LLP, WOODBURY (MATTHEW W. NAPARTY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SHAUB, AHMUTY, CITRIN & SPRATT, LLP, LAKE SUCCESS, DEMARIE & SCHOENBORN, P.C., BUFFALO (JOSEPH DEMARIE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

MICHAEL JAFFE, NEW YORK CITY, FOR NEW YORK STATE TRIAL LAWYERS ASSOCIATION, AMICUS CURIAE.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered January 23, 2012. The order, among other things, granted that part of plaintiffs' motion seeking summary judgment against defendants Arthur Hilger and Sally Bisher.

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

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

38

CA 12-00803

PRESENT: SMITH, J.P., FAHEY, VALENTINO, WHALEN, AND MARTOCHE, JJ.

TOWN OF AMHERST AND GRANITE STATE
INSURANCE COMPANY, PLAINTIFFS-RESPONDENTS,

V OPINION AND ORDER

ARTHUR HILGER, SALLY BISHER,
DEFENDANTS-APPELLANTS,
AND AARON HILGER, DEFENDANT.
(APPEAL NO. 2.)

SMITH, MURPHY & SCHOEPPERLE, LLP, BUFFALO, MAURO LILLING NAPARTY LLP, WOODBURY (MATTHEW W. NAPARTY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SHAUB, AHMUTY, CITRIN & SPRATT, LLP, LAKE SUCCESS, DEMARIE & SCHOENBORN, P.C., BUFFALO (JOSEPH DEMARIE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

MICHAEL JAFFE, NEW YORK CITY, FOR NEW YORK STATE TRIAL LAWYERS ASSOCIATION, AMICUS CURIAE.

Appeal from a judgment of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered January 23, 2012. The judgment awarded plaintiffs the sum of $30,230,533.15 against defendants Arthur Hilger and Sally Bisher.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying plaintiffs' motion in its entirety 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 following Opinion by FAHEY, J.:

I

This appeal arises from the refusal of Arthur Hilger and Sally Bisher (collectively, defendants), who were officers of nonparty McGonigle and Hill Roofing, Inc. (M&H), to seek insurance coverage from nonparty New York State Insurance Fund (SIF), M&H's insurer, with respect to a judgment plaintiff Town of Amherst (Town) has against M&H (Town judgment). There is no dispute that M&H, which is now dissolved, had insurance coverage under a workers' compensation and employers' liability policy that was issued to it by SIF (hereafter, SIF policy) and that was effective at the time of the underlying loss. There is also no dispute that SIF has not paid the Town judgment on behalf of M&H only because of defendants' intractable refusal to

request that SIF satisfy that judgment. For the reasons set forth below, plaintiffs commenced this action against defendants and defendant Aaron Hilger (collectively, Hilgers) in an effort to force the Hilgers to ensure SIF's compliance with the terms of the SIF policy.

Plaintiffs moved for summary judgment seeking, inter alia, a money judgment against the Hilgers and an order directing the Hilgers to take all necessary actions to ensure that SIF complies with the SIF policy. The Hilgers, in turn, cross-moved for summary judgment dismissing the complaint. Supreme Court granted that part of the cross motion seeking summary judgment dismissing the complaint against Aaron Hilger and otherwise denied the cross motion. The court also granted plaintiffs' motion insofar as it related to defendants and awarded plaintiffs judgment in the amount of $30,230,533.15. On defendants' appeal, we conclude that the judgment should be modified by denying plaintiffs' motion in its entirety, and we remit the matter to Supreme Court for further proceedings in accordance with our conclusions herein.

II

On February 21, 2002, Peter E. Bissell, who is not a party to this action, fell from a ladder that was not properly secured (hereafter, accident) and "sustained serious injuries, including bilateral lower extremity paraparesis and paralysis of the ankles and feet" (*Bissell v Town of Amherst*, 41 AD3d 1228, 1229, *lv denied* 14 NY3d 703). At the time of the accident, Bissell was working on a building owned by the Town as a roofer employed by M&H, a New York corporation. The father of Arthur Hilger was the president of M&H and died in or before 2004. Arthur Hilger was a vice-president of M&H and is the brother of Sally Bisher, who was the secretary of M&H.

After the accident, Bissell and his wife commenced a lawsuit against the Town alleging, inter alia, Labor Law violations and common-law negligence. The Town commenced a third-party action against M&H, which was consolidated with the main action. That action was before us on several occasions (*Matter of Bissell v Town of Amherst*, 79 AD3d 1638, *affd* 18 NY3d 697; *Bissell v Town of Amherst*, 56 AD3d 1144, *lv denied in part and dismissed in part* 12 NY3d 878; 41 AD3d 1228, *lv denied* 14 NY3d 703; 32 AD3d 1287; 6 AD3d 1229). On the prior appeals we, inter alia, affirmed an order denying the Town's motion to set aside a jury verdict on liability pursuant to Labor Law § 240 (1) (*Bissell*, 32 AD3d at 1287), affirmed that part of a judgment determining that Bissell sustained a grave injury in the accident (*Bissell*, 56 AD3d at 1147) and affirmed a judgment, i.e., the Town judgment, directing M&H to indemnify the Town for all amounts the Town paid pursuant to a judgment issued in Bissell's favor in the main action (*Bissell v Town of Amherst*, 56 AD3d 1149, 1149).

Plaintiff Granite State Insurance Company (Granite State) had issued a liability insurance policy in the amount of $10 million to the Town that was effective at the time of Bissell's accident and that

covered the loss resulting from that incident. The Town satisfied the judgment issued in favor of Bissell in the amount of $23,552,070, using insurance funds provided under the Granite State policy, together with self-insurance funds provided by the Town.

M&H, in turn and as noted, was insured at the time of the accident under the SIF policy. According to defendants, the SIF policy was the only insurance available to M&H with respect to the accident because there was no contract between M&H and the Town at the time of that incident that would have triggered coverage for contractual indemnification under M&H's general liability policy. Moreover, the SIF policy contains no policy limit for damages M&H must pay because of bodily injury to its employees, i.e., it provides unlimited coverage for common-law indemnification. In view of the judgment in favor of the Town against M&H on the issue of common-law indemnification (*see Bissell*, 56 AD3d at 1146), a logical mind would think that SIF would have indemnified the Town and reimbursed Granite State, and this matter would have been resolved.

Logic, however, did not prevail. M&H ceased doing business in May 2002, which was three months after the accident, and was dissolved on July 12, 2004. There is no dispute that SIF has no valid defense allowing it to disclaim coverage for M&H, and indeed it has not disclaimed coverage for M&H with respect to the Bissell action. Further, it is uncontested that the SIF policy provides that the insured's bankruptcy or insolvency will not relieve SIF of its coverage obligations. Nevertheless, M&H has never demanded that SIF pay the Town judgment and, according to Aaron Hilger[1] and defendants, has no intention of doing so. To date, SIF has not paid the Town judgment, and thus the Hilgers' refusal to seek coverage from SIF for M&H forced plaintiffs to satisfy a judgment for which M&H is ultimately responsible (*cf. Orlikowski v Cornerstone Community Fed. Credit Union*, 55 AD3d 1245, 1248, *lv dismissed* 11 NY3d 915), and for which SIF has a contractual obligation to insure M&H.

III

By summons and complaint filed November 3, 2010, plaintiffs commenced this action against the Hilgers, alleging that the Hilgers dissolved and liquidated M&H without satisfying the Town judgment. The complaint contained two causes of action: the first alleged that the Hilgers breached their fiduciary duties to plaintiffs to take all steps necessary to ensure that the lawful debts of M&H were paid, and the second alleged that the Hilgers "caused M&H to be liquidated in violation of Business Corporation Law [a]rticle 10," which provides for non-judicial dissolution. In the wherefore clause of the complaint, plaintiffs sought, inter alia, an order directing the Hilgers to "take all necessary steps" to ensure SIF's compliance with

[1]Unlike defendants, Aaron Hilger had no role in M&H's dissolution and was not an officer of that company when it was dissolved. As such and as noted, the court granted summary judgment dismissing the complaint against him.

the terms of the SIF policy and a judgment against the Hilgers personally for the amount the Town paid on the judgment Bissell took against it, together with interest.

On January 10, 2011, SIF sent a letter to the Hilgers confirming that

> "[SIF] will pay for the legal fees and disbursements incurred in [the Hilgers'] defense in [this] lawsuit. In addition, [SIF] will pay for any damages awarded against [the Hilgers] in [this] action except for any damages attributable to activities or actions taken by [any of the Hilgers] as officers and/or employees of [M&H] determined to be in violation of law."[2]

Two days later, the Hilgers answered the complaint, alleging that they had "fulfilled all of their legal obligations and obligations they may have had under the [SIF] policy."

The matter subsequently proceeded from discovery to motion practice, where plaintiffs moved and the Hilgers cross-moved for summary judgment. The submissions with respect to the motion and cross motion demonstrate, inter alia, that coverage for M&H under the SIF policy was effective at the time of the accident; that, despite M&H's dissolution, the Hilgers never requested that SIF indemnify M&H relative to the Town judgment and had no intention of doing so; that M&H's rights and duties under the SIF policy cannot be transferred without SIF's written consent; that M&H's creditors were paid upon its dissolution; and that the Hilgers were insulated by SIF from any personal liability resulting from this lawsuit.

Discovery did not establish a motive for the Hilgers' refusal to seek coverage from SIF, but at the oral argument of this appeal defendants' attorney indicated that their recalcitrance was borne of "animosity" toward the Town. In any event, following oral argument on the motion and cross motion, the court issued an order that reflects the court's rational umbrage with the Hilgers' refusal to seek coverage for M&H from SIF with respect to the Town judgment. The court issued a judgment against defendants in the amount of $23,552,070 and awarded statutory interest in the amount of $6,678,463.15, thus yielding a judgment in the aggregate amount of $30,230,533.15.

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[2]This letter was modified by correspondence from SIF to the Hilgers' counsel dated August 11, 2011, wherein SIF stated that it "will pay for any damages awarded against [the Hilgers] in [this] action." The record does not speak to the issue whether the modification was intended to protect the Hilgers from the danger that SIF's obligation to indemnify them would not accrue because the Hilgers could not satisfy a $23 million judgment against them (*see Orlikowski*, 55 AD3d at 1248).

IV

Before addressing the merits, we acknowledge plaintiffs' concern regarding the viability of an action against SIF in the Court of Claims as a catalyst for this action. Plaintiffs' attorney indicated that plaintiffs have a claim pending against the State of New York and SIF in the Court of Claims,[3] but noted that SIF is not subject to the provisions of Insurance Law § 3420 (*cf. Bowker v NVR, Inc.*, 39 AD3d 1162, 1163-1164), thus complicating plaintiffs' efforts to satisfy their judgment against M&H. On this point, *Lang v Hanover Ins. Co.* (3 NY3d 350) is instructive:

> "Insurance Law § 3420 . . . grants an injured party a right to sue [a] tortfeasor's insurer [in derogation of the common law], but only under limited circumstances—the injured party must first obtain a judgment against the tortfeasor, serve the [insurer] with a copy of the judgment and await payment for 30 days. Compliance with [those] requirements is a condition precedent to a direct action against the insurance company" (*id.* at 354; *see* Insurance Law § 3420 [a] [2]; [b] [1], [2]; *cf.* CPLR 3001 [amended in 2008 to provide, inter alia, that "(a) party who has brought a claim for personal injury or wrongful death against another party may maintain a declaratory judgment action directly against the insurer of such other party"]; Insurance Law § 3420 [a] [6] [same]).

The latitude the Insurance Law affords to a claimant to sue a private insurer of a tortfeasor does not, however, subject SIF to legal action brought by a claimant, or in this case an indemnitee of an SIF insured. Indeed, "[SIF] is exempt from the requirements of Insurance Law § 3420 (a) and (b) due to Insurance Law § 1108 (c)" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v State of New York*, 72 AD3d 620, 621, *lv denied* 16 NY3d 703 [internal quotation marks omitted]; *see Kenmore-Tonawanda School Dist. v State of New York*, 38 AD3d 203, 203, *lv denied* 10 NY3d 702). Plaintiffs thus have a legitimate concern that, as nonparties to the SIF policy, they lack standing to sue SIF, and they otherwise have no access to the coverage contained in the SIF policy by virtue of the intransigence of M&H in dissolving itself and refusing to seek coverage from SIF (*see Miraglia v State Ins. Fund*, 32 Misc 3d 471, 475). That concern explains plaintiffs' effort to seek recourse from the Hilgers individually through this action, and there can be no dispute that M&H's dissolution and the Hilgers' recalcitrance in refusing to seek from SIF the insurance coverage owed M&H by SIF with respect to the Town judgment is grossly inequitable and threatens a miscarriage of justice (*see generally* Workers' Compensation Law § 76 [1] [providing that SIF

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[3]The parties note that the action in the Court of Claims has been stayed pending the outcome of this litigation.

was created, in part, to provide coverage for common-law indemnification to employers of injured workers]; 2 Steven Plitt et al., Couch on Insurance 3d § 31:49 [1995] ["(w)here the contract of insurance provides for liability to third persons, the insurer and the insured cannot terminate such a contract by their voluntary action to the prejudice of a claimants' rights which have already vested"]).

V

The problem with this appeal, however, lies not in the facts, but in the law under which plaintiffs seek remuneration from defendants and the shape in which plaintiffs have cast this action, and that segue brings us to the merits. Plaintiffs did not move for summary judgment under any particular statute and, as noted, attack defendants under two theories: the alleged violation of Business Corporation Law article 10, and the purported breach of defendants' fiduciary duty to plaintiffs to ensure that M&H's obligations were paid. We conclude that neither theory has merit.

Turning first to the alleged violation of Business Corporation Law article 10, we note that Business Corporation Law § 1007 (a) provides that, at any time after dissolution, a "corporation *may* give a notice requiring all creditors and claimants . . . to present their claims in writing" (emphasis added). The failure to provide such notice would allow a creditor with an unlitigated claim that preexisted dissolution to sue the dissolved corporation even after dissolution (*see* § 1006 [a] [4]; [b]; *see also Matter of Ford v Pulmosan Safety Equip. Corp.*, 52 AD3d 710, 711; *Stop-Fire, Inc. v Fire Equip. Mfg. Corp.*, 47 AD2d 591, 591-592). Here, however, the Town's claim against M&H was the subject of litigation at the time of M&H's dissolution and thus could not be barred by the Business Corporation Law even if notice of the dissolution had been provided to plaintiffs by M&H (*see* § 1007 [b]). Consequently, plaintiffs' contention with respect to the harm flowing from the defendants' alleged violation of the Business Corporation Law is of no moment.

We next turn to plaintiffs' allegation that defendants breached a fiduciary duty to plaintiffs in failing to ensure that M&H's obligations were paid upon its dissolution. Plaintiffs' contention that defendants' refusal to ask for coverage for M&H under the SIF policy constitutes a failure to act in good faith, although almost certainly accurate, is likewise not actionable in this context. Pursuant to Business Corporation Law § 715 (h), "[a]n officer shall perform his duties as an officer in good faith and with that degree of care with which an ordinarily prudent person in a like position would use under similar circumstances." An action against an officer for misconduct, however, is circumscribed by Business Corporation Law § 720, which limits the relief available in such an action to an accounting (*see* § 720 [a] [1]), the setting aside of an unlawful conveyance, assignment or transfer of corporate assets (*see* § 720 [a] [2]), and the enjoinder of a proposed unlawful conveyance, assignment or transfer of corporate assets (*see* § 720 [a] [3]). Indeed, Business Corporation Law § 720 "may not be utilized to obtain a money judgment in an action at law" (*Ali Baba Creations v Congress Textile Printers*,

41 AD2d 924, 924). Inasmuch as plaintiffs' contentions concerning defendants' violation of Business Corporation Law article 10 and breach of fiduciary duty lack merit, we conclude that the court erred in granting that part of plaintiffs' motion with respect to defendants.

VI

Our inquiry, however, does not end at this juncture. Plaintiffs correctly note that Business Corporation Law § 1008, which is entitled "[j]urisdiction of supreme court to supervise dissolution and liquidation," vests Supreme Court with broad powers to "make all such orders as it may deem proper in all matters in connection with the dissolution or the winding up of the affairs of the corporation" (§ 1008 [a]). Included in those powers is the authority to "suspend or annul the dissolution or continue the liquidation of the corporation under the supervision of the court" (*id.*), as well as the ability to determine the validity of the dissolution (*see* § 1008 [a] [1]); to determine the validity of any claims presented against the corporation (*see* § 1008 [a] [3]); to determine the liability of an officer for the liabilities of the corporation (*see* § 1008 [a] [5]); and to make orders with respect to the payment, satisfaction or compromise of claims against the corporation (*see* § 1008 [a] [6]).

Moreover, "the court may at any stage of a case and on its own motion determine whether there is a nonjoinder of necessary parties" (*Matter of Lezette v Board of Educ., Hudson City School Dist.*, 35 NY2d 272, 282), and under the circumstances of this case M&H is a necessary party (*see* CPLR 1001 [a]; *see generally Matter of Jim Ludtka Sporting Goods, Inc. v City of Buffalo School Dist.*, 48 AD3d 1103, 1104, *lv denied* 11 NY3d 704). We therefore remit the matter to Supreme Court to allow it to join M&H as a necessary party (*see* CPLR 1001 [b]; *cf.* CPLR 1003), convert the action to a special proceeding pursuant to Business Corporation Law § 1008 (*see* CPLR 103 [c]; *see also Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 653-654) and exercise its authority under that statute, which includes the power to force M&H to seek coverage from SIF with respect to the Town judgment (*see* Business Corporation Law § 1008 [a] [8]).

In view of our determination, and regardless of our sentiments with respect to the equities, we do not address the parties' remaining contentions, except to note that, for the reasons set forth herein, the court properly denied those parts of the Hilgers' cross motion seeking summary judgment dismissing the complaint against defendants.

VII

Accordingly, we conclude that the judgment should be modified by denying plaintiffs' motion in its entirety, and we remit the matter to

Supreme Court for further proceedings in accordance with this opinion.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

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CA 12-01313

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

SANTOKH S. BADESHA, SUDARSHAN S. BAINS, BHOOPINDER S. MEHTA, HARBHAJAN S. PUREWAL, MAGHAR S. CHANA, RAJDEEP K. CHEEMA, AS MEMBERS OF BOARD OF TRUSTEES OF GURUDWARA OF ROCHESTER, AND GURUDWARA OF ROCHESTER, A CORPORATION ORGANIZED AND EXISTING UNDER RELIGIOUS CORPORATION LAW OF STATE OF NEW YORK, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V ORDER

PARMINDER S. SOCH, MANDEEP (MAKHAN) SINGH, AJAY SINGH, PUSHPINDER ANEJA, GURRINDER S. BEDI, IN HIS CAPACITY AS A MEMBER OF THE EXECUTIVE COMMITTEE GURUDWARA OF ROCHESTER, DAMAPAUL SONDHI AND SANDEEP S. GREWAL, IN THEIR CAPACITIES AS PURPORTED AUDITORS OF GURUDWARA OF ROCHESTER, DEFENDANTS-RESPONDENTS-APPELLANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered April 24, 2012. The order denied plaintiffs' motion and defendants' cross motion for summary judgment.

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

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

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CA 12-01441

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

ROBETTE GOODWIN, AS ADMINISTRATRIX OF THE ESTATE OF CHARLENE E. CLINTON, DECEASED, PLAINTIFF-RESPONDENT,

V OPINION AND ORDER

RICHARD W. PRETORIUS, M.D., ET AL., DEFENDANTS, RIZWANA LILANI, M.D., ANDREW BOGNANNO, M.D., LEIZL F. SAPICO, M.D., CLEMENT AYANBADEJO, M.D., AND VENKATA PUPPALA, M.D., DEFENDANTS-APPELLANTS.

RICOTTA & VISCO, ATTORNEYS & COUNSELORS AT LAW, BUFFALO (K. JOHN BLAND OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered December 21, 2011. The order denied the motion of defendants Rizwana Lilani, M.D., Andrew Bognanno, M.D., Leizl F. Sapico, M.D., Clement Ayanbadejo, M.D., Venkata Puppala, M.D. and Erie County Medical Center Corporation to dismiss the complaint against defendants-appellants.

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

Opinion by SCUDDER, P.J.:

I

In May 2009 Charlene E. Clinton (decedent) sought treatment at defendant Erie County Medical Center Corporation (ECMCC). She was admitted to ECMCC on May 7, 2009 and was discharged on May 12, 2009. Approximately five days later, decedent was transported by ambulance to ECMCC, and she died the next day. In August 2009, plaintiff served a notice of claim on ECMCC only, naming ECMCC as the sole defendant. Plaintiff thereafter commenced this action against, inter alia, Rizwana Lilani, M.D., Andrew Bognanno, M.D., Leizl F. Sapico, M.D., Clement Ayanbadejo, M.D., and Venkata Puppala, M.D. (collectively, Employee Defendants) and ECMCC (collectively, defendants). Defendants thereafter moved to dismiss the complaint against the Employee Defendants on the grounds that the Employee Defendants were neither served with the notice of claim nor named in the notice of claim (*see*

generally General Municipal Law § 50-e). Supreme Court denied the motion and, for the reasons that follow, we conclude that the order should be affirmed.

II

First, as defendants correctly conceded at oral argument of this appeal, General Municipal Law § 50-e does not require service of a notice of claim on the Employee Defendants as a condition precedent to the commencement of this action. ECMCC is a public benefit corporation (*see* Public Authorities Law § 3628 *et seq*.) and, therefore, it is undisputed that the provisions of General Municipal Law § 50-e apply (*see* Public Authorities Law § 3641 [1] [a]; *see e.g. Stanfield v Nohejl*, 182 AD2d 1138, 1138). General Municipal Law § 50-e (1) (b) provides, in pertinent part, that

> "[s]ervice of the notice of claim upon an . . . employee of a public corporation *shall not* be a condition precedent to the commencement of an action or special proceeding against such person. If an action or special proceeding is commenced against such person, but not against the public corporation, service of the notice of claim *upon the public corporation* shall be required only if the corporation has a statutory obligation to indemnify such person under this chapter or any other provision of law" (emphasis added).

It is undisputed that plaintiff served the notice of claim on ECMCC in accordance with the provisions of section 50-e (1) (b). Inasmuch as the statute unambiguously states that service upon the employees of ECMCC, i.e., the Employee Defendants, is not a condition precedent to the commencement of an action against the individual employees, there is no merit to defendants' initial contention on their motion that the failure to serve the Employee Defendants with the notice of claim requires dismissal of the complaint against them (*see generally* Public Authorities Law § 3641 [1] [a]; *Schiavone v County of Nassau*, 51 AD2d 980, 981, *affd* 41 NY2d 844; *Sandak v Tuxedo Union School Dist. No. 3*, 308 NY 226, 230; *Delgado v Connolly*, 246 AD2d 484, 485). We thus note that, to the extent that our prior decision in *Rew v County of Niagara* (73 AD3d 1463, 1464) suggests that service of a notice of claim upon an employee of a public corporation is a condition precedent to commencement of the action against such employee, that decision is no longer to be followed.

III

Second, defendants contend that, although service of the notice of claim on the Employee Defendants was not required, plaintiff was nevertheless required to name those individual defendants in the notice of claim as a condition precedent to the commencement of an action against them. Despite precedent supporting that contention, we agree with Supreme Court that there is no such requirement.

The requirements for a notice of claim are found in General Municipal Law § 50-e (2), which states:

> "The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his [or her] attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable . . ."

The notice of claim filed by plaintiff against ECMCC contained all of the required information. Defendants correctly contend, however, that precedent from this Department and others requires that all of the Employee Defendants also be named in the notice of claim. While recognizing the importance of stare decisis, we now conclude that our prior cases were wrongly decided.

In both *Rew* (73 AD3d at 1464) and *Cropsey v County of Orleans Indus. Dev. Agency* (66 AD3d 1361, 1362), this Court wrote that General Municipal Law § 50-e bars the commencement of an action against an individual who has not been named in a notice of claim where such notice is required by law. The decision in *Rew* cited only *Cropsey* for that proposition, and the decision in *Cropsey* cited only *Tannenbaum v City of New York* (30 AD3d 357, 358) in support of its statement to the same effect. In deciding *Tannenbaum*, the First Department cited only *White v Averill Park Cent. Sch. Dist.* (195 Misc 2d 409, 411 [Sup Ct, Rensselaer County 2003] [James B. Canfield, J.]) in support of its statement that section 50-e "makes unauthorized an action against individuals who have not been named in a notice of claim" (*Tannenbaum*, 30 AD3d at 358).

We can find no cases before *White* with such a holding. Indeed, in *Travelers Indem. Co. v City of Yonkers* (142 Misc 2d 334, 336), one of the only reported cases addressing the issue prior to the decision in *White*, the court wrote that it was "not aware of any provision in the General Municipal Law [that] would require the plaintiff to name any officer, appointee or employee in a notice of claim where the municipality was so named as a party." Because *White* appears to be the first case to impose such a requirement, we begin our analysis with that case.

The decision in *White* is devoid of any legal authority supporting the Justice's view that individual employees must be named in a notice of claim as a condition precedent to the commencement of an action against them. The Justice who authored the decision in *White* concluded that, without naming the individual employees, the municipality does not have "enough information to enable [it] to adequately investigate the claim" (195 Misc 2d at 411). He thus concluded that "permitting plaintiffs to prosecute causes of action against individuals who were not named in the[] notice of claim is contrary both to the letter and the purpose of [General Municipal Law

§ 50-e]" (*id.* at 412).[1]

Although *White* has been cited in numerous published and unpublished trial level cases, the first Appellate Division case to cite *White* is *Tannenbaum* (30 AD3d at 358). In that case, the First Department wrote:

> "General Municipal Law § 50-e makes unauthorized an action against individuals who have not been named in a notice of claim (*see* [*White*, 195 Misc 2d at 411]), thus warranting dismissal of the state claims against [the individual defendants] (*see Matter of Rattner v Planning Commn. of Vil. of Pleasantville*, 156 AD2d 521, 526 [1989], *lv dismissed* 75 NY2d 897 [1990])" (*id.* at 358).

As noted above, the decision in *White* cited no legal authority for its holding and, although the First Department also cited to *Rattner* (156 AD2d at 526),[2] that case does not stand for the proposition that individual employees must be named in a notice of claim. *Rattner* merely held in relevant part that a notice of claim pursuant to General Municipal Law § 50-e is required for actions against individual parties where "it is clear that the [claims] were brought against them in their official capacities" (*id.* at 526). That is because the purpose of a notice of claim is to permit governmental authorities to investigate claims expeditiously (*see Rosenbaum v City of New York*, 8 NY3d 1, 11; *see generally Sandak*, 308 NY at 232).

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[1]*White* and, subsequently, *Tannenbaum* have been followed by other trial level cases (*see e.g. Almas v Loza*, 2011 NY Slip Op 32721[U] [Sup Ct, NY County]; *Guzman v City of New York*, 2011 NY Slip Op 30797[U] [Sup Ct, NY County]; *Martire v City of New York*, 2009 NY Slip Op 31648[U] [Sup Ct, NY County]; *Gray v City of New York*, 2006 NY Slip Op 30417[U] [Sup Ct, NY County], *adhered to on rearg* 2007 NY Slip Op 34198[U] [Sup Ct, NY County]; *T.P. ex rel. Patterson v Elmsford Union Free Sch. Dist.*, 2012 WL 5992748, *8 [SD NY]; *Edwards v Jericho Union Free School Dist.*, 2012 WL 5817281, *9 [ED NY]; *Alexander v Westbury Union Free Sch. Dist.*, 829 F Supp 2d 89, 110 [ED NY 2011]; *Dilworth v Goldberg, M.D.*, 2011 WL 4526555, *6 [SD NY]; *DC v Valley Cent. Sch. Dist.*, 2011 WL 3480389, *1 [SD NY]; *Schafer v Hicksville Union Free Sch. Dist.*, 2011 WL 1322903, *11 [ED NY]).

[2]In their reply brief, defendants contend that, because the Court of Appeals dismissed the plaintiff's application for leave to appeal, they thus affirmed the appellate court's order. That contention lacks merit because a denial or dismissal of an application for leave to appeal is not the equivalent of an affirmance (*see e.g. Matter of Conservative Party of State of N.Y. v New York State Bd. of Elections*, 88 NY2d 998, 998; *Parillo v Salvador*, 276 AD2d 1000, 1001, *lv denied* 96 NY2d 702; *Matter of Quirk v Evans*, 116 Misc 2d 554, 556).

Where the governmental entity would be required to indemnify the individual employees named in a lawsuit, that governmental entity must be afforded the same opportunity to investigate the claims made against the individuals. Thus, the issue in *Rattner* (156 AD2d at 526) was whether a notice of claim, to be served on the public corporation, was required at all, not whether the notice of claim needed to name the specific individual employees.

The First Department has recently reaffirmed its position in *Tannenbaum*, stating that an action could not proceed against individual defendants "because they were not named in the notice of claim" (*Cleghorne v City of New York*, 99 AD3d 443, 446). In that decision, the only case cited by the Court was *Tannenbaum*.

IV

Our first foray into the subject matter was our decision in *Cropsey*. In that case the plaintiff appealed from an order that, inter alia, granted that part of the defendants' motion to dismiss the complaint in its entirety as to an employee of the defendant County of Orleans Industrial Development Agency. In determining that Supreme Court properly granted that part of the motion, we wrote, " 'General Municipal Law § 50-e makes unauthorized an action against individuals who have not been named in a notice of claim' where such a notice of claim is required by law" (*Cropsey*, 66 AD3d at 1362, quoting *Tannenbaum*, 30 AD3d at 358).

In our next decision addressing the issue, we were called upon to decide whether a trial court properly denied an individual deputy's motion to dismiss the complaint against him (*Rew*, 73 AD3d at 1464). We wrote:

> "General Municipal Law § 50-e bars an action against an individual who has not been named in a notice of claim only where such notice is required by law [citing *Cropsey*, 66 AD3d at 1362]. The naming of a county employee in the notice of claim, and thus the service of the notice of claim upon the employee, 'is not a condition precedent to the commencement of an action against such person unless the county is required to indemnify such person' " (*id.* at 1464, quoting *Bardi v Warren County Sheriff's Dept.*, 194 AD2d 21, 23-24, citing § 50-e [1] [b]).[3]

We ultimately held in *Rew* that a notice of claim was not required by law because the defendant County of Niagara had no duty to indemnify the individual deputy. The conduct of the deputy, as alleged by the plaintiff, " 'amount[ed] to [an] intentional tort[ ]' that [fell] outside the scope of his employment and thus [was] not encompassed

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[3]We have previously addressed the erroneous statement regarding service, *supra*.

within the duty to indemnify" (*id.* at 1464).

There is no doubt that, despite the absence of any statutory provision so holding, numerous cases have held that, where a notice of claim is required by law, a plaintiff must, as a condition precedent to the commencement of an action against individual employees of a public corporation, name those employees in the notice of claim. In support of her position that individual employees need not be named in a notice of claim, plaintiff notes the absence of any such requirement in General Municipal Law § 50-e and quotes from *Schiavone* (51 AD2d at 981) for the proposition that,

> "[o]n a purely practical basis, it is obvious that, uniquely in medical malpractice actions, a potential claimant may be unable to ascertain the perpetrators of the alleged malpractice within the 90-day notice period."

Schiavone dealt with a conflict between County Law former § 52 (2), which then required service of the notice of claim on all individual employees as a condition precedent to the commencement of an action, and General Municipal Law § 50-d, which dealt with actions against government-employed physicians and required that service of a notice of claim be made pursuant to General Municipal Law § 50-e, i.e., only upon the municipal corporation (*Schiavone*, 51 AD2d at 981). The Second Department determined that the failure to serve a notice of claim on resident physicians did not preclude the subsequent action against them (*id.*). Relying on *Sandak*, the Court wrote that, "[a]s in *Sandak*, the physicians in the instant case allegedly performed the acts complained of; they needed no advance notice, as does a municipality, to investigate facts of which they were unaware or to obtain information which subsequently might cease to be available" (*id.*).

The underlying issue in *Schiavone* concerned service of the notice of claim on the resident physicians, but the Court's rationale, i.e., recognizing that a plaintiff may not have an opportunity to identify the perpetrators of the tort in such a short period of time, applies equally to whether those individuals must be named in a notice of claim.

V

The question for this Court is whether we should follow our prior decisions, based on the doctrine of stare decisis.

> "The doctrine of stare decisis recognizes that legal questions, once resolved, should not be reexamined every time they are presented . . . The doctrine . . . rests upon the principle that a court is an institution, not merely a collection of individuals, and that governing rules of law do not change merely because the personnel of the court changes . . . Stare decisis is the preferred

> course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process" (*Matter of Philadelphia Ins. Co. [Utica Natl. Ins. Group]*, 97 AD3d 1153, 1155 [internal quotation marks omitted]).

While stare decisis is the preferred course, that doctrine "does not enjoin departure from precedent or preclude the overruling of earlier decisions" (*Matter of Simonson v Cahn*, 27 NY2d 1, 3; *see Dufel v Green*, 198 AD2d 640, 640-641, *affd* 84 NY2d 795). We previously wrote that,

> "[i]n our view, '[a]lthough due deference should be accorded the doctrine of stare decisis in order to promote consistency and stability in the decisional law, we should not blindly follow an earlier ruling [that] has been demonstrated to be unsound simply out of respect for that doctrine' . . . '[T]he doctrine of [stare decisis], like almost every other legal rule, is not without its exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason. The authorities are abundant to show that in such cases it is the duty of courts to re-examine the question' " (*Kash v Jewish Home & Infirmary of Rochester, N.Y., Inc.*, 61 AD3d 146, 150; *see Rumsey v New York & New England R.R. Co.*, 133 NY 79, 85; *see also Matter of Eckart*, 39 NY2d 493, 498-499).

Although "[p]recedents involving statutory interpretation are entitled to great stability" (*People v Hobson*, 39 NY2d 479, 489; *see Matter of Chalachan v City of Binghamton*, 81 AD2d 973, 974, *affd* 55 NY2d 989), we conclude that the courts have misapplied or misunderstood the law in creating, by judicial fiat, a requirement for notices of claim that goes beyond those requirements set forth in the statute. If the legislature had intended that there be a requirement that the individual employees be named in the notices of claim, it could easily have created such a requirement. Indeed, the absence of such a requirement has previously been noted (*see Verponi v City of New York*, 31 Misc 3d 1230 [A], 2011 NY Slip Op 50908 [U], *5). It is a well-settled rule of statutory construction that, "where as here the statute describes the particular situations in which it is to apply, 'an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded' " (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208-209, quoting McKinney's Cons Laws of NY, Book 1, Statutes, § 240). Inasmuch as the notice of claim requirements are "in derogation of [a] plaintiff's common-law rights," the statute creating such a requirement should be strictly construed in the plaintiff's favor

(*Sandak*, 308 NY at 230).

Finally, as the Court of Appeals has often stated:

> "The test of the sufficiency of a Notice of Claim is merely 'whether it includes information sufficient to enable the [municipality] to investigate' . . . 'Nothing more may be required' . . . Thus, in determining compliance with the requirements of General Municipal Law § 50-e, courts should focus on the purpose served by a Notice of Claim: whether based on the claimant's description municipal authorities can locate the place, fix the time and understand the nature of the accident" (*Brown v City of New York*, 95 NY2d 389, 393; *see e.g. Rosenbaum*, 8 NY3d at 10-11; *O'Brien v City of Syracuse*, 54 NY2d 353, 358).

The underlying purpose of the statute may be served without requiring a plaintiff to name the individual agents, officers or employees in the notice of claim. We share the concern enunciated in *Schiavone* (51 AD2d at 981) that plaintiffs may not be able to meet that judicially-created requirement.

VI

Therefore, to the extent that our decisions in *Rew* (73 AD3d at 1464) and *Cropsey* (66 AD3d at 1362) held that General Municipal Law § 50-e bars an action against individuals who have not been named in a notice of claim, where such a notice is required by law, those cases are no longer to be followed. Accordingly, we conclude that the order denying defendants' motion to dismiss the complaint against the Employee Defendants should be affirmed.

In view of our determination that the order should be affirmed, we do not address plaintiff's remaining contention.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

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CAF 12-00151

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

IN THE MATTER OF ALISSIA E.C.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LISA M.E., RESPONDENT,
AND ANGELO B., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

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

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered December 29, 2011 in a proceeding pursuant to Family Court Act article 10. The order adjudged that respondent Angelo B. neglected the subject child.

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

Memorandum: As limited by his brief, respondent father appeals from dispositional orders entered in these child neglect proceedings insofar as they bring up for review related orders of protection that were issued with respect to the subject children. We take judicial notice of the fact that, during the pendency of these appeals, Family Court vacated the relevant orders of protection and entered new orders of protection that will expire in November 2013 (*see generally Matter of Michael B.*, 80 NY2d 299, 318; *Matter of Deamari W. [Howard W.]*, 83 AD3d 1489, 1489). Because "[n]o appeal lies from a vacated . . . order" (*Matter of Niagara Mohawk Power Corp. v Town of Tonawanda Assessor*, 219 AD2d 883, 883), we dismiss these consolidated appeals (*see generally Matter of Justeen T.*, 17 AD3d 1148, 1148).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

114

CAF 12-00152

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

IN THE MATTER OF ISABEL I.G. AND JAILENE G.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LISA M.E., RESPONDENT,
AND ANGELO B., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

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

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR ISABEL I.G. AND JAILENE G.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered December 29, 2011 in a proceeding pursuant to Family Court Act article 10. The order adjudged that respondent Angelo B. neglected the subject children.

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

Same Memorandum as in *Matter of Alissia E.C.* (___ AD3d ___ [Mar. 22, 2013]).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

115

CAF 12-00153

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

IN THE MATTER OF MARIO A.B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ANGELO B., RESPONDENT-APPELLANT,
AND LISA E., RESPONDENT.
(APPEAL NO. 3.)

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

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

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

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered December 29, 2011 in a proceeding pursuant to Family Court Act article 10. The order adjudged that respondent Angelo B. neglected the subject child.

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

Same Memorandum as in *Matter of Alissia E.C.* (___ AD3d ___ [Mar. 22, 2013]).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

119

CA 12-01326

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

MARIA L. JAOUDE, PLAINTIFF-APPELLANT,

V ORDER

MATTHEW E. HANNAH, L.P. PARNASSOS AND RITA J. BIONDO, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

LAWRENCE A. SCHULZ, ORCHARD PARK, FOR PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS MATTHEW E. HANNAH AND L.P. PARNASSOS.

HAGELIN KENT LLC, BUFFALO (VICTOR WRIGHT OF COUNSEL), FOR DEFENDANT-RESPONDENT RITA J. BIONDO.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered June 15, 2012 in a personal injury action. The order settled the record on appeal with respect to plaintiff's appeal from the order and judgment (one paper) filed on April 1, 2011.

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

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

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CA 12-01475

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

CHRISTINE HOLLY GRIFFIN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL DAVID GRIFFIN, DEFENDANT-APPELLANT.

TIMOTHY E. INGERSOLL, ATTORNEY FOR THE CHILDREN,
RESPONDENT.

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

MAUREEN A. PINEAU, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

TIMOTHY E. INGERSOLL, ATTORNEY FOR THE CHILDREN, ROCHESTER, FOR ABIGAIL G., MARGARET G. AND BENJAMIN G.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered February 14, 2012. The order, among other things, modified defendant's visitation schedule.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the first ordering paragraph and as modified the order is affirmed without costs, the order entered November 14, 2011 insofar as it determined that plaintiff established a change of circumstances is vacated, and the amended order entered December 8, 2011 is vacated in its entirety.

Memorandum: Plaintiff mother commenced this action seeking, inter alia, a modification of certain provisions with respect to the parties' access arrangement set forth in their settlement agreement, which was incorporated in the judgment of divorce; an upward modification of defendant father's child support obligation; and an award of attorney's fees. Following a hearing, Supreme Court issued a decision and order entered November 14, 2011 (November 2011 order) in which it determined that defendant violated certain terms of the settlement agreement and that plaintiff was therefore entitled to an upward modification of defendant's child support obligation. The court further determined that plaintiff established a change in circumstances sufficient to warrant a modification of the access provisions in the settlement agreement and that she was entitled to an award of attorney's fees. The court also issued an amended order entered December 8, 2011 (December 2011 order) in which it set forth the modified access provisions and an order entered February 7, 2012 in which it calculated defendant's increased child support obligation

(February 2012 order). Defendant appeals from an order entered February 14, 2012 (final order) that, inter alia, incorporated the November 2011, December 2011 and February 2012 orders.

At the outset, we reject plaintiff's contention that certain issues raised by defendant with respect to the modification of the access schedule are not appealable because they were the subject of a consent order, i.e., the December 2011 order. Although the December 2011 order states at the end that it is a "[s]tipulation," it states at the beginning that it is an order entered after the court heard "testimony and . . . consider[ed] . . . evidence in this matter, in the best interests of the children." Additionally, the November 2011 order states that the amended access provisions were the result of the modification proposed by the Attorney for the Children. Notably, "no agreement or stipulation was placed upon the record during the . . . [action]" and "the court issued a written decision, a fact that supports the notion that the determination was made on the merits" (*Matter of Schunk*, 136 AD2d 904, 905; *see generally* CPLR 2104). Thus, the record before us "does not clearly indicate that the [relevant] order was made by consent" (*Schunk*, 136 AD2d at 905).

We agree with defendant that the court erred in modifying certain access provisions in the settlement agreement. An existing access arrangement may be modified only "upon a showing that there has been a subsequent change of circumstances" (Family Ct Act § 467 [b] [ii]), which plaintiff failed to establish here (*cf. Matter of Vasquez v Barfield*, 81 AD3d 1398, 1399). We therefore modify the final order accordingly. We further vacate the November 2011 order insofar as it determined that plaintiff established a change in circumstances warranting a modification of the access provisions in the settlement agreement and the December 2011 order in its entirety.

Defendant's contentions that the court erred in using his 2010 tax returns to calculate his child support obligation and that it abused its discretion in not granting a downward departure from the Child Support Standards Act (CSSA) are raised for the first time on appeal and thus are not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In any event, those contentions lack merit. The settlement agreement provided that defendant would be entitled to pay less than his required pro rata share of child support pursuant to the CSSA in exchange for providing health insurance for the children without any contribution from plaintiff. The settlement agreement required that, in the event that defendant "is not providing the health insurance coverage for the children, then the parties shall recalculate child support in accord with the [CSSA] and strictly apply the applicable percentages to the parties' total combined parental income." At the hearing, defendant admitted that he was no longer providing health insurance for the children and that he had stopped reimbursing plaintiff for the health insurance premiums in July 2010. Thus, the recalculation provisions of the settlement agreement were triggered thereby requiring that defendant's child support obligation be calculated in accordance with the CSSA. With respect to the court's use of the parties' 2010 tax returns (*see generally* Domestic Relations Law § 240 [1-b] [b] [5] [i]; *Matter of Kellogg v Kellogg*,

300 AD2d 996, 996), the record does not indicate that the parties provided the court with more recent financial documents to use in calculating defendant's support obligation.

Finally, we reject defendant's contention that the court abused its discretion in awarding attorney's fees to plaintiff. Contrary to defendant's contention, a party seeking an award of attorney's fees need not demonstrate an inability to pay those fees (*see DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881). The court here properly "review[ed] the financial circumstances of both parties together with all the other circumstances of the case, . . . includ[ing] the relative merit of the parties' positions" (*id.*). Moreover, we note that this action was necessitated, in part, by defendant's failure for over a year to provide the children with health insurance, thereby further justifying the court's award (*see generally Rados v Rados*, 133 AD2d 536, 536).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

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OP 12-01563

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

IN THE MATTER OF SANDRA DOORLEY,
PETITIONER-PLAINTIFF,

V OPINION AND ORDER

HONORABLE JOHN L. DEMARCO, HONORABLE JOHN R. SCHWARTZ, DALANA J. WATFORD, CRIMINAL DEFENDANT, AND ANNIE PEARL PUGH, CRIMINAL DEFENDANT,
RESPONDENTS-DEFENDANTS.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), PETITIONER-PLAINTIFF PRO SE.

HONORABLE JOHN L. DEMARCO, ROCHESTER, RESPONDENT-DEFENDANT PRO SE.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR RESPONDENTS-DEFENDANTS DALANA J. WATFORD AND ANNIE PEARL PUGH.

CYRUS R. VANCE, JR., NEW YORK CITY (VICTORIA M. WHITE OF COUNSEL), FOR DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK, AMICUS CURIAE.

Proceeding pursuant to CPLR article 78 and declaratory judgment action (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to compel respondents Honorable John L. DeMarco and Honorable John R. Schwartz to comply with CPL 216.00 (1), and for other relief.

It is hereby ORDERED that said petition/complaint insofar as it seeks relief in the nature of a writ of prohibition and declaratory relief is unanimously granted without costs, the petition/complaint insofar as it seeks relief in the nature of mandamus to compel is denied, and

It is ORDERED, ADJUDGED and DECREED that respondents-defendants Honorable John L. DeMarco and Honorable John R. Schwartz shall admit only those defendants meeting the criteria set forth in CPL 216.00 (1) into the judicial diversion program.

Opinion by CENTRA, J.P.:

I

Petitioner-plaintiff, the District Attorney of Monroe County (petitioner), commenced this original hybrid CPLR article 78 proceeding and declaratory judgment action against respondents-defendants Honorable John L. DeMarco and Honorable John R. Schwartz (respondent judges), as well as against respondents-defendants Dalana J. Watford and Annie Pearl Pugh, both criminal defendants (respondent defendants). Respondent defendants were charged by indictments with various criminal offenses and, after arraignment, were accepted in the judicial diversion program by Judge DeMarco. Respondent defendants' cases were thereafter transferred to Judge Schwartz. Petitioner opposes judicial diversion for respondent defendants and seeks, inter alia, mandamus to compel respondent judges to comply with CPL 216.00 (1), a judgment prohibiting respondent judges from allowing respondent defendants to participate in the judicial diversion program, and a judgment declaring that only defendants meeting the criteria set forth in CPL 216.00 (1) are eligible for the judicial diversion program. The criminal matters concerning respondent defendants were stayed pending the outcome of this proceeding/action. We now conclude that the petition/complaint should be granted in part.

II

As part of the Drug Law Reform Act of 2009, the New York State Legislature enacted CPL article 216, which created a judicial diversion program allowing selected felony offenders, whose substance abuse or dependence was a contributing factor to their criminal conduct, to undergo alcohol and substance abuse treatment rather than be sentenced to a term of imprisonment. After the arraignment of an "eligible defendant," an authorized court determines whether to allow the defendant to participate in judicial diversion (CPL 216.05 [1]; *see* CPL 216.05 [4]; *People v DeYoung*, 95 AD3d 71, 73-74).

CPL 216.00 (1) defines an " '[e]ligible defendant' " for judicial diversion as

> "any person who stands charged in an indictment or a superior court information with a class B, C, D or E felony offense defined in article two hundred twenty or two hundred twenty-one of the penal law or any other specified offense as defined in subdivision four of section 410.91 of this chapter . . . ."

Subdivisions (1) (a) and (b) of CPL 216.00, which do not apply here, list certain defendants who are not eligible for judicial diversion, such as defendants with a previous violent felony conviction. Penal Law articles 220 and 221 relate to controlled substances offenses and offenses involving marihuana, respectively, and CPL 410.91 sets forth the parameters for a sentence of parole supervision. Notably, CPL 410.91 (4) was repealed as of April 7, 2009, prior to the effective date of CPL 216.00; that subdivision of CPL 410.91 had imposed a requirement that the People consent to a sentence of parole supervision for a specified offense that was a class D felony. It appears that the reference to CPL 410.91 (4) was merely a

typographical error and that the legislature meant to cite CPL 410.91 (5), which lists the specified offenses (*see* Peter Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 216.00, 2012 Cumulative Pocket Part at 69-70). The specified offenses listed in CPL 410.91 (5) include offenses such as burglary in the third degree (Penal Law § 140.20) and criminal mischief in the second degree (§ 145.10).

In Monroe County, Judge DeMarco arraigns all felony indictments containing charges that are not expressly excluded by CPL 216.00 (1) (a) or (b). If Judge DeMarco determines that a defendant is eligible for judicial diversion and the defendant wishes to participate in that program, the case is transferred to Judge Schwartz, who monitors compliance with the alcohol or substance abuse treatment.

III

Watford was charged by an indictment with four counts of falsifying business records in the first degree (Penal Law § 175.10), three counts of identify theft in the second degree (§ 190.79 [1]), and one count of identify theft in the third degree (§ 190.78 [1]). The People alleged that Watford, on various dates in 2010, assumed the identities of four individuals in order to obtain cable services. After arraignment, Judge DeMarco ordered Watford to undergo a substance abuse evaluation over the People's objection. Watford thereafter moved for admission into judicial diversion, which the People opposed. On April 25, 2012, Judge DeMarco granted the motion and allowed Watford to be admitted into judicial diversion (*People v Watford*, 36 Misc 3d 456, 461-462). Watford thereafter pleaded guilty to the charges in the indictment and signed a judicial diversion contract. Watford was promised a misdemeanor conviction and a sentence of no more than three years of probation if she successfully completed judicial diversion. In the event that Watford failed to complete judicial diversion, she would be sentenced to an indeterminate term no greater than 2 to 4 years' incarceration. Watford's case was then transferred to Judge Schwartz to monitor her compliance with her judicial diversion contract.

In May 2012, Watford was charged by a second indictment with identity theft in the second degree (Penal Law § 190.79 [1]). The People alleged that "on or about and between" January 5 and 9, 2012, Watford assumed the identity of another individual and obtained in excess of $500. After arraignment, Judge DeMarco on June 20, 2012 again allowed Watford into judicial diversion. She pleaded guilty to the charge and signed a judicial diversion contract with the same terms as the prior contract.

Pugh was charged by an indictment with promoting prison contraband in the first degree (Penal Law § 205.25 [1]), assault in the third degree (§ 120.00 [1]), and petit larceny (§ 155.25). The People alleged that, on May 12, 2012, Pugh stole property from a grocery store, caused physical injury to a security guard, and knowingly and unlawfully introduced a cell phone into the Monroe County Jail. On August 8, 2012, Judge DeMarco accepted her into

judicial diversion for the reasons he had outlined in his decision in the Watford matter. Pugh thereafter pleaded guilty to the charges and signed a judicial diversion contract. If successful in judicial diversion, Pugh would receive a misdemeanor conviction and a sentence of three years' probation. If unsuccessful, she would receive a sentence of one year in jail.

IV

Petitioner commenced this original proceeding/action on August 24, 2012 seeking, inter alia, (1) a judgment pursuant to CPLR 7803 (1), i.e., mandamus to compel, directing respondent judges to deny respondent defendants' participation in the judicial diversion program; (2) a judgment pursuant to CPLR 7803 (2), i.e., writ of prohibition, prohibiting respondent judges from allowing respondent defendants to participate in the judicial diversion program; and (3) a judgment pursuant to CPLR 3001 declaring that only defendants who meet the criteria of CPL 216.00 (1) are eligible for participation in the judicial diversion program. Petitioner contended that respondent defendants were not eligible for judicial diversion because they did not meet the criteria of CPL 216.00 (1).

Respondent defendants submitted answers, in which they asserted that a determination that a defendant is eligible for judicial diversion is never a ministerial act, and always involves the exercise of the court's discretion; the respondent judges did not act in excess of their jurisdiction or authorized powers; and the outcome of each case is fact-specific. Watford alleged as an affirmative defense that the proceeding/action was untimely. Judge DeMarco submitted an answer and raised three objections: the petition/complaint failed to state a claim; the claims were not the proper subject of a CPLR article 78 proceeding; and the proceeding/action was time-barred. Judge Schwartz has elected not to appear.

V

Initially, we reject the timeliness objection. Petitioner commenced this hybrid proceeding/declaratory judgment action pursuant to CPLR article 78 and CPLR 3001, respectively. The statute of limitations for a proceeding seeking mandamus to compel is four months (*see* CPLR 217; *Town of Webster v Village of Webster*, 280 AD2d 931, 933-934), as it is for a proceeding seeking prohibition (*see* CPLR 217; *Matter of Holtzman v Marrus*, 74 NY2d 865, 866; *Matter of Holtzman v Goldman*, 71 NY2d 564, 568 n 1). To determine the statute of limitations for a declaratory judgment action, we must "examine the substance of that action to identify the relationship out of which the claim arises and the relief sought" (*Solnick v Whalen*, 49 NY2d 224, 229; *see Bennett Rd. Sewer Co. v Town Bd. of Town of Camillus*, 243 AD2d 61, 66). If the rights of the parties may be resolved in a different form of proceeding for which a specific limitations period applies, then we must use that period (*see Solnick*, 49 NY2d at 229-230). As explained below, petitioner properly seeks a writ of prohibition, and thus that four-month statute of limitations also applies to the declaratory judgment action (*see Matter of Riverkeeper,*

Inc. v Crotty, 28 AD3d 957, 960; *see generally Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194).

Judge DeMarco's decision granting Watford's motion for admission into judicial diversion on the first indictment was issued April 25, 2012, and his decision granting her admission into judicial diversion on the second indictment was made on June 20, 2012. His decision granting Pugh admission into judicial diversion was made on August 8, 2012. Petitioner commenced this original proceeding/action in this Court on August 24, 2012, which was within the four-month statute of limitations, and this proceeding/action is therefore timely.

VI

"[T]he remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion" (*Matter of Brusco v Braun*, 84 NY2d 674, 679; *see Matter of Maron v Silver*, 14 NY3d 230, 249, *rearg dismissed* 16 NY3d 736). A party seeking mandamus to compel "must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the [judge] to grant that relief" (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757; *see Matter of Harper v Angiolillo*, 89 NY2d 761, 765).

We conclude that the remedy of mandamus to compel is not appropriate here, and thus that part of the petition/complaint seeking that relief should be denied. The statutory scheme of CPL article 216 establishes that a court has discretion in determining whether to allow a defendant into the judicial diversion program. For example, CPL 216.05 (4) provides that when an authorized court determines "that an eligible defendant should be offered alcohol or substance abuse treatment . . . , an eligible defendant *may* be allowed to participate in the judicial diversion program offered by this article" (emphasis added). Inasmuch as a court's duties under CPL article 216 are not ministerial in nature, mandamus to compel does not apply.

VII

Because of its extraordinary nature, a writ of prohibition lies only where there is a clear legal right to that relief (*see Matter of Pirro v Angiolillo*, 89 NY2d 351, 356). Prohibition is available when "a court—in cases where judicial authority is challenged—acts or threatens to act either without jurisdiction or in excess of its authorized powers" (*Holtzman*, 71 NY2d at 569; *see Pirro*, 89 NY2d at 355). Prohibition does not lie to correct trial errors; the difference between a trial error and an action in excess of the court's power is that the latter impacts the entire proceeding (*see Holtzman*, 71 NY2d at 569).

> "When a petitioner seeks relief in the nature of prohibition pursuant to CPLR 7803 (2), the court must make a two-tiered analysis. It must first

> determine whether the issue presented is the type for which the remedy may be granted and, if it is, whether prohibition is warranted by the merits of the claim" (*id.* at 568).

Whether to grant prohibition is within the discretion of the court (*see Matter of Soares v Herrick*, 20 NY3d 139, 145; *Matter of Rush v Mordue*, 68 NY2d 348, 354).

Here, petitioner alleges that Judge DeMarco lacked the power to grant respondent defendants acceptance into judicial diversion and seeks to prohibit enforcement of his orders. Although the appealability or nonappealability of an issue is not dispositive (*see Holtzman*, 71 NY2d at 570), it is a factor to consider when determining whether prohibition is an appropriate remedy (*see Rush*, 68 NY2d at 354; *Matter of Doe v Connell*, 179 AD2d 196, 198). Here, the People are unable to appeal a judicial diversion eligibility determination (*see generally* CPL 450.20). Moreover, Judge DeMarco's determinations affected the entire proceedings inasmuch as respondent defendants were diverted from the normal criminal proceedings. We therefore conclude that petitioner has a clear legal right to the relief of prohibition.

We now consider whether Judge DeMarco acted in excess of his authorized powers in a matter over which he has jurisdiction. CPL 216.00 (1) provides as follows:

> " 'Eligible defendant' means any person who stands charged in an indictment or a superior court information with a class B, C, D or E felony offense defined in article two hundred twenty or two hundred twenty-one of the penal law or any other specified offense as defined in subdivision four of section 410.91 of this chapter, provided, however, a defendant is not an 'eligible defendant' if he or she:
>
> > "(a) within the preceding ten years, excluding any time during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony, has previously been convicted of: (i) a violent felony offense as defined in section 70.02 of the penal law or (ii) any other offense for which a merit time allowance is not available pursuant to subparagraph (ii) of paragraph (d) of subdivision one of section eight hundred three of the correction law, or (iii) a class A felony offense defined in article two hundred twenty of the penal law; or
> >
> > "(b) has previously been adjudicated a second violent felony offender pursuant to section

> 70.04 of the penal law or a persistent violent felony offender pursuant to section 70.08 of the penal law.
>
> "A defendant who also stands charged with a violent felony offense as defined in section 70.02 of the penal law or an offense for which merit time allowance is not available pursuant to subparagraph (ii) of paragraph (d) of subdivision one of section eight hundred three of the correction law for which the court must, upon the defendant's conviction thereof, sentence the defendant to incarceration in state prison is not an eligible defendant while such charges are pending. A defendant who is excluded from the judicial diversion program pursuant to this paragraph or paragraph (a) or (b) of this subdivision may become an eligible defendant upon the prosecutor's consent."

Thus, the first paragraph of CPL 216.00 (1) lists who is an " '[e]ligible defendant' " for acceptance into judicial diversion. It is undisputed that respondent defendants were not charged with any offenses under Penal Law §§ 220 or 221, or any specified offense in CPL 410.91. In our opinion, that ends the inquiry, and respondent defendants are not eligible for judicial diversion. It is well settled that " '[w]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning' " (*People v Kisina*, 14 NY3d 153, 158; *see People v Williams*, 19 NY3d 100, 103). Likewise, "statutory interpretation always begins with the words of the statute" (*People v Levy*, 15 NY3d 510, 515).

Despite the unambiguous language of the statute, Judge DeMarco chose to examine the nature and purpose of the statute and concluded that the proper interpretation of the statute was to permit respondent defendants entry into judicial diversion (*Watford*, 36 Misc 3d at 457-461). Specifically, Judge DeMarco found that, because respondent defendants were not ineligible for judicial diversion pursuant to CPL 216.00 (1) (a) and (b), it was within his discretion to determine whether they were eligible for judicial diversion, even though they also did not qualify for that program pursuant to the criteria set forth in CPL 216.00 (1) and 410.91 (5) (*Watford*, 36 Misc 3d at 458). That was error. " '[C]ourts must construe clear and unambiguous statutes as enacted and may not resort to interpretative contrivances to broaden the scope and application of the statutes' " (*People v Pagan*, 19 NY3d 368, 370). "Because the clearest indicator of legislative intent is the statutory text . . . , and the text of [CPL 216.00 (1)] is clear and unambiguous with respect to the matter in question, we need not explore the legislative history behind that statute . . . in an attempt to discern a contrary intent" (*People v Skinner*, 94 AD3d 1516, 1518 [internal quotation marks omitted]).

Simply put, had the legislature intended all nonviolent offenders who committed crimes because of their drug addiction to be eligible

for judicial diversion, it could have easily so stated. "It is not allowable to interpret what has no need of interpretation, and when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning . . . Courts cannot correct supposed errors, omissions or defects in legislation" (*Meltzer v Koenigsberg*, 302 NY 523, 525 [internal quotation marks omitted]).

Respondent defendants contend that the statute is ambiguous because it refers to CPL 410.91 (4), which was repealed at the time CPL 216.00 was enacted, and thus the statute must be interpreted by examining the purpose of the legislation. It is true, as pointed out earlier, that the statute contains what appears to be simply a typographical error. Instead of referring to CPL 410.91 (5), which lists specified offenses, it refers to CPL 410.91 (4), which as respondent defendants correctly note was repealed prior to the effective date of this statute. We conclude, however, that the defect does not render the statute ambiguous. Courts have uniformly interpreted the citation to CPL 410.91 (4) to be a citation to CPL 410.91 (5) (*see e.g. People v DeYoung*, 95 AD3d 71, 73; *People v Caster*, 33 Misc 3d 198, 200; *see also* Peter Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 216.00, 2012 Cumulative Pocket Part at 69-70).

Respondent defendants also object to a plain reading of the statute because such a reading would give prosecutors sweeping authority to indict individuals only for crimes that would render them ineligible for judicial diversion, and the intent of the legislature was to give courts the discretion to decide who should be allowed into judicial diversion. Judge DeMarco was also troubled by that prospect (*Watford*, 36 Misc 3d at 460 ["it is incomprehensible that the legislature intended to give prosecutors, rather than judges, the final say as to who gets considered for the program and who does not"]). It is well settled, however, that prosecutors have "broad discretion to decide what crimes to charge" (*People v Urbaez*, 10 NY3d 773, 775; *see People v Lawrence*, 81 AD3d 1326, 1326, *lv denied* 17 NY3d 797). There is no indication in this case that the prosecutor sought to indict respondent defendants with only non-eligible offenses. In any event, even if we disagreed with the People's exercise of discretion, that is not a basis for a court to "exceed its legal authority and base [its determination of] eligibility [for judicial diversion] upon an unindicted charge" (*Caster*, 33 Misc 3d at 204).

Thus, we conclude that, by refusing to comply with the plain language of CPL 216.00 (1), Judge DeMarco acted in excess of his authority in matters over which he has jurisdiction (*see Matter of Green v DeMarco*, 87 AD3d 15, 20; *Matter of Cosgrove v Ward*, 48 AD3d 1150, 1151).

VIII

Finally, we agree with petitioner that she is also entitled to declaratory relief (*see Green*, 87 AD3d at 20). "Although a declaratory judgment often revolves around a particular set of facts,

[t]he remedy is available in cases where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved" (*Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 150, *cert denied* 464 US 993 [internal quotation marks omitted]). Additionally, the "criminal court's ruling must have an obvious effect extending far beyond the matter pending before it so that it is likely that the issue will arise again with the same result in other cases" (*id.* at 152). Judge DeMarco relied on his decision in *Watford* in similarly determining that Pugh was entitled to judicial diversion even though she was not charged with an eligible offense. Thus, "it can be assumed that the issue presented here will recur in other prosecutions and that [Judge DeMarco] will decide the issue in the same way" (*Green*, 87 AD3d at 20).

IX

Accordingly, we conclude that those parts of the petition/complaint seeking relief in the nature of a writ of prohibition and declaratory relief should be granted and that part of the petition/complaint seeking relief in the nature of mandamus to compel should be denied. Consequently, respondent judges should be prohibited from granting respondent defendants' motions to be allowed to participate in judicial diversion, from accepting their guilty pleas and their judicial diversion contracts, and from taking any further action on respondent defendants' cases in judicial diversion. Further, a judgment should be entered declaring that respondent judges admit only those defendants meeting the criteria set forth in CPL 216.00 (1) into the judicial diversion program.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

124

CA 11-02557

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

MARIA L. JAOUDE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MATTHEW E. HANNAH, L.P. PARNASSOS AND RITA J. BIONDO, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LAWRENCE A. SCHULZ, ORCHARD PARK, FOR PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS MATTHEW E. HANNAH AND L.P. PARNASSOS.

HAGELIN KENT LLC, BUFFALO (VICTOR WRIGHT OF COUNSEL), FOR DEFENDANT-RESPONDENT RITA J. BIONDO.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered April 1, 2011 in a personal injury action. The order and judgment, inter alia, dismissed plaintiff's complaint on the merits as to all defendants.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident involving defendant Matthew E. Hannah and a second motor vehicle accident, which occurred approximately 45 minutes later, involving defendant Rita J. Biondo. At the time of the accident, Hannah was driving a utility truck owned by his employer, defendant L.P. Parnassos (Parnassos), during the course of his employment, and any liability on the part of Parnassos would be vicarious only (*see generally Fenster v Ellis*, 71 AD3d 1079, 1080).

A jury trial was held during which Biondo conceded that she was negligent in the operation of her vehicle. Following the trial, the jury returned a verdict of no cause of action based on its determination that Hannah was not negligent in the operation of his vehicle and that plaintiff had not sustained a serious injury as a result of the accident with Biondo. Plaintiff appeals from an order and judgment that, inter alia, denied her motion seeking to set aside the verdict as against the weight of the evidence or, in the alternative, seeking judgment notwithstanding the verdict on the issues of negligence and causation. We reject plaintiff's contention

that Supreme Court erred in denying her motion.

"A jury verdict should not be set aside as against the weight of the evidence unless the verdict could not have been reached upon any fair interpretation of the evidence" (*Enright v Bryne*, 20 AD3d 549, 549; *see Garrett v Manaser*, 8 AD3d 616, 616; *Aprea v Franco*, 292 AD2d 478, 478). "The determination of the jury, which observed the witnesses and the evidence, is entitled to great deference" (*Enright*, 20 AD3d at 549; *see Hernandez v Carter & Parr Mobile*, 224 AD2d 586, 587).

We conclude that the verdict with respect to Hannah was not against the weight of the evidence. Plaintiff's accident with Hannah occurred shortly after a significant snowstorm, which resulted in extensive tree damage, as well as power and overhead utility line damage. Hannah was in the process of backing out of a driveway when his vehicle collided with plaintiff's vehicle. Hannah testified that, as he was backing up, he was driving at a rate of speed of between one and two miles per hour and had engaged the rear back-up lights and alarm, as well as two flashing yellow beacon lights located on the truck's roof. He also testified that his line of sight was obstructed by piles of tree branches and snow on both sides of the driveway. Plaintiff testified that she never saw Hannah's vehicle prior to the collision. Thus, based on the evidence presented at trial, the jury could reasonably conclude that Hannah was not negligent in his operation of the utility truck. Inasmuch as the jury's verdict with respect to Hannah was supported by a fair interpretation of the evidence, we decline to disturb it. We also conclude that the verdict with respect to Biondo was not against the weight of the evidence. It cannot be said that the evidence regarding plaintiff's alleged serious injury preponderates so heavily in plaintiff's favor that the verdict with respect to that issue could not have been reached on any fair interpretation of the evidence (*see Lopreiato v Scotti*, 101 AD3d 829, 829-830).

Contrary to plaintiff's alternative contention with respect to Hannah, she was not entitled to judgment notwithstanding the verdict on the issue of Hannah's alleged negligence (*see generally Cohen v Hallmark Cards*, 45 NY2d 493, 499). Contrary to plaintiff's alternative contention with respect to Biondo, she was not entitled to judgment notwithstanding the verdict determining that, as a result of the accident, she sustained a serious injury. Given the conflicting testimony of plaintiff's experts and defendants' expert on the issues whether plaintiff sustained a serious injury and the causation of her alleged injuries, it cannot be said that there is "no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*id.* at 499; *see Pawlaczyk v Jones*, 26 AD3d 822, 823, *lv denied* 7 NY3d 701).

Finally, we reject plaintiff's contention that the court committed reversible error by permitting the attorney for Hannah and Parnassos to cross-examine plaintiff using physical therapy and medical records that were not in evidence. Even assuming, arguendo,

that the court erred in permitting that line of questioning, we conclude that the error "would not have affected the result" of this action and that any such error therefore is harmless (*Palmer v Wright & Kremers*, 62 AD2d 1170, 1170; *see Cook v Oswego County*, 90 AD3d 1674, 1675).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

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TP 12-01564

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

IN THE MATTER OF CRAIG SINGLETARY, 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 (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered August 21, 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 annulled on the law without costs, the second amended petition is granted, the penalty is vacated, and respondent is directed to expunge from petitioner's institutional record all references to the violation of inmate rules 113.25 (7 NYCRR 270.2 [B] [14] [xv]), 114.10 (7 NYCRR 270.2 [B] [15] [i]), 180.10 (7 NYCRR 270.2 [B] [26] [i]) and 180.11 (7 NYCRR 270.2 [B] [26] [ii]).

Memorandum: In this CPLR article 78 proceeding, petitioner seeks review of a Tier III hearing determination finding him guilty of violating various inmate rules arising from allegations that he conspired to have his girlfriend smuggle marihuana to him during a prison visit. The only evidence at the disciplinary hearing of such a conspiracy was correspondence between defendant and his girlfriend, who did not in fact smuggle drugs into prison or even attempt to do so. We agree with petitioner that the determination must be annulled because respondent violated 7 NYCRR 720.4, which governs the opening of incoming correspondence.

Pursuant to 7 NYCRR 720.4 (f) (2), the prison superintendent must request documentation from the person seeking authority to open incoming mail so as "to determine that there are sufficient grounds for reading the mail, that the reasons for reading the mail are

related to the legitimate interests of safety, security, and order, and that the reading is no more extensive than is necessary to further th[o]se interests." Here, the evidence presented at the hearing did not establish that the superintendent complied with the above mandate before authorizing the opening of petitioner's mail. Because evidence that was admitted at the hearing was seized in contravention of respondent's rules and regulations, the Hearing Officer's determination based on that evidence "must be annulled and all references thereto expunged from petitioner's file" (*Matter of Chavis v Goord*, 265 AD2d 798, 799; *see Matter of Knight v Goord*, 255 AD2d 930, 931).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

172

KA 11-02614

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT P. BIEGANOWSKI, DEFENDANT-APPELLANT.

AMY L. HALLENBECK, FULTON, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered September 19, 2011. The judgment convicted defendant, upon a jury verdict, of rape in the second degree and endangering the welfare of a child.

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 rape in the second degree (Penal Law § 130.30 [1] [statutory rape]) and endangering the welfare of a child (§ 260.10 [1]), defendant contends that the verdict is against the weight of the evidence. We reject that contention. The indictment alleged that defendant had sexual intercourse with his 13-year-old niece when she and her brother were visiting his residence on Easter Sunday in 2009. Defendant was 42 years old at the time. Approximately one year after the incident occurred, the victim told a counselor at youth camp what had happened, and the police were then notified. At trial, the victim testified that defendant threw her on the bed and forced himself on her while she screamed for defendant to stop and attempted to fight him off. According to the victim, defendant “reeked” of beer and staggered out of the bedroom after raping her. Defendant’s sister testified that the victim, her daughter, had a good relationship with defendant prior to Easter 2009, but had not been to his residence since that time. The physician who examined the victim testified that her hymen had been torn, and the victim testified that she was a virgin when she was raped by defendant. Defendant took the stand in his own defense, testifying that he had no recollection of what happened on the night in question because he was highly intoxicated from a combination of alcohol and medication. Defendant nevertheless denied having attacked the victim, testifying that he never laid a hand on her.

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 jury credited the testimony of the victim over that of defendant, and the victim's testimony was not incredible as a matter of law, i.e., it was not " 'impossible of belief because it [was] manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*People v Garafolo*, 44 AD2d 86, 88; *see People v Rumph*, 93 AD3d 1346, 1347, *lv denied* 19 NY3d 967). Although the victim did not immediately report the crime and waited approximately one year before reporting it, she explained the reason for her delay at trial, thus presenting "a credibility issue for the jury to resolve" (*People v Reynolds*, 81 AD3d 1166, 1167, *lv denied* 16 NY3d 898; *see People v Gathers*, 47 AD3d 959, 960-961, *lv denied* 10 NY3d 863).

We reject defendant's further contention that County Court considered unreliable evidence in determining the sentence, i.e., that defendant gave the victim herpes. " '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' " (*People v Warren*, 100 AD3d 1399, 1403; *see People v Travers*, 95 AD3d 1239, 1240; *see generally People v Outley*, 80 NY2d 702, 712). "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" (*Warren*, 100 AD3d at 1403 [internal quotation marks omitted]).

Here, defendant had ample notice prior to sentencing that the victim claimed that defendant gave her herpes and thus could have obtained medical evidence to refute the victim's allegation. The preplea investigation report twice mentioned that the victim had contracted herpes from defendant, and that report was provided to defendant before sentencing. Nor did defendant request an adjournment to attempt to procure such evidence. It was thus for the court "to consider defendant's arguments and to evaluate the information contained in the [presentence] report[s] in determining the appropriate sentence" (*People v Batthany*, 27 AD3d 837, 838).

Finally, we reject defendant's contention that the sentence is unduly harsh and severe, given that the court sentenced defendant to four years in prison, three years less than the maximum punishment allowed, and considering the nature of the offense. We therefore perceive no basis to modify the sentence as a matter of discretion in the interest of justice.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

177

KA 11-00341

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MELVIN L. STEPHENSON, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered January 31, 2011. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, manslaughter in the first degree and robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [3]), manslaughter in the first degree (§ 125.20 [1]), and robbery in the first degree (§ 160.15 [1]), defendant contends that the evidence is legally insufficient to establish his commission of any of the charged crimes. Defendant further contends that the verdict is against the weight of the evidence. Although defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence, we " 'necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298, *lv denied* 19 NY3d 968; *see People v Danielson*, 9 NY3d 342, 349; *People v Francis*, 83 AD3d 1119, 1120, *lv denied* 17 NY3d 806).

Viewing the evidence in the light most favorable to the People, as we must in the context of a legal sufficiency analysis (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to establish that defendant forcibly stole money from the victim and that, during the course and commission of that robbery, he strangled the victim to death. We further conclude that, when viewed in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although there was no direct evidence that defendant killed the victim or stole money from him, there was ample circumstantial evidence of defendant's guilt, and it is well settled that circumstantial evidence

is "not a disfavored form of proof and, in fact, may be stronger than direct evidence when it depends upon 'undisputed evidentiary facts about which human observers are less likely to err . . . or to distort' " (*People v Geraci*, 85 NY2d 359, 369).

The victim, an 80-year-old man who lived alone in an apartment in the same building where defendant resided, was found dead inside his apartment by a Meals-on-Wheels volunteer who brought him food at approximately 11:00 a.m. on December 1, 2009. The victim had been strangled and had several open cuts or abrasions on his body. The aide who assisted the victim with his bathing and other needs testified that the victim had no cuts or abrasions on his body when she gave him a shower the previous day. According to the Medical Examiner, the victim was killed sometime between 9:00 that morning and 8:30 the night before. There were drops of the victim's blood on the jacket defendant was wearing when he was questioned by the police on December 1, 2009, and the victim's DNA was found on a pair of gloves in defendant's pocket.

In addition, several residents of the apartment building testified that they observed defendant inside the victim's apartment the night before his body was found, and one resident heard the two men arguing over money. Defendant's former girlfriend testified that, several weeks before the victim was killed, defendant said that he was tired of being "broke" and that he could take money from the "old man downstairs" while he was sleeping. Another witness testified that defendant told him in mid-November 2009 that he was going to kill the victim.

The People also introduced evidence that the victim had more than $100 in his wallet on November 30, 2009, when he was last seen alive, and that his wallet was empty when he was found dead the following morning. During the day on November 30, 2009, defendant, who was unemployed, had no money. He attempted to sell something that day to another resident in the building, saying that he needed money to purchase minutes for his cell phone. The resident declined to buy anything from defendant. The next morning, i.e., the same morning that the victim's body was found, defendant purchased a carton of cigarettes and a 24-pack of beer, among other items. He also had minutes on his cell phone. When questioned by the police about where he got the money to pay for the beer and cigarettes, defendant said that he won $100 from a lottery ticket he purchased and cashed at the store on December 1, 2009. The police learned that no lottery tickets were cashed at that store that day for more than $20. In light of the above evidence, we cannot conclude that the evidence is legally insufficient or that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant's remaining contention is that defense counsel was ineffective for failing to preserve for our review his challenge to the legal sufficiency of the evidence. Because we have reviewed the sufficiency of the evidence in determining whether the verdict is against the weight of the evidence, defendant was not prejudiced by

defense counsel’s failure to preserve the sufficiency contention.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

189

CA 12-01652

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

IN THE MATTER OF MICHAEL J. MIMASSI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF WHITESTOWN ZONING BOARD OF APPEALS,
RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

DOUGLAS H. ZAMELIS, MANLIUS, FOR PETITIONER-APPELLANT.

WILLIAM P. SCHMITT, TOWN ATTORNEY, UTICA, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered May 7, 2012 in a proceeding pursuant to CPLR article 78. The order, sua sponte, transferred venue of the proceeding from Onondaga County to Oneida County.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul two determinations of respondent made in connection with petitioner's application for an area variance from a provision of the Town of Whitestown's Zoning Ordinance. The proceeding was commenced in Supreme Court, Onondaga County, and by the order in appeal No. 1 that court, sua sponte, transferred the proceeding to Supreme Court, Oneida County, pursuant to CPLR 507. We agree with petitioner that the court erred in transferring the proceeding sua sponte. CPLR 509 provides that the place of trial may be changed to another county "by order upon motion, or by consent." CPLR 510 provides the grounds for the change of the place of trial, upon a motion. A court "is authorized to change venue only upon motion and may not do so upon its own initiative" (*Kelson v Nedicks Stores*, 104 AD2d 315, 316). Additionally, a CPLR article 78 proceeding seeking to annul a determination denying a request for an area variance does not affect the title to, or the possession, use or enjoyment of, real property, and thus the court erred in relying on CPLR 507 in transferring the proceeding. In view of our determination, we vacate the judgment in appeal No. 2 dismissing the petition, and we do not address the issues raised in appeal No. 2.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

190

CA 12-01653

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

IN THE MATTER OF MICHAEL J. MIMASSI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF WHITESTOWN ZONING BOARD OF APPEALS,
RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

DOUGLAS H. ZAMELIS, MANLIUS, FOR PETITIONER-APPELLANT.

WILLIAM P. SCHMITT, TOWN ATTORNEY, UTICA, FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Norman I. Siegel, A.J.), entered July 19, 2012 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Same Memorandum as in *Matter of Mimassi v Town of Whitestown Zoning Bd. of Appeals* ([appeal No. 1] ___ AD3d ___ [Mar. 22, 2013]).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

206

KA 09-01942

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RHONDA A. FUMIA, DEFENDANT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, 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 August 14, 2009. The judgment convicted defendant, upon her plea of guilty, of 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 her, upon her plea of guilty, of assault in the first degree (Penal Law § 120.10 [1]). At the time of her plea on the assault count, defendant also admitted to a violation of probation. The sentence of probation had previously been imposed upon her conviction of robbery in the third degree (§ 160.05). As part of the negotiated plea agreement, defendant was promised that the sentences for the two convictions would be ordered to run concurrently. At the plea proceedings, County Court warned defendant that, if she was arrested on criminal charges or violated any of the terms of the orders of protection that were in place, it would no longer be bound by the sentencing agreement. Prior to sentencing, defendant was arrested and charged with criminal contempt in the first degree (§ 215.51 [b] [vi]) for violating a no contact order of protection. At sentencing, the court imposed an enhanced sentence by ordering that the sentences for the assault conviction and the violation of probation conviction run consecutively.

Defendant contends that the court erred in imposing an enhanced sentence because there was no “legitimate basis” for defendant’s arrest. Defendant failed to preserve her contention for our review because she failed to object to the enhanced sentence or to move to withdraw her plea or to vacate the judgment of conviction on that ground (*see People v Baxter*, 302 AD2d 950, 951, *lv denied* 99 NY2d 652; *People v Evans*, 302 AD2d 893, 894, *lv denied* 100 NY2d 561). In any event, defendant’s contention is without merit inasmuch as there was a

sufficient inquiry made to support "the existence of a legitimate basis for the arrest on that charge" (*People v Outley*, 80 NY2d 702, 713; *see People v Ayen*, 55 AD3d 1305, 1306). At an *Outley* hearing, the complainant identified defendant's voice in two telephone calls made to him while a no contact order of protection in his favor was in effect. Additionally, telephone records demonstrated that numerous telephone calls were made from the residence where defendant was staying to the complainant's telephone during the period that the order of protection was in effect. Furthermore, we see no reason to disturb the sentence imposed.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

209

CA 12-00544

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

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

V MEMORANDUM AND ORDER

DEREK GOODING, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (MARGOT S. BENNETT OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered February 2, 2012 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, determined that respondent is a dangerous sex offender requiring confinement and committed him to a secure treatment facility.

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

Memorandum: Respondent appeals from an order revoking his prior regimen of strict and intensive supervision and treatment (SIST), determining that he is a dangerous sex offender requiring confinement and committing him to a secure treatment facility (*see* Mental Hygiene Law § 10.01 *et seq.*). Contrary to respondent's contention, we conclude that petitioner established by clear and convincing evidence at the dispositional hearing that he is a dangerous sex offender requiring confinement (*see* §§ 10.03 [e]; 10.07 [f]). Moreover, Supreme Court, as the trier of fact, was " 'in the best position to evaluate the weight and credibility of the conflicting psychiatric testimony presented' " (*Matter of State of New York v Blair*, 87 AD3d 1327, 1327; *see Matter of State of New York v Timothy JJ.*, 70 AD3d 1138, 1144), and we see no basis to disturb its decision to credit the testimony of petitioner's expert over that of respondent's expert (*see Blair*, 87 AD3d at 1327). We reject respondent's further contention that petitioner was required to "refute the possibility of a less restrictive placement" or that the court was required to specifically address the issue of a less restrictive alternative (*see Matter of State of New York v Enrique T.*, 93 AD3d 158, 166-167, *lv dismissed* 18 NY3d 976).

Finally, respondent's constitutional and statutory challenges to

the treatment he received while in a regimen of SIST (*see* Mental Hygiene Law § 10.11) at Mid-Erie Counseling and Treatment Services (Mid-Erie) are not properly before us inasmuch as they are unpreserved for our review (*see Blair*, 87 AD3d at 1328; *see generally Matter of Giovanni K. [Dawn K.]*, 68 AD3d 1766, 1767, *lv denied* 14 NY3d 707). In any event, on the record before us, there is no evidence that either petitioner or Mid-Erie failed to fulfill its treatment responsibilities or violated respondent's due process rights.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

212

CA 12-01513

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

JEREMY CUPP, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EDWARD MCGAFFICK AND VANSANTIS DEVELOPMENT, INC.,
DEFENDANTS-RESPONDENTS.

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

GOLDBERG SEGALLA LLP, ROCHESTER (TIMOTHY P. WELCH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered November 30, 2011. The order denied plaintiff's motion for partial summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for personal injuries he sustained as a result of an accident in which his motorcycle was struck by a tractor-trailer that was owned by VanSantis Development, Inc. and operated by Edward McGaffick (collectively, defendants). Plaintiff appeals from an order denying his motion for partial summary judgment on the issue of negligence. We agree with plaintiff that Supreme Court erred in denying the motion, and we therefore reverse the order and grant the motion.

The Vehicle and Traffic Law provides that "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway" (Vehicle and Traffic Law § 1129 [a]). In support of the motion, plaintiff submitted his deposition testimony and that of McGaffick, wherein they each testified that the tractor-trailer operated by McGaffick struck plaintiff's motorcycle from the rear while the two vehicles proceeded in the right lane of traffic on the New York State Thruway. Thus, "plaintiff[] established [his] prima facie entitlement to judgment as a matter of law by demonstrating, through [his] deposition testimony, that [his] vehicle was traveling within one lane of traffic at all times when it was struck in the rear by [McGaffick's] vehicle" (*Scheker v Brown*, 85 AD3d 1007, 1007; *see*

Nsiah-Ababio v Hunter, 78 AD3d 672, 672-673; *see also Atkinson v Safety Kleen Corp.*, 240 AD2d 1003, 1004; *cf. Maxwell v Lobenberg*, 227 AD2d 598, 598-599). Additionally, it is well settled that "drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*Byrne v Calogero*, 96 AD3d 704, 705; *see Johnson v Phillips*, 261 AD2d 269, 271). McGaffick's deposition testimony that he did not see plaintiff's motorcycle before the collision establishes that he violated that duty.

Defendants' submission of McGaffick's deposition testimony that it was rainy and dark and that plaintiff was wearing dark clothing did not raise a triable issue of fact in opposition to the motion. "Even according full credit to the defendants' version of the accident, it was insufficient to raise a triable issue of fact in light of the circumstances of the accident" (*Volpe v Limoncelli*, 74 AD3d 795, 795; *see also Faul v Reilly*, 29 AD3d 626, 626; *Downs v Toth*, 265 AD2d 925, 925). "When a driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate of speed and to . . . compensate for any known adverse road conditions" (*Young v City of New York*, 113 AD2d 833, 834; *see Downs*, 265 AD2d at 925). In addition, plaintiff testified at his deposition that his motorcycle lights were illuminated, and defendants introduced no evidence to the contrary. Consequently, the court erred in denying the motion.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

222

KA 12-00148

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON H. CARTER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER 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 (Sara S. Sperrazza, J.), rendered May 27, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the fifth degree (Penal Law §§ 110.00, 220.06 [5]). 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 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; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

227

KA 12-00394

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON H. CARTER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER 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 (Sara S. Sperrazza, J.), rendered May 27, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the third degree (Penal Law § 265.02 [7]). 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 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; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

237

CA 12-01125

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

IN THE MATTER OF DANIEL KARLIN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MALCOLM R. CULLY, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY AND ANDREA W. EVANS, CHAIRWOMAN, NEW YORK STATE DIVISION OF PAROLE,
RESPONDENTS-RESPONDENTS.

DANIEL KARLIN, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered May 2, 2012 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition pursuant to CPLR article 78 seeking to annul the determination of the New York State Division of Parole (Parole Board) in May 2011, denying him parole release for the fourth time. "Petitioner is currently serving an aggregate term of 12 to 36 years in prison having been convicted in two different counties of numerous sex crimes involving young boys whom he supervised while he was employed as a camp counselor" (*Matter of Karlin v New York State Div. of Parole*, 77 AD3d 1015, 1015; *see Matter of Karlin v Alexander*, 57 AD3d 1156, 1156, *lv denied* 12 NY3d 704). While incarcerated, petitioner obtained his bachelor's degree and successfully participated in and led several programs. Nevertheless, "[d]iscretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined" (Executive Law § 259-i [2] [c] [A]; *see Matter of Silmon v Travis*, 95 NY2d 470, 476; *Matter of Gaston v Berbary*, 16 AD3d 1158, 1159). We reject the contention of petitioner that the Parole Board failed to consider the positive aspects of his institutional record and based its determination solely upon the seriousness of the crimes (*cf. Matter of King v New York State Div. of Parole*, 190 AD2d 423, 432-433, *affd* 83 NY2d 788; *Matter of Johnson v New York State Div. of*

Parole, 65 AD3d 838, 839). Although the Parole Board focused on the "deviant" nature of petitioner's crimes, it "also considered petitioner's program accomplishments, clean disciplinary record and postrelease plans in making its decision" (*Karlin*, 77 AD3d at 1015; *see Silmon*, 95 NY2d at 476-477). Further, the Parole Board noted that, while petitioner's behavior had improved since his last parole interview, it was concerned with the "multiple disciplinary violations" that petitioner had accumulated before 2007. We conclude that there was no "showing of irrationality bordering on impropriety" with respect to the Parole Board's determination, and thus there is no basis for judicial intervention (*Matter of Russo v New York State Bd. of Parole*, 50 NY2d 69, 77; *see Silmon*, 95 NY2d at 476). Finally, "[p]etitioner failed to raise [his equal protection claim] in his administrative appeal and thus has failed to exhaust his administrative remedies with respect to that contention" (*Matter of Shapard v Zon*, 30 AD3d 1098, 1099).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

255

KA 10-01056

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CRUSHAWN EVANS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 18, 2009. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of assault in the second degree (Penal Law § 120.05 [4]). The conviction arises from the accidental misfire of a sawed-off shotgun in Lincoln Park in Syracuse. Defendant failed to preserve for our review his contention that the People failed to establish that he had the requisite reckless mental state and thus that the evidence is legally insufficient to support the conviction inasmuch as he failed to move for a trial order of dismissal specifically directed at the alleged insufficiency (*see People v Gray*, 86 NY2d 10, 19).

Defendant further challenges the weight of the evidence supporting the verdict, however, and we thus "necessarily review the evidence adduced as to each of the elements of the crime[] in the context of our review of defendant's challenge regarding the weight of the evidence" (*People v Caston*, 60 AD3d 1147, 1149). "[B]ased on all the credible evidence[, we conclude that] a different finding would not have been unreasonable," and we therefore conduct an independent review of the trial evidence (*People v Bleakley*, 69 NY2d 490, 495). "The Court of Appeals has recently reiterated that, in reviewing the weight of the evidence, we must 'affirmatively review the record; independently assess all of the proof; substitute [our] own

credibility determinations for those made by the [factfinder] in an appropriate case; determine whether the verdict was factually correct; and acquit a defendant if [we are] not convinced that the [factfinder] was justified in finding that guilt was proven beyond a reasonable doubt' " (*People v Oberlander*, 94 AD3d 1459, 1459, quoting *People v Delamota*, 18 NY3d 107, 116-117). Upon our review, we conclude that the People failed to establish beyond a reasonable doubt that defendant "engage[d] in conduct which create[d] or contribute[d] to a substantial and unjustifiable risk that serious physical injury to another person by means of a deadly weapon . . . [would] occur" (CJI2d[NY] Penal Law § 120.05 [4]; *see generally Delamota,* 18 NY3d at 116-117). The People's theory of the case was that defendant's recklessness was demonstrated by conduct including bringing a loaded firearm, i.e., a sawed-off shotgun, to the park; possessing that firearm in proximity to others; and holding it pointed at the victim while defendant was imbibing alcohol, disregarding the risk that it might misfire. The People failed to establish beyond a reasonable doubt that defendant engaged in any of those activities. Indeed, they failed to present any evidence establishing that defendant brought the gun to the park; that the gun belonged to defendant; and that defendant had any knowledge that the gun was loaded with live ammunition or was aware of—and consciously disregarded—the risk that it might misfire (*see generally* Penal Law § 15.05 [3]). The only witness who observed defendant with the gun testified that as defendant "was picking it up it just went off." None of the three witnesses to the shooting, including the witness who observed defendant with the gun, testified that defendant pointed the gun at the victim at any time. Thus, although there was undisputed evidence of a serious physical injury and credible testimony that there was a deadly weapon in the park, we conclude that Supreme Court, as the factfinder, "failed to give the evidence the weight it should be accorded on the issue whether defendant recklessly caused [serious] physical injury" by means of a deadly weapon or a dangerous instrument (*People v Groth*, 71 AD3d 1391, 1392). Consequently, we reverse the judgment of conviction and dismiss the indictment. In light of our determination, we need not consider defendant's remaining contentions.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

258

KA 09-01281

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY J. HOLMES, DEFENDANT-APPELLANT.

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

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered May 29, 2009. The judgment convicted defendant, upon a jury verdict, of assault in the third degree (two counts), intimidating a victim or witness in the third degree (two counts) and endangering the welfare of a child.

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 two counts each of assault in the third degree (Penal Law § 120.00 [1]) and intimidating a victim or witness in the third degree (§ 215.15 [1]), and one count of endangering the welfare of a child (§ 260.10 [1]), defendant challenges the legal sufficiency and weight of the evidence with respect to the conviction of intimidating a victim or witness in the third degree and endangering the welfare of a child. Defendant failed to preserve for our review his contention that the evidence supporting the conviction of endangering the welfare of a child is legally insufficient on the ground that the child at issue was not in the room where the assault occurred (*see People v Carncross*, 14 NY3d 319, 324-325; *People v Gray*, 86 NY2d 10, 19; *People v Dizak*, 93 AD3d 1182, 1185, *lv denied* 19 NY3d 972, *reconsideration denied* 20 NY3d 932). Defendant's contention that the evidence is legally insufficient to support that conviction because the People failed to establish that the child at issue was not mentally or emotionally harmed, however, is properly before us (*see People v Payne*, 3 NY3d 266, 273, *rearg denied* 3 NY3d 767). In any event, both of defendant's contentions with respect to the legal sufficiency of the evidence supporting that conviction lack merit, as does defendant's contention concerning the legal sufficiency of the evidence with respect to the conviction of intimidating a victim or witness (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of those

crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "[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 Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]).

Contrary to defendant's further contention, County Court's *Molineux* ruling did not constitute an abuse of discretion (*see People v Dorm*, 12 NY3d 16, 19; *People v Duperroy*, 88 AD3d 606, 607, *lv denied* 18 NY3d 957; *People v Galloway*, 61 AD3d 520, 520-521, *lv denied* 12 NY3d 915). We note in any event that the court's limiting instruction in its jury charge "served to alleviate any potential prejudice resulting from the admission of the evidence" (*People v Alke*, 90 AD3d 943, 944, *lv denied* 19 NY3d 994; *see People v Freece*, 46 AD3d 1428, 1429, *lv denied* 10 NY3d 811).

Moreover, there is no merit to defendant's contention that he was prejudiced by the timing of the People's notice of intention to offer *Molineux* evidence, the timing of the *Molineux* hearing, which was conducted during jury selection, and the timing of the court's *Molineux* ruling, which was made upon the completion of jury selection. According to defendant, the timing of the court's *Molineux* ruling upon the completion of jury selection denied him the opportunity to explore the potential impact of that evidence on voir dire. It is well settled that "a defendant is not entitled as a matter of law to pretrial notice of the People's intention to offer evidence pursuant to *People v Molineux* (168 NY 264 [1901]) or to a pretrial hearing on the admissibility of such evidence" (*People v Small*, 12 NY3d 732, 733; *see People v Ventimiglia*, 52 NY2d 350, 362). Defendant's contention that defense counsel was forced to prepare for trial as if there would be no *Molineux* evidence lacks merit inasmuch as the record reflects that the People advised defense counsel at the *Sandoval* hearing of the possibility that *Molineux* issues would be raised shortly before trial, and there is no record support for defendant's further contention that the timing of the *Molineux* request was such that defendant could not discuss those issues with defense counsel. In any event, with respect to the timing of the court's *Molineux* ruling, we note that the court's limiting instruction concerning the jury's consideration of such evidence obviated any need for defense counsel during voir dire to explore the impact of that evidence.

Also without merit is defendant's contention that the court failed to engage in the second part of the *Ventimiglia* analysis, i.e., the court never analyzed whether the probative value of evidence of defendant's prior bad acts was outweighed by its potential for prejudice (*see People v Cass*, 18 NY3d 553, 560; *Ventimiglia*, 52 NY2d at 362). Although the court arguably could have better "recited its discretionary balancing of the probity of such evidence against its potential for prejudice" (*People v Meseck*, 52 AD3d 948, 950, *lv denied* 11 NY3d 739), we conclude that, viewing the record in its entirety, the court conducted the requisite balancing test (*see id.*). Here,

defense counsel opposed the introduction of the *Molineux* evidence based on its prejudicial effect, and the court's *Molineux* determination included a limiting instruction to the jury (*see People v Milot*, 305 AD2d 729, 731, *lv denied* 100 NY2d 585).

Finally, we note that the certificate of conviction reflects that defendant was convicted of assault in the third degree with respect to the first count of the indictment under Penal Law § 120.00, rather than more specifically under Penal Law § 120.00 (1), and it thus must be amended to that extent (*see generally People v Martinez*, 37 AD3d 1099, 1100, *lv denied* 8 NY3d 947).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

259

KA 10-02423

PRESENT: SMITH, J.P., SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICKY PROCTOR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered December 10, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]). We reject defendant's contention that Supreme Court erred in denying his motion for a mistrial after a witness testified that she had seen defendant's photograph in a photo array presented to her by a police detective who was investigating the subject homicide. The reference was brief and inadvertent, and any prejudice to defendant was minimized by the court's curative instruction (*see People v Cruz*, 134 AD2d 886, 886, *lv denied* 71 NY2d 894; *see also People v Gonzalez*, 295 AD2d 264, 265, *lv denied* 99 NY2d 535; *People v Rodriguez*, 281 AD2d 289, *lv denied* 98 NY2d 701). In any event, any error in the admission of that testimony is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

We reject defendant's further contention that the court erred in admitting negative identification testimony (*see People v Wilder*, 93 NY2d 352, 356). Defendant and his brother were so similar in appearance that they were referred to as "twins" by those who knew them and, thus, such testimony was relevant and probative in establishing that the witnesses to this crime could distinguish defendant from his brother.

Defendant further contends that the court erred in denying his motion for a mistrial based on the court's omission of allegedly

critical testimony from a readback given in response to a jury note. That contention is not preserved for our review inasmuch as defense counsel failed to raise that contention before the jury had recommenced its deliberations, when any "error could have been cured" (*People v Ramirez*, 15 NY3d 824, 826; *see People v Smart*, 100 AD3d 1473, 1474). In any event, defendant's contention is without merit. The record establishes that after defense counsel brought the omission to the court's attention, the court immediately took steps to have that testimony read to the jury. When the jury announced that it had a verdict before the supplemental readback could be given, the court, on the record, outlined a procedure that involved not accepting the verdict until that readback was given and then directing the jury to continue its deliberations with the benefit of having heard that supplemental testimony. The court therefore properly followed the procedures outlined in *People v O'Rama* (78 NY2d 270, 277-278). Finally, the sentence is not unduly harsh or severe.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

260

KA 09-00153

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PARIS D. MONTGOMERY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN 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 November 26, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and the indictment is dismissed without prejudice to the People to re-present any appropriate charges to another grand jury.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). We agree with defendant that reversal is required because the evidence presented at trial rendered the indictment duplicitous, thus creating the danger that he was convicted of a crime for which he was not indicted (*see People v Filer*, 97 AD3d 1095, 1096, *lv denied* 19 NY3d 1025). The trial evidence established that a police officer observed defendant engaging in conduct indicative of a drug sale on the front porch of a house on North Clinton Avenue containing a single occupied apartment. During the course of the transaction, the officer observed defendant entering the house, presumably to retrieve the drugs for the purchaser. When the police executed a search warrant that evening, they discovered a sandwich bag containing 28 individually packaged portions of cocaine in the entryway of the house located partially under the door of a vacant apartment. In the occupied apartment, which was at the top of the stairs in the entryway, the police recovered a digital scale and a jacket that contained several small empty plastic bags and a quantity of uncut cocaine. It is apparent from the record that the grand jury returned only a one-count indictment, having found the evidence of possession of the uncut cocaine insufficient to return a second count. Although neither the indictment nor the bill of particulars indicated

which cocaine defendant was charged with possessing, i.e., the cocaine in the sandwich bag or the uncut cocaine, the People orally specified before trial that the grand jury had found the evidence insufficient to charge defendant with possession of the uncut cocaine, and thus defendant had the requisite notice of the offense charged in the indictment (*see generally People v Alonzo*, 16 NY3d 267, 269). The indictment was rendered duplicitous, however, because the People presented evidence at trial that defendant had constructive possession of both the uncut cocaine and the cocaine in the sandwich bag. Indeed, the prosecutor advanced that theory in her opening statement and on summation. "Under the circumstances, there can be no assurance that the jury 'reached a unanimous verdict' " with respect to defendant's constructive possession of the cocaine in the sandwich bag as opposed to the uncut cocaine (*People v Bracewell*, 34 AD3d 1197, 1199, quoting *People v Keindl*, 68 NY2d 410, 418, *rearg denied* 69 NY2d 823). We therefore reverse the judgment of conviction and dismiss the indictment without prejudice to the People to re-present new charges to another grand jury (*see Filer*, 97 AD3d at 1096).

In light of the foregoing, it is unnecessary to address defendant's remaining contentions.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

267

CA 12-01829

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

MONA MADAFFERI AND IVAN MADAFFERI,
AS PARENTS AND NATURAL GUARDIANS OF
ALANNA MADAFFERI, AN INFANT,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ANDREW J. HERRING, DEFENDANT,
AND PHILIP S. MYERS, DEFENDANT-RESPONDENT.

CELLINO & BARNES, P.C., ROCHESTER (K. JOHN WRIGHT OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HAGELIN KENT LLC, BUFFALO (VICTOR WRIGHT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered November 18, 2011. The order, inter alia, denied those parts of the motion of plaintiffs for summary judgment on the issues of proximate cause, serious injury and ownership of the vehicle.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion for summary judgment on the issues of serious injury and ownership of the vehicle, and as modified the order is affirmed without costs.

Memorandum: In this personal injury action arising from a one-vehicle accident in which the vehicle struck a tree, plaintiffs appeal from an order that, inter alia, denied those parts of their motion for summary judgment on the issues of proximate cause, serious injury, and defendant Philip S. Myers' ownership of the vehicle. Plaintiffs' daughter was a passenger in the vehicle, which was driven by defendant Andrew J. Herring and allegedly purchased by Herring from Myers. It is undisputed that, at the time of the accident, the license plates issued to Myers remained on the vehicle, with Myers' permission.

Plaintiffs met their burden with respect to the issue of serious injury by submitting the sworn report of a medical expert establishing that their daughter sustained sacral fractures as well as an L3 endplate fracture as a result of the accident, inasmuch as "[a] serious injury is defined in relevant part as a fracture" (*Boorman v Bowhers*, 27 AD3d 1058, 1059; *see* Insurance Law § 5102 [d]; *Hillman v Eick*, 8 AD3d 989, 991). Herring did not oppose the motion, and Myers

failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Thus, we conclude that Supreme Court erred in denying that part of plaintiffs' motion, and we modify the order accordingly.

With respect to the issue of ownership, we note that, pursuant to Vehicle and Traffic Law § 420 (1), "[u]pon the transfer of ownership . . . of a motor vehicle . . . , its registration shall expire; and the seller . . . shall remove the number plates from the vehicle." Consequently, "[a] registered owner who transfers a vehicle without removing the license plates is estopped as against an injured third party from denying ownership" (*Dairylea Coop. v Rossal*, 64 NY2d 1, 10; *see Phoenix Ins. Co. v Guthiel*, 2 NY2d 584, 587-588; *Nelson v Alonge*, 286 App Div 921, 921). Inasmuch as Myers admittedly left his license plates on the vehicle after purportedly transferring ownership to Herring, Myers is estopped from denying ownership of the vehicle as against plaintiffs. The court therefore erred in denying that part of plaintiffs' motion seeking summary judgment on the issue of Myers' ownership of the vehicle, and we further modify the order accordingly.

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

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

268

CA 12-01797

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF MERRY-GO-ROUND PLAYHOUSE, INC.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ASSESSOR OF CITY OF AUBURN, BOARD OF ASSESSMENT
REVIEW OF CITY OF AUBURN, AND CITY OF AUBURN,
RESPONDENTS-RESPONDENTS.

BOYLE & ANDERSON, P.C., AUBURN (CHARLES H. LYNCH, JR., OF COUNSEL), FOR PETITIONER-APPELLANT.

JOHN C. ROSSI, CORPORATION COUNSEL, AUBURN (ANDREW S. FUSCO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered April 2, 2012. The order, insofar as appealed from, granted respondents' motion for summary judgment and denied petitioner's cross motion for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, respondents' motion for summary judgment is denied, petitioner's cross motion for summary judgment is granted, the petition is granted insofar as it seeks a tax exemption pursuant to Real Property Tax Law § 420-a (1) (a) for real property located at 112 Franklin Street and 230 Genesee Street in the City of Auburn, and the matter is remitted to Supreme Court, Cayuga County, for further proceedings in accordance with the following Memorandum: Petitioner, a not-for-profit corporation engaged in the performing arts, commenced this proceeding seeking review of the assessment for its property at 230 Genesee Street in the City of Auburn (Genesee Street property), as well as respondents' determination that the Genesee Street property and petitioner's property at 112 Franklin Street (collectively, properties) are not tax exempt pursuant to RPTL 420-a. The properties consist of apartment buildings used to house staff and actors employed in petitioner's seasonal theaters. The properties are open only to petitioner's actors and staff, and petitioner receives no income from the properties.

In lieu of an answer, respondents moved to dismiss the petition pursuant to CPLR 3211 (a) (7), and petitioner cross-moved for summary judgment on the petition. The parties agreed that the assessed valuation of the Genesee Street property should be reduced from

$400,999 to $400,000, and Supreme Court issued an order to that effect. In the same order, the court also treated respondents' motion as one for summary judgment, and granted that motion. Petitioner appeals from the order insofar as it granted respondents' motion for summary judgment and denied petitioner's cross motion for that relief.

"All real property within the state shall be subject to real property taxation . . . unless exempt therefrom by law" (RPTL 300). Both the New York Constitution and the RPTL provide exemptions from taxation for real property used for religious, educational or charitable purposes. The New York Constitution provides an absolute exemption for real property "used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit" (NY Const, art 16, § 1). RPTL 420-a (1) (a) also grants that mandatory exemption from taxation by providing that "[r]eal property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association . . . shall be exempt from taxation as provided in this section." RPTL 420-a (1) (a) thus creates a two-part test for determining eligibility for tax-exempt status, i.e., "[t]he owner of the real property must establish (1) that the organization is organized or conducted exclusively for an exempt purpose, and (2) that the land for which exemption is sought is used exclusively for an exempt purpose" (New York Nonprofit Law and Practice § 14.03 [4] [a] at 14-48 [Matthew Bender 2012]).

Here, there is no dispute that petitioner satisfied the first prong of RPTL 420-a (1) (a), i.e., that petitioner is organized exclusively for an exempt purpose. Petitioner's certificate of incorporation provides that petitioner was formed for purposes including the "present[ation] [of] theater as the showcase for all the arts"; "to encourage appreciation of wholesome entertainment in the Auburn area"; and "to conduct year round programs in the performing arts for children, teenagers, and adults."

Our analysis thus turns to the second prong of RPTL 420-a (1) (a), i.e., whether the properties are used exclusively for an exempt purpose. " 'Generally, the burden of proof lies with the taxpayer who is seeking to have real property declared tax exempt' " (*Matter of Lackawanna Community Dev. Corp. v Krakowski*, 12 NY3d 578, 581; *see Matter of Mobil Oil Corp. v Finance Adm'r of City of N.Y.*, 58 NY2d 95, 99). "[W]hile exemption statutes should be construed strictly against the taxpayer seeking the benefit of the exemption, an interpretation so literal and narrow that it defeats the exemption's settled purpose is to be avoided . . . Accordingly, 'exclusive', as used in the context of [tax] exemption statutes, has been held to connote 'principal' or 'primary' " (*Matter of Association of Bar of City of N.Y. v Lewisohn*, 34 NY2d 143, 153). Moreover, "[t]he test of entitlement to tax exemption under the 'used exclusively' clause of

[RPTL 420-a (1) (a)] is whether the particular use is ‘ “reasonably incident[al]” to the [primary or] major purpose of the [corporation]’ . . . Put differently, the determination of ‘ “whether the property is used exclusively for the statutory purposes depends upon whether its primary use is in furtherance of the permitted purposes” ’ (*Matter of Genesee Hosp. v Wagner*, 47 AD2d 37, 44, *affd* 39 NY2d 863, quoting *Gospel Volunteers v Village of Speculator*, 33 AD2d 407, 411, *affd* 29 NY2d 622)” (*Matter of Yeshivath Shearith Hapletah v Assessor of Town of Fallsburg*, 79 NY2d 244, 250).

Here, petitioner met its burden on its cross motion by presenting evidence that the primary use of the properties furthers a primary or major purpose of that corporation (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Applying a “fair reading” of the purposes set forth in petitioner’s certificate of incorporation (*Matter of Highland Lake Bible Conference v Board of Assessors of Town of Highland*, 92 AD2d 655, 656, *lv denied* 59 NY2d 604), we conclude that petitioner’s submissions establish that it was founded for the purpose of promoting and presenting theatrical arts, i.e., for purposes of education and the moral and mental improvement of men, women and children (*see Matter of Symphony Space v Tishelman*, 60 NY2d 33, 35). The affidavit of petitioner’s producing and creative director establishes that the use of the properties at issue is reasonably incidental to the primary or major purpose of petitioner (*see Yeshivath Shearith Hapletah*, 79 NY2d at 250), i.e., the properties are intended to house staff and actors who work in petitioner’s theaters and to help cultivate petitioner’s community amongst its artists. According to that director, the housing of actors and staff together promotes countless hours of volunteer work in the form of “running lines together, discussing creative ideas, working on wardrobes, [and] creating sets,” all of which further the purposes and mission of petitioner. That director also averred that the properties are not open to the public and create no income for petitioner. In view of that evidence, we conclude that petitioner met its initial burden on its cross motion (*see generally Zuckerman*, 49 NY2d at 562). Indeed, we note that housing used to further an exempt purpose has been found tax exempt in numerous other contexts (*see e.g. Matter of Adult Home at Erie Sta., Inc. v Assessor & Bd. of Assessment Review of City of Middletown*, 10 NY3d 205, 216; *Yeshivath Shearith Hapletah*, 79 NY2d at 247-251; *Matter of St. Joseph’s Health Ctr. Props. v Srogi*, 51 NY2d 127, 129; *University of Rochester v Wagner*, 63 AD2d 341, 355-356, *affd for the reasons stated* 47 NY2d 833; *Sephardic Congregation of S. Monsey v Town of Ramapo*, 47 AD3d 915, 916-918; *Matter of Foundation for A Course In Miracles v Theadore*, 172 AD2d 962, 964, *lv denied* 78 NY2d 856).

Respondents’ submissions both in support of their motion and in opposition to the cross motion, which consist primarily of the affidavit of the real property appraiser of the City of Auburn and petitioner’s tax exemption applications, do not raise an issue of fact to defeat the cross motion (*see generally Zuckerman*, 49 NY2d at 562). We thus reverse the order insofar as appealed from, grant petitioner’s cross motion for summary judgment and remit the matter to Supreme

Court to calculate the amount of real property tax, if any, to be refunded to petitioner (*see generally Miriam Osborn Mem. Home Assn. v Assessor of City of Rye*, 80 AD3d 118, 147). We further note that, although petitioner sought an award of costs and disbursements in the petition, including attorneys' fees, it did not specifically address that request for relief either before the motion court or on appeal. We thus grant the petition only insofar as it seeks a tax exemption for the properties pursuant to RPTL 420-a (1) (a) (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984; *cf. U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 596-597).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

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CA 12-01485

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

ARON THOMPSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

1241 PVR, LLC, CHRISTA CONSTRUCTION LLC,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (SCOTT P. ROGOFF OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FARACI LANGE, LLP, ROCHESTER (RAUL E. MARTINEZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered May 3, 2012. The order granted the motion of plaintiff for partial summary judgment on liability pursuant to Labor Law § 241 (6).

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries that he sustained while working at a construction site. The building under construction was owned by 1241 PVR, LLC, and Christa Construction LLC (Christa) (collectively, defendants) was the general contractor. Plaintiff fell on ice and snow that had accumulated on the floor of the building where he was framing interior walls before a proper roof or windows were installed. Defendants contend on appeal that Supreme Court erred in granting plaintiff's motion for partial summary judgment on liability with respect to the first cause of action, alleging the violation of Labor Law § 241 (6). We affirm.

We note at the outset that, contrary to defendants' contention, the court properly struck the proposed ordering paragraphs dismissing the second cause of action from the order submitted for the court's signature. The record establishes that plaintiff previously had withdrawn that cause of action (*see generally Schottin v Haque*, 179 AD2d 1049, 1049).

Defendants further contend that the court erred in granting plaintiff's motion because there are issues of fact with respect to defendants' affirmative defenses alleging comparative negligence and

primary assumption of risk. We reject that contention. Plaintiff alleged that defendants were liable for his injury pursuant to Labor Law § 241 (6) based on their alleged violation of 12 NYCRR 23-1.7 (d), which concerns slipping hazards arising from, inter alia, ice and snow. It is undisputed that there were in fact accumulations of ice and snow and that Christa was made aware of that fact. Defendants presented no evidence in opposition to demonstrate that the floor was reasonably and adequately safe despite the violation (*see* § 241 [6]), and thus the court properly determined as a matter of law that defendants were negligent. Defendants contend, however, that summary judgment is improper because there is an issue of fact with respect to their affirmative defense of comparative negligence. Specifically, defendants contend that plaintiff was negligent based on his failure to use tools provided by defendants to remove the ice and snow; his failure to disclose prior back surgeries; and his failure to take proper precautions while moving too quickly on the slippery surface. Defendants' duty to remove the ice and snow was nondelegable and, absent any express policy that employees, including plaintiff, were to remove ice and snow, plaintiff cannot be held negligent for his failure to undertake defendants' nondelegable duty (*cf. Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1427-1428; *Lorefice v Reckson Operating Partnership*, 269 AD2d 572, 573). Furthermore, defendants failed to raise an issue of fact whether plaintiff's alleged failure to disclose his prior back surgeries was a proximate cause of his fall. The foreman testified at his deposition that, if he had been aware of plaintiff's back condition, he would have required plaintiff to carry fewer metal studs; he did not testify that plaintiff would have been prevented from entering the area where he fell. Additionally, defendants presented no evidence in admissible form establishing that plaintiff was moving too quickly on the ice and snow at the time of his accident. Indeed, plaintiff's testimony is the only evidence of what actually occurred just prior to the accident because none of the other witnesses observed his fall. Defendants have therefore failed to introduce triable questions of fact regarding plaintiff's comparative negligence (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Finally, we reject defendants' contention that there is an issue of fact with respect to their affirmative defense of primary assumption of risk. Plaintiff was not involved in any "athletic or recreational activities" and the doctrine therefore does not apply to this case (*Custodi v Town of Amherst*, 20 NY3d 83, 88).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

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CAF 11-02203

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

IN THE MATTER OF LAWRENCE C. NELSON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MARIE L. MORALES, RESPONDENT-APPELLANT.

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

LAW OFFICE OF MARK A. YOUNG, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Thomas W. Polito, R.), entered August 31, 2011 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner primary physical custody of the subject child.

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

Memorandum: In this custody proceeding pursuant to article 6 of the Family Court Act, respondent mother appeals from an order modifying a prior custody order by awarding primary physical custody of the parties' teenage child to petitioner father. The prior order, issued in 1999 when the child was almost two years old, awarded primary physical custody to the mother. In 2007, the father moved to modify the 1999 order but his petition was dismissed following a hearing, Family Court having determined that he failed to prove a sufficient change of circumstances to warrant modification. The father commenced this modification proceeding in July 2010, but this time the court granted his petition, determining that the father had established a change of circumstances since the prior order and that it was in the best interests of the child to reside primarily with the father. The mother contends on appeal that the court erred in considering her pre-2007 changes in residence in determining that there had been a change in circumstances inasmuch as those changes were considered in the prior custody hearing and thus are barred by res judicata from consideration herein. We reject that contention. "It is well settled that '[a] party seeking a change in an established custody arrangement must show a change in circumstances [that] reflects a real need for change to ensure the best interest[s] of the child' " (*Matter of Moore v Moore*, 78 AD3d 1630, 1630, *lv denied* 16 NY3d 704; *see Matter of Crudele v Wells* [appeal No. 2], 99 AD3d 1227,

1228; *Matter of Maher v Maher*, 1 AD3d 987, 988).

Here, the court properly considered the mother's pre-2007 changes in residence as background information, in determining the significance of the mother's post-2007 change in residence (*see generally Matter of Tarrant v Ostrowski*, 96 AD3d 1580, 1581, *lv denied* 20 NY3d 855; *Matter of Gardner v Gardner*, 69 AD3d 1243, 1244-1245). In any event, even assuming, arguendo, that the court erred in considering her pre-2007 changes in residence, we conclude that the other evidence, including the child's statements at the *Lincoln* hearing, was sufficient to establish a change in circumstances.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

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CA 12-01484

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

JOHNNY WATSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SALVATORE PRIORE, ET AL., DEFENDANTS,
STEVEN A. ABDOO AND PETER M. BOLOS,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 3.)

ATHARI & ASSOCIATES, LLC, UTICA (MO ATHARI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CARL J. COCHI, UTICA, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered June 5, 2012. The order, among other things, denied plaintiff's motion for an order vacating the order and judgment entered in this action on November 2, 2011.

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

Same Memorandum as in *Watson v Priore* ([appeal No. 1] ___ AD3d ___ [Mar. 22, 2013]).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

291

CA 12-01517

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

WILLIAM A. CHAMBERS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MELANI C. EVANS AND MATTHEW TOUSLEY,
DEFENDANTS-APPELLANTS.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

STANLEY LAW OFFICES, LLP, SYRACUSE (KEITH R. YOUNG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), dated November 14, 2011. The order denied 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: Plaintiff, an automobile mechanic, commenced this action seeking to recover damages for injuries he sustained while he was servicing a vehicle owned by defendant Melani C. Evans, which was brought to plaintiff's place of employment, Cheney Tire, Inc. (Cheney Tire), by defendant Matthew Tousley, to have its dash face plate replaced. In switching out the face plate, plaintiff apparently caused electrical issues with the vehicle's fuel gauge. As plaintiff was disassembling the dashboard to recheck the fuel gauge, he noticed that the standard transmission vehicle was equipped with a remote car starter. Shortly thereafter, the vehicle unexpectedly started, dragged plaintiff for a distance, and then ran him over. In the complaint, as amplified by the bill of particulars, plaintiff alleged, inter alia, that Tousley negligently failed to warn him and/or Cheney Tire that the vehicle was equipped with a car starter, and that Tousley "negligently started the vehicle without the knowledge or permission of Cheney Tire . . . or any of [its] employees."

Contrary to the contention of defendants, we conclude that Supreme Court properly denied their motion for summary judgment dismissing the complaint. "Under general tort rules, a person may be negligent because he or she fails to warn another of known dangers or, in some cases, of those dangers [of] which he [or she] had reason to know" (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 246; *see Quinonez v Manhattan Ford, Lincoln-Mercury, Inc.*, 62 AD3d 495, 497; *Yousuf v*

Nowak, 306 AD2d 894, 895). We conclude that, under well-settled tort principles, defendants had a duty to warn plaintiff and/or Cheney Tire that their standard transmission vehicle was equipped with a remote car starter (*see Schumacher*, 59 NY2d at 246; *Yousuf*, 306 AD2d at 895; *cf. Quinonez*, 62 AD3d at 496-497). Defendants' own submissions established that they were aware of the risks posed by the existence of a remote car starter on a standard transmission vehicle and of the precautions necessary to reduce those risks. Defendants each testified at their respective depositions that, at the time the vehicle was purchased, the salesperson specifically told defendants that it had been equipped with a remote car starter, and advised them that it was necessary to place the vehicle in neutral and to apply the emergency brake before activating the remote starter. Evans testified that, even before she purchased the vehicle, she was aware of those necessary precautions because she had friends who owned standard transmission vehicles outfitted with remote starters who had activated the starter while in gear and the vehicle would "smash into something." Because of that risk, Tousley testified that, whenever he brought the vehicle to Cheney Tire for servicing, he "always told them there was a car starter in it, make sure you leave it in neutral and put the emergency brake on it."

Contrary to defendants' contention, we conclude that they failed to establish as a matter of law that the danger was open and obvious or that plaintiff was "fully aware" of the danger (*Theoharis v Pengate Handling Sys. of N.Y.*, 300 AD2d 884, 885). Plaintiff testified that he did not notice the starter box while he was replacing the dash face plate, which took approximately 90 minutes. It was not until plaintiff removed the lower dash plate in order to check the fuel gauge that he observed "a massive bunch of wires going to a box [and] just thought it had to be a car starter." The accident occurred within a few minutes of plaintiff's observation, and he testified that he "didn't have a chance to do [any]thing" prior to the accident.

We reject defendants' further contention that plaintiff's experience and training relieved them of any duty to warn plaintiff of the existence of the remote car starter. Although plaintiff was a certified auto mechanic with over 20 years of experience, including experience with standard transmission vehicles, he testified that remote car starters should not be installed on standard transmission vehicles and, indeed, he believed that it was "against the law" to do so. We thus conclude that defendants failed to establish that plaintiff, based upon his training and experience, was "fully aware of [the] specific hazard" posed by the car starter (*id.*), i.e., that the vehicle could start while in gear without the clutch being depressed (*cf. id.* at 885-886; *Czerniejewski v Steward-Glapat Corp.*, 236 AD2d 795, 796).

Defendants' reliance on *Sam v Town of Rotterdam* (248 AD2d 850, *lv denied* 92 NY2d 804) is misplaced. There, upon delivering a police vehicle to a car repair shop for repairs to its anti-lock braking system, a police officer advised the service personnel that the vehicle's anti-lock brake light flashed intermittently. As an employee of the shop was driving the vehicle into the service area,

the brakes failed, causing the vehicle to strike the injured plaintiff, a brake technician (*id.* at 850). The plaintiffs alleged that the defendant was negligent in "failing to make [the shop] aware of the dangerous and defective condition of the vehicle's braking system" (*id.* at 851). In affirming the order granting the defendant's motion for summary judgment dismissing the complaint, the Third Department concluded that the defendant's duty to warn was "limited to known defects" inasmuch as "a customer seeking repair work has no legal obligation to diagnose the problem for the repair facility, the purported expert in the field" (*id.* at 852). Further, the defendant established that the repair facility "had been informed of all problems concerning the vehicle," and the plaintiffs "came forward with no evidence identifying the actual cause of the brake failure or giving rise to an inference that [the] defendant was or should have been aware of the defective condition that caused the brakes to fail" (*id.*).

Here, by contrast, defendants were fully aware of the allegedly dangerous condition, i.e., the presence of a remote car starter on their standard transmission vehicle, and the repairs they were seeking were wholly unrelated to the starter. Moreover, although Tousley testified that he notified an employee of Cheney Tire that the vehicle was equipped with a remote starter and that it should be left in neutral with the emergency brake on, plaintiff submitted a work order and invoices from the date of the accident that contain no such instructions. In addition, Tousley testified that the owner of Cheney Tire yelled at him immediately after the accident that there was "a car starter in the vehicle and we didn't know." We thus conclude that where, as here, a vehicle has been modified or altered in a way that poses a danger to a person servicing the vehicle of which the vehicle's owner has reason to know and that danger is not readily apparent, the owner of the vehicle has a duty to warn service personnel of the danger (*see Yousuf*, 306 AD2d at 895; *see generally Higgins v Mason*, 255 NY 104, 109; *Brzostowski v Coca-Cola Bottling Co.*, 16 AD2d 196, 202).

Finally, we conclude that there is an issue of fact whether Tousley retained possession of the key fob containing the remote starter while plaintiff was servicing the vehicle and, if so, whether he negligently activated the starter, thereby causing the accident (*see generally Johnson v Yarussi Constr., Inc.*, 74 AD3d 1772, 1773; *Murphy v Omer Constr. Co.*, 242 AD2d 964, 966). Although Tousley denied that he possessed the key fob at the time of the accident, plaintiff testified that the keys to the vehicle were on the passenger seat of the vehicle when the accident occurred and that there was no fob attached to the keys.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

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CA 12-00977

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

JOHNNY WATSON, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

SALVATORE PRIORE, ET AL., DEFENDANTS,
LIVINGSTON WESTON, DEFENDANT-RESPONDENT-APPELLANT,
STEVEN A. ABDOO AND PETER M. BOLOS,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

ATHARI & ASSOCIATES, LLC, UTICA (MO ATHARI OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

BAILEY, KELLEHER & JOHNSON, P.C., ALBANY (MARC J. KAIM OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

CARL J. COCHI, UTICA, FOR DEFENDANTS-RESPONDENTS.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered November 2, 2011. The order and judgment, inter alia, granted the motions of defendants Livingston Weston, Steven A. Abdoo and Peter M. Bolos for summary judgment dismissing the complaint against them.

It is hereby ORDERED that said cross appeal is unanimously dismissed and the order and judgment is modified on the law by denying the motion of defendant Livingston Weston and reinstating the complaint against him and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages arising from his exposure to lead paint as a child. Defendants are former owners of various apartments rented by plaintiff's mother, with whom plaintiff lived at the time, and defendants Steven A. Abdoo and Peter M. Bolos were joint owners of the same apartment. In appeal No. 1, plaintiff appeals from an order and judgment that, inter alia, granted the motion of Abdoo and Bolos and that of defendant Livingston Weston seeking summary judgment dismissing the complaint against them and denied plaintiff's cross motion seeking partial summary judgment on the issue of negligence and dismissal of various affirmative defenses, including those based on plaintiff's alleged failure to mitigate damages. Although Weston is not aggrieved by the order and judgment in appeal No. 1, we note that he nevertheless cross-appeals from that order and judgment insofar as it denied that part of his

motion seeking summary judgment on the issue of proximate cause. We therefore dismiss Weston's cross appeal in appeal No. 1 (*see* CPLR 5511).

In appeal No. 2, plaintiff appeals from a judgment awarding, inter alia, statutory costs to Abdoo and Bolos and, in appeal No. 3, he appeals from a subsequent order denying his motion seeking, inter alia, to vacate the order and judgment in appeal No. 1 with respect to Abdoo and Bolos or leave to renew his opposition to their prior motion for summary judgment dismissing the complaint against them and his cross motion for partial summary judgment as against them.

We initially conclude in appeal No. 1 that Supreme Court properly denied plaintiff's cross motion insofar as it sought partial summary judgment on the issue of negligence. Contrary to plaintiff's contention, Real Property Law § 235-b does not give rise to a presumption that defendants had notice of the alleged dangerous condition in their properties arising from lead paint (*see Sykes v Roth*, 101 AD3d 1673, 1674). The factors set forth in *Chapman v Silber* (97 NY2d 9, 20-21) remain the bases for determining whether a landlord knew or should have known of the existence of a hazardous lead paint condition and thus may be held liable in a lead paint case.

We further conclude in appeal No. 1 that the court properly granted the motion of Abdoo and Bolos for summary judgment dismissing the complaint against them. Those defendants met their initial burden on the motion by submitting evidence that they did not have actual or constructive notice of the lead paint hazard on their property, and in response plaintiff failed to raise a triable issue of fact (*see Sanders v Patrick*, 94 AD3d 1514, 1515, *lv denied* 19 NY3d 814; *cf. Jackson v Brown*, 26 AD3d 804, 805). We agree with plaintiff, however, that the court erred in granting the motion of Weston for summary judgment dismissing the complaint against him. We therefore modify the order and judgment in appeal No. 1 accordingly.

The deposition testimony of Weston was equivocal and inconsistent with respect to whether he had constructive notice of a dangerous lead paint condition on his property. For instance, Weston alternately testified that there "could have been" peeling or chipping paint, that he did not recall whether there was peeling or chipping paint, and that he had "no problem" with peeling or chipping paint. Weston similarly contradicted himself as to whether he knew that a child lived in the apartment. Regarding the other *Chapman* factors, Weston testified that he believed that he had a right to re-enter the apartment to make repairs, and he admitted that he knew by 1990 that lead was bad for children and that it could be found in houses like his. In short, Weston's testimony, unlike that of Abdoo and Bolos, raised triable issues of fact regarding constructive notice (*see Williamson v Ringuett*, 85 AD3d 1427, 1428-1429; *Rivas v Danza*, 68 AD3d 743, 744-745; *Harden v Tynatishon*, 49 AD3d 604, 605). There is no merit to Weston's contention that he established as a matter of law that plaintiff's injuries were not caused by the alleged dangerous condition at his property.

We reject plaintiff's contention in appeal No. 1 that the court erred in refusing to dismiss in their entirety the affirmative defenses alleging that plaintiff failed to mitigate his damages. The court properly dismissed those affirmative defenses only to the extent that they allege that plaintiff failed to mitigate his damages prior to the time he could be held responsible for his actions (*see Sykes*, 101 AD3d at 1674; *Cunningham v Anderson*, 85 AD3d 1370, 1372, *lv dismissed in part and denied in part* 17 NY3d 948).

With respect to appeal No. 2, we conclude that, because the court properly granted the motion of Abdoo and Bolos for summary judgment dismissing the complaint against them, those defendants were entitled to an award of statutory costs pursuant to CPLR 8101.

Finally, in appeal No. 3, we reject plaintiff's contention that the court erred in denying those parts of his motion to vacate the order and judgment in appeal No. 1 and for leave to renew the prior motion of Abdoo and Bolos as well as that part of his cross motion with respect to those defendants. Plaintiff's motion was based on a document obtained by plaintiff during discovery entitled "Statement as to Condition," which was signed by Abdoo and Bolos at their closing when they purchased the property from its prior owner. In the document, Abdoo and Bolos acknowledge that they are aware "that the premises contain or may contain lead[-]base[d] paint," among other hazardous conditions. According to plaintiff, the document constitutes "new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]), "newly-discovered evidence" that would have changed the result (CPLR 5015 [a] [2]), and evidence of "fraud, misrepresentation, or other misconduct" by Abdoo and Bolos. We reject that contention. The document is relevant to only one of the *Chapman* factors — whether Abdoo and Bolos knew that the property was constructed at a time before lead-based interior paint was banned — and raises no issues of fact with respect to the remaining factors. For instance, the document does not state that defendants knew that there was peeling or chipping paint in the apartment or whether a child resided therein (*see id.* at 21). In addition, there is no evidence of fraud or misrepresentation on the part of Abdoo and Bolos.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

294

CA 12-00984

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

JOHNNY WATSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SALVATORE PRIORE, ET AL., DEFENDANTS,
STEVEN A. ABDOO AND PETER M. BOLOS,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

ATHARI & ASSOCIATES, LLC, UTICA (MO ATHARI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CARL J. COCHI, UTICA, FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered November 18, 2011. The judgment awarded costs and disbursements to defendants Steven A. Abdoo and Peter M. Bolos.

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

Same Memorandum as in *Watson v Priore* ([appeal No. 1] ___ AD3d ___ [Mar. 22, 2013]).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

318

CA 12-01219

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, AND VALENTINO, JJ.

NATIONAL FUEL GAS DISTRIBUTION CORPORATION,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

PUSH BUFFALO (PEOPLE UNITED FOR SUSTAINABLE HOUSING) AND WHITNEY YAX,
DEFENDANTS-RESPONDENTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (KENNETH A. MANNING OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

DUGGAN & BENTIVOGLI LLP, WILLIAMSVILLE (JAMES J. DUGGAN OF COUNSEL), AND CANTOR, DOLCE & PANEPINTO, P.C., BUFFALO, FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered March 2, 2012. The order, among other things, denied in part the motion of defendants to dismiss the amended complaint.

It is hereby ORDERED that said appeal by plaintiff is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: Plaintiff commenced this action alleging, inter alia, that members of defendant, PUSH Buffalo (People United for Sustainable Housing) (hereafter, PUSH), a community organization, and defendant Whitney Yax, a member of PUSH, trespassed on plaintiff's property in Williamsville and Buffalo, New York in staging demonstrations concerning plaintiff's use of funding it received to assist low-income customers with heating costs and with increasing the energy efficiency of their homes. According to defendants, this action constituted an impermissible Strategic Lawsuit Against Public Participation (SLAPP action) in violation of Civil Rights Law § 76-a (1), because it hindered defendants' efforts to challenge the use by plaintiff of the funding in question, and defendants sought, inter alia, attorneys' fees in their counterclaims pursuant to Civil Rights Law § 70-a (1) (a). Supreme Court granted defendants' motion seeking to dismiss the amended complaint (*see* CPLR 3211 [g]) and for summary judgment dismissing the amended complaint (*see* CPLR 3212 [h]) with the exception of the trespass claims against PUSH, and granted those parts of plaintiff's cross motion for partial summary judgment on liability on those trespass claims and for summary judgment dismissing the counterclaims (*see* CPLR 3212 [h]). We affirm.

As a preliminary matter, we conclude that plaintiff is not aggrieved by the order, and we therefore dismiss plaintiff's appeal (*see* CPLR 5511; *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544-545). On its appeal, plaintiff challenges only the court's determination that the action falls within the statutory definition of a SLAPP action, i.e., that it is materially related to PUSH's challenge to plaintiff's application to renew its permit to operate the Conservation Intervention Program (CIP) (*see* Civil Rights Law § 70-a [1] [a]). That challenge is relevant only in connection with defendants' counterclaims and, in granting those parts of plaintiff's cross motion for summary judgment dismissing the counterclaims, the court granted plaintiff the full relief it sought with respect to the counterclaims (*see Parochial Bus Sys.*, 60 NY2d at 545). We may, however, consider plaintiff's contention as an alternative ground for affirmance in connection with defendants' cross appeal (*see id.*).

"An 'action involving public petition and participation' is an action . . . for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to . . . comment on, . . . challenge or oppose such application or permission" (Civil Rights Law § 76-a [1] [a]). Plaintiff alleged that PUSH members trespassed on its private property when approximately 50 protesters appeared at plaintiff's headquarters and then, later the same day, at a customer service center, demanding a meeting with the chief executive officer (CEO) and refusing to leave when requested to do so by plaintiff's employees. The PUSH members left the respective locations only after the police arrived. The protest by PUSH members was designed to demand a meeting with plaintiff's CEO to challenge its application to the New York State Public Service Commission for a renewal of its permit to operate the CIP. We therefore reject plaintiff's contention that the allegations in the trespass claims against PUSH do not constitute allegations within the meaning of a SLAPP action, inasmuch as they are indeed materially related to PUSH's challenge to plaintiff's application to renew its CIP permit. Thus, plaintiff's action against PUSH was subject to "a heightened standard of proof" to avoid dismissal (*Guerrero v Carva*, 10 AD3d 105, 116; *see* CPLR 3211 [g]; 3212 [h]).

Nevertheless, we conclude that the court properly refused to dismiss the claims against PUSH for trespass inasmuch as plaintiff's action has "a substantial basis in fact and law" (CPLR 3212 [h]), and we conclude that the court properly granted those parts of plaintiff's cross motion for partial summary judgment on liability on those claims. "The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission . . . , or a refusal to leave after permission has been granted but thereafter withdrawn" (*Volunteer Fire Assn. of Tappan, Inc. v County of Rockland*, 101 AD3d 853, 855). It is well established that trespassing is not a protected First Amendment activity (*see Tillman v Distribution Sys. of Am.*, 224 AD2d 79, 87, *lv denied* 89 NY2d 814, *appeal dismissed* 89 NY2d 938; *Latrieste Rest. & Cabaret v Village of Port Chester*, 212 AD2d 668, 668-669, *lv denied* 86 NY2d 837, 838). In addition, the court properly granted those parts of plaintiff's

cross motion for summary judgment dismissing the counterclaims seeking, inter alia, attorneys' fees pursuant to Civil Rights Law § 70-a (1).

Although the amended complaint against defendant Whitney Yax was dismissed in its entirety, we reject her contention that the court abused its discretion in refusing to award attorneys' fees on her counterclaim pursuant to Civil Rights Law § 70-a (1). That section provides only that such fees *may* be recovered, and we perceive no abuse of discretion or improvident exercise of discretion in the court's refusal to award such fees in this case (*see generally Matter of West Branch Conservation Assn. v Planning Bd. of Town of Clarkstown*, 222 AD2d 513, 515).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

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KA 08-02465

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARTIN D. WOODS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered August 18, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of robbery in the first degree (Penal Law § 160.15 [4]). We agree with defendant that County Court erred in failing to consider the appropriate factors when it allowed the jury to hear portions of defendant's grand jury testimony that included references to being on parole, serving five years for robbing banks, and having on occasion sold drugs. "Prejudicial material 'not necessary to a full comprehension of the' directly related evidence . . . is inadmissible, even though part of the same conversation . . . or, indeed, of the same sentence" (*People v Ely*, 68 NY2d 520, 531). That principle applies to the admission at trial of a defendant's grand jury testimony just as it does to, e.g., audio recordings of telephone conversations (*see id.*; *People v Ward*, 62 NY2d 816, 818), statements made during the course of a crime to an undercover police officer (*see People v Crandall*, 67 NY2d 111, 116-117), and admissions made to police officers during custodial interrogation (*see People v Sanchez*, 262 AD2d 997, 997-998, *lv denied* 94 NY2d 866; *People v Gates*, 234 AD2d 941, 941, *lv denied* 89 NY2d 1011; *People v Mitchell*, 203 AD2d 948, 949, *lv denied* 83 NY2d 969). The court allowed the jury to hear such portions of defendant's grand jury testimony after concluding only that the statements were voluntary. In doing so, the court failed to consider whether such evidence was relevant and probative to any issue in this case (*see generally People v Ventimiglia*, 52 NY2d 350, 359-360) and then, if so, whether "its probative value exceed[ed] the potential for prejudice resulting to the defendant" (*People v*

Alvino, 71 NY2d 233, 242).

We conclude, in any event, that the admission of those portions of defendant's grand jury testimony is harmless error inasmuch as there is overwhelming evidence of guilt, and there is no significant probability that defendant otherwise would have been acquitted (*see People v Orbaker*, 302 AD2d 977, 978, *lv denied* 100 NY2d 541; *see generally People v Crimmins*, 36 NY2d 230, 241-242). The evidence included the testimony of defendant's accomplice who entered the store and committed the robbery in question while defendant waited outside; the store's video surveillance showing defendant outside the store at the time of the robbery; and statements made by defendant to the police while in custody. We have considered defendant's remaining contentions and conclude that none requires reversal or modification of the judgment.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

326

KA 11-02431

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRISTAN J. BOGA, DEFENDANT-APPELLANT.

WILLIAM G. PIXLEY, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered October 6, 2011. The judgment convicted defendant, upon a nonjury verdict, of reckless endangerment in the first degree, criminal mischief in the fourth degree, intimidating a victim or witness in the third degree, criminal contempt in the first degree and menacing in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of reckless endangerment in the first degree (Penal Law § 120.25), criminal mischief in the fourth degree (§ 145.00 [1]), intimidating a victim or witness in the third degree (§ 215.15 [1]), criminal contempt in the first degree (§ 215.51 [b] [i]) and menacing in the second degree (§ 120.14 [1]), defendant contends that the conviction of reckless endangerment and criminal mischief is not supported by legally sufficient evidence. Defendant failed to preserve that contention for our review inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Further, viewing the evidence in light of the elements of those crimes as well as the crime of menacing in the second degree 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 with respect to those crimes (*see generally Bleakley*, 69 NY2d at 495).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

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KA 12-00535

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL C. SINGER, DEFENDANT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-APPELLANT.

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), entered March 29, 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.

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed and sentencing him to a determinate term of incarceration, followed by three years of postrelease supervision. Contrary to defendant's contention, we conclude that the record does not establish that County Court " 'was unaware that it had the ability to exercise its discretion in determining whether to impose a lesser period of postrelease supervision' " (*People v McCrimager*, 81 AD3d 1324, 1324). We reject defendant's further contention that the duration of the period of postrelease supervision is unduly harsh or severe.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

328

KA 09-01371

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CORDELL A. ROBINSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered June 25, 2009. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree (two counts) and 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 following a jury trial of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [a]) and one count of assault in the second degree (§ 120.05 [6]). According to the evidence presented at trial, two passengers in a vehicle, one of whom was defendant, exited the vehicle, approached the victim, a pedestrian, and knocked her cell phone from her hand. In addition, one of them forcibly ripped her purse from her arm, injuring her. The victim observed her two assailants struggle to re-enter the backseat of the vehicle, and she also observed three other individuals in the vehicle and memorized the license plate. Within minutes, she called the police and described the vehicle and its occupants. Within an hour, the police stopped the vehicle and conducted a showup identification procedure. The victim identified defendant and another person as the individuals who stole her purse, and she also identified the driver of the vehicle. Defendant and the driver were eventually tried jointly and found guilty of all counts.

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). “Although a different result would not have been unreasonable, the jury was in the best position to assess the credibility of the witnesses and, on this

record, it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Orta*, 12 AD3d 1147, 1147, *lv denied* 4 NY3d 801).

We reject defendant's further contention that County Court erred in denying his request that the court require two potential defense witnesses to appear before it to assert their Fifth Amendment rights. The court was informed by counsel for those two potential witnesses, who were occupants of the vehicle, that they would invoke their Fifth Amendment rights if called to testify. Thus, although the customary practice is to have a witness appear with counsel to enable the court to make an inquiry on the record outside the presence of the jury (*see e.g. People v Bradford*, 300 AD2d 685, 686, *lv denied* 99 NY2d 612), here there was no reason to bring the witnesses before the court for such an inquiry (*see generally People v Savinon*, 100 NY2d 192, 199 n 7; *People v Macana*, 84 NY2d 173, 178-179).

We further reject defendant's contention that the court erred in denying his request to call three additional witnesses to testify regarding a declaration against penal interest made by one of those two potential defense witnesses, i.e., a statement in which that person admitted that he was in fact the purse snatcher. Contrary to defendant's contention, *People v Concepcion* (17 NY3d 192) does not constrain our review of this issue inasmuch as the court's reasoning for its rulings regarding those three witnesses was broader than defendant contends. We conclude that the court properly exercised its discretion in refusing to allow defendant to call those three witnesses, having permitted two other witnesses to testify regarding that declaration against penal interest; such a determination "involves a delicate balance of diverse factors and is entrusted to the sound judgment of the trial court, which is aptly suited to weigh the circumstances surrounding the declaration and the evidence used to bolster its reliability" (*People v Settles*, 46 NY2d 154, 169).

Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19), and in any event that contention lacks merit. We conclude that "there is [a] valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (*Bleakley*, 69 NY2d at 495). Contrary to defendant's further contention, the court did not err in responding to a note from the jury during its deliberations. The court's response "addressed the jury's inquiry and was a proper statement of the law" (*People v Banks*, 74 AD3d 1783, 1784, *lv denied* 17 NY3d 857). Additionally, the court did not err in denying defendant's request for a cross-racial identification charge (*see generally People v German*, 45 AD3d 861, 861, *lv denied* 9 NY3d 1034).

Finally, defendant failed to preserve for our review his contention that he was penalized for exercising his right to a jury trial inasmuch as he failed to raise that contention at the time of sentencing (*see People v Motzer*, 96 AD3d 1635, 1636, *lv denied* 19 NY3d 1104; *People v Stubinger*, 87 AD3d 1316, 1317, *lv denied* 18 NY3d 862).

In any event, the record does not support defendant's contention (*see Stubinger*, 87 AD3d at 1317).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

329

KA 11-00854

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK WILEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered February 9, 2011. 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: On appeal from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]), defendant correctly concedes that he failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct on summation (*see* CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We also reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to object to the alleged prosecutorial misconduct on summation. Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147; *People v Brown*, 67 AD3d 1369, 1370, *lv denied* 14 NY3d 886).

Contrary to defendant's further contention, the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We note in particular the well-established principle that "[i]ntent, like any other element of a crime, may be proved by circumstantial evidence" (*People v Ozarowski*, 38 NY2d 481, 489; *see People v Steinberg*, 79 NY2d 673, 682). In this case, the People established through the testimony of the victim and the eyewitness that defendant had the requisite intent. Although the victim did not see defendant strike him with the mug, the victim

testified that defendant was next to him when he felt the impact from the mug. Also, the eyewitness testified that he saw defendant swing the mug at the victim. We thus conclude that, viewing the evidence in the light most favorable to the People, "there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [internal quotation marks omitted]). Additionally, viewing the evidence in light of the elements of the crime as charged to the jury (*see id.*), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

330

CAF 12-01556

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

IN THE MATTER OF JENNIFER MCLAUGHLIN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY MCLAUGHLIN, RESPONDENT-APPELLANT.

BETZJITOMIR & BAXTER, LLP, BATH (SUSAN BETZJITOMIR OF COUNSEL), FOR RESPONDENT-APPELLANT.

THE LAW OFFICE OF NANCY M. ERACA, ELMIRA (NANCY M. ERACA OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered November 15, 2011 in a proceeding pursuant to Family Court Act article 8. The order directed respondent to observe certain conditions of behavior.

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

Memorandum: Respondent husband appeals from an order of protection issued in connection with Family Court's determination that he committed acts constituting the family offense of disorderly conduct against petitioner wife (*see* Family Ct Act § 812 [1]; Penal Law § 240.20 [1]). Although the order of protection has expired, the appeal is not moot inasmuch as respondent challenges only the court's finding that he committed a family offense and, " 'in light of enduring consequences which may potentially flow from an adjudication that a party has committed a family offense,' the appeal . . . is not academic" (*Matter of Hunt v Hunt*, 51 AD3d 924, 925; *see Marquardt v Marquardt*, 97 AD3d 1112, 1113).

Contrary to respondent's contention, petitioner met her burden of establishing by a preponderance of the evidence that respondent committed the family offense of disorderly conduct (*see* Family Ct Act § 832; *Matter of Hagopian v Hagopian*, 66 AD3d 1021, 1022; *Matter of R.M.W. v G.M.M.*, 23 Misc 3d 713, 717-718; *cf. Matter of Bartley v Bartley*, 48 AD3d 678, 678-679). Although respondent's conduct did not take place in public, section 812 (1) specifically states that, "[f]or purposes of this article, 'disorderly conduct' includes disorderly conduct not in a public place." In addition, disorderly conduct may be committed when a person "recklessly creat[es] a risk" of annoyance or alarm through violent or threatening behavior (Penal Law § 240.20

[1]). We thus reject respondent's contention that the statute "requires more than a 'risk.' "

We further reject respondent's contention that the Acting Family Court Judge abused her discretion in refusing to recuse herself. "Absent a legal disqualification, . . . a Judge is generally the sole arbiter of recusal" (*Matter of Murphy*, 82 NY2d 491, 495), and it is well established that a court's recusal decision will not be overturned absent an abuse of discretion (*see People v Moreno*, 70 NY2d 403, 405-406). Respondent contends that the Judge was biased against his attorney, who had filed a complaint against the Judge with the Judicial Conduct Committee. Although the Rules of the Chief Administrator of the Courts governing judicial conduct provide that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned" (22 NYCRR 100.3 [E] [1]), respondent's claim of bias is not supported by the record and is thus insufficient to require recusal. There is no evidence that any alleged bias had " 'result[ed] in an opinion on the merits [of this case] on some basis other than what the [J]udge learned from [her] participation in the case' " (*Board of Educ. of City Sch. Dist. of City of Buffalo v Pisa*, 55 AD2d 128, 136; *see e.g. Fecteau v Fecteau*, 97 AD3d 999, 1002; *People v Strohman*, 66 AD3d 1334, 1335-1336, *lv dismissed* 13 NY3d 911; *Matter of Petkovsek v Snyder*, 251 AD2d 1086, 1086-1087).

Finally, we reject respondent's contention that the court erred in admitting in evidence an audio recording of the incident made by the parties' son. While there is no dispute that the parties were not aware that he was recording the incident and did not give consent thereto, the eavesdropping statutes are implicated only when the recording is made "by a person not present thereat" (Penal Law § 250.00 [2]; *see* CPLR 4506 [1], [2]). The parties' son, who made the recording from his bedroom, was "present" for the purposes of the statutes (*see People v Kirsh*, 176 AD2d 652, 652-653, *lv denied* 79 NY2d 949).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

332

CA 12-01576

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

ROSEMARY WELSH, AS ADMINISTRATOR OF
THE ESTATE OF JOHN C. WELSH, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ST. ELIZABETH MEDICAL CENTER,
DEFENDANT-APPELLANT.

GALE GALE & HUNT, LLC, SYRACUSE (MATTHEW J. VAN BEVEREN OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOTTAR LEONE, PLLC, SYRACUSE (AARON J. RYDER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered December 13, 2011. The order denied the motion of defendant for summary judgment.

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

Memorandum: This medical malpractice action arises out of an incident in which plaintiff's decedent, a developmentally disabled adult, allegedly sustained injuries, including a fractured hip, as a result of a fall from an X ray table at defendant hospital. Plaintiff initially commenced this action as decedent's guardian and the caption was amended after decedent died from a cause unrelated to the claims made in this action. We reject defendant's contention that Supreme Court erred in denying its motion for summary judgment dismissing the complaint. Defendant failed to meet its " 'initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff['s decedent] was not injured thereby' " (*Humphrey v Gardner*, 81 AD3d 1257, 1258; *see James v Wormuth*, 74 AD3d 1895, 1895). With respect to decedent's fall from the X ray table, defendant failed to present competent proof that it did not deviate from the applicable standard of care when the technician left the room to develop the X rays that had just been taken, with decedent still on the table.

Contrary to defendant's further contention, it also failed to establish as a matter of law that decedent's injuries were not caused by the fall that is the subject of this action (*see Humphrey*, 81 AD3d at 1258). In support of its motion, defendant offered the affidavit

of decedent's physician who opined that, based on hospital records and his prior knowledge of decedent, the subject fall did not cause decedent's hip fracture and other injuries for which damages are sought in this action. The record establishes that decedent remained in the hospital for about four days after the subject fall, when he was discharged under plaintiff's care, and that his hip fracture and other injuries were diagnosed and treated approximately four days after that initial discharge, when he was readmitted to the hospital. We conclude that defendant failed to meet its initial burden on the issue of causation because, inter alia, the proof regarding decedent's symptoms and physical condition between the date of his fall and initial discharge is inconsistent, and defendant failed to present proof of an alternative cause of decedent's hip fracture and other injuries.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

335

CA 12-01494

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

GERALD BIELICKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EXCEL INDUSTRIES, INC., DEFENDANT-RESPONDENT.

ANDREWS, BERNSTEIN & MARANTO, LLP, BUFFALO (ROBERT MARANTO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (TARA WATERMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 1, 2012. The order granted defendant's motion for summary judgment and dismissed plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when, in the course of his employment, he was delivering a package to defendant's property. He attempted to open a door but, according to plaintiff, the door would not open because it was stuck and defendant had prior notice that "the door stuck on occasion." Defendant moved for summary judgment dismissing the complaint on the sole ground that the "condition alleged by Plaintiff, [i.e.], the door that would not open on the date of the accident, is not an inherently dangerous condition giving rise to a duty in tort." We conclude that Supreme Court erred in granting the motion.

As the Court of Appeals has written, the issue "whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally [one] of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [internal quotation marks omitted]; *see Werner v Kaleida Health*, 96 AD3d 1569, 1570; *Vanderwater v Sears*, 277 AD2d 1056, 1056; *cf. Palmer v Barnes & Noble Booksellers, Inc.*, 34 AD3d 1287, 1288). With respect to summary judgment motions, it is well established that "[a] motion for summary judgment must be denied 'if there is any significant doubt as to the existence of a triable issue [of fact], or if there is even arguably such an issue' .

. . Moreover, summary judgment is seldom appropriate in a negligence action" (*Vanderwater*, 277 AD2d at 1056; *see generally Andre v Pomeroy*, 35 NY2d 361, 364-365; *Stone v Goodson*, 8 NY2d 8, 12-13, *rearg denied* 8 NY2d 934).

Contrary to defendant's contention, we conclude that the issue whether the door, if stuck, constituted a dangerous condition is "fairly debatable" (*Stone*, 8 NY2d at 12). We reject defendant's attempts to distinguish this case from cases in which an attempt to open a stuck door caused a different injury, i.e., putting one's hand through a pane of glass rather than injuring one's arm or shoulder (*see Shay v Mozer, Inc.*, 80 AD3d 687, 687; *Gomez v Hicks*, 33 AD3d 856, 856; *Small v 870-7th Ave. Corp.*, 273 App Div 216, 217; *see also Obshatcko v Y. M. & Y. W. H. A. of Williamsburg*, 45 AD2d 1023, 1023). In the foregoing cases there was an issue of fact whether the injured plaintiff sustained a foreseeable injury and, "[i]f the risk of harm [is] foreseeable, the particular manner in which the injury occurred . . . [is] not material to defendant's liability" (*Buckley v Sun & Surf Beach Club*, 95 NY2d 914, 915; *see generally Sanchez v State of New York*, 99 NY2d 247, 252). In our view, the risk that a person attempting to pull open a stuck door might injure his or her arm or shoulder is as foreseeable as the risk of a person pushing his or her hand through a stuck door's glass pane while attempting to push the door open (*see e.g. Shay*, 80 AD3d at 687; *Gomez*, 33 AD3d at 856; *cf. Lopes v Sears, Roebuck & Co.*, 273 AD2d 360, 361), and indeed is more foreseeable than the risk of a person injuring his or her eye on a hook on the stuck door when that door is kicked open by another person (*see Obshatcko*, 45 AD2d at 1023). We therefore conclude that there is a triable issue of fact whether the door, if it was stuck, constituted a dangerous condition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

337

CA 12-01549

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

ERIE INSURANCE COMPANY OF NEW YORK, AS SUBROGEE OF MAPLEVALE FARMS, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AE DESIGN, INC., DEFENDANT-RESPONDENT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (MICHAEL FEELEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BURNS WHITE LLC, WEST CONSHOHOCKEN, PENNSYLVANIA (ANDREW J. FUGA, OF THE PENNSYLVANIA AND NEW JERSEY BARS, ADMITTED PRO HAC VICE, OF COUNSEL), AND LAW OFFICES OF BRADY & CARAFA, LIVERPOOL, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered December 21, 2011. The order granted the motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiff's subrogor, Maplevale Farms, Inc. (Maplevale), hired defendant to provide engineering services in connection with the construction of an addition to Maplevale's warehouse in Clymer, New York. The addition was built pursuant to plans and specifications prepared by defendant. Following a heavy snowfall, the roof of the original warehouse collapsed, resulting in damage to the building and the inventory and property stored therein. Plaintiff, as subrogee of Maplevale, commenced this action asserting causes of action for malpractice and breach of contract, and seeking to recover sums necessary to cover the losses sustained as the result of the roof collapse.

Supreme Court properly granted defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (1). According to the "Standard Terms and Conditions" of the agreement between Maplevale and defendant, "[a]ny litigation arising in any way from this Agreement shall be brought in the Courts of Common Pleas of Pennsylvania having jurisdiction." That forum selection clause is " 'prima facie valid and enforceable unless it is shown by the challenging party to be[, inter alia,] unreasonable, unjust, [or] in contravention of public policy' " (*KMK Safety Consulting, LLC v Jeffrey M. Brown Assoc., Inc.*,

72 AD3d 650, 651; *see Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534). Contrary to plaintiff's contention, the enforcement of the forum selection clause does not contravene New York public policy (*cf. Matter of Betlem*, 300 AD2d 1026, 1026-1027).

The "Standard Terms and Conditions" also provide that "[t]he laws of the Commonwealth of Pennsylvania shall govern the validity of this Agreement, its interpretation and performance," and plaintiff contends that the enforcement of the "limitation of legal liability" provision of the agreement pursuant to Pennsylvania law violates General Obligations Law §§ 5-322.1 and 5-324 and would thus contravene New York public policy. That contention, however, concerns choice of law, not choice of forum, and it may properly be raised before a court in the forum chosen by the parties in Pennsylvania (*see Boss v American Express Fin. Advisors, Inc.*, 6 NY3d 242, 247). "[O]bjections to a choice of law clause are not a warrant for failure to enforce a choice of forum clause" (*id.*).

We reject plaintiff's further contention that the forum selection clause does not apply to its allegations of negligence, and thus that the court erred in granting defendant's motion with respect to the malpractice cause of action. "[U]nder its broad and unequivocal terms, the applicability of the subject forum selection clause does not turn on the type or nature of the dispute between" Maplevale and defendant, and plaintiff "cannot circumvent application of the forum selection clause by pleading parallel and/or additional related noncontractual claims" (*Tourtellot v Harza Architects, Engrs. & Constr. Mgrs.*, 55 AD3d 1096, 1098).

Finally, contrary to plaintiff's contention, the "Standard Terms and Conditions" were expressly incorporated into the agreement, and the failure of Maplevale's president to read or recall the forum selection provision does not render that provision unenforceable (*see KMK Safety Consulting, LLC*, 72 AD3d at 651).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

339

CA 12-01202

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

CHESTER DANNER AND RITA DANNER,
PLAINTIFFS-APPELLANTS,

V ORDER

MYRON KOWAL, MYRON KOWAL, DOING BUSINESS AS
MYRON'S EXPRESSIONS IN CUISINE, AND MYRON
KOWAL, DOING BUSINESS AS MYRON'S EXPRESSIONS,
DEFENDANTS-RESPONDENTS.

LAW OFFICE OF ROBERT H. PERK, BUFFALO (MARIE LUKASIEWICZ OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered March 16, 2012. The order denied the motion of plaintiffs for a default judgment, granted the motion of defendants to dismiss the complaint and denied the motion of plaintiffs for an extension of time to serve defendants.

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

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

341

KA 12-00361

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN C. JOHNSON, DEFENDANT-APPELLANT.

MICHAEL STEINBERG, 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 February 6, 2012. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.), defendant contends that County Court erred in assessing 20 points against him under risk factor 7, for his relationship with one of the victims. We agree. At the SORA hearing, the People had "the burden of proving the facts supporting the [risk level classification] sought by clear and convincing evidence" (§ 168-n [3]; *see People v Wroten*, 286 AD2d 189, 199, *lv denied* 97 NY2d 610). Here, the People failed to meet their burden of establishing that defendant "established or promoted" his relationship with the victim "for the primary purpose of victimization" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 12 [2006]; *see People v Johnson*, 93 AD3d 1323, 1324). The People presented no evidence that defendant, who met the victim at a party, targeted the victim for the primary purpose of victimizing her (*see Johnson*, 93 AD3d at 1324; *cf. People v Washington*, 91 AD3d 1277, 1277, *lv denied* 19 NY3d 801; *People v Jackson*, 70 AD3d 1385, 1385, *lv denied* 14 NY3d 714). As a result of the court's error, defendant's score on the risk assessment instrument must be reduced by 20 points, and thus he should be presumptively classified as a level two risk. We therefore modify the order accordingly.

We note in any event that we agree with defendant that the court

failed to comply with Correction Law § 168-n (3), inasmuch as it failed to set forth the findings of fact and conclusions of law upon which it based its determination to assess points under risk factor 7 (*see People v Carlton*, 78 AD3d 1654, 1655, *lv denied* 16 NY3d 782; *People v Gilbert*, 78 AD3d 1584, 1584, *lv denied* 16 NY3d 704). The court merely recited its conclusion, i.e., that "[d]efendant established a relationship with [the victim] for the purpose of victimization."

Finally, we reject the contention of defendant that he was denied effective assistance of counsel at the SORA hearing (*see People v Rotterman*, 96 AD3d 1467, 1468, *lv denied* 19 NY3d 813; *People v Bowles*, 89 AD3d 171, 181, *lv denied* 18 NY3d 807).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

342

KA 11-02020

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW M. COBADO, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (ELIZABETH ENSELL OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Cattaraugus County Court (Larry M. Himelein, J.), rendered August 8, 2011. Defendant was resentenced upon his conviction of rape in the first degree (four counts) and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a resentence pursuant to which County Court added various terms of postrelease supervision (PRS) to the sentence previously imposed in 2003 on his conviction, following a jury trial, of four counts of rape in the first degree (Penal Law § 130.35 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [2]). Defendant failed to preserve for our review his contention that the court erred in resentencing him without ordering an updated presentence report in accordance with CPL 390.20 (*see People v Lard*, 71 AD3d 1464, 1465, *lv denied* 14 NY3d 889). In any event, that contention lacks merit. "Where, as here, [the] defendant has been continually incarcerated between the time of the initial sentencing and resentencing, to require an update . . . does not advance the purpose of CPL 390.20 (1)" (*id*. [internal quotation marks omitted]; *see People v Kuey*, 83 NY2d 278, 282-283; *People v James*, 4 AD3d 774, 775).

We reject defendant's further contention that he was deprived of effective assistance of counsel at resentencing (*see generally People v Baldi*, 53 NY2d 137, 147). Although defense counsel did not say anything on the record on defendant's behalf, the court ultimately imposed the minimum authorized term of PRS for the rape convictions (*see* Penal Law § 70.45 [2-a] [c]), and an equal term of PRS for the

weapons offense.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

345

KA 11-01635

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TILLMAN WARD, 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 Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered July 20, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court abused its discretion in consolidating two indictments for trial (*see People v Rios*, 72 AD3d 1489, 1490-1491, *lv denied* 15 NY3d 777). We reject that contention. Although the indictments are based upon different criminal transactions, the offenses charged are "the same or similar in law" (CPL 200.20 [2] [c]), and defendant failed to establish that there was "[s]ubstantially more proof on one or more [of the] joinable offenses than on others and [that] there [was] a substantial likelihood that the jury would be unable to consider separately the proof as it relat[ed] to each offense" (CPL 200.20 [3] [a]; *see generally People v Lane*, 56 NY2d 1, 7-8). Indeed, the fact that the jury convicted defendant on the charge from one incident but was unable to reach a verdict with respect to the charge from the other incident "reflects that the jury was able to consider each count as a separate and distinct incident" (*People v Reed*, 212 AD2d 962, 962, *lv denied* 86 NY2d 739).

We also reject defendant's contention that the evidence is legally insufficient with respect to the element of possession. "Defendant's possession of the weapon may be established through the doctrine of constructive possession, which is based on the exercise of dominion and control over the area in which an item is found" (*People*

v Carter, 60 AD3d 1103, 1106, *lv denied* 12 NY3d 924). Here, the police recovered the loaded handgun from the floor under the driver's seat of a vehicle, and defendant admitted to the police that he drove the automobile to the location where it was searched. The statutory presumption of possession set forth in Penal Law § 265.15 (3) provides that "[t]he presence in an automobile, other than a stolen one or a public omnibus, of any firearm . . . [or] defaced firearm . . . is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon . . . is found." Furthermore, defendant admitted to the police that he had possessed the weapon and had placed it under the driver's seat. That admission was confirmed by "DNA samples taken from the handgun [that] 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; *see People v Long*, 100 AD3d 1343, 1344). We thus conclude that the evidence is legally sufficient to establish the element of possession (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Even assuming, arguendo, that a different finding would not have been unreasonable, we conclude that the jury did not fail to give the evidence the weight it should be accorded (*see id*.).

We reject defendant's further contention that the court erred in denying his request to instruct the jury on the defense of temporary innocent possession of the handgun inasmuch as "there was no reasonable view of the evidence upon which the jury could have found that the defendant's possession was innocent" (*People v Johnson*, 30 AD3d 439, 439, *lv denied* 7 NY3d 813). Such an instruction is warranted where there is "proof in the record showing a legal excuse for [defendant] having the weapon in his possession as well as facts tending to establish that, once possession has been obtained, the weapon had not been used in a dangerous manner" (*People v Williams*, 50 NY2d 1043, 1045). Here, however, there was no such proof inasmuch as the People established that defendant took the weapon from another person and hid it under the driver's seat of the car he was driving, "and [that] he made no effort to turn the weapon over to the police after secreting it" (*People v Hanley*, 227 AD2d 144, 145). That evidence "is 'utterly at odds with . . . [a] claim of innocent possession' " (*People v Snyder*, 73 NY2d 900, 902, quoting *Williams*, 50 NY2d at 1045).

Finally, the sentence is not unduly harsh or severe.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

346

KA 11-02603

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER SHARP, DEFENDANT-APPELLANT.

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

CHRISTOPHER SHARP, DEFENDANT-APPELLANT PRO SE.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Terrence M. Parker, A.J.), rendered November 22, 2011. The judgment convicted defendant, upon a jury verdict, of criminal trespass in the second degree, criminal contempt in the first degree (three counts), possession of burglar's tools and custodial interference in the second degree and, upon his plea of guilty, of driving while intoxicated.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by amending the order of protection and as modified the judgment is affirmed, and the matter is remitted to Cattaraugus County Court for further proceedings.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, three counts of criminal contempt in the first degree (Penal Law § 215.51 [b] [i], [c]) and one count of custodial interference in the second degree (§ 135.45 [1]). We reject the contention of defendant that County Court erred in denying that part of his omnibus motion seeking to sever counts eight and nine from the first seven counts of the indictment. The counts were properly joined inasmuch as "they are 'defined by the same or similar statutory provisions and consequently are the same or similar in law' " (*People v Davis*, 19 AD3d 1007, 1007, *lv denied* 21 AD3d 1442, quoting CPL 200.20 [2] [c]), and defendant " 'failed to meet his burden of submitting sufficient evidence of prejudice from the joinder to establish good cause to sever' " (*People v Ogborn*, 57 AD3d 1430, 1430, *lv denied* 12 NY3d 786; *see* CPL 200.20 [3]).

Defendant further contends that the court erred in denying that part of his omnibus motion seeking to dismiss count eight of the indictment because the factual allegations in the indictment, as

amplified by the bill of particulars, were insufficient as a matter of law to support a charge of custodial interference in the second degree. We reject that contention. As relevant here, a person is guilty of custodial interference in the second degree when, "[b]eing a relative of a child less than sixteen years old, intending to hold such child permanently or for a protracted period, and knowing that he has no legal right to do so, he takes or entices such child from his lawful custodian" (Penal Law § 135.45 [1]). The indictment, as amplified by the bill of particulars and responses to a notice to produce, alleged that on or about October 19, 2010, defendant took the child from his mother, the child's lawful custodian; transported the child to Niagara Falls, New York; and kept the child in Niagara Falls overnight in violation of an order of protection permitting defendant to have only limited supervised visitation with the child. We conclude that those allegations fall within the "plain, natural meaning" of custodial interference as defined by Penal Law § 135.45 (1) (*People v Ditta*, 52 NY2d 657, 660; *see People v Morel*, 164 AD2d 677, 680-681, *lv denied* 78 NY2d 971). The sentence is not unduly harsh or severe.

Defendant's remaining contentions are raised in his pro se supplemental brief. Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support his conviction of criminal contempt in the first degree as charged in counts five and nine of the indictment (*see People v Gray*, 86 NY2d 10, 19; *see also People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). Defendant also failed to preserve for our review his contention that the court violated CPL 300.10 with respect to those counts, 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 likewise failed to preserve for our review his contention that the verdict was inconsistent inasmuch as he failed to object to the alleged inconsistency before the jury was discharged (*see People v Semrau*, 77 AD3d 1436, 1437-1438, *lv denied* 16 NY3d 746; *People v Camacho*, 70 AD3d 1393, 1393, *lv denied* 14 NY3d 886). In any event, that contention is without merit (*see People v Delancy*, 81 AD3d 1446, *lv denied* 17 NY3d 794; *see generally People v Tucker*, 55 NY2d 1, 6-8, *rearg denied* 55 NY2d 1039).

We agree with defendant, however, that the court erred in setting the expiration date of the order of protection in excess of the maximum legal duration. Although defendant failed to preserve that contention for our review (*see People v Nieves*, 2 NY3d 310, 315-317; *People v Mingo*, 38 AD3d 1270, 1271), we exercise our power to review it as a matter of discretion in the interest of justice (*see Mingo*, 38 AD3d at 1271; *see also* CPL 470.15 [6] [a]). We therefore modify the judgment by amending the order of protection, and we remit the matter to County Court to specify in the order of protection an expiration date in accordance with CPL 530.12 (5). Further, as defendant notes, the certificate of conviction incorrectly reflects that he was convicted of two counts of criminal trespass in the second degree. It must therefore be amended to reflect that he was convicted of a single count of criminal trespass in the second degree (*see People v Anderson*, 79 AD3d 1738, 1739, *lv denied* 16 NY3d 856).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

347

KA 11-01864

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CURTIS A. WRIGHT, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Ontario County Court (Frederick G. Reed, A.J.), rendered November 10, 2010. Defendant was resentenced upon his conviction of criminal possession of a controlled substance in the fourth degree and assault in the second degree (two counts).

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

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

348

KA 12-01481

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS A. WRIGHT, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered July 21, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the fourth degree, assault in the second degree (two counts), resisting arrest and escape in the third degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]) and two counts of assault in the second degree (§ 120.05 [3]), defendant contends that County Court erred in denying his challenge for cause to a prospective juror who, according to defendant, expressed a bias in favor of police officers. We reject that contention. "A challenge for cause is an objection to a prospective juror and may be made only on the ground that . . . [h]e has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at trial" (CPL 270.20 [1] [b]). Only statements that "cast serious doubt on [a prospective juror's] ability to render an impartial verdict" trigger a court's obligation to obtain an unequivocal assurance from the prospective juror that he or she can render an impartial verdict (*People v Arnold*, 96 NY2d 358, 363). Here, the prospective juror was an emergency medical technician who dealt with police officers when responding to service calls. During voir dire, the prospective juror stated that he "usually go[es] with what the officer said" when trying to sort out the facts at the scene of an accident or injury. In our view, that statement did not demonstrate a state of mind "likely" to preclude impartiality (CPL 270.20 [1] [b]), nor did it cast "serious"

doubt on the prospective juror's ability to render an impartial verdict (*Arnold*, 96 NY2d at 363).

In any event, in responding to follow-up questions from the prosecutor, the prospective juror gave an "unequivocal assurance that [he could] set aside any bias and render an impartial verdict based on the evidence" (*People v Johnson*, 94 NY2d 600, 614; *see People v Chambers*, 97 NY2d 417, 419). The prospective juror stated that he understood that police officers "are human" and thus "can be mistaken" or "lie," and that he could "evaluate the testimony [of police officers] to determine whether they are mistaken or lying" (*see People v Castrechino*, 24 AD3d 1267, 1268, *lv denied* 6 NY3d 810; *People v Chatman*, 281 AD2d 964, 965, *lv denied* 96 NY2d 899). We thus conclude that the court properly denied defendant's challenge for cause to the prospective juror.

Defendant further contends that the evidence is legally insufficient to establish that he assaulted the police officers because the People failed to establish that the police officers lawfully stopped his motor vehicle, and thus failed to establish that they were "performing a lawful duty" when they were injured (Penal Law § 120.05 [3]). We reject that contention. When viewed 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 establish that defendant was observed by the police officers making at least one traffic infraction, which justified the stop (*see People v Pealer*, 89 AD3d 1504, 1506, *affd* ___ NY3d ___ [Feb. 19, 2013]; *People v Robinson*, 97 NY2d 341, 349). The People thus established that the police officers were performing a lawful duty when they were injured.

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

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

349

CAF 12-01163

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF JUSTIN G.,
RESPONDENT-APPELLANT.

MONROE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

ARDETH L. HOUDE, ATTORNEY FOR THE CHILD, ROCHESTER, FOR RESPONDENT-APPELLANT.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (KELLY G. BARTUS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended order of the Family Court, Monroe County (Joan S. Kohout, J.), entered January 11, 2012 in a proceeding pursuant to Family Court Act article 3. The amended order adjudged that respondent committed an act that if committed by an adult would constitute the crime of gang assault in the second degree.

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

Memorandum: Contrary to respondent's contention, Family Court's finding that respondent committed an act that if committed by an adult would constitute the crime of gang assault in the second degree (Penal Law § 120.06), as an accomplice (§ 20.00), is supported by legally sufficient evidence on the issues of identification and serious physical injury. The victim testified that he was attacked initially by an individual other than respondent, and other people joined in the attack. With respect to the issue of identification, an eyewitness testified that respondent was one of the individuals who encircled the victim and engaged in the attack on him. With respect to the issue of serious physical injury, the victim testified that his vision was impaired as a result of the attack, and the court admitted in evidence the victim's certified hospital record, which indicated that the victim sustained a collapsed lung and fractures of the ribs and left orbital. We therefore conclude that ample evidence establishes that respondent was one of the attackers (*see People v Chardon*, 83 AD3d 954, 956, *lv denied* 18 NY3d 857), and that the victim sustained a serious physical injury (*see Matter of Timothy S.*, 1 AD3d 908, 909). Contrary to respondent's further contention, the court's rejection of his admission of guilt to one of the counts of the petition was not an abuse of discretion. Respondent failed to admit "the act . . . to which he [was] entering an admission" (Family Ct Act § 321.3 [1]; *see*

generally Matter of Tiffany MM., 298 AD2d 728, 729).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

351

CA 12-01192

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

JOSEPH C. HALE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MEADOWOOD FARMS OF CAZENOVIA, LLC, MARC P. SCHAPPELL AND THOMAS B. ANDERSON, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

ALEXANDER & CATALANO, LLC, SYRACUSE (WILLIAM P. SMITH, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (JAMES J. GASCON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered January 3, 2012. The order, inter alia, granted defendants' cross motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the cross motion for summary judgment dismissing the Labor Law § 240 (1) claim, and reinstating that claim, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries that he sustained when a ladder fell from the roof of a barn and knocked him from another ladder on which he was standing. In appeal No. 1, he appeals from an order that, inter alia, denied his motion for partial summary judgment on the Labor Law §§ 240 (1) and 241 (6) claims, and granted defendants' cross motion for summary judgment dismissing the Labor Law § 240 (1) claim. In appeal No. 2, he appeals from an order denying his motion seeking leave to renew and reargue his motion to settle the record in appeal No. 1 to include additional documentation.

In appeal No. 1, we agree with plaintiff that Supreme Court erred in granting defendants' cross motion with respect to the Labor Law § 240 (1) claim. We therefore modify the order in appeal No. 1 accordingly. Contrary to the court's conclusion, defendants failed to meet their initial burden on their cross motion of establishing as a matter of law that the homeowner exemption contained in the statute applies to them. We likewise reject plaintiff's contention that he

was entitled to summary judgment with respect to that issue. In pertinent part, the statute imposes liability for injuries arising from certain construction site accidents upon "contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work" (§ 240 [1]). "The homeowner exemption, which was added to Labor Law § 240 (1) . . . in 1980, was 'intended by the Legislature to shield homeowners from the harsh consequences of strict liability under the provisions of the Labor Law [and] reflect[s] the legislative determination that the typical homeowner is no better situated than the hired worker to furnish appropriate safety devices and to procure suitable insurance protection' " (*Dineen v Rechichi*, 70 AD3d 81, 83-84, *lv denied* 14 NY3d 703, quoting *Bartoo v Buell*, 87 NY2d 362, 367). The Court of Appeals has cautioned, however, against applying "an overly rigid interpretation of the homeowner exemption and [instead has] employed a flexible 'site and purpose' test to determine whether the exemption applies" (*Bartoo*, 87 NY2d at 367-368; *see Cannon v Putnam*, 76 NY2d 644, 650). Thus, "when an owner of a one- or two-family dwelling contracts for work that directly relates to the residential use of the home, even if the work also serves a commercial purpose, that owner is shielded by the homeowner exemption from the absolute liability" of Labor Law § 240 (*Bartoo*, 87 NY2d at 368).

Here, plaintiff alleged that he fell from a ladder while reconstructing a barn that defendants purchased and were having rebuilt on their property in Cazenovia. The property on which the barn was rebuilt consisted of several smaller parcels of land that had comprised an estate of approximately 350 acres in the early 1900s. Marc P. Schappell and Thomas B. Anderson (collectively, individual defendants), the sole shareholders of defendant Meadowood Farms of Cazenovia, LLC (Meadowood LLC), purchased the parcels in their individual capacities as part of their plan to restore the estate to its original size. The individual defendants had rehabilitated the estate's main residence, which was situated on the west end of the combined property, and they occasionally resided there. The property contained several other residences, including one that was used by the manager of Meadowood LLC as part of her employment compensation. The residence of that manager was on the east end of the combined property, approximately a quarter of a mile away from the residence of the individual defendants. Furthermore, deeds in the record establish that the parcel containing the manager's residence is on a street different from the parcel containing the individual defendants' residence. The individual defendants testified that they did not know whether they purchased the barn itself in their individual capacities or through Meadowood LLC. Heritage Structural Renovation, Inc. (Heritage), plaintiff's employer at the time of the accident, was subsequently hired to disassemble the barn and reconstruct it on the aforementioned property, but we conclude that there is conflicting evidence in the record with respect to whether Heritage entered into a contract with the individual defendants or Meadowood LLC. The barn was situated near the residence of Meadowood LLC's manager, along with several other barns that were used in the commercial operations of Meadowood LLC. The individual defendants testified at their depositions that the barn at issue was to be used in part for

Meadowood LLC's commercial operations, but they also submitted affidavits in support of the cross motion in which they averred that they had purchased it solely for historical preservation purposes.

Although the inconsistencies between the individual defendants' deposition testimony and their affidavits submitted in support of the cross motion do not appear to "constitute[] an attempt to avoid the consequences of [their] prior deposition testimony by raising feigned issues of fact" (*Shpizel v Reo Realty & Constr. Co.*, 288 AD2d 291, 291), we conclude that those inconsistencies present credibility issues that must be resolved at trial (*see Godlewski v Carthage Cent. Sch. Dist.*, 83 AD3d 1571, 1572; *Palmer v Horton*, 66 AD3d 1433, 1434; *Dietzen v Aldi Inc. [New York]*, 57 AD3d 1514, 1514). Consequently, there remains "an issue of fact as to the commercial versus residential nature of the improvements . . . All in all, neither party was entitled to summary judgment on the exemption issue on this record" (*Mandelos v Karavasidis*, 86 NY2d 767, 769; *see Davis v Maloney*, 49 AD3d 385, 386).

With respect to appeal No. 2, plaintiff contends that the court erred in denying his motion for leave to reargue or renew his prior motion to settle the record in appeal No. 1. It is undisputed, however, that plaintiff stipulated to settle the record in appeal No. 1 prior to seeking leave to reargue or renew and has not sought to be relieved from his stipulation (*see e.g. Clark v Delaware & Hudson R.R. Corp.*, 245 App Div 447, 451), and thus no appeal lies from the court's order in appeal No. 2 (*see Matter of New York City Health & Hosps. Corp.*, 248 AD2d 387, 387; *see generally* CPLR 5701). Once plaintiff stipulated to the record on appeal, he was no longer entitled to move to settle the record or, indeed, to seek leave to reargue or renew a motion to settle the record that preceded the stipulation. "Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation" (*Hallock v State of New York*, 64 NY2d 224, 230; *see McCoy v Feinman*, 99 NY2d 295, 302), and plaintiff made no such showing here.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

353

CA 12-01666

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF THE FORECLOSURE OF TAX LIENS
BY PROCEEDING IN REM PURSUANT TO ARTICLE 11
OF THE REAL PROPERTY TAX LAW BY COUNTY OF HERKIMER, PETITIONER-RESPONDENT;

MERRIANNE MOORE, RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

FELT EVANS, LLP, CLINTON (JUSTIN M. NACKLEY OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT J. MALONE, COUNTY ATTORNEY, HERKIMER (LORRAINE H. LEWANDROWSKI OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Norman I. Siegel, A.J.), entered November 17, 2011. The order denied the motion of respondent to vacate a judgment of foreclosure and for other relief.

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

Memorandum: In this in rem tax foreclosure proceeding pursuant to RPTL article 11, respondent appeals from an order denying her motion to vacate a judgment of foreclosure. Respondent contends that Supreme Court should have granted the motion because petitioner failed to comply with the notice requirements of RPTL 1125. We agree with petitioner, however, that respondent's motion was untimely. "A motion to reopen a default judgment of tax foreclosure 'may not be brought later than one month after entry of the judgment' " (*Matter of Foreclosure of Tax Liens by County of Clinton [Tupaz]*, 17 AD3d 914, 915, quoting RPTL 1131; *see Matter of County of Ontario [Helser]*, 72 AD3d 1636, 1637). Here, the judgment of foreclosure was entered on March 31, 2010, and respondent did not move to vacate it until September 12, 2011, nearly 18 months after it was entered. Contrary to respondent's contention, the statute of limitations set forth in RPTL 1131 applies even where, as here, the property owner asserts that he or she was not notified of the foreclosure proceeding (*see Matter of County of Schuyler [Solomon Fin. Ctr., Inc.]*, 83 AD3d 1243, 1244-1245, *lv denied* 17 NY3d 850, *rearg denied* 18 NY3d 853; *Helser*, 72 AD3d at 1637; *Matter of County of Sullivan [Spring Lake Retreat Ctr., Inc.]*, 39 AD3d 1095, 1095-1096).

In any event, we conclude that petitioner complied with the notice requirements of RPTL 1125 inasmuch as petitioner sent notice of

the foreclosure proceeding to respondent at her last known address by both certified mail and ordinary first class mail. Although the letter sent by certified mail was returned by the United States postal service with the notations "no such street" and "unable to forward," the letter sent by ordinary first class mail was not returned. RPTL 1125 (1) (b) (i) provides that "notice shall be deemed received unless *both* the certified mailing and the ordinary first class mailing are returned by the United States postal service within forty-five days after being mailed" (emphasis added). If both letters are returned, the foreclosing agent "shall attempt to obtain an alternative mailing address from the United States postal service" (*id.*). Here, because only one of the two letters was returned, petitioner was not obligated to take additional steps to notify respondent of the foreclosure proceedings (*see Helser*, 72 AD3d at 1637).

Furthermore, we note that respondent did not deny receiving actual notice of the foreclosure proceeding in the affidavit she submitted in support of her motion; instead, she averred only that notice was not provided to her "at the address of record" (*see generally Sendel v Diskin*, 271 AD2d 757, 758-759, *lv denied* 96 NY2d 707). In addition, respondent failed to establish that she notified petitioner of her change of address, as required by RPTL 1125 (1) (d). We therefore conclude that the court properly denied the motion.

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

356

CA 12-01685

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

JOSEPH C. HALE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MEADOWOOD FARMS OF CAZENOVIA, LLC, MARC P. SCHAPPELL AND THOMAS B. ANDERSON, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

ALEXANDER & CATALANO, LLC, SYRACUSE (JAMES L. ALEXANDER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (CHRISTINA F. DEJOSEPH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered September 4, 2012. The order denied plaintiff's motion seeking leave to renew and reargue.

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

Same Memorandum as in *Hale v Meadowood Farms of Cazenovia, LLC* ([appeal No. 1] ___ AD3d ___ [Mar. 22, 2013]).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court

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

360

CA 12-01778

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

CENTER STATE SECURITY CONSULTANTS, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SYRACUSE HOUSING AUTHORITY, DEFENDANT-RESPONDENT.

WALTER D. KOGUT, P.C., FAYETTEVILLE (WALTER D. KOGUT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (BRIAN J. BUTLER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered December 7, 2011. The order, inter alia, granted defendant's motion for summary judgment.

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

Memorandum: In this breach of contract action, plaintiff appeals from an order that, inter alia, granted defendant's motion for summary judgment dismissing the complaint. Plaintiff contends that Supreme Court erred in granting defendant's motion on the ground that plaintiff's contract with defendant was unenforceable under the common-law term limits rule, which "prohibits one municipal body from contractually binding its successors in areas relating to governance unless specifically authorized by statute or charter provisions to do so" (*Matter of Karedes v Colella*, 100 NY2d 45, 50). We reject that contention.

Plaintiff is owned and operated by Matthew Kwiek, a retired Syracuse police officer who is also plaintiff's only employee. In June 2000, defendant and plaintiff entered into a contract (Agreement) for a term of 10 years pursuant to which plaintiff was to provide consultation services for defendant's security operations. The Agreement was approved by defendant's Board of Commissioners (Board). Defendant did not hire Kwiek directly because Kwiek would not have been able to work for defendant and receive his pension unless he received a waiver from the retirement system of his former employer. In January 2002, the Agreement was amended to increase plaintiff's compensation and to allow Kwiek to have vacation and sick time. The amendment was signed by defendant's then-Executive Director and Kwiek, but was not approved by the Board. In June 2006, one week before the

then-Executive Director retired, the Agreement was amended again without Board approval. That second amendment extended the Agreement for another five years, i.e., until June 2015, under the same terms and conditions. In July 2007, defendant, acting through its Board and a new Executive Director, terminated the Agreement, whereupon plaintiff commenced this action seeking damages for breach of the Agreement and its two amendments.

Following discovery, defendant moved for summary judgment dismissing the complaint, and plaintiff cross-moved for partial summary judgment on liability. In granting the motion, the court determined that the Agreement violated the term limits rule and that, even if the initial Agreement was enforceable, the two amendments thereto were invalid and unenforceable because they had not been approved by the Board.

Plaintiff initially contends that the term limits rule does not apply because defendant is not a municipality, but instead is a public authority. We reject that contention. In *Matter of Lake v Binghamton Hous. Auth.* (130 AD2d 913, 914-915), the term limits rule was applied to the Binghamton Housing Authority, which is legally indistinguishable from defendant herein. More recently, we applied the term limits rule to an urban renewal agency (*see Matter of City of Utica Urban Renewal Agency v Doyle*, 66 AD3d 1495, 1496), and we can perceive no reason why a housing authority should be treated differently from such an agency.

Plaintiff further contends that the term limits rule applies only to actions that require Board approval. According to plaintiff, the initial Agreement, although approved by the Board, did not require Board approval under defendant's procurement policy. We reject that contention as well. Section II (A) of defendant's procurement policy provides that, "[n]otwithstanding the Executive Director's broad authority and responsibility to approve and execute SHA procurement actions, the Executive Director shall submit all contracts or procurement actions that exceed $50,000 or that are, or may be, the subject of contested awards to the SHA Board of Commissioners for consideration and for such action as the Commission may deem proper." Pursuant to that provision, the initial Agreement was necessarily submitted to the Board for its "consideration" because the total compensation paid thereunder to plaintiff exceeded $50,000.

Plaintiff nevertheless relies on Section II (C) of the procurement policy, which provides that "the Board shall maintain the duty to review and approve the award of purchases and contracts for equipment, materials, supplies and *non-personal services* in excess of $50,000 and that the Board shall also maintain the duty to review and approve any contract change orders in excess of $50,000" ([emphasis added]). Plaintiff asserts that its Agreement with defendant did not provide "non-personal services," and thus did not require Board approval. Although the procurement policy does not define "non-personal services," we conclude that the security consultation services rendered by plaintiff were not personal in nature, and that Board approval was thus required.

Finally, we reject plaintiff's contention that the term limits rule does not apply because the Agreement did not infringe upon the ability of future Boards to exercise any *governmental* powers. As noted above, the term limits rule "prohibits one municipal body from contractually binding its successors in areas relating to governance" (*Karedes*, 100 NY2d at 50). The rule does not apply, however, to contracts that relate only to business or proprietary matters, such as the administration of a municipal golf course in *Karedes* (*id*.). Here, we conclude that providing security to its tenants is not a business or proprietary matter for defendant. Instead, ensuring the safety of its residents is one of its core responsibilities and relates directly to matters of governance. Plaintiff mistakenly focuses on the specific duties performed by Kwiek, asserting that, because he had no authority to make decisions concerning defendant's operations, or policies, or the employment of off-duty police officers, he did not exercise any governmental powers. The focus should instead be on whether *defendant* was exercising governmental powers when it entered the contract with plaintiff, and we answer that question in the affirmative.

In sum, the term limits rule applies because defendant's Board exercised governmental powers when it approved the Agreement with plaintiff in January 2000, and because the 10-year term of the Agreement exceeded the term of all members of the Board who approved the Agreement. Although the terms of the Board members were staggered, five of the Board members served five-year terms, and two served two-year terms. When the Board terminated the Agreement in 2007, only three of the seven Board members who approved the Agreement in 2000 were still on the Board. Under the term limits rule, the 2000 Board was not permitted to bind contractually the 2007 Board or any subsequent Board to retain plaintiff as a security consultant (*see Karedes*, 100 NY2d at 50).

Entered: March 22, 2013

Frances E. Cafarell
Clerk of the Court