SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 2, 2015

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

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. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

244

CA 14-01125

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

JEFFERY BURNS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LECESSE CONSTRUCTION SERVICES LLC, DUKES PROPERTY DEVELOPMENT, LLC, THE MILLS HIGH FALLS HOUSING DEVELOPMENT FUND COMPANY, INC., U.S. CEILING CORP., URBAN LEAGUE OF ROCHESTER, NY, INC., DEFENDANTS-APPELLANTS, AND PRO CARPET, INC., DEFENDANT.

PRO CARPET, INC., THIRD-PARTY PLAINTIFF-APPELLANT,

V

JEFFERY W. BURNS, DOING BUSINESS AS BURNS FLOORING, THIRD-PARTY DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

BURDEN, GULISANO & HICKEY, LLC, BUFFALO (PHILIP M. GULISANO OF COUNSEL), FOR DEFENDANTS-APPELLANTS LECESSE CONSTRUCTION SERVICES LLC, THE MILLS HIGH FALLS HOUSING DEVELOPMENT FUND COMPANY, INC. AND URBAN LEAGUE OF ROCHESTER, NY, INC.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-APPELLANT DUKES PROPERTY DEVELOPMENT, LLC.

LIPPMAN O’CONNOR, BUFFALO (ROBERT H. FLYNN OF COUNSEL), FOR DEFENDANT-APPELLANT U.S. CEILING CORP.

GOERGEN, MANSON & MCCARTHY, BUFFALO (KELLY J. PHILIPS OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

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

Appeals from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered April 7, 2014. The order granted the motion of Pro Carpet, Inc., for summary judgment dismissing the

amended complaint and cross claims against it, dismissed the third-party action of Pro Carpet, Inc., denied in part the motion and cross motions of the remaining defendants for summary judgment, and granted in part plaintiff's motion for partial summary judgment.

It is hereby ORDERED that said appeal by defendant Dukes Property Development, LLC from the order insofar as it denied that part of its motion with respect to the Labor Law § 241 (6) claim against it and granted that part of the motion of defendant-third-party plaintiff Pro Carpet, Inc. with respect to the Labor Law § 241 (6) claim against it, and appeal by defendant U.S. Ceiling Corp. from the order insofar as it denied that part of its cross motion with respect to the Labor Law § 241 (6) claim against it, and appeal by defendants Lecesse Construction Services LLC, The Mills High Falls Housing Development Fund Company, Inc., and Urban League of Rochester, NY, Inc. from the order insofar as it granted the motion of defendant-third-party plaintiff Pro Carpet, Inc., and insofar as it sua sponte dismissed the third-party complaint is dismissed without costs, and the order is modified on the law by granting in part the cross motion of defendants Lecesse Construction Services LLC, The Mills High Falls Housing Development Fund Company, Inc. and Urban League of Rochester, NY, Inc. with respect to the Labor Law § 241 (6) claim and dismissing that claim against them except to the extent that it is premised on violations of 12 NYCRR 23-1.7 (e) and 23-1.30; granting that part of the motion of defendant Dukes Property Development, LLC and that part of the cross motion of defendant U.S. Ceiling Corp. with respect to the Labor Law § 200 claim and dismissing that claim against them; denying plaintiff's motion in its entirety; and reinstating the third-party complaint of defendant-third-party plaintiff Pro Carpet, Inc., and granting that part of its motion seeking summary judgment on its claim for attorney's fees and costs against third-party defendant pursuant to the indemnification agreement, 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 allegedly sustained when he fell down a stairway in an apartment complex then under construction. The accident allegedly occurred when he tripped on a drywall screw that was protruding out of the top of the stairway. Defendant Lecesse Construction Services LLC (Lecesse) was the general contractor for the construction project, and defendants The Mills High Falls Housing Development Fund Company, Inc. (Mills) and Urban League of Rochester, NY, Inc. (Urban League), jointly owned the apartment complex. Defendant Dukes Property Development, LLC (Dukes) was the finish carpentry subcontractor, defendant U.S. Ceiling Corp. (U.S. Ceiling) was the drywall and insulation contractor, and defendant-third-party plaintiff Pro Carpet, Inc. (Pro Carpet) was the flooring subcontractor. Pro Carpet subcontracted a portion of its work to third-party defendant, Jeffrey W. Burns, doing business as Burns Flooring, and Pro Carpet commenced a third-party action against him seeking, inter alia, contractual indemnification pursuant to its "Hold Harmless, Indemnification and Insurance" agreement with third-party-defendant.

By the order in appeal No. 1, Supreme Court granted in its entirety Pro Carpet's motion seeking summary judgment dismissing the amended complaint and cross claims against it, and sua sponte dismissed the third-party complaint. The court denied the motion of Dukes, the cross motion of U.S. Ceiling and the cross motion of Lecesse, Mills and Urban League (collectively, Lecesse defendants) insofar as they each sought summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against them. The court granted plaintiff's motion to the extent that it sought partial summary judgment determining that the accident was a substantial factor in causing his lumbar spine injuries, which required medical treatment that included surgery.

By the order in appeal No. 2, the court, inter alia, granted the motion of Dukes and the cross motion of U.S. Ceiling seeking, inter alia, leave to reargue their respective motion and cross motion insofar as they sought summary judgment dismissing the Labor Law § 241 (6) claim against them. Upon reargument, the court adhered to its original determination with respect to that claim.

As a preliminary matter, we dismiss the appeals of Dukes and U.S. Ceiling from the order in appeal No. 1 insofar as it denied those parts of their respective motion and cross motion with respect to the Labor Law § 241 (6) claim (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985). In addition, we dismiss the appeal of the Lecesse defendants from the order in appeal No. 2. The Lecesse defendants are not aggrieved by that order, and the contentions raised in their brief with respect to that order are in support of affirmance (*see Schramm v Cold Spring Harbor Lab.*, 17 AD3d 661, 663). Pro Carpet's appeal from the order in appeal No. 2 is also dismissed inasmuch as Pro Carpet has not raised on appeal any issue with respect to that order and has thus abandoned its appeal from that order (*see Abasciano v Dandrea*, 83 AD3d 1542, 1545).

We conclude in appeal No. 2 that the court erred in adhering to its prior decision denying Dukes' motion and U.S. Ceiling's cross motion insofar as they sought summary judgment dismissing the Labor Law § 241 (6) claim against them. The nondelegable duty imposed by that statute extends only to "[general] 'contractors and owners and their agents' " (*Krajnik v Forbes Homes, Inc.*, 120 AD3d 902, 904, quoting § 241 [6]; *see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318). As subcontractors, Dukes and U.S. Ceiling qualify as statutory agents only with regard to injuries "sustained in those areas and activities within the scope of the work delegated to [them]" (*Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 12 AD3d 1059, 1060). Dukes and U.S. Ceiling met their burden of establishing that they did not have control over plaintiff's work or the safety of the area involved in the incident, and plaintiff failed to raise a triable issue of fact (*see Rice v City of Cortland*, 262 AD2d 770, 771-772). We therefore reverse the order in appeal No. 2 insofar as appealed from by granting, upon reargument, the motion of Dukes and cross motion of U.S. Ceiling with respect to Labor Law § 241 (6).

In appeal No. 1, we conclude with respect to the Labor Law § 241

(6) claim that the court properly denied that part of the cross motion of the Lecesse defendants for summary judgment dismissing that claim against them to the extent that it is premised on the alleged violations of 12 NYCRR 23-1.7 (e) and 23-1.30. Those regulations are sufficiently specific to support the Labor Law § 241 (6) claim (*see Murphy v Columbia Univ.*, 4 AD3d 200, 202). " 'Moreover, both regulations are applicable to the facts of this case and arguably were violated by [the Lecesse] defendants, thus warranting a trial of [that] claim' " (*Mergenhagen v Dish Network Serv. L.L.C.*, 64 AD3d 1170, 1172). The court erred, however, in denying that part of the cross motion for summary judgment dismissing the remainder of Labor Law § 241 (6) claim against the Lecesse defendants. The Occupational Safety and Health Act regulations cited by plaintiff cannot support that claim (*see Millard v City of Ogdensburg*, 274 AD2d 953, 954), and plaintiff did not address any of the other violations of the Industrial Code that were alleged in his second amended bill of particulars in opposition to the cross motion (*see Vaneer v 993 Intervale Ave. Hous. Dev. Fund Corp.*, 5 AD3d 161, 163). We therefore modify the order in appeal No. 1 by granting that part of the cross motion of the Lecesse defendants for summary judgment dismissing the Labor Law § 241 (6) claim against them except to the extent that such claim is premised on the alleged violation of 12 NYCRR 23-1.7 (e) and 23-1.30.

The court also erred in denying the motion of Dukes and the cross motion of U.S. Ceiling insofar as they sought summary judgment dismissing the Labor Law § 200 claim against them. "Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877; *see Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425, 1427). Dukes and U.S. Ceiling, as subcontractors without control of plaintiff's work or ongoing control of the area in which he was injured, cannot be held liable under Labor Law § 200 (*see Krajnik*, 120 AD3d at 904; *Foots v Consolidated Bldg. Contrs., Inc.*, 119 AD3d 1324, 1326-1327; *Severino v Hohl Indus. Servs.*, 300 AD2d 1049, 1049-1050). We therefore further modify the order in appeal No. 1 by granting that part of the motion of Dukes and the cross motion of U.S. Ceiling seeking summary judgment dismissing the Labor Law § 200 claim against them.

We further conclude, however, that the court properly denied the motion of Dukes and the cross motion of U.S. Ceiling with respect to the common-law negligence claims against them. Neither of those defendants met its burden of establishing its entitlement to judgment dismissing that claim. As subcontractors, either Dukes or U.S. Ceiling " 'may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area' " (*Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1195), and neither of them established that it did not create the dangerous condition that caused plaintiff's fall (*see Babiack v Ontario Exteriors, Inc.*, 106 AD3d 1448, 1450).

The court also properly denied the cross motion of the Lecesse defendants insofar as it sought dismissal of the Labor Law § 200 and common-law negligence claims against them. Inasmuch as plaintiff alleges that the accident occurred as the result of a dangerous condition on the premises, any issue "whether [the Lecesse] defendants supervised or controlled plaintiff's work is irrelevant" (*Perry v City of Syracuse Indus. Dev. Agency*, 283 AD2d 1017, 1017). Those "[d]efendants, as the parties seeking summary judgment dismissing those claims, were required to 'establish as a matter of law that they did not exercise any supervisory control over the general condition of the premises or that they neither created nor had actual or constructive notice of the dangerous condition on the premises' " (*Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1416). We conclude that the Lecesse defendants failed to meet that burden.

We note that plaintiff did not appeal from that part of the order granting the motion of Pro Carpet for summary judgment dismissing the amended complaint against it. The Lecesse defendants contend that the court erred in dismissing the amended complaint and cross claims against Pro Carpet, and Dukes contends on appeal that the court erred in dismissing the Labor Law § 241 (6) claim against Pro Carpet. Inasmuch as the Lecesse defendants did not oppose Pro Carpet's motion, however, those defendants are not aggrieved by that part of the order (*see Mixon v TBV, Inc.*, 76 AD3d 144, 156-157), and Dukes is no longer aggrieved by that part of the order inasmuch as the Labor Law § 241 (6) claim against Dukes is dismissed by our order in appeal No. 2 (*see* CPLR 5511; *Walter J. Socha Bldrs. v Town of Clifton Park*, 101 AD2d 986, 986). We therefore dismiss the appeals of those defendants from that part of the order granting Pro Carpet's motion. We also dismiss the appeal of the Lecesse defendants from that part of the order sua sponte dismissing Pro Carpet's third-party complaint inasmuch as the Lecesse defendants were not aggrieved thereby (*see Goldman v Packaging Indus.*, 144 AD2d 533, 534).

We agree with Pro Carpet that the court erred in sua sponte dismissing its third-party complaint. We note that Pro Carpet's claims against plaintiff should have been interposed as counterclaims rather than in a third-party action (*see* CPLR 1007), but we will disregard this nonprejudicial defect (*see Gunderman v Sure Connect Cable Installation, Inc.*, 101 AD3d 1214, 1216 n 2). Contrary to the court's determination, we conclude that Pro Carpet's claim for attorney's fees and costs pursuant to its indemnification agreement with third-party defendant was not rendered moot by the dismissal of the complaint against it (*see Hoover v International Bus. Machs. Corp.*, 35 AD3d 371, 372). We further conclude that Pro Carpet established that, pursuant to " 'the language and purposes of the entire agreement and the surrounding facts and circumstances' " (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777), it is entitled to recover its "legal fees" and "all costs of defending" this action. We therefore further modify the order in appeal No. 1 accordingly.

Finally, we agree with the Lecesse defendants and Dukes that the court erred in granting that part of plaintiff's motion seeking

partial summary judgment determining that the accident "was a substantial factor in causing [his] lumbar spine injuries, necessity of lumbar fusion surgery and implantation and maintenance of a spinal cord stimulator." Plaintiff failed to meet his burden of establishing as a matter of law that his injuries were caused by the accident (*see Doyle v Sithe/Independence Power Partners*, 296 AD2d 847, 847). We therefore further modify the order in appeal No. 1 by denying plaintiff's motion in its entirety.

All concur except WHALEN, J., who dissents in part and votes to modify in accordance with the following memorandum: I respectfully dissent in part in appeal No. 1. Contrary to the view of the majority, in my view defendants Dukes Property Development, LLC (Dukes) and U.S. Ceiling Corp. (U.S. Ceiling) are subject to Labor Law § 200 liability. With respect to construction work, Labor Law §§ 240 (1) and 241 (6) explicitly impose duties regarding worker safety upon "[a]ll contractors and owners and their agents." The duties imposed by Labor Law § 200, by contrast, are directed not to specific persons or entities but rather to the workplace itself, i.e., "[a]ll places to which [the Labor Law] applies." I agree with the majority that Dukes and U.S. Ceiling, as subcontractors, are not liable to plaintiff under Labor Law § 200 by virtue of their control of the injury-producing work (*see Foots v Consolidated Bldg. Contrs., Inc.*, 119 AD3d 1324, 1326-1327). Here, however, "plaintiff's theory of liability is based on the allegedly defective condition of the premises rather than on the manner in which the work was performed," and Dukes and U.S. Ceiling are subject to Labor Law § 200 liability under that theory (*Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1156). Because neither subcontractor met its burden of establishing that it did not create the dangerous condition at the worksite in violation of Labor Law § 200, I would affirm that part of the order denying the motion of Dukes and the cross motion of U.S. Ceiling insofar as they sought summary judgment dismissing the Labor Law § 200 claim against them (*see Andrade v Triborough Bridge & Tunnel Auth.*, 35 AD3d 256, 257).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

245

CA 14-01126

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

JEFFERY BURNS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LECESSE CONSTRUCTION SERVICES LLC, DUKES PROPERTY DEVELOPMENT, LLC, THE MILLS HIGH FALLS HOUSING DEVELOPMENT FUND COMPANY, INC., U.S. CEILING CORP., URBAN LEAGUE OF ROCHESTER, NY, INC., DEFENDANTS-APPELLANTS, AND PRO CARPET, INC., DEFENDANT.

PRO CARPET, INC., THIRD-PARTY PLAINTIFF-APPELLANT,

V

JEFFERY W. BURNS, DOING BUSINESS AS BURNS FLOORING, THIRD-PARTY DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

BURDEN, GULISANO & HICKEY, LLC, BUFFALO (PHILIP M. GULISANO OF COUNSEL), FOR DEFENDANTS-APPELLANTS LECESSE CONSTRUCTION SERVICES LLC, THE MILLS HIGH FALLS HOUSING DEVELOPMENT FUND COMPANY, INC. AND URBAN LEAGUE OF ROCHESTER, NY, INC.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-APPELLANT DUKES PROPERTY DEVELOPMENT, LLC.

LIPPMAN O’CONNOR, BUFFALO (ROBERT H. FLYNN OF COUNSEL), FOR DEFENDANT-APPELLANT U.S. CEILING CORP.

GOERGEN, MANSON & MCCARTHY, BUFFALO (KELLY J. PHILIPS OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

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

Appeals from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered May 30, 2014. The order, insofar as appealed from, adhered to the prior order denying that part of the

motion of defendant Dukes Property Development, LLC, and that part of the cross motion of defendant U.S. Ceiling Corp., seeking summary judgment dismissing the Labor Law § 241 (6) claim against them.

It is hereby ORDERED that said appeals by defendants Lecesse Construction Services LLC, The Mills High Falls Housing Development Fund Company, Inc. and Urban League of Rochester, NY, Inc. and defendant-third-party plaintiff Pro Carpet, Inc. are unanimously dismissed without costs, and the order insofar as appealed from is reversed on the law without costs, those parts of the motion of defendant Dukes Property Development, LLC and the cross motion of defendant U.S. Ceiling Corp. with respect to the Labor Law § 241 (6) claim are granted, and that claim is dismissed against them.

Same memorandum as in *Burns v Lecesse Constr. Servs. LLC* ([appeal No. 1] ___ AD3d ___ [July 2, 2015]).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

449

CA 14-01730

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

SUSAN M. COFFED, AS ADMINISTRATOR OF THE ESTATE
OF JAMES B. COFFED, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN N. MCCARTHY AND GASPERINO F. FULFARO,
DEFENDANTS-APPELLANTS.

ADAMS, HANSON, REGO, KAPLAN & FISHBEIN, WILLIAMSVILLE (NICOLE B. PALMERTON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, LANCASTER (NELSON E. SCHULE, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered June 18, 2014. The order denied defendants' motion for summary judgment dismissing plaintiff's complaint.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, defendants' motion is granted, and the complaint is dismissed.

Memorandum: Plaintiff, as administrator of the estate of her husband (decedent), commenced this action seeking damages for fatal injuries sustained by decedent when the bicycle he was riding collided with a dump truck operated by John N. McCarthy (defendant) and owned by defendant Gasperino F. Fulfaro. Defendant had been traveling eastbound on Walden Avenue in the Village of Lancaster and was attempting to turn right onto Sheldon Avenue. Decedent was also traveling eastbound on Walden Avenue and was attempting to proceed across Sheldon Avenue on his bicycle. Several witnesses, including defendant, stated that the traffic signal controlling the intersection was red for eastbound traffic on Walden Avenue at the time of the accident. Although defendant initially told the police that the signal was green in his favor, he later explained that he was "very confused and upset" when he made that statement, and we agree with defendants that the record establishes as a matter of law that the signal was red.

Defendants contend that Supreme Court erred in denying their motion seeking summary judgment dismissing the complaint on the ground that decedent's failure to stop at the red light was the sole proximate cause of the accident. We agree. Defendants established

that defendant came to a complete stop at the red light and cautiously entered the intersection to make a legal right turn (*see* Vehicle and Traffic Law § 1111 [d] [2] [b]; *see generally Barile v Carroll*, 280 AD2d 988, 988), that defendant was unable to see decedent approaching the intersection (*see generally Wallace v Barody*, 124 AD3d 1172, 1173; *Barile*, 280 AD2d at 988-989), and that decedent was negligent as a matter of law in proceeding into the intersection against the red light (*see* § 1111 [d] [1]; *McLeod v Taccone*, 122 AD3d 1410, 1411; *Shapiro v Munoz*, 28 AD3d 638, 638). We therefore conclude that defendants "met their initial burden of establishing that defendant was operating his vehicle in a lawful and prudent manner and that there was nothing [he] could have done to avoid the collision" (*Heltz v Barratt*, 115 AD3d 1298, 1299, *affd* 24 NY3d 1185 [internal quotation marks omitted]). As a bicyclist, decedent was required to obey the traffic signal (*see* § 1231; *Joannis v Cahill*, 71 AD3d 1437, 1438), and thus was not "lawfully using the intersection" at the time of accident (§ 1111 [d] [2] [b]). We reject plaintiff's contention that decedent's failure to obey the traffic signal may have been excusable because of sun glare (*see generally Lifson v City of Syracuse*, 17 NY3d 492, 498).

In opposition to the motion, plaintiff failed to raise a triable issue of fact. Even assuming, arguendo, that plaintiff's opposing papers sufficiently preserved for our review her contention on appeal concerning the allegedly inoperable condition of the right rear turn signal on defendant's truck, we conclude that the condition of that turn signal was not a proximate cause of the accident (*see generally Velez v Hurley*, 264 AD2d 513, 514-515). The record establishes that there was an operable right turn signal on the truck's dump box that was activated and would have been visible from behind the truck, and further establishes that decedent was riding with his head down and not paying attention to his surroundings.

All concur except CENTRA and WHALEN, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent. "Viewing the evidence in the light most favorable to the non-moving party, as we must . . . , we conclude that there are issues of fact that preclude summary judgment" (*Russo v YMCA of Greater Buffalo*, 12 AD3d 1089, 1089, *lv dismissed* 5 NY3d 746). We would therefore affirm the order denying defendants' motion for summary judgment dismissing the complaint.

At the outset, we acknowledge that decedent was "subject to all of the duties applicable to the driver of a vehicle" pursuant to Vehicle and Traffic Law § 1231, and that defendants submitted evidence that decedent violated Vehicle and Traffic Law § 1111 (d) (1) by proceeding into the intersection against the red light. Plaintiff, however, submitted evidence concerning the position of the bicycle after the accident that raised an issue of fact whether decedent proceeded into the intersection at all, thereby raising an issue of fact whether he violated the statute (*see Sayed v Aviles*, 72 AD3d 1061, 1062-1063).

Even assuming, arguendo, that decedent was negligent and that his

negligence contributed to the accident, we conclude that a jury should resolve the issue whether decedent's negligence was the sole proximate cause of the accident. " 'There can be more than one proximate cause of an accident' . . . , and the issue of comparative negligence is generally a question for the jury to decide" (*Todd v Godek*, 71 AD3d 872, 872). Here, there was evidence that would support a finding that John N. McCarthy (defendant) was negligent in his operation of the dump truck and that his negligence contributed to the accident. Defendant had an obligation to " 'see what should be seen and to exercise reasonable care under the circumstances to avoid an accident' " (*Cupp v McGaffick*, 104 AD3d 1283, 1284), including in particular a collision with a bicyclist (*see* Vehicle and Traffic Law § 1146 [a]). Defendant testified that he saw decedent in the bicycle lane a mile before the intersection where the collision occurred. Even if we credit defendant's further testimony that he did not see decedent immediately before the accident, we conclude that triable issues of fact remain whether defendant "failed to see what was there to be seen through the proper use of his senses" (*Espiritu v Shuttle Express Coach, Inc.*, 115 AD3d 787, 789). In addition, it is undisputed that there was a bicycle lane to defendant's right as he drove on Walden Avenue toward the intersection, and a jury should determine whether, in the exercise of due care, defendant should have anticipated that a bicyclist would be in the bicycle lane (*see Colpan v Allied Cent. Ambulette, Inc.*, 97 AD3d 776, 777-778).

Finally, we cannot agree with the majority's conclusion that the inoperable condition of the truck's rear turn signal was not a proximate cause of the accident as a matter of law. That conclusion "requires the resolution of factual inferences in favor of defendants, which is improper on a motion for summary judgment" (*Morris v Lenox Hill Hosp.,* 232 AD2d 184, 185, *affd* 90 NY2d 953).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

478

CA 14-02011

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

SCOTT M. HARVEY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HANDELMAN, WITKOWICZ AND LEVITSKY, LLP,
STEVEN M. WITKOWICZ AND STEVEN B. LEVITSKY,
DEFENDANTS-RESPONDENTS.

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

DUGGAN & PAWLOWSKI LLP, BUFFALO (JAMES J. DUGGAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered March 18, 2014. The order granted the motion of defendants for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint to the extent it seeks damages with respect to defendants' representation of plaintiff in the underlying personal injury action against the County of Orleans and Nicole M. Gaulin in her individual capacity and official capacity as an employee of the County of Orleans, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this legal malpractice action seeking damages for the alleged negligence of defendants in their representation of him in a personal injury action arising from a motor vehicle accident that occurred on March 27, 2007. In September 2007, defendants commenced the underlying personal injury action on plaintiff's behalf against Nicole Gaulin, the owner and driver of the other vehicle involved in the accident. Subsequently, defendants, on plaintiff's behalf, moved for permission to file a late notice of claim on Gaulin's employer, the County of Orleans (County), and on the Kendall Central School District (District), the district to which Gaulin was providing services on behalf of the County. That motion was granted by Supreme Court, and the County and the District appealed. We modified the order by affirming that part of the order granting leave to file a notice of claim and by deleting that part of the order which added the County and the District as defendants to the action (*Harvey v Gaulin* [appeal No. 2], 68 AD3d 1789).

During the pendency of the prior appeal, a notice of claim was served on the County and the District, and an examination pursuant to General Municipal Law § 50-h was conducted. The amended complaint adding the County and the District as defendants was filed on March 4, 2010.

By order dated March 21, 2011, the court granted the motions of the County and the District to dismiss the amended complaint against them as time-barred. No appeal was taken from the March 21, 2011 order. On April 17, 2011, plaintiff filed a consent to change of attorney and defendants' representation of plaintiff ceased.

By order dated November 7, 2011, the court granted the motion of Gaulin's estate, substituted pursuant to CPLR 1015, for summary judgment dismissing the amended complaint against it for, inter alia, failure to serve Gaulin with a notice of claim. No appeal was taken from that order.

Plaintiff then commenced this legal malpractice action alleging, inter alia, that defendants were negligent in failing to timely commence an action against the County and the District and in failing to serve Gaulin with a notice of claim. Plaintiff's complaint also stated causes of action for fraud, breach of contract, and violation of Judiciary Law § 487. The court subsequently granted defendants' motion for summary judgment dismissing the complaint in this action in its entirety on the basis that any negligence on defendants' part was not the proximate cause of plaintiff's injury.

We note at this juncture that plaintiff has abandoned any issues related to the District (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). To establish a cause of action for legal malpractice, "a plaintiff must prove (1) that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care" (*Phillips v Moran & Kufta, P.C.*, 53 AD3d 1044, 1044-1045 [internal quotation marks omitted]; *see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442). "In order to prevail on a motion for summary judgment seeking dismissal of a complaint for legal malpractice, a defendant must establish that the plaintiff is unable to prove at least one necessary element of the legal malpractice action, i.e., that the plaintiff is unable to prove that he or she would have been successful on the underlying claim but for [the defendant's] negligence" (*Giardina v Lippes*, 77 AD3d 1290, 1291 [internal quotation marks omitted], *lv denied* 16 NY3d 702). Where a client fails to pursue an appeal in an underlying action, in order to determine whether the failure to pursue an appeal, as opposed to defendants' negligence, was the proximate cause of the client's injury, we must determine whether an appeal in the underlying action was "likely to succeed" (*Grace v Law*, 24 NY3d 203, 210).

Here, we conclude that defendants failed to meet their burden to establish as a matter of law that any alleged negligence on their part

resulting in the March 21, 2011 order dismissing of the amended complaint against the County was not a proximate cause of plaintiff's damages (*see Grace v Law*, 108 AD3d 1173, 1176, *affd* 24 NY3d 203). Thus, the court erred in granting the motion with respect to plaintiff's causes of action arising out of defendants' handling of the underlying personal injury action against the County. In support of their motion for summary judgment, defendants' own submissions established that the action against the County was commenced 51 days after the expiration of the limitations period. While the statute of limitations set forth in General Municipal Law § 50-i was tolled from the time plaintiff commenced the proceeding to obtain leave to file a late notice of claim until the order granting that relief went into effect (*see Giblin v Nassau County Med. Ctr.*, 61 NY2d 67, 74), the order granting such leave was effective when entered (*see Toro v City of New York*, 271 AD2d 523, 523-524, *lv denied* 96 NY2d 705), and the appeal from that order provided no further toll (*see Dublanica v Rome Hosp./Murphy Mem. Hosp.*, 126 AD2d 977, 977, *lv denied* 70 NY2d 605). Thus, the limitations period expired on December 10, 2008, and the amended complaint adding the County was not timely when filed on March 4, 2010 (*see generally Ambrus v City of New York*, 87 AD3d 341, 345). We therefore further conclude that an appeal from the order dismissing the action against the County on limitations grounds had no likelihood of success.

Plaintiff also contends that the court erroneously granted summary judgment to defendants because an appeal from the November 7, 2011 order granting Gaulin's estate summary judgment based upon a failure to serve Gaulin with a notice of claim was not likely to succeed. We agree. The court dismissed the action against Gaulin's estate on the ground that Gaulin was not served with a notice of claim in her official capacity as a County employee. However, defendants did not oppose the motion of Gaulin's estate on that ground. Thus, defendants failed to preserve for our review the issue for any possible appeal by plaintiff and/or his substitute counsel (*see Antokol & Coffin v Myers*, 30 AD3d 843, 845; *Crawford v Windmere Corp.*, 262 AD2d 268, 269). We therefore conclude that any appeal of the dismissal on this issue was not likely to succeed, and "defendants failed to establish as a matter of law that any negligence on their part was not a proximate cause of plaintiff's damages" (*Grace*, 108 AD3d at 1176). We further note that, in moving for summary judgment, defendants did not raise the issue whether an appeal from the dismissal of the amended complaint against Gaulin in her individual capacity would have been "likely to succeed." Nonetheless, the court dismissed the complaint in its entirety. That too was error (*see generally Kuhl v Piatelli*, 31 AD3d 1038, 1039; *Clarke v Davis*, 277 AD2d 902, 902). We therefore modify the order by denying the motion insofar as it sought dismissal of plaintiff's claims regarding defendants' representation of plaintiff in the underlying personal injury action against the County and Gaulin, in both her official and individual capacities, and we reinstate the complaint to that extent.

Plaintiff's remaining contentions have been rendered academic by

our determination.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

527

TP 14-01847

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

IN THE MATTER OF RICHARD H. PEESO, PETITIONER,

V MEMORANDUM AND ORDER

BARBARA J. FIALA, COMMISSIONER, NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH 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, Monroe County [Ann Marie Taddeo, J.], entered October 10, 2014) to review a determination revoking the driver's license of petitioner.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination revoking his driver's license based on his refusal to submit to a chemical test following his arrest for driving while intoxicated. Petitioner contends that the determination was affected by an error of law because the report of refusal did not indicate that petitioner's intoxication was voluntary and the report, thus, was insufficient to establish reasonable grounds that he was driving while intoxicated. We reject that contention. We conclude that the report of refusal submitted at the hearing established that the police officer had reasonable grounds to believe that petitioner had been driving while intoxicated based upon his observations of petitioner, including petitioner's failure of field sobriety tests (*see Gagliardi v Department of Motor Vehs.*, 144 AD2d 882, 883-884, *lv denied* 74 NY2d 606; *Matter of Smith v Commissioner of Motor Vehs.*, 103 AD2d 865, 866). At the hearing, the arresting officer's report of refusal was received in evidence and read into the record. That report establishes that the officer stopped the vehicle driven by petitioner based on the vehicle's speed, which exceeded the posted limit by 22 miles per hour, and a lane violation. After stopping the vehicle, the officer observed petitioner to have, among other things, a strong odor of alcoholic beverage on his breath, a flushed complexion, and poor coordination and balance. Petitioner thereafter

failed five standard field sobriety tests, and the officer arrested him for driving while intoxicated. Contrary to petitioner's further contention, the determination is supported by substantial evidence in the record, i.e., the report of refusal (*see Matter of Gray v Adduci*, 73 NY2d 741, 743). Petitioner's reliance on *People v Cruz* (48 NY2d 419, 427, *appeal dismissed* 446 US 901) is misplaced inasmuch as that case involved a criminal conviction for driving while intoxicated.

We reject petitioner's further contention that the Department of Motor Vehicles Appeals Board improperly relied upon an adverse inference from petitioner's failure to testify at the hearing. Such an inference was permissible (*see* 15 NYCRR 127.5 [b]; *see generally Matter of Northland Transp. v Jackson*, 271 AD2d 846, 848). We have considered petitioner's remaining contention and conclude that it is without merit.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

601

CA 14-02023

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

PAULA ANN REEVES, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GARY J. GIANNOTTA, AS CHIEF OF AUBURN POLICE DEPARTMENT, CITY OF AUBURN, OFFICER SKARDINSKI, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

LEMIRE, JOHNSON & HIGGINS, LLC, MALTA (BRADLEY J. STEVENS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

STEWART L. WEISMAN, MANLIUS, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered February 19, 2014. The order, inter alia, denied the motion of defendants-appellants for summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion of defendants-appellants is granted, and the complaint is dismissed against them.

Memorandum: Plaintiff commenced this action alleging that "[d]efendants intentionally interfered with [her] right of possession of . . . [f]irearms" that the police removed from her parents' home while executing a warrant for their arrest for selling drugs. According to plaintiff, "a couple of months" after her parents were arrested, she and her mother agreed that plaintiff would receive the firearms in exchange for the money that plaintiff gave to her parents for legal fees. When plaintiff contacted the Auburn Police Department, personally and through her attorney, trying to retrieve the firearms, she and her attorney were told that plaintiff had to obtain a court order to retrieve the firearms. County Court issued an order on December 10, 2010, awarding plaintiff ownership and possession of the firearms (December 2010 order), but the police had already destroyed the firearms. We conclude that Supreme Court erred in denying the motion of defendants-appellants (defendants) for summary judgment dismissing the complaint against them.

"An actionable 'conversion takes place when someone, intentionally and *without authority*, assumes or exercises control over personal property belonging to someone else, interfering with that

person's right of possession' " (*LM Bus. Assoc., Inc. v State of New York*, 124 AD3d 1215, 1216-1217, *lv denied* 25 NY3d 905, quoting *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property . . . and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Colavito*, 8 NY3d at 50).

Defendants met their initial burden with respect to both elements, and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). With respect to the first element, defendants established that plaintiff did not have a possessory right or interest in the firearms, and plaintiff failed to raise an issue of fact in that regard. We reject plaintiff's contention that she had possessory rights to the firearms based on the December 2010 order. The cause of action for conversion accrued when the firearms were destroyed or, as plaintiff alternatively alleges, misappropriated by members of the police department after plaintiff made a demand for them, over a month before plaintiff obtained the court order (*see Pecoraro v M&T Bank Corp.*, 11 AD3d 950, 951; *Johnson v Gumer*, 94 AD2d 955, 955). Thus, we conclude that defendants established that "plaintiff did not own, or have possessory rights to, the property when any such cause[] of action accrued" (*Wild v Hayes*, 68 AD3d 1412, 1414).

Likewise, we reject plaintiff's contention that she had possessory rights to the firearms based on an agreement with her mother. Plaintiff failed to raise an issue of fact with her self-serving deposition testimony that her mother agreed to give her the firearms in exchange for assistance with legal fees, and she otherwise failed to submit any evidence to raise an issue of fact whether she had a right of possession superior to that of the police who previously seized the firearms (*see Williams v Pinks, Feldman & Brooks*, 141 AD2d 723, 724, *lv denied* 73 NY2d 701; *see also LM Bus. Assoc., Inc.*, 124 AD3d at 1217-1218). In addition, plaintiff's allegation that the firearms were misappropriated rather than destroyed "is too speculative to survive defendants' motion for summary judgment" (*Lincoln Trust v Spaziano*, 118 AD3d 1399, 1401; *see Stewart v Kier*, 100 AD3d 1389, 1390).

With respect to the second element, defendants established that their exercise of control over the firearms was authorized, and plaintiff failed to raise an issue of fact. Defendants were authorized to seize the firearms from plaintiff's parents pursuant to Penal Law § 400.05, and the same statute directed that those firearms be destroyed absent, inter alia, a "certificate" from a court or a district attorney directing that they be preserved (*see* § 400.05 [2], [3]). It is undisputed that plaintiff did not attempt to have the firearms returned to her until the spring of 2010, approximately a year and a half after the firearms were seized, and Penal Law § 400.05 (2) provides for automatic destruction of seized firearms "at least once each year." Inasmuch as plaintiff did not formally challenge the validity of the seizure prior to the firearms' destruction and she conceded at her deposition that she was not the lawful owner of the

firearms until she received the December 2010 order, defendants' seizure and destruction of the firearms was authorized by statute and does not constitute conversion (*see LM Bus. Assoc., Inc.*, 124 AD3d at 1217).

In light of our determination, we do not address defendants' remaining contentions.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

621

CA 14-00777

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

DOMENIC MAGGIO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RONALD JOHN DOUGHTERY, THE TULLY HILL CORPORATION, DOING BUSINESS AS TULLY HILL CHEMICAL DEPENDENCY TREATMENT CENTER, COMMUNITY GENERAL HOSPITAL AND MICHAEL SHAW, DEFENDANTS-RESPONDENTS.

KUCHNER LAW FIRM, PLLC, SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, GARDEN CITY (LISA ROBINSON OF COUNSEL), FOR DEFENDANT-RESPONDENT THE TULLY HILL CORPORATION, DOING BUSINESS AS TULLY HILL CHEMICAL DEPENDENCY TREATMENT CENTER.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (C. TAYLOR PAYNE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS COMMUNITY GENERAL HOSPITAL AND MICHAEL SHAW.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (EDWARD J. SMITH, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT RONALD JOHN DOUGHTERY.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered April 10, 2013. The order, among other things, granted the motions and cross motion of defendants to preclude plaintiff from offering any expert evidence at trial and to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motions and cross motion in part, and reinstating the complaint, and as modified the order is affirmed without costs.

Memorandum: In this action for medical malpractice, plaintiff alleges that defendants failed to diagnose his Wernicke's Syndrome and failed to follow the standard of medical care in the prescription and administration of thiamine. Defendants moved and cross-moved pursuant to, inter alia, CPLR 3126 for an order precluding plaintiff from offering any expert evidence at trial for failure to comply with CPLR 3101 (d) (1), and dismissing the complaint. Supreme Court granted the motions and cross motion, and plaintiff appeals.

We reject plaintiff's contention that the court erred in granting the motions and cross motion insofar as they sought preclusion. "It is within the sound discretion of the trial court to determine whether a witness may testify as an expert[,] and that determination should not be disturbed in the absence of serious mistake, an error of law or abuse of discretion" (*Harris v Seager*, 93 AD3d 1308, 1309 [internal quotation marks omitted]). The record establishes that the report of plaintiff's expert was prepared in draft format prior to plaintiff's cross motion for an extension of time to provide expert disclosure and that plaintiff delayed disclosing that report for approximately eight months after its preparation. Plaintiff does not dispute that he disclosed the expert's report after the court-imposed deadline for disclosure. Furthermore, the report failed to disclose information required by CPLR 3101 (d) (1). We therefore perceive no abuse of the court's discretion in granting preclusion (*see Harris*, 93 AD3d at 1309).

We agree with plaintiff, however, that the court erred in granting those parts of the motions and cross motion seeking dismissal of the complaint on the ground that plaintiff cannot establish a prima facie case without the benefit of expert testimony (*cf. Grassel v Albany Med. Ctr. Hosp.*, 223 AD2d 803, 805, *lv dismissed in part and denied in part* 88 NY2d 842; *see generally Monahan v St. Joseph's Hosp. & Health Care Ctr.* [appeal No. 1], 82 AD2d 102, 107). We therefore modify the order accordingly. The motions and cross motion sought dismissal as a sanction for a discovery violation rather than summary judgment dismissing the complaint. We conclude that, under the circumstances of this case, preclusion was the appropriate sanction and that the court therefore abused its discretion in dismissing the complaint (*see Breen v Laric Entertainment Corp.*, 2 AD3d 298, 300; *see also* CPLR 3126; *cf. Tartan Textile Servs., Inc. v. St. Joseph's Hosp. Health Ctr.*, 59 AD3d 955, 956).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

650

CA 14-01846

PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND DEJOSEPH, JJ.

RACHEL HECKL, PERSONAL NEEDS GUARDIAN OF AIDA COREY, AN INCAPACITATED INDIVIDUAL, THOMAS J. COREY AND OLIVIA J. COREY, CO-PROPERTY GUARDIANS OF AIDA COREY, AN INCAPACITATED INDIVIDUAL, PLAINTIFFS-RESPONDENTS,
PERMACLIP PRODUCTS CORPORATION, PLAINTIFF,

V MEMORANDUM AND ORDER

DANIEL M. WALSH, ET AL., DEFENDANTS,
HSBC NORTH AMERICA, INC., AND HSBC BANK USA N.A., DEFENDANTS-APPELLANTS.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (MITCHELL J. BANAS, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered July 25, 2014. The order, among other things, denied the motion of defendant HSBC Bank USA N.A. to dismiss the amended complaint with respect to the causes of action asserted on behalf of Aida Corey, and tolled the statute of limitations on the causes of action of Aida Corey as of July 11, 2005.

Now, upon the stipulated order of Supreme Court, Erie County entered September 16, 2014 discontinuing the action against defendant HSBC North America, Inc.,

It is hereby ORDERED that said appeal by defendant HSBC North America, Inc. is unanimously dismissed upon stipulation and the order is affirmed without costs.

Memorandum: Plaintiff guardians and plaintiff Permclip Products Corporation (Permclip) commenced this action asserting causes of action for conversion, replevin and fraud in connection with the alleged embezzlement of funds by defendants Daniel M. Walsh and Frank Panaro from Aida Corey, the incapacitated individual represented by plaintiff guardians and the widow of Permclip's founder. HSBC Bank USA N.A. (defendant) is alleged to be vicariously liable as Panaro's employer (*see Heckl v Walsh* [appeal No. 2], 122 AD3d 1252, 1253).

Contrary to defendant's contention, Supreme Court properly directed a hearing pursuant to CPLR 208 on its motion to dismiss pursuant to CPLR 3211 (a) (5) rather than summarily deciding the motion in its favor. The record contains conflicting evidence with respect to whether Aida Corey was "unable to protect [her] legal rights because of an over-all inability to function in society" during the relevant period following the accrual of the causes of action (*McCarthy v Volkswagen of Am.*, 55 NY2d 543, 548; *see Kelly v Solvay Union Free Sch. Dist.*, 116 AD2d 1006, 1006). Contrary to defendant's further contention, in view of the undisputed medical evidence presented at the hearing, including the diagnosis of irreversible and permanent dementia, the court properly concluded that Aida Corey continuously suffered from an "over-all inability to function in society" since July 11, 2005 and thus that the statute of limitations on any causes of action are tolled under CPLR 208 (*McCarthy*, 55 NY2d at 548; *see Barnes v County of Onondaga*, 65 NY2d 664, 666; *Yannon v RCA Corp.*, 131 AD2d 843, 845-848).

Finally, we reject defendant's contention that the court erred during the hearing in excluding the contents of Aida Corey's communications with her attorneys based on attorney-client privilege and thus that it is entitled to a new hearing. Contrary to defendant's contention, there was no waiver of the attorney-client privilege based on the assertion of the insanity toll under CPLR 208. Plaintiffs did not place the subject matter of the privileged communications at issue, nor can it be said that " 'invasion of the privilege is required to determine the validity of the client's claim or defense and application of the privilege would deprive [defendant] of vital information' " (*Clark v Clark*, 93 AD3d 812, 816).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

664

KA 14-02271

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

IN THE MATTER OF BOARD OF EXAMINERS OF SEX OFFENDERS OF THE STATE OF NEW YORK, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JAMES D'AGOSTINO, RESPONDENT-RESPONDENT.

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

STUART J. LAROSE, SYRACUSE, FOR RESPONDENT-RESPONDENT.

Appeal from a revised order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), dated April 3, 2014. The revised order determined that the offense of which respondent was convicted in Cambodia was not a registerable offense pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the revised order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Onondaga County, for a risk level determination in compliance with Correction Law § 168-n (3).

Memorandum: The Board of Examiners of Sex Offenders of the State of New York (Board) commenced this proceeding pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.), seeking an order determining respondent's risk level. The Board appeals from a revised order determining, inter alia, that the offense upon which respondent "was convicted in the Cambodian Court is not registerable." We disagree, and we therefore reverse the revised order and remit the matter to Supreme Court for a risk level determination in compliance with Correction Law § 168-n (3).

The record establishes, and respondent does not contest, that he was convicted in Cambodia of "Child Prostitution and Exploitation" and sentenced to four years in prison in 2011. Respondent also concedes that his conviction was affirmed on appeal in Cambodia, although his sentence was reduced to 18 months. After respondent served that sentence and returned to the State of New York, the Board determined that the Cambodian offense was a registerable offense, requiring respondent to be classified pursuant to SORA. The Board prepared a case summary and risk assessment instrument, and recommended that respondent be classified as a level two risk. In preparing those

documents, the Board obtained a certificate of conviction and a translation of the record from the Cambodian trial court proceedings, which was provided by the Cambodian government and translated by Interpol. Neither party disputes the accuracy of the record or the translation.

Respondent opposed the Board's determination, contending that he should not be required to register as a sex offender because the Cambodian conviction did not comport with due process. After a hearing, Supreme Court issued a revised decision and order, concluding that the crime of which respondent had been convicted met the statutory requirements of a registerable offense (*see* Correction Law § 168-a [2] [a]), but further concluding that the conviction was obtained in violation of respondent's right to due process because, at trial, the victim recanted his accusations of sexual conduct. The court concluded that the conviction was based solely upon the testimony of a police officer to whom the victim initially reported respondent's sexual conduct. Based on the foregoing conclusions, the court further concluded that respondent had not committed a registerable offense, and declined to complete the risk level assessment and make a risk level determination. The Board, which has been represented throughout the proceedings by the Onondaga County District Attorney (*see* Correction Law §§ 168-k [2]; 168-n [3]), appeals.

Initially, we reject the Board's contention that respondent may not challenge whether he committed a registerable offense in the context of a SORA proceeding. To the contrary, the Court of Appeals has unequivocally stated that a "determination by the Board . . . that a person who committed an offense in another state must register in New York is reviewable in a proceeding to determine the offender's risk level" (*People v Liden*, 19 NY3d 271, 273). We also reject the Board's contention that *Liden* is limited to convictions from other states and, therefore, does not apply to the situation before us. The Court's determination in *Liden* was based on its conclusion that judicial efficiency and "good policy" are both promoted by allowing a challenge to the registerability of an offense in the same proceeding in which the court determines an offender's risk level (*id.* at 276), and we conclude that those considerations apply equally to challenges to the registerability of convictions from other countries.

We agree, however, with the Board's further contention that the court erred in determining that respondent had not committed a registrable offense. Contrary to respondent's contention and the court's conclusion, respondent failed to establish that he was denied due process by the Cambodian Court, and Supreme Court therefore erred in determining that the Cambodian conviction did not constitute a registerable offense for purposes of determining respondent's risk level classification pursuant to SORA.

SORA imposes registration requirements on " '[s]ex offender[s],' " i.e., "any person who is convicted of" certain sex offenses enumerated in the statute (Correction Law § 168-a [1]). Respondent correctly concedes that the offense of which he was

convicted had all of the essential elements of a sex offense, i.e., patronizing a prostitute in the third degree (Penal Law § 230.04), when the person patronized is less than 17 years old (*see* Correction Law § 168-a [2] [a] [i]; [d] [i]). Respondent contends, however, that the offense does not fall within the ambit of SORA because he was denied due process by the Cambodian Court. Even assuming, arguendo, that respondent was required to establish by a mere preponderance of the evidence that the offense is not registerable (*see generally People v Gillotti*, 23 NY3d 841, 861-862), we conclude that he failed to meet that burden because he failed to establish that he was denied due process.

Initially, we note that the Board submitted the transcript of the trial in Cambodia, and the parties agree that respondent appealed his conviction in that country. Respondent failed to submit any evidence establishing the result of that appeal other than a reduction of his sentence, however, and thus he failed to establish that he was denied due process. Furthermore, respondent also failed to submit any evidence regarding whether he had, or exercised, the right to pursue a further appeal. Inasmuch as it appears that he had the right to appeal to the Cambodian Supreme Court (*see e.g. United States v Boyajian*, 2014 WL 6750230 at *2-3), "there already exist[s at least one] procedural vehicle[] for challenging the constitutional propriety of [his conviction] under the facts presented here . . . Thus, a new, judicially created, remedy is not needed in this situation to ensure protection of the accused's right to due process of law" (*People v Knack*, 72 NY2d 825, 827).

In any event, even assuming, arguendo, that respondent's challenge is procedurally proper, he failed to establish that he was denied due process in light of the evidence presented at his trial. He contended, and Supreme Court concluded, that the 15-year-old victim recanted his testimony that respondent engaged in sexual activity with him and that there was no other evidence that he committed the crime charged and, thus, that he was denied due process because he was convicted solely upon hearsay evidence, i.e., a police officer's testimony regarding the victim's prior statements. That conclusion is belied by the evidence in the record from the Cambodian trial.

First, the 15-year-old male victim testified at trial and, although he claimed at trial that he did not engage in sexual activity with respondent, he admitted that he had previously told the police officer that such activity had occurred. Consequently, the record establishes that the police officer did not invent that version of the events. In addition, the victim testified that he initially told the police officer that he and respondent engaged in sexual activity because the officer threatened him, but the officer denied making threats, and teachers from the victim's school testified that they were present when the officer spoke with the victim, and that the officer did not threaten the victim. Additionally, the victim's hospital records were introduced into evidence, and they indicated that the victim "was sexually abused (*clarified by him*) but left [with] no burns, cuts or tears" (emphasis added). Thus, the victim reported the sexual activity at a time when he was not threatened by

the police officer, undermining the victim's testimony that he reported the sexual activity only because he was threatened. Also, despite denying that he engaged in sexual activity with the victim, respondent admitted in his trial testimony that he slept under blankets with the victim and several of the victim's brothers, and that he bathed in a restaurant pool with them. An employee of that restaurant testified that respondent "took baths with three children, but [she saw respondent] playing with the penis of only one child." Consequently, there was direct evidence of sexual contact between respondent and the victim, circumstantially corroborating the victim's initial statement and providing indicia that it was reliable. Finally, there was significant evidence, including respondent's testimony at trial, establishing that he gave gifts, money, and other financial consideration to the victim's family, before and after the sexual activity was alleged to have occurred.

Based on that evidence, we conclude that respondent failed to establish that the conviction violated his due process rights. In the State of New York, "[w]here the People establish that a witness is unwilling to testify due to the defendant's own conduct, or by the actions of others 'with the defendant's knowing acquiescence,' defendant forfeits the right to confrontation, and [the witness's] out-of-court statements are admissible . . . This exception is based on 'the public policy of reducing the incentive to tamper with witnesses' " (*People v Dubarry*, 25 NY3d 161, 174; *see People v Alston*, 27 AD3d 311, 312, *lv denied* 7 NY3d 751; *see generally People v Geraci*, 85 NY2d 359, 369-370; *Matter of Holtzman v Hellenbrand*, 92 AD2d 405, 410-415). Here, respondent's due process rights were not violated when the Cambodian Court concluded that respondent bribed the witnesses against him so that they would not testify against him, nor when that court relied upon those witnesses's prior statements implicating respondent inasmuch as the statements "bore sufficient indicia of reliability" (*Alston*, 27 AD3d at 312). Consequently, we conclude that "the statements were not 'so devoid of reliability as to offend due process' " (*People v Wilson*, 115 AD3d 891, 891, *lv denied* 24 NY3d 966, quoting *People v Cotto*, 92 NY2d 68, 78).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

671

CAF 14-00526

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

IN THE MATTER OF LANCE M. LAPOINT,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

WENDY PELLICIOTTI, RESPONDENT-RESPONDENT.

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

KAREN J. DOCTER, ATTORNEY FOR THE CHILD, FAYETTEVILLE.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered February 26, 2014 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, directed that respondent continue to be the parent of primary residence.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: Pursuant to Family Court Act article 6, petitioner father sought "joint custody or full custody [i]f needed[,]" of the parties' child and specific dates and times for visitation. The father appeals from an order insofar as it directed that respondent mother continue to be the "parent of primary residence."

We agree with the father that Family Court erred in designating the mother the "parent of primary residence," thereby implicitly condoning the mother's relocation to Florida with the child. Inasmuch as "the court made no explicit determination that the relocation was in the best interests of the child, and . . . failed to make findings regarding relevant factors that must be considered in making such a determination" (*Matter of McLaughlin v Michaud*, 256 AD2d 1130, 1131; *see Matter of Tropea v Tropea*, 87 NY2d 727, 740-741), we reverse the order insofar as appealed from and remit the matter to Family Court for a determination, including specific findings, whether relocation to Florida with the mother is in the best interests of the child.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

683

CA 15-00092

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

CANDACE SWATLAND, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN R. KYLE AND TRUGREEN LIMITED PARTNERSHIP, DEFENDANTS-RESPONDENTS.

BROWN CHIARI LLP, LANCASTER (NELSON E. SCHULE, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HINSHAW & CULBERTSON LLP, CHICAGO, ILLINOIS (KIMBERLY A. JANSEN, OF THE ILLINOIS BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (James P. Punch, A.J.), entered June 3, 2014. The judgment awarded plaintiff money damages in the amount of $30,000 for past pain and suffering and in the amount of $15,000 for future pain and suffering.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting the posttrial motion in part and setting aside the verdict with respect to damages for past and future pain and suffering, and as modified the judgment is affirmed without costs, and a new trial is granted on those elements of damages only unless defendants, within 20 days of service of a copy of the order of this Court with notice of entry, stipulate to increase the award of damages for past pain and suffering to $150,000 and for future pain and suffering to $50,000, in which event the judgment is modified accordingly, and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained in a motor vehicle accident. Following a trial, the jury found that plaintiff sustained a serious injury under the significant limitation of use category set forth in Insurance Law § 5102 (d) and awarded damages for past medical expenses, past pain and suffering, and future pain and suffering.

We reject plaintiff's contention that Supreme Court erred in limiting the cross-examination of defendants' medical expert with respect to fees he received in connection with referrals made by defendants' former counsel. The nature and extent of cross-examination is entrusted to the trial court's discretion (*see Badr v Hogan*, 75 NY2d 629, 634; *Siemucha v Garrison*, 111 AD3d 1398, 1399-

1400), and we perceive no abuse of discretion here.

We agree with plaintiff, however, that the court erred in denying that part of her posttrial motion seeking increases in the damage awards for past and future pain and suffering or, in the alternative, a new trial on damages. The jury found that plaintiff sustained a serious injury under the significant limitation of use and 90/180-day categories (*see* Insurance Law § 5102 [d]), but awarded only $30,000 for past pain and suffering and $15,000 for future pain and suffering. In view of plaintiff's testimony and the medical evidence that plaintiff sustained herniated discs at C5-C6 and C6-C7 that required surgery, we conclude that the award of damages deviates materially from what would be reasonable compensation for the injuries she sustained (*see* CPLR 5501 [c]). In our view, $150,000 for past pain and suffering and $50,000 for future pain and suffering are the minimum amounts the jury could have awarded as a matter of law based on the evidence at trial (*see Orlikowski v Cornerstone Community Fed. Credit Union*, 55 AD3d 1245, 1247, *lv dismissed* 11 NY3d 915). We therefore modify the judgment accordingly, and we grant a new trial on damages for past and future pain and suffering only unless defendants, within 20 days of service of a copy of the order of this Court with notice of entry, stipulate to increase the award of damages for past pain and suffering to $150,000 and for future pain and suffering to $50,000, in which event the judgment is modified accordingly.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

693

KA 12-01693

PRESENT: SCUDDER, P.J., CARNI, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES W. TOMLIN, III, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ROMANA A. LAVALAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered February 9, 2012. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class E felony, and unlawful possession of marihuana.

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 driving while intoxicated as a felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]), and unlawful possession of marihuana (Penal Law § 221.05). Defendant failed to preserve for our review his challenge to the alleged legal insufficiency of the evidence with respect to the element of intoxication because he failed to move for a trial order of dismissal on that ground (*see People v Gray*, 86 NY2d 10, 19). Contrary to defendant's contention, the evidence is legally sufficient to establish that he operated the motor vehicle at the time and place charged in the indictment (*see People v Blake*, 5 NY2d 118, 119-120). Furthermore, viewing the evidence in light of the elements of the crime and the violation 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).

We reject defendant's contention that County Court abused its discretion in denying as untimely his request for a missing witness charge with respect to one of the police officers at the scene of defendant's arrest. "The request was not made until both parties had rested, rather than at the close of the People's proof, when defendant became 'aware that the witness would not testify' " (*People v Williams*, 94 AD3d 1555, 1556). In any event, we note that the witness

was no longer a police officer, and was incarcerated after having been prosecuted by the same District Attorney's office. Thus, it cannot be said that the witness was "favorably disposed" to the People and was under their control (*People v Gonzalez*, 68 NY2d 424, 429).

Defendant further contends that the court erred in permitting the prosecutor to elicit testimony from a police officer regarding defendant's failure to respond to an unspecified inquiry made to him while in the holding cell after his arrest, because such testimony was inconsistent with the court's pretrial suppression ruling. Contrary to defendant's contention, the testimony made no reference to defendant's refusal to submit to a breath test, which was the subject of the pretrial suppression ruling. The testimony concerning defendant's failure to respond to an unspecified inquiry was properly admitted because it was relevant to establishing defendant's physical condition, demeanor and general responsiveness to questioning (*see People v McRobbie*, 97 AD3d 970, 971-972, *lv denied* 20 NY3d 934). By failing to object during the prosecutor's summation, defendant failed to preserve for our review his contention that the prosecutor made an improper reference to defendant's breath test refusal during summation and, in any event, he was not thereby denied a fair trial (*see People v Johnston*, 43 AD3d 1273, 1274-1275, *lv denied* 9 NY3d 1007). Defendant further contends that the court erred in permitting the prosecutor to play portions of the booking video for the jury because the booking video was not included in the People's CPL 710.30 notice. We reject that contention, inasmuch as the portions of the booking video played for the jury showed defendant's physical condition, and they contained questions and answers about defendant's pedigree information as well as spontaneous statements by defendant not in response to any questions or interrogation (*see People v Higgins*, 124 AD3d 929, 932-933).

We reject defendant's further contention that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). We note in particular that defense counsel was not ineffective in failing to request a charge in accordance with CPL 60.50 (*see People v Higgins*, 123 AD3d 1143, 1144). Defendant's admission with respect to the operation of the motor vehicle was sufficiently corroborated by other evidence (*see People v Tyra*, 84 AD3d 1758, 1759, *lv denied* 17 NY3d 822) and, under these circumstances, defense counsel could have reasonably concluded that such a charge would focus the jury's attention on the strength of the corroborating evidence (*see generally People v Smith-Merced*, 50 AD3d 259, 259, *lv denied* 10 NY3d 939). Defendant thus "has failed to show the absence of strategic or other legitimate explanations for defense counsel's alleged shortcoming[]" (*People v Gilpatrick*, 63 AD3d 1636, 1637, *lv denied* 13 NY3d 835). Finally, the sentence is not unduly harsh or severe.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

698

CAF 14-00273

PRESENT: SCUDDER, P.J., CARNI, SCONIERS, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF ARKADIAN S., EDEN S., AND ELYSIUM S.

---------- MEMORANDUM AND ORDER

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

CRYSTAL S. AND JOSHUA S., RESPONDENTS-APPELLANTS.

CYNTHIA B. BRENNAN, AUBURN, FOR RESPONDENT-APPELLANT CRYSTAL S.

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

FREDERICK R. WESTPHAL, COUNTY ATTORNEY, AUBURN (SAMUEL P. GIACONA OF COUNSEL), FOR PETITIONER-RESPONDENT.

JAMES A. LEONE, ATTORNEY FOR THE CHILDREN, AUBURN.

Appeals from an order of the Family Court, Cayuga County (Mark H. Fandrich, A.J.), entered January 9, 2014 in a proceeding pursuant to Family Court Act article 10. The order denied the motion of respondent Crystal S. to vacate prior court orders.

It is hereby ORDERED that said appeal by respondent Joshua S. is unanimously dismissed and the order is affirmed without costs.

Memorandum: Respondents appeal from an order denying respondent mother's motion pursuant to Family Court Act § 1061 and CPLR 5015 (a) (2) and (3) to vacate various prior orders that limited her reunification and contact with the subject children, including a June 10, 2013 order modifying a permanency planning goal, a 2012 order suspending her parenting time with the subject children, and an October 27, 2010 order issued upon an application for temporary removal of the children. She also sought to vacate an August 30, 2012 order finding that respondent father abused and derivatively neglected the subject children. We note at the outset that the father is not an aggrieved party and therefore lacks standing to appeal inasmuch as he did not formally join in the mother's motion to vacate (*see Matter of Abraham S.*, 291 AD2d 452, 452; *Matter of George O.*, 115 Misc 2d 782, 783 n 2). Thus, his appeal must be dismissed (*see* CPLR 5511; *Matter of Cooper v Cooper*, 74 AD3d 1868, 1868-1869).

Contrary to the mother's contention, we conclude that Family Court did not abuse its discretion in denying her motion without a

hearing (*see Matter of Carrie F. v David PP.*, 34 AD3d 1108, 1109). The mother failed to make an " 'evidentiary showing sufficient to warrant a hearing' " on the issue of good cause to vacate the prior orders (*Matter of Melissa FF.*, 285 AD2d 682, 684; *see Matter of Kole HH. [Thomas HH.]*, 84 AD3d 1518, 1519; *Matter of Cadejah AA.*, 34 AD3d 1141, 1142). Indeed, her motion is based on a single, misinterpreted phrase in the September 2, 2011 progress note.

To the extent that the mother purports to appeal directly from the 2012 order suspending her parenting time with the subject children, contending that her due process rights were violated by that order, we note that her contention is not properly before us inasmuch as she failed to take a timely appeal from that order (*see* Family Ct Act § 1113).

We do not consider the mother's contention that the father's due process rights were violated and thus that the court should have granted that part of her motion seeking to vacate the order finding that he abused and derivatively neglected the subject children. "[I]t is well established that third parties may not assert the alleged violations of another's constitutional rights" (*Matter of Harriet II. v Alex LL.*, 292 AD2d 92, 95; *see Forward v Webster Cent. Sch. Dist.*, 136 AD2d 277, 280, *appeal dismissed* 72 NY2d 908, *reconsideration denied* 73 NY2d 740). We note in any event that the mother raises that contention for the first time on appeal and thus failed to preserve it for our review (*see Matter of Emerald L.C. [David C.]*, 101 AD3d 1679, 1680; *Matter of York v Zullich*, 89 AD3d 1447, 1448).

Finally, we reject the mother's contention that she is entitled to vacatur of the orders pursuant to CPLR 5015 (a) (2) and (3). Although the Attorney for the Children correctly notes that the mother failed to include those provisions as a ground for relief in her notice of motion, we disregard this technical deficiency inasmuch as she included those grounds for relief in her attorney's supporting affirmation (*see* CPLR 2001; *Matter of LiMandri*, 171 AD2d 747, 747). In any event, the mother is not entitled to relief pursuant to CPLR 5015 (a) (2). She failed to show that the September 2, 2011 progress note was not disclosed during discovery in the underlying abuse and neglect proceeding against father, and thus the evidence was not newly discovered (*see Matter of Mark D. v Marion M.*, 12 AD3d 1082, 1083; *Kerner v Kerner* [appeal No. 5], 262 AD2d 1082, 1082, *lv dismissed in part and denied in part* 94 NY2d 873). Additionally, the progress note "would not likely have produced a different result" in light of the evidence that the father sexually abused one of the subject children (*Matter of Latasha M.*, 205 AD2d 457, 457). The mother is not entitled to relief pursuant to CPLR 5015 (a) (3) because she "failed to meet [her] burden of establishing the existence of fraud, misrepresentation or other misconduct of an adverse party" (*Matter of Shere L. v Odell H.*, 303 AD2d 1023, 1024; *see Rappold v Wagner* [appeal No. 4], 244 AD2d 856, 856).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

699

CA 14-01006

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

ELISABETH R. VURAL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW OZHAN VURAL, DEFENDANT-APPELLANT.

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

ALDERMAN AND ALDERMAN, SYRACUSE (EDWARD B. ALDERMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered August 27, 2013 in a divorce action. The judgment, among other things, distributed the marital assets and awarded plaintiff child support.

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

Memorandum: Defendant husband appeals from a judgment of divorce that, inter alia, directed him to pay child support and distributed marital assets and debts. We reject defendant's contention that Supreme Court erred in its valuation of the marital residence. The court's valuation was " 'within the range of expert testimony and adequately supported by the record' " (*Johnson v Johnson*, 277 AD2d 923, 925, *lv dismissed* 96 NY2d 792). The court also properly credited plaintiff with her contribution of separate property for the down payment on the marital residence (*see Pelcher v Czebatol*, 98 AD3d 1258, 1259). With respect to the distribution of the remaining marital assets and debts, we conclude that the court did not abuse its " 'substantial discretion in determining what distribution of property [—including debt—] will be equitable under all the circumstances' " (*Oliver v Oliver*, 70 AD3d 1428, 1429).

Contrary to defendant's contentions, the court did not abuse its discretion in awarding child support to plaintiff or in calculating the amount of that award. The court acknowledged that, given the roughly equal incomes of the parties and their shared custody arrangement, no award of child support would typically be appropriate (*see generally Leonard v Leonard*, 109 AD3d 126, 128). After considering the parties' respective financial resources, however, including defendant's inheritance, the court properly awarded child support to plaintiff (*see Matter of Cody v Evans-Cody*, 291 AD2d 27,

30-31; *see also* Domestic Relations Law § 240 [1-b] [e] [4]). Finally, after applying the statutory guidelines to calculate the basic child support obligation, the court considered the relevant statutory factors and properly determined that application of the basic obligation would be unjust or inappropriate (*see Matter of Dutchess County Dept. of Social Servs. v Day*, 96 NY2d 149, 155-156).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

706

CA 14-01040

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

CATHERINE FLINT, ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF MARIE SMITH, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT ZIELINSKI, M.D., DEFENDANT-RESPONDENT, ET AL., DEFENDANT.

HOGAN WILLIG, PLLC, AMHERST (SCOTT DUQUIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONNORS & VILARDO, LLP, BUFFALO (MOLLIE C. MCGORRY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered February 13, 2014. The order granted the motion of defendant Robert Zielinski, M.D., for summary judgment dismissing the complaint against him.

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 against defendant Robert Zielinski, M.D.

Memorandum: Marie Smith (decedent) commenced this medical malpractice action on November 18, 2008, alleging, inter alia, that Robert Zielinski, M.D. (defendant) "failed to take necessary, immediate and timely steps to diagnose [cancer in her lung]." Following decedent's death, Catherine Flint (plaintiff) was substituted as the plaintiff in the action. Defendant moved for summary judgment dismissing the complaint against him, contending that plaintiff's claims were barred by the statute of limitations. Specifically, defendant contended that the malpractice cause of action was based on his failure to take any steps to diagnose decedent's lung cancer in light of certain findings contained in a May 2, 2006 CT scan, which was more than two and one-half years before the action was commenced (*see* CPLR 214-a). Defendant further contended that he never established a course of treatment for lung cancer and, therefore, the continuous treatment doctrine would not apply.

Supreme Court granted that motion, and we now reverse. It is well settled that "a medical malpractice action must be commenced within 2 ½ years from the date 'of the act, omission or failure

complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to said act, omission or failure' " (*Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 295, quoting CPLR 214-a [emphasis omitted]). A medical malpractice "cause of action accrues on the date when the alleged original negligent act or omission occurred" (*id.*); "subsequent continuous treatment does not change or extend the accrual date but serves only to toll the running of the applicable [s]tatute of [l]imitations" (*Matter of Daniel J. v New York City Health & Hosps. Corp.*, 77 NY2d 630, 634). Here, the cause of action accrued on May 5, 2006, when defendant made the decision to forgo any follow-up procedures after reading the results of the May 2, 2006 CT scan. We thus conclude that defendant "established [his] prima facie right to summary judgment by demonstrating that [decedent] commenced this action more than 2½ years after the . . . allegedly negligent act[] or omission[] . . . The burden then shifted to plaintiff to show triable issues of fact with respect to the application of the continuous treatment doctrine" (*Waring v Kingston Diagnostic Radiology Ctr.*, 13 AD3d 1024, 1025; *see Cox v Kingsboro Med. Group*, 88 NY2d 904, 906). We conclude that plaintiff, who relied on medical records submitted by defendant in support of the motion, raised such a triable issue of fact.

The medical records establish that, after decedent was diagnosed with breast cancer in April 2005 and underwent a modified radical mastectomy, she was referred to defendant, an oncologist, for "consultation." Defendant first saw decedent on May 20, 2005, at which time they discussed various treatment options, including chemotherapy. Based on decedent's age and "significant co-morbidities," they "opted against pursuing chemotherapy." Instead, defendant agreed to "monitor" decedent for a recurrence, i.e., metastasis, of the disease. Decedent had numerous appointments with defendant from May 2005 through December 2007, and at each appointment defendant would monitor decedent for a recurrence or metastasis of the cancer. In his deposition, which was submitted in support of his motion, defendant testified that the most common places for breast cancer to metastasize are "[t]he remaining regional lymph nodes, the bone, *the lung*, the liver, [and the] brain" (emphasis added). Decedent developed cancer in her lung, and we agree with plaintiff that there is a triable issue of fact whether defendant was continuously treating decedent for the same illness, injury or condition giving rise to the action.

While the failure to establish a course of treatment cannot be deemed a course of treatment (*see Nykorchuck v Henriques*, 78 NY2d 255, 259), it is well settled that "[t]he monitoring of an abnormality to ascertain the presence or onset of a disease or condition may constitute treatment for purposes of tolling" the statute of limitations (*Oksman v City of New York*, 271 AD2d 213, 215; *see Reiter v Sartori*, 2 AD3d 1412, 1413; *see also Cherise v Braff*, 50 AD3d 724, 726; *Dolce v Powalski*, 13 AD3d 1200, 1201). That includes the monitoring of patients who are at high risk for developing cancer for the onset of the disease (*see e.g. Sosnoff v Jackman*, 45 AD3d 568,

569-570, *lv dismissed* 10 NY3d 885; *Melup v Morrissey*, 3 AD3d 391, 391). Indeed, the CT scan at issue was ordered as part of defendant's "continuing efforts . . . to treat a particular condition," i.e., to monitor the potential appearance of cancer in decedent's chest area (*Massie v Crawford*, 78 NY2d 516, 519, *rearg denied* 79 NY2d 978).

Contrary to defendant's contention, *Ceglio v BAB Nuclear Radiology, P.C.* (120 AD3d 1376) does not require a different result. In that case, the radiology defendants were monitoring the plaintiff husband for "postsurgical changes" following the removal of a pituitary tumor, and they allegedly failed to notice a colloid cyst on an MRI (*id.* at 1377). Inasmuch as the plaintiffs "presented no evidence to suggest that the colloid cyst, which allegedly caused the injuries complained of, was in any way connected to the pituitary changes for which the radiology defendants were monitoring [the plaintiff husband]" (*id.*), the Second Department concluded that the plaintiffs had failed to raise a question of fact whether the plaintiff husband had received continuous treatment.

Here, as opposed to *Ceglio*, the evidence established that defendant was monitoring decedent for the appearance of cancer in her chest area. Decedent developed cancer in her chest area, a cancer that was allegedly identifiable on a CT scan ordered by defendant to rule out the presence of cancer in decedent's chest. We thus conclude that there is an issue of fact whether defendant's monitoring of decedent's chest area for cancer and his relationship with her from May 2005 until December 2007 "amounted to continuous treatment of the same original condition or complaint," regardless of whether the cancer that developed in decedent's lungs was a primary lung cancer or a metastasis of the breast cancer (*Mandel v Herrmann*, 271 AD2d 661, 662; *cf. Perrino v Maguire*, 60 AD3d 1475, 1476-1477; *Trimper v Jones*, 37 AD3d 1154, 1155-1156).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

723

CAF 13-02100, CAF 13-02102

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF ALEXANDER S.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DAVID S. AND ALECIA P., RESPONDENTS-APPELLANTS.

RAYMOND P. KOT, II, WILLIAMSVILLE, FOR RESPONDENT-APPELLANT DAVID S.

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

JESSICA M. PEASLEE, BATH, FOR PETITIONER-RESPONDENT.

CHRISTINE M. VALKENBURGH, ATTORNEY FOR THE CHILD, BATH.

Appeals from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered November 22, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondents' parental rights with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father and respondent mother appeal from an order that, inter alia, terminated their parental rights with respect to the subject child and ordered that the child be freed for adoption. We reject the parents' contention that Family Court erred in finding that the child is a permanently neglected child and in terminating the parents' parental rights with respect to him. Petitioner met its burden of establishing "by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the [parents] and [the child] by providing 'services and other assistance aimed at ameliorating or resolving the problems preventing [the child's] return to [the parents'] care' . . . , and that the [parents] failed substantially and continuously to plan for the future of the child although physically and financially able to do so . . . Although the [parents] participated in . . . services offered by petitioner, [they] did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243, *lv denied* 12 NY3d 715; *see* § 384-b [7] [a]). Contrary to the

parents' further contentions, we conclude that the court properly denied their respective requests for a suspended judgment (*see Matter of Lillianna G. [Orena G.]*, 104 AD3d 1224, 1225; *Matter of Dahmani M. [Jana M.]*, 104 AD3d 1245, 1246). We also conclude that the court properly denied the mother's request for assignment of new counsel inasmuch as her request was vague, unsubstantiated, and did not demonstrate good cause warranting a substitution of counsel (*see Matter of Wiley v Musabyemariya*, 118 AD3d 898, 900-901, *lv denied* 24 NY3d 907*; see also People v Porto*, 16 NY3d 93, 101-102; *People v MacLean*, 48 AD3d 1215, 1217, *lv denied* 10 NY3d 866, *reconsideration denied* 11 NY3d 790). Finally, we have reviewed the father's remaining contention and conclude that it lacks merit.

Frances E. Cafarell

Entered: July 2, 2015

Clerk of the Court

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

735

CA 14-02254

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

ESTATE OF DAVID J. KINGSTON, DECEASED, BY
EXECUTOR, MONICA KINGSTON,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

KINGSTON FARMS PARTNERSHIP, ROBERT KINGSTON AND
DANIEL J. KINGSTON,
DEFENDANTS-APPELLANTS-RESPONDENTS.

HARTER SECREST & EMERY LLP, ROCHESTER (BRIAN M. FELDMAN OF COUNSEL), AND RANDOLPH A. MEYER, GENESEO, FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

THE LAW OFFICE OF PETER K. SKIVINGTON, PLLC, GENESEO (PETER K. SKIVINGTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered September 3, 2014. The order granted that part of the motion of plaintiff for summary judgment with respect to the first cause of action and denied that part of the motion with respect to the second cause of action.

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

Memorandum: In this action arising out of a partnership agreement among brothers, one of whom is now deceased, defendants appeal from an order insofar as it granted that part of plaintiff's motion for summary judgment on the first cause of action, for specific performance of the valuation provisions of the agreement. Plaintiff cross-appeals from the same order denying that part of her motion for summary judgment with respect to the second cause of action, for breach of contract. We conclude that Supreme Court erred in granting that part of the motion seeking summary judgment on the first cause of action, and we therefore modify the order accordingly.

Plaintiff's decedent, David J. Kingston (David), and his two brothers, defendants Robert Kingston and Daniel J. Kingston, were partners in defendant Kingston Farms Partnership (Kingston Farms) pursuant to a partnership agreement dated August 20, 1998. The partnership agreement called for the partners to conduct an annual March meeting for the purpose of determining the value of Kingston Farms (Partnership Value), and directed that if the most recent

valuation mutually agreed upon by the partners was more than 18 months old at the time of a partner's death, withdrawal, or disability, the Partnership Value would be determined by Kingston Farms' accountant using a formula set forth in the partnership agreement. It is undisputed that the partners never met in March in any year during the term of the partnership agreement, but the partners did meet each December to sign a balance sheet for Kingston Farms' line-of-credit lender, Farm Credit, including on December 19, 2011, when the Farm Credit balance sheet valued Kingston Farms at $2,995,835.

David died on November 18, 2012 and, under the terms of the partnership agreement, his estate is entitled to 90% of his one-third share of the Partnership Value as of that date. After a dispute arose over the Partnership Value, plaintiff commenced this action, alleging that because the partners did not meet each March as required by the partnership agreement, Kingston Farms' accountant must calculate the Partnership Value. Defendants responded that, because the partners met annually in December and set forth the value of Kingston Farms by signing the Farm Credit balance sheet, the amount recited on the 2011 Farm Credit balance sheet is the Partnership Value for purposes of calculating the amount owed to David's estate.

"[T]he law is abundantly clear in New York that, even where a contract specifically contains . . . a provision stating that it cannot be modified except by a writing, it can, nevertheless, be effectively modified by actual performance and the parties' course of conduct" (*Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 245). Waiver of a contract right through abandonment may be established by " 'affirmative conduct' " of a contract party and, "[g]enerally, the existence of an intent to forgo such a right is a question of fact" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104).

Here, although the partnership agreement provides that the Partnership Value shall be determined in a signed writing at an annual March meeting of Kingston Farms' partners, the parties agree that the partners **never** met in March; instead, they met annually in December to sign the Farm Credit balance sheet, including in December 2011, less than a year before David's death. We therefore conclude that an issue of fact exists whether the partners, by conducting an annual meeting in December and signing thereat a writing arguably reciting the Partnership Value, modified the partnership agreement through their course of conduct. If the conduct of the partners modified the partnership agreement, there is a related, consequent issue of fact whether the Partnership Value is the amount recited on the December 2011 Farm Credit balance sheet or whether it must be calculated by Kingston Farms' accountant pursuant to the terms of the partnership agreement. Those issues of fact preclude summary judgment on the first cause of action, for specific performance of the valuation provisions of the agreement, and on the second cause of action, for breach of contract.

We reject plaintiff's contention on her cross appeal that defendants' opposition to the motion is precluded by the Dead Man's

Statute (CPLR 4519), or by the doctrine of waiver. "[E]vidence submitted . . . [that] may be excludable at trial under the Dead Man's Statute . . . is nevertheless sufficient to . . . defeat [a] motion for summary judgment" (*Lopez v Town of Gates*, 258 AD2d 961, 961), and evidence in opposition to plaintiff's motion that David agreed to the establishment of the Partnership Value by signing the Farm Credit balance sheet each December is therefore not precluded by the Dead Man's Statute. With respect to waiver, "a defense established by the papers is sufficient though unpleaded to warrant denial of a motion for summary judgment" (*Consumer Solutions Reo, LLC v Giglio*, 78 AD3d 1609, 1610 [internal quotation marks omitted]), and although defendants did not explicitly use the term "waiver" in their answer or opposition to plaintiff's motion, we conclude that, as outlined above, the evidence submitted on the motion raises issues of fact whether David waived strict adherence to the terms of the partnership agreement.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

739

KA 11-00202

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEROLD N. MITCHUM, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, HARTER SECREST & EMERY LLP (MAURA C. MCGUIRE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Robert B. Wiggins, A.J.), rendered December 22, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts), criminal possession of a weapon in the third degree, and criminally using drug paraphernalia in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of two counts each of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]), and one count of criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant contends that County Court erred in denying his challenge for cause to a prospective juror whose statements during voir dire cast doubt on the prospective juror's ability to be impartial. We agree.

It is well established that "[p]rospective jurors who make statements that cast serious doubt on their ability to render an impartial verdict, and who have given less-than-unequivocal assurances of impartiality, must be excused" (*People v Arnold*, 96 NY2d 358, 363; *see People v Nicholas*, 98 NY2d 749, 750; *People v Chambers*, 97 NY2d 417, 419). While no "particular expurgatory oath or 'talismanic' words [are required,] . . . [prospective] jurors must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent them from reaching an impartial verdict" (*Arnold*, 96 NY2d at 362; *see People v Strassner*, 126 AD3d 1395, 1396). Here, the statement of a prospective juror during voir dire with respect to the credibility of the testimony of police officers or bias

in favor of the police cast serious doubt on his ability to render an impartial verdict (*see Nicholas*, 98 NY2d at 751-752; *Strassner*, 126 AD3d at 1396*; People v Lewis*, 71 AD3d 1582, 1583-1584), and that prospective juror failed to provide "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). Contrary to the court's conclusion, we conclude that the prospective juror's answers to the questions asked by the court after he expressed bias toward the police were "insufficient to constitute such an unequivocal declaration" (*People v Bludson*, 97 NY2d 644, 646; *see Strassner*, 126 AD3d at 1396). "Inasmuch as defendant had exhausted all of his peremptory challenges before the completion of jury selection, the denial of defendant's challenge[] for cause constitutes reversible error" (*Strassner*, 126 AD3d at 1396; *see* CPL 270.20 [2]).

Contrary to the further contention of defendant, we conclude that the court properly refused to suppress evidence seized from his home. Contrary to defendant's contention, the confidential informant's basis of knowledge was sufficiently established at the in camera *Darden* hearing (*see People v Darden*, 34 NY2d 177). "Without disclosing the exact substance of the *Darden* hearing testimony, we conclude that the information from the informant, in its totality, provided ample basis to conclude that the informant had a basis for his or her knowledge that defendant was in possession of [drugs or drug paraphernalia]" (*People v Knight*, 94 AD3d 1527, 1528-1529, *lv denied* 19 NY3d 998 [internal quotation marks omitted]). We further conclude that the hearsay information supplied in the search warrant application satisfied the two prongs of the *Aguilar-Spinelli* test and that the search warrant was issued upon probable cause (*see People v Monroe*, 82 AD3d 1674, 1675, *lv denied* 17 NY3d 808; *People v Flowers*, 59 AD3d 1141, 1142-1143; *People v Hernandez*, 262 AD2d 1032, 1032, *lv denied* 94 NY2d 863). In view of the quality of the confidential informant's information, it is irrelevant that the controlled buy did not occur at defendant's home (*see People v Myhand*, 120 AD3d 970, 974, *lv denied* 25 NY3d 952). Consequently, although we agree with defendant that we cannot uphold the suppression ruling based on the eavesdropping information inasmuch as the court did not rely on that information in refusing to suppress the evidence (*see People v Concepcion*, 17 NY3d 192, 195; *People v Roosevelt*, 125 AD3d 1452, 1454), we reject defendant's contention that the evidence recovered from his residence should have been suppressed.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

752

CA 14-01627

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

TAMMY GARDNER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NATHAN KORTHALS, DEFENDANT-RESPONDENT.

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (ANDREW F. EMBORSKY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MINDY L. MARRANCA, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered September 3, 2014. The order, among other things, allowed the subject child to register for and attend Tonawanda High School.

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, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Defendant father moved, inter alia, to change the school in which the subject child is enrolled because the father's home is now the child's primary residence pursuant to a stipulated order, and the father also sought to modify the access schedule contained in the stipulated order. We reject the contention of the Attorney for the Child that the mother's appeal from the order granting the father's motion is moot because the child no longer wishes to change schools, and his parents support his decision. The order is adverse to the interests of the mother such that her "rights . . . will be directly affected by the determination of the appeal" in the absence of an agreement by the father withdrawing his request for that relief (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714).

We agree with the mother that Supreme Court erred in granting that part of the father's motion seeking to change the school in which the child is enrolled without first conducting a hearing and considering any additional extrinsic evidence on the issue whether the parties intended a change to the child's school enrollment to be contemporaneous with his change in primary residence (*see Fecteau v Fecteau*, 97 AD3d 999, 1000; *Matter of Perry v Knab*, 231 AD2d 854, 854-855; *see generally Walker v Walker*, 42 AD3d 928, 928-929, *lv dismissed* 9 NY3d 947). We therefore modify the order by vacating the ordering paragraph authorizing the change in the child's high school

enrollment, and we remit the matter to Supreme Court for such a hearing unless the court determines upon remittal that the issue is moot.

We reject the mother's contention, however, that the court erred in granting that part of the father's motion seeking to modify the access schedule. Under the totality of the circumstances, giving particular weight to the then-16-year-old child's wishes and the adverse effect that the current access schedule would have on his time with his brother, we conclude that the court properly determined that there had been a change in circumstances to warrant an inquiry into the best interests of the child in this respect (*see Matter of McVey v Barnett*, 107 AD3d 808, 809; *Matter of Rulinsky v West*, 107 AD3d 1507, 1508; *cf. Matter of Boedecker-Frey v Boedecker-Frey*, 176 AD2d 392, 393). We further conclude that the court did not err in modifying the access schedule inasmuch as the record establishes that "the adjusted [access] schedule is in the best interests of the child[ ]" (*Matter of Jones v Laird*, 119 AD3d 1434, 1435, *lv denied* 24 NY3d 908), and we note in any event that the modified schedule has no meaningful adverse impact on the mother's interests.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

761

CA 15-00051

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

IN THE MATTER OF LEONARD FISCHER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL GRAZIANO, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY, AND TINA M. STANFORD, CHAIRWOMAN, NEW YORK STATE BOARD OF PAROLE,
RESPONDENTS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (HILLEL DEUTSCH OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

LEONARD FISCHER, PETITIONER-RESPONDENT PRO SE.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered September 15, 2014 in a proceeding pursuant to CPLR article 78. The judgment vacated the determination of the New York State Board of Parole to deny petitioner parole release and directed a de novo hearing.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to vacate the determination of the New York State Board of Parole (Board) denying his release to parole supervision. Respondents appeal from a judgment granting the petition and directing a de novo hearing before a different panel. We reverse the judgment and dismiss the petition. "It is well settled that parole release decisions are discretionary and will not be disturbed so long as the Board complied with the statutory requirements enumerated in Executive Law § 259-i" (*Matter of Gssime v New York State Div. of Parole*, 84 AD3d 1630, 1631, *lv dismissed* 17 NY3d 847; *see Matter of Delacruz v Annucci*, 122 AD3d 1413, 1413). The Board is "not required to give equal weight to each of the statutory factors" but, rather, may "place[] greater emphasis on the severity of the crimes than on the other statutory factors" (*Matter of MacKenzie v Evans*, 95 AD3d 1613, 1614, *lv denied* 19 NY3d 815; *see Delacruz*, 122 AD3d at 1413). "Judicial intervention is warranted only when there is a 'showing of irrationality bordering on impropriety' " (*Matter of Silmon v Travis*, 95 NY2d 470, 476; *see Matter of Gaston v Berbary*, 16 AD3d 1158, 1159). Here, we conclude upon our review of the hearing transcript and the Board's written

decision that the Board properly considered the required statutory factors and adequately set forth its reasons for denying petitioner's application for release (*see Matter of Siao-Pao v Dennison*, 11 NY3d 777, 778, *rearg denied* 11 NY3d 885). We further conclude that there was no showing of " 'irrationality bordering on impropriety' " (*Silmon*, 95 NY2d at 476).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

790

KA 14-02030

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHANIEL WILLIS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Ontario County Court (William F. Kocher, J.), entered August 13, 2014. The order affirmed an order of the Canandaigua City Court, which denied defendant's petition for a downward modification of his 2006 Sex Offender Registration Act classification.

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

Memorandum: Defendant commenced this proceeding in Canandaigua City Court, seeking, pursuant to Correction Law § 168-o, a downward modification of his previously-imposed classification as a level three risk pursuant to the Sex Offender Registration Act ([SORA] § 168 *et seq.*). The court denied the petition and defendant appealed from that order in County Court. He now appeals from an order of County Court that affirmed City Court's order.

Initially, we note that "[a]n appeal may be taken to the appellate division as of right from an order of a county court . . . which determines an appeal from a judgment of a lower court" (CPLR 5703 [b]), and here County Court determined the appeal from an order of City Court, not a judgment. Nevertheless, "where[, as here,] the rights of the parties are for all practical purposes finally determined," we conclude that this appeal as of right pursuant to CPLR 5703 (b) is properly before us (*Highlands Ins. Co. v Maddena Constr. Co.*, 109 AD2d 1071, 1072; *see Hayes v City of Amsterdam*, 2 AD3d 1139, 1140; *Pigler v Adam, Meldrum & Anderson Co.*, 195 AD2d 1011, 1011).

Defendant failed to preserve for our review his contention that City Court erred in requiring that he establish his entitlement to a reduction of his risk level by clear and convincing evidence (*see generally People v Akinpelu*, 126 AD3d 1451, 1452; *People v Shepard*,

103 AD3d 1224, 1224, *lv denied* 21 NY3d 856). In any event, that contention is without merit because, in a petition for a modification of a SORA risk level pursuant to section 168-o (2), defendant "bears the burden of proving the facts supporting a requested modification by clear and convincing evidence" (*People v Lashway*, __ NY3d ___, ___ [June 11, 2015]; *see People v David W.*, 95 NY2d 130, 140; *People v Grossman*, 85 AD3d 1632, 1632, *lv denied* 17 NY3d 708), and here defendant failed to meet that burden (*see People v McCollum*, 83 AD3d 1504, 1504-1505; *People v Cullen*, 79 AD3d 1677, 1677, *lv denied* 16 NY3d 709).

Finally, we reject defendant's contention that City Court failed to hold a hearing as required by Correction Law § 168-o (4). To the contrary, that court conducted a hearing at which it admitted all evidence submitted by defendant. Defendant failed to preserve for our review his further contention that a more extensive hearing was required (*see generally Cullen*, 79 AD3d at 1677).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

792

KA 14-00348

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC L. STRONG, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered January 28, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted grand larceny 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 attempted grand larceny in the third degree (Penal Law §§ 110.00, 155.35 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), 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: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

803

CAF 14-01000

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

IN THE MATTER OF SAMANTHA J. MOREDOCK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY T. CONTI, RESPONDENT-APPELLANT.

IN THE MATTER OF ANTHONY T. CONTI,
PETITIONER-APPELLANT,

V

SAMANTHA J. MOREDOCK, RESPONDENT-RESPONDENT.

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

TED A. BARRACO, ROCHESTER, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered August 23, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted sole custody and primary physical residence of the subject child to Samantha J. Moredock.

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

Memorandum: Respondent-petitioner father appeals from an order that, inter alia, dismissed his petition for enforcement of the parties' prior custody order and granted petitioner-respondent mother's petition for modification of that custody order by awarding her sole custody and primary physical residency of the child. The prior order of custody was entered on consent of the parties and granted the parties joint legal and physical custody of their child.

We conclude that Family Court properly denied the father's petition, pursuant to which the father sought the return of the child from Monroe County, where she was relocated by the mother, to Saratoga County, where the child resided at the time of the custody order and where the custody order presumes the child will live. We also

conclude that the court properly granted the mother's petition.

We agree with the father that the court erred in failing to analyze this matter as one requiring a determination whether the relocation was in the best interests of the child after considering all relevant factors (*see Matter of Tropea v Tropea*, 87 NY2d 727, 740-741). That determination was required "notwithstanding the fact that the [mother] had already relocated with [the child]" (*Matter of Baxter v Borden*, 122 AD3d 1417, 1418, *lv denied* 24 NY3d 915). Nevertheless, "the record is sufficient for this Court to make [that] determination" (*Matter of Brian C.*, 32 AD3d 1224, 1225, *lv denied* 7 NY3d 717), and we conclude that the mother has demonstrated by a preponderance of the evidence that her relocation of the child was in the child's best interests (*see Tropea*, 87 NY2d at 740-741). Without the relocation, the mother, who is the child's primary caregiver, would be living in poverty without a stable home. Relocation was therefore in the best interests of the child because the mother's move to Monroe County economically enhanced the lives of the mother and the child (*see id.*; *Matter of Scialdo v Cook*, 53 AD3d 1090, 1092). We agree with the mother and the Attorney for the Child that in this case "economic necessity . . . present[s] a particularly persuasive ground for permitting the . . . move" (*Tropea*, 87 NY2d at 739). In addition, the child is doing well emotionally, socially and educationally, and she is happy with the current arrangement.

Furthermore, there is no indication that the impact of the relocation on the child has been detrimental to the child's relationship with the father. The mother helped facilitate and did not interfere with the father's visitation under the current biweekly visitation schedule, and she enabled the father and child to have telephone conversations. The decreased visitation that the child will have with her half-siblings, while important, is not determinative (*see Matter of Johnson v Johnson*, 202 AD2d 584, 585, *lv denied* 83 NY2d 760, citing *Eschbach v Eschbach*, 56 NY2d 167). We reject the father's contention that we should not permit relocation because the mother allegedly lied in order to obtain the father's permission to relocate with the child. The mother testified that she did not lie, and the court, which "was 'in the best position to evaluate the character and credibility of the witnesses,' " found the mother to be more credible (*Matter of Christopher J.S. v Colleen A.B.*, 43 AD3d 1350, 1350-1351). Even assuming, arguendo, that the father's version of events is true, we note that our analysis "must be based on the best interests of the child[ ] and not a desire to punish a recalcitrant parent" (*Baxter*, 122 AD3d at 1418 [internal quotation marks omitted]). We therefore conclude that relocation with the mother is in the best interests of the child.

We further reject the father's contention that the court erred in awarding the mother sole custody. The court's determination " 'must be accorded great deference . . . and should not be disturbed where, as here, it is supported by a sound and substantial basis in the record' " (*Christopher J.S.*, 43 AD3d at 1350). "The court was 'in the best position to evaluate the character and credibility of the witnesses' . . . , and we see no reason to disturb the court's

determination that it was in the best interests of the child to award sole custody to the [mother]" (*id*.). We conclude that "the record supports the court's determination that joint custody is inappropriate inasmuch as the parties have an acrimonious relationship and are unable to communicate with each other in a civil manner" (*id*. at 1350-1351). Notably, the court granted the mother an order of protection based on a family offense petition upon determining that the allegations therein were "established by a fair preponderance of the evidence" (*Matter of Parameswar v Parameswar*, 109 AD3d 473, 474). Finally, we have reviewed the father's remaining contentions and conclude that they are without merit.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

808

CA 14-01199

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

SUSAN TERASAKA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID TERASAKA, DEFENDANT-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

ALDERMAN AND ALDERMAN, SYRACUSE (EDWARD B. ALDERMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered September 16, 2013 in a divorce action. The order, among other things, distributed the marital assets.

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

Memorandum: Defendant appeals from an order that, inter alia, equitably distributed the parties' marital property in a divorce action. We reject defendant's contention that Supreme Court erred in determining that the disputed trust account, funded with plaintiff's premarital property and property acquired by gift or inheritance, was plaintiff's separate property. It is well settled that separate property that is " 'commingled with marital property or is subsequently titled in the joint names of the spouses is presumed to be marital property' " (*Gately v Gately*, 113 AD3d 1093, 1094, *lv dismissed* 23 NY3d 1048), and that "[t]he party seeking a finding of separate property has the burden of rebutting that presumption" (*id*.). Here, the uncontroverted evidence at trial "trace[d] the source of the [commingled] funds . . . with sufficient particularity to rebut the presumption that they were marital property" (*id*. at 1903 [internal quotation marks omitted]). Defendant stipulated to the introduction in evidence of the forensic accounting report prepared by plaintiff's accountant "subject to whatever legal arguments either party may advance" regarding certain aspects of the report. Furthermore, plaintiff's accountant was the only expert witness who testified regarding the report and the ability to distinguish plaintiff's separate property from the parties' marital property even after they were commingled. Plaintiff also rebutted the presumption that the commingled separate property is now marital property by establishing that her transfer of her separate funds into a marital checking account for 95 days was merely a convenient means of transferring her

separate funds into her trust account (*see Noble v Noble*, 78 AD3d 1386, 1389). Furthermore, the marital checking account in which the funds at issue were commingled was held only in plaintiff's name (*see Chamberlain v Chamberlain*, 24 AD3d 589, 593).

Finally, contrary to defendant's contention, the court properly ordered him to pay the fees of the Attorney for the Child (AFC) inasmuch as the record establishes that there was a significant "economic disparity between the parties[' incomes]" (*Veronica S. v Philip R.S.*, 70 AD3d 1459, 1461; *see Stefaniak v NFN Zulkharnain*, 119 AD3d 1418, 1419). Although defendant asserts that plaintiff engaged in obstructionist conduct with respect to the AFC, the record does not establish that plaintiff's motion to remove the AFC was frivolous.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

834

CA 14-02094

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

NICOLE VARI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PETER A. CAPITANO, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

LAW OFFICE OF DESTIN C. SANTACROSE, BUFFALO (LISA M. DIAZ-ORDAZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

GELBER & O'CONNELL, LLC, AMHERST (KRISTOPHER A. SCHWARZMUELLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 3, 2014. The order, insofar as appealed from, granted those parts of plaintiff's motion seeking partial summary judgment against defendant Peter A. Capitano on the issue of negligence, and dismissal of defendant Peter A. Capitano's affirmative defense of comparative negligence.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, and those parts of the motion seeking summary judgment on the issue of defendant Peter A. Capitano's negligence and dismissal of that defendant's first affirmative defense insofar as it asserts comparative negligence are denied.

Memorandum: Plaintiff commenced this consolidated personal injury action for injuries she sustained in two separate motor vehicle accidents. Only the first accident, which occurred on November 6, 2008 and involved plaintiff and Peter A. Capitano (defendant), is at issue on appeal. Plaintiff moved for partial summary judgment on the issue of defendant's negligence and to dismiss defendant's first affirmative defense, which was premised on "the culpable conduct of the plaintiff, including comparative negligence and assumption of risk . . . and failure to wear a seatbelt." Defendant contends that Supreme Court erred in granting that part of the motion concerning defendant's negligence, as well as that part of the motion seeking dismissal of the first affirmative defense insofar as it asserts comparative negligence. We agree.

Plaintiff testified at her deposition that she was stopped at a red light when defendant's vehicle hit her vehicle from behind. Although the fact that defendant's vehicle rear-ended plaintiff's

stopped vehicle establishes a prima facie case of negligence, we conclude that there is evidence of a nonnegligent explanation for the collision sufficient to preclude an award of summary judgment to plaintiff (*see Johnson v Yarussi Constr., Inc.*, 74 AD3d 1772, 1772-1773; *Ramadan v Maritato*, 50 AD3d 1620, 1621). Defendant testified at his deposition that he brought his vehicle to a complete stop behind plaintiff's vehicle and that, when the light turned green, plaintiff "took off" and then "stopped dead," giving him no opportunity to stop his vehicle in time to avoid the collision. Defendant's account of the accident was also supported by the deposition testimony of a nonparty witness. Given the divergent accounts of the manner in which the accident occurred, "there remains an issue of fact with regard to the respective negligence, if any, on the part of plaintiff and defendant[]" (*Palmer v Horton*, 66 AD3d 1433, 1434; *see Johnson*, 74 AD3d at 1772-1773; *Ramadan*, 50 AD3d at 1621).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

835

CA 13-01599

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

MICHAEL J. CARLSON, SR., INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF CLAUDIA D'AGOSTINO CARLSON, DECEASED, AND AS ASSIGNEE OF WILLIAM PORTER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AMERICAN INTERNATIONAL GROUP, INC., ET AL., DEFENDANTS, AND AMERICAN ALTERNATIVE INSURANCE CO., DEFENDANT-APPELLANT.

RUBIN, FIORELLA & FRIEDMAN LLP, NEW YORK CITY (PAUL KOVNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, LANCASTER (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered December 4, 2012. The order, insofar as appealed from, denied the cross motion of defendant American Alternative Insurance Co. to dismiss the first cause of action against it.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the cross motion is granted in part, and the first cause of action against defendant American Alternative Insurance Co. is dismissed.

Memorandum: Plaintiff commenced this action pursuant to Insurance Law § 3420 (a) (2) to collect on certain insurance policies after a second amended judgment against MVP Delivery and Logistics, Inc. (MVP) and William Porter was entered upon a jury verdict (*see Carlson v Porter* [appeal No. 2], 53 AD3d 1129, *lv denied* 11 NY3d 708). Defendant American Alternative Insurance Co. (AAIC) issued a commercial umbrella policy to Airborne, Inc. and later changed the named insured to DHL Express, Risk Management (DHL). AAIC cross-moved to dismiss, inter alia, the first cause of action of the complaint against it, which alleged that AAIC was responsible to plaintiff for payment of the judgment pursuant to Insurance Law § 3420 (a) (2) and (b).

Supreme Court erred in denying that part of the cross motion. "[T]he right to sue a tortfeasor's insurance company to satisfy a

judgment obtained against the tortfeasor" exists only pursuant to Insurance Law § 3420 (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 352). Here, plaintiff may not recover against AAIC pursuant to section 3420 (a) (2) because the policy was not "issued or delivered in this state" (*id.*). The parties and the court have improperly conflated the phrase "issued or delivered" with "issued for delivery," which was used in the former version of Insurance Law § 3420 (d), and therefore the definition of "issued for delivery" is not relevant here (*see Preserver Ins. Co. v Ryba*, 10 NY3d 635, 642). The policy here was issued in New Jersey and delivered in Seattle, Washington, and then in Florida. It was not issued or delivered in New York, and therefore the first cause of action of the complaint against AAIC must be dismissed (*cf. American Cont. Props. v National Union Fire Ins. Co. of Pittsburgh*, 200 AD2d 443, 446-447).

Contrary to plaintiff's alternative contention (*see Parochial Bus. Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), he may not seek payment of the judgment against AAIC pursuant to the MCS-90 endorsement. That federally-mandated endorsement provides, inter alia, that "the insurer . . . agrees to pay . . . any final judgment recovered against the insured" (49 CFR 387.15; *see Pierre v Providence Washington Ins. Co.*, 99 NY2d 222, 225-226, 228). In *Pierre*, the Court held that any entity meeting the insurer's definition of an "insured" under the policy qualified as an "insured" under the MCS-90 endorsement (*id.* at 230-231). After that decision was rendered, the Federal Motor Carrier Safety Administration (FMCSA), which regulates the interstate trucking industry, defined the term "insured" on the MCS-90 endorsement as the named insured only (*see* 70 Fed Reg 58065-58066). Insurance companies had sought regulatory guidance from FMCSA in response to federal and state court decisions, including *Pierre*, regarding the definition of the term "insured" as used in the MCS-90 form (*see* 70 Fed Reg 58066). FMCSA stated that form MCS-90 was "not intended, and do[es] not purport, to require insurance companies or sureties to satisfy a judgment against any party other than the motor carrier named in the endorsement or its fiduciary" (*id.*). It is well settled that "[a]n agency's interpretation of its own regulation 'is entitled to deference if that interpretation is not irrational or unreasonable' " (*Matter of IG Second Generation Partners L.P. v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 10 NY3d 474, 481; *see Matter of Brown v Wing*, 93 NY2d 517, 524; *Matter of Rodriguez v Perales*, 86 NY2d 361, 367). We give such deference to FMSCA's interpretation of "insured" on the MCS-90 form, and we conclude that plaintiff cannot seek payment of the judgment against AAIC on behalf of either MVP or Porter, neither of whom are named insureds on the AAIC policy (*see Armstrong v U.S. Fire Ins. Co.*, 606 F Supp 2d 794, 825-826).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

840

CA 14-02027

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

MICHAEL J. CARLSON, SR., INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF CLAUDIA D'AGOSTINO CARLSON, AND AS ASSIGNEE OF WILLIAM PORTER,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

AMERICAN INTERNATIONAL GROUP, INC., AIG DOMESTIC CLAIMS, INC., AMERICAN ALTERNATIVE INSURANCE CO., NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,
DEFENDANTS-APPELLANTS-RESPONDENTS,
AND DHL EXPRESS (USA), INC., FORMERLY KNOWN AS DHL WORLDWIDE EXPRESS, INC., DEFENDANT-RESPONDENT.

HODGSON RUSS LLP, BUFFALO (KEVIN D. SZCZEPANSKI OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS AMERICAN INTERNATIONAL GROUP, INC., AIG DOMESTIC CLAIMS, INC. AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

RUBIN, FIORELLA & FRIEDMAN LLP, NEW YORK CITY (PAUL KOVNER OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT AMERICAN ALTERNATIVE INSURANCE CO.

BROWN CHIARI LLP, LANCASTER, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, NEW YORK CITY (PATRICK J. LAWLESS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals and cross appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered June 25, 2014. The order, among other things, denied in part the motion of defendants American International Group, Inc., AIG Domestic Claims, Inc., and National Union Fire Insurance Company of Pittsburgh, PA, and the cross motion of defendant American Alternative Insurance Co., to dismiss plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action pursuant to Insurance Law § 3420 (a) (2) to collect on certain insurance policies after a second amended judgment against MVP Delivery and Logistics, Inc. (MVP) and William Porter was entered upon a jury verdict (*see Carlson v Porter* [appeal No. 2], 53 AD3d 1129, *lv denied* 11 NY3d 708). DHL Worldwide Express, Inc., doing business as DHL Express (DHL), had a cartage agreement with MVP, whereby MVP provided delivery services for DHL. In the underlying wrongful death action, the jury determined that Porter was negligent in causing the motor vehicle accident that led to the death of plaintiff's decedent, and MVP was statutorily liable for Porter's negligence as the owner of the vehicle driven by Porter (*see Carlson*, 53 AD3d at 1133). Plaintiff recovered from MVP's insurer and now seeks to recover under a primary and umbrella policy issued to DHL by defendant National Union Fire Insurance Company of Pittsburgh, PA (National Union), and under an umbrella policy issued to DHL by defendant American Alternative Insurance Co. (AAIC). Defendants American International Group, Inc., and AIG Domestic Claims, Inc. (collectively, AIG), together with National Union, moved to dismiss the complaint against them, and AAIC cross-moved to dismiss the complaint against it (collectively, defendants).

Defendants moved and cross-moved, respectively, to dismiss the complaint based on both a failure to state a cause of action (CPLR 3211 [a] [7]), and a defense based upon documentary evidence (CPLR 3211 [a] [1]). Supreme Court granted in part the motion and cross motion. As a preliminary matter, we note that, "[o]n a motion to dismiss under CPLR 3211, the pleading is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference" (*Simkin v Blank*, 19 NY3d 46, 52). We further note that "[d]ismissal under CPLR 3211 (a) (1) is warranted 'only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law' " (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152, quoting *Leon v Martinez*, 84 NY2d 83, 88).

We agree with defendants that the court erred in denying that part of their motion and cross motion seeking to dismiss the first cause of action, which was asserted pursuant to Insurance Law § 3420 (a) (2), and we therefore modify the order accordingly. As we concluded in a companion appeal, plaintiff may not maintain a section 3420 (a) (2) action against AAIC inasmuch as AAIC did not issue or deliver an insurance policy in this state (*Carlson v American Intl. Group, Inc.*, ___ AD3d ___ [July 2, 2015]). We also agree with AIG that the first cause of action should be dismissed against them because they established that they are not insurers. In the alternative, and with respect to National Union, we conclude that plaintiff may not maintain a section 3420 (a) (2) action against defendants. The primary National Union policy defined an insured as, inter alia, "[a]nyone else while using with your permission a covered 'auto' you own, hire or borrow." The umbrella National Union policy defined an insured as, inter alia, "[a]ny person . . . or organization with respect to any **auto** owned by you, loaned to you or hired by you or on your be half [*sic*] and used with your permission." The umbrella

AAIC policy defined an insured as, inter alia, "any person or organization . . . included as an **insured** in the Scheduled Underlying Insurance," i.e., in the National Union primary policy. Thus, MVP and Porter may be an "insured" under the three policies only if the vehicle used by Porter at the time of the accident was "hired" by DHL and was being used with DHL's permission.

We agree with defendants that in order for the MVP vehicle driven by Porter to be deemed a vehicle "hired" by DHL, there must be a showing that DHL exercised control over the vehicle, and not general control over MVP (*see* 8A Couch on Insurance, §§ 118:48, 118:49 [3d ed 2014]). "Generally, a vehicle owned by an independent contractor who contracts with the insured to perform services for the insured is not a hired automobile . . . [T]he contract between the insured and the independent contractor in those situations is generally for the *services* of the subcontractor, not the *vehicle* used in providing the services" (*id.*, § 118:52 [emphasis added]). In *Dairylea Coop. v Rossal* (64 NY2d 1, 7), an independent contractor was hired to transport milk. The Court held that the tanker truck was not a hired automobile where "the tank farm milk hauling contract . . . called for transportation of milk by . . . an independent contractor rather than use of a particular tanker in the rendition of such service" (*id.* at 10-11; *see Federal Ins. Co. v Ryder Truck Rental*, 189 AD2d 582, 584, *affd* 82 NY2d 909, *rearg denied* 83 NY2d 830; *see also U.S. Fid. & Guar. Co. v Heritage Mut. Ins. Co.*, 230 F3d 331, 334-335; *Toops v Gulf Coast Mar. Inc.*, 72 F3d 483, 487-488; *Chicago Ins. Co. v Farm Bur. Mut. Ins. Co. of Arkansas, Inc.*, 929 F2d 372, 373-374; *American Cas. Co. of Reading, Pa. v Denmark Foods*, 224 F2d 461, 463). General supervision is not enough (*see U.S. Fid. & Guar. Co.*, 230 F3d at 335). There is a "distinction between hiring a company that provides transportation and hiring a truck" (*Toops*, 72 F3d at 487).

We conclude that the cartage agreement does not show that DHL had sufficient control over the MVP vehicle in order for it to be deemed a "hired" automobile. Rather, it showed that DHL hired MVP as an independent contractor to provide delivery services. It provided that MVP "shall have the sole right to determine all aspects of its performance of its obligations under this Agreement, including the staffing, operation, and routing of the [MVP] Vehicles in the Service Areas." MVP was responsible for registering, insuring, fueling, and bearing all other costs and fees relating to the vehicles. The fact that DHL required the MVP vehicles to have a certain appearance does not, in our view, show the requisite control over the vehicle within the meaning of a "hired" automobile. "The [vehicle] was not hired by [DHL] and was not being used at the time of the accident by an employee of [DHL] in its business or in its behalf, but was being used by an employee of [MVP] under an independent contract" (*American Cas. Co. of Reading, Pa.*, 224 F2d at 463). Moreover, inasmuch as DHL did not have control over the MVP vehicle, "it cannot be said in any realistic sense that . . . [DHL] could grant [MVP] permission to use it" (*Dairylea Coop.*, 64 NY2d at 10).

We further agree with defendants that the court erred in denying

that part of their motion and cross motion seeking to dismiss the fourth cause of action, alleging a violation of General Business Law § 349, and we therefore further modify the order accordingly. The allegations in the complaint show that this is a " 'private' contract dispute over policy coverage and the processing of a claim which is unique to these parties" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 321; *see Shou Fong Tam v Metropolitan Life Ins. Co.*, 79 AD3d 484, 486; *Cooper v New York Cent. Mut. Fire Ins. Co.*, 72 AD3d 1556, 1557-1558). In light of our determination, we conclude that plaintiff's cross appeal, which seeks reinstatement of the misrepresentation and bad faith causes of action, is without merit.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

841

CA 14-01642

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

LORI BARNABA-HOHM, AS ADMINISTRATRIX OF THE ESTATE OF DANIEL HOHM, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ST. JOSEPH'S HOSPITAL HEALTH CENTER, EMERGENCY CARE SERVICES OF NEW YORK, P.C., AMBER WILSON, ANP-C, DEBORAH FIORDALICE, P.C., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (APPEAL NO. 1.)

KUEHNER LAW FIRM, PLLC, SYRACUSE (BRIAN D. ROY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (ASHLEY D. HAYES OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ST. JOSEPH'S HOSPITAL HEALTH CENTER AND DEBORAH FIORDALICE, P.C.

PHELAN, PHELAN & DANEK, LLP, ALBANY (JOSEPH B. SLATER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS EMERGENCY CARE SERVICES OF NEW YORK, P.C. AND AMBER WILSON, ANP-C.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered May 8, 2014. The order granted the motions of defendants Emergency Care Services of New York, P.C., and Amber Wilson, ANP-C, and defendants St. Joseph's Hospital Health Center and Deborah Fiordalice, P.C., for partial summary judgment and dismissed plaintiff's cause of action for wrongful death against those defendants.

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

Memorandum: Plaintiff commenced this medical malpractice and wrongful death action seeking damages arising from the death of her husband (decedent), who died from ethylene glycol poisoning in what was determined to be a suicide. In appeal No. 1, plaintiff appeals from an order granting the respective motions of defendants Emergency Care Services of New York, P.C. and Amber Wilson, ANP-C (Wilson defendants), and defendants St. Joseph's Hospital Health Center and Deborah Fiordalice, P.C. (hospital defendants), for partial summary judgment dismissing the wrongful death cause of action against them

based on the expiration of the statute of limitations. In appeal No. 2, plaintiff appeals from an order granting the motion of defendant Ahmad Bilal, M.D., for leave to amend his answer to assert a statute of limitations defense and for partial summary judgment dismissing the wrongful death cause of action against him based on that defense. We affirm in both appeals.

In appeal Nos. 1 and 2, plaintiff advances several contentions to the effect that defendants' motions should have been denied on procedural grounds. We reject those contentions. Although CPLR 3212 (b) requires that a motion for summary judgment be supported by a copy of the pleadings, the Wilson defendants complied with that requirement by submitting the complaint and their answer, and they were not required to submit the answers of the other defendants (*see Bacon v Arden*, 244 AD2d 940, 941).

Bilal's failure to comply with CPLR 3212 (b) in his initial submission was excusable because he thereafter submitted a copy of his answer to the court (*see Dale v Gentry*, 66 AD3d 1469, 1469*; see also* CPLR 2001; *Avalon Gardens Rehabilitation & Health Care Ctr., LLC v Morsello*, 97 AD3d 611, 612). In addition, the court properly granted Bilal's motion for leave to amend his answer in the absence of surprise or prejudice to plaintiff arising from his delay in raising a statute of limitations defense (*see* CPLR 3025 [b]; *Fahey v County of Ontario*, 44 NY2d 934, 935; *Town of Webster v Village of Webster*, 280 AD2d 931, 932-933). The record establishes that plaintiff was aware at all relevant times that her wrongful death cause of action was potentially time-barred. Plaintiff's remaining contentions against Bilal were raised for the first time in her reply brief and are therefore not properly before us (*see Turner v Canale*, 15 AD3d 960, 961, *lv denied* 5 NY3d 702).

A court has discretion to overlook late or defective service of a motion where the nonmoving party is not prejudiced (*see Bucklaew v Walters*, 75 AD3d 1140, 1141; *Clark v State of New York* [appeal No. 2], 302 AD2d 942, 944), and we conclude that the hospital defendants' alleged failure to serve their initial moving papers on plaintiff's attorney "was a mere irregularity that did not result in substantial prejudice" to plaintiff given that she was able to address the substance of the statute of limitations issue in her opposition papers (*Jones v LeFrance Leasing L.P.*, 81 AD3d 900, 903; *see Ciafone v Queens Ctr. for Rehabilitation & Residential Healthcare*, 126 AD3d 662, 663; *Clark*, 302 AD2d at 944; *see generally* CPLR 2103 [b] [2]).

Contrary to plaintiff's contention with respect to the merits in each appeal, the infancy toll provided in CPLR 208 does not apply to her wrongful death cause of action, even though the minor children of plaintiff and decedent are distributees of decedent's estate, because plaintiff is also a distributee and was available both to seek appointment as the personal representative of the estate and to commence an action on behalf of the children in a timely fashion (*see Baez v New York City Health & Hosps. Corp.*, 80 NY2d 571, 576-577; *Public Adm'r of Kings County v Hossain Constr. Corp.*, 27 AD3d 714,

716; *Merced v Wyckoff Hgts. Med. Ctr.*, 225 AD2d 532, 532, *lv denied* 88 NY2d 805; *cf. Hernandez v New York City Health & Hosps. Corp.*, 78 NY2d 687, 693-694; *Matter of Boles v Sheehan Mem. Hosp.*, 265 AD2d 910, 911-912).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

842

CA 14-01776

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

LORI BARNABA-HOHM, AS ADMINISTRATRIX OF THE ESTATE OF DANIEL HOHM, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ST. JOSEPH'S HOSPITAL HEALTH CENTER, ET AL., DEFENDANTS, AND AHMAD BILAL, M.D., DEFENDANT-RESPONDENT. (APPEAL NO. 2.)

KUEHNER LAW FIRM, PLLC, SYRACUSE (BRIAN D. ROY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered May 8, 2014. The order, among other things, granted the motion of defendant Ahmad Bilal, M.D., for partial summary judgment and dismissed plaintiff's cause of action for wrongful death against him.

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

Same memorandum as in *Barnaba-Hohm v St. Joseph's Hosp. Health Ctr.* ([appeal No. 1] ___ AD3d ___ [July 2, 2015]).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

844

KA 14-01240

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. VALTIN, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (GREGORY A. KILBURN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered May 15, 2014. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree and disseminating indecent material to minors in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [4]) and disseminating indecent material to minors in the second degree (§ 235.21 [3]). 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: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

845

KA 14-00514

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTONIO L. JAMES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered November 27, 2013. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of grand larceny in the fourth degree (Penal Law § 155.30 [1]), defendant contends that his waiver of the right to appeal is unenforceable and that his sentence is unduly harsh and severe. "Even assuming, arguendo, that defendant's waiver of the right to appeal is unenforceable . . . , or that it does not otherwise preclude his challenge to the severity of his sentence" (*People v Vann*, 115 AD3d 1334, 1334), we nevertheless perceive no basis to modify the sentence, an indeterminate term of imprisonment of 1⅓ to 3 years, as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]). We note that, although defendant was only 22 years old at the time of sentencing, he already had an extensive criminal record, including four prior felonies, and he failed to complete three separate terms of probation.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

846

KA 13-02165

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN TYLER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered August 18, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted 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 his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]). We agree with defendant that the waiver of the right to appeal does not encompass his challenge to the severity of the sentence because "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal" with respect to his conviction that he was also waiving his right to appeal any issue concerning the severity of the sentence (*People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076; *see People v Maracle*, 19 NY3d 925, 928). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

847

KA 14-02257

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAMES ALDRICH, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO, FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wyoming County Court (Mark H. Dadd, J.), dated July 11, 2013. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

848

KA 13-01277

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVAUHN DONALDSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 24, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [2] [b]). We agree with defendant that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence inasmuch as Supreme Court did not explain during the course of the allocution concerning the waiver of the right to appeal that he was waiving the right to appeal any issue regarding the severity of the sentence (*see People v Maracle*, 19 NY3d 925, 928; *People v Peterson*, 111 AD3d 1412, 1412). Furthermore, although the written waiver of the right to appeal specifically encompassed any challenge to the sentence, the written waiver does not foreclose our review of the severity of the sentence because "[t]he court did not inquire of defendant whether he understood the written waiver or whether he had even read the waiver before signing it" (*People v Bradshaw*, 18 NY3d 257, 262; *see People v Elmer*, 19 NY3d 501, 510). We nevertheless conclude that the enhanced sentence is not unduly harsh or severe. Although the court advised defendant at the time of the plea that it would sentence him to a split sentence of local incarceration and probation, that commitment was predicated on defendant's compliance with the conditions that, inter alia, he cooperate with and be truthful during his presentence interview with the Probation Department and that he appear at all court appearances,

and defendant failed to comply with those conditions.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

849

KA 14-00519

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAIRO S. CHAVEZ, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered March 10, 2014. The judgment convicted defendant, upon a jury verdict, of rape in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of rape in the third degree (Penal Law § 130.25 [2]). Although defendant did not waive the right to appeal and thus his challenge to the severity of the sentence is properly before us (*see generally People v Lopez*, 6 NY3d 248, 255; *People v Hidalgo*, 91 NY2d 733, 737), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

850

KA 14-00398

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN M. DURYEE, DEFENDANT-APPELLANT.

JEANNIE D. MICHALSKI, CONFLICT DEFENDER, GENESEO, FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Livingston County Court (Dennis S. Cohen, J.), entered January 9, 2014. 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 vacating the determination that defendant is a sexually violent offender and as modified the order is affirmed without costs.

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court erred in granting the People's request for an upward departure from risk level two, which was the presumptively correct risk level pursuant to his score on the risk assessment instrument. "The court's discretionary upward departure [to a level three risk] was based on clear and convincing evidence of aggravating factors to a degree not taken into account by the risk assessment instrument" (*People v Sherard*, 73 AD3d 537, 537, *lv denied* 15 NY3d 707), including "defendant's overall criminal history" (*People v Goodwin*, 126 AD3d 610, 611). Here, defendant's criminal history includes a prior sexual offense against a child (*see People v Tucker*, 127 AD3d 1508, 1509). The risk assessment instrument also did not take into account the fact that "at the time of the underlying offense defendant had already been adjudicated a level [one] offender" (*People v Faulkner*, 122 AD3d 539, 539, *lv denied* 24 NY3d 915), and that defendant committed his most recent crime after having completed sex offender treatment.

Although defendant did not raise the issue, we note that there is a conflict between the order and the decision. As the court properly stated in its decision, defendant is not a sexually violent offender

(*see* Correction Law § 168-a [3] [a] [i]), but the order thereafter issued by the court stated that defendant is a sexually violent offender. Where, as here, "there is a conflict between a decision and order, the decision controls" (*Matter of Quentin L.*, 231 AD2d 890, 891; *see Del Nero v Colvin*, 111 AD3d 1250, 1253; *Matter of Edward V.*, 204 AD2d 1060, 1061), "and the order 'must be modified to conform to the decision' " (*Del Nero*, 111 AD3d at 1253). We therefore modify the order by vacating the determination that defendant is a sexually violent offender.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

851

KA 14-00392

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHELBY ROBERTSON, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered June 26, 2012. 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 imposed upon his conviction of possessing a sexual performance by a child (Penal Law § 263.16) and sentencing him to an indeterminate term of incarceration. Contrary to defendant's contention, we conclude that the People established by the requisite preponderance of the evidence that defendant violated the terms and conditions of his probation (*see* CPL 410.70 [3]; *People v Ortiz*, 94 AD3d 1436, 1436, *lv denied* 19 NY3d 999). The evidence adduced at the hearing established that defendant violated the terms and conditions of his probation by possessing a computer and computer parts, failing to "attend, actively participate and remain in" a required treatment program, and failing to comply with the Sex Offender Registration Act requirement regarding registration of a change of address (*see* Correction Law § 168-f [4]).

Finally, the sentence is not unduly harsh or severe.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

852.1

KA 14-00994

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL J. PRIEST, DEFENDANT-APPELLANT.

LAW OFFICES OF JOSEPH D. WALDORF, P.C., ROCHESTER (JOSEPH D. WALDORF 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 March 25, 2014. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree and rape in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea and waiver of indictment are vacated, the superior court information is dismissed, and the matter is remitted to Jefferson County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and rape in the third degree (§ 130.25 [2]). "As the People correctly concede, the waiver of indictment and superior court information are defective and, therefore, the plea is a nullity and must be vacated. Where, as here, a defendant is charged with a class A felony, the defendant cannot validly waive indictment or consent to be prosecuted by a superior court information" (*People v Mayo*, 21 AD3d 1316, 1316-1317; *see* CPL 195.10 [1] [b]; *People v Trueluck*, 88 NY2d 546, 549-550). We therefore vacate defendant's plea and his waiver of indictment, and we dismiss the superior court information. "Of course, the People may present the case to the [g]rand [j]ury" (*People v Ford*, 159 AD2d 933, 934).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

852

CAF 13-01383

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

IN THE MATTER OF CHRISTOPHER CALICE,
PETITIONER-RESPONDENT,

V ORDER

JEANINE TURNER, FORMERLY JEANINE CALICE,
RESPONDENT-APPELLANT.

ANNA JOST, TONAWANDA, FOR RESPONDENT-APPELLANT.

LINDA M. JONES, ATTORNEY FOR THE CHILD, BATAVIA.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered August 2, 2013. The order, among other things, directed respondent to pay petitioner the sum of $300.00 for attorney's fees and costs.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see* Family Court Act § 1112 [a]; *Matter of Trentacoste v Trentacoste*, 198 AD2d 284, 285).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

853

KA 12-01625

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA L. MACK, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (ANDREW M. MOLITOR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered April 23, 2012. The appeal was held by this Court by order entered November 21, 2014, decision was reserved and the matter was remitted to Chautauqua County Court for further proceedings (122 AD3d 1444).

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

Memorandum: We previously held this case, reserved decision and remitted the matter to County Court to rule on defendant's motion to withdraw his guilty plea (*People v Mack*, 122 AD3d 1444). Upon remittal, defendant withdrew his motion. We therefore affirm the judgment.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

854

KA 12-02087

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN M. HALLMARK, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

NATHANIEL L. BARONE, PUBLIC DEFENDER, MILLVILLE (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (PATRICK E. SWANSON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered October 1, 2012. The appeal was held by this Court by order entered November 21, 2014, decision was reserved and the matter was remitted to Chautauqua County Court for further proceedings (122 AD3d 1438).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of attempted criminal sale of a controlled substance in the fifth degree (§§ 110.00, 220.31). We previously determined in each appeal that County Court did not rule on defendant's pro se motion to withdraw his guilty plea (*People v Hallmark*, 122 AD3d 1438, 1439), and we therefore held the case, reserved decision, and remitted the matter to County Court to rule on defendant's motion (*id*.). On remittal, however, defendant withdrew his motion. Thus, the only issue remaining for us to address is the severity of the sentence and, contrary to defendant's contention in each appeal, we conclude that the sentence is not unduly harsh and severe.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

855

KA 12-02088

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN M. HALLMARK, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

NATHANIEL L. BARONE, PUBLIC DEFENDER, MAYVILLE (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (PATRICK E. SWANSON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered October 1, 2012. The appeal was held by this Court by order entered November 21, 2014, decision was reserved and the matter was remitted to Chautauqua County Court for further proceedings (122 AD3d 1444).

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

Same memorandum as in *People v Hallmark* ([appeal No. 1] ___ AD3d ___ [July 2, 2015]).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

856

TP 15-00212

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

IN THE MATTER OF BENJAMIN JUSTIN BROWNLEE,
PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, ET AL., RESPONDENTS.

BENJAMIN JUSTIN BROWNLEE, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered January 27, 2015) to review a determination of respondents. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

858

KA 14-00502

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSEPH D. RANCKA, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (ANDREW M. MOLITOR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered January 13, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

859

KA 14-00978

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD A. BIZARDI, DEFENDANT-APPELLANT.

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN JAMES MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (JEFFREY A. DOMACHOWSKI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered April 22, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance 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 sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). Contrary to defendant's contention, we conclude that he knowingly, intelligently, and voluntarily waived his right to appeal as a condition of the plea (*see generally People v Lopez*, 6 NY3d 248, 256). County Court "engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice . . . , and the record establishes that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Burts*, 114 AD3d 1272, 1273, *lv denied* 22 NY3d 1197 [internal quotation marks omitted]). Contrary to defendant's contention, the court "was not required to specify during the colloquy which specific claims survive the waiver of the right to appeal" (*People v Rodriguez*, 93 AD3d 1334, 1335, *lv denied* 19 NY3d 966). Defendant's contention that the court erred in denying his request for a *Wade* hearing is encompassed by the valid waiver (*see People v Jenkins*, 117 AD3d 1528, 1529, *lv denied* 23 NY3d 1063).

Although defendant's contention that his guilty plea was not knowing, voluntary, and intelligent survives his valid waiver of the right to appeal, defendant failed to preserve that contention for our review by moving to withdraw his plea or to vacate the judgment of conviction (*see People v Robinson*, 112 AD3d 1349, 1349, *lv denied* 23

NY3d 1042), and this case does not fall within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

860

KA 13-01568

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DANIEL R. GRIMM, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered July 1, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree.

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

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

861

KA 13-01851

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER T. BRINSON, JR., DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JASON A. MACBRIDE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered September 11, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and unlawful possession of marihuana.

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, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Defendant did not move to withdraw the plea or to vacate the judgment of conviction, and he therefore failed to preserve for our review his contention that he did not knowingly, voluntarily and intelligently enter the plea (*see People v Davis*, 45 AD3d 1357, 1357-1358, *lv denied* 9 NY3d 1005). Furthermore, "inasmuch as nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the plea" (*People v Lewandowski*, 82 AD3d 1602, 1602), this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666). In any event, defendant's contention is without merit (*see People v Smith*, 37 AD3d 1141, 1142, *lv denied* 9 NY3d 851, *reconsideration denied* 9 NY3d 926).

Finally, the sentence is not unduly harsh or severe.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

863

KA 12-00144

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RUBEN JOSE BURGOS, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered November 23, 2011. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the first degree (three counts) and aggravated harassment in the second degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts each of criminal contempt in the first degree (Penal Law § 215.51 [b] [iii]) and aggravated harassment in the second degree (§ 240.30 [1] [a]). Defendant contends that his rejection of the plea offer was not voluntary, knowing, and intelligent because County Court misinformed him of the maximum sentence he could receive after trial. While we agree with defendant that the court's statement concerning his maximum sentencing exposure was erroneous, the record does not support his contention that reversal of the judgment of conviction is required (*see People v Lane*, 221 AD2d 948, 948, *lv denied* 87 NY2d 975, *cert denied* 519 US 829). Rather, the issue whether defendant would have accepted the plea offer absent the court's erroneous statement must be raised in a proceeding pursuant to CPL article 440, "wherein a record focused on this issue may be developed" (*People v Surowka*, 103 AD3d 985, 986; *see e.g. People v Ross*, 123 AD3d 454, 454; *see also Matter of Dong Chong v Annucci*, 50 AD3d 1331, 1332).

We reject defendant's further contention that his sentence is

unduly harsh and severe.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

864

CA 14-01341

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

IN THE MATTER OF MIGUEL DIAZ,
PETITIONER-APPELLANT,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered June 19, 2014 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Ansari v Travis*, 9 AD3d 901, *lv denied* 3 NY3d 610).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

865

CA 14-01786

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

ALBERTO POLANCO, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 123819.)

ALBERTO POLANCO, CLAIMANT-APPELLANT PRO SE.

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

Appeal from an order of the Court of Claims (Nicholas V. Midey, Jr., J.), entered September 23, 2014. The order granted the motion of defendant to dismiss the claim.

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

Memorandum: Claimant, a prisoner at the Auburn Correctional Facility, commenced this action seeking damages based on the alleged negligence of the "State Parole Board Employees [in] fail[ing] to perform acts within the scope of their employment and in the discharge of their official duties." The Court of Claims granted defendant's motion to dismiss the claim on the grounds that it lacked subject matter jurisdiction over the claim and that defendant is absolutely immune from liability. We affirm.

Contrary to claimant's contention, "[r]egardless of how a claim is characterized, one that requires, as a threshold matter, the review of an administrative agency's determination falls outside the subject matter jurisdiction of the Court of Claims" (*Green v State of New York*, 90 AD3d 1577, 1578, *lv dismissed in part and denied in part* 18 NY3d 901). "Although claimant characterized his claim as one for money damages, upon our review of the record we conclude that adjudication of his claim requires review of the underlying administrative determination, over which the Court of Claims lacks subject matter jurisdiction" (*id*. at 1578-1579). In any event, the court also properly granted the motion based on absolute immunity. It is well established that "[d]eterminations pertaining to parole and its revocation . . . are deemed strictly sovereign and quasi-judicial in nature and, accordingly, [defendant], in making such determinations, is absolutely immune from tort liability" (*Semkus v State of New York*, 272 AD2d 74, 75, *lv denied* 95 NY2d 761; *see Arteaga*

v State of New York, 72 NY2d 212, 217; *Mertens v State of New York*, 73 AD3d 1376, 1377, *lv denied* 15 NY3d 706). Here, "claimant has not articulated any facts to support his claim that the [Parole Board employees] acted in excess of their authority or in violation of any relevant rules or regulations" (*Loret v State of New York*, 106 AD3d 1159, 1159, *lv denied* 22 NY3d 852; *see Varela v State of New York*, 283 AD2d 841, 841).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

866

KA 09-00861

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON S. HALL, DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON 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 (Alex R. Renzi, J.), rendered April 22, 2009. The appeal was held by this Court by order entered July 3, 2014, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (119 AD3d 1349). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision, and remitted the matter to County Court to make and state for the record its determination whether defendant is a youthful offender (*People v Hall*, 119 AD3d 1349, 1350). Upon remittal the court, after considering the appropriate factors (*see People v Cruickshank*, 105 AD2d 325, 334, *affd sub nom. People v Dawn Maria Co.*, 67 NY2d 625), refused to grant defendant youthful offender status. We conclude that the court did not thereby abuse its discretion (*see People v Johnson*, 109 AD3d 1191, 1191-1192, *lv denied* 22 NY3d 997), and we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see generally People v Shrubsall*, 167 AD2d 929, 930-931). The sentence is not unduly harsh or severe.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

867

KA 14-00460

PRESENT: CENTRA, J.P., LINDLEY, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LAMONT T. CONNER, ALSO KNOWN AS LAMONT K. CONNER,
DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered July 19, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

868

KA 13-02111

PRESENT: CENTRA, J.P., LINDLEY, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID J. PEREZ, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JASON A. MACBRIDE OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Ontario County Court (Craig J. Doran, J.), dated November 1, 2013. The order directed defendant to pay certain restitution.

It is hereby ORDERED that the order so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reducing the surcharge to 5% of the amount of restitution and as modified the order is affirmed.

Memorandum: In appeal No. 1, defendant appeals from an order directing him to pay restitution and, in appeal No. 2, he appeals from an amended order that corrected a typographical error in the order in appeal No. 1. We note at the outset that the appeal from the amended order must be dismissed because the amended order did not effect a "material or substantial change" to the order in appeal No. 1 (*Matter of Kolasz v Levitt*, 63 AD2d 777, 779). We also note that, as defendant contends and the People correctly concede, County Court failed to conduct an adequate colloquy with respect to the waiver of the right to appeal, rendering that waiver invalid (*see generally People v Lopez*, 6 NY3d 248, 256).

On the merits, we reject defendant's contention that the evidence at the restitution hearing was insufficient to support the amount of restitution ordered. The People met their burden of establishing the amount of restitution by a preponderance of the evidence through, inter alia, the victims' testimony, which the court found to be credible (*see* CPL 400.30 [4]; *People v Tzitzikalakis*, 8 NY3d 217, 221-222; *People v Wilson*, 108 AD3d 1011, 1013-1014). Although defendant asserts that the victims were lying about the amount of money that was stolen from them, we perceive no basis in the record for us to substitute our credibility determinations for those of the court,

which had "the advantage of observing the witnesses and [was] in a better position to judge veracity than an appellate court" (*People v Dolan*, 155 AD2d 867, 868, *lv denied* 75 NY2d 812).

As the People again correctly concede, however, the court erred in imposing a surcharge of 10% of the total amount of the restitution ordered instead of the 5% surcharge directed by Penal Law § 60.27 (8). Although defendant failed to preserve his contention for our review, we exercise our power to review it as a matter of discretion in the interest of justice (*cf. People v Kirkland*, 105 AD3d 1337, 1338-1339, *lv denied* 21 NY3d 1043), and we modify the order in appeal No. 1 accordingly. The additional surcharge was not authorized because there was no "filing of an affidavit of the official or organization designated pursuant to [CPL 420.10 (8)] demonstrating that the actual cost of the collection and administration of restitution . . . in [this] case exceeds five percent of the entire amount of the payment or the amount actually collected" (§ 60.27 [8]; *see People v Stachnik*, 101 AD3d 1590, 1592, *lv denied* 20 NY3d 1104).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

869

KA 14-01205

PRESENT: CENTRA, J.P., LINDLEY, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID J. PEREZ, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JASON A. MACBRIDE OF COUNSEL), FOR RESPONDENT.

Appeal from an amended order of the Ontario County Court (Craig J. Doran, J.), dated December 19, 2013. The amended order directed defendant to pay certain restitution.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Perez* ([appeal No. 1] ___ AD3d ___ [July 2, 2015]).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

870

KA 14-00928

PRESENT: CENTRA, J.P., LINDLEY, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM J. MOORE, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Onondaga County Court (Joseph E. Fahey, J.), dated May 8, 2014. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). Based upon a total risk factor score of 85 points on the risk assessment instrument, defendant was presumptively classified a level two risk. In a prior appeal, we reversed an order determining that defendant was a level three risk based on the automatic override for a prior felony conviction of a sex crime (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 3-4 [2006]), and we vacated the risk level determination and remitted the matter to County Court for further proceedings in compliance with Correction Law § 168-n (3) (*People v Moore*, 115 AD3d 1360). Upon remittal, the court again determined that defendant is a level three risk.

Contrary to defendant's contention, "[t]he court's discretionary upward departure [to a level three risk] was based on clear and convincing evidence of aggravating factors to a degree not taken into account by the risk assessment instrument" (*People v Sherard*, 73 AD3d 537, 537, *lv denied* 15 NY3d 707). The court properly relied upon factors that, "as a matter of law, . . . tend[ed] to establish a higher likelihood of reoffense or danger to the community" (*People v Wyatt*, 89 AD3d 112, 123, *lv denied* 18 NY3d 803), including defendant's prior felony conviction of a sex crime, his difficulty controlling his impulses, and his victimization of young girls over an extended period of time (*see People v Vaillancourt*, 112 AD3d 1375, 1376, *lv denied* 22

NY3d 864).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

871

KA 12-00991

PRESENT: CENTRA, J.P., LINDLEY, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS CARRASQUILLO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered May 9, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [3]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. We agree with defendant that the waiver of the right to appeal is invalid because "the minimal inquiry made by County Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Jones*, 107 AD3d 1589, 1589, *lv denied* 21 NY3d 1075 [internal quotation marks omitted]; *see e.g. People v Hassett*, 119 AD3d 1443, 1443-1444, *lv denied* 24 NY3d 961), and because "there is no basis upon which to conclude that the court ensured 'that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*Jones*, 107 AD3d at 1590, quoting *People v Lopez*, 6 NY3d 248, 256). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

872

KA 14-00324

PRESENT: CENTRA, J.P., LINDLEY, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY A. SHAY, DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered December 9, 2013. The judgment convicted defendant, upon his plea of guilty, of possessing an obscene sexual performance by a child and sexual abuse in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of possessing an obscene sexual performance by a child (Penal Law § 263.11) and two counts of sexual abuse in the second degree (§ 130.60 [2]). We note at the outset that, as the People correctly concede, defendant did not waive his right to appeal. "[A]lthough a waiver of the right to appeal was initially mentioned during a discussion of the elements of the plea agreement, County Court failed to elicit the waiver from defendant during the plea colloquy" (*People v Crane*, 294 AD2d 867, 867, *lv denied* 98 NY2d 767).

We reject defendant's contention that the sentence is unduly harsh or severe. We agree with defendant, however, and the People again correctly concede, that the court erred in directing that the definite sentences imposed on the misdemeanor counts shall run consecutively to the indeterminate sentence imposed on the felony count (*see* Penal Law § 70.35). We therefore modify the judgment by directing that the definite sentences shall run concurrently with the indeterminate sentence (*see People v Leabo*, 84 NY2d 952, 953; *People v*

Shorter, 6 AD3d 1204, 1205-1206, *lv denied* 3 NY3d 648).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

873

KA 14-00794

PRESENT: CENTRA, J.P., LINDLEY, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

EDWARD T. WHEELER, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Victoria M. Argento, J.), entered March 20, 2014. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

874

KA 14-01516

PRESENT: CENTRA, J.P., LINDLEY, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRY L. HARES, DEFENDANT-APPELLANT.

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN JAMES MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (NATHAN J. GARLAND OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered June 12, 2014. The judgment convicted defendant, upon her plea of guilty, of fraudulent practices, welfare fraud in the fifth degree and misuse of food stamps.

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

Memorandum: Defendant appeals from a judgment convicting her, upon her guilty plea, of fraudulent practices (Workers' Compensation Law § 114 [1]), welfare fraud in the fifth degree (Penal Law § 158.05) and misuse of food stamps (Social Services Law § 147 [1] [a] [i]). Pursuant to the plea agreement, County Court sentenced defendant to concurrent terms of probation, ordered her to pay restitution in the amount of $12,176.50, and issued an order of forfeiture with respect to her right to receive workers' compensation benefits. Defendant asks us to vacate the order of forfeiture as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]), contending that it is unfair for her to be barred from receiving workers' compensation benefits in the future for her existing back injury. The record establishes, however, that the order of forfeiture was part of the People's plea offer, which defendant voluntarily accepted, and, in view of the fact that defendant has a prior conviction of welfare fraud, the People may have asked the court for a harsher sentence if she had not agreed to the forfeiture. In addition, we note that, despite her alleged back disability, defendant was able to earn unreported income as a cage dancer, which involved physical activity that included hanging upside down from bars. Under the circumstances, we decline to vacate the agreed-upon order of forfeiture.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

875

KA 12-00989

PRESENT: CENTRA, J.P., LINDLEY, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REID T. HOUSTON, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered April 12, 2012. 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 [3]). County Court properly refused to suppress the weapon seized by the police pursuant to a search order authorizing the search of the apartment shared by defendant and a probationer. Contrary to defendant's contention, the affidavit submitted by the probation officer in support of his application for a search order provided the issuing court with "reasonable cause to believe that the [probationer had] violated a condition of [his] sentence" by using and possessing illegal drugs (CPL 410.50 [3]; *see People v Borger*, 57 AD3d 691, 691), and the court therefore properly issued an order authorizing the search of the premises where the probationer resided (*see Borger*, 57 AD3d at 691; *People v Dawson*, 73 AD2d 979, 980, *appeal dismissed* 51 NY2d 1005). In view of defendant's failure to provide sufficient factual support for his allegation that the search order was not supported by reasonable cause to believe that the probationer had violated a condition of his sentence, the court properly concluded that a hearing was not required (*see generally People v Vanness*, 106 AD3d 1265, 1266, *lv denied* 22 NY3d 1044; *People v Jenkins*, 64 AD3d 993, 994).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

876

KA 12-02196

PRESENT: CENTRA, J.P., LINDLEY, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL W. GOODRELL, DEFENDANT-APPELLANT.

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (MARIO J. GUTIERREZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN T. LEEDS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered August 7, 2012. The judgment convicted defendant, upon a jury verdict, of endangering the welfare of a child (two counts), public lewdness (two counts) and burglary in the third degree as a sexually motivated felony (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentences imposed on each count of burglary in the third degree as a sexually motivated felony shall run concurrently with respect to each other and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts each of endangering the welfare of a child (Penal Law § 260.10 [1]), public lewdness (§ 245.00), and burglary in the third degree as a sexually motivated felony (§§ 130.91 [1]; 140.20). We reject defendant's contention that County Court erred in denying his motion to sever inasmuch as the offenses "were part of a single continuing incident and were thus properly joinable pursuant to CPL 200.20 (2) (a)" (*People v Lee*, 275 AD2d 995, 997, *lv denied* 95 NY2d 966). In addition, "[t]he offenses were properly joined because they involved incidents in which proof with respect to one crime would be material and admissible as evidence[-]in[-]chief in a trial with respect to the other crimes" (*People v McAvoy*, 70 AD3d 1467, 1467, *lv denied* 14 NY3d 890; *see* CPL 200.20 [2] [b]). Inasmuch as "the offenses were properly joinable under CPL 200.20 (2) (a) or (b), discretionary severance was not available" (*Lee*, 275 AD2d at 997; *see* CPL 200.20 [3]; *People v Lane*, 56 NY2d 1, 7).

We reject defendant's further contention that the court erred in refusing to suppress the identification testimony of a middle school

custodian. Contrary to defendant's contention, the photo array used in the pretrial identification procedure was not unduly suggestive. "There is no requirement that the photograph of a defendant shown as part of a photo array be surrounded by photographs of individuals nearly identical in appearance" (*People v Starks*, 91 AD3d 975, 975, *lv denied* 18 NY3d 998), and, here, we conclude that the alleged variations in appearance between defendant and the other persons depicted in the photo array were "not sufficient to create a substantial likelihood that the defendant would be singled out for identification" (*People v Chipp*, 75 NY2d 327, 336, *cert denied* 498 US 833; *see People v Hicks*, 110 AD3d 1488, 1489, *lv denied* 22 NY3d 1156; *People v Davis*, 15 AD3d 930, 931, *lv denied* 5 NY3d 761). Defendant's further contention that the court erred in failing to suppress the prospective in-court identification testimony of one of the victims is moot, inasmuch as that victim did not identify defendant at trial (*see People v Townsley*, 240 AD2d 955, 957, *lv denied* 90 NY2d 943, *reconsideration denied* 90 NY2d 1014).

We reject defendant's contention that he was unduly prejudiced by the court's *Molineux* ruling. Here, the evidence of uncharged crimes and prior bad acts was properly admitted in evidence to demonstrate defendant's motive, intent and identity (*see generally People v Molineux*, 168 NY 264, 293-294; *People v Wemette*, 285 AD2d 729, 731, *lv denied* 97 NY2d 689), and its probative value was not outweighed by its prejudicial effect (*see Wemette*, 285 AD2d at 731). We note, moreover, that "the court's limiting instruction minimized any prejudice to defendant" (*People v Washington*, 122 AD3d 1406, 1408). Even assuming, arguendo, that the court erred in admitting the testimony of a victim of a prior incident who was unable to provide an in-court identification of defendant, we conclude that the error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Contrary to defendant's contention, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to support the conviction of both counts of public lewdness (*see Matter of Jeffrey V.*, 185 AD2d 241, 241-242; *Matter of Paul R.*, 131 AD2d 764, 764-765). We further conclude that, viewing the evidence in light of the elements of all of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see People v Judware*, 75 AD3d 841, 845, *lv denied* 15 NY3d 853; *see generally People v Bleakley*, 69 NY2d 490, 495). We agree with defendant, however, that the sentence is unduly harsh and severe under the circumstances of this case, and we therefore modify the judgment as a matter of discretion in the interest of justice by directing that the sentences imposed on each count of burglary in the third degree as a sexually motivated felony shall run concurrently with respect to each other (*see* CPL 470.15 [6] [b]).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

877

CAF 14-01769

PRESENT: CENTRA, J.P., LINDLEY, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF RENYHIA M. AND RAHMIER M.
---------- MEMORANDUM AND ORDER
COMMISSIONER OF THE ONTARIO COUNTY DEPARTMENT
OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

SHAWNA M., RESPONDENT-APPELLANT.

SUSAN GRAY JONES, CANANDAIGUA, FOR RESPONDENT-APPELLANT.

JOHN W. PARK, COUNTY ATTORNEY, CANANDAIGUA (HOLLY A. ADAMS OF COUNSEL), FOR PETITIONER-RESPONDENT.

JOSEPH S. DRESSNER, ATTORNEY FOR THE CHILDREN, CANANDAIGUA.

Appeal from an order of the Family Court, Ontario County (Craig J. Doran, J.), entered September 2, 2014 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: Family Court properly granted the petition seeking to terminate the parental rights of respondent mother with respect to the subject children on the ground of permanent neglect. The mother admitted that she permanently neglected the children, and the record of the dispositional hearing supports the court's determination that the best interests of the children would be served by terminating the mother's parental rights and freeing the children for adoption (*see Matter of La'Derrick J.W. [Ashley W.]*, 85 AD3d 1600, 1602, *lv denied* 17 NY3d 709; *Matter of Eleydie R. [Maria R.]*, 77 AD3d 1423, 1424).

We reject the mother's contention that the court abused its discretion in declining to enter a suspended judgment. "The court's focus at the dispostional hearing is the best interests of the child[ren,] . . . [and] [t]he court's assessment that the [mother] was not likely to change her behavior is entitled to great deference" (*Matter of Kyle S.*, 11 AD3d 935, 936 [internal quotation marks omitted]). Furthermore, "the record of the dispositional hearing establishes that . . . any progress that [the mother] made was not sufficient to warrant any further prolongation of the child[ren's] unsettled familial status" (*Matter of Kyla E. [Stephanie F.]*, 126 AD3d 1385, 1386, *lv denied* ___ NY3d ___ [June 10, 2015] [internal quotation marks omitted]). Lastly, we reject the mother's contention that she

was denied effective assistance of counsel "inasmuch as [she] did not demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Brown v Gandy*, 125 AD3d 1389, 1390 [internal quotation marks omitted]).

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

878

KA 14-00797

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS L. GAINEY, DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Monroe County Court (John L. DeMarco, J.), entered March 14, 2014. The order determined that defendant is a level one risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order determining that he is a level one risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). At the SORA hearing, defendant asserted that County Court (DeMarco, J.) lacked jurisdiction to proceed with the hearing on the ground that the sentencing court (Marks, J.) failed to certify that he was a sex offender, as required by Correction Law § 168-d (1) (a). The court reserved decision on the issue whether it had jurisdiction and proceeded with the hearing, indicating that it would rule on the jurisdiction issue in its decision. The court, however, failed to address that issue in its decision. We cannot deem the court's failure to address the issue as a determination that it rejected defendant's assertion that it lacked jurisdiction (*see People v McDonald*, 125 AD3d 1280, 1280). Thus, even assuming, arguendo, that the court's determination that defendant is a level one risk constitutes an implicit determination that it had jurisdiction to assess a risk level, we cannot affirm the order on that basis because the court did not expressly "decide that issue adversely to defendant" (*People v Stanley*, 128 AD3d 1472, 1474; *see People v Concepcion*, 17 NY3d 192, 197-198; *People v LaFontaine*, 92 NY2d 470, 474, *rearg denied* 93 NY 849). We therefore hold the case, reserve decision and remit the matter to County Court for a determination whether the failure of the sentencing court to certify defendant as a sex offender as required by Correction Law § 168-d (1) (a) deprived the court of

jurisdiction in this matter.

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

879

KA 14-00124

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SHANNAN M. WARNER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered November 4, 2013. The judgment convicted defendant, upon her plea of guilty, of forgery in the second degree.

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

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

880

KA 12-00135

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SHAUDADE O. LUKE, ALSO KNOWN AS "SHY",
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (LINDA M. CAMPBELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered September 26, 2011. The judgment convicted defendant, upon her plea of guilty, of criminal sale of a controlled substance in the second degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on March 3, 2015 and by the attorneys for the parties on January 15, 2015 and in March, 2015,

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

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

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

882

KA 13-02071

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KENNETH H. FORD, DEFENDANT-APPELLANT.

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wayne County Court (John B. Nesbitt, J.), entered October 8, 2013. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Entered: July 2, 2015

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1107/82) KA 15-00885. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LARRY WILLIAMS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, SCONIERS, WHALEN, AND DEJOSEPH, JJ. (Filed July 2, 2015.)

MOTION NO. (649/91) KA 02-00858. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM J. BARNES, JR., DEFENDANT-APPELLANT. -- Motion for reconsideration denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND DEJOSEPH, JJ. (Filed July 2, 2015.)

MOTION NO. (860/01) KA 00-00075. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARIO WOODS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ. (Filed July 2, 2015.)

MOTION NO. (324/04) KA 03-00717. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JASON G. HOLMQUIST, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND WHALEN, JJ. (Filed July 2, 2015.)

MOTION NO. (1403/04) KA 02-00984. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICKY ORTA, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, WHALEN, AND DEJOSEPH, JJ. (Filed July 2, 2015.)

MOTION NO. (1573/07) KA 05-00983. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES F. CAHILL, III, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed July 2, 2015.)

MOTION NO. (1008/08) KA 04-02863. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHARLES E. HATHAWAY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, SCONIERS, WHALEN, AND DEJOSEPH, JJ. (Filed July 2, 2015.)

MOTION NO. (562/14) KA 12-00893. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LARRY WILLIAMS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, SCONIERS, WHALEN, AND DEJOSEPH, JJ. (Filed July 2, 2015.)

MOTION NO. (126/15) CA 14-01142. -- CHRISTOPHER HAMILTON, PLAINTIFF-APPELLANT, V JOHN MILLER, DAVID MILLER, JULES MUSINGER, DOUG MUSINGER AND SINGER ASSOCIATES, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ. (Filed July 2, 2015.)

MOTION NO. (128/15) CA 14-01268. -- LAURIE JACOBI, PLAINTIFF-APPELLANT, V JENNIE DENI AND FRANK DENI, DEFENDANTS-RESPONDENTS. -- Motion for leave to

appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ. (Filed July 2, 2015.)

MOTION NO. (200.2/15) CA 14-01356. -- AINSWORTH M. BENNETT, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF VIRGINIA R. BENNETT, DECEASED, PLAINTIFF-APPELLANT, V ST. JOHN'S HOME AND ST. JOHN'S HEALTH CARE CORPORATION, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.) -- Motion for reargument denied. Leave to appeal to the Court of Appeals granted. PRESENT: PERADOTTO, J.P., CARNI, SCONIERS, WHALEN, AND DEJOSEPH, JJ. (Filed July 2, 2015.)

MOTION NOS. (438-439/15) KA 14-01022. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL A.C., DEFENDANT-APPELLANT (APPEAL NO. 1.) KA 14-01023. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL A.C., DEFENDANT-APPELLANT (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, VALENTINO, AND WHALEN, JJ. (Filed July 2, 2015.)

MOTION NO. (603/15) CA 14-01999. -- RICH PRODUCTS CORPORATION, PLAINTIFF-APPELLANT-RESPONDENT, V KENYON & KENYON, LLP, DEFENDANT-RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ. (Filed July 2, 2015.)

KA 14-00833. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JERQUAN M. MORANGE, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from a Judgment of the Niagara County Court, Sara S. Farkas, J. - Attempted Robbery, 2nd Degree). PRESENT: SCUDDER, P.J., CARNI, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed July 2, 2015.)

KA 13-01991. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOHN E. SABINS, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon his guilty plea of criminal possession of a forged instrument in the second degree (Penal Law § 170.25). Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38). We conclude that there is a nonfrivolous issue as to whether defendant's plea was knowing, voluntary and intelligent, concerning whether defendant was advised of the direct consequences of his plea (*see generally People v Jones*, 118 AD3d 1360, 1361). We therefore relieve counsel of his assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from a Judgment of the Steuben County Court, Joseph W. Latham, J. - Criminal Possession of a Forged Instrument, 2nd Degree). PRESENT: SCUDDER, P.J., CARNI, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed July 2, 2015.)

KA 13-01992. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOHN E. SABINS, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon his guilty plea of criminal possession of a forged instrument in the second degree (Penal Law § 170.25). Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38). We conclude that there is a nonfrivolous issue as to whether defendant's plea was knowing, voluntary and intelligent, concerning whether defendant was advised of the direct consequences of his plea *(see generally People v Jones*, 118 AD3d 1360, 1361). We therefore relieve counsel of his assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from a Judgment of the Steuben County Court, Joseph W. Latham, J. - Criminal Possession of a Forged Instrument, 2nd Degree). PRESENT: SCUDDER, P.J., CARNI, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed July 2, 2015.)

KA 13-01993. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOHN E. SABINS, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon his guilty plea of robbery in the third degree (Penal Law § 160.05). Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38). We conclude that there is a nonfrivolous

issue as to whether defendant's plea was knowing, voluntary and intelligent, concerning whether defendant was advised of the direct consequences of his plea (*see generally People v Jones*, 118 AD3d 1360, 1361), and whether the written plea agreement called for consecutive sentencing in relation to another sentence imposed at the same time, as stated during the plea proceedings and at sentencing. We therefore relieve counsel of his assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from a Judgment of the Steuben County Court, Joseph W. Latham, J. - Robbery, 3rd Degree). PRESENT: SCUDDER, P.J., CARNI, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed July 2, 2015.)

KA 13-01994. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOHN E. SABINS, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon his guilty plea of criminal possession of a forged instrument in the second degree (Penal Law § 170.25). Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38). We conclude that there is a nonfrivolous issue as to whether defendant's plea was knowing, voluntary and intelligent, concerning whether defendant was advised of the direct consequences of his plea (*see generally People v Jones*, 118 AD3d 1360, 1361). We therefore relieve counsel of his assignment and assign new counsel to brief this issue, as well as any other

issues that counsel's review of the record may disclose. (Appeal from a Judgment of the Steuben County Court, Joseph W. Latham, J. - Criminal Possession of a Forged Instrument, 2nd Degree). PRESENT: SCUDDER, P.J., CARNI, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed July 2, 2015.)

KA 14-01384. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL J. WILLIAMS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from a Judgment of the Wyoming County Court, Michael M. Mohun, J. - Aggravated Harassment of Employee by Inmate). PRESENT: SCUDDER, P.J., CARNI, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed July 2, 2015.)