SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 1, 2013

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1040

CA 12-00434

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

IN THE MATTER OF THE BOARD OF MANAGERS OF
FRENCH OAKS CONDOMINIUM, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF AMHERST, HARRY WILLIAMS, TOWN ASSESSOR
OF TOWN OF AMHERST, BOARD OF ASSESSMENT REVIEW
OF TOWN OF AMHERST, RESPONDENTS-APPELLANTS,
AND WILLIAMSVILLE CENTRAL SCHOOL DISTRICT,
INTERVENOR-RESPONDENT.

PHILLIPS LYTLE LLP, BUFFALO (MARC W. BROWN OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

AMIGONE, SANCHEZ & MATTREY, LLP, BUFFALO (B.P. OLIVERIO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered June 7, 2011 in proceedings pursuant to RPTL article 7. The order, inter alia, determined the value of the French Oaks Condominium after a hearing before a referee.

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

Memorandum: Petitioner commenced this RPTL article 7 proceeding (first proceeding) seeking review of the real property tax assessments for its condominium complex (complex) for the 2009-2010 tax year. Respondents appeal from an order that determined the value of the complex for tax assessment purposes after a hearing before a referee. We affirm.

We note as background that, after commencing the first proceeding, petitioner commenced a second proceeding seeking review of the complex's real property tax assessments for the 2010-2011 tax year. The parties stipulated that a referee would hear and determine the first proceeding and that the result of the first proceeding would resolve the second proceeding.

The trial relating to the first proceeding was essentially a contest between the respective expert appraisers for petitioner and respondents. At trial, respondents moved to dismiss the first petition on the ground that the appraisal report of petitioner's expert was so fundamentally flawed that petitioner failed to meet its

burden of showing by substantial evidence the existence of a valid dispute with respect to the valuation of the complex. The Referee denied the motion and subsequently established a market value for the complex in accordance with the rules set forth in *Matter of East Med. Ctr., L.P. v Assessor of Town of Manlius* (16 AD3d 1119, 1120), and by applying an income approach to valuation (*see Matter of South Bay Dev. Corp. v Board of Assessors of County of Nassau*, 108 AD2d 493, 498). Under the income approach, the market rental value for the 39 units in the complex was estimated and the complex's overhead expenses were subtracted from that figure in order to obtain the net operating income. The net operating income was then divided by a final capitalization rate in order to obtain the value of the complex. The final capitalization rate was determined by identifying a comparable complex or complexes and dividing the yearly net operating income of each comparable complex by its sale price, which yielded a capitalization rate. The capitalization rate, in turn, was then added to a tax factor, which was calculated by multiplying the tax rate by the equalization rate, and dividing the ensuing product by 1,000. The addition of those figures, i.e., the capitalization rate and the tax factor, yielded a final capitalization rate.

After applying the calculation under the income approach, the Referee valued the complex at $4,353,030 and thereafter apportioned that amount between the 39 units in the complex. In calculating the assessed value of the complex, the Referee adopted the calculations of respondents' expert with respect to both the net operating income and the tax factor and adopted the calculation of petitioner's expert only with respect to the capitalization rate. Supreme Court subsequently ordered, inter alia, that respondent Town of Amherst and intervenor, Williamsville Central School District, were to amend the 2009 and 2010 tax rolls with respect to the complex to reflect the determination of the Referee, and that the provisions and restrictions of RPTL 727 shall apply to the Referee's determinations.

With respect to the merits, we reject respondents' contention that the appraisal of petitioner's expert does not demonstrate the existence of a credible valuation dispute regarding the valuation of the complex under the substantial evidence standard. "Our analysis begins with the recognition that a property valuation by the tax assessor is presumptively valid . . . and thus 'obviates any necessity, on the part of the assessors, of going forward with proof of the correctness of their valuation' . . . However, when a petitioner challenging the assessment comes forward with 'substantial evidence' to the contrary, the presumption disappears" (*Matter of FMC Corp. [Peroxygen Chems. Div.] v Unmack*, 92 NY2d 179, 187; *see Matter of Thomas v Davis*, 96 AD3d 1412, 1413). "The substantial evidence standard is a minimal standard. It requires less than clear and convincing evidence . . . , and less than proof by a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt" (*FMC Corp. [Peroxygen Chems. Div.]*, 92 NY2d at 188 [internal quotation marks omitted]).

" 'In the context of tax assessment cases, the "substantial evidence" standard merely requires that petitioner demonstrate the

existence of a valid and credible dispute regarding valuation' " (*Thomas*, 96 AD3d at 1413, quoting *FMC Corp. [Peroxygen Chems. Div.]*, 92 NY2d at 188; *see East Med. Ctr., L.P.*, 16 AD3d at 1120). In such a proceeding, "substantial evidence will most often consist of a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser" (*Matter of Niagara Mohawk Power Corp. v Assessor of Town of Geddes*, 92 NY2d 192, 196). The requirements for appraisal reports are set forth in 22 NYCRR 202.59 (g) (2).

Here, respondents challenge the sufficiency of petitioner's expert evidence. First, respondents contend that petitioner's expert was not qualified to testify. We reject that contention. The fact that petitioner's expert is not a licensed appraiser is of no moment (*see Matter of OCG L.P. v Board of Assessment Review of the Town of Owego*, 79 AD3d 1224, 1226). Likewise, there is no merit to respondents' contention that petitioner's expert should have been precluded from testifying on petitioner's behalf. To the extent that the acceptance of a fee by petitioner's expert undermines his appraisal, that deficiency goes to the weight to be afforded that appraisal, not its admissibility (*see generally National Fuel Gas Supply Corp. v Goodremote*, 13 AD3d 1134, 1135; *Champlain Natl. Bank v Brignola*, 249 AD2d 656, 657).

Second, respondents challenge petitioner's appraisal on the ground that it lacks information with respect to the interior areas of each of the complex's units. Specifically, respondents contend that the lack of photographs of the interior of the complex's individual units in petitioner's appraisal renders that appraisal insufficient. We reject that contention. Pursuant to 22 NYCRR 202.59 (g) (2), "appraisal reports . . . *may* contain photographs of the property under review" (emphasis added), but there is no requirement that an appraisal must contain photographs. Respondents' further contention that petitioner's appraisal lacks evidentiary value because it does not describe the interior of the units is also without merit. Petitioner's expert opined that the differences in the respective interiors of the units did not affect their rental value, and that opinion was a factor for the court to consider in weighing the evidence (*see generally Welch Foods v Town of Westfield*, 222 AD2d 1053, 1054).

Third, respondents' contention that the Referee should have disregarded petitioner's appraisal because it failed to establish the fair market value of each of the complex's units lacks merit. In view of the similarity of the units and the fact that all of the units were constructed at approximately the same time, there is no need here for petitioner's expert to allocate a specific value to the individual units in the complex. Thus, that failure affects the weight of petitioner's expert evidence, not its sufficiency (*see generally National Fuel Gas Supply Corp.*, 13 AD3d at 1135; *Champlain Natl. Bank*, 249 AD2d at 657).

Fourth, respondents contend that petitioner's appraisal is insufficient because the market rents analysis for comparable

properties provided by petitioner's expert is not supported by "a clear and concise statement of every fact that a party will seek to prove in relation to those comparable properties" (22 NYCRR 202.59 [g] [2]). Respondents also contend that petitioner's appraisal is insufficient because it did not provide an adequate explanation of how petitioner's expert assigned each unit in the complex a specific rental value within a range of rental values per square foot. Pursuant to 22 NYCRR 202.59 (g) (2), "[t]he appraisal reports shall contain a statement of . . . the conclusions as to value reached by the expert, together with the facts, figures and calculations by which the conclusions were reached." "A major reason for the rule requiring the disclosure of facts and source materials at the appraisal stage is to allow opposing counsel the opportunity to effectively prepare for cross-examination" (*Matter of Gullo v Semon*, 265 AD2d 656, 657). Here, petitioner's expert applied location and rent concession adjustments to comparable properties in his appraisal without specifying the basis for those adjustments, and also assigned a rental value for each of the units in the complex within a range of expected rental prices per square foot without explaining the reasons for the discrepancies in the rental values of those units. With respect to the adjustments, "petitioner was not required to provide a detailed narrative in its appraisal explaining each adjustment made in the report" (*Matter of Bialystock & Bloom v Gleason*, 290 AD2d 607, 609). In any event, the appraisal of petitioner's expert provided respondents with "sufficient details necessary to examine the comparable [rents] used [in reaching the expert's] conclusions" regarding the value of the complex (*id.*). With respect to the rental values assigned to each of the units in the complex, we conclude that the appraisal of petitioner's expert "contained sufficient facts, figures and calculations regarding [those rental values] so that respondent[s were] not prejudiced in cross-examining" petitioner's expert (*Gullo*, 265 AD2d at 657).

Fifth, respondents contend that the bases for and the explanation of the bases for the calculation of the capitalization rate provided by petitioner's expert are insufficient. We reject that contention. Specifically, respondents contend that, in calculating the capitalization rate, petitioner's expert improperly considered properties that were dissimilar to the complex in his analysis of comparable sales. As respondents correctly note, the complex was constructed between 2002 and 2005, and all of the comparable complexes incorporated in the appraisal of petitioner's expert were built well before that time. Additionally, the interiors of the properties considered as comparable sales (hereafter, comparable sales) were not described in petitioner's appraisal. That appraisal, however, provided the year in which many of the comparable sales were built and the square footage, size and unit prices of the comparable sales. Thus, there was sufficient information provided in the appraisal to allow respondents to prepare for cross-examination of petitioner's expert on any differences between the comparable sales and the complex (*see id.*). Respondents also contend that the information regarding three of the four comparable sales cited in petitioner's appraisal is outdated because there was a subsequent sale of those properties that petitioner's expert did not consider. Respondents' attorney, however,

had sufficient information to address the issue of the subsequent sale on cross-examination (*see id.*). Thus, inasmuch as respondents were provided sufficient information to prepare for cross-examination regarding the alleged deficiencies in the comparable sales, any weaknesses in the choice of comparable sales used by petitioner's expert goes to the weight to be given his appraisal, not its sufficiency (*see generally National Fuel Gas Supply Corp.*, 13 AD3d at 1135; *Champlain Natl. Bank*, 249 AD2d at 657). Moreover, we note that, with respect to one of the alleged "outdated" comparable sales, petitioner's expert testified that he attempted to obtain income and expense information regarding the most recent sale, but the owners of that complex would not disclose that information.

Respondents further contend that the explanation of the capitalization rate provided by petitioner's expert is insufficient because petitioner's expert used income and expense information regarding each of the comparable sales that was based on "forecasts," rather than on actual income and expenses, and failed to provide the periods to which that information related. We reject that contention. Although petitioner's expert described the financial information for each of the comparable sales as "forecast financials" in his appraisal, there was sufficient information in the appraisal to allow respondents to explore the absence of historical financial information for the comparable sales on cross-examination (*see Gullo*, 265 AD2d at 657). Thus, any weakness in the financial information relied upon by petitioner's expert goes to the weight to be afforded his appraisal, not its sufficiency (*see generally National Fuel Gas Supply Corp.*, 13 AD3d at 1135; *Champlain Natl. Bank*, 249 AD2d at 657).

Having determined that petitioner met its initial burden of demonstrating a valid and credible dispute regarding valuation, we now turn to respondents' contention that the Referee's determination with respect to the final capitalization rate is against the weight of the evidence. In conducting a weight of the evidence review, we "must weigh the entire record, including evidence of claimed deficiencies in the assessment, to determine whether [the] petitioner has established by a preponderance of the evidence that its property has been overvalued" (*Thomas*, 96 AD3d at 1413 [internal quotation marks omitted]). Viewing the evidence in the light most favorable to petitioner, the prevailing party, we conclude that the Referee's determination with respect to the final capitalization rate is supported by a fair interpretation of the evidence (*see generally Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170).

"The determination of a proper capitalization rate is a factual question for the trial court, and the opinion evidence of appraisers is competent evidence of that rate" (*Matter of Greater N.Y. Sav. Bank v Commissioner of Fin.*, 15 AD3d 661, 661). Put differently, "[t]he rate of capitalization itself is a matter for proof and argument . . . and *expert testimony based on the personal knowledge and expertise of the witness is competent evidence and admissible*" (*Matter of Addis Co. v Srogi*, 79 AD2d 856, 857, *lv denied* 53 NY2d 603 [emphasis added]). Thus, the court's determination with respect to the capitalization

rate should be affirmed if it is "within the range of expert testimony and is supported by the evidence" (*Matter of Schoeneck v City of Syracuse*, 93 AD2d 988, 988-989).

Here, respondents contend that the Referee should have adopted the capitalization rate of their expert. We reject that contention. Significantly, respondents' expert relied on national statistics rather than statistics based on the western New York real estate market. In addition, respondents' expert failed to discuss the formula he used to determine the capitalization rate on which he relied. We therefore conclude that the Referee's rejection of the capitalization rate provided by respondents' expert is supported by a fair interpretation of the evidence.

Respondents further contend that the court erred in crediting the capitalization rate of petitioner's expert on the same grounds that they challenge the legal sufficiency of petitioner's appraisal, i.e., that it was based on dissimilar comparable sales and flawed financial data; and ignored more recent comparable sales. Those alleged defects in petitioner's appraisal, however, do not render the capitalization rate proposed by petitioner's expert incredible as a matter of law. Indeed, an appraisal is an "*estimation* of worth" (Black's Law Dictionary 117 [9th ed 2009] [emphasis added]), i.e., an approximate calculation of worth, and we question the degree of precision that such a study may achieve. Thus, respondents' complaints with respect to the comparable sales data on which petitioner's expert relied are unavailing; the Referee knew of the imperfections in that data, but was justified in relying on petitioner's calculations despite those flaws. Moreover, we conclude that the Referee was also justified in crediting petitioner's capitalization rate even though that rate was calculated, at least in part, by using financial information petitioner's expert had acquired as a result of his prior professional involvement with the comparable sales. Although petitioner's expert had what appears to have been a partial expense sheet for the one comparable sale and a profit/loss statement from a second comparable sale, he acknowledged on cross-examination that he did not have audited financial statements for the comparable sales when he calculated the net operating income for those properties, which was in turn used to calculate the capitalization rate. Notably, unlike sales data, which is a matter of public record, data regarding the net operating income of a comparable property is almost always the exclusive property of private enterprise. We therefore question the frequency and ease with which an appraiser is able to obtain *private* and often *proprietary* income data with respect to a comparable property. Respondents addressed that issue at oral argument, and explained only that one would "get [such information] by calling . . . the individual associations, the individual apartments." We conclude that, under these circumstances, disturbing the order based on the failure of petitioner's expert to provide "hard" data with respect to all of the comparable sales used in his capitalization analysis would stifle the ability to challenge a tax assessment. In any event, "opinion evidence of appraisers is competent evidence of [a capitalization] rate" (*Greater N.Y. Sav. Bank*, 15 AD3d at 661; *see Addis Co.*, 79 AD2d at 857), and under these circumstances the use of

opinion evidence to establish a capitalization rate is appropriate.

All concur except PERADOTTO and CARNI, JJ., who dissent and vote to modify in accordance with the following Memorandum: We respectfully dissent because, in our view, the conclusion of petitioner's appraiser with respect to his capitalization rate is legally and factually flawed, and each flaw is independently fatal to petitioner's case. We thus conclude that petitioner failed to meet its ultimate burden of establishing that the subject property is overvalued, and we would therefore adopt the value set forth in respondents' trial appraisal and modify the order accordingly (*see Matter of Thomas v Davis*, 96 AD3d 1412, 1414).

The legal flaw underlying the capitalization rate analysis of petitioner's appraiser is that he relied on his "personal exposure" to at least three of the four comparable properties to justify the financial figures that he used to calculate his capitalization rate. Although we agree with the majority that "opinion evidence of appraisers is competent evidence of [a capitalization] rate" (*Matter of Greater N.Y. Sav. Bank v Commissioner of Fin.*, 15 AD3d 661, 661; *see Matter of Addis Co. v Srogi*, 79 AD2d 856, 857, *lv denied* 53 NY2d 603), we conclude that such opinion evidence must still be supported "by factual data supporting such rate" (*Kurnick v State of New York*, 54 AD2d 1098, 1098). An appraiser cannot simply list financial figures of comparable properties in his or her appraisal report that are derived from alleged personal knowledge; he or she must subsequently "prove" those figures to be facts at trial (22 NYCRR 202.59 [g] [2]; *see Matter of Niagara Mohawk Power Corp. v City of Cohoes Bd. of Assessors*, 280 AD2d 724, 727, *lv denied* 96 NY2d 719). Petitioner's appraiser, however, failed to offer any factual support for the great majority of his figures. Thus, there was no way for respondents' counsel to conduct an adequate cross-examination of petitioner's appraiser with respect to those figures (*see Matter of Niagara Mohawk Power Corp. v Town of Bethlehem Assessor*, 225 AD2d 841, 843). In the absence of any documentary or tangible evidence, respondents' counsel could not determine whether petitioner's appraiser accurately reported the financial figures of the allegedly comparable properties, nor can we make such a determination.

Appraisal is not a novel or emerging profession; its methodologies are not mysterious either in general or to this Court. Countless other cases have come before this Court in which conflicting expert appraisers have had no trouble collecting the data and documents necessary to establish an evidentiary foundation for their opinions with respect to a capitalization rate, and we do not see anything remarkable here to excuse petitioner's appraiser from that task. Moreover, even if extenuating circumstances were present in this case rendering it difficult for an appraiser to develop an evidentiary foundation for an opinion, that fact would not cure the defect in petitioner's appraisal (*see Matter of City of Rochester v Iman*, 51 AD2d 651, 652). Above all, we see no occasion here to take a plain failure of proof and to extrapolate from it a new, relaxed evidentiary standard in tax assessment cases based on the assumption that to do otherwise would stifle petitions challenging tax

assessments. Rules of evidentiary foundation are restrictive, and intentionally so (*see generally Wagman v Bradshaw*, 292 AD2d 84, 91).

Even if we were to accept petitioner's appraiser's recitation of the financial figures regarding the comparable properties based on his prior professional involvement with those properties, it is evident that the numerous precise, unrounded figures for, inter alia, gross annual income, effective gross income, and net operating income that he used came not from his memory, but rather from documents. At the very least, those documents should have been included in his appraisal and in the record before us (*see generally Matter of Northern Pines MHP, LLC v Board of Assessment Review of the Town of Milton*, 72 AD3d 1314, 1316; *Star Plaza v State of New York*, 79 AD2d 746, 747). Without such an evidentiary foundation, we conclude that the unsupported financial figures used by petitioner's appraiser are simply hearsay and that such figures do not become admissible upon his bare assertion that he saw them at some point in the past (*see generally Wagman*, 292 AD2d at 86-87).

We further conclude that the capitalization rate of petitioner's appraiser is factually flawed inasmuch as he did not make appropriate adjustments to the comparable properties used in calculating that rate. The subject property's units were built between 2003 and 2005, while the four comparable properties were built in 1959, 1969, 1973, and 1978, respectively. Additionally, most of the units in the comparable properties were smaller than the units in the subject property, some were even half the size of the subject property's units. Petitioner's appraiser, however, failed to make any adjustments for the marked differences in age, condition, and size among the comparable properties' units and the subject property's units.

We cannot agree with the majority's conclusion that the failure to adjust for such relevant, marketable characteristics as age and size (*see generally Matter of Bialystock & Bloom v Gleason*, 290 AD2d 607, 608) is simply a matter of "weight to be given [petitioner's] appraisal." We recognize that "[t]he suitability of comparable sales is a matter resting within the sound discretion of the trial court" and that differences in properties may be accounted for by adjustments (*Chase Manhattan Bank v State of New York*, 103 AD2d 211, 222; *see Niagara Falls Urban Renewal Agency v 123 Falls Realty*, 66 AD2d 1009, 1010, *appeal dismissed* 46 NY2d 997, *lv denied* 47 NY2d 711). Nor do we question the general principle that " '[comparability] does not . . . connote . . . identity' " (*Matter of Katz v Assessor of Vil./Town of Mount Kisco*, 82 AD2d 654, 658). Contrary to the majority, however, we conclude that the degree of comparability "becomes a question of fact" only where the differences between a subject property and comparable properties have been explained and adjusted for value (*Niagara Falls Urban Renewal Agency*, 66 AD2d at 1010). Inasmuch as the record does not reflect any adjustment for the age and size of the comparable properties' units by petitioner's appraiser, any consideration of those factors by the Trial Referee or Supreme Court, or any basis for this Court to make its own adjustments, we are compelled to conclude that the purportedly comparable properties are incomparable as a

matter of law. In other words, if weight of the evidence is the standard to be applied (*see National Fuel Gas Supply Corp. v Goodremote*, 13 AD3d 1134, 1135; *Champlain Natl. Bank v Brignola*, 249 AD2d 656, 657), we conclude that petitioner's appraisal should be accorded no weight.

To the extent that petitioner's appraisal contains "lump-sum" adjustments without breaking those adjustments down into specific categories and quantities, we conclude that such adjustments are improper because they do not afford an adequate basis for our review (*Matter of County of Dutchess [285 Mill St.]*, 186 AD2d 891, 892; *see also Geffen Motors v State of New York*, 33 AD2d 980, 980).

We would therefore modify the order by reducing the aggregate assessment to $5,080,000 and adopting respondents' apportionment of values among the subject units.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

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CA 12-00432

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

RUSTIN R. HOWARD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BIOWORKS, INC., DEFENDANT-RESPONDENT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ANDREW J. RYAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (STEVEN E. COLE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Ontario County (Craig J. Doran, A.J.), entered November 21, 2011 in a breach of contract action. The order and judgment granted plaintiff money damages of $1 and directed defendant to reflect a noninterest bearing monetary obligation to plaintiff of $19,800 on its balance sheet until paid.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by vacating the award of damages of $1 and ordering that judgment be entered for plaintiff in the amount of $19,800, together with interest commencing December 22, 2005, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this breach of contract action alleging that defendant failed to pay him deferred compensation in the amount of $19,800 for prior services that he performed in accordance with the parties' written agreement. We determined on a prior appeal that the record established as a matter of law that there was an anticipatory repudiation of the agreement by defendant and that "Supreme Court properly granted that part of plaintiff's motion for summary judgment on liability only, inasmuch as there is an issue of fact with respect to the amount of damages" (*Howard v BioWorks, Inc.*, 83 AD3d 1588, 1588). Thereafter, the court conducted a nonjury trial on damages. Plaintiff appeals from an order and judgment that, inter alia, awarded him nominal damages in the amount of one dollar.

We reject plaintiff's contention that our prior decision is the law of the case with respect to the amount of damages resulting from defendant's breach of the agreement inasmuch as we did not decide the issue of the amount of damages to be awarded but, rather, expressly held that an issue of fact existed in that regard (*id.*; *see Puckett v County of Erie* [appeal No. 3], 262 AD2d 966, 967). We agree with

plaintiff's further contention, however, that the court erred in awarding only nominal damages. As we stated in the prior decision, plaintiff was "entitled to damages for total breach" (*Howard*, 83 AD3d at 1589). The record establishes that defendant breached the parties' agreement on December 22, 2005, when it informed plaintiff in an unequivocal fashion that it never intended to pay him the amount agreed upon in the contract. Based on that date, we conclude that plaintiff is entitled to damages in the amount of $19,800, together with interest commencing December 22, 2005, and we modify the order and judgment accordingly.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1228

CA 11-02568

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

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

V MEMORANDUM AND ORDER

MICHAEL MATTER, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered November 15, 2011 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, determined that respondent is a detained sex offender requiring civil management.

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

Memorandum: Respondent appeals from an order determining that he is a detained sex offender requiring civil management through a regimen of strict and intensive supervision and treatment (SIST) and placing him with the New York State Department of Corrections and Community Supervision (DOCCS).

On June 2, 2008, just prior to respondent's release from the custody of DOCCS, petitioner filed a Mental Hygiene Law article 10 petition seeking respondent's civil management. Petitioner asserted that respondent was a detained sex offender under Mental Hygiene Law § 10.03 (g) (1), inasmuch as he was serving a sentence for a sex offense defined in section 10.03 (p). Respondent moved to dismiss the petition on the ground that he was not a detained sex offender when the petition was filed because his sentence calculation was erroneous. According to respondent, he should have been released from the custody of DOCCS several months before the petition was filed and he thus was not in the lawful custody of DOCCS when the petition was filed. Supreme Court agreed with respondent and granted both respondent's motion to dismiss the petition as well as his separate application for a writ of habeas corpus. This Court reversed the order and judgment, reinstated the petition, and remitted the matter to Supreme Court for further proceedings (*Matter of State of New York v Matter*, 78 AD3d 1694, *rearg*

denied 81 AD3d 1388). We note that, in support of his motion for reargument, respondent contended that the petition was properly dismissed pursuant to *Matter of State of New York v Rashid* (16 NY3d 1), which was decided after we issued our initial decision, inasmuch as he was not "lawfully" in custody. In denying reargument, we rejected that contention because the pivotal issue was whether he was in fact in the custody of DOCCS when the article 10 petition was filed (*see People ex rel. Joseph II. v Superintendent of Southport Correctional Facility*, 15 NY3d 126, 135, *rearg denied* 15 NY3d 847), not whether the custody was "lawful," and it is undisputed that he was in custody. Following our denial of respondent's motion for reargument and upon remittal, the court issued the instant civil management order.

Contrary to respondent's contention, petitioner established by clear and convincing evidence that he is currently a dangerous sex offender requiring SIST (*see* Mental Hygiene Law § 10.07 [f]). Contrary to respondent's contention, proof of his past conduct is probative of his present mental state (*see generally Matter of George L.*, 85 NY2d 295, 307-308). Further, in determining whether a party is a dangerous sex offender, a court may "rely on all the relevant facts and circumstances" (*Matter of State of New York v Motzer*, 79 AD3d 1687, 1688).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1252

CA 12-00182

PRESENT: SMITH, J.P., CENTRA, LINDLEY, AND WHALEN, JJ.

JANNIE NESMITH, IN HER REPRESENTATIVE CAPACITY ONLY AS PARENT AND NATURAL GUARDIAN OF JANNIE PATTERSON, AN INFANT AND LORENZO PATTERSON, JR., PLAINTIFFS-RESPONDENTS, OPINION AND ORDER

V

ALLSTATE INSURANCE COMPANY, DEFENDANT-APPELLANT.

SHAPIRO, BEILLY & ARONOWITZ, LLP, NEW YORK CITY (ROY J. KARLIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

NIXON LAW FIRM, PLLC, WHITESBORO (JAMES E. NIXON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

ANDERSON KILL & OLICK, P.C., NEW YORK CITY (JOHN G. NEVIUS OF COUNSEL), FOR UNITED POLICYHOLDERS, AMICUS CURIAE.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered October 27, 2011. The judgment, insofar as appealed from, denied defendant's motion for summary judgment and granted that part of the plaintiffs' cross motion seeking a declaration.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the cross motion is denied in its entirety, the motion is granted insofar as declaratory relief was sought, and judgment is granted in favor of defendant as follows:

> It is ADJUDGED and DECLARED that plaintiffs' losses are encompassed by the $500,000 per occurrence limit in the insurance policy at issue.

Opinion by SMITH, J.: Plaintiffs commenced this action seeking a declaration of the rights of the parties to an insurance policy. In November 1991, defendant issued the policy to Tony Clyde Wilson, the owner of an apartment building in the City of Rochester. The policy, which had a per-occurrence limit of $500,000, was for one year, and it was renewed for two additional one-year periods. In 1993, two children were exposed to lead paint while living in an apartment in that building, and one suffered injuries as a result of that exposure. According to Wilson's deposition testimony, he attempted to remediate the lead paint condition after learning that the children had been

exposed to lead, although the record is unclear with respect to the exact actions that he undertook. That family moved out of the apartment shortly thereafter, and the mother of those children later commenced an action against, inter alia, Wilson, seeking damages for injuries that the child sustained as a result of her exposure to lead (first tort action). In 1994, two children of a subsequent tenant were also exposed to lead in the same apartment. Plaintiffs herein commenced a separate action to recover damages for the personal injuries sustained by those two children (second tort action). While the second tort action was pending, the first tort action settled for $350,000, which defendant paid pursuant to its policy. Defendant took the position that the noncumulation clause in the policy limited its liability for all lead exposures in the apartment to a single policy limit of $500,000, and offered plaintiffs the remaining $150,000 of coverage to settle the second action. The parties entered into a stipulation whereby Wilson was released from liability. They further agreed that plaintiffs would recover $150,000 if the noncumulation clause limited recovery to a single policy limit as claimed by defendant, but plaintiffs would recover $500,000 if the policy also required defendant to pay the full policy limit for the injuries sustained by the second set of children. Plaintiffs then commenced this declaratory judgment action to resolve that issue. Defendant appeals from a judgment denying its motion for summary judgment dismissing the complaint and granting plaintiffs' cross motion insofar as it sought a declaration that the amount of insurance coverage to which plaintiffs are entitled is the full $500,000 policy limit.

At issue on this appeal is whether the policy requires defendant to pay a second full policy limit under these circumstances or whether plaintiffs' losses are encompassed by the $500,000 per occurrence limit in the insurance policy. We agree with defendant that, pursuant to the unequivocal language of the policy, defendant is responsible only up to its limit for a single policy, and we thus conclude that Supreme Court should have granted a declaration in favor of defendant.

Our analysis begins with the well-settled proposition that "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*White v Continental Cas. Co.*, 9 NY3d 264, 267; *see State of New York v Home Indem. Co.*, 66 NY2d 669, 671). The policy provision at issue states:

> "Regardless of the number of insured persons, injured persons, claims, claimants or policies involved, our total liability under the Family Liability Protection coverage for damages resulting from one accidental loss will not exceed the limit shown on the declarations page. All bodily injury and property damage resulting from one accidental loss or from continuous or repeated exposure to the same general conditions is considered the result of one accidental loss" (emphasis omitted).

The Court of Appeals interpreted this insurer's nearly identical policy provision in *Hiraldo v Allstate Ins. Co.* (5 NY3d 508, 512). There, a child was injured by exposure to lead in an apartment covered by a policy that the property owners renewed for two additional policy periods while the injured party stayed in the apartment and was further exposed to the lead. The Court of Appeals, relying in part upon three federal District Court decisions applying New York law to this policy language (*see Bahar v Allstate Ins. Co.*, 2004 WL 1782552, 2004 US Dist LEXIS 15612 [SD NY, Aug. 9, 2004]; *Greene v Allstate Ins. Co.*, 2004 WL 1335927, 2004 US Dist LEXIS 10860 [SD NY, June 15, 2004]; *Greenidge v Allstate Ins. Co.*, 312 F Supp 2d 430 [SD NY 2004]), concluded that the noncumulation clause was fatal to the plaintiff's claim that the insurer should pay its full policy limit on all three policies.

Pursuant to the Court of Appeals' decision in *Hiraldo*, the mere fact that the property owners therein renewed their policy for two additional policy periods does not permit the plaintiffs to recover more than a single policy limit. And, based upon the clear language of the policy at issue here, the number of claims and claimants does not require the insurer to pay more than its single policy limit (*see Ramirez v Allstate Ins. Co.*, 26 AD3d 266, 266; *see generally Mt. McKinley Ins. Co. v Corning Inc.*, 96 AD3d 451, 452). Thus, our determination turns on the resolution of the discrete issue whether the exposure of children to lead paint in an apartment during different tenancies is encompassed by the phrase "resulting from . . . continuous or repeated exposure to the same general conditions" in the noncumulation clause. We conclude that the only reasonable interpretation of that clause requires that the two claims be classified as a single accidental loss within the meaning of the policy.

The evidence establishes that the two sets of children lived in the same apartment at different times, less than a year apart. Although the owner testified at a deposition that he attempted to remediate the lead hazard, there is nothing in the record establishing that he removed all of the lead paint from the subject apartment. Upon a close reading of that deposition testimony, we conclude that it fails to establish what, if any, action the owner actually took to remediate the lead paint hazard. Furthermore, there is no evidence that the owner added other lead paint to the apartment in the interim, and indeed paint containing lead could not legally have been sold anywhere in the United States for more than 15 years prior to that time (*see* 16 CFR 1303.1; 42 FR 44199). Consequently, the evidence establishes that the lead paint that injured the second set of children is the same lead paint that was present in the apartment when the first set of children lived there. The First Department concluded in asbestos-related litigation that "any group of claims arising from exposure to an asbestos condition at a common location, at approximately the same time (for example at the same steel mill or factory), may be found to have arisen from the same occurrence," as defined in a provision similar to the one in this case (*Mt. McKinley Ins. Co.*, 96 AD3d at 452). We agree with that conclusion and apply it here, in the context of lead-related litigation. Inasmuch as the

claims arise from exposure to the same condition, and the claims are spatially identical and temporally close enough that there were no intervening changes in the injury-causing conditions, they must be viewed as a single occurrence within the meaning of the policy.

Plaintiffs' remaining contentions do not warrant extended discussion. We reject plaintiffs' contention that the court properly denied defendant's motion due to outstanding discovery issues. The court specifically stated that the issue of discovery was moot, and did not base its determination on that point. We also reject plaintiffs' contention that, due to the remediation performed by the owner, the subsequent exposure of the second set of children must be viewed as a different accident. As discussed, there is no evidence establishing the remediation that was performed, and the evidence establishes that the same general conditions, the preexisting lead paint, caused the injury to both sets of children. "Although the children may have ingested the lead at different times and their blood tests showed different levels of exposure, the injuries all flowed from the same conditions in their immediate environment," and thus the noncumulation clause limits the plaintiffs in the first and second tort actions to a single policy limit (*Allstate Ins. Co. v Bonn*, 709 F Supp 2d 161, 167 [DC RI, 2010]). Plaintiffs' contention that Monroe County certified that the hazard had been removed is not supported by the record. Similarly, the record does not support the amicus curiae's oft-repeated allegation that the two sets of children lived in different apartments.

We have considered the remaining contentions of plaintiffs and the amicus curiae and conclude that they are without merit. Accordingly, we conclude that the judgment insofar as appealed from should be reversed and that the cross motion should be denied in its entirety, and we further conclude that judgment should be granted in defendant's favor, declaring that plaintiffs' losses are encompassed by the $500,000 per occurrence limit in the insurance policy at issue.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1305

KA 12-01004

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK L. FELDHOUSEN, DEFENDANT-APPELLANT.

JON L. WILSON, LOCKPORT (LEONARD G. TILNEY, JR., 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 (Matthew J. Murphy, III, J.), rendered June 22, 2011. The judgment convicted defendant, upon a jury verdict, of assault in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of assault in the third degree (Penal Law § 120.00 [2]). Defendant contends that County Court erred in charging assault in the third degree as a lesser included offense of assault in the second degree (Penal Law § 120.05 [2]) because there is no reasonable view of the evidence that could support a finding that defendant did not act intentionally. Inasmuch as defendant objected to that charge on a different ground at trial, he failed to preserve his current contention for our review (*see* CPL 470.05 [2]; *People v Autar*, 54 AD3d 609, *lv denied* 11 NY3d 922).

In any event, defendant's contention lacks merit. The court properly charged the lesser included offense of assault in the third degree (Penal Law § 120.00 [2]) because there is a reasonable view of the evidence to support a finding that defendant committed that crime (*see generally People v Glover*, 57 NY2d 61, 63). Based upon the testimony of defendant and the victim, the jury could rationally conclude that defendant did not intend to cause physical injury to the victim but, instead, consciously disregarded the substantial and unjustifiable risk that his physical contact with the victim would cause physical injury (*see* §§ 15.05 [3], 120.00 [2]). The fact that defendant acted deliberately "does not necessarily preclude a finding of recklessness" (*People v Lora*, 85 AD3d 487, 492, *appeal dismissed* 18

NY3d 829).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1310

CAF 11-01878

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

IN THE MATTER OF MARIA M. VENUS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RYAN BRENNAN, RESPONDENT-RESPONDENT.

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

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

DEBORAH A. BELLOMO, ATTORNEY FOR THE CHILD, SYRACUSE, FOR VICTORIA E.B.

Appeal from an order of the Family Court, Onondaga County (Gina M. Glover, R.), entered May 20, 2011 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, denied the petition seeking permission to relocate with the subject child.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the petition is granted, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following Memorandum: Petitioner mother commenced this proceeding seeking to modify the parties' joint custody order by granting the mother permission to relocate from Syracuse to the New York City area with the parties' child. Before the commencement of this proceeding, the parties stipulated that all proceedings seeking modification of the prior custody order would be determined by a referee or judicial hearing officer (stipulation), and thus a hearing on this matter was held before a referee. Following the hearing, Family Court, inter alia, denied the mother's petition seeking permission to relocate with the parties' child.

We agree with the mother that the court's determination lacks a sound and substantial basis in the record and that she met her burden of establishing by a preponderance of the evidence that the proposed relocation is in the child's best interests (*see Matter of Parish A. v Jamie T.*, 49 AD3d 1322, 1323; *see generally Matter of Tropea v Tropea*, 87 NY2d 727, 740-741). Here, the mother established by a preponderance of the evidence that the relocation will benefit the

child economically and emotionally inasmuch as the relocation will increase the mother's earning potential and will enable her to spend more time with the child. Additionally, the mother has agreed to maintain a visitation schedule that will foster the child's relationship with the father, to transport the child to and from Syracuse, and to pay any related transportation costs (*see Parish A.*, 49 AD3d at 1323; *see also Matter of Butler v Hess*, 85 AD3d 1689, 1690-1691, *lv denied* 17 NY3d 713; *Matter of Scialdo v Cook*, 53 AD3d 1090, 1092). We therefore reverse the order insofar as it denied the mother's petition seeking permission to relocate with the child, and we remit the matter to Family Court to establish an appropriate visitation schedule for the father.

The mother further contends that the Attorney for the Child (AFC) was ineffective on the grounds that the AFC did not present any witnesses or submit any evidence at the hearing, did not advocate a position in her written closing argument and did not request a *Lincoln* hearing. We reject that contention. We conclude that, under the circumstances presented here, the failure of the AFC to present evidence at the hearing, without more, does not constitute ineffective assistance (*see Matter of Grabiel V.*, 59 AD3d 1132, 1133, *lv denied* 12 NY3d 711). The AFC actively participated in the hearing by cross-examining the parties and witnesses, and there is no requirement that she submit a position in her written closing argument. Additionally, there is no indication that the AFC would have succeeded in obtaining a *Lincoln* hearing even had she requested one given the age of the child, who was five at the time of the hearing (*see generally Matter of Farnham v Farnham*, 252 AD2d 675, 677).

Finally, the mother's contention that the Referee lacked jurisdiction to hear this matter because the mother was not represented by counsel when she signed the stipulation is without merit inasmuch as there is no requirement that she be represented when signing a stipulation (*see Matter of Stearns v Stearns*, 11 AD3d 746, 747; *see generally Gibson v Gibson*, 284 AD2d 908, 909).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1312

CA 11-02351

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

JAMES LUPPINO, SUCCESSOR ADMINISTRATOR OF
THE ESTATE OF MARIA V. LUPPINO, DECEASED,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ACEA M. MOSEY, AS ADMINISTRATOR OF THE ESTATE
OF WILLIAM E. O'BRIEN, M.D., DECEASED, ET AL.,
DEFENDANTS,
AND CATHOLIC HEALTH SYSTEM, DOING BUSINESS AS
KENMORE MERCY HOSPITAL, DEFENDANT-RESPONDENT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAMON MOREY LLP, BUFFALO (JULIE M. BARGNESI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 19, 2011. The order, inter alia, granted the motion of defendant Catholic Health System, doing business as Kenmore Mercy Hospital, to confirm the Report and Recommendation of the Judicial Hearing Officer.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the first through third ordering paragraphs and denying that part of the motion of defendant Catholic Health System, doing business as Kenmore Mercy Hospital, for leave to renew and as modified the order is affirmed without costs, the order entered October 28, 2010 referring the matter to a judicial hearing officer is reversed, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: We agree with plaintiff that Supreme Court erred in granting that part of the motion of Catholic Health System, doing business as Kenmore Mercy Hospital (defendant), seeking leave to renew its opposition to plaintiff's motion to strike the answer (*see Carroway Luxury Homes, LLC v Integra Supply Corp.*, 57 AD3d 1448, 1449; *McNerney v Fundalinski*, 48 AD3d 1256, 1257; *Moss v McKelvey*, 32 AD3d 1281, 1282). We note as background that plaintiff moved to strike defendant's answer on, inter alia, the ground that defendant willfully ignored an April 2007 order compelling it to produce certain contract documents, which order was affirmed by this Court (*Luppino v O'Brien*, 59 AD3d 991, 992). A motion for leave to renew must be "based upon new facts not offered on the prior motion that would change the prior

determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2], [3]; *see Blazynski v A. Gareleck & Sons, Inc.*, 48 AD3d 1168, 1170, *lv denied* 11 NY3d 825). Here, defendant offered no new facts in support of that part of its motion for leave to renew; rather, defendant again submitted a 2007 affidavit from its Vice-President of Compliance and Administrative Services (Vice-President), wherein he averred that some of the documents sought by plaintiff did not exist (2007 affidavit). We therefore modify the order by denying that part of defendant's motion for leave to renew its opposition to plaintiff's motion to strike defendant's answer.

Contrary to the further contention of plaintiff, however, the court properly granted that part of defendant's motion for leave to reargue its opposition to plaintiff's motion to strike defendant's answer on the ground that the court misapprehended the facts and the law in determining that motion (*see* CPLR 2221 [d] [2]). In granting plaintiff's motion, the court stated that, because defendant asserted the same position that it asserted when it opposed plaintiff's original motion to compel discovery of the contract documents, defendant was in essence requesting that the court overrule the April 2007 order and this Court's affirmance thereof. The court therefore reasoned that it was "left . . . with no option except to fashion a remedy for [defendant]'s failure to comply with the previous discovery orders of the court." Defendant's position in opposition to the motion to strike its answer, however, was that it had complied with the April 2007 order by producing all of the requested contract documents in existence. Any question concerning the existence or nonexistence of the specific contract documents at issue here, however, was not before the court that granted the April 2007 order or this Court on appeal (*see Luppino*, 59 AD3d at 992). Thus, the court's June 2010 order (2010 order) striking defendant's answer was based upon the court's misapprehension that it had no choice but to penalize defendant for failing to produce the contract documents at issue.

Although the court on the motion to renew could not have considered the 2007 affidavit because it did not contain new facts and defendant failed to establish a reasonable justification for not presenting it earlier (*see* CPLR 2221 [e]; *Blazynski*, 48 AD3d at 1170), the court should have considered that affidavit in opposition to plaintiff's motion to strike defendant's answer.

"We have repeatedly held that the striking of a pleading is appropriate only where there is a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith" (*Hann v Black*, 96 AD3d 1503, 1504 [internal quotation marks omitted]). "Once a moving party establishes that the failure to comply with a disclosure order was willful, contumacious or in bad faith, the burden shifts to the nonmoving party to offer a reasonable excuse" (*WILJEFF, LLC v United Realty Mgt. Corp.*, 82 AD3d 1616, 1619). Here, plaintiff met his initial burden, "thereby shifting the burden to defendant to offer a reasonable excuse" for its noncompliance with the disclosure order (*Hill v Oberoi*, 13 AD3d 1095, 1096). Defendant, however, offered such an excuse by submitting the 2007 affidavit, and

the court should have determined the merits of that excuse.

We agree with plaintiff, however, that, upon reargument, the court abused its discretion in referring the matter to a judicial hearing officer (JHO). We therefore reverse the order of referral. CPLR 4212 provides in pertinent part that, "[u]pon the motion of a[ ] party . . . or on its own initiative, the court may submit any issue of fact required to be decided by the court to an advisory jury or[,] *upon a showing of some exceptional condition requiring it* . . . , to a referee to report" (CPLR 4212 [emphasis added]; *see Martin-Trigona v Waaler & Evans*, 148 AD2d 361, 363). "[T]he 'exceptional condition' requirement of CPLR 4212 . . . is not met if the issue can be decided by the court 'without extraordinary impingement on [its] regular business' " (Siegel, NY Prac § 379, at 644 [4th ed 2005], quoting *Matter of Wilder v Straus-Duparquet*, 5 AD2d 1, 3; *see Miller v Albertina Realty Co., Inc.*, 198 App Div 340, 343).

Here, the issue referred to the JHO was "whether [defendant] complied with the [April 2007 order]," i.e., whether the relevant documents sought to be produced by plaintiff exist and are able to be produced. We conclude that defendant failed to establish any "exceptional condition" warranting a referral of that issue to a JHO (CPLR 4212). Although the ultimate issue whether defendant complied with the April 2007 order is sharply contested, the underlying issue, i.e., whether and to what extent certain documents exist or can be reproduced, is not factually complicated (*cf. Walter v Walter*, 38 AD3d 763, 765; *Rosen v Rosen*, 16 AD3d 398, 399; *Matter of Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO [State of New York]*, 273 AD2d 668, 671). While a hearing was warranted due to the conflicting positions of the parties, referral to a JHO was not necessary. As the court stated in *Wilder* (5 AD2d at 2-3), "[w]hile the issue raised in this case may not be too summarily determined, there is no justification in protracting the proceedings as is likely to occur on a reference, nor in imposing the attendant expense on the parties. The court is eminently capable of determining the issue expeditiously, and without extraordinary impingement on the regular business of the court."

The only justification offered by defendant in support of reference to a JHO was that the JHO to whom the issue was referred was the judge who granted the April 2007 order prior to his retirement from the bench and thus that he could provide "insight" into the meaning of that order. We conclude, however, that there was no need for an interpretation or explanation of the April 2007 order, which speaks for itself. The order simply required defendant to produce, inter alia, the contract documents in question. The only issue that remained was whether defendant had complied with those portions of the April 2007 order, an issue that did not require the knowledge or particular expertise of the JHO.

We therefore further modify the order on appeal by vacating those parts of the order confirming and adopting the JHO's report and recommendation and finding that defendant complied with the April 2007 order. We remit the matter to Supreme Court to determine whether

defendant complied with the April 2007 order and, if not, whether defendant has "willfully and contumaciously" refused to produce the requested documents such that the 2010 order striking defendant's answer should stand. We note that, until the issue of defendant's compliance with the April 2007 order is determined after an evidentiary hearing, it is premature to consider plaintiff's contention that the court erred in vacating the 2010 order.

Finally, in light of our conclusion that the matter was improperly referred to a JHO, we need not address plaintiff's further contention that the JHO should have conducted an evidentiary hearing and that he exceeded the scope of his authority.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1317

CA 12-01143

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

IN THE MATTER OF THE ARBITRATION BETWEEN
PROFESSIONAL, CLERICAL, TECHNICAL, EMPLOYEES
ASSOCIATION, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

BOARD OF EDUCATION FOR BUFFALO CITY SCHOOL
DISTRICT, RESPONDENT-APPELLANT.

JAECKLE, FLEISCHMANN & MUGEL, LLP, BUFFALO (JAMES N. SCHMIT OF COUNSEL), FOR RESPONDENT-APPELLANT.

BARTLO, HETTLER & WEISS, KENMORE (PAUL D. WEISS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered October 7, 2011 in a proceeding pursuant to CPLR article 75. The order and judgment, among other things, granted petitioner's application to vacate an arbitration award.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the petition is denied, the cross petition is granted and the arbitration award is confirmed.

Memorandum: Petitioner, the negotiating representative for full-time, noninstructional staff employed by the Buffalo City School District, commenced this CPLR article 75 proceeding seeking to vacate an arbitration award in favor of respondent. Respondent appeals from an order and judgment granting petitioner's application to vacate the arbitration award and denying respondent's cross petition to confirm the award. We agree with respondent that Supreme Court erred in vacating the arbitration award inasmuch as it is not irrational and the arbitrator did not exceed a specific limitation on her authority.

It is well established that "an arbitrator's rulings, unlike a trial court's, are largely unreviewable" (*Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530, 534). Thus, "a court may vacate an arbitration award only if it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*id.*; *see generally* CPLR 7511 [b] [1] [iii]). "Outside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where 'an

arbitrator has made an error of law or fact' " (*Matter of Kowaleski [New York State Dept. of Correctional Servs.]*, 16 NY3d 85, 91, quoting *Falzone*, 15 NY3d at 534; *see Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79). Indeed, an arbitrator's interpretation of a collective bargaining agreement "may even disregard 'the apparent, or even the plain, meaning of the words' of the contract before him [or her] and still be impervious to challenge in the courts" (*Matter of Albany County Sheriff's Local 775 of Council 82, AFSCME, AFL-CIO [County of Albany]*, 63 NY2d 654, 656, quoting *Rochester City School Dist. v Rochester Teachers Assn.*, 41 NY2d 578, 582). As the Court of Appeals explained, "Courts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies. A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one. Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326).

Of the three "narrow grounds" that may form the basis for vacating an arbitration award (*United Fedn. of Teachers, Local 2, AFT, AFL-CIO*, 1 NY3d at 79; *see Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100*, 14 NY3d 119, 123), only the irrational and exceeding enumerated limitations grounds are at issue here. "An award is irrational if there is no proof whatever to justify the award" (*Matter of Lucas [City of Buffalo]*, 93 AD3d 1160, 1164 [internal quotation marks omitted]; *see Matter of Buffalo Council of Supervisors & Adm'rs, Local No. 10, Am. Fedn. of School Adm'rs [Board of Educ. of City School Dist. of Buffalo]*, 75 AD3d 1067, 1068). So long as an arbitrator "offer[s] even a barely colorable justification for the outcome reached," the arbitration award must be upheld (*Matter of Monroe County Sheriff's Off. [Monroe County Deputy Sheriffs' Assn., Inc.]*, 79 AD3d 1797, 1799 [internal quotation marks omitted]; *see Matter of Buffalo Teachers Fedn., Inc. [Board of Educ. of Buffalo City School Dist.]*, 67 AD3d 1402, 1402).

An award may be set aside on the ground that an arbitrator exceeded his or her power "only if the[arbitrator] gave a completely irrational construction to the provisions in dispute and, in effect, made a new contract for the parties" (*Matter of National Cash Register Co. [Wilson]*, 8 NY2d 377, 383; *see Rochester City School Dist.*, 41 NY2d at 583). "The mere fact that a different construction could have been accorded the provisions concerned and a different conclusion reached does not mean that the arbitrator[] so misread those provisions as to empower a court to set aside the award" (*National Cash Register Co.*, 8 NY3d at 383; *see United Fedn. of Teachers, Local 2, AFT, AFL-CIO*, 1 NY3d at 82-83; *Matter of Albany County Sheriffs Local 775 of N.Y. State Law Enforcement Officers Union, Dist. Council 82, AFSCME, AFL-CIO [County of Albany]*, 27 AD3d 979, 981). Rather, so long as the contractual language is "reasonably susceptible of the

construction given it by the arbitrator[],” a court may not vacate the award (*National Cash Register Co.*, 8 NY2d at 383; *see Albany County Sheriffs Local 775 of N.Y. State Law Enforcement Officers Union, Dist. Council 82, AFSCME, AFL-CIO*, 27 AD3d at 981).

Here, the issue before the arbitrator was whether respondent’s selection process in filling two vacancies in the newly-created title of Assistant Management Analyst (AMA) violated the collective bargaining agreement (CBA) between petitioner and respondent, and the arbitrator concluded that it did not. We conclude that the arbitrator’s decision was neither irrational, i.e., wholly without supporting proof (*see Lucas*, 93 AD3d at 1164; *Buffalo Council of Supervisors & Adm’rs, Local No. 10, Am. Fedn. of School Adm’rs [Board of Educ. of City School Dist. of Buffalo]*, 75 AD3d at 1068), nor was it made in excess of her power (*see Matter of Rochester City School Dist. [Rochester Teachers Assn. NYSUT/AFT-AFL/CIO*], 38 AD3d 1152, 1153, *lv denied* 9 NY3d 813). Article 23, § 1 (e) of the CBA provides that “[t]he arbitrator . . . shall limit his [or her] decision to the application and interpretation of the [CBA]” and that “[t]he decision of the arbitrator shall be final and binding upon the parties.” Article 23, § 2 (g) further provides that the arbitrator lacks the power “to amend, modify, or delete any provision of th[e CBA].” The issue before the arbitrator primarily concerned her interpretation and application of article 22, § 1 (d) of the CBA, which provides as follows: “Should a new position or a permanent vacancy occur in a job title included in the bargaining unit which cannot be filled by reason of the absence of appropriate eligibility list, then in such case, an appropriate notice of the said opening shall be posted on all bulletin boards for a period of ten (10) working days, stating the job title, pay rate, job location, and necessary qualifications for the job. In filling the vacancy, *the employee with the greatest seniority among those who qualify in the judgment of the supervisor recommending the appointment shall be chosen*” (emphasis added).

In seeking to vacate the arbitration award, petitioner contended that the above provision of the CBA required respondent to select the most senior member of its bargaining unit who met the minimum qualifications for the AMA positions posted in respondent’s recruitment bulletins, i.e., a bachelor’s degree in business administration or public administration or an associate’s degree in those fields plus two years of experience. Petitioner relied on the use of the term “employee” in the CBA——defined as “permanent, probationary, or provisional personnel, or those who have been in Board Service on a full time basis for six (6) consecutive months or more”——as opposed to the terms “candidate” or “applicant.” Under petitioner’s interpretation of the CBA, provided that one or more employees, i.e., members of petitioner, met the minimum qualifications for the AMA positions, respondent could not hire outside the bargaining unit.

Contrary to petitioner’s interpretation, however, the arbitrator concluded that article 22, § 1 (d) of the CBA afforded the supervisor the authority to assess the qualifications of applicants and to make the final determination on whom to appoint to the relevant position.

The arbitrator relied upon the clause within that provision stating that "those who qualify *in the judgment of the supervisor recommending the appointment* shall be chosen" (emphasis added). The arbitrator disagreed with petitioner that seniority "trumps" the supervisor's discretion. She reasoned that, under petitioner's interpretation of the CBA, "any employee, meaning a member of the bargaining unit working in any department of the [Buffalo City School] District, could apply for any vacant position and be appointed if minimally qualified, regardless of the supervisor's judgment that he or she does not qualify to perform all the duties of the position. That argument is a misreading of the contract language." The arbitrator further concluded that the term "qualify" as used in the second sentence of article 22, § 1 (d) did not mean minimally qualified. According to the arbitrator, "[t]he language of the [CBA] does not obligate [respondent] to hire the most senior of the [bargaining unit] members who meets the minimum qualifications. Seniority would apply only if the supervisor's judgment finds two or more equally qualified candidates . . . Clear and unambiguous phrasing gives the supervisor ultimate authority."

Contrary to petitioner's contention, we conclude that the court erred in determining that the arbitrator's interpretation of the contract is "completely irrational" (*National Cash Register Co.*, 8 NY2d at 383; *see Rochester City School Dist.*, 41 NY2d at 583). The second sentence of article 22, § 1 (d) of the CBA does not state that respondent must appoint the most senior employee who meets the minimum or necessary qualifications for a vacant position, i.e., the minimum qualifications listed in the recruitment bulletins. Rather, as noted above, the applicable clause provides that, "[i]n filling the vacancy, the employee with the greatest seniority *among those who qualify in the judgment of the supervisor recommending the appointment* shall be chosen" (emphasis added). The language therefore is "reasonably susceptible of the construction given it by the arbitrator[]" (*National Cash Register Co.*, 8 NY2d at 383). Notably, article 6 of the CBA, which sets forth the rights of management, provides that, "except as herein specifically provided to the contrary, [respondent] and its administrative staff have the unquestioned right to exercise all normally accepted management prerogatives including," inter alia, "[t]o appoint such employees as it may require for the performance of its duties and responsibilities" and to "*fix and determine their qualifications*, duties, job titles and compensation" (emphasis added). That article therefore supports the arbitrator's determination that article 22, § 1 (d) grants the appointing supervisor the authority to determine the qualifications of candidates for a vacant position where there is no existing civil service eligibility list.

We further conclude that the court erred in determining that the arbitrator impermissibly modified the CBA by allowing respondent to choose from among all candidates or applicants for the AMA positions when the CBA refers only to "employees." Contrary to petitioner's contention, the arbitrator did not read the term "employees" out of the contract or replace that term with the term "applicants" or "candidates." Instead, the arbitrator interpreted the disputed provision to mean that respondent must provisionally appoint the most

senior employee only when, in the judgment of the applicable supervisor, two or more employees are qualified for the post. That interpretation was a proper exercise of the arbitrator's authority and did not, as the court concluded, "re-writ[e]" the CBA (*see Monroe County Sheriff's Off.*, 79 AD3d at 1798; *see generally Albany County Sheriff's Local 775 of Council 82, AFSCME, AFL-CIO*, 63 NY2d at 656). Here, although all four of the employee-applicants met the minimum educational qualifications as set forth in the recruitment bulletins, the supervisor determined that they were unqualified for the AMA positions because they were unable to utilize Excel computer software (Excel) to analyze financial data and make financial projections. While one of the employee-applicants was "familiar" with Excel, she could not apply her Excel skills to the assigned task, and the remaining employee-applicants could not perform basic functions in Excel. The appointing supervisor testified at the arbitration hearing that Excel is "required for about 99% of the job duties" of an AMA, and that testimony was unrefuted. Because none of the employee-applicants was qualified in the judgment of the appointing supervisor, respondent hired two nonemployees who demonstrated their proficiency in using Excel.

Because we conclude that the arbitrator's interpretation of the agreement is not "completely irrational," her interpretation is beyond our power of review (*see Rochester City School Dist.*, 38 AD3d at 1153). Thus, the arbitration award must be confirmed (*see Monroe County Sheriff's Off.*, 79 AD3d at 1798; *Buffalo Council of Supervisors & Adm'rs, Local No. 10, Am. Fedn. of School Adm'rs*, 75 AD3d at 1068-1069; *Buffalo Teachers Fedn., Inc.*, 67 AD3d at 1402-1403).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1323

KA 08-01510

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY S. CURRAN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

TIMOTHY S. CURRAN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Dennis M. Kehoe, A.J.), rendered May 16, 2008. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the third degree (six counts) and endangering the welfare of a child (nine 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 six counts of criminal sexual act in the third degree (Penal Law § 130.40 [2]) and nine counts of endangering the welfare of a child (§ 260.10 [1]). Defendant failed to preserve for our review his contention that County Court erred in denying his challenge for cause to a prospective juror on the ground that she expressed an unwillingness to afford him the requisite presumption of innocence (*see* CPL 470.05 [2]). Defendant challenged that prospective juror for cause on another ground, i.e., based on the concern that she "seemed totally confused the whole time she was out there," and we decline to exercise our power to review defendant's present contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's contention that the court improperly applied the Rape Shield Law (CPL 60.42) in precluding the cross-examination of two prosecution witnesses with respect to whether the victim engaged in online conversations with other firemen from the fire station where defendant was employed. Contrary to defendant's contention, such evidence was not relevant to support his defense that the victim's testimony was fabricated (*see People v Scott*, 67 AD3d 1052, 1054-1055, *affd* 16 NY3d 589; *People v Weinberg*, 75 AD3d 612, 613, *lv denied* 15 NY3d 896).

Defendant further contends that the court improperly limited his cross-examination of the victim and another prosecution witness on the issue whether the victim ever sent defendant a text message containing a racial slur. We reject that contention. "The probative value of the testimony that defendant sought to elicit was outweighed by the possibility of unduly prejudicing the People, confusing the issues, or misleading the jury" (*People v Dean*, 299 AD2d 892, 892, *lv denied* 99 NY2d 613).

Defendant failed to preserve for our review his contention that the victim's testimony concerning her disclosure to her friend about her relationship with defendant was not a complaint or expression of outrage sufficient to qualify under the "prompt outcry" exception to the hearsay rule (*see* CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Although we agree with defendant that the People failed to establish that the disclosure was made at the " 'first suitable opportunity' " (*People v McDaniel*, 81 NY2d 10, 17, quoting *People v O'Sullivan*, 104 NY 481, 486), we conclude that the error is harmless. The proof of defendant's guilt is overwhelming, and there is no significant probability that the jury would have acquitted defendant were it not for the error (*see generally People v Arafet*, 13 NY3d 460, 467; *People v Crimmins*, 36 NY2d 230, 241-242). We note that the victim's testimony about her *own* out-of-court statements did not constitute hearsay and, therefore, application of the "prompt outcry" exception was not necessary for the admission of that testimony. However, we are constrained to review and affirm a judgment of conviction only on those issues decided adversely to defendant (*see People v Concepcion*, 17 NY3d 192, 195). The court's initial incorrect ruling, that the victim's testimony about her own out-of-court statements constituted hearsay, was actually in defendant's favor and is therefore not subject to our review (*see id.*).

Defendant also failed to preserve for our review his contention that the testimony of the prosecution witness about the victim's disclosure of her relationship with defendant was not a "prompt outcry" because it was not made at the first suitable opportunity (*see* CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's further contention that the victim's disclosure about her relationship with defendant to the prosecution witness was not a sufficient complaint or expression of "outrage" (*see generally People v Bennett*, 79 NY2d 464, 472*; People v Taylor*, 75 NY2d 277, 286). In any event, we conclude that any error in the admission of that testimony is harmless (*see generally Arafet*, 13 NY3d at 467).

Defendant failed to preserve for our review his contention in his pro se supplemental brief that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). Contrary to the further contention of defendant in his pro se supplemental brief, we conclude that, viewing the evidence in light of the elements 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 generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contentions in his pro se supplemental brief that the court erred in admitting evidence of an uncharged crime and that he was denied a fair trial by prosecutorial misconduct on summation (*see* CPL 470.05 [2]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1325

KA 11-01166

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KASIEM WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 3, 2011. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]). We reject defendant's contention that Supreme Court abused its discretion in denying defendant's motion to withdraw his plea of guilty. " 'Permission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea' " (*People v Pillich*, 48 AD3d 1061, 1061, *lv denied* 11 NY3d 793; *see People v Alexander*, 97 NY2d 482, 485-486). Moreover, a court does not abuse its discretion in denying a motion to withdraw a guilty plea where the defendant's allegations in support of the motion are belied by the defendant's statements during the plea proceeding (*see People v Beaty*, 303 AD2d 965, 965, *lv denied* 100 NY2d 559; *People v Rickard*, 262 AD2d 1073, 1073, *lv denied* 94 NY2d 828). Here, defendant's claim of confusion regarding the crime to which he was pleading guilty as well as his claim of innocence are belied by the statements he made under oath during the plea colloquy (*see Rickard*, 262 AD2d at 1073). Contrary to defendant's further 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; *People v Lococo*, 92 NY2d 825, 827).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1333

CA 12-01208

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

ROBERT LANDAHL AND GAIL LANDAHL,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO AND U&S SERVICES, INC.,
DEFENDANTS-APPELLANTS.

U&S SERVICES, INC., THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

INDUSTRIAL POWER & LIGHTING CORPORATION,
THIRD-PARTY DEFENDANT-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANT-APPELLANT U&S SERVICES, INC. AND THIRD-PARTY PLAINTIFF-RESPONDENT.

CAPEHART & SCATCHARD, P.A., ELMIRA (MATTHEW R. LITT OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (BRYAN E. DOLIN OF COUNSEL), FOR DEFENDANT-APPELLANT CITY OF BUFFALO.

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

Appeals from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), dated December 8, 2011 in a personal injury action. The order denied the motion of third-party defendant for summary judgment, denied the motion of defendant City of Buffalo for summary judgment and denied in part the cross motion of defendant-third-party plaintiff U&S Services, Inc. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the cross motion of defendant-third-party plaintiff with respect to the Labor Law § 241 (6) claim in its entirety and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries allegedly sustained by

Robert Landahl (plaintiff) when his foot slid from a worn marble step with a 1½-inch depression on a stairway in City Hall in defendant City of Buffalo (City). Plaintiff was employed by third-party defendant, Industrial Power & Lighting Corporation (IPL), a subcontractor hired by defendant-third-party plaintiff, U&S Services, Inc. (U&S), the project manager. Plaintiffs asserted causes of action against U&S for violations of Labor Law §§ 200, 240 (1) and 241 (6) and common-law negligence. Plaintiffs also asserted a cause of action against the City for common-law negligence, and U&S commenced the third-party action against IPL seeking, inter alia, contractual indemnification. IPL subsequently moved for summary judgment dismissing the third-party complaint, and the City moved and U&S cross-moved for summary judgment dismissing the amended complaint against them. Supreme Court, in relevant part, granted U&S's cross motion with respect to the Labor Law § 240 (1) claim and with respect to the Labor Law § 241 (6) claim insofar as it is premised on the violation of 12 NYCRR 23-1.5 (a), 23-1.7 (d) and 23-1.32, and denied the motions of IPL and the City. IPL, U&S and the City appeal.

Turning first to IPL's appeal, we reject IPL's contentions that the court erred in denying its motion because the subcontract is unclear and ambiguous as to whether IPL must indemnify U&S relative to plaintiff's accident. " '[W]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances' " (*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433, quoting *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492). Here, the subcontract explicitly evidenced IPL's promise to indemnify U&S in the event of an on-the-job injury caused by an act or omission of IPL in the performance of that agreement (*see id.*). We further conclude that IPL failed to meet its initial burden of establishing that it was not negligent with respect to the accident (*cf. Martinez v Tambe Elec., Inc.*, 70 AD3d 1376, 1377-1378; *Masters v Celestian*, 21 AD3d 1426, 1427; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Turning next to U&S's appeal, we reject U&S's contention that its duty to maintain the premises in a safe condition was obviated by the open and obvious nature of the stair in question and thus that the court erred in denying its cross motion with respect to the Labor Law § 200 claim and the common-law negligence cause of action against it. "The issue whether a condition was readily observable impacts on plaintiff's comparative negligence and does not negate [a] defendant's duty to keep the premises reasonably safe" (*Pelow v Tri-Main Dev.*, 303 AD2d 940, 941; *see Bax v Allstate Health Care, Inc.*, 26 AD3d 861, 863). U&S's reliance on *Gasper v Ford Motor Co.* (13 NY2d 104, 110-111, *mot to amend remittitur granted* 13 NY2d 893) is misplaced. That case stands for the proposition that an open and obvious hazard *inherent in the injury-producing work* is not actionable, but here the defect complained of lies in the condition of the stair in question, not in the installation work plaintiff was assigned to perform. Thus,

the alleged open and obvious condition of the stair does not absolve U&S of its duty to keep the workplace in a safe condition (*see Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201, 202; *England v Vacri Constr. Corp.*, 24 AD3d 1122, 1124; *cf. Dinallo v DAL Elec.*, 43 AD3d 981, 982). We further conclude that U&S failed to establish as a matter of law that the hazard posed by the stair was open and obvious and that they had no duty to warn plaintiff of that tripping hazard (*see Juoniene v H.R.H. Constr. Corp.*, 6 AD3d 199, 200-201).

Contrary to U&S's further contention with respect to the remaining Labor Law claims and the common-law negligence cause of action against it, the issue of proximate cause is for the jury (*see generally Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784; *Prystajko v Western N.Y. Pub. Broadcasting Assn.*, 57 AD3d 1401, 1403). Although U&S contends that a slip on a smooth marble step is not actionable (*see Portanova v Trump Taj Mahal Assoc.*, 270 AD2d 757, 758, *lv denied* 95 NY2d 765), that contention is of no moment inasmuch as plaintiffs allege that plaintiff fell on a stair that was worn and cupped.

Contrary to the further contention of U&S, the issue whether U&S directed or controlled plaintiff's work methods is immaterial to a determination whether U&S is liable under the Labor Law § 200 claim and the common-law negligence cause of action against it. " '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' " (*Fisher v WNY Bus Parts, Inc.*, 12 AD3d 1138, 1139, quoting *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877; *see Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425, 1427). The theory of liability under that Labor Law section may be based either "on a defective condition of the premises [or] the manner of the work" (*Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 2 AD3d 1345, 1349; *see Ortega v Puccia*, 57 AD3d 54, 61). U&S's contention "presupposes that supervision or control over the plaintiff's work is the proper legal standard against which the defendant['s] alleged liability is to be measured in this instance," i.e., based on the manner of the work (*Chowdhury v Rodriguez*, 57 AD3d 121, 128), and we agree with plaintiffs that they are alleging a defective condition of the premises. In any event, we conclude that U&S failed to meet its initial burden with respect to the Labor Law § 200 claim and the common-law negligence cause of action against it " 'because it failed to establish that it had no [actual or] constructive notice of the allegedly hazardous condition[]' " of the stair in question (*Kobel v Niagara Mohawk Power Corp.*, 83 AD3d 1435, 1435; *see Baker v City of Buffalo*, 90 AD3d 1684, 1685).

We further conclude under the circumstances of this case, however, that the court erred in denying that part of U&S's cross motion seeking summary judgment dismissing the Labor Law § 241 (6) claim insofar as it is premised on the alleged violation of 12 NYCRR 23-1.7 (e) (1). U&S met its initial burden of establishing that 12 NYCRR 23-1.7 (e) (1) is inapplicable to the facts of this case (*see generally Smith v County of Monroe*, 229 AD2d 984, 984), and plaintiffs

failed to raise a triable issue of fact in opposition thereto (*see generally Zuckerman*, 49 NY2d at 562). We therefore modify the order by granting that part of the cross motion of U&S with respect to the Labor Law § 241 (6) claim in its entirety.

Turning now to the City's appeal, we reject the City's contention that the prior written notice requirement of Buffalo City Charter § 21-2 applies to the facts of this case (*see Quackenbush v City of Buffalo*, 43 AD3d 1386, 1388). Contrary to the further contention of the City, we conclude that there is a triable issue of fact whether the 1½-inch depression in the stair in question is a dangerous or defective condition (*see Smith v A.B.K. Apts.*, 284 AD2d 323, 323; *Wolcott v Forgnone*, 277 AD2d 1039, 1039; *see generally Trincere v County of Suffolk*, 90 NY2d 976, 977). We have reviewed the remaining contention of the City and conclude that it is without merit.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1335

CA 12-01013

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

PENN MILLERS INSURANCE COMPANY,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

C.W. COLD STORAGE, INC.,
DEFENDANT-RESPONDENT-APPELLANT,
AND THRUWAY PRODUCE, INC., DEFENDANT-RESPONDENT.

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN, NEW YORK CITY (ERIC A. FITZGERALD OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD LLP, ROCHESTER (HENRY R. IPPOLITO OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Orleans County (John A. Michalek, J.), entered January 10, 2012. The order denied the motion of plaintiff for summary judgment and denied the cross motion of defendant C.W. Cold Storage, Inc. for summary judgment.

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

Memorandum: Pursuant to agreements with defendant Thruway Produce, Inc. (Thruway), C.W. Cold Storage, Inc. (defendant) stored apples that Thruway had sold to a subsidiary of nonparty Milnot Holding Corporation for later processing into baby food. Following the discovery of rodenticide in apples that Thruway had allegedly supplied to the subsidiary between January and March 2006, Milnot commenced an action against Thruway in federal court seeking damages for the economic losses that it sustained from the recall of products potentially containing rodenticide that had already been processed and shipped. Thruway, seeking contribution or indemnification, thereafter impleaded defendant and others in September 2008. At the time of the incidents underlying the federal action, defendant was covered by an agribusiness property and commercial general liability insurance policy issued by plaintiff. Upon receiving notice of the claim against defendant, plaintiff reserved its right to disclaim coverage but nevertheless undertook defendant's defense in the third-party action.

In February 2011, plaintiff commenced the instant action seeking a judgment declaring that it has no duty to defend or indemnify

defendant on various grounds, including, as alleged in the first cause of action, defendant's failure to give plaintiff timely notice of a covered occurrence. Plaintiff thereafter moved for summary judgment on its first cause of action; defendant opposed the motion and cross-moved for summary judgment in its favor, i.e., a declaration that, inter alia, it gave timely notice of the occurrence to plaintiff and that plaintiff is estopped from effectively disclaiming coverage by its delay in so notifying defendant. Supreme Court denied both the motion and the cross motion, concluding that plaintiff failed to meet its initial burden of demonstrating the untimeliness of defendant's occurrence notice and that defendant failed to establish, as a matter of law, that it suffered prejudice from plaintiff's four-year delay in formally disclaiming coverage. This appeal and cross appeal ensued. We conclude that while Supreme Court properly denied both the motion and the cross motion, the second "declaring" paragraph in its order was improper and should be vacated.

Initially, and contrary to the court's determination (which itself was erroneously characterized in the order as a "declaration"), we conclude that plaintiff met its initial burden on the motion by establishing that defendant did not provide it with notice of a potential claim until more than four months after the latest rodenticide incident, and that defendant thus failed to comply with the policy condition requiring timely notice of a covered occurrence (*see Lobosco v Best Buy, Inc.*, 80 AD3d 728, 731-732; *233 E. 17th St., LLC v L.G.B. Dev., Inc.*, 78 AD3d 930, 931-932; *see generally Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 339). Moreover, defendant neither raised a triable issue of fact with respect to the timeliness of its occurrence notice nor established a reasonable excuse for its failure to provide such timely notice (*see 2130 Williamsbridge Corp. v Interstate Indem. Co.*, 55 AD3d 371, 372; *Heydt Contr. Corp. v American Home Assur. Co.*, 146 AD2d 497, 498-499, *lv dismissed* 74 NY2d 651).

Specifically, the mistaken belief of defendant's President that notice to its broker constituted notice to plaintiff does not excuse defendant's failure to comply with the policy's notice condition, nor does it constitute a material issue of fact in relation thereto (*see 2130 Williamsbridge Corp.*, 55 AD3d at 372). We therefore modify the order by vacating the second "declaring" paragraph thereof, which provides "that there is an issue of fact whether notice to [plaintiff] . . . of the occurrence was late, and therefore [plaintiff] has not established its entitlement to judgment on that issue."

Nevertheless, we conclude that the motion was properly denied because triable issues of fact remain with respect to the effectiveness of plaintiff's disclaimer of coverage such that it cannot be determined, as a matter of law, whether plaintiff is obligated to defend and indemnify defendant under the policy (*see O'Dowd v American Sur. Co. of N.Y.*, 3 NY2d 347, 355). Where, as here, the underlying claim involves only economic injury, the timeliness, and thus effectiveness, of an insurer's disclaimer is not governed by Insurance Law § 3420 (d) (2) but rather is governed by the common law, "under [which] prejudice must generally be established as the result

of an unreasonable delay in disclaiming before an insurer will be estopped from asserting noncoverage" (*Globe Indem. Co. v Franklin Paving Co.*, 77 AD2d 581, 582; *see William M. Moore Constr. Co. v United States Fid. & Guar. Co.*, 293 NY 119, 123-124).

Here, defendant plausibly contends that it was prejudiced by plaintiff's delay in disclaiming coverage, notice of which was made on the eve of trial in the third-party action and after its defense had been given over to plaintiff (*see generally American Tr. Ins. Co. v Wilfred*, 296 AD2d 360, 361), and plaintiff made no evidentiary showing to rebut that contention or to demonstrate the absence of any material issues of fact with respect thereto (*see Vecchiarelli v Continental Ins. Co.*, 277 AD2d 992, 993; *see generally Vega v Restani Constr. Corp.*, 18 NY3d 499, 503). Although plaintiff's reservation of rights letters allowed it to "preserve[ ] its defense under the policy[ ] until the facts warranting disclaimer became clear" (*Tower Ins. Co. of N.Y. v Khan*, 93 AD3d 618, 619), "[i]t did not permit [plaintiff] to unreasonably delay the exercise of those rights[ ] to the detriment of [defendant]" (*Greater N.Y. Sav. Bank v Travelers Ins. Co.*, 173 AD2d 521, 521).

With respect to the cross motion, although defendant's showing of prejudice from plaintiff's delayed coverage disclaimer was sufficient to require the denial of plaintiff's motion, it was not sufficiently developed to justify summary judgment in defendant's favor declaring that plaintiff's disclaimer of coverage was ineffective as a matter of law (*see Legum v Allstate Ins. Co.*, 33 AD3d 670, 670-671; *Vecchiarelli*, 277 AD2d at 993). We note that the presumption of prejudice that may attach to a late coverage disclaimer is inapplicable here because plaintiff has not "retained control of [defendant]'s defense *to final judgment or to a settlement*" (*William M. Moore Constr. Co.*, 293 NY at 124 [emphasis added; internal quotation marks omitted]). Defendant's cross motion was therefore properly denied as well.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1345

TP 12-01171

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

IN THE MATTER OF TREVOR SPEARS, PETITIONER,

V MEMORANDUM AND ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered June 20, 2012) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by vacating the recommended loss of good time and as modified the determination is confirmed without costs and the matter is remitted to respondent for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a Tier III hearing, that he violated inmate rules 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusal to obey direct order]) and 113.10 (7 NYCRR 270.2 [B] [14] [i] [weapon possession]). We conclude that the determination is supported by substantial evidence. "The misbehavior report, together with the testimony of the correction officer who wrote it and the photograph[] of the [tweezers inserted into a pen and secured by a shoelace], constitutes substantial evidence supporting the determination that petitioner violated [those] inmate rule[s]" (*Matter of Oliver v Fischer*, 82 AD3d 1648, 1648). Contrary to petitioner's further contention, the inability of his inmate assistant to obtain a videotape of the incident did not constitute a denial of his right to present documentary evidence "inasmuch as petitioner was advised that no such videotape existed" (*Matter of Carini v Goord*, 270 AD2d 663, 664). Petitioner contends for the first time on appeal that the Hearing Officer confused him about his right to testify and present evidence. Thus, "[p]etitioner failed to exhaust his administrative

remedies with respect to that contention, and this Court has no discretionary authority to reach that contention" (*Matter of Alvarez v Fischer*, 94 AD3d 1404, 1406).

Finally, the "penalty is not so disproportionate to the offense as to be shocking to one's sense of fairness" (*Matter of Ciotoli v Goord*, 256 AD2d 1192, 1193). "It is well established that a decision to withhold good time allowance which is made in accordance with the law is not subject to judicial review" (*Matter of Burke v Goord*, 273 AD2d 575, 575, *appeal dismissed and lv denied* 95 NY2d 898). Nevertheless, as respondent correctly concedes, the loss of 12 months' good time imposed is contrary to a prior order of Supreme Court directing that, upon a new hearing, the Hearing Officer could not impose any greater penalty than that imposed after the original hearing, i.e., six months' loss of good time. As a result, the recommended loss of good time must be vacated. We therefore modify the determination accordingly, and we remit the matter to respondent for a determination of the loss of good time that is in compliance with Supreme Court's prior order.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1349

CAF 12-01059

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

IN THE MATTER OF ELIZABETH A. JEFFERY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

GEOFFREY R. SPRAGUE, RESPONDENT-RESPONDENT.

MICHELLE A. COOKE, BATH, FOR PETITIONER-APPELLANT.

WENDY L. GOULD, BATH, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Steuben County (Joseph W. Latham, J.), dated January 3, 2012 in a proceeding pursuant to Family Court Act article 4. The order denied the petition for an increase in child support.

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

Memorandum: Petitioner mother appeals from an order of Family Court that granted respondent father's objections to the order of the Support Magistrate and denied the petition for an increase in child support. We reject the mother's contention that, in determining whether to grant the objections to the Support Magistrate's order, the court was limited to determining whether the Support Magistrate abused his discretion. Although "[t]he greatest deference should be given to the decision of the [Support Magistrate,] who is in the best position to assess the credibility of the witnesses and the evidence proffered" (*Matter of DeNoto v DeNoto*, 96 AD3d 1646, 1648 [internal quotation marks omitted]), the court "was empowered to 'make, with or without holding a new hearing, [its] . . . own findings of fact' " (*Matter of Boyer v Boyer*, 261 AD2d 968, 968, quoting Family Ct Act § 439 [e] [ii]; *see Matter of Kellogg v Kellogg*, 300 AD2d 996, 996). Thus, the court had broad authority to review the order of the Support Magistrate and to grant a party's objections to the order upon determining that it would impose a hardship on that party. On this record, we conclude that the court properly concluded that using the father's 2010 income, which was higher than his 2011 income, to determine that he could afford to pay more than double the amount of his previous child support payments would result in a nearly impossible financial situation for the father at his 2011 earning level. Furthermore, "[c]ourts have 'considerable discretion to attribute or impute an annual income to a parent' " (*Winnert-Marzinek v Winnert*, 291 AD2d 921, 922), and we conclude that the court did not

abuse its discretion in declining to impute income to the father.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1360

CA 12-00504

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

DEBRA J. MILLER, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF EDWARD M. MILLER, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SAVARINO CONSTRUCTION CORPORATION AND 26 MISSISSIPPI STREET LLC, DEFENDANTS-RESPONDENTS.

SPADAFORA & VERRASTRO, LLP, BUFFALO (RICHARD E. UPDEGROVE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (TARA E. WATERMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered December 8, 2011. The order granted defendants' motion for summary judgment.

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

Memorandum: Plaintiff commenced this personal injury and wrongful death action after plaintiff's decedent suffered a fatal heart attack at a building (building) allegedly owned by defendant 26 Mississippi Street LLC (26 Mississippi) that was undergoing renovation and rehabilitation from a warehouse into a mixed-use facility (hereafter, project). Decedent's employer had been hired to provide temporary heat to the building, and defendant Savarino Construction Corporation (Savarino Construction) had been hired as the construction manager with respect to the project. Decedent suffered the heart attack after ascending five flights of stairs to reach the uppermost floor of the building, where a temporary heat cannon that decedent and a coworker were to attach to a rigid natural gas line was located. Supreme Court granted defendants' motion for summary judgment dismissing the complaint against them, and we affirm.

We reject at the outset defendants' contention that plaintiff abandoned her appeal with respect to 26 Mississippi (*cf. Ciesinski v Town of Aurora*, 202 AD2d 984, 984). Turning to the merits, we agree with defendants that the court properly granted those parts of the motion for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action.

" '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' " (*Fisher v WNY Bus Parts, Inc.*, 12 AD3d 1138, 1139, quoting *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877; *see Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425, 1427). "[W]here, as here, a plaintiff's injuries stem not from the manner in which the work was being performed[ ] but, rather, from a dangerous condition on the premises, [an owner or] general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (*Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1416 [internal quotation marks omitted]; *see Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 2 AD3d 1345, 1349).

Here, defendants submitted in support of their motion an abstract of title for the property on which the building was located (abstract), which establishes that nonparty Michigan Street Development, LLC (Michigan Street), not 26 Mississippi, owned the building at all times relevant to this matter. Defendants therefore met their initial burden on that part of the motion concerning the Labor Law § 200 and common-law negligence causes of action with respect to 26 Mississippi (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562; *Biggs v Hess*, 85 AD3d 1675, 1675), and plaintiff failed to raise a triable issue of fact in opposition (*cf. Palermo v Taccone*, 79 AD3d 1616, 1620; *see generally Zuckerman*, 49 NY2d at 562). With respect to Savarino Construction, defendants submitted the contract pursuant to which Michigan Street retained Savarino Construction to serve as the construction manager at the project (contract). Under the contract, Savarino Construction was responsible for, inter alia, coordinating the activities and safety programs of the contractors at the project, but had no control over the acts, omissions or safety precautions of the contractors. Thus, inasmuch as Savarino Construction was not responsible either for the performance of that work or the premises on which that work was undertaken, defendants met their initial burden on that part of the motion concerning the Labor Law § 200 and common-law negligence causes of action with respect to Savarino Construction (*see Ozimek*, 83 AD3d at 1416; *see generally Zuckerman*, 49 NY2d at 562), and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman*, 49 NY2d at 562). Even assuming, arguendo, that the bill of particulars specified that decedent's death arose from the method of decedent's work rather than the condition of the building, we conclude that the result would be the same. Defendants established as a matter of law that they did not have the authority to supervise or control the methods and manner of decedent's work, and plaintiff failed to raise a triable issue of fact sufficient to defeat that part of the motion concerning the Labor Law § 200 and common-law negligence causes of action (*see John v Klewin Bldg. Co., Inc.*, 94 AD3d 1502, 1503).

We further conclude that the court properly granted that part of the motion seeking summary judgment dismissing the Labor Law § 241 (6) cause of action. Here, through the submission of the abstract and the contract, defendants established that 26 Mississippi is not an "owner" within the meaning of Labor Law § 241 (6) (*see generally Scaparo v*

Village of Ilion, 13 NY3d 864, 866), and plaintiff failed to raise an issue of fact in opposition (*see generally Zuckerman*, 49 NY2d at 562). Moreover, we conclude that there is an issue of fact whether decedent was engaged in a protected activity under section 241 (6) (*cf. Love v New York State Thruway Auth.*, 17 AD3d 1000, 1002-1003; *see generally Zuckerman*, 49 NY2d at 562), but we also conclude with respect to both defendants that the court properly granted that part of their motion seeking summary judgment dismissing the section 241 (6) cause of action because plaintiff failed to support that cause of action by alleging the violation of a qualifying provision of the Industrial Code (*see Piazza*, 2 AD3d at 1348). In her bill of particulars, plaintiff appeared to premise her section 241 (6) cause of action on the alleged violation of 12 NYCRR 23-2.7 (a), but on appeal plaintiff abandoned any contention with respect to that Industrial Code section, and we therefore do not address it (*see Brownell*, 89 AD3d at 1427; *Ciesinski*, 202 AD2d at 984). "The violations of the Industrial Code alleged by plaintiff for the first time on appeal are not properly before us . . . , and plaintiff otherwise failed to allege the violation of any concrete specifications of the Industrial Code" (*Cody v Garman*, 266 AD2d 850, 851; *see Thompson v Marotta*, 256 AD2d 1124, 1125). Plaintiff's contention that she may rely on the violation of New York State Building Code 3002.4 to support the section 241 (6) cause of action is also raised for the first time on appeal (*see Cody*, 266 AD2d at 851), and in any event lacks merit (*cf. Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 n; *Millard v City of Ogdensburg*, 274 AD2d 953, 954).

Finally, we agree with defendants that the court properly granted those parts of their motion seeking dismissal of the Labor Law causes of action against Savarino Construction because Savarino Construction was not a statutory agent of an owner or contractor (*see Brownell*, 89 AD3d at 1427-1428; *Uzar v Louis P. Ciminelli Constr. Co., Inc.*, 53 AD3d 1078, 1079).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1368

KA 11-00688

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID HECK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered March 25, 2011. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) for having intentionally caused his mother's death at their home in the Town of Tonawanda, contending that reversal is required for a number of reasons. We first address defendant's challenges to the weight and sufficiency of the evidence of his guilt (*see generally People v Bleakley*, 69 NY2d 490, 495). "In assessing legal sufficiency, a court must determine whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial" when that evidence is viewed in the light most favorable to the People (*People v Cahill*, 2 NY3d 14, 57 [internal quotation marks omitted]; *see People v Contes*, 60 NY2d 620, 621). Here, the proof of defendant's guilt is not only legally sufficient to convict, it is also fairly characterized as overwhelming. The evidence at trial established that defendant failed to notify police of his mother's death for several days; falsely stated to his neighbors that she was alive despite his knowledge of her death; staged the crime scene to make it appear that his mother had accidentally fallen and hit her head and then proceeded to tailor his account of her death accordingly; admitted to a fellow jail inmate while awaiting trial that he had killed his mother with a hammer; and had both a motive and the opportunity to commit the crime. In addition, a hammer was missing from the otherwise well-stocked toolbox

in defendant's home, and forensic evidence conclusively established that the victim did not die from a fall, as defendant had originally claimed, but rather from 13 blows to her head.

We similarly reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Danielson*, 9 NY3d 342, 348-349). Aside from the incriminating evidence set forth above, defendant's theory of the case at trial, which was not that his mother had died from a fall but rather that an unknown intruder had killed her while he was out shopping, was unsupported by any credible evidence. Defendant was the only person who had lawful access to the house apart from his mother, and there was no evidence that the house had been broken into or that anything had been stolen from it. Moreover, the fact that the victim was struck 13 times in the head is consistent with the People's theory that this was a crime of passion and not, as defense counsel suggested, the act of an intruder who unexpectedly encountered the occupant of a house in the course of a burglary.

We next consider defendant's challenges to the court's refusal to suppress his various statements to police. We initially conclude that the police lawfully entered defendant's home pursuant to the emergency exception to the warrant requirement of the Fourth Amendment to the United States Constitution and art I, § 12 of the New York Constitution (*see People v Mitchell*, 39 NY2d 173, 177-178, *cert denied* 426 US 953; *see also Brigham City v Stuart*, 547 US 398, 406). Here, officers were responding to a 911 call from someone in that house who was heard moaning and groaning but who did not otherwise speak to the operator. Thus, defendant's statements to police at his home were not the fruit of an unlawful entry, and the court therefore properly refused to suppress them (*see People v Stergiou*, 279 AD2d 387, 387, *lv denied* 96 NY2d 835). We note that defendant does not contend that he was subjected to custodial interrogation at the home.

Defendant further challenges the admissibility of statements he made to police in the absence of *Miranda* warnings while in a private room at Kenmore Mercy Hospital (KMH), where he had been taken for treatment of a prior self-inflicted wound following the discovery of his mother's body. Although defendant argues that he was in custody at KMH and was thus entitled to *Miranda* warnings before being interrogated there (*see generally People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851), the record does not disclose whether, at the time he made the statements at issue, he was in the custody of KMH mental health authorities pursuant to Mental Hygiene Law § 9.39 (a) (1) or whether, conversely, he was in the custody of police pursuant to section 9.41 (*see Gonzalez v State of New York*, 121 Misc 2d 210, 214-215, *revd on other grounds* 110 AD2d 810, *appeal dismissed* 67 NY2d 647). While the interplay of those provisions might circumscribe the applicability of the standard *Yukl* analysis that defendant urges us to undertake (*see People v Ripic*, 182 AD2d 226, 233, *appeal dismissed* 81 NY2d 776), we ultimately need not consider the issue further because, for the reasons that follow, we conclude that any error in admitting the KMH statements is harmless under these circumstances.

The error, if any, is harmless primarily because defendant repeated the purportedly inadmissible statements approximately 3½ hours later to another police officer after he was transferred to Erie County Medical Center (ECMC) and advised of his *Miranda* rights. Thus, even if the KMH statements should have been suppressed, the ECMC statements would still have been properly admitted at trial; given the passage of time, the involvement of different police personnel, and the change in location, there had been a "sufficiently 'definite, pronounced break' " in the questioning to dissipate any taint of a prior *Miranda* violation upon the later statements (*People v Paulman*, 5 NY3d 122, 130-132, quoting *People v Chapple*, 38 NY2d 112, 115). We also note that, in both his KMH and ECMC statements, defendant vehemently denied any involvement in the victim's death and made no direct admissions of guilt. There is therefore no reasonable possibility that defendant would have been acquitted had his non-incriminating statements at KMH been suppressed and, because the evidence of defendant's guilt is otherwise overwhelming, we conclude that any error in admitting those statements is harmless (*see generally People v Crimmins*, 36 NY2d 230, 237; *cf. People v Foster*, 72 AD3d 1652, 1655, *lv dismissed* 15 NY3d 750).

We reject defendant's further contention that the court improperly permitted the introduction of demonstrative evidence at trial in the form of a hammerhead model (*see People v Gorham*, 72 AD3d 1108, 1110, *lv denied* 15 NY3d 773; *Rojas v City of New York*, 208 AD2d 416, 417, *lv denied* 86 NY2d 705; *see generally People v Del Vermo*, 192 NY 470, 482-483). We likewise reject defendant's contention that the court improperly received the victim's autopsy photographs in evidence. The photographs were relevant to establish the cause of her death and to counter defendant's statement to the police at his home that she had died from an accidental fall (*see People v Pobliner*, 32 NY2d 356, 369-370, *rearg denied* 33 NY2d 657, *cert denied* 416 US 905; *People v Alvarez*, 38 AD3d 930, 931-932, *lv denied* 8 NY3d 981).

Defendant's contention that he was deprived of a fair trial by prosecutorial misconduct during summation is unpreserved for our review (*see People v Romero*, 7 NY3d 911, 912). In any event, although comments by the prosecutor denigrating the defense's theory of the case were indeed improper (*see People v Gordon*, 50 AD3d 821, 822), they were not so pervasive or egregious as to deprive defendant of a fair trial (*see People v Jacobson*, 60 AD3d 1326, 1328, *lv denied* 12 NY3d 916). Nor can it be said that defendant received ineffective assistance of counsel due to the lack of any objection to those improper comments. Rather, defense counsel provided defendant with meaningful representation throughout the proceedings (*see generally People v Baldi*, 54 NY2d 137, 147; *cf. People v Fisher*, 18 NY3d 964, 966-967).

We have considered defendant's remaining contentions and conclude that they lack merit.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1370

KA 11-00316

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY SNYDER, DEFENDANT-APPELLANT.

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

JEREMY SNYDER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Herkimer County Court (Patrick L. Kirk, J.), rendered January 14, 2011. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, rape in the second degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and as a matter of discretion in the interest of justice and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, rape in the first degree (Penal Law § 130.35 [1]). Prior to trial, defendant sought a *Sandoval* ruling precluding the prosecutor from questioning him concerning three prior convictions if he were to testify at trial, including a conviction of sexual abuse in the first degree based upon acts occurring more than nine years prior to trial. With respect to that conviction and defendant's subsequent conviction for failure to comply with the requirements of the Sex Offender Registration Act (Correction Law § 168 *et seq*.), County Court ruled that the prosecutor could ask defendant "if he was convicted of two felonies since the date of [an earlier] conviction without mentioning either one of those, because of the fact that they do relate to the two charges that are presently before the Court," i.e., rape in the first and second degrees. During cross-examination, defendant testified that he had moved out of the residence that was the scene of the crime because he did not approve of the activities that were taking place there. The prosecutor asked defendant if he "didn't approve, because [he was] generally a law-abiding person," and defendant replied that "[n]obody's perfect, sir. We all make mistakes." The prosecutor then asked "[d]oes that mean yes, you are generally a law-abiding person, or otherwise," and defendant replied "[f]or the past three years of my life, yes, sir."

The prosecutor thereupon elicited testimony from defendant that he would never harm a teenager such as the victim, and that he would never force himself upon another person sexually. Finally, the prosecutor was permitted to ask, over objection, whether defendant had been convicted of sexual abuse in the first degree. We agree with defendant that the prosecutor violated the court's *Sandoval* ruling. Consequently, we reverse the judgment of conviction and grant a new trial.

Initially, we note that defendant failed to preserve for our review his contentions that the prosecutor violated the court's *Sandoval* ruling with respect to the earlier questions in the above line of inquiry (*see* CPL 470.05 [2]), although, as noted, he objected to the latter question. We exercise our power to review the merits of his contentions with respect to the earlier questions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

The prosecutor, despite the court's *Sandoval* ruling, asked a series of general questions regarding prior bad acts by defendant, and then questioned him specifically regarding the precluded prior conviction. The Court of Appeals has long "recognized that the 'cross-examination with respect to crimes or conduct similar to that of which the defendant is presently charged may be highly prejudicial' " (*People v Smith*, 18 NY3d 588, 593, quoting *People v Sandoval*, 34 NY2d 371, 377), and indeed the court precluded questioning regarding the prior sexual conviction to obviate any such prejudice. The prosecutor's initial questions with respect to whether defendant led a law-abiding life were in violation of the court's *Sandoval* ruling, which limited the prosecutor to asking certain specific questions about defendant's prior convictions. The prosecutor circumvented that ruling by asking the general questions, and he then used defendant's responses as the basis for asking specific follow-up questions that elicited testimony regarding the precluded sexual abuse conviction. Contrary to the People's contention, defendant did not open the door to questioning on the subject of his prior sexual abuse conviction (*cf. People v Rios*, 166 AD2d 616, 618, *lv denied* 77 NY2d 842). A defendant opens the door to cross-examination concerning previously-precluded evidence where, inter alia, "defendant's testimony was meant to elicit an incorrect jury inference" (*People v Cooper*, 92 NY2d 968, 969). Here, defendant's testimony that he had been a law-abiding citizen for the last three years was, at "best, ambiguous and cannot fairly be construed, as the People urge, as assertions by defendant that he had not previously committed" the crime of sexual abuse approximately nine years earlier (*People v Moore*, 92 NY2d 823, 825). Moreover, although defendant later testified that he would never harm a teenager such as the victim and that he would never force himself upon another person, the questions that elicited those responses were in violation of the court's *Sandoval* ruling. The People may not elicit a general statement by asking questions that violate the *Sandoval* ruling for the sole purpose of circumventing that ruling. The court therefore erred in concluding that defendant opened the door to questioning about the prior sexual abuse conviction (*cf. People v Ramirez*, 60 AD3d 415, 416, *lv denied* 12 NY3d 928; *People v Santmyer*, 231 AD2d 956, 956; *People v*

Mays, 187 AD2d 535, 535, *lv denied* 81 NY2d 843).

Defendant also contends that the indictment was jurisdictionally defective because it failed to specify the date upon which the crimes alleged in the indictment occurred. We reject that contention. The indictment alleged that the rape and endangering the welfare of a 13-year-old girl occurred during November 2008. The four-week time period alleged is reasonable under the circumstances (*see People v Coapman*, 90 AD3d 1681, 1682, *lv denied* 18 NY3d 956; *People v Aaron V.*, 48 AD3d 1200, 1201, *lv denied* 10 NY3d 955; *People v Risolo*, 261 AD2d 921, 921-922).

Defendant further contends that the court erred in refusing to subpoena certain records regarding counseling received by the victim. Inasmuch as the judgment of conviction must be reversed, we direct that the court conduct an in camera review of the records to ascertain whether they relate to the crimes charged in the indictment (*see generally People v Tissois*, 72 NY2d 75, 77-78; *People v Gissendanner*, 48 NY2d 543, 549-550).

Contrary to defendant's contentions in his pro se supplemental brief, the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495) and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). In view of our determination to reverse the judgment and grant a new trial, we do not address defendant's remaining contentions, including those raised in his pro se supplemental brief.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1381

CA 12-01051

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

IN THE MATTER OF NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

AMALGAMATED TRANSIT UNION LOCAL UNION 1342 AND VINCENT G. CREHAN, PRESIDENT/BUSINESS AGENT, AMALGAMATED TRANSIT UNION LOCAL UNION 1342, RESPONDENTS-RESPONDENTS.

DAVID J. STATE, BUFFALO, JAECKLE FLEISCHMANN & MUGEL, LLP (RANDALL M. ODZA OF COUNSEL), FOR PETITIONER-APPELLANT.

REDEN & O'DONNELL, LLP, BUFFALO (JOSEPH E. O'DONNELL OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered February 14, 2012. The order denied the petition to stay arbitration and granted the cross motion of respondents to compel arbitration.

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

Memorandum: This case involves a labor dispute arising from a collective bargaining agreement (CBA) between petitioner, a public benefit corporation that provides bus and light rail transit service, and respondent Amalgamated Transit Union Local Union 1342 (Local 1342), which represents a unit of petitioner's employees. Petitioner appeals from an order denying its petition to stay arbitration and granting respondents' cross motion to compel arbitration.

Since 1946, petitioner and Local 1342 have been parties to a series of CBAs, the most recent of which covered the period from August 1, 2006 to July 31, 2009. In May 2009, shortly before the most recent CBA expired, petitioner notified Local 1342 that it was exercising its right to terminate the CBA. In August 2011, following unsuccessful negotiations between the parties, Local 1342 demanded that the terms and conditions of a new CBA be determined by compulsory "interest arbitration." Petitioner rejected that request and commenced this proceeding seeking a stay of arbitration pursuant to CPLR article 75. In cross-moving for an order compelling arbitration, respondents contended that a right to compulsory interest arbitration

was conferred by a so-called Section 13 (c) Agreement (Agreement) entered into by the parties in 1973 pursuant to the federal Urban Mass Transportation Act of 1964 (UMTA). Supreme Court agreed with respondents that the Agreement entitled Local 1342 to compulsory interest arbitration. That was error. We thus agree with petitioner that the court should have granted its petition and denied the cross motion.

As a preliminary matter, we reject petitioner's contention that our 1992 decision in *Matter of Local Union 1342 of Amalgamated Tr. Union v Niagara Frontier Tr. Metro Sys.* (183 AD2d 355, *lv denied* 81 NY2d 710) (*ATU*) collaterally estopps Local 1342 from now seeking compulsory interest arbitration. *ATU* concerned the interplay between sections 22 and 23 of the CBA, not the general question implicated here, i.e., whether compulsory arbitration is *ever* available to determine the terms of a *new* CBA or, more specifically, whether such arbitration is available under the Agreement. Thus, because the issues in *ATU* are not identical to those raised in this case, our decision in *ATU* does not have collateral estoppel effect here (*see generally Buechel v Bain*, 97 NY2d 295, 303-304, *cert denied* 535 US 1096).

We nevertheless agree with petitioner that the Agreement does not entitle Local 1342 to compulsory interest arbitration. Section 13 (c) agreements are required by the UMTA in order to preserve (but not enhance) the existing union rights of transit employees when federal funds are used by public entities to purchase private transit companies (*see Jackson Tr. Auth. v Local Div. 1285, Amalgamated Tr. Union, AFL-CIO-CLC*, 457 US 15, 17). As the Second Circuit stated, legislative history "makes it reasonably clear that [UMTA section] 13 (c) was intended to preserve the rights of employees under existing collective bargaining agreements and to maintain the status quo with respect to the employer's obligation to bargain collectively, *not to create new rights for the employees or enhance existing ones*" (*Division 580, Amalgamated Tr. Union, AFL-CIO v Central N.Y. Regional Transp. Auth.*, 556 F2d 659, 662 [emphasis added]). Thus, the Agreement could not have conferred a right to compulsory interest arbitration that, indisputably, did not exist prior to its adoption in 1973 and has not been included in any subsequent CBA.

Moreover, we reject respondents' contention that paragraph 13 of the Agreement specifically authorizes compulsory interest arbitration. Although certain language in paragraph 13, if read in isolation, might be construed to create a right to compulsory interest arbitration, paragraphs 19 and 28 make clear that the parties' previously existing arbitration rights (which, as noted, did not include compulsory interest arbitration) would not be *expanded* by the Agreement. It is therefore apparent from a reading of the entire Agreement that a right to compulsory interest arbitration was not created thereby. Rather, consistent with the purpose of section 13 (c) of the UMTA, the Agreement was designed merely to maintain the status quo with respect to the parties' collective bargaining framework.

Nor are we persuaded by respondents' contention that a footnote

in the 1975 Model Section 13 (c) Agreement, which largely tracks the language of the Agreement here, demonstrates that the parties agreed to compulsory interest arbitration in 1973. Although the footnote references "interest arbitration proceedings," it does not necessarily follow that the parties thereby agreed to be compelled to participate in such proceedings as part of each contract negotiation cycle. We note that the parties may agree to participate voluntarily in interest arbitration on an ad hoc basis, as they did, for example, in 1981, and that may well explain the reference to interest arbitration in the footnote. We also note that respondents placed no emphasis on the footnote before Supreme Court and made no mention of it in the argument portion of their brief on appeal; instead, the footnote is mentioned only in the statement of facts, while the argument focuses on the claim that interest arbitration is mandated by paragraph 13 of the Agreement. We address the contention only because respondents' attorney placed heavy emphasis on the footnote during oral argument.

In any event, even assuming, arguendo, that the Agreement entitles Local 1342 to interest arbitration over petitioner's objection, we would conclude, as we did in *ATU*, that such a result "contravenes public policy, both by compelling a public entity, which has broad responsibilities to the entire population of the State, to be bound forever to nonmandatory subjects of bargaining, i.e., interest arbitration, and by encumbering its ability to negotiate an entirely new collective bargaining agreement which reflects the changing requirements and mandates of the public interest" (*ATU*, 183 AD2d at 361-362).

In light of our determination, we need not address petitioner's remaining contentions.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1391

CA 12-01134

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

CALVIN BAKER, PLAINTIFF-APPELLANT,

V ORDER

FRANK MURANO AND DONNA MURANO,
DEFENDANTS-RESPONDENTS.

FRANK MURANO AND DONNA MURANO,
THIRD-PARTY PLAINTIFFS,

V

WILLIAM PATTON, DOING BUSINESS AS PATTON
HOME IMPROVEMENT, THIRD-PARTY DEFENDANT.

SEGAR & SCIORTINO PLLC, ROCHESTER (STEPHEN A. SEGAR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered December 9, 2011. The judgment and order, insofar as appealed from, denied plaintiff's motion for partial summary judgment.

Now, upon the stipulation of settlement and discontinuance of action signed by the attorneys for the parties and filed in the Monroe County Clerk's Office on September 17, 2012,

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1423

KA 11-01777

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RANDA BILLS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered May 2, 2011. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed and as modified the judgment is affirmed, and the matter is remitted to Cattaraugus County Court for resentencing.

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of two counts of driving while intoxicated as a felony (Vehicle and Traffic Law §§ 1192 [2]; 1193 [1] [c]). Although defendant validly waived her right to appeal, we agree with defendant that her sentence must be vacated because the record establishes that County Court misapprehended its discretion in imposing a $1,000 fine on each count (*see People v Figueroa*, 17 AD3d 1130, 1131, *lv denied* 5 NY3d 788; *People v John*, 288 AD2d 848, 850, *lv denied* 97 NY2d 705). The court's statement, "I will have to fine you," reflects "the court's misapprehension that it had no ability to exercise its discretion in determining whether to impose a fine" (*People v Kropp*, 49 AD3d 1339, 1340 [internal quotation marks omitted]; *see Figueroa*, 17 AD3d at 1131; *People v Fehr*, 303 AD2d 1039, 1040, *lv denied* 100 NY2d 538). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing. In light of our determination, we do not address defendant's remaining contention.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1424

KA 11-00988

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH SNOW, 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 Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered March 17, 2011. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: 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.*). On appeal, defendant's sole contention is that Supreme Court erred in denying his request for a downward modification of his presumptive risk level. We reject that contention inasmuch as defendant failed to present clear and convincing evidence of special circumstances warranting a downward departure (*see People v Jefferson*, 74 AD3d 1756, 1756, *lv denied* 15 NY3d 709; *People v Wragg*, 41 AD3d 1273, 1274, *lv denied* 9 NY3d 809).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1425

KA 11-00012

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNNY ROGERS, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered November 19, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that the 19-year preindictment delay violated his right to a speedy trial and his due process right to prompt prosecution. We reject that contention. In examining the *Taranovich* factors (*People v Taranovich*, 37 NY2d 442, 445), we conclude that, although the 19-year preindictment delay was substantial, the nature of the underlying charge was serious, and defendant remained at liberty until he was indicted. Moreover, the People met their burden of establishing good cause for the delay (*see People v Decker*, 13 NY3d 12, 14-16; *People v Chatt*, 77 AD3d 1285, 1285, *lv denied* 17 NY3d 793). Indeed, they established that there was insufficient evidence to charge defendant shortly after the crimes occurred, and it was not until the statements of three witnesses were obtained and DNA testing was completed that the People brought the charges against defendant. The People's decision to bring the charges against defendant many years later "was not an abuse of the significant amount of discretion that the People must of necessity have, and there is no indication that the decision was made in anything other than good faith" (*Decker*, 13 NY3d at 15). We further conclude that, while the delay may have caused some degree of prejudice to defendant, "there is no indication that the defense was significantly impaired by the delay" (*id.*). Contrary to defendant's further contention, there was no need for a *Singer* hearing (*People v Singer*, 44 NY2d 241, 255) because no issue of fact exists regarding the cause of the delay and because the record provided County Court with a sufficient basis to determine whether the

delay was justified (*see People v Gathers*, 65 AD3d 704, 704, *lv denied* 13 NY3d 859; *cf. People v Watts*, 78 AD2d 1008, 1009).

We reject defendant's contention that the court abused its discretion in denying his request for an adjournment after the People turned over alleged *Brady* material less than a week before the trial. " '[T]he court's exercise of discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice' " (*People v Peterkin*, 81 AD3d 1358, 1360, *lv denied* 17 NY3d 799). Even assuming, arguendo, that the interdepartmental memo of the police department was *Brady* material, we conclude that defendant had a meaningful opportunity to use it at trial and thus was not prejudiced by the denial of his request for an adjournment.

Defendant next contends that the court erred in denying his challenges for cause to two prospective jurors. Initially, we note that, contrary to the People's contention, defendant exhausted all of his peremptory challenges, and thus the issue is properly before us (*see* CPL 270.20 [2]). On the merits, however, we agree with the People that the court properly denied the challenges. It is well settled that "a prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the prospective juror states unequivocally on the record that he or she can be fair and impartial" (*People v Chambers*, 97 NY2d 417, 419; *see People v Harris*, 19 NY3d 679, 685). Here, while the two prospective jurors stated that they knew victims of domestic violence, nothing said by them on that issue raised a serious doubt as to their ability to render an impartial verdict (*see People v Turner*, 6 AD3d 1190, 1190, *lv denied* 3 NY3d 649). Their responses were unequivocal despite their use of the word "think" (*see People v Odum*, 67 AD3d 1465, 1465, *lv denied* 14 NY3d 804, 15 NY3d 755, *cert denied* ___ US ___, 131 S Ct 326). The second prospective juror at issue also made statements indicating that he would find a police officer more credible than someone else. Thus, in order to avoid excusing that juror, it was incumbent upon the court to elicit an unequivocal assurance of the prospective juror's ability to be impartial (*see People v Johnson*, 17 NY3d 752, 753), which the court here did. The court asked the prospective juror at issue if he would follow an instruction that he was not to give any greater weight to a police officer's testimony, and the prospective juror responded, "yes. If it was an order, yes, I would."

Contrary to defendant's further contention, the court properly admitted testimony regarding prior incidents of domestic violence by defendant against the victim, i.e., his wife, because it was probative of defendant's motive, intent, and identity (*see People v Kelly*, 71 AD3d 1520, 1521, *lv denied* 15 NY3d 775; *People v Colbert*, 60 AD3d 1209, 1212; *People v Parsons*, 30 AD3d 1071, 1073, *lv denied* 7 NY3d 816). The evidence of domestic violence perpetrated by defendant against a witness was also properly admitted because it was inextricably interwoven with that witness's testimony (*see generally People v Ely*, 68 NY2d 520, 529). Additionally, contrary to defendant's contention, the court weighed the probative value of the

domestic violence evidence against its prejudicial impact (*see People v DiTucci*, 81 AD3d 1249, 1250, *lv denied* 17 NY3d 794), and the prejudicial impact of that evidence was minimized by the court's limiting instructions (*see People v Carson*, 4 AD3d 805, 806, *lv denied* 2 NY3d 797).

Defendant failed to preserve for our review his contention that hearsay testimony from a witness regarding the victim's pregnancy violated his right of confrontation (*see People v Rivera*, 33 AD3d 450, 450-451, *lv denied* 7 NY3d 928) and, in any event, that contention lacks merit inasmuch as defendant opened the door to such testimony (*see People v Reid*, 19 NY3d 382, 388). Contrary to defendant's contention, his right to remain silent was not violated by the testimony of a police officer that defendant waived his *Miranda* warnings and provided an oral statement, but refused to provide an affidavit (*see People v Hendricks*, 90 NY2d 956, 957; *People v Beecham*, 74 AD3d 1216, 1217, *lv denied* 15 NY3d 918, *reconsideration denied* 16 NY3d 856). Defendant's further contention that the testimony of another police officer also violated his right to remain silent is not preserved for our review (*see People v Larsen*, 145 AD2d 976, 977, *lv denied* 73 NY2d 1017), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant next contends that the court erred in refusing to admit in evidence a prior inconsistent statement of a prosecution witness. The contents of that affidavit were essentially put before the jury during cross-examination of the witness, and the decision whether to admit the affidavit in evidence was therefore within the court's discretion (*see People v Piazza*, 48 NY2d 151, 164-165). We perceive no abuse of discretion in the court's refusal to do so (*see People v Lewis*, 277 AD2d 1022, 1022-1023, *lv denied* 96 NY2d 802).

Defendant also contends that certain conduct by the prosecutor denied him a fair trial. We agree with defendant that it was improper for the prosecutor to imply during the testimony of a witness that defendant had an obligation to call another witness (*see People v Grice*, 100 AD2d 419, 422), but we conclude that the court's curative instruction was sufficient to alleviate any prejudice to defendant (*see People v Smith*, 88 AD3d 487, 488; *People v Peterson*, 71 AD3d 1419, 1420, *lv denied* 14 NY3d 891). Additionally, even assuming, arguendo, that certain comments by the prosecutor on summation impermissibly shifted the burden of proof (*see People v Grant*, 94 AD3d 1139, 1141), we conclude that the comments were not so pervasive or egregious as to deny defendant a fair trial (*see People v Caldwell*, 98 AD3d 1272, 1273). Defendant's further contention that the prosecutor failed to correct allegedly false testimony by one of the expert witnesses is not preserved for our review (*see People v Golson*, 93 AD3d 1218, 1219-1220, *lv denied* 19 NY3d 864), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that the evidence is legally

insufficient to establish that he was the perpetrator (*see generally People v Bleakley*, 69 NY2d 490, 495). The evidence established that defendant made admissions to several different people that he killed his wife. We further conclude that, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Inasmuch as there was direct evidence of defendant's guilt consisting of his admissions to several witnesses that he killed his wife, we reject defendant's further contention that the court erred in failing to give a circumstantial evidence charge (*see People v Casper*, 42 AD3d 887, 888, *lv denied* 9 NY3d 990).

Defendant failed to preserve for our review his contention that the testimony of the experts violated his right of confrontation (*see People v Encarnacion*, 87 AD3d 81, 89, *lv denied* 17 NY3d 952) and, in any event, that contention is without merit. Those experts relied on an autopsy report and DNA paternity report, respectively, but the actual reports were not admitted in evidence. "Out-of-court statements that are related by [an] expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause" (*Williams v Ilinois*, ___ US ___, ___, 132 S Ct 2221, 2228 [June 18, 2012]).

Defendant was not denied a fair trial based upon cumulative error (*see People v Rumph*, 93 AD3d 1346, 1348, *lv denied* 19 NY3d 967), and the court did not err when it sentenced defendant. The court did not base its sentence on a crime of which defendant had been acquitted (*cf. People v Wilkonson*, 281 AD2d 373, 374, *lv denied* 96 NY2d 926), but rather sentenced him based on all the relevant facts and circumstances surrounding the crime of which he was convicted (*see People v La Veglia*, 215 AD2d 836, 837). We have examined defendant's remaining contentions and conclude that they are without merit.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1427

KA 12-00337

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. CADY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, THE WOLFORD LAW FIRM, LLP (JAMES A. HOBBS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered January 12, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, those parts of the motion seeking to suppress tangible property and statements are granted, the indictment is dismissed, and the matter is remitted to Supreme Court, Monroe County, for proceedings pursuant to CPL 470.45.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b], [3]) and one count of criminal possession of a weapon in the third degree (§ 265.02 [1]). In appeal No. 2, defendant appeals from a resentence on his conviction.

With respect to appeal No. 1, defendant contends that Supreme Court erred in refusing to suppress the handgun that he discarded while being pursued by the police and his subsequent statements to the police. According to defendant, the police lacked a reasonable suspicion to justify the pursuit. We agree.

At the suppression hearing, the People presented evidence that, at approximately 11:00 p.m. on January 31, 2009, police officers were patrolling the Dayton Street area in the City of Rochester in an attempt to locate an individual who had shot a police officer that afternoon. Numerous officers were involved in the investigation, which involved establishing perimeters and engaging people who might

have information about the shooting or the suspect. Defendant was observed by police walking in the area of Hudson Avenue and Avenue D, which was within a block or two of where the shooting occurred. As the People acknowledge, defendant was not a suspect in the shooting. Two uniformed officers approached defendant and attempted to speak with him, whereupon defendant said, "What, we can't go to the store?" Defendant had been walking toward a store that was open for business at that time. Before the officers were able to answer defendant's question, defendant turned his back on them, made a gesture with his arms toward his waistband, and began running. The police pursued defendant on foot and observed him discard a handgun from his pocket as he was being tackled by a fellow officer.

As an initial matter, we note that defendant does not dispute that the police had an objective credible reason to approach defendant to request information about the shooting, thereby rendering the police encounter lawful at its inception (*see People v De Bour*, 40 NY2d 210, 220). "With respect to the subsequent pursuit, it is well settled that 'the police may pursue a fleeing defendant if they have a reasonable suspicion that defendant has committed or is about to commit a crime' " (*People v Riddick*, 70 AD3d 1421, 1422, *lv denied* 14 NY3d 844, quoting *People v Martinez*, 80 NY2d 444, 446). Flight alone, however, " 'is insufficient to justify pursuit because an individual has a right "to be let alone" and refuse to respond to police inquiry' " (*id.*, quoting *People v Holmes*, 81 NY2d 1056, 1058). Nevertheless, "defendant's flight in response to an approach by the police, *combined with other specific circumstances indicating that the suspect may be engaged in criminal activity*, may give rise to reasonable suspicion, the necessary predicate for police pursuit" (*People v Sierra*, 83 NY2d 928, 929 [emphasis added]; *see Riddick*, 70 AD3d at 1422). "It is further well settled that actions that are 'at all times innocuous and readily susceptible of an innocent interpretation . . . may not generate a founded suspicion of criminality' " (*Riddick*, 70 AD3d at 1422).

Here, "the fact that defendant reached for his waistband, absent any indication of a weapon such as the visible outline of a gun or the audible click of the magazine of a weapon, does not establish the requisite reasonable suspicion that defendant had committed or was about to commit a crime" (*id.* at 1422-1423; *see Sierra*, 83 NY2d at 930; *cf. People v Bachiller*, 93 AD3d 1196, 1197-1198, *lv dismissed* 19 NY3d 861). Moreover, the fact that defendant was located in the general vicinity of a police shooting, approximately eight hours after the shooting occurred, does not provide the "requisite reasonable suspicion, in the absence of 'other objective indicia of criminality' " that would justify pursuit (*Riddick*, 70 AD3d at 1423), and no such evidence was presented at the suppression hearing. Thus, "although the police had a valid basis for the initial encounter, 'there was nothing that made permissible any greater level of intrusion' " (*id.*, quoting *People v Howard*, 50 NY2d 583, 590, *cert denied* 449 US 1023).

"Inasmuch as the police officers' pursuit of defendant was unlawful, the handgun seized by the police should have been suppressed

. . . , and the statements made by defendant to the police following the unlawful seizure also should have been suppressed as fruit of the poisonous tree" (*id.* at 1424). In light of our determination that the court erred in refusing to suppress the handgun obtained as a result of the illegal pursuit and his subsequent statements to the police, defendant's guilty plea must be vacated (*see id.*). Moreover, because our determination results in the suppression of all evidence in support of the crimes charged, the indictment must be dismissed (*see People v Stock*, 57 AD3d 1424, 1425). We therefore remit the matter to Supreme Court for further proceedings pursuant to CPL 470.45.

Finally, in light of our determination that reversal of the judgment in appeal No. 1 is required, we vacate the resentence in appeal No. 2.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1428

KA 10-00155

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. CADY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, THE WOLFORD LAW FIRM, LLP (JAMES A. HOBBS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered January 19, 2010. Defendant was resentenced upon his conviction of criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree.

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

Same Memorandum as in *People v Cady* ([appeal No. 1] ___ AD3d ___ [Feb. 1, 2013]).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1434

CA 12-00960

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

DANIEL J. CIAPA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

OTTO MISSO, INDIVIDUALLY AND DOING
BUSINESS AS PARTNER'S BAR & PIZZERIA,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

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

MOSEY PERSICO, LLP, BUFFALO (JENNIFER C. PERSICO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 2, 2011 in a personal injury action. The order granted the motion of defendant Otto Misso, individually and doing business as Partner's Bar & Pizzeria, for leave to reargue his motion for summary judgment dismissing the complaint and all cross claims against him and, upon reargument, granted the summary judgment motion.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he slipped and fell while working as a "prep man" at a pizzeria located at 395 Shanley Street in Cheektowaga. At the time of his accident, plaintiff was employed by defendant 395 Shanley Corp., which was sued "individually" and doing business as Partner's Bar & Pizzeria (Shanley Corp.). Plaintiff also sued Otto Misso, individually and doing business as Partner's Bar & Pizzeria (defendant), who was the owner of the real property at 395 Shanley Street and the president and sole shareholder of Shanley Corp. Plaintiff appeals from an order granting defendant's motion for leave to reargue his motion for summary judgment dismissing the complaint and all cross claims against him and, upon reargument, granting the summary judgment motion. We affirm.

"As a general rule, when an employee is injured in the course of . . . employment, [the employee's] sole remedy against his [or her] employer lies in his [or her] entitlement to a recovery under the Workers' Compensation Law" (*Billy v Consolidated Mach. Tool Corp.*, 51

NY2d 152, 156, *rearg denied* 52 NY2d 829; *see* Workers' Compensation Law §§ 11, 29 [6]*; Weiner v City of New York*, 19 NY3d 852, 854). Workers' Compensation Law § 11 provides that "[t]he liability of an employer prescribed by the [Workers' Compensation Law] shall be exclusive and in place of any other liability whatsoever, to such employee . . . or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom." Additionally, Workers' Compensation Law § 29 (6) provides that workers' compensation benefits "shall be the exclusive remedy to an employee . . . when such employee is injured or killed by the negligence or wrong of another in the same employ . . . . "

An employee may not "circumvent[ ] . . . the workers' compensation scheme" by suing his or her employer in a capacity other than that of employer – for example, in the employer's capacity as the owner of the property upon which the accident occurred (*Weiner*, 19 NY3d at 855; *see Billy*, 51 NY2d at 158-160). Thus, "[u]nder Workers' Compensation Law §§ 11 and 29 (6), an employer cannot be held liable as landowner for job-related injuries its employee sustains on its property" (*Diaz v Rosbrock Assoc. Ltd. Partnership*, 298 AD2d 547, 548; *see Weiner*, 19 NY3d at 855; *Billy*, 51 NY2d at 158-160; *O'Connor v Spencer [1997] Inv. Ltd. Partnership*, 2 AD3d 513, 514-515). Moreover, "[t]he protection against lawsuits brought by injured workers which is afforded to employers by Workers' Compensation Law §§ 11 and 29 (6) also extends to entities which are alter egos of the entity which employs the plaintiff" (*Samuel v Fourth Ave. Assoc., LLC*, 75 AD3d 594, 594-595).

As plaintiff correctly concedes, Supreme Court properly granted the motion of Shanley Corp. for summary judgment dismissing the complaint against it. It is undisputed that Shanley Corp. was plaintiff's employer, and plaintiff allegedly was injured in the course of his employment. Thus, Shanley Corp. is shielded from tort liability by the exclusive remedy provisions of the Workers' Compensation Law (*see generally Weiner*, 19 NY3d at 853; *Billy*, 51 NY2d at 156, 158). Plaintiff contends, however, that there is an issue of fact whether defendant is likewise shielded from suit under the Workers' Compensation Law. We reject that contention.

Defendant established his entitlement to judgment as a matter of law based upon the exclusivity provisions of Workers' Compensation Law §§ 11 and 29 (6) (*see DeJesus v Todaro*, 48 AD3d 341, 343-344; *Melson v Sebastiano*, 32 AD3d 1259, 1260; *Lamm v Lore*, 247 AD2d 878, 878-879). Indeed, defendant established that, as the sole shareholder and president of Shanley Corp., he and Shanley Corp. are in essence the same legal entity, i.e., plaintiff's employer, for purposes of Workers' Compensation Law § 11 (*see Sulecki v City of New York*, 74 AD3d 454, 454-455; *see also Carty v East 175th St. Hous. Dev. Fund Corp.*, 83 AD3d 529, 529; *Diaz*, 298 AD2d at 548; *cf. Palmer v Dezer Props. II*, 270 AD2d 207, 207, *lv denied* 95 NY2d 931). Defendant also established his entitlement to summary judgment dismissing the complaint on the basis of Workers' Compensation Law § 29 (6) (*see Melson*, 32 AD3d at 1260; *Medrano v Pritchard Indus.*, 298 AD2d 271,

272; *Williams v Northrup*, 270 AD2d 806, 807; *Lovario v Vuotto*, 266 AD2d 191, 192; *Kent v Younis*, 265 AD2d 889, 889-890). It is well established that "a worker . . . who is injured during the course of his [or her] employment, cannot maintain an action to recover damages for personal injuries against the owner of the premises where the accident occurred when the owner is also an officer of the corporation that employed the worker" (*Lovario*, 266 AD2d at 192; *see also Kent*, 265 AD2d at 889-890; *Halstead v Wightman*, 247 AD2d 909, 910; *Kinsman v McGill*, 210 AD2d 659, 659-660; *Roll v Murphy*, 174 AD2d 1030, 1030). Here, as president and sole owner of plaintiff's corporate employer, defendant was "under a duty to plaintiff, as plaintiff's coemployee, to provide plaintiff a safe place to work . . . [and] any duty [defendant] was under to plaintiff by reason of his ownership of the premises upon which plaintiff was allegedly injured is . . . indistinguishable from such duty as he bore plaintiff as his coemployee" (*Medrano*, 298 AD2d at 272; *see Melson*, 32 AD3d at 1260; *Williams*, 270 AD2d at 807; *Concepcion v Diamond*, 224 AD2d 189, 189; *Kinsman*, 210 AD2d at 660).

In opposition to defendant's motion, plaintiff failed to raise a triable issue of fact as to the applicability of the exclusivity provisions of the Workers' Compensation Law (*see Halstead*, 247 AD2d at 910). Plaintiff submitted the affidavit of a private investigator who averred that defendant told him that plaintiff "was not and never had been [his] employee." Plaintiff also submitted his own affidavit, in which he averred that he was working for Partner's Bar & Pizzeria at the time of his injury and that the accident occurred when he was carrying a tray of cheese into the pizzeria's walk-in cooler. Neither of those submissions raises an issue of fact as to the applicability of the exclusivity provisions of the Workers' Compensation Law. Contrary to the contention of plaintiff, the fact that defendant allegedly expressed inconsistent positions concerning plaintiff's employment status does not raise a material issue of fact sufficient to survive defendant's motion. Both parties acknowledge that Shanley Corp. was plaintiff's employer, and plaintiff offered no evidence contradicting or refuting defendant's statement that he was the president and sole shareholder of Shanley Corp.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1435

CA 12-01157

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

TABITHA HELLER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PETER JANSMA, DEFENDANT-APPELLANT.

HAGELIN KENT LLC, BUFFALO (AARON M. ADOFF OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREWS, BERNSTEIN & MARANTO, LLP, BUFFALO (PASQUALE V. BOCHIECHIO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 3, 2012 in a personal injury action. The order denied in part defendant's motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained in a motor vehicle collision with defendant, and defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Supreme Court denied that part of the motion with respect to the significant disfigurement and significant limitation of use categories and otherwise granted the motion. We agree with defendant that the court should have granted the motion in its entirety.

Defendant met his initial burden of establishing that plaintiff did not sustain a serious injury under the significant disfigurement category of serious injury, and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The alleged 1½-inch scar on plaintiff's shin is imperceptible in the photographs submitted by defendant in support of the motion (*see generally Jordan v Baine*, 241 AD2d 894, 896) and, based upon the photographs and other evidence in the record, we conclude that defendant met his initial burden of establishing that no reasonable person would regard the condition as unattractive, objectionable or the subject of pity or scorn (*see generally Loiseau v Maxwell*, 256 AD2d 450, 450). Plaintiff's deposition testimony that she is bothered by the scar does not raise a triable issue of fact

whether it constitutes a significant disfigurement under the statute (*see Ferguson v Temmons*, 79 AD2d 1090, 1091).

Defendant also met his initial burden with respect to the significant limitation of use category of serious injury, concerning the alleged injury to plaintiff's cervical spine, and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562). Defendant submitted the report of a physician who examined plaintiff on behalf of defendant stating, inter alia, that plaintiff suffered a cervicothoracic strain in the accident, a soft tissue injury from which she would be expected to recover fully in a matter of days to weeks. The report further states that there was no restriction in the range of motion of plaintiff's cervical spine, and that diagnostic testing revealed no objective evidence of injury related to the accident. In addition, defendant submitted plaintiff's deposition testimony in which she testified that she returned to work a few days after the accident and resumed her other daily activities shortly thereafter. Those submissions were sufficient to establish prima facie that plaintiff did not sustain a significant limitation of use in the accident (*see Charley v Goss*, 54 AD3d 569, 570-571, *affd* 12 NY3d 750). In opposition to the motion, plaintiff submitted the affidavit of her treating chiropractor, whose most recent examination of plaintiff predated his affidavit by more than three years and thus was insufficient to raise a triable issue of fact (*see Kreimerman v Stunis*, 74 AD3d 753, 755; *Trotter v Hart*, 285 AD2d 772, 773).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1436

CA 12-01100

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

JESSICA M. SCHMIDT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TINA M. GUENTHER, DEFENDANT-RESPONDENT,
MARK BESECKER, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

ADAMS, HANSON, REGO, CARLIN, HUGHES, KAPLAN & FISHBEIN, WILLIAMSVILLE (NICOLE B. PALMERTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered May 9, 2012 in a personal injury action. The order denied the motion of defendant Mark Besecker for summary judgment dismissing the complaint and all cross claims against him.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint and all cross claims against defendant Mark Besecker are dismissed.

Memorandum: Plaintiff commenced this personal injury action after being involved in a four-vehicle rear-end collision in July 2008 on Transit Road near its intersection with Rapids Road in the Town of Lockport. The first vehicle in the chain was operated by defendant Heather E. Watt; the second was operated by defendant Mark Besecker; the third was operated by plaintiff; and the fourth was operated by defendant Tina M. Guenther. While Besecker successfully avoided rear-ending Watt's vehicle and plaintiff successfully stopped her vehicle before rear-ending Besecker's vehicle, Guenther was not able to stop her vehicle in time, and she rear-ended plaintiff's vehicle. Besecker contends that Supreme Court erred in denying his motion for summary judgment dismissing the complaint and all cross claims against him, given that plaintiff had completely and successfully stopped her vehicle behind his before it was rear-ended by Guenther's vehicle. That stop, according to Besecker, broke the chain of causation and thereby relieved him of liability for plaintiff's subsequent injuries.

We agree.

It is well established that, absent extraordinary circumstances not present here (*see generally Tutrani v County of Suffolk*, 10 NY3d 906, 907-908), injuries resulting from a rear-end collision are not proximately caused by any negligence on the part of the operator of a preceding vehicle when the rear-ended vehicle had successfully and completely stopped behind such vehicle prior to the collision (*see Princess v Pohl*, 38 AD3d 1323, 1323, *lv denied* 9 NY3d 802; *Coffey v Baker*, 34 AD3d 1306, 1307-1308, *lv dismissed in part and denied in part* 8 NY3d 867; *Lester v Chmaj*, 251 AD2d 1069, 1070). Here, it is undisputed that plaintiff's vehicle came to a full stop behind Besecker's vehicle before being rear-ended by Guenther's vehicle. Besecker thereby established his entitlement to judgment as a matter of law dismissing the complaint and the cross claims against him (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

As an alternative ground for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), Guenther contends that summary judgment dismissing her cross claim against Besecker is nevertheless precluded by issues of fact concerning whether Besecker's vehicle was actually stopped at the time of the rear-end collision at issue and whether he thereby contributed to that collision. We reject that contention because "[those] issues are not material to the determination of [Besecker's] summary judgment motion" (*Rezu Enters., Inc. v Isani*, 80 AD3d 427, 427-428; *see Emery v New York City Tr. Auth.*, 78 AD3d 416, 417; *Wenz v Shafer*, 293 AD2d 742, 743). Specifically, it remains uncontroverted that plaintiff's vehicle came to a complete stop behind Besecker's vehicle before being rear-ended by Guenther's vehicle, and we thus conclude that any link between plaintiff's injuries and Besecker's conduct was thereby severed as a matter of law (*see Rzepecki v Yauch*, 277 AD2d 984, 984-985; *Lester*, 251 AD2d at 1070). Guenther's reliance on *Tutrani* (10 NY3d at 907-908) is misplaced; the unique circumstances of that case are not present here and, in contrast to the police officer in *Tutrani*, Besecker did not operate the first vehicle in the accident chain.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1438

CA 12-01105

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

LEE T. HENDRYX AND SHARON HENDRYX,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RICHARD M. PAYNE, SUZANNE PAYNE, MARK NOLAN,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

RICHARD M. PAYNE, SUZANNE PAYNE AND ENCHANTED
VALLEY RENTALS, LLC, THIRD-PARTY
PLAINTIFFS-RESPONDENTS,

V

MARK NOLAN, THIRD-PARTY DEFENDANT-APPELLANT.

BRIAN P. FITZGERALD, P.C., BUFFALO (DEREK J. ROLLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-RESPONDENTS RICHARD M. PAYNE AND SUZANNE PAYNE.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANT-APPELLANT MARK NOLAN AND THIRD-PARTY DEFENDANT-APPELLANT.

FRANCIS M. LETRO, BUFFALO (RONALD J. WRIGHT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal and cross appeal from an order of the Supreme Court, Cattaraugus County (Gerald J. Whalen, J.), entered December 22, 2011. The order, among other things, denied in part the motion of defendants-third-party plaintiffs Richard M. Payne and Suzanne Payne for summary judgment dismissing the amended complaint against them and denied the cross motion of defendant-third-party defendant, Mark Nolan, for summary judgment dismissing the amended complaint and the third-party complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in its entirety and dismissing the amended complaint against defendants-third-party plaintiffs Richard M. Payne and Suzanne Payne, and by granting the cross motion in part and dismissing the amended complaint, as amplified by the bill of particulars, insofar as it alleges that defendant-third-party defendant, Mark Nolan, was negligent in failing to hold the ladder, and as modified the order is affirmed without

costs.

Memorandum: Plaintiffs commenced this negligence action seeking damages after Lee T. Hendryx (plaintiff) fell from a ladder owned by defendant-third-party defendant, Mark Nolan, on property owned by defendants-third-party plaintiffs Richard M. Payne and Suzanne Payne. We note as background that Nolan was hired by the Paynes to power wash their house, and plaintiff agreed to help Nolan. Nolan set up the ladder with one set of feet on a cement walkway and the other set on the grass. The ladder was next to an aluminum awning that extended over the front steps of the house. As plaintiff climbed the ladder and began using the power washer, Nolan held onto the ladder. When plaintiff was finished, he handed the wand of the power washer to Nolan, and Nolan let go of the ladder and turned to shut off the power washer. As plaintiff began to descend the ladder, it "rocked" toward the awning and, when plaintiff attempted to steady himself by grabbing the awning, the right side of the awning detached from the house and plaintiff fell to the ground. As relevant to this appeal, the Paynes moved for summary judgment dismissing the amended complaint against them and Nolan cross-moved for summary judgment dismissing the amended complaint and the third-party complaint against him. Supreme Court granted in part and denied in part the motion with respect to the Paynes (hereafter, motion) and denied the cross motion. The Paynes now appeal, and Nolan cross-appeals.

Addressing first the Paynes' appeal, we agree with them that the court should have granted their motion in its entirety, and we therefore modify the order accordingly. Plaintiffs alleged that the Paynes were negligent in allowing an unsafe and dangerous condition to exist on their property, i.e., a defective walkway and a defective awning. With respect to the alleged defective cement walkway, plaintiff testified at his deposition that he was unsure of what caused the ladder to "rock," but he speculated that the walkway "rocked." The Paynes established as a matter of law that the walkway was not defective, and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Although there was a gap in the walkway where it abutted the steps, as well as a crack in another part of the walkway, the Paynes submitted evidence establishing that the walkway did not tilt, rock, or move in any way. In opposition to the motion, plaintiffs' expert opined that the walkway was in "disrepair" as evidenced by the gap and the crack, but never stated that the walkway rocked.

With respect to the alleged defective awning, we agree with the Paynes that plaintiff's use of the awning to attempt to steady himself when the ladder rocked was "a superseding cause of such an extraordinary nature that it was not an occurrence which should have been guarded against in the exercise of reasonable care in maintaining the property in a safe condition" (*Perez v Rodriguez*, 40 AD3d 1062, 1063; *see Freeman v Cobos*, 240 AD2d 698, 699).

Addressing next Nolan's cross appeal, we note that plaintiffs alleged that Nolan was negligent in, inter alia, his placement of the ladder. In denying the cross motion, the court held that questions of

fact existed with respect to "the set up of the ladder, together with the securing or lack of securing the ladder while plaintiff was upon it on the day of the accident." To the extent that the amended complaint, as amplied by the bill of particulars, alleges that Nolan was negligent in failing to hold the ladder, we conclude that the court erred in denying that part of Nolan's cross motion seeking summary judgment dismissing that claim. We therefore further modify the order accordingly. We agree with Nolan that he did not undertake or breach any duty to hold the ladder after he had first done so (*see Barnes v Sanders*, 269 AD2d 811, 811). Indeed, "no such duty was undertaken or breached . . . [inasmuch as Nolan's] conduct did not place plaintiff 'in a more vulnerable position than he would have been in had [Nolan] never taken any action at all' " (*id.*). We reject Nolan's contention, however, that the court erred in denying his cross motion with respect to the claim that he negligently placed the ladder inasmuch as there is a triable issue in that respect (*cf. Marsh v Marsh*, 45 AD3d 1100, 1101).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1440

CA 12-00460

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

JOSEPH MILES, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

GREAT LAKES CHEESE OF NEW YORK, INC. AND
MURNANE BUILDING CONTRACTORS, INC.,
DEFENDANTS-RESPONDENTS-APPELLANTS.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

HISCOCK & BARCLAY, LLP, SYRACUSE (MATTHEW J. LARKIN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT GREAT LAKES CHEESE OF NEW YORK, INC.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (JENNIFER L. WANG OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT MURNANE BUILDING CONTRACTORS, INC.

Appeal and cross appeals from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered December 15, 2011. The order denied the motion of plaintiff for partial summary judgment on liability with respect to the Labor Law § 240 (1) cause of action and denied in part the cross motions of defendants for summary judgment dismissing the complaint against them.

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

Memorandum: Plaintiff commenced this Labor Law action seeking damages for injuries he sustained when he was struck in the head by two scaffold planks weighing between 50 and 70 pounds each. At the time of the accident, plaintiff and a coworker were in the process of raising the planks from the lowest level on the scaffolding, which was approximately 3½ feet above the ground, to a higher level approximately 20 inches above the lowest level. The coworker balanced himself between the scaffold frame and one of the outriggers, where he then lifted the end of the planks while plaintiff knelt on the ground and attempted to move another outrigger. The coworker subsequently lost his balance, let go of the planks, and dropped them onto plaintiff's head.

Plaintiff moved for partial summary judgment on liability with respect to the Labor Law § 240 (1) cause of action, and defendants

each cross-moved for summary judgment dismissing the complaint against them. Supreme Court denied the motion and granted the cross motions in part by dismissing the Labor Law § 241 (6) cause of action insofar as it was premised upon two of the three Industrial Code regulations that defendants allegedly violated. Plaintiff appeals, and defendants cross-appeal.

With respect to the appeal, we conclude that the court erred in denying plaintiff's motion, and we therefore modify the order accordingly. Plaintiff established as a matter of law that he was exposed to "hazards . . . related to the effects of gravity where protective devices are called for . . . because of . . . a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514; *see Swedenhjelm v Safway Steel Prods., Inc.*, 19 AD3d 1004, 1004). Plaintiff further established that he was exposed to "a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603), and that his task "necessarily placed [him] in a position where he was at risk of being struck by . . . falling [planks]" (*Heidelmark v State of New York*, 1 AD3d 748, 749). Specifically, Labor Law § 240 (1) was violated because the safety device at issue in this case, i.e., the scaffold frame, was not "so constructed, placed and operated as to give proper protection" to plaintiff, inasmuch as it was inadequate to protect him from the foreseeable risk that his coworker might drop the planks onto him (§ 240 [1]; *see generally Felker v Corning Inc.*, 90 NY2d 219, 224-225).

Contrary to the court's determination, defendants failed to raise a triable issue of fact either with respect to whether plaintiff's alleged misuse of the scaffold was the sole proximate cause of his injuries or with respect to whether plaintiff was a recalcitrant worker (*see Whiting v Dave Hennig, Inc.*, 28 AD3d 1105, 1106). Indeed, our conclusion that plaintiff established, as a matter of law, that defendants violated section 240 (1) necessarily precludes a finding that plaintiff's conduct was the sole proximate cause of his injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290-291). Furthermore, although plaintiff was instructed to stay under the scaffold frame during the process of raising the planks to a higher level, he cannot be deemed to be a recalcitrant worker by virtue of his alleged failure to abide by that instruction. Nothing in the record suggests that plaintiff refused to use an available and adequate safety device (*see Gallagher v New York Post*, 14 NY3d 83, 88-89), and "[a]n instruction by an employer or owner to avoid 'unsafe practices is not a 'safety device' in the sense that plaintiff's failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment' " (*Szuba v Marc Equity Props., Inc.*, 19 AD3d 1176, 1177, quoting *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 563).

Regarding the cross appeal, we conclude that the court properly denied those parts of the cross motions with respect to the cause of action under Labor Law § 241 (6) insofar as it was premised upon defendants' alleged violation of 12 NYCRR 23-5.6 (f), the remaining

Industrial Code regulation that plaintiff relied on. Defendants failed to establish as a matter of law that such regulation does not apply to these facts, that it was not violated, or that any violation thereof was not a proximate cause of plaintiff's injuries (*see generally Treu v Cappelletti*, 71 AD3d 994, 998).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1443

CA 12-00086

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

VILLAGE OF ILION, ET AL., PLAINTIFFS,
AND VILLAGE OF HERKIMER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF HERKIMER, INDIVIDUALLY AND AS
ADMINISTRATOR OF HERKIMER COUNTY SELF-INSURANCE
PLAN, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

LONGSTREET & BERRY, LLP, SYRACUSE (MARTHA L. BERRY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON (ALBERT J. MILLUS, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony J. Paris, J.), entered June 17, 2011. The order granted in part the motion of defendant County of Herkimer, individually and as administrator of Herkimer County Self-Insurance Plan, for a declaratory judgment and an order of preclusion.

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

Same Memorandum as in *Village of Ilion v County of Herkimer* ([appeal No. 3] ___ AD3d ___ [Feb. 1, 2013]).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1444

CA 12-00087

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

VILLAGE OF ILION, ET AL., PLAINTIFFS,
AND VILLAGE OF HERKIMER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF HERKIMER, INDIVIDUALLY AND AS
ADMINISTRATOR OF HERKIMER COUNTY SELF-INSURANCE
PLAN, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

LONGSTREET & BERRY, LLP, SYRACUSE (MARTHA L. BERRY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON (ALBERT J. MILLUS, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony J. Paris, J.), entered September 21, 2011. The order, inter alia, granted the motion of defendant County of Herkimer, individually and as administrator of Herkimer County Self-Insurance Plan, for prejudgment interest on damages.

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

Same Memorandum as in *Village of Ilion v County of Herkimer* ([appeal No. 3] ___ AD3d ___ [Feb. 1, 2013]).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1445

CA 12-00088

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

VILLAGE OF ILION, ET AL., PLAINTIFFS,
AND VILLAGE OF HERKIMER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF HERKIMER, INDIVIDUALLY AND AS
ADMINISTRATOR OF HERKIMER COUNTY SELF-INSURANCE
PLAN, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 3.)

LONGSTREET & BERRY, LLP, SYRACUSE (MARTHA L. BERRY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON (ALBERT J. MILLUS, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oneida County (Anthony J. Paris, J.), entered September 21, 2011. The judgment, inter alia, awarded money damages to defendant County of Herkimer, individually and as administrator of Herkimer County Self-Insurance Plan, on its amended and supplemental counterclaims.

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

Memorandum: The Village of Herkimer (plaintiff) is a former member of the Herkimer County Self-Insurance Plan (Plan), which was created in 1956 pursuant to article 5 of the Workers' Compensation Law. In 2005, plaintiffs commenced this action against, inter alia, defendant County of Herkimer, individually and as Plan administrator (County), after a dispute developed between the County and its municipalities with respect to the Plan's future. As relevant to this appeal, the County moved for summary judgment on its amended and supplemental counterclaims. Supreme Court granted the motion and directed an inquest on damages, and we affirmed (*Village of Ilion v County of Herkimer*, 63 AD3d 1549). At the ensuing inquest, a jury awarded the County $1,617,528 in damages against plaintiff, to which the court later added, inter alia, $833,580.87 in prejudgment interest.

The instant appeals are from various papers entered in connection with the damages inquest, including the final judgment rendered upon the jury verdict. Because plaintiff's right to appeal from the

interlocutory orders challenged in appeal Nos. 1 and 2 was terminated by the entry of the judgment challenged in appeal No. 3 (*see Matter of Aho*, 39 NY2d 241, 248), we dismiss the appeals from the orders in appeal Nos. 1 and 2 (*see Colonial Sur. Co. v Lakeview Advisors, LLC*, 93 AD3d 1253, 1254). We necessarily considered the parties' contentions with respect to those interlocutory orders in connection with appeal No. 3, however (*see id.*; *see also* CPLR 5501 [a] [1]), and we now affirm the judgment thereby challenged.

The court did not err in declining to instruct the jury to discount any damage award that it rendered; "discounting is performed by the trial court and juries are specifically instructed . . . to award a full amount of future damages, without a reduction to present value" (*Toledo v Iglesia Ni Christo*, 18 NY3d 363, 368; *see* CPLR 4111 [e]). In any event, contrary to plaintiff's contention, the County's award of damages did not actually constitute compensation for future losses; by its verdict, the jury found that plaintiff owed the County $1,617,528 as of December 31, 2005, a sum that it thereafter wrongfully withheld. Inasmuch as there is no basis for discounting the award of damages, the court's award of prejudgment interest on those damages is neither a windfall nor a penalty (*cf. Milbrandt v Green Refractories Co.*, 79 NY2d 26, 31; *see generally Toledo*, 18 NY3d at 368-369). Rather, it is fair compensation for the period in which plaintiff held money that rightfully belonged to the County (*see Love v State of New York*, 78 NY2d 540, 544). Moreover, the court did not abuse its discretion in setting the rate of the prejudgment interest awarded at 9%, the maximum permitted by law (*see* General Municipal Law § 3-a [1]). That rate is "presumptively fair and reasonable, notwithstanding any contemporaneous grant of judicial discretion to impose a lesser amount" (*Rodriguez v New York City Hous. Auth.*, 91 NY2d 76, 81), and plaintiff failed to rebut the presumption here (*see Denio v State of New York*, 7 NY3d 159, 168-169). We have considered plaintiff's remaining contentions and conclude that they lack merit.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1453

KA 09-01308

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL MCGREW, DEFENDANT-APPELLANT.

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

MICHAEL MCGREW, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered June 15, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and unlawful possession of marihuana.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking suppression of physical evidence is granted, the indictment is dismissed, and the matter is remitted to Onondaga County Court for further proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him following a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and unlawful possession of marihuana (§ 221.05), defendant contends that reversal is warranted because the police officer who stopped both defendant and his codefendant prior to their arrest lacked the statutory authority to do so. We agree, and conclude that County Court therefore erred in refusing to suppress the physical evidence obtained as a result of that illegal stop.

The subject stop occurred in a college parking lot in the Town of DeWitt at approximately 7:30 p.m. on December 28, 2008. A City of Syracuse police detective assigned to a security detail for an athletic event at the college saw codefendant approach the foyer of its gymnasium. According to the detective, codefendant then turned around and started walking back in the direction from which he came. The detective followed codefendant in his police car, and observed codefendant approach a parked sedan. Codefendant opened the front passenger-side door of the sedan, leaned in, leaned back out, closed the door and proceeded back toward the gymnasium.

At that point, the detective exited his police vehicle and asked to speak to codefendant, who, according to the detective, smelled of burnt marihuana. Defendant emerged from the car several seconds later and stopped walking when the detective asked to speak with him. The detective then recognized that defendant had bloodshot eyes and also smelled of burnt marihuana, which defendant and codefendant admitted to having smoked. After his partner arrived on the scene, the detective looked into the car with a flashlight to make sure no one else was in that vehicle. He saw a small baggie containing a leafy substance in the compartment of the driver's side door, which he believed to be marihuana. The detective, who detected an odor of unburned marihuana around the car, then asked codefendant and defendant for consent to search that vehicle. Consent was granted, and the ensuing search revealed a loaded revolver on the floor in front of the passenger seat. The detective then called the DeWitt police to effect a formal arrest of defendant and codefendant, and the gun and the marihuana were subsequently seized from the vehicle. The parties thereafter stipulated that the events in question occurred more than 100 yards from the boundary line of the City of Syracuse.

Pursuant to CPL 140.50 (1), "a police officer may [under certain circumstances] stop a person in a public place located *within the geographical area of such officer's employment*" (emphasis added), the relevant "geographical area" in this case being the City of Syracuse (CPL 1.20 [34-a] [b]). We thus conclude that, under these circumstances, the detective lacked statutory authorization to stop and question defendant in the Town of DeWitt (*see People v Howard*, 115 AD2d 321, 321; *Brewster v City of New York*, 111 AD2d 892, 893). Moreover, on these facts, the detective's violation of CPL 140.50 (1) requires suppression of the evidence derived therefrom, i.e., the gun and the marihuana seized from the car (*see People v Greene*, 9 NY3d 277, 280-281). We thus grant that part of defendant's omnibus motion seeking suppression of that physical evidence, dismiss the indictment, and remit the matter to County Court for further proceedings pursuant to CPL 470.45.

As an alternative ground for reversal, defendant contends that the court abused its discretion in rejecting defense counsel's peremptory challenge to a prospective juror. This contention is properly before us (*see* CPL 470.05 [2]; *cf. People v Buckley*, 75 NY2d 843, 846), and we conclude that it too has merit.

At the outset of jury selection, the court told the attorneys for both defendant and codefendant that they would have a total of 15 peremptory challenges, with seven challenges allocated to defendant and eight to codefendant. Then, consistent with *People v Alston* (88 NY2d 519, 524-529), the court determined that the parties could exercise peremptory challenges only to the number of jurors necessary to seat a twelve-person venire. Put differently, the court indicated that the parties would consider prospective jurors in groups of equivalent size to the number of seats to be filled on the jury, and that peremptory challenges would be exercised with respect to each such group.

After the prosecutor exercised his peremptory challenges with respect to the first group of prospective jurors, the court turned to the defenses' peremptory challenges, and told codefendant's counsel that "this is a combination. Both of you have to agree." Codefendant's attorney indicated that he had talked with defendant's attorney "about most of these," and proceeded to exercise four peremptory challenges.

The foregoing peremptory challenges were shared with defendant, and the court did not ask defense counsel about peremptory challenges before proceeding to the next group of seven prospective jurors under consideration. With respect to that group of prospective jurors, the prosecutor had exercised one peremptory challenge and codefendant's attorney had exercised two such challenges before defendant's attorney indicated that "we," i.e., defendant's attorney and codefendant's attorney, "need to talk a second." After an off-the-record discussion, codefendant's attorney indicated that "we're going to exercise one more peremptory challenge," and proceeded to do so. The court then swore the eight jurors that had been selected by that point, and thereupon recessed for lunch.

Following lunch, the court conducted the voir dire of the next group of prospective jurors. At the end of that questioning, defendant's attorney indicated that he and codefendant's attorney "have to share" the juror questionnaires, and that "[i]f one of us objects to the exercise of peremptory, that person is seated, so we are debating between ourselves which kind of makes it a little bit more complicated." The court eventually entertained challenges to a group of four prospective jurors, at which time the prosecutor exercised one peremptory challenge and codefendant's attorney exercised two. Once again, defendant's attorney did not personally exercise any peremptory challenges.

At that point, there were three jurors left to be selected, and the prosecutor and codefendant's attorney used one and two peremptory challenges, respectively, on the group of three prospective jurors before them. Another group of three prospective jurors was brought before the parties, and codefendant's attorney exercised a peremptory challenge with respect to one such prospective juror, and asked, "How many do I have left[?]" The court, apparently speaking to defendant's attorney, stated that "[y]ou're keeping track," and defendant's attorney indicated that there were four remaining defense peremptory challenges, which the court reduced to three in view of the challenge to the subject prospective juror.

Codefendant's attorney then attempted to challenge another prospective juror, who was not part of the group then under consideration. The court refused to accept the challenge, noting that the particular prospective juror at issue was not part of the subject group. The court thereafter seated the two remaining prospective jurors in that group of three.

With one juror remaining to be seated, the court instructed the attorneys to use any challenges with respect to that new prospective

juror. On the prompt of defendant's attorney, codefendant's attorney challenged the sole prospective juror in that group, and defendant's attorney then inquired whether one of the prospective jurors from the previous group of three prospective jurors had been seated. The clerk answered affirmatively, and codefendant's attorney complained that "we did not want [that prospective juror]." The court ignored the further complaint of codefendant's attorney that the court was proceeding "too fast" through jury selection, and denied the request of codefendant's attorney to strike the juror at issue. A 12th juror was subsequently seated, and codefendant's attorney then objected to the presence of the juror at issue on the jury on the ground that proceedings were "just going too fast, I couldn't hear." The court noted the objection before swearing the remaining jurors. The record reflects that approximately one minute passed between the time at which the juror at issue was seated and the time at which the jury was sworn.

Under these circumstances, "we can detect no discernable interference or undue delay caused by [the] momentary oversight [of the attorneys for defendant and codefendant] that would justify [the court's] hasty refusal to entertain [their] challenge. Accordingly, we conclude that the court's denial of the challenge was an abuse of discretion (*see generally People v Steward*, 17 NY3d 104 [trial court's limitation on time given for voir dire held an abuse of discretion]) and, because the right to exercise a peremptory challenge against a specific prospective juror is a 'substantial right' (*People v Hamlin*, 9 AD2d 173, 174), reversal is mandated" (*People v Jabot*, 93 AD3d 1079, 1081-1082).

We now turn to defendant's remaining contentions. We reject defendant's contentions that the evidence is legally insufficient to support the conviction and that the verdict is against the weight of the evidence. His challenge to the legal sufficiency of the evidence is preserved with respect to the conviction of criminal possession of a weapon in the second degree, but not with respect to the conviction of unlawful possession of marihuana (*see People v Gray*, 86 NY2d 10, 19). In any event, defendant's challenge lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that reversal is required because he may have been convicted upon a theory not charged in the indictment. "Preservation is not required inasmuch as '[t]he right of an accused to be tried and convicted of only those crimes and upon only those theories charged in the indictment is fundamental and nonwaivable' " (*People v Bradford*, 61 AD3d 1419, 1420-1421, *affd* 15 NY3d 329; *see People v Boykins*, 85 AD3d 1554, 1555, *lv denied* 17 NY3d 814). Nevertheless, we reject that contention. "It is well established that a defendant cannot be convicted of a crime based on evidence of an 'uncharged theory' " (*People v Gunther*, 67 AD3d 1477, 1478, quoting *People v Grega*, 72 NY2d 489, 496), but here, " 'defendant received the

requisite fair notice of the accusations against him' " (*People v Abeel*, 67 AD3d 1408, 1410), and the indictment did not limit the People to a particular theory of possession at trial.

In view of our determination, we do not address defendant's remaining contentions raised in his main and pro se supplemental briefs.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1460

CA 12-00596

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

FRANK FERGUSON AND EVA FERGUSON,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

HANSON AGGREGATES NEW YORK, INC.,
DEFENDANT-RESPONDENT.

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

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

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

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

Memorandum: Plaintiffs commenced this Labor Law § 200 and common-law negligence action seeking damages for injuries sustained by Frank Ferguson (plaintiff) when he fell from the trailer of his truck at defendant's mine facility. At the time of his fall, plaintiff had just finished redistributing gravel in his trailer, which he had picked up from the mine facility. According to plaintiff, that redistribution was necessary to allow the load of gravel to be secured with a tarp as required under state law. Plaintiffs alleged that defendant was negligent in failing to provide a "tarping platform" or other type of fall protection so that he could have safely affixed the tarp to his trailer.

We agree with plaintiffs that Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint. "It is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law" (*Lombardi v Stout*, 80 NY2d 290, 295). Defendant, however, may be liable for common-law negligence or the violation of Labor Law § 200 if it "had actual or constructive notice of the allegedly dangerous condition on the premises which caused the . . . plaintiff's injuries,

regardless of whether [it] supervised [plaintiff's] work" (*Selak v Clover Mgt., Inc.*, 83 AD3d 1585, 1587 [internal quotation marks omitted]; *see McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1582; *Konopczynski v ADF Constr. Corp.*, 60 AD3d 1313, 1314-1315). Although defendant established that it did not supervise or control plaintiff's work, defendant failed to establish that it did not have actual or constructive notice of the allegedly dangerous condition on the premises that caused plaintiff's injuries (*see Baker v City of Buffalo*, 90 AD3d 1684, 1685; *Kobel v Niagara Mohawk Power Corp.*, 83 AD3d 1435, 1435-1436).

We further conclude that the court erred in determining that the regulations promulgated by the Mine Safety and Health Administration were inapplicable to this case. Contrary to defendant's contention, those regulations are not so narrowly construed as to apply only to miners. Instead, under plaintiffs' theory that defendant had actual or constructive notice of the allegedly dangerous condition, an alleged violation of those regulations as they relate to defendant's common-law and statutory duty to maintain the premises in a reasonably safe condition so as to provide a safe place to work may be considered as some evidence of defendant's negligence (*see* PJI 2:29; *see generally Murdoch v Niagara Falls Bridge Commn.*, 81 AD3d 1456, 1457, *lv denied* 17 NY3d 702; *Cruz v Long Is. R.R. Co.*, 22 AD3d 451, 454, *lv denied* 6 NY3d 703; *Landry v General Motors Corp., Cent. Foundry Div.*, 210 AD2d 898, 898). We note, however, that, inasmuch as defendant's alleged failure to comply with the regulation entitled "Site-specific hazard awareness training" (30 CFR 46.11) is unrelated to its duty with regard to the premises, any failure to comply with that regulation cannot be used as evidence of defendant's breach of its common-law or statutory duty to provide a safe place to work in this case.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1462

CA 12-00961

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

MIDSTATE MUTUAL INSURANCE COMPANY, AS SUBROGEE
OF DOREEN L. TOPOREK AND MICHAEL I. RUI,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CAMP ROAD TRANSMISSIONS, INC., DEFENDANT,
AND LAKESHORE TIRE & AUTO, INC.,
DEFENDANT-RESPONDENT.
(ACTION NO. 1.)

DOREEN L. TOPOREK AND MICHAEL I. RUI,
PLAINTIFFS-APPELLANTS,

V

CAMP ROAD TRANSMISSIONS, INC., DEFENDANT,
AND LAKESHORE TIRE & AUTO, INC.,
DEFENDANT-RESPONDENT.
(ACTION NO. 2.)

GALLO & IACOVANGELO, LLP, ROCHESTER (AMANDA R. INSALACO OF COUNSEL), FOR PLAINTIFF-APPELLANT MIDSTATE MUTUAL INSURANCE COMPANY, AS SUBROGEE OF DOREEN L. TOPOREK AND MICHAEL I. RUI.

GARVEY & GARVEY, BUFFALO (MATTHEW J. GARVEY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS DOREEN L. TOPOREK AND MICHAEL I. RUI.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (SEAN W. COSTELLO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from a judgment and order (one paper) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 29, 2011. The judgment and order, among other things, denied the motion of plaintiffs to set aside the jury verdict.

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

Memorandum: Action No. 1 was commenced by plaintiff, Midstate Mutual Insurance Company (Midstate), as subrogee of Doreen L. Toporek and Michael I. Rui, and Toporek and Rui (hereafter, plaintiffs) in turn commenced action No. 2 seeking damages related to a fire in a pick-up truck owned by Toporek that spread to plaintiffs' home.

Midstate and plaintiffs alleged in their respective actions that defendants were negligent with respect to certain repairs. The jury returned a verdict in favor of defendants, and Supreme Court denied the motion of Midstate and plaintiffs pursuant to CPLR 4404 seeking a new trial.

On appeal, Midstate and plaintiffs contend that the court abused its discretion in denying their request for a missing witness charge at the joint trial with respect to the sole shareholder of defendant Lakeshore Tire & Auto, Inc. (Lakeshore), and Lakeshore's employee. We reject that contention. Although the attorney for Lakeshore indicated during his opening argument that those witnesses would testify about repairs made to the vehicle, Midstate and plaintiffs failed to establish that the charge was warranted because no material fact about which those witnesses would testify was at issue (*see generally Doviak v Lowe's Home Ctrs., Inc.*, 63 AD3d 1348, 1352). Lakeshore agreed with the testimony of plaintiffs' witnesses regarding what repairs were made and further agreed that its employees did not detect a faulty fuel line. The only disputed issue was the cause of the fire, which was the subject of expert testimony. We further note that, in any event, the request for the missing witness charge was not timely inasmuch as it was not made until after the close of proof, rather than at the time Midstate and plaintiffs became aware that Lakeshore would not call the witnesses (*see Chary v State of New York*, 265 AD2d 913, 914; *see generally People v Gonzalez*, 68 NY2d 424, 427-428).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1471

KA 11-02162

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD FREEMAN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered September 29, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree, possession of burglar's tools and resisting arrest.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, burglary in the third degree (Penal Law § 140.20), defendant contends that the evidence is legally insufficient to establish that he intended to commit a crime when he unlawfully entered the vacant house he was charged with burglarizing. Defendant's contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). The People were required to prove "only defendant's general intent to commit a crime in the [building] . . . , not his intent to commit a specific crime" (*People v Lewis*, 5 NY3d 546, 552). Moreover, the People were not required to prove that defendant actually committed the intended crime (*see People v Porter*, 41 AD3d 1185, 1186, *lv denied* 9 NY3d 963). The jury was entitled to infer defendant's intent to commit a crime inside the building from the evidence that he broke a window to gain entry (*see generally People v Barnes*, 50 NY2d 375, 381; *People v Grant*, 162 AD2d 1021, 1022), as well as from the evidence of his simultaneous possession of burglar tools (*see People v Wright*, 92 AD2d 722). The jury was also entitled to infer defendant's intent from his "actions and assertions when confronted by the police" (*People v Mitchell*, 254 AD2d 830, 831, *lv denied* 92 NY2d 984), which included fighting with the police and threatening one of the arresting officers.

Finally, in view of the fact that defendant has a criminal record dating back to 1973, including three prior felony convictions, as well

as the fact that he violently resisted arrest, we perceive no basis to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1473

KA 10-00704

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUMARIO L. STRICKLAND, DEFENDANT-APPELLANT.

LEONARD, CURLEY & WALSH, PLLC, ROME (MARK C. CURLEY 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 (Barry M. Donalty, J.), rendered February 20, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The contention of defendant that he was denied effective assistance of counsel based on defense counsel's failure to seek to suppress the handgun seized from the building in which he was staying survives his plea of guilty and waiver of the right to appeal "only insofar as he contends that his plea was infected by the allegedly ineffective assistance and that he entered the plea because of his attorney's allegedly poor performance" (*People v Bethune*, 21 AD3d 1316, 1316, *lv denied* 6 NY3d 752; *see generally People v Petgen*, 55 NY2d 529, 534-535, *rearg denied* 57 NY2d 674). That contention, however, involves matters outside the record on appeal and therefore must be raised by way of a motion pursuant to CPL article 440 (*see People v Neal*, 56 AD3d 1211, 1211, *lv denied* 12 NY3d 761*; People v Jennings*, 8 AD3d 1067, 1068, *lv denied* 3 NY3d 676).

Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1475

KA 11-01197

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES R. WILSON, DEFENDANT-APPELLANT.

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

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (AMANDA M. CHAFEE OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Steuben County Court (Joseph W. Latham, J.), entered May 5, 2011. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Steuben County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order determining that he is a level three risk under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We agree with defendant that County Court did not perform the requisite searching inquiry when evaluating defendant's request to proceed pro se, and we therefore reverse the order and remit the matter to County Court for a new SORA proceeding in accordance with defendant's right to counsel (*see generally People v Allen*, 99 AD3d 1252, 1253).

It is well settled that defendants have a statutory right to counsel in SORA proceedings (*see* Correction Law § 168-n [3]; *People v David W.*, 95 NY2d 130, 138; *People v Bowles*, 89 AD3d 171, 178-179, *lv denied* 18 NY3d 807; *People v Wyatt*, 89 AD3d 112, 117, *lv denied* 18 NY3d 803). A defendant's right to proceed pro se is also well settled (*see People v McIntyre*, 36 NY2d 10, 17). In order to invoke that right, however, "(1) the request [must be] unequivocal and timely asserted, (2) there [must be] a knowing and intelligent waiver of the right to counsel, and (3) the defendant [must not have] engaged in conduct which would prevent the fair and orderly exposition of the issues" (*id.*; *see People v Chicherchia*, 86 AD3d 953, 954, *lv denied* 17 NY3d 952). "If a timely and unequivocal request has been asserted, then the trial court is obligated to conduct a 'searching inquiry' to ensure that the defendant's waiver is knowing, intelligent, and voluntary" (*Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 385; *see People v Crampe*, 17 NY3d 469, 481-482). The requisite inquiry

" 'should affirmatively disclose that a trial court has delved into a defendant's age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver' " (*People v Arroyo*, 98 NY2d 101, 104, quoting *People v Smith*, 92 NY2d 516, 520).

Here, the trial court failed to conduct the necessary "searching inquiry" to ensure that defendant's waiver of the right to counsel was unequivocal, voluntary, and intelligent (*Allen*, 99 AD3d at 1253 [internal quotation marks omitted]). The only statement made by the court regarding the dangers of proceeding pro se was the comment, "[y]ou might be better served by going with your original impulse to have assigned counsel represent you." The court did not inquire about defendant's age, experience, intelligence, education, or exposure to the legal system, nor did it explain the risk inherent in proceeding pro se or the advantages of representation by counsel (*see People v Lott*, 23 AD3d 1088, 1089). The court's failure to conduct a searching inquiry renders defendant's waiver of the right to counsel invalid and requires reversal (*see Crampe*, 17 NY3d at 481-482; *see also Allen*, 99 AD3d at 1253; *Lott*, 23 AD3d at 1089-1090).

In light of our decision, we do not address defendant's remaining contentions.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1476

KA 11-02346

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOHN D. WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LIPSITZ GREEN SCIME CAMBRIA, LLP, BUFFALO (TIMOTHY P. MURPHY 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 January 3, 2011. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1477

KA 11-00991

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN D. WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LIPSITZ GREEN SCIME CAMBRIA, LLP, BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Orleans County Court (James P. Punch, J.), rendered February 14, 2011. Defendant was resentenced upon his conviction of driving while intoxicated, a class E felony.

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

Memorandum: On appeal from a resentence following his conviction upon a plea of guilty of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]), defendant contends that the ignition interlock device (IID) component of his sentence should be vacated. As defendant correctly concedes, County Court informed him prior to his plea that his sentence would include an IID component, but defendant contends that the court's failure to inform him of the length of time he would be required to maintain an IID in his vehicle rendered his plea involuntary. Defendant failed to preserve that contention for our review (*see People v Murray*, 15 NY3d 725, 726-727). In any event, even assuming, arguendo, that defendant's contention has merit, we conclude that defendant would not be entitled to the remedy he seeks, i.e., vacatur of the IID component of his sentence, because the remedy for an involuntary plea is vacatur of the plea itself (*see generally People v Catu*, 4 NY3d 242, 245). Furthermore, defendant would not in any case be entitled to vacatur of that component of his sentence inasmuch as the IID requirement is mandated by law (*see* § 1193 [1] [c] [iii]).

Finally, defendant's sentence is not unduly harsh or severe.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1480

CAF 11-01752

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

IN THE MATTER OF DALTUN A.B.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANIEL B., JR., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT.

ALAN P. REED, COUNTY ATTORNEY, BATH (CRAIG A. PATRICK OF COUNSEL), FOR PETITIONER-RESPONDENT.

SALLY A. MADIGAN, ATTORNEY FOR THE CHILD, BATH, FOR DALTUN A.B.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered August 10, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: Respondent father appeals from three orders terminating his parental rights with respect to each of his three children upon a finding of severe abuse arising from his conviction of the murder of their mother (*see* Social Services Law § 384-b [4] [e]; [8] [a] [iii] [A]). Based on that finding, Family Court conducted a dispositional hearing and concluded that the best interests of the children required that they be placed for adoption.

Preliminarily, we take judicial notice that the father has filed a notice of appeal from the judgment convicting him of murder. Contrary to the father's contention, however, his attorney's failure to seek a stay of the Family Court proceedings based upon the pendency of such appeal does not constitute ineffective assistance of counsel. Because an order terminating parental rights on the ground that such parent was convicted of murdering the other parent may be affirmed notwithstanding the pendency of an appeal challenging such conviction (*see* Social Services Law § 384-b [8] [a] [iii] [A]; CPL 1.20 [13]; *see e.g. Matter of Brendan N.*, 79 AD3d 1175, 1179, *lv denied* 16 NY3d 735), there is no merit to the premise upon which the father's ineffective assistance contention is based, namely, that Family Court would have been required to stay these proceedings due to the pendency of his

criminal appeal had his attorney simply moved for such relief. As such, the father's attorney "cannot be deemed ineffective for [having] fail[ed] to make a motion . . . that [wa]s unlikely to [have] be[en] successful" (*Matter of Jamaal NN.*, 61 AD3d 1056, 1058, *lv denied* 12 NY3d 711; *see Matter of Kenneth L. [Michelle B.]*, 92 AD3d 1245, 1246). Furthermore, during the dispositional phase of the Family Court proceedings, the father's attorney unequivocally stated that the father did not oppose the termination of his parental rights. Thus, the "allegation that counsel's failure to [seek a stay] was an error–as opposed to a strategic decision made by counsel not to pursue the matter–is speculative" (*Matter of Kilmartin v Kilmartin*, 44 AD3d 1099, 1104; *see Matter of Katherine D. v Lawrence D.*, 32 AD3d 1350, 1351-1352, *lv denied* 7 NY3d 717; *Matter of Brian S.M.*, 309 AD2d 1224, 1225).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1481

CAF 11-01753

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

IN THE MATTER OF DESIREE R.B.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANIEL B., JR., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT.

ALAN P. REED, COUNTY ATTORNEY, BATH (CRAIG A. PATRICK OF COUNSEL), FOR PETITIONER-RESPONDENT.

SALLY A. MADIGAN, ATTORNEY FOR THE CHILD, BATH, FOR DESIREE R.B.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered August 10, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Same Memorandum as in *Matter of Daltun A.B.* (___ AD3d ___ [Feb. 1, 2013]).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1482

CAF 11-01754

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

IN THE MATTER OF DYLAN A.B.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANIEL B., JR., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT.

ALAN P. REED, COUNTY ATTORNEY, BATH (CRAIG A. PATRICK OF COUNSEL), FOR PETITIONER-RESPONDENT.

SALLY A. MADIGAN, ATTORNEY FOR THE CHILD, BATH, FOR DYLAN A.B.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered August 10, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Same Memorandum as in *Matter of Daltun A.B.* (___ AD3d ___ [Feb. 1, 2013]).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1484

CA 12-00921

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

MARY J. HALL AND FILLMORE V. HALL,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY FENCE, INC., DEFENDANT-RESPONDENT,
DR. R. REED STEVENS, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

BURGIO, KITA & CURVIN, BUFFALO (STEVEN P. CURVIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (MARK C. DAVIS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

LIPPMAN O'CONNOR, BUFFALO (MATTHEW J. DUGGAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered March 19, 2012. The order, among other things, denied the motion of defendant Dr. R. Reed Stevens for summary judgment.

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

Memorandum: We affirm for reasons stated in the decision at Supreme Court. We add only that, to the extent that the amended complaint, as amplified by the bill of particulars, may be construed as alleging that defendant Dr. R. Reed Stevens is vicariously liable for the alleged negligence of defendant City Fence, Inc. (City Fence), the court properly noted in its decision that no such liability can attach because City Fence is an independent contractor (*see Kleeman v Rheingold*, 81 NY2d 270, 273-274).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1485

CA 12-00497

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

CPB INTERNATIONAL, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FEDERAL LABORATORIES CORP., DEFENDANT-APPELLANT.

AMIGONE, SANCHEZ & MATTREY, LLP, BUFFALO (ARTHUR G. BAUMEISTER, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered October 19, 2011. The order denied defendant's motion to dismiss plaintiff's complaint.

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

Memorandum: Defendant appeals from an order denying its motion to dismiss the complaint in this action, which seeks, inter alia, to enforce a default judgment entered against it by a Pennsylvania court. We conclude that Supreme Court properly denied the motion.

Plaintiff is a Delaware corporation with its principal place of business in Pennsylvania. Defendant is a New York corporation engaged in the manufacture and sale of nutritional supplements, and its principal place of business is in the Town of Alden, New York. In 2006, plaintiff sold quantities of a substance known as chondroitin sodium sulfate to defendant pursuant to three separate contracts. In 2007, plaintiff commenced an action in the United States District Court for the Middle District of Pennsylvania, alleging that defendant had breached those contracts by failing to pay the sums due thereunder. The federal court granted defendant's motion to dismiss that action for lack of personal jurisdiction (*see generally World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 291-294; *International Shoe Co. v Washington*, 326 US 310, 316-319).

Plaintiff thereafter commenced an action in a Pennsylvania court, asserting the same breach of contract causes of action against defendant that had been dismissed in the federal court action. The complaint alleged that jurisdiction was proper in the Pennsylvania court pursuant to the "General Terms and Conditions" of each contract, in which the parties agreed that the contracts would be governed by

Pennsylvania law and that disputes arising therefrom would be resolved in the state courts of Pennsylvania or the federal courts in Pennsylvania. Although the record establishes that defendant received service of process in that action, defendant did not answer or otherwise appear, and a default judgment was entered against it.

Plaintiff subsequently commenced the instant action seeking enforcement of the Pennsylvania court's default judgment and asserting three causes of action each for breach of contract and account stated. Defendant moved to dismiss the complaint on the grounds that the Pennsylvania court lacked personal jurisdiction to render the default judgment that plaintiff seeks to enforce (*see* CPLR 3211 [a] [1]) and that the remaining causes of action are barred by the applicable statute of limitations (*see* CPLR 3211 [a] [5]). Supreme Court properly denied the motion.

"The full faith and credit clause of the United States Constitution (US Const, art IV, § 1) requires a judgment of one state court to have the same credit, validity, and effect in every other court of the United States [as] it ha[s] in the state in which it was pronounced" (*Matter of Bennett*, 84 AD3d 1365, 1367, *lv denied* 19 NY3d 801; *see Boudreaux v State of La., Dept. of Transp.*, 11 NY3d 321, 325, *cert denied* ___ US ___, 129 S Ct 2864). Thus, "[a]s a matter of full faith and credit, . . . the courts of this State [are] limited to determining whether the rendering court had jurisdiction" before enforcing a judgment of a sister state, including one obtained upon default (*Fiore v Oakwood Plaza Shopping Ctr.*, 78 NY2d 572, 577, *rearg denied* 79 NY2d 916, *cert denied* 506 US 823; *see generally Parker v Hoefer*, 2 NY2d 612, 616-617, *cert denied* 355 US 833).

Here, contrary to defendant's contention, we conclude that the order dismissing the federal action did not deprive the Pennsylvania court of personal jurisdiction over it. While that order may have provided a basis for asserting the defense of collateral estoppel in the Pennsylvania action, which defendant could have raised or waived under Pennsylvania law (*see Hopewell Estates, Inc. v Kent*, 646 A2d 1192, 1194), it does not provide a ground for a collateral attack upon the Pennsylvania court's ensuing default judgment by means of the instant action (*see Oldham v McRoberts*, 21 AD2d 231, 234-235, *affd* 15 NY2d 891; *Steinberg v Metro Entertainment Corp.*, 145 AD2d 333, 333-334).

With respect to the remaining causes of action, we agree with defendant that each are subject to a four-year limitations period under the law of both New York (*see* UCC 2-725 [1]; CPLR 213 [2]; *Herba v Chichester*, 301 AD2d 822, 822-823) and Pennsylvania (*see* 13 Pa CS § 2725 [a]; 42 Pa CS § 5525 [a] [2]), and that more than four years elapsed between the accrual of plaintiff's most recent cause of action and its commencement of the instant action. As Supreme Court properly concluded, however, plaintiff raised a triable issue of fact with respect to the timeliness of those causes of action by submitting evidence that defendant tendered a partial payment toward its purported contractual obligations such that the four-year limitations period may have been effectively tolled up to and including the date

upon which plaintiff ultimately commenced this action (*see Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d 516, 521-522; *New York State Higher Educ. Servs. Corp. v Muson*, 117 AD2d 947, 947-948; *Chittenholm v Giffin*, 65 A2d 371, 373).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1489

CA 12-01209

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

SAMIA GUTIERREZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PIERCE A. DEVINE, KYLE TATUM, DEFENDANTS,
AND LUTZ BROTHERS, INC., DEFENDANT-RESPONDENT,

CAMPBELL & SHELTON LLP, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LIPPMAN O'CONNOR, BUFFALO (ROBERT H. FLYNN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered September 26, 2011. The order, inter alia, granted the motion of defendant Lutz Brothers, Inc. for summary judgment.

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

Memorandum: Plaintiff commenced this negligence and Dram Shop action seeking to recover damages for injuries she sustained when the vehicle in which she was a passenger struck a tree. The vehicle was operated by defendant Pierce A. Devine. Devine, a minor, tested positive for alcohol after the accident, and was charged with operating a motor vehicle while under the influence of alcohol (Vehicle and Traffic Law § 1192 [3]) and vehicular assault in the second degree (Penal Law § 120.03 [1]). Before the accident, defendant Kyle Tatum, Tatum's girlfriend, and plaintiff drove to a gas station/convenience store owned and operated by Lutz Brothers, Inc. (defendant), and Devine met them there. Tatum, who was 17 years old at the time, purchased beer from the store using false identification. The four minors then drove to a beach on Lake Erie, where they drank beer for approximately two hours. When it started to rain, they dropped Tatum's car off at Devine's house, and drove in Devine's car to the home of Tatum's girlfriend to pick up a movie. The accident occurred when the group was driving back to Devine's house. Plaintiff appeals from an order that, inter alia, granted defendant's motion for summary judgment dismissing the second amended complaint against it. We affirm.

We note at the outset that, although the second amended complaint asserts a violation of General Obligations Law § 11-101, there is no

claim or evidence that defendant sold alcohol to anyone who was visibly intoxicated at the time of the sale in violation of that statute (*see Williams v TeDave Enters.*, 242 AD2d 861, 861). The analysis is therefore limited to whether plaintiff has a viable claim under General Obligations Law § 11-100. That statute provides in relevant part that "[a]ny person who shall be injured in person . . . by reason of the intoxication or impairment of ability of any person under the age of [21] years . . . shall have a right of action to recover actual damages against any person who knowingly causes such intoxication or impairment of ability by unlawfully furnishing to or unlawfully assisting in procuring alcoholic beverages *for such person* with knowledge or reasonable cause to believe that such person was under the age of [21] years" (*id.* [emphasis added]). Thus, the General Obligations Law "explicit[ly] . . . limit[s] liability for injuries caused by an intoxicated minor to the unlawful supply of alcoholic beverages *to that person*" (*Sherman v Robinson*, 80 NY2d 483, 487). "The plain language of the [Dram Shop Act] specifies that the individual who by reason of intoxication causes injury must be the very person to whom defendant furnished the alcoholic beverages, or for whom they were procured" (*id.*; *see Jacobs v Amodeo*, 208 AD2d 1171, 1172; *Dodge v Victory Mkts.*, 199 AD2d 917, 919). Further, "liability under General Obligations Law § 11-100 may be imposed only on a person who knowingly causes intoxication by furnishing alcohol to (or assisting in the procurement of alcohol for) persons known or reasonably believed to be underage" (*Sherman*, 80 NY2d at 487-488).

Here, it is undisputed that defendant sold the alcohol at issue to Tatum and that Devine was the intoxicated person who caused plaintiff's injuries. There is no evidence that defendant knowingly sold or furnished alcoholic beverages to Devine, the underage tortfeasor, nor is there evidence that defendant assisted in procuring alcoholic beverages for Devine. Rather, the unlawful transaction was with Tatum (*see Bregartner v Southland Corp.*, 257 AD2d 554, 555; *Dalrymple v Southland Corp.*, 202 AD2d 548, 549).

Contrary to plaintiff's contention, "[n]othing in the General Obligations Law imposed upon defendant [convenience store owner] a duty . . . to investigate possible ultimate consumers in the parking lot beyond its doors" (*Sherman*, 80 NY2d at 488). Plaintiff's reliance on our decision in *Krampen v Foster* (242 AD2d 913) is misplaced. In *Krampen*, although the alcohol was not sold directly to the driver, the plaintiffs presented evidence that the store clerk knew both the purchaser and the driver (*id.* at 914). While the purchase took place, the store clerk looked out the window at the driver's car, which was parked directly in front of the store window, and the driver waved to the store clerk (*id.*). There is no such evidence in this case. Here, the record establishes that none of defendant's employees knew Tatum, Devine, or any of their companions, and the minors likewise did not know any of defendant's employees. Further, unlike in *Krampen*, plaintiff submitted no evidence that any of defendant's employees saw the people or activities in the parking lot. Thus, because plaintiff's injuries were not caused by the minor who purchased the alcohol, there can be no liability under the Dram Shop Act (*see*

Sherman, 80 NY2d at 487; *Krampen*, 242 AD2d at 914), and the court therefore properly granted that part of defendant's motion for summary judgment dismissing the Dram Shop cause of action against it.

Finally, it is well settled that there is no common-law cause of action for the negligent provision of alcohol (*see Murphy v Cominsky*, 100 AD3d 1493, 1495; *O'Neill v Ithaca Coll.*, 56 AD3d 869, 872; *McGlynn v St. Andrew Apostle Church*, 304 AD2d 372, 373, *lv denied* 100 NY2d 508; *see generally D'Amico v Christie*, 71 NY2d 76, 84-85), and the court therefore also properly granted that part of defendant's motion for summary judgment dismissing the common-law negligence cause of action against defendant.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1490

CA 12-01058

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

NATASHA MUCKOVA, M.D., CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 97318.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCHELL & SCHELL, P.C., FAIRPORT (GEORGE A. SCHELL OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Philip J. Patti, J.), entered August 9, 2011. The judgment awarded claimant money damages after a trial.

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

Memorandum: Claimant commenced this action seeking damages for injuries she sustained as a result of contracting tuberculosis during the autopsy of an inmate (decedent), allegedly owing to defendant's negligence. Following trial, the Court of Claims awarded claimant $500,000. We agree with defendant that it owed no duty of care to claimant, and we therefore reverse the judgment and dismiss the amended claim. As a preliminary matter, we note that the language of the court's decision is sufficiently broad to encompass an analysis of both defendant's alleged duty to warn claimant of decedent's active tuberculosis and defendant's alleged duty to record the active tuberculosis diagnosis in decedent's chart in the prison infirmary. Inasmuch as claimant now contends that the only duty at issue is defendant's duty to maintain accurate records, however, we conclude that she has abandoned any contention with respect to a duty to warn (*see Chapman-Raponi v Vescio*, 11 AD3d 1042, 1043; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

With respect to the sole remaining theory of liability at issue on appeal, i.e., defendant's breach of its alleged duty to record the tuberculosis diagnosis in decedent's medical chart pursuant to 10 NYCRR 405.10 (c) (8), we conclude that claimant has no private cause of action against defendant for the prison's failure to comply with that regulation in the absence of a showing, or indeed an allegation,

that claimant had the requisite special relationship with defendant (*see Pelaez v Seide*, 2 NY3d 186, 198-201; *Abraham v City of New York*, 39 AD3d 21, 25, *lv denied* 10 NY3d 707). "The laws and regulations of this State pertaining to the control of reportable or communicable diseases were enacted to protect the public in general, and not a particular class of persons . . . Stated otherwise, they 'were intended to benefit the injured [claimant], but in the broad sense of protecting all members of the general public similarly situated' " (*Abraham*, 39 AD3d at 25, quoting *O'Connor v City of New York*, 58 NY2d 184, 190, *rearg denied* 59 NY2d 762). In light of our determination that defendant owed claimant no duty of care based on the alleged violation of 10 NYCRR 405.10 (c) (8), we need not address defendant's remaining contentions (*see Pulka v Edelman*, 40 NY2d 781, 782).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

1

TP 11-02379

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

IN THE MATTER OF NAHSHON JACKSON, PETITIONER,

V ORDER

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

NAHSHON JACKSON, PETITIONER PRO SE.

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, Cayuga County [Mark H. Fandrich, A.J.], entered October 21, 2011) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

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TP 12-01402

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

IN THE MATTER OF DAWUD RAHMAN, PETITIONER,

V ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered July 27, 2012) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated an inmate rule.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

11

CAF 12-00962

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

IN THE MATTER OF ALICIA A. WRIGHT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

AMY E. WALKER, RESPONDENT-APPELLANT,
AND KEVIN NOLTEE, RESPONDENT.

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

TIFFANY M. SORGEN, ATTORNEY FOR THE CHILD, CANANDAIGUA, FOR ANESSA N.

Appeal from an order of the Family Court, Ontario County (Stephen D. Aronson, A.J.), entered May 21, 2012 in a proceeding pursuant to Family Court Act article 6. The order granted the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the following Memorandum: Respondent Amy E. Walker, the grandmother of the subject child, appeals from an order granting the petition of petitioner mother to modify an order of custody entered upon consent. That prior order, inter alia, awarded the grandmother, the mother, and respondent Kevin Noltee, the child's father, joint legal custody of the child and awarded the grandmother primary physical custody of the child. In her petition, the mother did not seek to modify custody but, rather, she sought only visitation with the child in the mother's own home. Family Court granted the petition, and this Court granted a stay of enforcement of that order pending appeal.

We agree with the grandmother that the court committed reversible error when it failed to advise her of her right to assigned counsel. Family Court Act § 262 (a) (iii) provides that the court must advise respondents "in any proceeding under part three of article six of this act" of their right to be represented by counsel of their own choosing, their right to an adjournment to confer with counsel, and their right to have counsel assigned by the court in any case where they are financially unable to obtain their own counsel. The Attorney for the Child (AFC) contends that, although the Second and Third Departments have held that respondents in visitation proceedings are entitled to assigned counsel (*see e.g. Matter of Samuel v Samuel*, 33 AD3d 1010, 1010-1011; *Matter of Wilson v Bennett*, 282 AD2d 933, 934), this Court has not adopted that position. Contrary to the contention

of the AFC, this Court has not squarely addressed the issue whether respondents in visitation proceedings are entitled to the benefit of section 262. We are compelled to do so now, and we concur in the result reached by the Second and Third Departments.

The statute expressly provides that respondents in "*any* proceeding under part three of article six of [the Family Court Act]" are entitled to assigned counsel and the court is mandated to advise them of that right (§ 262 [a] [iii] [emphasis added]). "Although Family Court Act article 6, part 3 is entitled 'custody,' the cited portion of the Family Court Act delineates the jurisdiction of Family Court, which expressly encompasses the right to determine visitation issues and/or modify prior visitation orders (*see*, Family Ct Act §§ 651, 652). Thus, although . . . the word 'visitation' does not appear anywhere in Family Court Act § 262, a proceeding to modify a prior order of visitation plainly is a proceeding under Family Court Act article 6, part 3 and, hence, falls within the purview of the assigned counsel statute" (*Wilson*, 282 AD2d at 934; *see Samuel*, 33 AD3d at 1010-1011; *Matter of Bernard UU. v Kelly VV.*, 28 AD3d 880, 881; *Matter of Grayson v Fenton*, 8 AD3d 696, 696).

We thus conclude that the grandmother, as a respondent in a proceeding under Family Court Act article six, part three, was entitled to be advised of her right to assigned counsel and to be provided with assigned counsel, if financially eligible. "The deprivation of a party's fundamental right to counsel in a custody or visitation proceeding requires reversal, without regard to the merits of the unrepresented party's position" (*Matter of Brown v Wood*, 38 AD3d 769, 770; *see Wilson*, 282 AD2d at 935; *see also Matter of Howard v Howard*, 85 AD3d 1587, 1588). We therefore reverse the order and remit the matter to Family Court for further proceedings on the petition.

In view of our determination, we do not reach the remaining issues raised by the grandmother.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

12

CAF 12-00201

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

IN THE MATTER OF YVONNE STEWARD,
PETITIONER-APPELLANT,

V ORDER

CARMELL V. LUCAS, RESPONDENT-RESPONDENT.

TIMOTHY R. LOVALLO, BUFFALO, FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered January 10, 2012 in a proceeding pursuant to Family Court Act article 6. The order granted respondent's motion to dismiss the petition.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

16

TP 12-00620

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

IN THE MATTER OF JOSEFINE LARATONDA,
PETITIONER,

V ORDER

CAROL DANKERT, COMMISSIONER, ERIE COUNTY
DEPARTMENT OF SOCIAL SERVICES, NIRAV R. SHAH,
COMMISSIONER, NEW YORK STATE DEPARTMENT OF
HEALTH, AND ELIZABETH BERLIN, ACTING
COMMISSIONER, OFFICE OF ADMINISTRATIVE HEARINGS,
NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY
ASSISTANCE, RESPONDENTS.

LEGAL SERVICES FOR THE ELDERLY, DISABLED OR DISADVANTAGED OF WESTERN NEW YORK, INC., BUFFALO (ANTHONY H. SZCZYGIEL OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENTS NIRAV R. SHAH, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, AND ELIZABETH BERLIN, ACTING COMMISSIONER, OFFICE OF ADMINISTRATIVE HEARINGS, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [John F. O'Donnell, J.], entered April 2, 2012) to review a determination of New York State Department of Health. The determination found that petitioner was permanently absent and subject to Chronic Care budgeting status effective August 1, 2010.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed for reasons stated in the decision of New York State Department of Health.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

17

CA 12-01289

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

TERESA M. BELEC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID A. BELEC, DEFENDANT-APPELLANT.

MICHAEL D. SCHMITT, ROCHESTER, FOR DEFENDANT-APPELLANT.

INCLIMA LAW FIRM, PLLC, ROCHESTER (CHARLES P. INCLIMA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Elma A. Bellini, J.), entered September 30, 2011 in a divorce action. The judgment, inter alia, determined the issues of custody and child support.

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

Memorandum: Defendant father appeals from a judgment that, inter alia, determined the issues of custody and child support. We reject the father's contention that the Referee's decision awarding sole custody and primary physical residence of the child to plaintiff mother, which decision was adopted by Supreme Court, lacked a sound and substantial basis in the record. Initially, we reject the father's contention that the Referee failed to set forth a sufficient factual basis for his decision. The Referee properly "set forth the facts [he] deem[ed] essential" in making his determination (*Matter of Mathewson v Sessler*, 94 AD3d 1487, 1489, *lv denied* 19 NY3d 815 [internal quotation marks omitted]). The Referee found, inter alia, that the father's application for equal time with and/or sole custody of the child was economically motivated and that the mother was more fit because the father was preoccupied with child support, placed his needs above the child's needs, and was not as stable. When the father moved out of the marital residence, he agreed to certain visitation time with the child that was established to accommodate his schedule. The court gave appropriate consideration to that agreement, pursuant to which the mother was the primary physical custodian (*see generally Martusewicz v Martusewicz*, 217 AD2d 926, 926-927, *lv denied* 88 NY2d 801). We conclude that the Referee's factual findings are supported by a sound and substantial basis in the record (*see Matter of McLeod v McLeod*, 59 AD3d 1011, 1011).

Contrary to the father's further contention, the Referee did not

abuse his discretion in ordering the father to pay 40% of the child's private elementary school tuition (*see Fruchter v Fruchter*, 288 AD2d 942, 943). A court may award educational expenses "[w]here [it] determines, having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires, that the present or future provision of . . . private . . . education for the child is appropriate" (Domestic Relations Law § 240 [1-b] [c] [7]; *see Francis v Francis*, 72 AD3d 1594, 1595). The evidence established that the parties agreed to send the child to a certain private school rather than the public school where they resided, and at the time of the trial the child had been in that school for three years and was thriving. Although the father testified that he wanted the child to attend the public school in the district where he now lived, there was no evidence that the child could attend that school, that it was in her best interests to attend that school, or that the father was financially unable to provide the necessary funds for the private school.

We have considered the remaining contentions of the father and conclude that they are without merit.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

20

TP 12-01401

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

IN THE MATTER OF EDWARD B. JOHNSON, PETITIONER,

V ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (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, Wyoming County [Mark H. Dadd, A.J.], entered July 27, 2012) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

21

TP 12-01403

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

IN THE MATTER OF THOMAS MCFADDEN, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered July 27, 2012) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

24

KA 12-01286

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRACY Q. WASHINGTON, DEFENDANT-APPELLANT.

FRANK M. BOGULSKI, BUFFALO, 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 (Thomas M. Van Strydonck, J.), rendered November 17, 2011. The judgment convicted defendant, upon a nonjury verdict, of burglary in the third degree and petit larceny.

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

Memorandum: On appeal from a judgment convicting him, upon a nonjury verdict, of burglary in the third degree (Penal Law § 140.20) and petit larceny (§ 155.25), defendant contends that the evidence is legally insufficient to establish with respect to both crimes that the merchandise he returned to a Lord & Taylor store was stolen or that he knew that it was stolen. We reject that contention. Viewed in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), the evidence is legally sufficient to establish that defendant knowingly returned unpurchased merchandise in exchange for store credit, which he then used to purchase an item of clothing (*see* §§ 140.20, 155.25; *People v Weaver*, 89 AD3d 1477, 1478; *see generally People v Bleakley*, 69 NY2d 490, 495). Additionally, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

26

KA 09-00725

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MANUEL ZHANAY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered January 16, 2009. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree (three counts) and criminal sexual act in the third degree.

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

Memorandum: On appeal from a judgment convicting him of, inter alia, three counts of rape in the third degree (Penal Law § 130.25 [2]), defendant contends that he was denied effective assistance of counsel. That contention involves matters outside the record and should be raised by way of a motion pursuant to CPL article 440 (*see People v Haffiz*, 19 NY3d 883, 885; *People v Woods*, 93 AD3d 1287, 1289, *lv denied* 19 NY3d 969).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

30

CAF 11-01212

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

IN THE MATTER OF AMBER MURPHY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN WELLS, RESPONDENT-APPELLANT.

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

WILLIAM M. BORRILL, NEW HARTFORD (JEFFREY T. LOTTERMOSER, JR., OF COUNSEL), FOR PETITIONER-RESPONDENT.

PAUL SKAVINA, ATTORNEY FOR THE CHILDREN, ROME, FOR BRENNAN W. AND ALEXANDER W.

Appeal from an order of the Family Court, Oneida County (Brian M. Miga, J.H.O.), entered April 1, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, modified a prior custody order.

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

Memorandum: Respondent father appeals from an order that, inter alia, modified a prior joint custody order entered on the parties' consent (prior order) by awarding primary physical custody of the parties' children to petitioner mother and granting her all decision-making authority with respect to the children's health, education and welfare. The prior order provided that either parent could seek modification of the custody and visitation provisions of that order without first demonstrating a change in circumstances. Despite that provision, the father contends on appeal that the Judicial Hearing Officer (JHO) failed to make the requisite findings regarding a change in circumstances, and that the mother failed to establish that there had been a change in circumstances that would warrant a review of the existing custody arrangement. Even assuming, arguendo, that a showing of changed circumstances must be made notwithstanding the contrary language in the prior order (*see Matter of Schattinger v Schattinger*, 256 AD2d 1209, 1210, *appeal dismissed* 93 NY2d 919), we conclude that the mother established the requisite change in circumstances.

" '[A] change in circumstances may be demonstrated by, *inter alia*, . . . interference with the noncustodial parent's visitation rights and/or telephone access' " (*Goldstein v Goldstein*, 68 AD3d 717,

720), and the record here establishes that the father interfered with the children's telephone communications with the mother. Furthermore, a change in circumstances exists where, as here, the parents' relationship becomes so strained and acrimonious that communication between them is impossible (*see Matter of O'Loughlin v Sweetland*, 98 AD3d 983, 984; *Matter of Spiewak v Ackerman*, 88 AD3d 1191, 1192; *Matter of Ingersoll v Platt*, 72 AD3d 1560, 1561). We further conclude that, " '[a]lthough [the JHO] did not specifically state that [he] found a sufficient change in circumstances, . . . the record reveals extensive findings of fact, placed on the record by [the JHO], which demonstrate unequivocally that a significant change in circumstances occurred since the entry of the [prior] order' " (*Matter of Pauline E. v Renelder P.*, 37 AD3d 1145, 1146; *see Matter of Bedard v Baker*, 40 AD3d 1164, 1165).

We have considered the father's remaining contention and conclude that it is without merit.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

40

KAH 11-02184

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DAVID P. HARRINGTON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MALCOLM R. CULLY, SUPERINTENDENT, COLLINS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Christopher J. Burns, J.), entered September 16, 2011 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition seeking a writ of habeas corpus on the ground that he was denied effective assistance of counsel in connection with his plea of guilty. We affirm. It is well established that a petition for habeas corpus relief is not a proper vehicle for raising a contention of ineffective assistance of counsel (*see People ex rel. Hinton v Graham*, 66 AD3d 1402, 1402, *lv denied* 13 NY3d 934, *rearg denied* 14 NY3d 795). Even assuming, arguendo, that petitioner's contention had merit, we would conclude that petitioner is not entitled to the relief sought, i.e., immediate release (*see id.*; *People ex rel. Smith v Burge*, 11 AD3d 907, 908, *lv denied* 4 NY3d 701; *see generally People ex rel. Kaplan v Commissioner of Correction of City of N.Y.*, 60 NY2d 648, 649).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

42

KA 11-01488

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN WHITE, DEFENDANT-APPELLANT.

SETH M. AZRIA, SYRACUSE, 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 (Anthony F. Aloi, J.), rendered June 18, 2010. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree and criminal sexual act 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 [2]) and criminal sexual act in the first degree (§ 130.50 [1]), defendant contends that the waiver of the right to appeal is not valid, and he challenges the severity of the sentence. Although we agree with defendant that the waiver of the right to appeal is invalid because the perfunctory inquiry made by County Court was "insufficient to establish that the court 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767; *see People v Hamilton*, 49 AD3d 1163, 1164), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

44

KA 08-02456

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BECKY L. FRANK, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (HEATHER PARKER HINES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered November 3, 2008. The judgment convicted defendant, upon her plea of guilty, of criminally negligent homicide and endangering the welfare of a child (two counts).

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

45

KA 10-00717

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MALCOLM E. WILLIAMS, ALSO KNOWN AS MIDNIGHT,
DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ERIN TUBBS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered October 8, 2008. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of manslaughter in the first degree (Penal Law § 125.20 [1]). County Court properly determined that the 15-year-old defendant was not in custody when he made incriminating statements. The evidence presented at the suppression hearing established that defendant approached police officers who responded to a call reporting a fight and asked them for protection. He voluntarily entered a police vehicle and told the police that he had information about a murder. When the police and defendant arrived at the Public Safety Building, defendant was taken to a witness reception area that had couches and a desk; he was not handcuffed; he used a restroom and was provided with a drink; and he was not asked any accusatory questions (*see People v Kelley*, 91 AD3d 1318, 1318, *lv denied* 19 NY3d 963). Furthermore, the police contacted defendant's mother by telephone in his presence, and he was aware that an officer left the building to pick up his mother and his older brother (*see generally* CPL 140.20 [6]). The suppression court's resolution of the issue whether defendant was in custody "must be accorded great weight" (*Kelley*, 91 AD3d at 1318) and, contrary to defendant's contention, we conclude that a reasonable 15-year-old, innocent of any crime, would not have felt that his or her freedom was restricted (*see Matter of Rennette B.*, 281 AD2d 78, 85-86; *cf. Matter of Ricardo S.*, 297 AD2d 255, 256; *see generally People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US

851).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

49

CAF 11-02227

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

IN THE MATTER OF KISH MOSHER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOEL MOSHER, RESPONDENT-APPELLANT.

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

THOMAS M. O'DONNELL, ATTORNEY FOR THE CHILDREN, NIAGARA FALLS, FOR SAWYER M. AND MAXWELL M.

Appeal from an order of the Family Court, Niagara County (David E. Seaman, J.), entered October 4, 2011 in a proceeding pursuant to Family Court Act article 6. The order directed the parties to participate in and cooperate in therapeutic supervised visitation for petitioner.

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

Memorandum: Respondent father appeals from an order entered in a proceeding commenced by petitioner mother seeking enforcement of a 2009 visitation order. Family Court determined that the father was not in willful violation of the 2009 order, and the court continued the existing supervised visitation arrangement. The father and the Attorney for the Children contend on appeal that the court erred in continuing supervised visitation. Inasmuch as the father never requested a modification of the 2009 order and is not aggrieved by the court's disposition of the enforcement petition, this appeal must be dismissed (*see* CPLR 5511; *see generally Matter of Terrance M. [Terrance M., Sr.]*, 75 AD3d 1147, 1147; *Matter of Rivera v Perez*, 299 AD2d 944, 944).

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

52

CAF 11-01682

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

IN THE MATTER OF ANNASTASIA C.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; ORDER

RONNIE C., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

SCHAVON R. MORGAN, ATTORNEY FOR THE CHILD, MACHIAS, FOR ANNASTASIA C.

Appeal from an order of the Family Court, Cattaraugus County (Larry M. Himelein, J.), entered July 7, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

53

CAF 11-01683

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

IN THE MATTER OF THOR C.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; ORDER

RONNIE C., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

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

SCHAVON R. MORGAN, ATTORNEY FOR THE CHILD, MACHIAS, FOR THOR C.

Appeal from an order of the Family Court, Cattaraugus County (Larry M. Himelein, J.), entered July 7, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

54

CAF 11-01684

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

IN THE MATTER OF LOKI C.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

ORDER

RONNIE C., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

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

SCHAVON R. MORGAN, ATTORNEY FOR THE CHILD, MACHIAS, FOR LOKI C.

Appeal from an order of the Family Court, Cattaraugus County (Larry M. Himelein, J.), entered July 7, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

55

CAF 11-01685

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

IN THE MATTER OF WILLOW C.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; ORDER

RONNIE C., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

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

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

SCHAVON R. MORGAN, ATTORNEY FOR THE CHILD, MACHIAS, FOR WILLOW C.

Appeal from an order of the Family Court, Cattaraugus County (Larry M. Himelein, J.), entered July 7, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

60

CAF 11-01770

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

IN THE MATTER OF ANNASTASIA C.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; ORDER

CAROL C., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

SCHAVON R. MORGAN, ATTORNEY FOR THE CHILD, MACHIAS, FOR ANNASTASIA C.

Appeal from an order of the Family Court, Cattaraugus County (Larry M. Himelein, J.), entered July 7, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent had permanently neglected the subject child and transferred guardianship and custody of the child to petitioner.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

61

CAF 11-01771

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

IN THE MATTER OF LOKI C.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; ORDER

CAROL C., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

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

SCHAVON R. MORGAN, ATTORNEY FOR THE CHILD, MACHIAS, FOR LOKI C.

Appeal from an order of the Family Court, Cattaraugus County (Larry M. Himelein, J.), entered July 7, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent had permanently neglected the subject child and transferred guardianship and custody of the child to petitioner.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

62

CAF 11-01772

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

IN THE MATTER OF WILLOW C.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; ORDER

CAROL C., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

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

SCHAVON R. MORGAN, ATTORNEY FOR THE CHILD, MACHIAS, FOR WILLOW C.

Appeal from an order of the Family Court, Cattaraugus County (Larry M. Himelein, J.), entered July 7, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent had permanently neglected the subject child and transferred guardianship and custody of the child to petitioner.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

63

CAF 11-01773

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

IN THE MATTER OF THOR C.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; ORDER

CAROL C., RESPONDENT-APPELLANT.

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

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

SCHAVON R. MORGAN, ATTORNEY FOR THE CHILD, MACHIAS, FOR THOR C.

Appeal from an order of the Family Court, Cattaraugus County (Larry M. Himelein, J.), entered July 7, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent had permanently neglected the subject child and transferred guardianship and custody of the child to petitioner.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

65

TP 12-01273

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

IN THE MATTER OF DEREK SLOANE, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered July 5, 2012) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

67

KA 11-02321

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOHN C. TOWNLEY, ALSO KNOWN AS JOHN TOWNLEY,
DEFENDANT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, 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 October 17, 2011. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

72

KA 11-02221

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WILLIAM J. PLUME, ALSO KNOWN AS WILLIAM J. AGUIRRE, ALSO KNOWN AS WILLIAM J. AQUIRE, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Cattaraugus County Court (Larry M. Himelein, J.), rendered August 9, 2011. Defendant was resentenced upon his conviction of burglary in the first degree (two counts), assault in the first degree (two counts) and assault in the second degree (two counts).

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

81

CA 12-01423

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

IN THE MATTER OF THE ESTATE OF GLORIA H. LAMBERT,
DECEASED.
---------- ORDER
WAYNE C. LAMBERT, PETITIONER-RESPONDENT-RESPONDENT;

JOHN R. LAMBERT, RESPONDENT-PETITIONER-APPELLANT.

THE HILPERT LAW OFFICES, CROTON-ON-HUDSON (STEVEN FELSENFELD OF COUNSEL), FOR RESPONDENT-PETITIONER-APPELLANT.

MARIANNE BROWN, LIVERPOOL, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PETITIONER-RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Oswego County (John J. Elliott, S.), entered September 15, 2011. The order, inter alia, denied the motion of respondent-petitioner to vacate a decree of probate, granted the petition of petitioner-respondent for appointment as successor executor and denied the cross petition of respondent-petitioner for probate.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

86

KA 09-02373

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LAMMAR HALL, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES 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 (Stephen R. Sirkin, A.J.), rendered February 23, 2009. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

98

CA 12-00849

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

MELODY BARROWS AND TIMOTHY BARROWS,
PLAINTIFFS-APPELLANTS,

V ORDER

PETER CATALANO AND ALEXANDER & CATALANO, LLC,
DEFENDANTS-RESPONDENTS.

WILLIAMS & RUDDEROW, PLLC, SYRACUSE (S. ROBERT WILLIAMS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (MICHELLE M. DAVOLI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered January 27, 2012. The order granted defendants' motion for summary judgment dismissing plaintiffs' complaint.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

103

CA 12-01358

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

MARK W. LOUER, PLAINTIFF-APPELLANT,

V ORDER

KATHLEEN H. BERSANI, AS EXECUTRIX OF THE ESTATE
OF FRANK A. BERSANI, JR., DECEASED,
DEFENDANT-RESPONDENT.

THE WLADIS LAW FIRM, P.C., SYRACUSE (KEVIN C. MURPHY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (ROBERT A. BARRER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered November 3, 2011. The order, among other things, granted the cross motion of defendant for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 11 and 25, 2013,

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

105

KA 11-01293

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DANIEL J. MONTULLI, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (STEVEN D. SESSLER 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 (William F. Kocher, J.), rendered May 19, 2011. The judgment convicted defendant, upon his plea of guilty, of kidnapping in the second degree, criminal contempt in the first degree, criminal mischief in the third degree and criminal contempt in the second degree.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

125

KA 11-01056

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HARRY N. FOMBY, 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 resentence of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered March 28, 2011. Defendant was resentenced upon his conviction of robbery in the second degree (two counts).

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

Memorandum: Defendant was convicted following a jury trial of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [b]), and he appeals from a resentence with respect to those convictions. Supreme Court (Tills, A.J.) originally sentenced defendant to concurrent determinate 15-year terms of imprisonment, but failed to impose periods of postrelease supervision (PRS) as required by Penal Law § 70.45 (1). To remedy that error (*see* Correction Law § 601-d), Supreme Court (Wolfgang, J.) later resentenced defendant to the same terms of imprisonment with corresponding periods of PRS prior to the completion of the originally-imposed sentence. Contrary to defendant's contention, the resentence did not violate his due process rights (*see People v Lingle*, 16 NY3d 621, 630-631). Furthermore, we conclude that "in resentencing defendant the court simply corrected the error . . . made at the time of the original sentence and thus that the resentence was proper" (*People v Mehmel*, 98 AD3d 1256, 1256; *see People v Sparber*, 10 NY3d 457, 472; *see generally People v Howard*, 96 AD3d 1691, 1692, *lv denied* 19 NY3d 1103). The imposition of the terms of PRS does not render the sentence unduly harsh or severe.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

130

KA 11-02011

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE ALVARADO, DEFENDANT-APPELLANT.

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

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (KRISTYNA S. MILLS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered August 8, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that County Court erred in admitting certain recorded conversations in evidence at trial before he pleaded guilty. By pleading guilty, defendant forfeited his right to seek our review of that contention. " 'A guilty plea generally results in a forfeiture of the right to appellate review of any nonjurisdictional defects in the proceedings' " (*People v Leary*, 70 AD3d 1394, 1395, *lv denied* 14 NY3d 889, quoting *People v Fernandez*, 67 NY2d 686, 688). "This is so because a defendant's 'conviction rests directly on the sufficiency of his plea, not on the legal or constitutional sufficiency of any proceedings which might have led to his conviction after trial' . . . A guilty plea will thus . . . effect a forfeiture of the right to revive certain claims made prior to the plea" (*People v Hansen*, 95 NY2d 227, 230). Here, defendant challenges the admissibility of the recordings, both at the audibility hearing and at the trial. Issues arising from an audibility hearing are forfeited by a plea of guilty (*see People v Jiminez*, 277 AD2d 956, 956-957, *lv denied* 96 NY2d 784), as are challenges to evidentiary rulings made during trial (*see People v Davis*, 99 AD3d 1228, 1229).

Finally, the sentence is not unduly harsh or severe.

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

152

CAF 11-02335

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

IN THE MATTER OF JOHNNY TORRES,
PETITIONER-APPELLANT,

V ORDER

JAMIE NESTARK, RESPONDENT-RESPONDENT.

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

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

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered October 24, 2011 in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

154

CA 12-00714

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

BERNICE MALCOLM, PLAINTIFF-APPELLANT,

V ORDER

HONEOYE FALLS-LIMA CENTRAL SCHOOL DISTRICT,
HONEOYE FALLS-LIMA EDUCATION ASSOCIATION AND
NEW YORK STATE UNITED TEACHERS,
DEFENDANTS-RESPONDENTS.

BERNICE MALCOLM, PLAINTIFF-APPELLANT PRO SE.

RICHARD E. CASAGRANDE, LATHAM (ANTHONY J. BROCK OF COUSNEL), FOR DEFENDANTS-RESPONDENTS HONEOYE FALLS-LIMA EDUCATION ASSOCIATION AND NEW YORK STATE UNITED TEACHERS.

WAYNE A. VANDER BYL, WILLIAMSON, FOR DEFENDANT-RESPONDENT HONEOYE FALLS-LIMA CENTRAL SCHOOL DISTRICT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered July 22, 2011. The order, among other things, granted the motions of defendants to dismiss the complaint.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

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

157

CA 12-00026

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

IN THE MATTER OF ROBERT FLOYD,
PETITIONER-APPELLANT,

V ORDER

ANDREA W. EVANS, CHAIRWOMAN, NEW YORK STATE
DIVISION OF PAROLE, RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered November 15, 2011 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Entered: February 1, 2013

Frances E. Cafarell
Clerk of the Court

MOTION NOS. (587-588/92) KA 12-02340. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EDWARD C. PIAZZA, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 12-02341. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EDWARD C. PIAZZA, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, FAHEY, PERADOTTO, AND VALENTINO, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (1077/93) KA 03-02091. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ULYSSES TRAMMEL, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, WHALEN, AND MARTOCHE, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (412/01) KA 00-02247. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V REGINALD CHATMAN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND SCONIERS, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (1507/02) KA 00-01556. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANGEL R. ESCALERA, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND VALENTINO, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (1398/04) KA 04-00568. -- THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V ROBERT D. SCOTT, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, VALENTINO, WHALEN, AND MARTOCHE, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (1473/04) KA 02-00396. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ISMAEL SALADEEN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, VALENTINO, AND MARTOCHE, JJ. (Filed Feb. 1, 2013.)

MOTION NOS. (1613-1614/04) KA 02-00035. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V PAUL BRIDGEFOURTH, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 02-00786. -– THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V PAUL BRIDGEFOURTH, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, CARNI, LINDLEY, AND VALENTINO, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (1090/08) KA 05-02009. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER L. POOLE, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for reargument and leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, PERADOTTO, SCONIERS, AND WHALEN, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (644/09) KA 08-00218. -- THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V JEREMY MILLER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, VALENTINO, AND MARTOCHE, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (224/10) KA 07-02171. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER JAMISON, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (1542/10) KA 09-01050. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KUMAR S. JONES, ALSO KNOWN AS QUMAR JONES, ALSO KNOWN AS JESUS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, AND WHALEN, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (938/12) CA 11-02092. -- DANIEL WILLIAMS AND EDWARD WILLIAMS, PLAINTIFFS-APPELLANTS, V BEEMILLER, INC., DOING BUSINESS AS HI-POINT, CHARLES BROWN, MKS SUPPLY, INC., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS, AND THE UNITED STATES, RESPONDENT. (APPEAL NO. 1.) -- Motions for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (938/12) CA 11-02092. -- DANIEL WILLIAMS AND EDWARD WILLIAMS,

PLAINTIFFS-APPELLANTS, V BEEMILLER, INC., DOING BUSINESS AS HI-POINT, CHARLES BROWN, MKS SUPPLY, INC., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS, AND THE UNITED STATES, RESPONDENT. (APPEAL NO. 1.) -- Motion for reargument is granted in part and, upon reargument, the opinion and order entered October 5, 2012 (100 AD3d 143) is amended by adding the following section after section III:

IV

We reject the alternative contention of MKS in support of affirmance that plaintiffs failed to state a cause of action for common-law negligence or public nuisance under New York law (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.,* 60 NY2d 539, 545-546). With respect to the common-law negligence cause of action, although " ' [a] defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others' " (*Hamilton v Beretta U.S.A. Corp*., 96 NY2d 222, 233, quoting *D'Amico v Christie*, 71 NY2d 76, 88), "[a] duty may arise . . . where there is a relationship . . . between defendant and a third-person tortfeasor that encompasses defendant's actual control of the third person's actions" (*id.*). In *Hamilton*, the Court of Appeals determined that no such relationship existed because the plaintiffs were unable to draw any connection between specific gun manufacturers and the criminal wrongdoers (*id.* at 233-234). Indeed, Stephen Fox, one of the plaintiffs in *Hamilton*, did not know the source of the gun used to shoot him, and thus plaintiffs were unable to show "that the gun used to harm plaintiff Fox came from a source amenable to the exercise of any duty of care that plaintiffs would

impose upon defendant manufacturers" (*id.* at 234). Here, by contrast, plaintiffs have alleged that defendants sold the specific gun used to shoot plaintiff to an unlawful straw purchaser for trafficking into the criminal market, and that defendants were aware that the straw purchaser was acting as a conduit to the criminal gun market. Thus, unlike in *Hamilton*, plaintiffs have sufficiently alleged that defendants "were a direct link in the causal chain that resulted in plaintiffs' injuries, and that defendants were realistically in a position to prevent the wrongs" (*id.*).

Further, Caldwell's intervening criminal act does not necessarily sever the causal connection between the alleged negligence of defendants and plaintiff's injury (*see Earsing v Nelson*, 212 AD2d 66, 70). Rather, "liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant[s'] negligence" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784; *see Bell v Board of Educ. of City of N.Y.*, 90 NY2d 944, 946). Here, plaintiffs allege that defendants, including MKS, knowingly participated in the sale of 140 handguns, including 87 handguns in a single transaction, to Bostic's gun trafficking ring. We conclude that those allegations are sufficient to raise a question of fact whether it was reasonably foreseeable that supplying large quantities of guns for resale to the criminal market would result in the shooting of an innocent victim (*see generally Bell*, 90 NY2d at 946; *Earsing*, 212 AD2d at 69-70). Thus, "[w]hether the alleged negligence of [MKS] was a proximate cause of [plaintiff's] injuries is a question of fact for the jury" (*Earsing*, 212

AD2d at 70).

We likewise conclude that the allegations in the complaint are sufficient to state a cause of action for public nuisance (*see Johnson v Bryco Arms*, 304 F Supp 2d 383, 398-399; *see generally Baity v General Elec. Co.*, 86 AD3d 948, 951). As discussed above, plaintiffs allege that defendants violated federal and state laws by selling guns to a straw purchaser, who funneled the guns into the criminal gun market, thereby posing a danger to the general public, and that plaintiff was injured by one of those guns. Thus, plaintiffs have alleged that defendants engaged in unlawful conduct that endangered the lives of "a considerable number of persons" (*Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 568, *rearg denied* 42 NY2d 1102), and that plaintiff " 'suffered special injury beyond that suffered by the community at large' " (*Baity*, 86 AD3d at 951; *see A-1 Jewelry & Pawn, Inc.*, 247 FRD at 348; *Johnson*, 304 F Supp 2d at 398-399).

and by changing the original section "IV" to section "V," and the original section "V" to section "VI." PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (959/12) CA 12-00663. -- KIMBERLY MITCHELL CONVERSE, PLAINTIFF, V DOLE FOOD COMPANY, INC., DOLE FRESH FRUIT COMPANY, DEFENDANTS-APPELLANTS, AND LEONARD'S EXPRESS, INC., DEFENDANT-RESPONDENT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied.

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (987/12) CA 12-00576. -- JOSHUA JOHNSON, PLAINTIFF-APPELLANT, V JORGE DEL VALLE, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: FAHEY, J.P., PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (1011/12) CA 12-00595. -- JAQUANDA NERO AND LAQUESHA NERO, INFANTS BY THE PARENT AND NATURAL GUARDIAN, FELICIA NERO, PLAINTIFFS-RESPONDENTS, V ISAAC KENDRICK, ELIZABETH KENDRICK, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND MARTOCHE, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (1043/12) CA 12-00002. -- LORI HOOVER, PLAINTIFF-RESPONDENT, AND JESSICA BOWERS, PLAINTIFF-RESPONDENT-APPELLANT, V NEW HOLLAND NORTH AMERICA, INC., FORMERLY KNOWN AS FORD NEW HOLLAND, INC., CASE NEW HOLLAND, INC., NIAGARA FRONTIER EQUIPMENT SALES, INC., FORMERLY KNOWN AS NIAGARA FORD NEW HOLLAND, INC., DEFENDANTS-APPELLANTS-RESPONDENTS, ET AL., DEFENDANTS. CNH AMERICA LLC, THIRD-PARTY PLAINTIFF-APPELLANT, V KYLE P. ANDREWS, TREASURER OF NIAGARA COUNTY, AS TEMPORARY ADMINISTRATOR FOR THE ESTATE OF GARY HOOVER, DECEASED, THIRD-PARTY DEFENDANT-RESPONDENT.

(APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (1044/12) CA 12-00563. -- LORI HOOVER AND JESSICA BOWERS, PLAINTIFFS-RESPONDENTS, V NEW HOLLAND NORTH AMERICA, INC., FORMERLY KNOWN AS FORD NEW HOLLAND, INC., CASE NEW HOLLAND, INC., NIAGARA FRONTIER EQUIPMENT SALES, INC., FORMERLY KNOWN AS NIAGARA FORD NEW HOLLAND, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. CNH AMERICA LLC, THIRD-PARTY PLAINTIFF-APPELLANT, V KYLE P. ANDREWS, TREASURER OF NIAGARA COUNTY, AS TEMPORARY ADMINISTRATOR FOR THE ESTATE OF GARY HOOVER, DECEASED, THIRD-PARTY DEFENDANT-RESPONDENT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (1206/12) CA 12-00689. -- CHRISTINE L. PALERMO, PLAINTIFF-RESPONDENT, V JOSEPH A. PALERMO, DEFENDANT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, VALENTINO, AND MARTOCHE, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (1213.1/12) CA 11-01738. -- VIRGINIA S. PAUL, PLAINTIFF-APPELLANT, V DAVID G. COOPER, AS ADMINISTRATOR OF THE ESTATE OF ERNEST R. COOPER, DECEASED, UNITED REFINING HOLDINGS, INC., DOING BUSINESS

AS KWIK FILL GAS STATION, UNITED REFINING COMPANY OF PENNSYLVANIA, UNITED REFINING CO., AND UNITED REFINING, INC., DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, VALENTINO, AND MARTOCHE, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (1213.2/12) CA 12-01183. -- VIRGINIA S. PAUL, PLAINTIFF-APPELLANT, V DAVID G. COOPER, AS ADMINISTRATOR OF THE ESTATE OF ERNEST R. COOPER, DECEASED, UNITED REFINING HOLDINGS, INC., DOING BUSINESS AS KWIK FILL GAS STATION, UNITED REFINING COMPANY OF PENNSYLVANIA, UNITED REFINING CO., AND UNITED REFINING, INC., DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, VALENTINO, AND MARTOCHE, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (1216/12) KAH 11-02050. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. JAMAR GILMORE, PETITIONER-APPELLANT, V HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (1256.1/12) CA 12-00679. -- IN THE MATTER OF NIAGARA FRONTIER

TRANSIT METRO SYSTEM, INC., PETITIONER-APPELLANT, V AMALGAMATED TRANSIT LOCAL UNION 1342 AND VINCENT G. CREHAN, RESPONDENTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ. (Filed Feb. 1, 2013.)

MOTION NO. (1271/12) CA 12-00731. -- IN THE MATTER OF THE ESTATE OF PERCY PERRY, DECEASED. REV. BARNEY B. PERRY, SR., PETITIONER-APPELLANT; TRACEE MEGNA, EXECUTRIX OF THE ESTATE OF PERCY PERRY, DECEASED, RESPONDENT-RESPONDENT. -- Motion for reargument denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed Feb. 1, 2013.)