SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 6, 2017

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

170

CA 15-01530

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

ANNA BARRETT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WALTER GRENDA, ET AL., DEFENDANTS,
TD AMERITRADE HOLDING CORPORATION,
TD AMERITRADE, INC., TD AMERITRADE
INSTITUTIONAL AND TD AMERITRADE
CLEARING, INC., DEFENDANTS-APPELLANTS.

BARITZ & COLMAN LLP, NEW YORK CITY (DAVID S. RICHAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JOANNE A. SCHULTZ, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered June 5, 2015. The order denied without prejudice the motion of defendants TD Ameritrade Holding Corporation, TD Ameritrade, Inc., TD Ameritrade Institutional and TD Ameritrade Clearing, Inc., to dismiss the complaint against them or, in the alternative, to compel arbitration.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion of defendants TD Ameritrade Holding Corporation, TD Ameritrade, Inc., TD Ameritrade Institutional, and TD Ameritrade Clearing, Inc. is granted and the complaint is dismissed against them.

Memorandum: Plaintiff commenced this action asserting causes of action for fraud, negligence, breach of contract, breach of fiduciary duty, and a violation of General Business Law § 349 against all of the defendants for conduct relating to her investment in a private fund established by Walter Grenda, Timothy Dembski, and Reliance Financial Advisors, LLC (collectively, Reliance defendants).

Defendants TD Ameritrade Holding Corporation, TD Ameritrade, Inc., TD Ameritrade Institutional, and TD Ameritrade Clearing, Inc. (collectively, TD Ameritrade defendants) moved to dismiss the complaint against them pursuant to CPLR 3211 (a) (1) and (7) or, in the alternative, to compel arbitration.

In support of their motion pursuant to CPLR 3211, the TD Ameritrade defendants submitted an IRA Application, signed by plaintiff, and a Client Agreement, which was incorporated by reference

into the IRA Application. By signing the IRA Application, plaintiff appointed the Reliance defendants as "agent and attorney-in-fact . . . to buy, sell and trade in stocks, bonds and any other securities, and/or contracts relating to the same [in] accordance with the Client Agreement (incorporated by reference) applicable to this account held in [plaintiff's] name . . . without notice to [plaintiff]." Additionally, the IRA Application stated that plaintiff "also underst[oo]d and agree[d] that TD Ameritrade ha[d] no duty or responsibility to monitor trading in [plaintiff's] accounts by [her] Agent."

The Client Agreement provided that plaintiff's accounts with the TD Ameritrade defendants were "self-directed," plaintiff was "responsible for orders and instructions placed in [her a]ccount," and that "[a]ny investment decision that [plaintiff] ma[d]e . . . [wa]s based on [her] own investment decisions or those of [her a]dvisor and [were] at [her] own risk."

Concluding that the motion was "premature" in the absence of discovery, Supreme Court denied it without reviewing the substantive contentions advanced therein. We conclude that the court erred in denying the motion.

Initially, we note that, contrary to plaintiff's contention, the order is appealable despite the fact that the court denied the motion without prejudice (*see Lobello v New York Cent. Mut. Fire Ins. Co.*, 112 AD3d 1287, 1287; *see also Gruet v Care Free Hous. Div. of Kenn-Schl Enters.*, 305 AD2d 1060, 1060), and we further conclude that the appeal is timely. Although plaintiff could have moved to dismiss the appeal for failure to perfect within 60 days of service of the notice of appeal (*see* 22 NYCRR 1000.12 [a]), she did not do so (*see generally Matter of Allegany Wind LLC v Planning Bd. of Town of Allegany*, 115 AD3d 1268, 1270). Thereafter, the TD Ameritrade defendants moved for an extension of time to perfect their appeal, which this Court granted (*see* 22 NYCRR 1000.13 [f]).

With respect to the cause of action for fraud insofar as asserted against the TD Ameritrade defendants, plaintiff was required to allege "misrepresentation of a material fact, scienter, justifiable reliance, and injury" (*Merrill Lynch Credit Corp. v Smith*, 87 AD3d 1391, 1392 [internal quotation marks omitted]). Here, plaintiff failed to allege specifically that the TD Ameritrade defendants knew or should have known the monthly statements it sent to plaintiff reported a false or inaccurate value (*see id.* at 1393), and the allegations were not otherwise pleaded with particularity as required by CPLR 3016 (b). Consequently, we agree with the TD Ameritrade defendants that the court erred in denying that part of the motion seeking dismissal of the fraud cause of action against them for failure to state a cause of action (*see* CPLR 3211 [a] [7]).

We also agree with the TD Ameritrade defendants that the court erred in denying that part of their motion seeking dismissal of the cause of action for breach of contact against them. "Plaintiff was required to set forth in that cause of action . . . the provisions of

the contract upon which the claim is based" (*M&T Bank Corp. v Gemstone CDO VII, Ltd.*, 68 AD3d 1747, 1750-1751 [internal quotation marks omitted]; *see Valley Cadillac Corp. v Dick*, 238 AD2d 894, 894). While plaintiff broadly alleged that she "had a contract with all defendants to provide prudent financial advice for her benefit" and that the TD Ameritrade defendants were "obligated to have supervisory and compliance procedures in place," she failed to identify the particular contractual provision that was breached (*see* CPLR 3211 [a] [7]). In addition, the documentary evidence submitted by the TD Ameritrade defendants, i.e., the IRA Application and Client Agreement, conclusively refutes plaintiff's allegation that the TD Ameritrade defendants owed any such contractual obligations to her. Consequently, we agree with the TD Ameritrade defendants that the court erred in failing to dismiss the breach of contract cause of action against them (*see* CPLR 3211 [a] [1]; *Sheriff's Silver Star Assn., Inc. v County of Oswego*, 27 AD3d 1104, 1105-1106, *lv denied* 7 NY3d 712).

With respect to the negligence cause of action, we agree with the TD Ameritrade defendants that plaintiff "failed to show that there was a legal duty imposed upon [them] independent of the contract itself, or that [they] engaged in tortious conduct separate and apart from [their alleged] failure to fulfill [their] contractual obligations" (*LHR, Inc. v T-Mobile USA, Inc.*, 88 AD3d 1301, 1303-1304 [internal quotation marks omitted]; *see D'Ambrosio v Engel*, 292 AD2d 564, 565, *lv denied* 99 NY2d 503; *see also Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389). Thus, we conclude that the court erred in denying that part of the motion seeking dismissal of the negligence cause of action against the TD Ameritrade defendants (*see* CPLR 3211 [a] [7]).

With respect to the cause of action for breach of fiduciary duty insofar as asserted against the TD Ameritrade defendants, in opposition to the motion, plaintiff clarified that the TD Ameritrade defendants' fiduciary duty to her arose by virtue of plaintiff having discretionary accounts with them; the IRA Application and Client Agreement conclusively establish, however, that plaintiff's accounts with the TD Ameritrade defendants were, instead, self-directed. Consequently, the TD Ameritrade defendants owed no fiduciary duty to plaintiff (*see Celle v Barclays Bank P.L.C.*, 48 AD3d 301, 303; *Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 268-269; *see also De Kwiatkowski v Bear, Stearns & Co., Inc.*, 306 F3d 1293, 1311; *Press v Chemical Inv. Servs. Corp.*, 166 F3d 529, 536). We therefore conclude that the court erred in failing to dismiss the cause of action for breach of fiduciary duty insofar as asserted against the TD Ameritrade defendants (*see* CPLR 3211 [a] [1]).

We agree with the TD Ameritrade defendants that the court erred in denying that part of the motion seeking dismissal of the cause of action for a violation of General Business Law § 349 against them, but for a reason different from those advanced by them (*see generally State of New York v Popricki*, 89 AD2d 391, 392). We conclude that plaintiff failed to plead that the alleged deceptive acts or practices

"affect[] the consuming public at large" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 321; *see generally Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26-27), and that failure is fatal to the cause of action.

In light of our determination, we do not reach the parties' remaining contentions.

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

966

KA 13-02024

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES BRADLEY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM G. PIXLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered October 4, 2013. The judgment convicted defendant, upon a jury verdict, of criminally negligent homicide and assault in the third degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of criminally negligent homicide (Penal Law § 125.10) and assault in the third degree (§ 120.00 [3]), defendant contends that the conviction is not supported by legally sufficient evidence because the evidence presented at trial varied from the limited theories alleged in the indictment, as amplified by the bill of particulars. We agree.

On May 9, 2011, defendant suffered a seizure while operating his vehicle, and the seizure caused him to drive into a park, where he struck two children, killing one and injuring the other. Thereafter, defendant was indicted by a grand jury and charged with manslaughter in the second degree (Penal Law § 125.15 [1]) for recklessly causing a death; assault in the second degree (§ 120.05 [4]) for recklessly causing serious physical injury by means of a dangerous instrument, i.e., a motor vehicle; and driving while ability impaired by drugs (Vehicle and Traffic Law § 1192 [4]) for operating a motor vehicle while his ability to do so was impaired by the use of a drug, i.e., marihuana. Prior to trial, defendant served multiple demands for a bill of particulars requesting, inter alia, that the People specifically describe how defendant was reckless. In response, the People specified only that “[t]he ingestion of marihuana and a failure

to take medication were both factors that contributed to the defendant's recklessness." Despite defendant's objections during the course of the trial, including a motion for a trial order of dismissal at the close of the People's case and renewal of that motion at the close of all proof (*see generally People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678), the People presented evidence that defendant was reckless based upon not only marihuana use and failure to take medication, but also based upon, inter alia, his lack of sleep, failure to inform his doctors of his syncope events, and failure to control his alcohol consumption. The jury found defendant not guilty of the indicted charges but guilty of the lesser included offenses of criminally negligent homicide and assault in the third degree.

We note at the outset that, contrary to the People's contention, defendant preserved the legal insufficiency issue for our review. A conviction is supported by legally sufficient evidence "when, viewing the facts in [the] light most favorable to the People, 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349; *see People v Bleakley*, 69 NY2d 490, 495). "Where the charge against a defendant is limited either by a bill of particulars or the indictment itself, the defendant has a fundamental and nonwaivable right to be tried only on the crimes charged" (*People v Duell*, 124 AD3d 1225, 1226, *lv denied* 26 NY3d 967 [internal quotation marks omitted]). Here, because the People specifically narrowed their theory of recklessness in the bill of particulars, County Court was " 'obliged to hold the prosecution to this narrower theory alone' " (*id.* at 1227; *see People v Smith*, 161 AD2d 1160, 1161, *lv denied* 76 NY2d 865).

The People did not present any evidence that marihuana use, in general, may cause seizures or that marihuana use caused defendant's specific seizure herein. In addition, the People did not present any evidence that defendant had been prescribed anti-seizure medication and that he had failed to take it. Inasmuch as there was a variance between the People's trial evidence and the indictment as amplified by the bill of particulars, and that evidence was insufficient to support the theories of defendant's recklessness set forth in the bill of particulars, defendant was essentially tried and convicted on charges for which he had not been indicted (*see Duell*, 124 AD3d at 1227). The judgment of conviction therefore must be reversed and the indictment must be dismissed (*see id.*; *People v Burns*, 303 AD2d 1032, 1033-1034; *Smith*, 161 AD2d at 1161; *cf. People v Graves*, 136 AD3d 1347, 1348-1349, *lv denied* 27 NY3d 1069).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

976

CA 17-00289

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, TROUTMAN, AND WINSLOW, JJ.

COUNTY OF MONROE AND MONROE COUNTY AIRPORT AUTHORITY, PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

CLOUGH HARBOUR & ASSOCIATES, LLP, DEFENDANT-APPELLANT-RESPONDENT.

SHEATS & BAILEY, PLLC, BREWERTON (EDWARD J. SHEATS OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (JOHN H. CALLAHAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 17, 2016. The order denied the motion of plaintiffs for summary judgment and denied the cross motion of defendant seeking, inter alia, summary judgment.

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

Memorandum: Plaintiffs commenced this action against defendant seeking a declaration that defendant is obligated, under the terms of the parties' agreement, to reimburse plaintiffs for all defense costs associated with an underlying personal injury lawsuit brought against plaintiffs (*Klepanchuk v County of Monroe*, 129 AD3d 1609, *lv denied* 26 NY3d 915). Preliminarily, we note that defendant effectively abandoned any challenge to Supreme Court's denial of its cross motion for summary judgment dismissing the complaint pursuant to CPLR 3212 inasmuch as defendant has not raised any such challenge on appeal (*see Becker-Manning, Inc. v Common Council of City of Utica*, 114 AD3d 1143, 1143-1144). Notably, defendant's main and reply briefs state that "[t]he Decision and Order of the court below should be affirmed insofar as it denied the motion and cross-motion for summary judgment pursuant to CPLR 3212."

We conclude that the court properly denied plaintiffs' motion for summary judgment seeking the requested declaration. Contrary to plaintiffs' contention, the indemnification provision at issue is triggered only in the event of a finding of an intentional or negligent act by defendant and, on this record, plaintiffs have failed to show either one as a matter of law (*see Bellreng v Sicoli & Massaro, Inc*. [appeal No. 2], 108 AD3d 1027, 1031; *Guarnieri v Essex*

Homes of WNY, 24 AD3d 1266, 1266-1267). We further conclude that the explicit language of the indemnification provision does not violate General Obligations Law § 5-322.1 inasmuch "as it does not require [defendant] to indemnify [plaintiffs] for [their] own negligence" (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 209). Instead, the "provision is clear, obligating [defendant] to indemnify [plaintiffs] only when it is shown that damages were caused by [defendant's] own negligence" (*id.*; *see Ostuni v Town of Inlet*, 64 AD3d 854, 855; *Kowalewski v North Gen. Hosp.*, 266 AD2d 114, 114-115).

We conclude that the court properly denied that part of defendant's cross motion seeking to dismiss the complaint under CPLR 3211 (a) (7). It is well established that a declaratory judgment is a discretionary remedy (*see* CPLR 3001; *Bower & Gardner v Evans*, 60 NY2d 781, 782; *Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 148, *cert denied* 464 US 993), and "the [general] rule in declaratory judgment actions [is] that on a motion to dismiss the complaint for failure to state a cause of action, the only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to him" (*Law Research Serv. v Honeywell, Inc.*, 31 AD2d 900, 901; *see Plaza Dr. Group of CNY, LLC v Town of Sennett*, 115 AD3d 1165, 1166). Contrary to defendant's contention, the existence of triable issues of fact does not preclude declaratory relief (*see Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99-100, *lv denied* 15 NY3d 703; *Empire Mut. Ins. Co. v McLaughlin*, 35 AD2d 1074, 1074; *Armstrong v County of Onondaga, Onondaga County Water Dist.*, 31 AD2d 735, 736). We reject defendant's further contention that the action should be dismissed because plaintiffs have other adequate alternative remedies available. The Court of Appeals has expressly noted that "[t]he mere existence of other adequate remedies . . . does not require dismissal: 'We have never gone so far as to hold that, when there exists a genuine controversy requiring a judicial determination, the Supreme Court is bound, solely for the reason that another remedy is available, to refuse to exercise the power conferred by [the predecessor statutes to CPLR 3001]' " (*Morgenthau*, 59 NY2d at 148). Contrary to defendant's final contention, plaintiffs are not precluded from bringing a declaratory judgment action because they did not implead defendant in the underlying action (*see Hudson Ins. Co. v AK Const. Co., LLC*, 92 AD3d 521, 521; Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3001:14).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

982

CA 17-00372

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, TROUTMAN, AND WINSLOW, JJ.

PROSTHETIC HOME SERVICES, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FIDELIS CARE OF NEW YORK WESTERN REGION,
DEFENDANT-RESPONDENT.

DADD, NELSON, WILKINSON & WUJCIK, ATTICA (JAMES M. WUJCIK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

NIXON PEABODY LLP, BUFFALO (ERIK A. GOERGEN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered May 3, 2016. The order granted the motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action against defendant, a New York State-sponsored health insurance provider, asserting causes of action for fraud resulting in breach of contract and for prima facie tort. Pursuant to a contract with defendant, plaintiff provided prosthetic services to defendant's members, and defendant reimbursed plaintiff according to a reimbursement rate schedule that was adjusted periodically during the term of the contract. Plaintiff did not renew the contract after defendant informed plaintiff that all prosthetic providers would be compelled to accept the same reduced reimbursement rate if they wished to continue to do business with defendant. According to plaintiff, that information was untrue inasmuch as not all prosthetic providers doing business with defendant in western New York were offered the same reimbursement rate or were compelled to accept a reduced reimbursement rate. Defendant moved to dismiss the complaint pursuant to CPLR 3211 (a) (5) and (7). Plaintiff opposed the motion and, in the alternative, sought leave to replead the complaint pursuant to CPLR 3211 (e). Supreme Court granted the motion, and we affirm.

Both of plaintiff's causes of action contained pleading defects. Inasmuch as plaintiff presented no proposed amendments to correct the defects (*see Gerrish v State Univ. of N.Y. at Buffalo*, 129 AD3d 1611, 1613), we conclude that the court properly denied plaintiff leave to

replead the complaint (*see generally* CPLR 3211 [e]).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

984.1

CA 17-00545

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF DAVID SCHNEITER AND RACHEL SCHNEITER, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, RESPONDENT, AND ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT-APPELLANT.

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

ZDARSKY, SAWICKI & AGOSTINELLI, LLP, BUFFALO (DAVID E. GUTOWSKI OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

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

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 3, 2017 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, granted the petition and directed respondent Erie County Department of Social Services to return the subject child to the certified foster home of petitioners.

It is hereby ORDERED that the judgment so appealed from is unanimously modified in the exercise of discretion by vacating that part granting the petition insofar as it sought the return of the subject child to the certified foster home of petitioners and by vacating the second through sixth decretal paragraphs, and as modified the judgment is affirmed without costs, and the matter is remitted to respondent New York State Office of Children and Family Services to conduct forthwith a hearing to determine the best interests of the child in accordance with the following memorandum: This proceeding arises out of a determination of respondent Erie County Department of Social Services (DSS) to remove the subject child, born in March 2015, from petitioners' foster care. The child had been living in petitioners' home since May 2015, but was removed on June 1, 2016 to be reunited with her siblings in a different foster home (*see* 18 NYCRR 431.10). Petitioners sought administrative review of the removal and requested a fair hearing before respondent New York State Office of Children and Family Services (OCFS) (*see* Social Services Law §§ 22, 400; 18 NYCRR 443.5), which was completed by August 17, 2016. After the hearing, OCFS issued a decision on or about October 7, 2016,

concluding that the determination of DSS to remove the child was arbitrary and capricious and not supported by substantial evidence. Despite that decision, OCFS did not order the return of the child to petitioners' home but instead remitted the matter to DSS to complete an evaluation of the child to determine whether it was appropriate to leave her in her present foster home or to return her to petitioners. Petitioners thereafter commenced this proceeding pursuant to CPLR article 78 challenging the decision of OCFS (*see* Social Services Law § 22 [9] [b]; *see generally People ex rel. Ninesling v Nassau County Dept. of Social Servs.*, 46 NY2d 382, 386, *rearg denied* 46 NY2d 836). Supreme Court granted the petition, concluding that OCFS abused its discretion in remitting the matter to DSS and should have, among other things, immediately returned the child to petitioners and thus directing DSS to do so. DSS appealed and, while the appeal was pending, this Court issued an order staying the child's return to petitioners, staying proceedings in Family Court concerning the adoption of the child by the foster parent of the child's siblings, and affording petitioners periods of visitation with the child.

Contrary to the contention of DSS, the court properly refused to transfer the proceeding to this Court pursuant to CPLR 7804 (g) inasmuch as the petition does not raise a substantial evidence issue (*see Matter of Dubb Enters. v New York State Liq. Auth.*, 187 AD2d 831, 832; *see also Matter of Guesno v Village of E. Rochester*, 118 AD3d 1460, 1460). Petitioners herein are challenging the decision of OCFS after the fair hearing, to the extent that OCFS failed to return the child to petitioners, rather than the underlying removal itself.

Further, we agree with the court that, in its decision after the fair hearing, OCFS should have immediately ordered the return of the child to petitioners. Although a court does not conduct a de novo review of the best interests of the child in the context of a CPLR article 78 proceeding challenging an agency's determination to remove a foster child from a foster home, the best interests of the child are nevertheless of great importance during the review process (*see Matter of John B. v Niagara County Dept. of Social Servs.*, 289 AD2d 1090, 1091-1092; *see also Matter of O'Rourke v Kirby*, 54 NY2d 8, 13). If an agency does not act consistently with the best interests of the child, its "actions must be deemed arbitrary and capricious, or not based on substantial evidence" (*John B.*, 289 AD2d at 1092 [internal quotation marks omitted]; *see O'Rourke*, 54 NY2d at 15 n 2). Here, petitioners offered uncontroverted expert testimony at the fair hearing that the child's removal from petitioners' home and the disruption of the primary bond that the child had developed with petitioner Rachel Schneiter was contrary to the child's best interests and represented a "trauma" that will have a "significant impact on all areas of her development." Moreover, the record of the fair hearing establishes that DSS, prior to removing the child, did not evaluate or even consider the child's emotional relationship with her siblings or her attachment to petitioners, both of which are enumerated in 18 NYCRR 431.10 (b) as "[f]actors to be considered in making a determination of whether siblings or half-siblings should be placed together." Based upon the foregoing, we conclude that the court properly determined that the decision of OCFS to not return the child to petitioners' home

immediately was in error.

This case, however, presents unique difficulties because well over a year has elapsed since the child's removal from petitioners' home and the subsequent fair hearing. We acknowledge that petitioners' expert testified at the hearing that the damage caused to the child could be mitigated or reversed if she were "swiftly" or "urgently" returned to petitioners' care, but the child has been living in the foster home with her siblings since June 1, 2016. It would be conjecture for us to conclude now that disrupting the child's life again and returning her to petitioners' home would be more consistent with her best interests than having her remain in her present foster home. Despite our conclusion that the court adjudicated this matter appropriately, the relief sought by petitioners, i.e., the immediate return of the child, is inappropriate at this juncture. In the exercise of our discretion, we therefore modify the judgment accordingly, and we remit the matter to OCFS to conduct a hearing forthwith to determine the best interests of the child and to fashion an appropriate remedy consistent with the evidence presented at the hearing (*see Matter of Peters v McCaffrey*, 173 AD2d 934, 936; *Goldstein v Lavine*, 100 Misc 2d 126, 135; *see generally Bennett v Jeffreys*, 40 NY2d 543, 548-550). Should petitioners be aggrieved by OCFS's subsequent decision, they may seek review through another CPLR article 78 proceeding. While the matter is pending, the adoption proceedings currently pending in Family Court concerning the child's adoption by the foster parent of the child's siblings shall remain stayed, and petitioners shall continue to be afforded visitation with the child as ordered by this Court in an order entered on April 4, 2017 and modified on April 7, 2017.

In reaching our decision, we stress that it is apparent from the record that petitioners and the foster parent of the child's siblings both offer supportive and loving homes. The delay in affording the child the stability she deserves has been needlessly created solely by her erroneous removal from petitioners' home by DSS and the subsequent failure of OCFS to order the child's immediate return following the fair hearing.

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

988

TP 17-00519

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF QUAYSHAUN HUBBARD, PETITIONER,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING 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 (VICTOR PALADINO 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 [Michael M. Mohun, A.J.], entered March 13, 2017) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rules 101.10 (7 NYCRR 270.2 [B] [2] [i]) and 180.10 (7 NYCRR 270.2 [B] [26] [i]) and as modified the determination is confirmed without costs and respondent is directed to expunge from petitioner's institutional record all references to the violation of those inmate rules.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III hearing, that he violated various inmate rules. As respondent correctly concedes, the determination that petitioner violated inmate rules 101.10 (7 NYCRR 270.2 [B] [2] [i] [engaging in sexual acts]) and 180.10 (7 NYCRR 270.2 [B] [26] [i] [violating a visitation procedure]) must be annulled. Petitioner was deprived of his right to reply to the evidence against him with respect to those charges because of the unexplained unavailability for use at the disciplinary hearing of the videotape that allegedly depicted his violations thereof (*see Matter of Marquez v Mann*, 192 AD2d 100, 103-104; *see generally Matter of Tolliver v Fischer*, 125 AD3d 1023, 1023-1024, *lv denied* 25 NY3d 908; *Matter of Farrell v New York State Off. of the Attorney Gen.*, 108 AD3d 801, 801-802). We therefore modify the determination accordingly, and

we direct respondent to expunge from petitioner's institutional record all references thereto. Inasmuch as petitioner has already served the penalty and there was no recommended loss of good time, there is no need to remit the matter to respondent for reconsideration of the penalty (*see Matter of Washington v Annucci*, 150 AD3d 1700, 1701; *Matter of Reid v Saj*, 119 AD3d 1445, 1446).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1001

CA 17-00305

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, NEMOYER, AND CURRAN, JJ.

UTICA MUTUAL INSURANCE COMPANY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALFA MUTUAL INSURANCE COMPANY, AMERICAN AGRICULTURAL INSURANCE COMPANY, ARROWOOD INDEMNITY COMPANY, DORINCO REINSURANCE COMPANY, EMPLOYERS MUTUAL CASUALTY COMPANY, FACTORY MUTUAL INSURANCE COMPANY, FARMERS MUTUAL HAIL INSURANCE COMPANY OF IOWA, GENERAL SECURITY NATIONAL INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, GREATER NEW YORK MUTUAL INSURANCE COMPANY, GUARANTEE INSURANCE COMPANY, HANOVER INSURANCE COMPANY, THE HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY, HASTINGS MUTUAL INSURANCE COMPANY, MERASTAR INSURANCE COMPANY, MERRIMACK MUTUAL FIRE INSURANCE COMPANY, METROPOLITAN GROUP PROPERTY AND CASUALTY INSURANCE COMPANY, MITSUI SUMITOMO INSURANCE USA INC., MOSAIC INSURANCE COMPANY, MOTORISTS MUTUAL INSURANCE COMPANY, PARTNERRE INSURANCE COMPANY OF NEW YORK, FORMERLY KNOWN AS WINTERTHUR REINSURANCE CORPORATION OF AMERICA, FORMERLY KNOWN AS “WINTERTHUR” SWISS INSURANCE COMPANY, U.S. BRANCH, PRAETORIAN INSURANCE COMPANY, SEATON INSURANCE COMPANY, SENTRY INSURANCE A MUTUAL COMPANY, SIRIUS AMERICA INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY COMPANY, UNITED FIRE AND CASUALTY COMPANY, WAUSAU UNDERWRITERS INSURANCE COMPANY, WESTERN NATIONAL MUTUAL INSURANCE COMPANY, WESTPORT INSURANCE COMPANY, ZURICH AMERICAN INSURANCE COMPANY, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

HUNTON & WILLIAMS LLP, WASHINGTON, D.C. (SYED S. AHMAD, OF THE WASHINGTON, D.C. AND VIRGINIA BARS, ADMITTED PRO HAC VICE, OF COUNSEL), FELT EVANS, LLP, CLINTON, FOR PLAINTIFF-APPELLANT.

HOGAN LOVELLS US LLP, NEW YORK CITY (SEAN THOMAS KEELY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered August 22, 2016. The judgment granted the motion of defendants-respondents for partial summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting judgment in favor of defendants-respondents as follows:

> It is ADJUDGED and DECLARED that plaintiff is not entitled to recover from defendants-respondents any amounts exceeding the "reinsurance accepted" amount set forth in item 4 of the relevant reinsurance certificates,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, judgment declaring the rights and obligations of the parties with respect to reinsurance policies issued by defendants to plaintiff. We conclude that, for reasons stated in its decision, Supreme Court properly granted the motion of defendants-respondents seeking partial summary judgment. The court erred, however, in failing to declare the rights of the parties, and we therefore modify the judgment by making the requisite declaration (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1007

CA 17-00369

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, NEMOYER, AND CURRAN, JJ.

AJMRT, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LINDA L. KERN AND 2080 EAST RIDGE RD LLC,
DEFENDANTS-APPELLANTS.

LECLAIR KORONA VAHEY COLE LLP, ROCHESTER (PAUL L. LECLAIR OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

UNDERBERG & KESSLER, LLP, ROCHESTER (ALINA NADIR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered May 16, 2016. The order, among other things, granted plaintiff a preliminary injunction and denied the cross motion of defendants to dismiss the complaint.

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

Memorandum: Plaintiff is the lessee of property located at 2080 East Ridge Road in the Town of Irondequoit (property). Defendant Linda L. Kern acquired the property in 2008 and, in 2016, she sold it to defendant 2080 East Ridge Rd LLC. Plaintiff subsequently commenced this action seeking, inter alia, specific performance of a right of first refusal to purchase the property pursuant to a lease agreement executed in 1971 by the alleged predecessors in interest of plaintiff and Kern (1971 lease). Plaintiff alleges that, in March 2003, Kern's predecessor in interest and plaintiff executed an "Extension of Lease" (March 2003 extension), which assigned the 1971 lease to plaintiff and extended the term of that lease. Plaintiff moved for, inter alia, a temporary restraining order and preliminary injunction enjoining defendants from altering or transferring the property, or taking any other action with respect to the property that may be adverse to plaintiff's interest during the pendency of this action. Defendants cross-moved for, inter alia, an order dismissing the complaint pursuant to CPLR 3211 (a) (1), (3) and (7) on the ground that plaintiff did not have a right of first refusal inasmuch as the 1971 lease is not the operable lease for the property, and that the March 2003 extension extended the term of a lease of the property dated March 27, 2003 (March 27, 2003 lease). Supreme Court, inter alia, granted that part of plaintiff's motion seeking a preliminary injunction and denied defendants' cross motion. We affirm.

We conclude that the court properly granted that part of plaintiff's motion seeking a preliminary injunction. "In order to prevail on a motion for a preliminary injunction, the moving party has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury in the absence of injunctive relief, and (3) a balance of equities in its favor" (*Eastman Kodak Co. v Carmosino*, 77 AD3d 1434, 1435*; see John G. Ullman & Assoc., Inc. v BCK Partners, Inc.*, 139 AD3d 1358, 1358, *lv dismissed* 28 NY3d 943).

With respect to the first element, we conclude that plaintiff established by clear and convincing evidence that there was a likelihood of success on the merits with respect to whether the March 2003 extension was an agreement to extend the term of the 1971 lease. While the March 2003 extension does not specifically refer to the 1971 lease and does make reference to a lease dated March 27, 2003, plaintiff avers that the March 27, 2003 lease was never drafted, executed or recorded, and defendants were unable to locate a copy of the March 27, 2003 lease. Moreover, plaintiff submitted evidence that plaintiff and Kern acted with the understanding that the March 2003 extension extended the 1971 lease inasmuch as plaintiff made, and defendant Kern accepted, rental and tax payments in accordance with the terms of the 1971 lease, and Kern gave plaintiff notice of the bona fide offer to purchase the property, as required under the right of first refusal clause found in the 1971 lease.

We further conclude that plaintiff established by clear and convincing evidence that it will be irreparably harmed in the absence of injunctive relief. We reject defendants' contention that the court improperly considered evidence submitted in plaintiff's reply papers with respect to that issue (*see Ryan Mgt. Corp. v Cataffo*, 262 AD2d 628, 630). In its moving papers, plaintiff submitted evidence that it leased the property for several years with the understanding that the 1971 lease, which included a right of first refusal clause, was in effect. Plaintiff also submitted evidence that it exercised its right of first refusal pursuant to the terms of the 1971 lease. It was only after defendants submitted their opposition to plaintiff's motion that plaintiff became aware that defendants contended that the 1971 lease was inoperative. In reply, plaintiff made a "direct response to [the] allegations raised by . . . defendant[s] in [their] opposition papers" (*id.*), by asserting that it had previously attempted to purchase the property but that its offer was rejected, and that it had been waiting to purchase the property pursuant to the right of first refusal clause in the 1971 lease because the property is unique, has a prime location and holds value to the family of plaintiff's members.

With respect to the third element, we conclude that the balance of equities favors granting that part of plaintiff's motion seeking a preliminary injunction (*see Felix v Brand Serv. Group LLC*, 101 AD3d 1724, 1726). Although defendants may suffer a delay in altering or transferring the property should they prevail on the merits, plaintiff's interest will be permanently affected if the property is altered or transferred while this action is pending.

Finally, we conclude that the court properly denied defendants' cross motion to dismiss the complaint (*see generally EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1009

KA 14-01897

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL WILLIAMS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered March 4, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), assault in the second degree, and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1], [3]). Defendant's claims that the prosecutor improperly vouched for the credibility of four prosecution witnesses during summation are not preserved for our review because he failed to object to the allegedly improper comments (*see People v Williams*, 46 NY2d 1070, 1071). We decline to exercise our power to review those claims as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Viewing the evidence in light of the elements of murder in the second degree under Penal Law § 125.25 (1) and (3) as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's contention that the verdict is against the weight of the evidence with respect to the element of "intent to cause the death of another" (§ 125.25 [1]), "[t]he testimony established that . . . defendant shot one of [the] victims in the back at close range when that victim tried to flee in an attempt to thwart . . . defendant's robbery attempt" and, thus, "[t]he jury was justified in inferring, based on these facts, an intent on the part of . . . defendant to kill" (*People v Woods*, 126 AD2d 766, 767, *lv denied* 69 NY2d 888, *reconsideration*

denied 70 NY2d 659). With respect to the element of causing the death of another during an "attempt[] to commit robbery" (§ 125.25 [3]), the prosecution presented testimony that, during the fatal encounter, defendant's accomplice displayed a gun to the murder victim and stated, "Give it up," with reference to the victim's marihuana, and that defendant later admitted that he was "going to rob somebody" and things "didn't go like [they were] supposed to, [and] he shot a Hispanic dude." That testimony is not incredible as a matter of law and we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Baker*, 30 AD3d 1102, 1102-1103, *lv denied* 7 NY3d 846).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1010

TP 17-00424

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF NJERA WILSON, PETITIONER,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING 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 (ZAINAB A. CHAUDHRY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered February 28, 2017) to review two determinations of respondent. The determinations found after tier III hearings that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination finding petitioner guilty of violating inmate rule 101.2 (7 NYCRR 270.2 [B] [2] [v]) is unanimously annulled on the law without costs, the petition is granted in part, respondent is directed to expunge from petitioner's institutional record all references to that violation and to refund the $5 surcharge, and the remaining determination is confirmed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul two determinations, following two separate tier III disciplinary hearings, that he violated various inmate rules. The first determination concerned an incident that occurred on May 20, 2016, and the second determination concerned an incident that occurred on May 23, 2016. Addressing first the determination related to the May 23, 2016 incident, we conclude that respondent correctly concedes that the determination finding that petitioner violated inmate rule 101.22 (7 NYCRR 270.2 [B] [2] [v] [stalking]) is not supported by substantial evidence. We therefore grant the petition in part by annulling the determination finding that petitioner violated that inmate rule, and we direct respondent to expunge from petitioner's institutional record all references to that violation and to refund the $5 surcharge related thereto.

Contrary to petitioner's remaining contention, the determination

related to the May 20, 2016 incident, finding that he violated inmate rules 103.10 (7 NYCRR 270.2 [B] [4] [i] [extortion]), 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusal to obey order]), 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference with employee]) and 107.11 (7 NYCRR 270.2 [B] [8] [ii] [harassment]), is supported by substantial evidence (*see People ex rel. Vega v Smith*, 66 NY2d 130, 139-140; *Matter of Green v Sticht*, 124 AD3d 1338, 1339, *lv denied* 26 NY3d 906). At the hearing, petitioner pleaded guilty to violating rules 106.10 and 107.10, and he does not challenge his guilt with respect to violating those rules. " 'In any event, the guilty plea constitutes substantial evidence of his guilt' " (*Matter of Holdip v Travis*, 9 AD3d 825, 826; *see Matter of Liner v Fischer*, 96 AD3d 1416, 1417).

With respect to the remaining two inmate rules, the misbehavior report and the testimony of its author constitute substantial evidence that petitioner violated them (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966; *Vega*, 66 NY2d at 140). Petitioner's testimony that he did not commit the violations "merely presented an issue of credibility that the Hearing Officer was entitled to resolve against him" (*Green*, 124 AD3d at 1339; *see Foster*, 76 NY2d at 966).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1015

KA 15-02036

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL AYALA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered November 20, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia in the second degree (three counts).

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of one count of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and three counts of criminally using drug paraphernalia in the second degree (§ 220.50 [1] - [3]), defendant contends that, inasmuch as there was no direct evidence of his constructive possession, County Court erred in refusing to provide a circumstantial evidence instruction to the jury. We agree.

While executing a search warrant in an apartment leased to defendant's girlfriend, but in which defendant was present, police officers found baggies of cocaine in a bedroom. The baggies were located variously in a jacket pocket, in a dresser drawer, and on the floor behind the headboard of the bed. None of the baggies was in plain view. The officers also recovered a dilutant commonly used in the drug trade in a kitchen cabinet, numerous small baggies commonly used in the drug trade in a kitchen cabinet and a dresser drawer in the bedroom, and three cellular phones in a dresser drawer with one of the baggies of cocaine. On top of the dressers in the bedroom, in plain view, were a scale and a box of sandwich bags. Inside the box of sandwich bags were a smaller scale and a credit or debit card in defendant's name. In different locations in the apartment, police officers recovered documents in defendant's name. One had been mailed

to defendant at the apartment, but a more recent document had been mailed to defendant at a different address.

Both defendant and his girlfriend were indicted for possession of the cocaine and paraphernalia. Defendant's girlfriend pleaded guilty, and the People proceeded to trial against defendant based on his constructive possession of the drugs and paraphernalia. At defendant's trial, however, defendant's girlfriend testified that all of the drugs were hers and that defendant, who did not live at the apartment, was unaware of her involvement in the drug trade.

We conclude that reversal is required based on the court's refusal to provide a circumstantial evidence instruction. "Constructive possession can be proven directly or circumstantially" (*People v Santiago*, 22 NY3d 990, 992), and "[a] circumstantial evidence charge is required [only] where the evidence against a defendant is 'wholly circumstantial' " (*People v Guidice*, 83 NY2d 630, 636; *see People v Slade*, 133 AD3d 1203, 1207, *lv denied* 26 NY3d 1150; *see also People v Hardy*, 26 NY3d 245, 249). Here, although there was direct evidence of defendant's dominion and control over the apartment based on his presence in the apartment, "there was no direct evidence of his dominion or control over the drugs . . . found in the apartment" (*People v Brian*, 84 NY2d 887, 889; *see People v Spencer*, 1 AD3d 709, 710). Contrary to the People's contention, the cocaine and most of the paraphernalia were not in plain view (*cf. People v Downs*, 21 AD3d 1414, 1414-1415, *lv denied* 5 NY3d 882; *People v Wilson*, 284 AD2d 958, 958, *lv denied* 96 NY2d 943). As a result, "to find that defendant had control over the contraband, the drawing of an additional inference was required. For this reason, the circumstantial evidence charge requested by defense counsel was required" (*Spencer*, 1 AD3d at 710).

We further agree with defendant that the error cannot be deemed harmless. The testimony of defendant's girlfriend exculpated defendant and, apart from his mere presence in the apartment and several items bearing his name, there was no evidence linking defendant to the apartment in order to establish constructive possession of the contraband. Thus it cannot be said that the proof of defendant's guilt is overwhelming (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1020

CAF 15-01464

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF MICHAEL G. WHITNEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DENISE T. WHITNEY, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

LOVALLO & WILLIAMS, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR PETITIONER-APPELLANT.

DAVID S. SARKOVICS, ATTORNEY FOR THE CHILD, ORCHARD PARK.

Appeal from an order of the Family Court, Erie County (Michael F. Griffith, J.), entered August 6, 2015 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for a modification of a prior custody order.

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

Same memorandum as in *Matter of Whitney v Whitney* ([appeal No. 3] ___ AD3d ___ [Oct. 6, 2017]).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1021

CAF 15-01465

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF MICHAEL G. WHITNEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DENISE T. WHITNEY, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

LOVALLO & WILLIAMS, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR PETITIONER-APPELLANT.

DAVID S. SARKOVICS, ATTORNEY FOR THE CHILD, ORCHARD PARK.

Appeal from an order of the Family Court, Erie County (Michael F. Griffith, J.), entered August 6, 2015 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition alleging a violation of a prior order.

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

Same memorandum as in *Matter of Whitney v Whitney* ([appeal No. 3] ___ AD3d ___ [Oct. 6, 2017]).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1022

CAF 15-01466

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF MICHAEL G. WHITNEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DENISE T. WHITNEY, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

LOVALLO & WILLIAMS, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR PETITIONER-APPELLANT.

DAVID S. SARKOVICS, ATTORNEY FOR THE CHILD, ORCHARD PARK

Appeal from an order of the Family Court, Erie County (Michael F. Griffith, J.), entered August 6, 2015 in a proceeding pursuant to Family Court Act article 6. The order dismissed the amended petition for a modification of a prior custody order.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the amended petition is reinstated, and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following memorandum: Petitioner father appeals from six separate orders that dismissed a petition and an amended petition seeking to modify a prior order regarding custody of the parties' children (appeal Nos. 1, 3-6), as well as a petition alleging that respondent mother had violated the visitation provisions of that prior order (appeal Nos. 2 and 5). We note at the outset that we dismiss the appeals from the orders in appeal Nos. 4, 5 and 6 inasmuch as those orders, which granted the motions to dismiss of the mother and the Attorneys for the Children, are subsumed in the final orders dismissing the petitions and amended petition in appeal Nos. 1, 2 and 3 (*see* CPLR 5501 [a] [1]; *Matter of Orzech v Nikiel*, 91 AD3d 1305, 1306). We also further dismiss the appeal from the order in appeal No. 1 because the amended petition superseded the original petition (*see Matter of Schultz v Schultz* [appeal No. 2], 107 AD3d 1616, 1616).

With respect to appeal No. 2, which summarily dismissed the father's petition seeking to hold the mother in contempt of court based on allegations that she violated the visitation provisions of the prior custody order, we conclude that Family Court properly dismissed that petition inasmuch as "the allegations set forth in the petition are insufficient to support a finding of contempt" (*Matter of Fewell v Koons*, 87 AD3d 1405, 1406).

In appeal No. 3, the father contends that the court erred in dismissing his amended petition to modify the prior order regarding custody of the parties' two children. During the pendency of these appeals, we dismissed the father's appeals insofar as they concerned custody of the parties' older child because he reached the age of 18 (*see* Domestic Relations Law § 2; *Matter of Woodruff v Adside*, 26 AD3d 866, 866). We thus address the father's contentions regarding the order in appeal No. 3 only insofar as they concern the parties' younger child. We agree with the father that the court erred in dismissing the amended petition without a hearing inasmuch as the father made "a sufficient evidentiary showing of a change in circumstances to require a hearing" (*Matter of Gelling v McNabb*, 126 AD3d 1487, 1487 [internal quotation marks omitted]; *see Matter of Machado v Tanoury*, 142 AD3d 1322, 1323), based upon, inter alia, the undisputed fact that, after entry of the prior custody order, one of the children was left unattended at the mother's house and accidently set a fire that resulted in $125,000 in property damage. We therefore reverse the order in appeal No. 3, reinstate the amended petition and remit the matter to Family Court for a hearing thereon.

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1023

CAF 15-01467

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF MICHAEL G. WHITNEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DENISE T. WHITNEY, RESPONDENT-RESPONDENT.
(APPEAL NO. 4.)

LOVALLO & WILLIAMS, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR PETITIONER-APPELLANT.

DAVID S. SARKOVICS, ATTORNEY FOR THE CHILD, ORCHARD PARK.

Appeal from an order of the Family Court, Erie County (Michael F. Griffith, J.), entered August 6, 2015 in a proceeding pursuant to Family Court Act article 6. The order granted the motion of the Attorney for the Child to dismiss the amended petition for modification of a prior custody order.

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

Same memorandum as in *Matter of Whitney v Whitney* ([appeal No. 3] ___ AD3d ___ [Oct. 6, 2017]).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1024

CAF 15-01468

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF MICHAEL G. WHITNEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DENISE T. WHITNEY, RESPONDENT-RESPONDENT.
(APPEAL NO. 5.)

LOVALLO & WILLIAMS, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR PETITIONER-APPELLANT.

DAVID S. SARKOVICS, ATTORNEY FOR THE CHILD, ORCHARD PARK.

Appeal from an order of the Family Court, Erie County (Michael F. Griffith, J.), entered August 6, 2015 in a proceeding pursuant to Family Court Act article 6. The order granted the motion of respondent to dismiss the petitions and amended petition.

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

Same memorandum as in *Matter of Whitney v Whitney* ([appeal No. 3] ___ AD3d ___ [Oct. 6, 2017]).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1025

CAF 15-01469

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF MICHAEL G. WHITNEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DENISE T. WHITNEY, RESPONDENT-RESPONDENT.
(APPEAL NO. 6.)

LOVALLO & WILLIAMS, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR PETITIONER-APPELLANT.

DAVID S. SARKOVICS, ATTORNEY FOR THE CHILD, ORCHARD PARK.

Appeal from an order of the Family Court, Erie County (Michael F. Griffith, J.), entered August 6, 2015 in a proceeding pursuant to Family Court Act article 6. The order granted the motion of the Attorney for the Child to dismiss the amended petition for modification of a prior custody order.

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

Same memorandum as in *Matter of Whitney v Whitney* ([appeal No. 3] ___ AD3d ___ [Oct. 6, 2017]).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1026

CA 17-00114

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

HENRY J. WATERMAN, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER AND DAVID J. BAGLEY, II,
DEFENDANTS-APPELLANTS.

BRIAN F. CURRAN, CORPORATION COUNSEL, ROCHESTER (SPENCER L. ASH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Monroe County (Elma A. Bellini, J.), entered July 27, 2016. The order denied the motion of defendants for summary judgment dismissing the complaint and granted the cross motion of plaintiff for summary judgment on the issue of proximate cause.

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

Memorandum: Supreme Court properly denied defendants' motion for summary judgment dismissing the complaint. Contrary to defendants' contention, they are not entitled to governmental immunity. "Governmental immunity does not apply when a public employee, acting in the course of his or her employment, commits an ordinary tort that anyone else might commit—for example, when the employee is negligent in driving a [vehicle]" (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 432 [Smith, J., concurring]). Contrary to defendants' further contention, the court did not abuse its discretion in refusing to consider unauthenticated and uncertified exhibits submitted in support of their motion (*see Dyer v 930 Flushing, LLC*, 118 AD3d 742, 742-743; *see also McBryant v Pisa Holding Corp.*, 110 AD3d 1034, 1035).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1027

CA 16-02232

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

CHRISTINA M. BOEHM, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GUISSEPPE G. ROSARIO, ALSO KNOWN AS G.M. ROSARIO-PARRILLA, DEFENDANT-RESPONDENT.

VINAL & VINAL, P.C., BUFFALO (JEAN VINAL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN SPENCER LLC, BUFFALO (WILLIAM SWIFT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered September 15, 2016. The order denied plaintiff's motion to set aside the jury verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle she was driving collided with a vehicle operated by defendant. After a jury trial, the jury found that both plaintiff and defendant were negligent and apportioned fault, and further found that plaintiff did not sustain a serious injury. Plaintiff appeals from an order denying her posttrial motion to set aside the verdict.

Plaintiff contends that she is entitled to a new trial because defense counsel repeatedly made statements to the jury implying that defendant had no insurance. We reject that contention. References to insurance coverage are generally irrelevant to the issues and are improper because of their prejudicial nature (*see Leotta v Plessinger*, 8 NY2d 449, 461, *rearg denied* 9 NY2d 688, *mot to amend remittitur granted* 9 NY2d 686; *Rendo v Schermerhorn*, 24 AD2d 773, 773; *see also Salm v Moses*, 13 NY3d 816, 817-818). Contrary to plaintiff's contention, defense counsel's references to defendant as her "client" were not improper, and her statements that defendant should not be held "responsible" for certain medical expenses were in response to plaintiff's testimony and the arguments of plaintiff's counsel. Defense counsel never stated or implied that defendant lacked insurance coverage for the accident or would have to pay out of pocket (*cf. Rendo*, 24 AD2d at 773).

We reject plaintiff's further contention that she is entitled to a new trial based on alleged cumulative error during the trial. Plaintiff never requested that Supreme Court take judicial notice of a certain mathematical computation on speed and distance, and therefore there was no error by the court in failing to take such judicial notice. The court did not abuse its discretion in not allowing redirect examination of plaintiff's treating physician and limiting the duration of the cross-examination of the physician who examined plaintiff on defendant's behalf (*see Swatland v Kyle*, 130 AD3d 1453, 1454; *see generally Feldsberg v Nitschke*, 49 NY2d 636, 643, *rearg denied* 50 NY2d 1059). The court's rulings were based on time constraints; the court ended questioning at 5:00 p.m. on the respective days of the witnesses' testimony, and plaintiff did not seek to have the witnesses returned the following day. We have examined plaintiff's remaining claims of alleged errors during the trial and conclude that they are without merit.

Plaintiff raises no issue on appeal regarding the jury's finding of no serious injury, and she has therefore abandoned her contention in her posttrial motion that the verdict should be set aside as against the weight of the evidence on that issue (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). The jury's finding that plaintiff did not sustain a serious injury renders moot plaintiff's contentions that the court erred in denying her motion for a directed verdict on the issue of negligence (*see Cummings v Jiayan Gu*, 42 AD3d 920, 923), and that the verdict is against the weight of the evidence with respect to the jury's apportionment of fault (*see Hinterberger v Leslie*, 45 AD3d 1314, 1314).

All concur except LINDLEY, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent. As a general rule, "whether a defendant has or has not obtained insurance is irrelevant to the issues, and, since highly prejudicial, therefore, inadmissible" (*Leotta v Plessinger*, 8 NY2d 449, 461, *rearg denied* 9 NY2d 688, *mot to amend remittitur granted* 9 NY2d 686; *see Constable v Matie* [appeal No. 3], 199 AD2d 1004, 1005). Here, I conclude that plaintiff should be afforded a new trial because defendant's attorney improperly implied to the jury that defendant lacked insurance coverage and that any award of damages would have to be paid out of his own pocket (*see Vassura v Taylor*, 117 AD2d 798, 799, *appeal dismissed* 68 NY2d 643; *Doody v Gottshall*, 19 Misc 3d 1136[A], *8, *affd as modified* 67 AD3d 1349).

At the outset of his opening statement, defense counsel, referring to defendant, said, "You know, he's an immigrant, he works full time, he has two jobs, and just trying to make a living." Although defendant did in fact have insurance coverage for the accident and defense counsel had been retained by the carrier, defense counsel went on to say that defendant "hired me to defend him in this lawsuit," and that plaintiff, who "wasn't working at the time of the accident," is "trying to get money from my client." Defense counsel further stated in his opening: "I don't think it's my client's responsibility to pay this woman;" "Should my client be responsible for paying this woman's [medical] bills?;" and "[defendant] shouldn't

have to pay for plaintiff's pain medication." Plaintiff's counsel objected three times to these comments, but the court overruled the objections and declined to give a curative instruction. In his summation, defense counsel again suggested that defendant himself would have to satisfy a judgment with his own funds, stating, "I don't think my client should have to pay for" certain of plaintiff's claimed expenses arising from the accident.

In my view, the above comments "may very well have engendered sympathy [for defendant] in the jurors' minds" (*Rendo v Schermerhorn*, 24 AD2d 773, 773), thus depriving plaintiff of a fair trial. I would therefore reverse the order, grant plaintiff's posttrial motion to set aside the verdict, and grant a new trial.

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1029

CA 17-00317

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

JANE DOE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS D'ANGELO, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RICHARD T. SARAF OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL O. MORSE, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered May 2, 2016. The order denied the motion of defendant Nicholas D'Angelo to dismiss the complaint against him, granted the cross motion of plaintiff to extend the time to serve the summons and complaint nunc pro tunc and granted the cross motion of plaintiff to compel Nicholas D'Angelo to provide certain authorizations for access to records.

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

Memorandum: In this action to recover damages for personal injuries, Nicholas D'Angelo (defendant) appeals from an order that denied his motion to dismiss the complaint against him for untimely service, and granted plaintiff's cross motion to extend the time to serve the summons and complaint and for an order compelling defendant to provide authorizations to access sealed records relating to his youthful offender adjudication.

We agree with plaintiff that Supreme Court properly denied defendant's motion inasmuch as defendant waived his defense of lack of personal jurisdiction based on improper service of process by failing to move to dismiss the complaint on that ground within 60 days of serving his answer (*see* CPLR 3211 [e]; *Anderson & Anderson, LLP-Guangzhou v Incredible Invs. Ltd.*, 107 AD3d 1520, 1521; *Britt v Buffalo Mun. Hous. Auth.*, 48 AD3d 1181, 1181-1182; *Woleben v Sutaria*, 34 AD3d 1295, 1296). Defendant's contention that his motion was based on the statute of limitations, as opposed to improper service, is belied by the record and, in any event, is without merit because plaintiff filed the summons with notice prior to the expiration of the limitations period (*see* CPLR 203 [c]; 304 [a]; *see generally Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 100).

We likewise conclude that, inasmuch as defendant failed to move to dismiss the complaint based on improper service within 60 days of serving his answer, he cannot challenge the court's determination to grant that part of plaintiff's cross motion seeking an extension of time for service of the summons and complaint pursuant to CPLR 306-b (*see JP Morgan Chase Bank, N.A. v Venture*, 148 AD3d 1269, 1271). In any event, upon consideration of the relevant factors, including the expiration of the statute of limitations, the meritorious nature of plaintiff's cause of action against defendant, and defendant's failure to show any prejudice, we conclude that the court did not abuse its discretion in granting that part of plaintiff's cross motion (*see Woods v M.B.D. Community Hous. Corp.*, 90 AD3d 430, 430-431; *Moss v Bathurst*, 87 AD3d 1373, 1374; *Busler v Corbett*, 259 AD2d 13, 17).

We also reject defendant's contention that the court erred in ordering him pursuant to CPLR 3124 to provide authorizations to access records related to defendant's youthful offender adjudication in this matter. Under CPL 720.35 (2), "all official records and papers concerning the [youthful offender] adjudication are sealed" (*Castiglione v James F.Q.*, 115 AD3d 696, 697). Nevertheless, "[a]s with other privileges, the privilege of CPL 720.35 (2) is waived 'where the individual affirmatively places the information or conduct in issue' " (*id.*, quoting *Green v Montgomery*, 95 NY2d 693, 700; *see Auto Collection, Inc. v C.P.*, 93 AD3d 621, 623; *Pink v Ricci*, 74 AD3d 1773, 1774). Here, we conclude that defendant waived his statutory privilege inasmuch as he placed the information or conduct in issue when he asserted a cross claim for indemnification against defendant Niagara Falls City School District (*see Pink*, 74 AD3d at 1774; *see also Rodriguez v Ford Motor Co.*, 301 AD2d 372, 372; *Maurice v Mahon*, 239 AD2d 188, 188). Moreover, although Supreme Court was not the court that rendered the youthful offender adjudication (*see* CPL 720.35 [2]; *State Farm Fire & Cas. Co. v Bongiorno*, 237 AD2d 31, 35; *Matter of Gannett Suburban Newspapers v Clerk of County Ct. of County of Putnam*, 230 AD2d 741, 741), we reject defendant's contention that Supreme Court lacked authority to order the disclosure of the records inasmuch as defendant "has waived the privilege" afforded by the statute (*Castiglione*, 115 AD3d at 697; *see Lott v Great E. Mall*, 87 AD2d 978, 979).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1047

CA 17-00020

PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR STRUCTURED ASSET INVESTMENT LOAN TRUST 2005-4, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES D. LIEBEL, DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

DEGNAN LAW OFFICE, CANISTEO (ANDREW J. ROBY OF COUNSEL), FOR DEFENDANT-APPELLANT.

HINSHAW & CULBERTSON LLP, NEW YORK CITY (DANA B. BRIGANTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered March 10, 2016. The order, among other things, granted plaintiff's motion for summary judgment.

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

Memorandum: Plaintiff, as trustee for the Structured Asset Investment Loan Trust 2005-4 (Trust), commenced this action seeking to foreclose a mortgage secured by residential property owned by James D. Liebel (defendant). We conclude that Supreme Court properly granted plaintiff's motion for, inter alia, summary judgment on its complaint, and denied defendant's cross motion for summary judgment dismissing the complaint. Contrary to defendant's contention, plaintiff had standing to commence the foreclosure action. " 'In an action to foreclose a mortgage, the plaintiff has standing where, at the time the action is commenced, it is the holder or assignee of both the subject mortgage and the underlying note' " (*JPMorgan Chase Bank, N.A. v Kobee*, 140 AD3d 1622, 1623-1624; *see NNPL Trust Series 2012-1 v Lunn*, 149 AD3d 1552, 1553). Here, plaintiff sufficiently pleaded in its complaint that it "is the current owner and holder of the aforesaid mortgage and note." Moreover, plaintiff's submissions in support of its motion establishied that the note and mortgage were assigned to the Trust in 2005 and have not been subsequently reassigned (*see NNPL Trust Series 2012-1*, 149 AD3d at 1554; *JPMorgan Chase Bank, N.A.*, 140 AD3d at 1624). Defendant failed to raise an issue of fact with respect to plaintiff's standing, and indeed admitted the foregoing facts in his answer and in the submission of his attorney (*see generally NNPL Trust Series 2012-1*, 149 AD3d at

1554; *JPMorgan Chase Bank, N.A.*, 140 AD3d at 1624).

Contrary to defendant's further contention, we conclude that the court did not abuse its discretion in permitting plaintiff to amend its pleadings to conform to the proof with respect to a 2008 foreclosure action and a 2009 loan modification agreement (*see* CPLR 3025 [c]; *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23, *rearg denied* 55 NY2d 801; *Murray v City of New York*, 43 NY2d 400, 405-406, *rearg dismissed* 45 NY2d 966). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1048

CA 17-00221

PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

PITTSFORD CANALSIDE PROPERTIES, LLC,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

PITTSFORD VILLAGE GREEN, ALSO KNOWN AS PITTSFORD VILLAGE GREEN ASSOCIATES, BOARD OF MANAGERS OF PITTSFORD VILLAGE GREEN, ALSO KNOWN AS PITTSFORD VILLAGE GREEN ASSOCIATES AND PITTSFORD VILLAGE GREEN ASSOCIATES, INC.,
DEFENDANTS-APPELLANTS-RESPONDENTS.

GOLDBERG SEGALLA LLP, ROCHESTER (PATRICK B. NAYLON OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

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

Appeal and cross appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered November 17, 2016. The order, among other things, denied the motion of plaintiff to strike defendants' demand for a jury trial and denied the motion of defendants for partial summary judgment and bifurcation.

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

Memorandum: Plaintiff, the owner of real property located in the Town of Pittsford, commenced this action alleging, inter alia, causes of action for negligence, trespass, private nuisance and public nuisance against defendants, who own and operate a neighboring office park. Plaintiff alleges that defendants improperly and unlawfully diverted storm water onto plaintiff's property and proximately caused the spread of contaminants, which resulted in a $1.7 million increase in the cost of plaintiff's Brownfield Cleanup Program project. Defendants appeal and plaintiff cross-appeals from an order that, inter alia, denied defendants' motion for partial summary judgment limiting the amount of damages or, in the alternative, bifurcation of the trial, and denied plaintiff's motion to strike defendants' demand for a jury trial. We affirm.

At the outset, we agree with defendants that Supreme Court erred in determining that their motion was an improper successive motion for summary judgment. Plaintiff and defendants entered into a

stipulation, which the court approved and reduced to a written order, that explicitly authorized defendants' motion to limit the amount of damages and thus provided the requisite "sufficient cause" for the motion (*Sexstone v Amato*, 8 AD3d 1116, 1116, *lv denied* 3 NY3d 609 [internal quotation marks omitted]; *see Rupert v Gates & Adams, P.C.*, 83 AD3d 1393, 1395).

Nevertheless, the court considered the merits of defendants' motion, and we conclude that the court properly refused to prospectively limit plaintiff's damages to $250,000 based on a 2007 bankruptcy sale stipulation in which plaintiff agreed that the property would be assessed at that amount for tax purposes. Defendants' assertion that the 2007 stipulation fixed the market value of the property at $250,000 confuses assessed value with market value, and the law "clearly distinguishes between an assessment or assessed value on the one hand, and the full market value or full value of the property on the other" (*Matter of Briffel v County of Nassau*, 31 AD3d 79, 83, *affd* 8 NY3d 249). We note that "the purpose of awarding damages in a tort action is to make the plaintiff whole" (*Franklin Corp. v Prahler*, 91 AD3d 49, 54) and, when a plaintiff seeks to recover damages for an injury to property, the proper measure of damages is typically the lesser of the cost to repair or the diminution of market value (*see Fisher v Qualico Contr. Corp.*, 98 NY2d 534, 539-540, citing *Hartshorn v Chaddock*, 135 NY 116, 122, *rearg denied* 32 NE 648; *see also McDermott v City of Albany*, 309 AD2d 1004, 1006, *lv denied* 1 NY3d 509). Contrary to defendants' contention, however, measuring damages as the lesser of the cost to repair or the diminution of market value does not require limiting the amount of damages to the assessed value of a property.

We further note that "[t]here are also situations in which a property may be deemed to have a negative market value, i.e., where the cost to remediate the property exceeds the market value of the property" (*Shaw v Rosha Enters., Inc.*, 129 AD3d 1574, 1578, citing *Matter of Roth v City of Syracuse*, 21 NY3d 411, 415) and, under a negative market value approach, a plaintiff may be entitled to recover the costs of remediation in excess of the property's fair market value (*see id.* at 1577-1578).

We reject defendants' further contention that the court erred in denying that part of their motion seeking the alternative relief of bifurcation of the trial. The determination " 'whether to conduct a bifurcated trial rests within the discretion of the trial court' " (*Wright v New York City Tr. Auth.*, 142 AD3d 1163, 1163), and we conclude that the court did not abuse its discretion (*see* CPLR 603; *see also* CPLR 4011).

Finally, contrary to plaintiff's contention on its cross appeal, we conclude that the court properly denied plaintiff's motion to strike defendants' demand for a jury trial (*see International Playtex v CIS Leasing Corp.*, 115 AD2d 271, 272). We have declined to apply the prevailing rule in the other Departments of the Appellate Division that a defendant waives his or her right to a jury trial on jury-triable causes of action in the complaint by interposing an equitable

counterclaim based on the same transaction (*see id.*). The plain text of CPLR 4102 (c) does not address that issue, and the rule that prevails in the other Departments would force defendants to commence separate actions to assert equitable counterclaims, thereby encouraging the prosecution of inefficient and wasteful parallel actions (*see International Playtex*, 115 AD2d at 272). We conclude, however, that "[t]he need for a full relitigation of the equitable claims and the possibility of inconsistent results can be avoided by permitting the legal action and the equitable claims to be tried at the same time" (*id.*).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1055

CA 16-02206

PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

SHANNON POOLER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DENNY L. POOLER, DEFENDANT-APPELLANT.

UNDERBERG & KESSLER LLP, ROCHESTER (RONALD G. HULL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Ontario County (Daniel P. Majchrzak, Jr., R.), entered May 19, 2016. The order, inter alia, determined that the debt owed on the Discover Card account is marital debt.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by determining that the debt owed on the Discover Card account is the separate debt of plaintiff and is not marital debt, and as modified the order is affirmed without costs.

Memorandum: In this postdivorce proceeding, defendant husband appeals from an order that, inter alia, determined that the debt owed on a Discover Card account is marital debt and equitably distributed that debt between the parties. "[T]he initial determination of whether a particular asset is marital or separate property is a question of law, subject to plenary review on appeal" (*Fields v Fields*, 15 NY3d 158, 161 [internal quotation marks omitted]). Here, Supreme Court erroneously classified the Discover Card account as marital debt subject to equitable distribution inasmuch as plaintiff wife asserted in her net worth statement that the Discover Card debt belonged to her alone (*see generally Koch v Koch*, 134 AD2d 574, 574; *Jolis v Jolis*, 98 AD2d 692, 692-693). We therefore modify the order accordingly. We reject defendant's remaining contentions for reasons stated in the decision at Supreme Court.

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1061

KA 17-00531

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM J. PURDY, DEFENDANT-APPELLANT.

EDELSTEIN & GROSSMAN, NEW YORK CITY (JONATHAN I. EDELSTEIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTOPHER BOKELMAN, ACTING DISTRICT ATTORNEY, LYONS (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered January 24, 2014. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree and grand larceny in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentences imposed on counts one and two of the indictment shall run concurrently with each other and concurrently with the resentence imposed on count three of the indictment.

Memorandum: Defendant was convicted following a jury trial of burglary in the second degree (Penal Law § 140.25 [2]), grand larceny in the second degree (§ 155.40 [1]), and criminal possession of stolen property in the second degree (§ 165.52), arising from an incident in which defendant and other persons stole approximately $405,000 in cash from a safe belonging to the victim. On a prior appeal, we modified the judgment by, inter alia, reversing those parts convicting him of the burglary and grand larceny counts because of an erroneous suppression ruling, and we granted a new trial with respect to those counts (*People v Purdy*, 106 AD3d 1521, 1524). We also remitted the matter for resentencing on the count of criminal possession of stolen property because of a sentencing error with respect thereto (*id*.). Defendant now appeals from the judgment convicting him, following the retrial before a jury, of the same burglary and grand larceny counts.

Contrary to defendant’s contention, County Court properly refused to permit him to impeach a witness using a statement of the witness that defendant characterized as a prior inconsistent statement. It is well settled that “a witness may not be impeached simply by showing that he omitted to state a fact, or to state it more fully at a prior

time . . . [unless it is] shown that at the prior time the witness[’s] attention was called to the matter and that he [or she] was specifically asked about the facts embraced in the question propounded at trial” (*People v Bornholdt*, 33 NY2d 75, 88; *see People v Keys*, 18 AD3d 780, 781, *lv denied* 5 NY3d 807). Here, a witness for the People testified that he saw the victim’s name on documents that defendant had removed from the safe. Thereafter, defense counsel argued that the witness had omitted that fact from his prior testimony and sought to impeach the witness using that testimony. We note, however, that defendant failed to show that the witness had been asked about that specific fact during the prior testimony, and thus he failed to establish that the witness had given a prior inconsistent statement. Consequently, the court properly refused to permit defendant to use the witness’s prior testimony for the purpose of impeachment (*see Keys*, 18 AD3d at 781; *see generally Bornholdt*, 33 NY2d at 88).

Defendant further contends that the court abused its discretion in admitting evidence of purchases that he and his girlfriend allegedly made during the days following the burglary. Specifically, defendant challenges testimony concerning a used car that was purchased on the day after the burglary using approximately $6,000 in cash; evidence of new clothes and other items that were allegedly purchased by defendant’s girlfriend at the mall and recovered from her sister’s car immediately thereafter by police investigators while defendant was present in the mall parking lot; and evidence of two watches recovered by police investigators from defendant’s bedroom along with a receipt for two watches dated the day after the burglary. Insofar as defendant contends that the prejudicial effect of the challenged evidence outweighed its probative value, he failed to preserve his contention for our review because he did not object to the admission of the evidence on that ground (*see People v Cullen*, 110 AD3d 1474, 1475, *affd* 24 NY3d 1014), 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]). To the extent that defendant challenges the testimony concerning the purchase of the car on the ground that it was irrelevant, defendant likewise failed to preserve his contention for our review because he did not object to the testimony on that ground (*see People v Garcia-Santiago*, 60 AD3d 1383, 1383, *lv denied* 12 NY3d 915). In any event, we conclude that defendant’s challenge to the testimony lacks merit.

To the extent that defendant contends that the court abused its discretion in admitting the evidence of the clothes recovered from the sister’s car and the watches recovered from his bedroom on the ground that the evidence was irrelevant, we reject his contention. “Evidence is relevant if it has any tendency in reason to prove the existence of any material fact, i.e., it makes determination of the action more probable or less probable than it would be without the evidence” (*People v Scarola*, 71 NY2d 769, 777; *see People v Inman*, 134 AD3d 1434, 1435-1436, *lv denied* 27 NY3d 999). We conclude that the possibility that the purchase money for the clothes and watches came from a legitimate source was not so great as to make the evidence of those purchases irrelevant (*see People v Lopez*, 40 AD3d 1119, 1121).

Finally, we agree with defendant that the aggregate sentence imposed is unduly harsh and severe. We therefore modify the judgment as a matter of discretion in the interest of justice by directing that the sentences imposed on counts one and two, the longest of which, for burglary in the second degree, is a determinate term of imprisonment of 14 years plus five years of postrelease supervision, shall run concurrently to each other, and concurrently to the resentence previously imposed for criminal possession of stolen property in the second degree on count three of the indictment (*see generally* CPL 470.15 [6] [b]).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1064

CAF 16-00498

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF JAMAR MCDUFFIE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SHONTEA REDDICK, RESPONDENT-RESPONDENT.

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

RONALD M. CINELLI, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered February 26, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that the parties shall have joint custody of the subject child and designated respondent the primary residential custodian.

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, Erie County, for further proceedings in accordance with the following memorandum: Petitioner father commenced this proceeding pursuant to Family Court Act article 6 to obtain custody of and/or visitation with the parties' minor son. Family Court referred the petition to a Court Attorney Referee to hear and report (*see* CPLR 4212). The Referee conducted an evidentiary hearing and issued an oral report. Three days later, the Referee issued supplemental written findings. The court, acting on its own initiative, confirmed the Referee's report that same day. The father now appeals.

Preliminarily, we reject the father's challenges to the order of reference. The father's "argument that the court erred when it referred this matter to a referee in the absence of exceptional circumstances (*see* CPLR 4212) is waived, since the record establishes that [he] participated in the proceeding before the [R]eferee without objection" (*Matter of Nilda S. v Dawn K.*, 302 AD2d 237, 238, *lv denied* 100 NY2d 512; *see Matter of Wolf v Assessors of Town of Hanover*, 308 NY 416, 420; *Matter of General Elec. Capital Corp. v Loretto-Utica Residential Health Care Facility*, 77 AD3d 1468, 1469; *compare Luppino v Mosey*, 103 AD3d 1117, 1119-1120). Contrary to the father's further contention, the reference order's purported noncompliance with 22 NYCRR 202.43 (d) is irrelevant to its validity because, with one exception inapplicable here (*see* 22 NYCRR 202.16), the provisions of 22 NYCRR part 202 apply only to "civil actions and proceedings in the

Supreme Court and the County Court," not to proceedings in the Family Court (22 NYCRR 202.1 [a]; *see Matter of McDermott v Berolzheimer*, 210 AD2d 559, 559-560).

We nevertheless agree with the father that the court violated CPLR 4403 by confirming the Referee's report "prior to the expiration of the 15-day period during which the parties were permitted to move to confirm or reject the report in whole or in part" (*Sidoti v Degliuomini*, 10 AD3d 396, 396; *see generally Sroka v Sroka*, 255 AD2d 897, 898; *Matter of Breland [Motor Veh. Acc. Indem. Corp.]*, 24 AD2d 881, 881). CPLR 4403 applies to proceedings in Family Court (*see Matter of McClarin v Valera*, 108 AD3d 719, 719-720; *see generally* Family Ct Act § 165 [a]). We therefore reverse the order and remit the matter to Family Court to afford the parties and the Attorney for the Child an opportunity to file any appropriate motions under CPLR 4403 (*see Sidoti*, 10 AD3d at 396).

The remaining contentions are academic in light of our determination.

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1065

CAF 16-01184

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF VALENTINA M.S.

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DARRELL W., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

VANLOON LAW, LLC, ROCHESTER (NATHAN A. VANLOON OF COUNSEL), FOR RESPONDENT-APPELLANT.

JENNIFER NOTO, MT. MORRIS, FOR PETITIONER-RESPONDENT.

SARA E. ROOK, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered May 20, 2016 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, terminated the parental rights of respondent.

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

Memorandum: Respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect and transferred guardianship and custody of the child to petitioner.

We reject the father's contention that reversal is required because petitioner did not comply with the statutory requirement of contacting the child's paternal grandmother (grandmother) and advising her of the pendency of this proceeding and her right to seek to become a foster parent or to seek custody of the child (*see* Family Ct Act § 1017 [1]). Even assuming, arguendo, that petitioner failed to fulfill its statutory duty with respect to the child's grandmother, we conclude that reversal is not required. The provisions of article 10 explicitly require a best interests analysis when a relative petitions for custody of a child (*see* § 1055-b [a] [ii]; *Matter of Lundyn S. [Al-Rahim S.]*, 144 AD3d 1511, 1511-1512, *lv denied* 29 NY3d 901). Here, however, the grandmother filed a petition for custody of the child. Family Court denied that petition after determining that it was not in the child's best interests for custody to be granted to the grandmother, and that determination is not reviewable on the present appeal. Thus, we conclude that petitioner's notification of the

grandmother pursuant to section 1017 could not have led to placement of the child with the grandmother.

Contrary to the father's further contention, petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and the child (*see* Social Services Law § 384-b [7] [a]). The evidence adduced at the fact-finding hearing established that petitioner, inter alia, scheduled regular visitation between the two and referred the father to tailored services designed to address his needs regarding his mental health and parenting skills (*see Matter of Joshua T.N. [Tommie M.]*, 140 AD3d 1763, 1763, *lv denied* 28 NY3d 904; *Matter of Jerikkoh W. [Rebecca W.]*, 134 AD3d 1550, 1550-1551, *lv denied* 27 NY3d 903).

We reject the father's contention that petitioner did not prove that he permanently neglected the child. Although the father took advantage of some of the services offered by petitioner, petitioner demonstrated that he failed to fully comply with his service plan inasmuch as he did not regularly attend visitation and refused to engage in mental health treatment (*see Matter of Chloe W. [Amy W.]*, 148 AD3d 1672, 1674, *lv denied* 29 NY3d 912; *Matter of Zachary H. [Jessica H.]*, 129 AD3d 1501, 1501, *lv denied* 25 NY3d 915). Although the court misstated that the father failed to engage in recommended sex offender treatment, as opposed to the recommended mental health treatment, the misstatement does not warrant reversal (*see Matter of Breann B.*, 185 AD2d 711, 711).

Finally, the court did not abuse its discretion in terminating the father's parental rights rather than granting a suspended judgment. Despite the father's participation in some services, he had not made progress "sufficient to warrant any further prolongation of the child[]'s unsettled familial status" (*Joshua T.N.*, 140 AD3d at 1764 [internal quotation marks omitted]).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1066

CAF 16-01199

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF VALENTINA M.S.

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

DARRELL W., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

VANLOON LAW, LLC, ROCHESTER (NATHAN A. VANLOON OF COUNSEL), FOR RESPONDENT-APPELLANT.

JENNIFER NOTO, MT. MORRIS, FOR PETITIONER-RESPONDENT.

SARA E. ROOK, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an addendum of the Family Court, Livingston County (Robert B. Wiggins, J.), entered June 13, 2016 in a proceeding pursuant to Family Court Act article 10. The addendum clarified a prior order.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Kolasz v Levitt*, 63 AD2d 777, 779).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1074

CA 16-02202

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF JOHN J. DECARR, KIMBERLY DECARR, STEVE CATELLO, HEATHER CATELLO, MARTY STAPLE, DAWN STAPLE, CODY STAPLE, GARY GAGLIANESE, TERESA DALTMORE, ROBERT CALPETER, JR., CYNTHIA CALPETER, MARY PARRY, ULI ASERIAN, LYNN ASERIAN, CHARLOTTE ASERIAN, ALMONDIE SHIMPINE, DAMIAN MARINO, BOB GREMS, DEBBIE GREMS, LISA GAUDET, DWIGHT DAVIS, MONICA DAVIS, SUE WHITE, ROBIN ROPETSKI, CHRIS ROPETSKI, JEFF STOFFEL, DAVID BYRNE AND MARGARET BYRNE, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

ZONING BOARD OF APPEALS FOR TOWN OF VERONA, MARTIN SCHAUB, SAL SPARCE, HENRY GERWIG, JAMES REGAN AND PATRICK BARKER, CONSTITUTING ZONING BOARD OF APPEALS OF TOWN OF VERONA, VINCENT ROSSI, AS THE TOWN ATTORNEY FOR THE TOWN OF VERONA, TOWN OF VERONA, EVOLUTION SITE SERVICES, LLC, UPSTATE CELLULAR PARTNERSHIP, DOING BUSINESS AS VERIZON WIRELESS, AND WILLIAM G. FRECH LIVING TRUST, RESPONDENTS-RESPONDENTS.

CAMPANELLI & ASSOCIATES, P.C., MERRICK (ANDREW J. CAMPANELLI OF COUNSEL), FOR PETITIONERS-APPELLANTS.

YOUNG/SOMMER LLC, ALBANY (J. MICHAEL NAUGHTON OF COUNSEL), STOCKLI SLEVIN & PETERS, LLP, AND ROSSI & ROSSI, NEW YORK MILLS, FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Norman I. Siegel, J.), entered September 2, 2016 in a proceeding pursuant to CPLR article 78. The judgment denied petitioners' request to file an amended petition and dismissed the petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul a determination of respondent Zoning Board of Appeals for Town of Verona (ZBA) granting a special use permit and an area variance to respondents Evolution Site Services, LLC, Upstate Cellular Partnership, doing business as Verizon Wireless, and William

G. Frech Living Trust (collectively, Applicants) for construction of a wireless telecommunications facility. Supreme Court, upon the consent of all parties, adjourned the proceeding to permit the ZBA to issue a "more complete decision" upon the review of additional submissions from petitioners' attorney. Following that subsequent decision, petitioners requested to amend the petition to address deficiencies therein purportedly raised by the second decision. The court denied petitioners' request to amend the petition and dismissed the petition, ruling that the ZBA's determination to issue the special use permit and area variance had a rational basis and was based on substantial evidence. We now affirm.

"Where, as here, the zoning ordinance authorizes a use permit subject to administrative approval, the applicant need only show that the use is contemplated by the ordinance and that it complies with the conditions imposed to minimize anticipated impact on the surrounding area . . . The [zoning authority] is required to grant a special use permit unless it has reasonable grounds for denying the application" (*Matter of North Ridge Enters. v Town of Westfield*, 87 AD2d 985, 986, *affd* 57 NY2d 906; *see Matter of George Eastman House, Inc. v Morgan Mgt., LLC*, 130 AD3d 1552, 1554, *lv denied* 26 NY3d 910). Moreover, inasmuch as the Applicants include a public utility, the ZBA was further limited in its discretion to deny the area variance (*see Matter of Cellular Tel. Co. v Rosenberg*, 82 NY2d 364, 371-372; *see also* Town Law § 274-b [1]; *Matter of Lloyd v Town of Greece Zoning Bd. of Appeals* [appeal No. 1], 292 AD2d 818, 819, *lv dismissed in part and denied in part* 98 NY2d 691, *rearg denied* 98 NY2d 765). "A telecommunications provider that is seeking a variance for a proposed facility need only establish that there are gaps in service, that the location of the proposed facility will remedy those gaps and that the facility presents a minimal intrusion on the community" (*Matter of Site Acquisitions v Town of New Scotland*, 2 AD3d 1135, 1137).

Contrary to petitioners' contentions, the Applicants were not required to establish that their proposal was the "least intrusive means" to address a "significant gap" in service in order for the ZBA to grant their application (*see Omnipoint Communications, Inc. v City of White Plains*, 430 F3d 529, 535). Those elements constitute "the showing an applicant must make before [the Telecommunications Act of 1996 (TCA)] § 332 (c) (7) (B) (i) (II) will *require* a [zoning authority] to grant its application" (*id.*; *see Sprint Spectrum, L.P. v Willoth*, 176 F3d 630, 643). Thus, "[w]hen evaluating the evidence, local and state zoning laws govern the weight to be given the evidence[,] . . . [and] the TCA does not affect or encroach upon the substantive standards to be applied under established principles of state and local law" (*Orange County-Poughkeepsie Ltd. Partnership v Town of E. Fishkill*, 84 F Supp 3d 274, 295, *affd* 632 Fed Appx 1, [internal quotation marks omitted]). We conclude that the determination that the Applicants established the existence of a gap in service, that the location of the proposed facility would remedy that gap, and that the facility presented a minimal intrusion "has a rational basis and is supported by substantial evidence" (*Matter of Ifrah v Utschig*, 98 NY2d 304, 308; *see Matter of Expressview Dev.,*

Inc. v Town of Gates Zoning Bd. of Appeals, 147 AD3d 1427, 1428-1429).

Petitioners contend that the ZBA's determination, as amplified by the second decision, addressed concerns that were not raised by petitioners but failed to address concerns that were in fact raised. Contrary to petitioners' contention, a significant number of letters to the ZBA raised health concerns as a reason for opposing the construction of the facility and, thus, it was not a "*plainly false*" statement in the determination that health concerns were one of the reasons residents opposed the facility. Although the determination, as amplified by the second decision, is silent on the issues concerning property values, "it can be ascertained from a review of the record that the decision to grant the [application nonetheless] had a rational basis" (*Matter of Fischer v Markowitz*, 166 AD2d 444, 445; *see Matter of Dietrich v Planning Bd. of Town of W. Seneca*, 118 AD3d 1419, 1421).

Petitioners further contend that respondent Martin Schaub, as Chairman of the ZBA, predetermined the outcome of the application. We reject that contention. The comments attributed to Schaub, as contained in the record on appeal, constitute merely "a predisposition on questions of law" related to the limited power of the ZBA to deny a public utility's application, as opposed to a "prejudgment of specific facts at issue in [the] adjudicatory proceeding" (*Matter of 1616 Second Ave. Rest. v New York State Liq. Auth.*, 75 NY2d 158, 162*; see Matter of City of Beacon v Surles*, 161 AD2d 945, 947, *appeal dismissed* 76 NY2d 936).

Finally, we conclude that the court did not err in denying petitioners' request to amend the petition. "Although leave to amend a pleading should be freely granted (*see* CPLR 3025 [b]), it may be denied where the proposed amendment is palpably insufficient or patently devoid of merit . . . 'Accordingly, in considering a motion for leave to amend, it is incumbent upon the court to examine the sufficiency and merits of the proposed amendment' " (*Matter of Haberman v Zoning Bd. of Appeals of City of Long Beach*, 78 AD3d 945, 946; *cf. Matter of Clairol Dev., LLC v Village of Spencerport*, 100 AD3d 1546, 1546). Here, the parties had consented to the issuance of an amplified decision, and the court agreed to consider petitioners' proposed amendments related to that amplified decision. The court did so and properly concluded that they were devoid of merit.

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1075

CA 17-00526

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, AND CURRAN, JJ.

WILLIAM SCHIFERLE, PLAINTIFF-APPELLANT,

V OPINION AND ORDER

CAPITAL FENCE CO., INC., DEFENDANT-RESPONDENT.

BARCLAY DAMON, LLP, BUFFALO (MICHAEL E. FERDMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (JON F. MINEAR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered August 29, 2016. The order, among other things, denied plaintiff's motion to vacate and/or modify an arbitration award.

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

Opinion by NeMoyer, J.:

When an employee prevails on a wage nonpayment claim under article 6 of the Labor Law, "the court shall allow such employee to recover . . . all reasonable attorney's fees" (§ 198 [1-a]). We hold that a wage claimant may, in certain circumstances, validly waive their statutory right to attorney's fees under section 198. And because this case presents a textbook instance of such a valid waiver, there is no basis to upset the challenged arbitration award.

FACTS

The material facts are uncontested. Plaintiff worked as a salesman for defendant Capital Fence Co., Inc., a small business owned by plaintiff's brother. A dispute subsequently erupted regarding the amount of commissions that defendant owed plaintiff. Plaintiff sued defendant in Supreme Court, asserting common law causes of action for breach of contract and unjust enrichment. Plaintiff also asserted a statutory wage nonpayment claim under Labor Law article 6. Defendant answered, and discovery ensued. The parties later agreed to resolve "this matter . . . through binding arbitration, pursuant to CPLR Article 75," and they executed an arbitration agreement. This appeal centers around paragraph 9 of the arbitration agreement, which says in relevant part:

> "The parties shall bear their own costs and attorneys' fees related to the arbitration. However, this provision does not prevent the arbitrator from awarding reasonable legal fees to [plaintiff] based on Labor Law, Article 6, as demanded in the amended complaint, including reasonable legal fees related to the arbitration."

Following an arbitration hearing, the arbitrator rendered a comprehensive decision finding in plaintiff's favor on his Labor Law article 6 wage claim and awarding him the sum of $40,942.54 in "unpaid earned commissions." The arbitrator refused to grant plaintiff any pre-award interest, however, and he further "decline[d] to award attorney's fees."

Plaintiff thereafter moved in Supreme Court to vacate and/or modify the arbitrator's award insofar as it denied pre-award interest and attorney's fees (*see generally* CPLR 7511). Noting that a successful plaintiff "in a Labor Law Article 6 [wage] claim is automatically entitled to attorney's fees by the express language of Labor Law § 198(1-a)" as well as to "pre-judgment interest under CPLR 5001(a)," plaintiff argued that the arbitrator, by "treating awards of pre-judgment interest and attorney's fees as discretionary . . . and declining to award them, . . . acted in manifest disregard of well-established law and undermined the strong and well-defined public policy considerations of Article 6 of the Labor Law." Supreme Court denied plaintiff's motion and confirmed the arbitration award.

Plaintiff appeals, and we now affirm.

DISCUSSION

Arbitration is a creature of contract, and arbitrators draw their power from the consent of the arbitrants, not from the sovereignty of the State. It is thus "well settled that judicial review of arbitration awards is extremely limited" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479, *cert dismissed* 548 US 940). Indeed, "courts are obligated to give deference to the decision of the arbitrator . . . even if the arbitrator misapplied the substantive law" (*Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336). An arbitration award is not immune from judicial scrutiny, however, and it will be vacated if, inter alia, the arbitrator "exceeded his power" (CPLR 7511 [b] [1] [iii]; *see also* 9 USC § 10 [a] [4] [same provision in Federal Arbitration Act]). An arbitrator can exceed his or her power in a variety of ways, three of which are relevant to this appeal.

First, an arbitrator exceeds his or her power by transgressing a "specifically enumerated limitation" on their authority (*New York City Tr. Auth.*, 6 NY3d at 336). The most obvious example of such a transgression occurs when the arbitrator expands his or her subject matter jurisdiction in direct contravention of the terms of the governing arbitration agreement (*see e.g. Matter of Local 2841 of N.Y.*

State Law Enforcement Officers Union, AFSCME, AFL-CIO [City of Albany], 53 AD3d 974, 976 [“the arbitrator exceeded his power in amending the terms of the CBA . . . in contravention of an expressed term of the CBA which prohibited amending, modifying or deleting any provision thereof”]; *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, 980-981 [arbitral award properly vacated where arbitrator, “in effect, made a new contract for the parties” in contravention of explicit provision of arbitration agreement which denied arbitrator power to “alter, add to or detract from the CBA” (internal quotation marks omitted)]). A specifically enumerated restriction upon the arbitrator’s power can also arise by negative implication from the arbitration agreement (*see Matter of Hunsinger v Minns*, 197 AD2d 871, 871). In *Stolt-Nielsen S.A. v AnimalFeeds Intl. Corp.* (559 US 662), for instance, the United States Supreme Court held that an agreement by specified parties to arbitrate their commercial disputes on a bilateral basis necessarily precluded the arbitrator from compelling the parties to submit to binding class arbitration (*see id.* at 684-687). A specifically enumerated restriction on the arbitrator’s power can arise even from a source wholly independent of the arbitration agreement itself, such as when a statute “requires the arbitrator to consider and determine the merits of [a particular issue] where such [issue] is raised” (*Matter of Kowaleski [New York State Dept. of Corr. Servs.]*, 16 NY3d 85, 91 [applying Civil Service Law § 75-b (3) (a)]).

Second, an arbitrator exceeds his or her power by rendering an award that contravenes a “strong public policy” of this State (*Hackett v Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146, 155 [internal quotation marks omitted]). Indeed, “ ‘it is the established law in this State that an award which is violative of public policy will not be permitted to stand’ ” (*Matter of Buffalo Police Benevolent Assn. [City of Buffalo]*, 4 NY3d 660, 664, quoting *Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 630). An arbitral award violates public policy when, inter alia, it “creates an *explicit* conflict with other laws and their attendant policy concerns” (*Matter of New York State Corr. Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 327). Contrary to defendant’s contention, the Court of Appeals did not hold in *Sprinzen* that an arbitral award is categorically immune from vacatur on public policy grounds unless it involved “punitive damages, [the] antitrust laws, claims concerning liquidating insolvent insurance companies, and certain matters involving public schools”. As the *Sprinzen* court repeatedly stated, those categories were merely “examples” and “illustrations of instances where courts will intervene in the arbitration process” in order to vindicate public policy (*id.* at 630-631).

Third, an arbitrator exceeds his power when he “manifestly disregard[s]” the substantive law applicable to the parties’ dispute (*Wien & Malkin LLP*, 6 NY3d at 480-481). “To modify or vacate an award on the ground of manifest disregard of the law, a court must find ‘both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored

by the arbitrators was well defined, explicit, and clearly applicable to the case' " (*id.* at 481, quoting *Wallace v Buttar*, 378 F3d 182, 189; *see Transparent Value, L.L.C. v Johnson*, 93 AD3d 599, 601 [recapitulating standard]; *see e.g. Matter of Kingdon Capital Mgt., LLC v Kaufman*, 110 AD3d 648, 648, *lv denied* 22 NY3d 861 [recognizing and applying manifest disregard standard]; *Matter of WBP Cent. Assoc., LLC v Deco Constr. Corp.*, 44 AD3d 781, 781 ["In a proceeding pursuant to CPLR article 75 . . . (a)n award made by an arbitration panel will not be vacated for errors of law or fact committed by the arbitrators *unless the award exhibits a manifest disregard of the law*" (emphasis added)]).[1]

The manifest disregard standard is, admittedly, a controversial one (*compare Comedy Club, Inc. v Improv West Assocs.*, 553 F3d 1277, 1290, *cert denied* 558 US 824, *with Affymax, Inc. v Ortho–McNeil–Janssen Pharms., Inc.*, 660 F3d 281, 285 *and Matter of Banc of Am. Sec. v Knight*, 4 Misc 3d 756, 760-763), but we think the controversy is unwarranted. Under both the Federal Arbitration Act (9 USC § 10 [a] [4]) and our State law (CPLR 7511 [b] [1] [iii]), an arbitration award is subject to vacatur when the arbitrator exceeds his or her power, and as the Second Circuit has explained, arbitrators who act in "manifest disregard of the law" have "thereby 'exceeded their powers' " within the meaning of 9 USC § 10 (a) (4) (*Stolt-Nielsen S.A. v AnimalFeeds Intl. Corp.*, 548 F3d 85, 95, *revd on other grounds* 559 US 662). After all, as Judge Sack astutely observed for the *Stolt-Nielsen S.A.* panel, "parties do not agree in advance to submit to arbitration that is carried out in manifest disregard of the law" (*id.*). The United States Supreme Court has consistently assumed the existence of this ground for vacating arbitral awards (*see Stolt-Nielsen S.A.*, 559 US at 672 n 3), and our Court of Appeals explicitly adopted the manifest disregard standard in a case governed by the Federal Arbitration Act (*see Wien & Malkin LLP*, 6 NY3d at 480-481). Given our high Court's unanimous adoption of the manifest disregard standard under the Federal Arbitration Act in *Wien & Malkin LLP*, we see no reason to reject the manifest disregard standard under the identically-worded provision of CPLR 7511 (1) (b) (iii) – particularly given the utility of harmonizing state and federal practice regarding judicial oversight of arbitration proceedings (*see e.g. Matter of Brady v Williams Capital Group, L.P.*, 14 NY3d 459, 466).[2]

II

Plaintiff challenges the subject arbitration award on each of the

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[1]Our decision in *Matter of City of Buffalo (Buffalo Police Benevolent Assn.)* (13 AD3d 1202) predates *Wien & Malkin LLP* by several years and has never been cited subsequently on the issue of manifest disregard.

[2]Notably, defendant does not challenge the viability of "manifest disregard" as a ground for vacating an arbitral award under CPLR 7511.

three foregoing theories. *First*, plaintiff argues that the arbitrator exceeded a specifically enumerated limitation on his power by construing paragraph 9 of the arbitration agreement merely to permit attorney's fees at the arbitrator's discretion. *Second*, citing Labor Law § 198, plaintiff argues that the arbitrator's refusal to award attorney's fees violated New York's strong public policy in favor of attorney's fees for successful wage claimants. And *third*, plaintiff argues that the arbitrator's refusal to award attorney's fees constituted a manifest disregard of the applicable substantive law, i.e., section 198.[3]

A

Initially, we summarily reject plaintiff's claim that the arbitrator's refusal to award attorney's fees violated a specifically enumerated restriction on his power reflected in the arbitration agreement. To the contrary, the subject arbitration agreement explicitly and unambiguously grants the arbitrator unfettered discretion to award or withhold attorney's fees in the event that plaintiff prevailed on his Labor Law article 6 wage claim. The arbitrator acted consistently with the discretion afforded him by the parties. To the extent that plaintiff relies upon parol evidence in the form of pre-arbitration emails to contradict this unambiguous provision of the arbitration agreement, he does so impermissibly (*see Greenfield v Philles Records*, 98 NY2d 562, 569-570; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162).

B

Plaintiff's public policy and manifest disregard arguments require more probing analysis, however, for they transcend the literal words of the parties' arbitration agreement (*see generally Weiner v Diebold Group*, 173 AD2d 166, 167 ["While the parties to a contract are free to make any bargain they wish and are held to bargains made by them with their eyes open . . . , they are not free to enter into contracts which violate public policy"]). Had the subject arbitration agreement been silent on the subject of attorney's fees, we would have little difficulty in concluding that the arbitrator's refusal to award the attorney's fees required by Labor Law § 198 contravened public

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[3]Plaintiff also challenges, on public policy and manifest disregard grounds, the arbitrator's refusal to grant pre-award interest. It is well established, however, that an arbitrator's refusal to grant such interest – even in contract disputes where prejudgment interest is normally mandatory (*see* CPLR 5001 [a]) – is not itself a sufficient basis for upsetting an arbitration award (*see Matter of Levin & Glasser, P.C. v Kenmore Prop., LLC*, 70 AD3d 443, 444; *Matter of Rothermel [Fidelity & Guar. Ins. Underwriters]*, 280 AD2d 862, 862; *Matter of Gruberg [Cortell Group]*, 143 AD2d 39, 39; *Matter of Penco Fabrics [Louis Bogopulsky, Inc.]*, 1 AD2d 659, 659). Our analysis will thus focus on the thornier question of attorney's fees.

policy and constituted a manifest disregard of the law (*see DeGaetano v Smith Barney, Inc.*, 983 F Supp 459, 462-469 [so holding]). But the subject arbitration agreement is not silent on the question of attorney's fees; in paragraph 9, plaintiff explicitly waived his right to the attorney's fees provided by section 198. Plaintiff's public policy and manifest disregard theories thus necessarily hinge on the validity of his waiver of his statutory right to attorney's fees (*see id.* at 464).

Here, briefly, is why. If public policy permits a wage claimant to waive his or her right to attorney's fees under Labor Law § 198, then an arbitrator cannot possibly violate public policy by exercising the discretion validly conferred by virtue of such a waiver. In that event, there is no "*explicit* conflict" between the arbitrator's award and a statutory provision rendered inoperative by waiver (*New York State Corr. Officers & Police Benevolent Assn.*, 94 NY2d at 327). A valid waiver of the right to attorney's fees under Labor Law § 198 would likewise foreclose plaintiff's manifest disregard theory. An arbitrator, after all, cannot have manifestly disregarded a statutory right that was validly waived. As Judge Barkett observed in *Montes v Shearson Lehman Bros., Inc.* (128 F3d 1456), the manifest disregard rule operates "in the *absence* of a valid and legal agreement" to depart from the substantive laws governing a particular claim (*id.* at 1459 [emphasis added]). Our task thus distills to determining whether someone in plaintiff's position may ever waive their right to attorney's fees under section 198, and, if so, whether this plaintiff validly waived that right under the particular circumstances of this case.

i

We turn first to the question of waivability. In evaluating the waivability of statutory attorney's fees under Labor Law § 198, we are mindful both of our State's "long standing policy against the forfeiture of earned wages" (*Weiner*, 173 AD2d at 167), and of the critical role that attorney's fees play in ensuring a wage claimant's ability to meaningfully vindicate that longstanding policy (*see P & L Group v Garfinkel*, 150 AD2d 663, 664 [section 198 "reflect(s) a strong legislative policy aimed at protecting an employee's right to wages earned"]). In fact, wage claims often involve relatively small sums, and the Legislature's guarantee of statutory attorney's fees to the successful claimant offers the bar a powerful financial incentive to undertake wage theft cases (*see generally City of Riverside v Rivera*, 477 US 561, 576-578 [discussing underlying rationale for statutory attorney's fees in civil rights cases]).

But the importance of a right does not control its waivability. "Indeed, most rights and privileges are waivable" in appropriate circumstances (*Green v Montgomery*, 95 NY2d 693, 699). "A custodial parent's right to collect child support payments," for example, "is subject to waiver, both express and implied" (*Matter of Dox v Tynon*, 90 NY2d 166, 174). Parties to a contract may waive the full statute of limitations and agree to a shorter period in which an assumpsit action must be commenced (*see John J. Kassner & Co. v City of New*

York, 46 NY2d 544, 550-551). A municipality may, in certain instances, surrender its statutory prerogative to appoint any one of the three highest-scoring candidates on a civil service exam (*see Matter of Professional, Clerical, Tech. Empls. Assn. [Buffalo Bd. of Educ.]*, 90 NY2d 364, 373-377). A criminal defendant may waive his or her right to appeal (*see People v Seaberg*, 74 NY2d 1, 5). One court even permitted a capital defendant to waive his right to present the mitigating evidence necessary to save his own life (*see People v Lavalle*, 181 Misc 2d 916, 918).

Against that backdrop, we can identify no per se impediment to a wage claimant's waiver of his or her right to the attorney's fees provided by Labor Law § 198. Most importantly, nothing in the State Constitution, Labor Law, or decisional law explicitly bars a wage claimant from waiving his or her right to statutory attorney's fees under section 198. The Legislature has, in contrast, explicitly prohibited the waiver of the reciprocal right to attorney's fees in landlord-tenant cases (*see* Real Property Law § 234). The Legislature's decision to bar a party from surrendering their right to statutory attorney's fees in one circumstance, but not in another, is strong evidence that the Legislature would not find a waiver inimical to public policy in the latter circumstance (*see generally Matter of McDermott v Berolzheimer*, 210 AD2d 559, 559-560). And given that the right to attorney's fees is necessarily personal to the wage claimant, this particular waiver will not undermine the statutory protections afforded other wage claimants, the general public, or individuals not party to the arbitration agreement through which this plaintiff waived his right to section 198 attorney's fees (*compare Matter of Consolidated Rail Corp. v Hudacs*, 223 AD2d 289, 293, *affd* 90 NY2d 958). We therefore hold that, "[l]ike [almost] any other provision of law," a wage claimant may waive his right to attorney's fees under section 198 (*O'Brien v Lodi*, 246 NY 46, 50). Our conclusion on this score is consistent with *Kamat v Prakash* (420 SW3d 890, 910-911), in which a Texas appellate court permitted an employee to waive her right to attorney's fees under the federal Fair Labor Standards Act.[4]

ii

Waivable rights, of course, are not waived validly in every instance (*see e.g. Kessler v Kessler*, 33 AD3d 42, 47-50 *lv dismissed* 8 NY3d 968 [statutory right to seek attorney's fees in matrimonial matters held waivable, but not validly waived under circumstances of that case]). That is particularly so when a party purports to waive their right to statutory attorney's fees as part of an arbitration agreement. Indeed, several courts, relying upon the particular circumstances presented, have voided provisions in arbitration agreements that waive a party's statutory right to attorney's fees. Three cases are particularly instructive.

In *DeGaetano* (983 F Supp 459, *supra*), Judge Cote in the Southern

[4]The Fair Labor Standards Act, like article 6 of the Labor Law, protects an employee's right to wages earned.

District declined to enforce an employee's prospective waiver of her right to statutory attorney's fees because the waiver was contained within an arbitration agreement that the employer made a condition of employment. Judge Cote held that such a provision, when invoked to bar the employee's right to attorney's fees under the federal employment discrimination laws, violated public policy because it prevented the employee from effectively vindicating her statutory cause of action in the arbitral forum (*see id.* at 464-469).

The Supreme Court of Washington State invalidated a similar provision in which an employee, as a condition of employment, agreed to arbitrate disputes with his employer and waive any right to attorney's fees he might otherwise have during the arbitration proceedings. The employee's waiver of his right to attorney's fees in connection with the arbitration agreement, wrote the court, was "substantively unconscionable" and therefore unenforceable (*Adler v Fred Lind Manor*, 153 Wash 2d 331, 355).

And in a somewhat different context, the First Circuit in *Kristian v Comcast Corp.* (446 F3d 25) effectively voided an adhesive agreement entered into by a class of Comcast customers which waived their right to statutory attorney's fees in, among other things, antitrust cases. Given the astronomical cost of litigating antitrust claims and the "minor amount an individual plaintiff would likely recover relative to the cost of prosecution," the *Kristian* panel held that this waiver, which was embedded within a customer's blanket agreement to arbitrate all disputes with Comcast, operated to prevent cable subscribers from vindicating their statutory antitrust rights (*id.* at 52).

We have no quarrel whatsoever with the holdings of these and similar cases. Whether based on the *Gilmer/Mitsubishi* doctrine[5], generic public policy concerns, or unconscionability principles derived from contract law, all of the foregoing cases involve attorney's-fee waivers executed prospectively by individuals with no real ability to insist upon their rights. The power imbalance was so acute, the compulsion so palpable, and the unfairness so rank, that no fair-minded jurist could think it appropriate to enforce a waiver of important statutory rights under those circumstances.

But this case is different. The real parties in interest here are brothers. The arbitration agreement – along with its waiver of

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[5] The *Gilmer/Mitsubishi* doctrine bars arbitration of statutory causes of action if the specific terms of the arbitration agreement would prevent the plaintiff from 'effectively vindicating' his cause of action in the arbitral forum (*Gilmer v Interstate/Johnson Lane Corp.*, 500 US 20; *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 US 614). Our Court of Appeals has repeatedly recognized and applied the *Gilmer/Mitsubishi* doctrine (*see Brady*, 14 NY3d at 466-467; *Fletcher v Kidder, Peabody & Co.*, 81 NY2d 623, 648, *cert denied* 510 US 993).

plaintiff's right to attorney's fees should he prevail on his wage claim – was executed retrospectively, i.e., with respect to a claim that had already accrued and was already the subject of litigation in Supreme Court. Plaintiff could have simply continued litigating in Supreme Court, and, had he prevailed, he would have been entitled to the attorney's fees that he was denied in arbitration (*see e.g. Polyfusion Elecs., Inc. v Promark Elecs., Inc.*, 108 AD3d 1186, 1187; *Zeman v Falconer Elecs., Inc.*, 55 AD3d 1240, 1241-1242).

Plaintiff did not continue with litigation, however. Instead, he elected to bargain away his right to attorney's fees in exchange for the simplicity, informality, and reduced expense of arbitration, together with an opportunity to request attorney's fees at the arbitrator's discretion. He might now regret that bargain, but it was his to make. He was not coerced into waiving his rights by the exigencies of his situation, nor did he labor under a power imbalance that made negotiation an exercise in futility. Having voluntarily exchanged his statutory right to attorney's fees for the expeditious and informal procedures of arbitration, plaintiff cannot avail himself of those expedited procedures and then run to court to recover the very thing that he tendered in exchange for those expedited procedures. Plaintiff, in short, cannot have his cake and eat it too.

CONCLUSION

Plaintiff validly waived his right to the attorney's fees afforded by Labor Law § 198. He therefore cannot prevail on his present claim that the arbitrator violated public policy and manifestly disregarded the law by exercising the very discretion validly conferred by the arbitration agreement. It follows that Supreme Court properly denied plaintiff's motion to vacate or modify the arbitration award. Accordingly, the order appealed from should be affirmed.

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1079

KA 15-01198

PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN DOGAN, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered June 15, 2015. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree and robbery in the first degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]), and three counts of robbery in the first degree (§ 160.15 [4]), arising from a series of incidents in which he shot a man in the face, used a firearm in an attempt to steal a car, and then used a firearm to steal a rental truck. He was apprehended by the police a few minutes after he stole the truck. We reject defendant's contention that County Court erred in refusing to suppress, inter alia, all evidence seized as the result of his apprehension.

Contrary to defendant's initial contention, the testimony of the police officers at the suppression hearing was not " 'unbelievable as a matter of law, manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*People v Bush*, 107 AD3d 1581, 1582, *lv denied* 22 NY3d 954). " 'The suppression court's credibility determinations and choice between conflicting inferences to be drawn from the proof are granted deference and will not be disturbed unless unsupported by the record' " (*People v Twillie*, 28 AD3d 1236, 1237, *lv denied* 7 NY3d 795). Based on our review of the testimony at the hearing, we perceive no basis to disturb the suppression court's determination to credit the testimony of the police officers (*see People v Williams*, 115 AD3d 1344, 1345; *Bush*, 107 AD3d at 1582).

We reject defendant's contentions that the initial encounter

constituted a level-three forcible stop, and that the officers lacked the requisite reasonable suspicion that he was involved in a crime (*see generally People v Moore*, 6 NY3d 496, 498-499; *People v De Bour*, 40 NY2d 210, 223). Here, defendant matched the physical description of the person reported to have shot a man in the face, attempted to carjack a vehicle from two people nearby and then, at gunpoint, successfully robbed another man of a rental truck. Within a few minutes, defendant was observed a short distance away, exiting a rental truck matching the description of the stolen vehicle, and entering a nearby house. Shortly thereafter, a police officer observed him apparently leaving that house. Thus, "based upon defendant's physical and temporal proximity to the scene of the reported incident" and those additional factors (*People v McKinley*, 101 AD3d 1747, 1748, *lv denied* 21 NY3d 1017), we conclude that the police initially had the requisite founded suspicion that criminal activity was afoot to justify their common-law inquiry (*see id.*; *see generally People v Garcia*, 20 NY3d 317, 322; *People v Hollman*, 79 NY2d 181, 185). The court properly determined that the police thereafter had the requisite reasonable suspicion that defendant "may be engaged in criminal activity" based upon those factors, together with his flight from the police (*People v Sierra*, 83 NY2d 928, 929; *cf. People v Cady*, 103 AD3d 1155, 1156; *People v Riddick*, 70 AD3d 1421, 1422-1423, *lv denied* 14 NY3d 844).

Contrary to defendant's contention that he was arrested without probable cause when he was handcuffed and placed in the back of a police vehicle, "[t]he People presented testimony at the suppression hearing supporting the conclusion that defendant was subjected to a nonarrest detention preparatory to transporting him back to the location that was the subject of the [crimes] for a showup identification procedure" (*People v Andrews*, 57 AD3d 1428, 1429, *lv denied* 12 NY3d 850; *see People v Bolden*, 109 AD3d 1170, 1172, *lv denied* 22 NY3d 1039). Probable cause for defendant's arrest was established when defendant was identified by the victims of the successful and attempted vehicle thefts as the perpetrator of those crimes.

We reject defendant's contention that the identification procedure was unduly suggestive. "Showup identifications 'are strongly disfavored but are permissible if exigent circumstances require immediate identification . . . or[, as in this case,] the suspect[is] captured at or near the crime scene and can be viewed by the [victims] immediately' " (*People v Johnson*, 81 NY2d 828, 831; *see People v Duuvon*, 77 NY2d 541, 544-545). We also reject defendant's contention that the showup identification procedure was rendered unduly suggestive because he was in handcuffs and in the presence of a uniformed police officer (*see People v Santiago*, 83 AD3d 1471, 1471, *lv denied* 17 NY3d 800; *People v Davis*, 48 AD3d 1120, 1122, *lv denied* 10 NY3d 957). Defendant's contention that the victims "may have been improperly influenced at the time of the identification is purely speculative" (*People v Berry*, 50 AD3d 1047, 1048, *lv denied* 10 NY3d 956; *see People v Calero*, 105 AD3d 864, 865, *lv denied* 22 NY3d 1039), as is his further contention that the police otherwise suggested to the victims that defendant was involved in either the robbery or the

attempted robbery.

Defendant further contends that he was deprived of effective assistance of counsel at the hearing. That contention does not survive his plea of guilty inasmuch as "[t]here is no showing that the plea bargaining process was infected by any allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance" (*People v Burke*, 256 AD2d 1244, 1244, *lv denied* 93 NY2d 851; *see People v Fulton*, 133 AD3d 1194, 1196, *lv denied* 26 NY3d 1109, *reconsideration denied* 27 NY3d 997).

Defendant further contends that the court erred in sentencing him without ruling on his objection to the statements that the crime victims provided to the court via the prosecutor, and that the sentence must be vacated and the matter remitted to the sentencing court for such a ruling. We reject that contention. It is well settled that, "as a matter of due process, an offender may not be sentenced on the basis of materially untrue assumptions or misinformation . . . Rather, [t]o comply with due process . . . the sentencing court must assure itself that the information upon which it bases the sentence is reliable and accurate" (*People v Naranjo*, 89 NY2d 1047, 1049 [internal quotation marks omitted]). It is also well settled that, with respect to remarks made by a prosecutor at sentencing, "[t]he sentencing court is permitted to consider any evidence relevant to the defendant's history and character in making a sentence determination . . . The key to proper sentencing procedure is whether the defendant has been afforded an opportunity to refute the information before the court which may negatively influence the court's determination" (*People v Williams*, 195 AD2d 492, 493).

Here, defense counsel did not object to the content of the information provided by the prosecutor or question its validity. To the contrary, counsel objected solely on the ground that the victims did not provide the information through the presentence investigation process. Indeed, counsel said that "the fact that the[victims] were going about their daily business and it was disrupted by my client's crimes, clearly that's something we can deduce from what occurred here," and counsel took "as a given that any violent crime[] has an effect on its victims." Thus, inasmuch as defendant failed to allege that he was deprived of an opportunity to challenge the content of the information provided by the prosecutor (*cf. People v James*, 114 AD3d 1312, 1312), the court did not err in sentencing defendant without expressly ruling on his objection.

Finally, the sentence is not unduly harsh or severe.

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1083

KA 15-01059

PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSICA N. COURTEAU, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered April 20, 2015. The judgment convicted defendant, upon a jury verdict, of endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of endangering the welfare of a child (Penal Law § 260.10 [1]). The conviction arises out of defendant's conduct in connection with a traumatic brain injury sustained by an 18-month-old child when the child was in defendant's care. The jury acquitted defendant of the more serious charges of assault in the first degree (§ 120.10 [3]), reckless assault of a child (§ 120.02 [1]) and reckless endangerment in the first degree (§ 120.25).

Defendant's challenge to the legal sufficiency of the evidence supporting the child endangerment charge is not preserved for our review because she made only a general motion for a trial order of dismissal with respect to that charge (*see People v Gray*, 86 NY2d 10, 19).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence. In reviewing the weight of the evidence we must determine in the first instance whether, "based on all the credible evidence[,] a different finding would not have been unreasonable" (*People v Bleakley*, 69 NY2d 490, 495). "Where, as here, an acquittal would not have been unreasonable, we 'must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions' " (*People v Dean*, 70 AD3d 1193, 1194, quoting *Danielson*, 9 NY3d at 348). In

performing our weight of the evidence review, moreover, we may consider the jury's acquittal on the other counts in the indictment (*see People v Rayam*, 94 NY2d 557, 563 n; *People v O'Neil*, 66 AD3d 1131, 1134 n 2; *People v Ross*, 62 AD3d 619, 619, *lv denied* 12 NY3d 928). Based on the weight of the credible evidence, we conclude that the jury was justified in finding defendant not guilty of those counts charging her with recklessly engaging in conduct that caused the child's injury or created a grave risk of death to the child, while at the same time finding her guilty of the count charging her with "knowingly act[ing] in a manner likely to be injurious to the physical . . . welfare of [the] child" (Penal Law § 260.10 [1]). Specifically, the jury was justified in finding that the evidence established that the seriousness of the child's condition was apparent to defendant, and that her failure to take appropriate action amounted to knowingly acting in a manner likely to be injurious to the child (*see People v Keegan*, 133 AD3d 1313, 1316, *lv denied* 27 NY3d 1152; *People v Brandi E.*, 105 AD3d 1341, 1343, *lv denied* 22 NY3d 1154; *People v Lewis*, 83 AD3d 1206, 1207, *lv denied* 17 NY3d 797).

Defendant failed to preserve for our review her contention that the prosecutor, during summation, improperly urged the jury to speculate concerning defendant's mental state at the time that the child was in her care (*see People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849). In any event, even assuming that the prosecutor's comment was improper, we conclude that it was not so egregious that it deprived defendant of a fair trial (*see People v Griffin*, 125 AD3d 1509, 1511).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1093

CA 17-00402

PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

PATRICIA J. CURTO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ERIE COUNTY, MARK C. POLONCARZ, ERIE COUNTY EXECUTIVE, AND MICHAEL A. SIRAGUSA, ERIE COUNTY ATTORNEY, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

PATRICIA J. CURTO, PLAINTIFF-APPELLANT PRO SE.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (THOMAS J. NAVARRO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order (denominated decision) of the Erie County Court (David W. Foley, A.J.), dated March 28, 2016. The order affirmed an amended judgment of Buffalo City Court.

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

Memorandum: Plaintiff commenced this small claims action in Buffalo City Court seeking damages in the amount of $300. In an amended judgment, City Court awarded damages in that amount, together with disbursements of $15. On appeal from the order affirming the amended judgment, plaintiff contends that County Court erred in failing to award her additional disbursements. We reject that contention.

"Appellate review of small claims is limited to determining whether 'substantial justice has not been done between the parties according to the rules and principles of substantive law' " (*Rowe v Silver & Gold Expressions*, 107 AD3d 1090, 1091, quoting UCCA 1807). "Thus, judgment rendered in a small claims action will be overturned only if it is 'so shocking as to not be substantial justice' " (*Coppola v Kandey Co.*, 236 AD2d 871, 872). The determination to award $15 in disbursements meets the standard of substantial justice. Moreover, the only item of expense sought by plaintiff that qualified as an allowable disbursement under UCCA 1908 was the filing fee (*see* UCCA 1908 [a]), which was $15 (*see* UCCA 1803 [a]) and not $90, as plaintiff contends. We have examined plaintiff's remaining

contentions and conclude that they are without merit.

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1094

CA 17-00405

PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

PATRICIA J. CURTO, PLAINTIFF-APPELLANT,

V ORDER

ERIE COUNTY, MARK C. POLONCARZ, ERIE COUNTY EXECUTIVE, AND MICHAEL A. SIRAGUSA, ERIE COUNTY ATTORNEY, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

PATRICIA J. CURTO, PLAINTIFF-APPELLANT PRO SE.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (THOMAS J. NAVARRO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an amended order of the Erie County Court (David W. Foley, A.J.), dated May 19, 2016. The amended order denied the motion of plaintiff for leave to reargue.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1103

KA 15-01889

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PABLO CONTRERAS, ALSO KNOWN AS “NEW YORK”,
DEFENDANT-APPELLANT.

MARY R. HUMPHREY, NEW HARTFORD, 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 May 18, 2015. The judgment convicted defendant, upon a nonjury verdict, of manslaughter in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a nonjury trial of manslaughter in the first degree (Penal Law § 125.20 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant contends that the evidence is legally insufficient to support his conviction of manslaughter because he was too intoxicated to form the requisite intent to cause serious physical injury to another person. We conclude that defendant failed to preserve that contention for our review inasmuch as his general motion for a trial order of dismissal was not “ ‘specifically directed’ at” that alleged shortcoming in the evidence (*People v Gray*, 86 NY2d 10, 19; *see generally People v Fafone*, 129 AD3d 1667, 1668, *lv denied* 26 NY3d 1039). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that a rational trier of fact could infer that defendant intended to cause serious physical injury (*see generally People v Hunter*, 70 AD3d 1388, 1388, *lv denied* 15 NY3d 751).

Inasmuch as defendant failed to renew his motion for a trial order of dismissal after he presented a justification defense at trial, his further contention that the evidence is legally insufficient to support the conviction of manslaughter in the first degree because the People failed to disprove that defense is also unpreserved for our review (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *see also People v Diehl*, 128 AD3d 1409, 1410).

Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). County Court, as the finder of fact, "was entitled to discredit the testimony of defendant" that the victim was the initial aggressor and was armed with a "big knife" (*People v Streeter*, 21 AD3d 1291, 1292, *lv denied* 6 NY3d 898). We note that the court "was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the [court] failed to give the evidence the weight it should be accorded" (*People v Carter*, 145 AD3d 1567, 1568 [internal quotation marks omitted]; *see People v Chelley*, 121 AD3d 1505, 1506, *lv denied* 24 NY3d 1218, *reconsideration denied* 25 NY3d 1070).

Even assuming, arguendo, that defendant preserved for our review his contention that his oral statements to the police were custodial in nature and unlawfully obtained in violation of his rights under *Miranda v Arizona* (384 US 436), we conclude that defendant abandoned that contention by failing to seek a ruling on that part of his omnibus motion seeking to suppress his statements and by failing to object to the admission in evidence of his statements at trial (*see People v Adams*, 90 AD3d 1508, 1509, *lv denied* 18 NY3d 954). Moreover, even assuming, arguendo, that the court did deny that part of defendant's omnibus motion seeking to suppress his statements, we cannot consider the merits of defendant's contention inasmuch as it was "defendant's obligation to prepare a proper record" (*People v Olivo*, 52 NY2d 309, 320, *rearg denied* 53 NY2d 797), and defendant failed to include in the record on appeal his omnibus motion challenging the admissibility of the statements, a transcript of a pretrial *Huntley* hearing, and the court's suppression ruling (*see generally People v Smith*, 147 AD3d 1527, 1530, *lv denied* 29 NY3d 1087).

Defendant contends that the court abused its discretion in denying his request for a mistrial on the ground that he was denied his right to a fair trial by the testimony of a jailhouse informant. We conclude that defendant's contention is unpreserved for our review inasmuch as the record establishes that defendant did not request a mistrial (*see* CPL 470.05 [2]). Furthermore, defendant consented to the People's motion to withdraw the informant's testimony, and he did not oppose the court's proposed remedy of striking the informant's testimony from the record. The trial court was in the best position to determine the remedy necessary to protect defendant's right to a fair trial (*see e.g. People v Duell*, 124 AD3d 1225, 1228, *lv denied* 26 NY3d 967; *People v Lewis*, 247 AD2d 866, 866, *lv denied* 93 NY2d 1021) and, "in the absence of further objection or a request for a mistrial, [striking the informant's testimony] 'must be deemed to have corrected the error to the defendant's satisfaction' " (*People v Acosta*, 134 AD3d 1525, 1526, *lv denied* 27 NY3d 990, quoting *People v Heide*, 84 NY2d 943, 944).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1105

KA 12-01518

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW J. NORSTRAND, DEFENDANT-APPELLANT.

KINDLON SHANKS & ASSOCIATES, ALBANY (KATHY MANLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered May 17, 2012. The judgment convicted defendant, upon a jury verdict, of leaving the scene of a personal injury incident resulting in death without reporting.

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 leaving the scene of a personal injury incident resulting in death without reporting (Vehicle and Traffic Law § 600 [2] [a], [c] [ii]). The evidence at trial established that a vehicle struck a pedestrian resulting in his death and that the vehicle left the scene of the accident. A witness gave the police the license plate number of the vehicle, which was registered to defendant. Several hours later, another witness saw the vehicle parked on a street a short distance away from the crime scene, and it had damage consistent with striking a pedestrian. A couple of hours after the accident, defendant was standing in front of a bar and flagged down a passing police officer. The officer testified that defendant appeared intoxicated, and that he showed the officer where he had parked his vehicle, which parking space was now empty. Defendant was issued a ticket for leaving a vehicle unattended with the keys inside (*see* Vehicle and Traffic Law § 1210 [a]). The defense theory at trial was that defendant was not the person driving the vehicle that struck the pedestrian.

We reject defendant's contention that County Court improperly allowed a witness to identify the driver of the vehicle using defendant's booking photograph. The witness testified that she looked at the driver of the vehicle while their vehicles were stopped side by side at a red light just prior to the accident because the driver had

just engaged in unsafe driving behavior. The witness, however, was unable to identify defendant in the courtroom as the driver of the vehicle. The People then showed the witness defendant's booking photograph, and she identified the person in the photo as the driver of the vehicle. The witness had made a pretrial identification of defendant from a photo array that the court had concluded was not unduly suggestive, but that evidence was not presented to the jury, presumably based on the "evidentiary rules ordinarily barring the admission of photographic identification evidence" (*People v Perkins*, 15 NY3d 200, 205; *see generally* CPL 60.25 [1] [a], [b]; *People v Bayron*, 66 NY2d 77, 81). An officer testified that defendant's appearance at trial was somewhat changed from the time of the commission of the offense. Under these circumstances, we conclude that the in-court identification used here was not likely to result in an unreliable identification (*cf. People v Powell*, 67 NY2d 661, 662; *People v Rivera*, 74 AD2d 857, 857-858).

Contrary to defendant's further contention, the prosecutor did not vouch for the credibility of that witness during summation (*see People v Ielfield*, 132 AD3d 1298, 1299, *lv denied* 27 NY3d 1152). Defendant failed to preserve for our review his contention that the court erred in failing to give a cross-racial identification charge to the jury (*see People v Dingle*, 147 AD3d 1080, 1080-1081), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's contention, the court did not err in omitting a witness's cross-examination testimony during a readback inasmuch as the jury specifically requested only that witness's direct examination testimony (*see People v Coleman*, 32 AD3d 1239, 1240, *lv denied* 8 NY3d 844; *cf. People v Berger*, 188 AD2d 1073, 1074, *lv denied* 81 NY2d 881). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, contrary to defendant's contention, the autopsy photograph of the victim was properly admitted in evidence (*see People v Hernandez*, 79 AD3d 1683, 1684, *lv denied* 16 NY3d 895).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1108

CAF 16-00841

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF CARTER B. AND CLARAH B.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN
AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LOGAN D., RESPONDENT-APPELLANT,
AND SANDY B., RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (MAGGIE SEIKALY OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered April 14, 2016 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, found that respondent-appellant had neglected the subject children.

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

Memorandum: Respondent mother, Logan D., appeals from an order adjudging the two subject children to be neglected by virtue of her drug use. Preliminarily, and contrary to the contention of the Attorney for the Children, this appeal was not rendered moot by the subsequent entry of a consent order that granted custody of the children to the maternal grandmother. "[T]he finding of neglect constitutes a permanent and significant stigma that might indirectly affect the mother's status in future proceedings" (*Matter of Tyler W. [Stacey S.]*, 121 AD3d 1572, 1572 [internal quotation marks omitted]; *see Matter of Jamiar W. [Malipeng W.]*, 84 AD3d 1386, 1386-1387).

On the merits, we conclude that Family Court's finding of neglect is supported by the requisite preponderance of the evidence. "[P]roof that a person repeatedly misuses . . . drugs . . . to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child except

that such drug . . . misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program" (Family Ct Act § 1046 [a] [iii]; *see Matter of Nikita A.*, 16 AD3d 736, 737). Here, by submitting overwhelming evidence of the mother's repeated misuse of cocaine and heroin, petitioner "established a prima facie case of neglect pursuant to Family Court Act § 1046 (a) (iii) and, therefore, neither actual impairment of the child[ren's] physical, mental, or emotional condition nor specific risk of impairment need be established" (*Matter of Sadiq H. [Karl H.]*, 81 AD3d 647, 647 [internal quotation marks, brackets, and citations omitted]; *see Matter of Jonathan E. [John E.]*, 149 AD3d 1197, 1199). "To the extent that the presumption set forth in Family Court Act § 1046 (a) (iii) may not have been the basis for the court's finding of neglect, . . . we are not precluded from affirming the order based on that presumption inasmuch as the authority of this Court to review the facts is as broad as that of Family Court" (*Matter of Anthony L.*, 144 AD3d 1690, 1692, *lv denied* 28 NY3d 914 [internal quotation marks omitted]).

Contrary to the mother's contention, petitioner was not obligated to present additional specific evidence to establish the common-sense proposition that repeated, multi-year abuse of cocaine and heroin "would *ordinarily* have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality" (Family Ct Act § 1046 [a] [iii] [emphasis added]; *see generally Judd v Lake Shore & Michigan S. Ry. Co.*, 155 App Div 1, 4-5, *affd* 214 NY 622).

We reject the mother's further contention that the presumption of neglect embodied in Family Court Act § 1046 (a) (iii) was inapplicable given her purported "participat[ion] in a recognized rehabilitative program." Even assuming, arguendo, that the methadone replacement program in which the mother was enrolled constitutes a "recognized rehabilitative program" within the meaning of section 1046 (a) (iii), her 18 separate positive drug tests and admitted continued drug use while enrolled in this program established that she was not "voluntarily and regularly participating" therein (*see Matter of Brooklyn S. [Stafania Q.—Devin S.]*, 150 AD3d 1698, 1699, *lv denied* ___ NY3d ___ [Sept. 14, 2017]; *see generally Matter of Keira O.*, 44 AD3d 668, 670).

In light of our determination, the mother's remaining contentions are academic.

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1111

CAF 15-02048

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF BRADY J.C. AND KENNEDY L.C.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

JUSTIN P.C., RESPONDENT-APPELLANT.

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

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered November 4, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject children.

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

Memorandum: Respondent father appeals from an order that, inter alia, terminated his parental rights on the ground of permanent neglect with respect to the subject children and freed the children for adoption. The children were removed from the father's home and placed in foster care after a domestic violence incident when the father was beating his wife and throwing objects, and a diaper bag thrown by the father struck one of the children. Contrary to the father's contention, petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between him and the children (*see* Social Services Law § 384-b [3] [g] [i]; [4] [d]; [7] [f]; *Matter of Burke H. [Richard H.]*, 134 AD3d 1499, 1500; *Matter of Kelsey R.K. [John J.K.]*, 113 AD3d 1139, 1139, *lv denied* 22 NY3d 866; *see generally Matter of Sheila G.*, 61 NY2d 368, 373). Among other things, petitioner conducted service plan reviews and provided supervised visitation with the children until the visits were suspended because of the father's behavior during the visits. Petitioner also referred the father to parenting and domestic violence programs and to anger management and mental health counseling.

We conclude that, despite those diligent efforts, the father failed to plan for the future of the children (*see Burke H.*, 134 AD3d

at 1500-1501). The father did not complete all of the programs or regularly attend mental health treatment and, as noted above, Family Court suspended his supervised visits with the children because of his belligerent and threatening behavior during the visits. To the extent that the father completed any of the recommended programs or services, he "did not successfully address or gain insight into the problems that led to the removal of the child[ren] and continued to prevent the child[ren's] safe return" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243, *lv denied* 12 NY3d 715; *see Matter of Rachael N. [Christine N.]*, 70 AD3d 1374, 1374, *lv denied* 15 NY3d 708).

We reject the father's contention that the court erred in allowing him to represent himself at the dispositional hearing. The father had both a constitutional right and a statutory right to be represented by counsel in this Family Court Act article 6 proceeding (*see generally Matter of Casey N.*, 59 AD3d 625, 627). That right may be waived and the party may opt to proceed pro se (*see id.*; *Matter of Kristin R.H. v Robert E.H.*, 48 AD3d 1278, 1279; *Matter of Meko M.*, 272 AD2d 953, 954). The colloquy between the father and the court established that the father's decision to proceed pro se was made knowingly, intelligently, and voluntarily (*see generally Casey N.*, 59 AD3d at 627-628).

Contrary to the father's contention, the record supports the court's determination that termination of the father's parental rights was in the best interests of the children (*see* Family Ct Act § 631; *Matter of Star Leslie W.*, 63 NY2d 136, 147-148; *Matter of Kendalle K. [Corin K.]*, 144 AD3d 1670, 1672). The father further contends that the court erred in relying on an exhibit that was not admitted in evidence in rendering its determination after the dispositional hearing. It appears that much of the information in that exhibit, which consisted of incident reports that documented instances when the father threatened visitation staff and caseworkers, was already before the court through the caseworker's visitation notes that were admitted in evidence during the dispositional hearing, and some incident reports that were admitted in evidence during the fact-finding hearing and that the court took judicial notice of during the dispositional hearing. To the extent that the information in the exhibit was not already in evidence, we conclude that the court's reliance thereon was harmless inasmuch as the record otherwise supports the court's determination to terminate the father's parental rights (*see generally Matter of Danaryee B. [Erica T.]*, 145 AD3d 1568, 1568-1569). We have considered the father's remaining contention and conclude that it is without merit.

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1121

CA 16-02339

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

CARLA BRASHAW AND SEAN BRASHAW,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ELLIOT C. COHEN, M.D., AND NEW CONCEPTS
OBSTETRICS AND GYNECOLOGY, PLLC,
DEFENDANTS-RESPONDENTS.

DEFRANCISCO & FALGIATANO, LLP, EAST SYRACUSE (CHARLES FALGIATANO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (ZACHARY M. MATTISON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered September 29, 2016. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs Carla Brashaw (mother) and Sean Brashaw (father) are the parents of an infant who died shortly after birth (decedent), and they commenced this medical malpractice action seeking to recover damages for emotional injuries that they allegedly sustained as a result of defendants' negligence in providing medical treatment while the mother was pregnant with the decedent. The relevant facts are not in dispute. In 2011, the mother became pregnant and began receiving treatment from defendant Elliot C. Cohen, M.D. The mother had a history of difficult pregnancies and, after approximately 20 weeks, Cohen diagnosed her as having an incompetent cervix and the mother was admitted to the hospital. Three days later, the mother delivered the decedent. Doctors at the hospital told plaintiffs that the decedent would not survive because his lungs were not fully developed and, indeed, he died only an hour after delivery. During his short life, the decedent had a slow heartbeat, was breathing, and could grab his father's finger, but his skin remained pale blue in color, he did not cry, and he did not move his arms and legs. The mother did not sustain an independent injury during the course of the pregnancy or the delivery.

Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint. Initially, we note that plaintiffs

do not dispute that the action was properly dismissed insofar as it was brought by the father. Insofar as the action was brought by the mother, where, as here, an infant is injured in utero as a result of medical malpractice and is born alive, the mother cannot recover damages for emotional injuries without having sustained an independent injury as a result of the alleged malpractice (*see Sheppard-Mobley v King*, 4 NY3d 627, 636; *Ward v Safajou*, 145 AD3d 836, 837, *lv denied* 29 NY3d 906). Under such circumstances, the infant may commence an action seeking damages for his or her injuries (*see Sheppard-Mobley*, 4 NY3d at 636; *Ward*, 145 AD3d at 837). Absent an independent injury, the mother can recover damages for emotional injuries arising from medical malpractice that causes an in utero injury only if that malpractice results in miscarriage or stillbirth (*see Broadnax v Gonzalez*, 2 NY3d 148, 155; *Ward*, 145 AD3d at 837).

We reject plaintiffs' contention that this case falls into a "logical gap" left open by *Broadnax* and *Sheppard-Mobley*. In *Broadnax*, the Court of Appeals allowed a mother to bring an action to recover damages for emotional injuries "where otherwise none would be available to redress the wrongdoing that resulted in a miscarriage or stillbirth" (*Sheppard-Mobley*, 4 NY3d at 637; *see Broadnax*, 2 NY3d at 155). Later, in *Sheppard-Mobley*, the Court expressly declined to expand that doctrine to a situation where the injured infant was born alive and thus was capable of bringing his or her own action (*see Sheppard-Mobley*, 4 NY3d at 637; *see also Ward*, 145 AD3d at 837). Insofar as plaintiffs contend that the mother should be able to recover damages for emotional injuries because a wrongful death cause of action would not have a viable accompanying cause of action for conscious pain and suffering, we conclude that this is an inherent aspect of wrongful death actions rather than a specific problem with prenatal medical malpractice actions (*see generally Anderson v Rowe*, 73 AD2d 1030, 1031). Whether to allow a plaintiff to recover damages for emotional injuries under such circumstances is a matter for the Legislature.

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1123

KA 13-00445

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EMMANUEL L. SHEPPARD, DEFENDANT-APPELLANT.

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered February 22, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree (two counts), criminal possession of a controlled substance in the third degree, conspiracy in the second degree and criminally using drug paraphernalia in the second degree (five counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, two counts of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]). With respect to defendant's challenge to County Court's denial of his motion to suppress evidence, we affirm for the reasons stated in *People v Richardson* (132 AD3d 1313, 1314-1315, *lv denied* 26 NY3d 1149). By failing to move to withdraw his plea or to vacate the judgment of conviction, defendant failed to preserve for our review his further contentions that the plea allocution was factually insufficient (*see People v Lopez*, 71 NY2d 662, 665-666), and that the plea was not knowingly, voluntarily and intelligently entered (*see People v Boyden*, 112 AD3d 1372, 1372-1373, *lv denied* 23 NY3d 960). This case does not fall within the narrow exception to the preservation requirement inasmuch as nothing in the plea colloquy "clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea" (*Lopez*, 71 NY2d at 666).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1124

KA 14-01652

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ARTHUR LEWIS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered September 3, 2014. The judgment convicted defendant, upon a jury verdict, of rape in the third degree, forcible touching and endangering the welfare of a child (two counts).

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

Memorandum: On appeal from a judgment convicting him following a jury trial of rape in the third degree (Penal Law § 130.25 [2]), forcible touching (former § 130.52), and two counts of endangering the welfare of a child (§ 260.10 [1]), defendant contends that he was denied a fair trial by prosecutorial misconduct. We conclude that "[d]efendant failed to object to the prosecutor's cross-examination of defendant and the prosecutor's comments during summation, and thus failed to preserve for our review his contentions concerning the alleged prosecutorial misconduct" (*People v Gibson*, 280 AD2d 903, 903, *lv denied* 96 NY2d 862).

We reject defendant's alternative contention that defense counsel was ineffective for failing to object to the prosecutor's cross-examination of defendant and the prosecutor's comments during summation inasmuch as failure to make an objection that has little or no chance of success does not constitute ineffective assistance of counsel (*see People v Douglas*, 60 AD3d 1377, 1377-1378, *lv denied* 12 NY3d 914; *see generally People v Caban*, 5 NY3d 143, 152). We agree with defendant that, generally, it is improper for a prosecutor to force a defendant on cross-examination to characterize the prosecution witnesses as liars (*see e.g. People v Hicks*, 100 AD3d 1379, 1379; *People v McClary*, 85 AD3d 1622, 1624; *People v Edwards*, 167 AD2d 864, 864, *lv denied* 77 NY2d 877). Nevertheless, "a distinction has to be made between a defendant's testimony that conflicts with that of the

People's witnesses and yet is susceptible to the suggestion that the witnesses spoke out of mistake or hazy recollection and the situation where, as here, the defendant's testimony leaves open only the suggestion that the People's witnesses have lied. In the latter circumstance, the prosecution has the right to ask whether the witnesses are liars" (*People v Overlee*, 236 AD2d 133, 139, *lv denied* 91 NY2d 976; *see People v Walker*, 117 AD3d 1441, 1441, *lv denied* 23 NY3d 1044; *People v Head*, 90 AD3d 1157, 1158).

Moreover, although we again agree with defendant that courts have "disapproved of a prosecutor, in summation, characterizing the defense theory as a 'conspiracy' by the . . . prosecution witnesses to convict the defendant" (*People v Hayes*, 48 AD3d 831, 831, *lv denied* 10 NY3d 959), we conclude that the prosecutor's remarks constituted a fair response to the defense counsel's summation (*see id.*; *People v Perkins*, 24 AD3d 890, 891-892, *lv denied* 6 NY3d 816; *People v Thomas*, 226 AD2d 290, 290, *lv denied* 88 NY2d 995). In summation, defense counsel argued that the victims had fabricated their testimony and had "conspire[d] to hurt [defendant] and hurt him in the worst way."

With respect to the remaining allegations of prosecutorial misconduct, we conclude that the prosecutor did not improperly vouch for the credibility of the prosecution witnesses. Rather, "the prosecutor's attempts to persuade the jurors as to the credibility of the victim[s] and [their] account[s] constituted fair comment on the evidence . . . and fair response to the summation of defense counsel" (*People v Redfield*, 144 AD3d 1548, 1550, *lv denied* 28 NY3d 1187).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), and " 'weighing the probative value of the conflicting testimony and the conflicting inferences that could be drawn, while deferring to the jurors' ability to observe the witnesses and assess their credibility,' " we conclude that it was not contrary to the weight of the credible evidence for the jury to determine that defendant committed the charged offenses (*People v Tuszynski*, 120 AD3d 1568, 1569, *lv denied* 25 NY3d 954; *see generally People v Bleakley*, 69 NY2d 490, 495). The jury heard testimony from both victims and from defendant, and the jury was entitled to credit the testimony of the victims, which was amply corroborated by other evidence and was not incredible as a matter of law (*see People v Smith*, 60 AD3d 1367, 1367, *lv denied* 12 NY3d 921). Even assuming, arguendo, that a different verdict would not have been unreasonable, we note that "the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Carter*, 145 AD3d 1567, 1568 [internal quotation marks omitted]).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1125

KA 15-00021

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRICK TROTMAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 19, 2014. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). The charges stemmed from an altercation outside a bar that resulted in a shooting.

Defendant failed to preserve for our review his contention that the photographic arrays used by the police were unduly suggestive (*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]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), and affording great deference to the jury's credibility determinations, we conclude that the verdict is not against the weight of the evidence with respect to the issues of intent and identification (*see generally People v Bleakley*, 69 NY2d 490, 495). The jury was entitled both to infer defendant's criminal intent from the victim's testimony that defendant aimed and fired a gun at him, and to accept the victim's identification of defendant as the perpetrator, which was corroborated by several eyewitnesses who had prior familiarity with defendant.

We agree with defendant that Supreme Court erred in denying his

request for a missing witness charge. Defendant met his initial burden of demonstrating that the uncalled witness, who was walking behind the victim moments before the altercation, was "knowledgeable about a pending material issue and that such witness would be expected to testify favorably to the opposing party" (*People v Gonzalez*, 68 NY2d 424, 428; *see People v Smith*, 225 AD2d 1030, 1030). The burden then shifted to the People "to account for the witness' absence or otherwise demonstrate that the charge would not be appropriate" (*Gonzalez*, 68 NY2d at 428). The People failed to meet that burden inasmuch as their "unsubstantiated assertion that the witness claimed to have no recollection of the pertinent events is insufficient to establish that the witness was not available or that he was not knowledgeable about any pending material issue" (*Smith*, 225 AD2d at 1031). Moreover, the prosecutor's assertion is not substantiated by virtue of the fact that he provided it under oath (*see generally People v Macana*, 84 NY2d 173, 179). We nevertheless conclude that the court's error in denying defendant's request is harmless inasmuch as the evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the error (*see People v Fields*, 76 NY2d 761, 763; *People v Abdul-Jaleel*, 142 AD3d 1296, 1297, *lv denied* 29 NY3d 946; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

We reject the further contention of defendant that he was denied effective assistance of counsel based upon defense counsel's strategic decisions not to seek a jury charge on a lesser-included offense (*see People v Colville*, 20 NY3d 20, 23; *People v Rivera*, 71 NY2d 705, 708-709; *People v Lane*, 60 NY2d 748, 749-751), or to object to alleged instances of prosecutorial misconduct (*see People v Taylor*, 1 NY3d 174, 176-177). The record, viewed as a whole, demonstrates that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, the sentence is not unduly harsh or severe.

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1126

KA 16-00009

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW JONES, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered December 10, 2015. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the third degree (Penal Law § 155.35 [1]). We agree with defendant that County Court improperly sentenced him as a second felony offender and that the sentence is therefore illegal. We note that the issue of the illegality of his sentence survives his valid waiver of the right to appeal (*see People v Bailey*, 105 AD3d 1359, 1360, *lv denied* 21 NY3d 1040).

To qualify as a second felony offense, the sentence for the prior felony conviction must have been imposed before the commission of the present felony (*see* Penal Law § 70.06 [1] [b] [ii]). Defendant's present felony conviction arises from the filing of 93 false unemployment certificates, which resulted in defendant unlawfully obtaining more than $10,000 in unemployment benefits during a 32-month period between November 2011 and June 2014. Defendant accepted a plea bargain in which he would waive indictment and plead guilty by superior court information to a single count of grand larceny in the third degree covering the entire 32-month period, in exchange for a sentence to a mandatory indeterminate term of incarceration as a second felony offender, based on two prior felony convictions. We conclude, however, that those two prior felony convictions do not qualify as predicate offenses for second felony offender purposes inasmuch as defendant was sentenced on those predicate felony

convictions after he had begun, and while he was still in the midst of committing, the present felony (*see* § 70.06 [1] [b] [ii]; *People v Greer*, 86 AD2d 781, 781; *see also People v Samms*, 95 NY2d 52, 58). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing.

Upon remittal, the court must impose a lawful sentence on defendant as a first felony offender, which may result in a lesser sentence than that bargained for by the People and defendant. "[I]n that event, the court must entertain a motion by the People, should the People be so disposed, to vacate the plea and set aside the conviction in its entirety" (*People v Ignatowski*, 70 AD3d 1472, 1473 [internal quotation marks omitted]; *see People v Irwin*, 166 AD2d 924, 925). "Further, should the People be so disposed, they may withdraw their consent to the waiver of indictment" (*People v Hamilton*, 49 AD3d 1163, 1164-1165; *see* CPL 195.10 [1] [c]).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1127

KA 15-01690

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALFRED C. ROBINSON, 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 resentence of the Onondaga County Court (Thomas J. Miller, J.), rendered February 4, 2013. Defendant was resentenced upon his conviction of, inter alia, attempted murder in the first degree.

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

Memorandum: Defendant was convicted in 2003 upon a jury verdict of, inter alia, attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1]) and bribing a witness (§ 215.00), and he was sentenced to concurrent and consecutive terms of incarceration aggregating to 41 years to life. This Court affirmed the judgment of conviction on direct appeal (*People v Robinson*, 28 AD3d 1126, *lv denied* 7 NY3d 794). Several years later, defendant made a motion in Federal District Court seeking a writ of habeas corpus and, in 2009, that court granted the motion in part, vacated the judgment of conviction with respect to the bribery charge in count seven of the indictment, and directed a retrial on that count (*Robinson v Graham*, 671 F Supp 2d 338, 355-356 [ND NY 2009]). The Federal District Court further ordered that, "unless the People retry [defendant] on [c]ount [s]even of the [i]ndictment . . . within a reasonable time, consistent with the New York speedy trial law, [defendant's] sentence must be redetermined without regard to the conviction on that count" (*id.* at 364).

The People did not retry defendant on the bribery charge or move for resentencing and, in 2012, defendant made a motion in County Court seeking, inter alia, to dismiss the indictment, contending that the court had lost jurisdiction over the case owing to the delay in resentencing. After several more delays, the court denied the motion and resentenced defendant nunc pro tunc on February 4, 2013 to the same sentence that it had originally imposed, except that it

eliminated the sentence on the bribery charge in count seven. We affirm.

Contrary to defendant's contention, the court properly concluded that it had not lost jurisdiction over the case because of the delay in resentencing. The Court of Appeals has stated that " '[s]entence must be pronounced without unreasonable delay' " (*People v Drake*, 61 NY2d 359, 364; *see* CPL 380.30 [1]) and, "unless excused[, such a delay] result[s] in a loss of jurisdiction requiring dismissal of the indictment" (*Drake*, 61 NY2d at 367). This Court has "conclude[d] that the analysis in *People v Drake* applies to delays in resentencing as well as to those between conviction and sentencing, but with one salient difference. Prejudice is presumed to result from delays between conviction and sentence[. . . but, as] with other postjudgment delay . . . , defendant must demonstrate prejudice resulting from the delay between sentencing and resentencing" (*People v Hatzman* [appeal No. 1], 218 AD2d 185, 188). Applying that principle here, we note that there was a "long and unexplained" delay between the Federal District Court's order and resentencing (*Drake*, 61 NY2d at 366; *see People v Davis*, 29 AD3d 814, 816; *People v Keller*, 238 AD2d 758, 759), but we conclude that defendant failed to demonstrate any prejudice resulting therefrom. The order of the Federal District Court merely directed that defendant be retried upon a single count of the indictment or be resentenced without respect to that count. The order had no impact on his incarceration on the remaining counts of the indictment, and County Court resentenced defendant simply by eliminating the sentence on the bribery count. In light of defendant's failure to demonstrate any prejudice with respect to the remaining counts of the indictment, we see no reason to conclude that the court lost jurisdiction over them because of the delay in resentencing (*cf. Hatzman*, 218 AD2d at 189; *see generally Keller*, 238 AD2d at 759).

We reject defendant's contention that the court erred in resentencing him without ordering an updated presentence report. Although the resentencing judge had discretion to order an updated report, "[t]here was no legal obligation that he do so . . . , and we find no abuse of discretion in his determination not to update the presentence report here" (*People v Kuey*, 83 NY2d 278, 283). Defendant was continuously incarcerated during the period of time between sentencing and resentencing, he was given the opportunity to provide information about his conduct during that period, and the resentencing court "expresse[d] no disagreement with the sentencing court's evaluation of sentencing criteria or the appropriateness of the term imposed" (*id.* at 282).

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

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1128

KA 14-00585

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER N. CYGANIK, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered August 22, 2013. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class D felony, aggravated unlicensed operation of a motor vehicle in the first degree and driving a vehicle not equipped with an ignition interlock device.

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, among other things, driving while intoxicated (DWI) as a class D felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]). Defendant contends that his plea was not knowing, intelligent, and voluntary because, before he pleaded guilty, County Court failed to inform him of the amount of the fine to be imposed and to advise him that, following his indeterminate term of imprisonment, he would be subject to a three-year conditional discharge, during which he would be required to install and maintain an ignition interlock device (IID) in his vehicle. It is undisputed that defendant's contention concerning the voluntariness of the plea survives his waiver of the right to appeal (*see People v Neal*, 148 AD3d 1699, 1700, *lv denied* 29 NY3d 1084). Nonetheless, even assuming, arguendo, that the conditional discharge, like the fine, was a direct consequence of the plea, thereby requiring the court to advise defendant of such at the time of the plea (*see People v Panek*, 104 AD3d 1201, 1202, *lv denied* 21 NY3d 1018; *see generally* Penal Law § 60.21; *People v Harnett*, 16 NY3d 200, 205; *People v Ford*, 86 NY2d 397, 403), we conclude that defendant was required to preserve his contention for our review, and he failed to do so.

Here, the court informed defendant during the plea proceeding

that the matter would be transferred to the Rochester Drug Treatment Court (drug court), but that if defendant was terminated from the diversion program without successfully completing it, he would be subject to, among other things, concurrent terms of imprisonment with a cap of 2 to 6 years on the DWI charge, installation of an IID in his vehicle, and imposition of a fine. The court did not state the amount of the fine or that the installation of an IID would be effectuated through a three-year conditional discharge following defendant's indeterminate term of imprisonment. One week later, defendant appeared in drug court with defense counsel, and they both signed a Drug Treatment Court Felony Diversion Contract (Contract) on that date. Defendant initialed each of the enumerated conditions in the Contract, including a provision in which he expressly acknowledged that his termination from the diversion program would result in, among other things, a term of imprisonment capped at 2 to 6 years followed by a three-year conditional discharge with installation of an IID in his vehicle, and a fine. Defense counsel certified that she had explained to defendant his rights as affected by the Contract. Defendant was terminated from the diversion program after several months of participation, and he was sentenced by County Court over nine months after he initially appeared in drug court and executed the Contract.

The record thus establishes that defendant was made aware shortly after the plea and well before sentencing that, if he was terminated from the drug court diversion program, his sentence would include a consecutive three-year conditional discharge with the condition that an IID be installed in his vehicle. Inasmuch as defendant had a reasonable opportunity to challenge the validity of the plea on the ground that the court failed to advise him before he pleaded guilty of the conditional discharge, we conclude that defendant was required to preserve that challenge for our review (*see People v Williams*, 27 NY3d 212, 219-223; *People v Crowder*, 24 NY3d 1134, 1136-1137; *People v Murray*, 15 NY3d 725, 726-727; *cf. People v Louree*, 8 NY3d 541, 545-546). He failed to do so, however, because he did not move to withdraw the plea or otherwise object to the imposition of the conditional discharge (*see Williams*, 27 NY3d at 214; *Crowder*, 24 NY3d at 1136-1137). Likewise, inasmuch as the court advised defendant during the plea colloquy that it would impose a fine and defendant acknowledged in the Contract that a fine would be a component of his sentence if he was terminated from the diversion program, we conclude that defendant had a reasonable opportunity to challenge the plea on the ground that the court failed to advise him of the amount of the fine, and thus preservation was also required for that challenge (*see Neal*, 148 AD3d at 1700). "By failing to seize upon the[ ] opportunities to object or seek additional pertinent information," defendant failed to preserve for our review his contention concerning the voluntariness of the plea (*Williams*, 27 NY3d at 223; *see Murray*, 15 NY3d at 727), and we decline defendant's request to exercise our power to review that contention as a matter of discretion in the

interest of justice (*see* CPL 470.15 [3] [c]).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1129

CAF 16-00395

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF JUSTIN T.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN
AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

WANDA T., RESPONDENT,
AND JOSEPH M., RESPONDENT-APPELLANT.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (CATHERINE Z. GILMORE OF COUNSEL), FOR PETITIONER-RESPONDENT.

JOHN W. SHARON, ATTORNEY FOR THE CHILD, SYRACUSE.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered February 25, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent Joseph M. had abandoned the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that terminated his parental rights with respect to the subject child on the ground of permanent neglect. We affirm. The father contends that Family Court erred in excusing petitioner from demonstrating diligent efforts toward reunifying the father with the child based on the father's incarceration. Contrary to the father's contention, the court did not excuse petitioner from its obligation to demonstrate diligent efforts based on the father's incarceration but, rather, excused petitioner on the ground that the court, in a prior order under a separate docket number, had "previously determined in accordance with [section 358-a (3) (b)] . . . that reasonable efforts to make it possible for the child to return safely to his or her home [were] not required" (§ 384-b [7] [a]; *see* § 358-a [3] [b]). Petitioner contends that the father's contention is not properly before this Court because he did not appeal from the earlier order. We reject that contention. The father is challenging the court's determination in the instant proceeding to excuse petitioner from demonstrating diligent efforts toward reunification.

Although the court's determination in this proceeding was based on a previous determination under a separate docket number, the father's contention is properly before us. In any event, we agree with petitioner that the father's contention lacks merit (*see* § 384-b [7] [a]; *see also* § 358-a [3] [b]; *Matter of Carlos R.*, 63 AD3d 1243, 1244-1245, *lv denied* 13 NY3d 704; *Matter of Fernando V.*, 275 AD2d 280, 282).

Contrary to the father's further contention, petitioner established that the father permanently neglected the child inasmuch as he "failed to address successfully the problems that led to the removal of the child and continued to prevent the child's safe return" (*Matter of Ja-Nathan F.*, 309 AD2d 1152, 1152; *see generally Matter of Nathaniel T.*, 67 NY2d 838, 841-842). Although the father contends on appeal that a suspended judgment would have been in the child's best interests, the father "did not request a suspended judgment at the dispositional hearing and thus failed to preserve for our review [his] contention that the court erred in failing to grant that relief" (*Matter of Kyla E. [Stephanie F.]*, 126 AD3d 1385, 1386, *lv denied* 25 NY3d 910; *see Matter of Charles B.*, 46 AD3d 1430, 1431, *lv denied* 10 NY3d 705). In any event, where, as here, the parent has not made any progress in addressing the issues that led to the child's removal, a suspended judgment is unwarranted (*see Matter of Danaryee B. [Erica T.]*, 151 AD3d 1765, 1766; *Matter of James P. [Tiffany H.]*, 148 AD3d 1526, 1527, *lv denied* 29 NY3d 908).

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

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1130

CAF 15-01651

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF IREISHA P. AND JORDAN P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SHONITA M., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

ELISABETH M. COLUCCI, BUFFALO, FOR PETITIONER-RESPONDENT.

BERNADETTE M. HOPPE, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered September 3, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, revoked the suspended judgment issued on behalf of Shonita M. and terminated her parental rights with respect to the subject children.

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

Memorandum: In appeal No. 1, respondent mother appeals from an order entered on September 3, 2015 that revoked a suspended judgment entered upon her admission of permanent neglect and terminated her parental rights with respect to the two subject children. We note at the outset that, inasmuch as the corrected order and order in appeal Nos. 2 and 3 contain no material or substantive change from the order in appeal No. 1, the appeals from those orders must be dismissed (*see Matter of Kolasz v Levitt*, 63 AD2d 777, 779).

It is well established that, if Family Court " 'determines by a preponderance of the evidence that there has been noncompliance with any of the terms of [a] suspended judgment, the court may revoke the suspended judgment and terminate parental rights' " (*Matter of Amanda M. [George M.]*, 140 AD3d 1677, 1677; *see Matter of Ronald O.*, 43 AD3d 1351, 1352). Here, the mother acknowledged that she failed to comply with the terms of the suspended judgment, and that such failure included repeated positive tests for cocaine (*see Matter of Carmen C. [Margarita N.]*, 95 AD3d 1006, 1008; *Matter of Erie County Dept. of Social Servs. v Anthony P.*, 45 AD3d 1384, 1384). We conclude that there is a sound and substantial basis in the record to support the court's determination that it is in the children's best interests to

terminate the mother's parental rights (*see Amanda M.*, 140 AD3d at 1677; *Matter of Brian C.*, 32 AD3d 1224, 1225-1226, *lv denied* 7 NY3d 717).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1131

CAF 15-01652

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF IREISHA P. AND JORDAN P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SHONITA M., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

ELISABETH M. COLUCCI, BUFFALO, FOR PETITIONER-RESPONDENT.

BERNADETTE M. HOPPE, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from a corrected order of the Family Court, Erie County (Margaret O. Szczur, J.), entered September 10, 2015 in a proceeding pursuant to Social Services Law § 384-b. The corrected order, among other things, revoked the suspended judgment issued on behalf of Shonita M. and terminated her parental rights with respect to the subject children.

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

Same memorandum as in *Matter of Ireisha P.* ([appeal No. 1] ___ AD3d ___ [Oct. 6, 2017]).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1132

CAF 15-01653

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF IREISHA P. AND JORDAN P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SHONITA M., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

ELISABETH M. COLUCCI, BUFFALO, FOR PETITIONER-RESPONDENT.

BERNADETTE M. HOPPE, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered September 14, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, revoked the suspended judgment issued on behalf of Shonita M. and terminated her parental rights with respect to the subject children.

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

Same memorandum as in *Matter of Ireisha P.* ([appeal No. 1] ___ AD3d ___ [Oct. 6, 2017]).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1134

CAF 16-00224

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF KAYLEE Z.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RHIANNON Z., RESPONDENT-APPELLANT.

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

KIMBERLY S. CONIDI, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered February 8, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent had abandoned the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, adjudged that she abandoned the subject child. We reject the mother's contention that petitioner failed to establish abandonment. "A child is deemed abandoned where, for the period six months immediately prior to the filing of the petition for abandonment . . . , a parent 'evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or [petitioner], although able to do so and not prevented or discouraged from doing so by [petitioner]' " (*Matter of Azaleayanna S.G.-B. [Quaneesha S.G.]*, 141 AD3d 1105, 1105, quoting § 384-b [5] [a]; *see* § 384-b [4] [b]). Petitioner bears the burden of establishing abandonment "by clear and convincing evidence" (*Matter of John F. [John F., Jr.]*, 149 AD3d 1581, 1582; *see Matter of Annette B.*, 4 NY3d 509, 514, *rearg denied* 5 NY3d 783).

Here, the mother admitted in her testimony at the hearing that she had moved to Florida voluntarily after the child was placed in foster care based upon a finding of neglect, that she thereafter had only a single visit with the child, which occurred after the petition herein was filed, and that her only contacts with the child, the caseworker, or the child's foster parent during the six-month period

prior to the filing of the petition were several telephone calls and one birthday gift. We conclude that those are merely "sporadic and insubstantial contacts" (*Matter of Dustin JJ. [Clyde KK.]*, 114 AD3d 1050, 1051, *lv denied* 23 NY3d 901), and it is well settled that "an abandonment petition is not defeated by a showing of sporadic and insubstantial contacts where[, as here,] clear and convincing evidence otherwise supports granting the petition" (*Matter of Candice K.*, 245 AD2d 821, 822; *see Matter of Jamal B. [Johnny B.]*, 95 AD3d 1614, 1615-1616, *lv denied* 19 NY3d 812).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1135

CAF 15-02086

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF KAYLEE D.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KIMBERLY D., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

KELIANN M. ARGY, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

CHARLES N. ZAMBITO, COUNTY ATTORNEY, BATAVIA (PAULA A. CAMPBELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

PAMELA THIBODEAU, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered November 2, 2015 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Memorandum: In these consolidated appeals arising from combined proceedings pursuant to Family Court Act article 10, respondent mother appeals in appeal Nos. 1 and 2 from orders that, respectively, adjudicated her children Kaylee D. and Damien M. to be neglected. We affirm.

As an initial matter, the mother's contention in both appeals that she was denied a fair hearing on the ground that Family Court was biased against her is not preserved for our review inasmuch as she failed to make a motion requesting that the court recuse itself (*see Matter of Shonyo v Shonyo*, 151 AD3d 1595, 1596; *Matter of Curry v Reese*, 145 AD3d 1475, 1476). In any event, that contention lacks merit. The court was within its "broad authority" when it questioned witnesses, interrupted to elicit and clarify testimony, and admonished the mother and her counsel during the mother's testimony (*Matter of Emily A. [Gina A.]*, 129 AD3d 1473, 1474 [internal quotation marks omitted]; *see Matter of Rasyn W.*, 270 AD2d 938, 938, *lv denied* 95 NY2d 766). We therefore conclude, contrary to the mother's contention, that "[t]he record does not establish that the court was biased or prejudiced against [her]" (*Rasyn W.*, 270 AD2d at 938; *see Curry*, 145 AD3d at 1476).

A neglected child is defined as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof" (Family Ct Act § 1012 [f] [i] [B]). As the Court of Appeals has explained, "[t]he statute . . . imposes two requirements for a finding of neglect, which must be established by a preponderance of the evidence . . . First, there must be proof of actual (or imminent danger of) physical, emotional or mental impairment to the child . . . Second, any impairment, actual or imminent, must be a consequence of the parent's failure to exercise a minimum degree of parental care . . . This is an objective test that asks whether a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances" (*Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [internal quotation marks omitted]). "Moreover, it is well established that 'the statutory requirement of imminent danger . . . does not require proof of actual injury' . . . , and that '[a] single incident where the parent's judgment was strongly impaired and the child exposed to a risk of substantial harm can sustain a finding of neglect' " (*Matter of Raven B. [Melissa K.N.]*, 115 AD3d 1276, 1278).

Here, we conclude that the court properly determined that the child in each appeal was neglected as the result of an incident that took place in the early morning of October 18, 2014. The testimony of petitioner's witnesses, which was credited by the court, established that the police were dispatched at approximately 5:22 a.m. to respond to a report that a female was yelling at her children in front of a residence and that the children were crying. Upon arriving at the scene, a police officer observed the mother and her 5½-year-old daughter and 11-year-old son standing in front of a residence. The children were dressed in light coats, pajamas, and sneakers in weather conditions that the officer described as being 45 degrees with moderate rain. In response to the officer's inquiry regarding the mother's reason for being outside with the children in such conditions, the mother stated that "it was a beautiful, stormy morning" and that she was "just out for a beautiful walk." The officer noticed that the mother was lethargic, her eyes were "droopy," she did not respond coherently to many of the officer's questions, and she entirely failed to respond to some of his inquiries while simply staring at him blankly. Based upon his training and experience, the officer suspected that the mother was under the influence of a narcotic. The children reported that the mother had engaged in bizarre behavior that morning, including waking them up, telling them that they had to leave their residence because of an emergency, and instructing them to carry a cardboard box filled with various items. Those statements were corroborated by the officer's observations of the mother's behavior and the fact that the mother and the children had in their possession a box containing telephone and cable wire, a damaged corrugated dryer vent, and water heater pipes (*see* Family Ct Act § 1046 [a] [vi]; *see generally Matter of Z'naya D.J. [Vanessa J.]*, 141 AD3d 651, 652).

After the officer spoke with the children, the mother declared her intention to leave, but she was detained and, when she resisted, she was put up against a vehicle, handcuffed, and placed in a patrol vehicle. The mother was arrested for endangering the welfare of the children (Penal Law § 260.10) and for appearing in public under the influence of narcotics (§ 240.40). According to the officer, the children were cold and wet and, although they were not immediately sheltered while he was assessing the situation, they were shortly thereafter placed in another patrol vehicle for the dual purpose of removing them from the weather conditions and transporting them to the police station. The police discovered that the mother was in possession of a box of suboxone, which is used to treat opiate dependence, and that the box was missing 22 doses even though the mother's prescription was issued only five days prior and the medication was to be taken only twice daily. The mother's physician documented that the mother had previously reported a tendency to increase the dosage of suboxone on her own, and the physician testified that misuse of suboxone can have untoward side effects such as sedation, dysphoria and mood changes, and may affect a person's cognitive abilities (*see generally Matter of Crystiana M. [Crystal M.–Pamela J.]*, 129 AD3d 1536, 1537).

Based upon the foregoing, we conclude that the court properly determined that petitioner established by a preponderance of the evidence that the children were neglected inasmuch as they were in imminent danger of physical, emotional or mental impairment as a consequence of the mother's failure to exercise a minimum degree of parental care in providing the children with proper guardianship (*see* Family Ct Act § 1012 [f] [i] [B]; *Matter of Devon EE. [Evelyn EE.]*, 125 AD3d 1136, 1137-1138, *lv denied* 25 NY3d 904; *Matter of Pedro C. [Josephine B.]*, 1 AD3d 267, 268). The above incident is by itself sufficient to sustain the finding of neglect inasmuch as the record establishes that the mother's judgment was strongly impaired and the children were exposed to a risk of substantial harm (*see Pedro C.*, 1 AD3d at 268). " 'The fact that [the mother] presented conflicting evidence to the court does not require a different result' " (*Matter of Emily W. [Michael S.–Rebecca S.]*, 150 AD3d 1707, 1709) and, here, the court declined to credit the mother's effort to minimize or explain her behavior (*see Devon EE.*, 125 AD3d at 1137-1138). "We accord great weight and deference to the court's determinations, 'including its drawing of inferences and assessment of credibility,' and we will not disturb those determinations where, as here, they are supported by the record" (*Emily W.*, 150 AD3d at 1709).

We reject the mother's further contention in both appeals that the court erred in concluding that petitioner established, by a preponderance of the evidence, that the mother also neglected the children by abandoning them following her arrest (*see* Family Ct Act § 1012 [f] [ii]; Social Services Law § 384-b [5]). The evidence at the hearing established that the mother evinced an intent to forgo her parental rights and obligations as manifested by her failure to visit the children or to communicate with the children or petitioner, although she was able to do so in the days following her arrest and

was not prevented or discouraged from doing so by petitioner (*see* Social Services Law § 384-b [5] [a]). "The statute makes clear that the burden rests on the parent to maintain contact and that subjective good faith will not prevent a finding of abandonment" (*Matter of Julius P.*, 63 NY2d 477, 481; *see* § 384-b [5] [b]) and, here, contrary to the mother's contention in both appeals, the record establishes that she failed to maintain such contact.

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1136

CAF 15-02087

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF DAMIEN M.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KIMBERLY D., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

KELIANN M. ARGY, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

CHARLES N. ZAMBITO, COUNTY ATTORNEY, BATAVIA (PAULA A. CAMPBELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

PAMELA THIBODEAU, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered November 2, 2015 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Same memorandum as in *Matter of Kaylee D. (Kimberly D.)* ([appeal No. 1] ___ AD3d ___ [Oct. 6, 2017]).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1137

CA 17-00547

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF JOHN KENNEDY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE FOR PEOPLE WITH
DEVELOPMENTAL DISABILITIES AND KERRY DELANEY,
ACTING COMMISSIONER, NEW YORK STATE OFFICE FOR
PEOPLE WITH DEVELOPMENTAL DISABILITIES,
RESPONDENTS-RESPONDENTS.

D. JEFFREY GOSCH, SYRACUSE, FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Onondaga County (James P. Murphy, J.), dated May 19, 2016 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: After petitioner was terminated from his job with respondent New York State Office for People with Developmental Disabilities, he commenced this proceeding pursuant to CPLR article 78 challenging that termination. Supreme Court dismissed the petition on jurisdictional grounds because the notice of petition served and filed by petitioner omitted a return date in violation of CPLR 403 (a). We now reverse.

In dismissing the petition, the court relied on a line of cases, all from the Third Department, holding that such an omission constitutes a jurisdictional defect (*see e.g. Matter of Lamb v Mills*, 296 AD2d 697, 698-699, *lv denied* 99 NY2d 501; *Matter of Oates v Village of Watkins Glen*, 290 AD2d 758, 759; *Matter of Hawkins v McCall*, 278 AD2d 638, 638, *lv denied* 96 NY2d 713; *Matter of Vetrone v Mackin*, 216 AD2d 839, 840). Those cases, however, were all decided before CPLR 2001 was amended in 2007 "to permit courts to disregard mistakes, omissions, defects or irregularities made at the commencement of a proceeding, which includes commencement by the filing of a petition" (*Matter of Oneida Pub. Lib. Dist. v Town Bd. of*

the Town of Verona, 153 AD3d 127, 129), and the Third Department has since held that "the rule articulated in [its] prior decisions—a notice of petition lacking a return date is jurisdictionally defective and, therefore, prohibits a court from exercising its authority under CPLR 2001—is no longer tenable" (*id.* at 130). We agree inasmuch as "the purpose behind amending CPLR 2001 was 'to allow courts to correct or disregard technical defects, occurring at the commencement of an action [or proceeding], that do not prejudice the opposing party' and 'to fully foreclose dismissal of actions for technical, non-prejudicial defects' " (*id.* at 129-130, quoting *Ruffin v Lion Corp.*, 15 NY3d 578, 582).

We therefore reverse the judgment, reinstate the petition, and remit the matter to Supreme Court to exercise the discretion afforded to it under CPLR 2001.

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1138

CA 16-02191

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

PNC BANK, NATIONAL ASSOCIATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARSEENA HARMONSON, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

DEGNAN LAW OFFICE, CANISTEO (ANDREW ROBY OF COUNSEL), FOR DEFENDANT-APPELLANT.

LECLAIRRYAN, A PROFESSIONAL CORPORATION, ROCHESTER (CHRISTINA L. SHIFTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered February 1, 2016. The order granted plaintiff's motion for a default judgment against defendant Marseena Harmonson and for an order of reference, and denied the cross motions of that defendant seeking, inter alia, leave to file a late answer.

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

Memorandum: Plaintiff commenced this foreclosure action after Marseena Harmonson (defendant) defaulted on a note and mortgage. Defendant served plaintiff with an answer 8½ months later, accompanied by a letter acknowledging the answer's untimeliness. Plaintiff refused service and filed a notice of return, and then moved for a default judgment against defendant and for an order of reference. Defendant filed a cross motion seeking, inter alia, dismissal of the complaint on various grounds or leave to file a late answer. Defendant filed a second cross motion later that same month seeking a declaration that, inter alia, a prior assignment of the note and mortgage is void, as well as seeking dismissal of the complaint on additional grounds not stated in her first cross motion. Supreme Court granted plaintiff's motion and denied defendant's cross motions. We affirm.

Plaintiff established its entitlement to a default judgment and an order of reference through proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of defendant's failure to answer (*see* CPLR 3215 [f]; *HSBC Bank USA, N.A. v Clayton* [appeal No. 2], 146 AD3d 942, 944).

Contrary to defendant's contention, the court properly denied her application seeking leave to file a late answer inasmuch as defendant failed to offer the court a reasonable excuse for her default (*see Morgan Stanley Mtge. Loan Trust 2006-17XS v Waldman*, 131 AD3d 1140, 1140-1141; *see also* CPLR 3012 [d]). In light of that failure, we need not consider whether defendant established a potentially meritorious defense (*see Wells Fargo Bank, N.A. v Dysinger*, 149 AD3d 1551, 1552; *Morgan Stanley Mtge. Loan Trust 2006-17XS*, 131 AD3d at 1141). Defendant's contention that her participation in settlement discussions constitutes a reasonable excuse for her default is raised for the first time on appeal, and thus it is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). Moreover, defendant's participation in settlement discussions is not a fact supported by the record and, in any event, such participation does not constitute a reasonable excuse for her default (*see Federal Natl. Mtge. Assn. v Zapata*, 143 AD3d 857, 858; *US Bank, N.A. v Samuel*, 138 AD3d 1105, 1106-1107).

We have examined defendant's remaining contention and conclude that it lacks merit.

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court

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

1146

CA 17-00356

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

JACQUELINE M. JONES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SENECA COUNTY, DEFENDANT-RESPONDENT.

DEPUTY FRANK ELDREDGE, RESPONDENT.

CERULLI, MASSARE & LEMBKE, ROCHESTER (MATTHEW R. LEMBKE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ADAMS BELL ADAMS, P.C., ROCHESTER (RICHARD T. BELL, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (CURTIS A. JOHNSON OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered May 10, 2016. The order denied the motion of plaintiff seeking leave to amend her complaint to add Deputy Frank Eldredge as a defendant and granted the cross motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she allegedly sustained as a result of an encounter with respondent, Deputy Frank Eldredge, a Sheriff's deputy employed by defendant. Supreme Court denied plaintiff's motion seeking leave to amend her complaint to add respondent as a defendant and granted defendant's cross motion for summary judgment dismissing the complaint. We affirm.

Contrary to plaintiff's contention, the court properly granted the cross motion. We reject plaintiff's challenges to the viability of our prior decisions holding that "[a] county may not be held responsible for the negligent acts of the Sheriff and his [or her] deputies on the theory of respondeat superior, in the absence of a local law assuming such responsibility" (*Marashian v City of Utica*, 214 AD2d 1034, 1034; *see Villar v County of Erie*, 126 AD3d 1295, 1296-1297; *Trisvan v County of Monroe*, 26 AD3d 875, 876, *lv dismissed* 6 NY3d 891; *Smelts v Meloni* [appeal No. 3], 306 AD2d 872, 873, *lv denied* 100 NY2d 516). Although "[t]he 1989 amendment to New York

Constitution, article XIII, § 13 (a) . . . allows a county to accept responsibility for the negligent acts of the Sheriff[,] it does not impose liability upon the county for the acts of the Sheriff or his [or her] deputies on a theory of respondeat superior" (*Marashian*, 214 AD2d at 1034; *see Wilson v Sponable*, 81 AD2d 1, 11-12, *appeal dismissed* 54 NY2d 834). Here, defendant established that it did not assume such responsibility by local law (*see Villar*, 126 AD3d at 1296-1297; *Mosey v County of Erie*, 117 AD3d 1381, 1385; *cf. Barr v County of Albany*, 50 NY2d 247, 255-257; *Marashian*, 214 AD2d at 1034).

Plaintiff contends that defendant nonetheless assumed responsibility for the acts of its Sheriff's deputies when it entered into a collective bargaining agreement (CBA) with the Seneca County Sheriff's Police Benevolent Association. We reject that contention. Plaintiff's rationale is that the CBA provides for indemnification of employees from judgments and settlements upon claims arising from actions taken within the scope of such employees' public employment and duties. We note, however, that a CBA is not a local law and, in any event, the language of the CBA here does not expressly provide that defendant will assume responsibility for the tortious acts of its Sheriff's deputies (*see Santiamagro v County of Orange*, 226 AD2d 359, 359-360; *Nichols v County of Rensselaer*, 129 AD2d 167, 169-170; *cf. Barr*, 50 NY2d at 255-257). We reject plaintiff's further contention that General Municipal Law § 50-j (1) renders defendant liable for the actions of its Sheriff's deputies (*see Smelts*, 306 AD2d at 873).

Inasmuch as plaintiff asserted against defendant causes of action based only on respondeat superior, we conclude that the complaint "was properly dismissed against it because [defendant] did not assume liability for the acts of the Sheriff or his deputies, and plaintiff has alleged no other theory of liability against [defendant]" (*id.*; *see D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 959; *see also Kolko v City of Rochester*, 93 AD2d 977, 977-978).

Contrary to plaintiff's further contention, we conclude that the court properly denied her motion seeking leave to amend her complaint to add respondent as a defendant. Plaintiff failed to establish that respondent and defendant are united in interest, and thus plaintiff is not entitled to the benefit of the relation back doctrine (*see Johanson v County of Erie*, 134 AD3d 1530, 1530-1531; *Trisvan*, 26 AD3d at 876; *see generally* CPLR 203 [c]; *Buran v Coupal*, 87 NY2d 173, 177-178). Here, respondent and defendant are not united in interest inasmuch as defendant cannot be held vicariously liable for the acts of its Sheriff's deputies (*see Johanson*, 134 AD3d at 1531; *Trisvan*, 26 AD3d at 876). In view of our determination, we do not address the alternative ground upon which the court denied the motion.

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court