SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 25, 2016

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. HENRY J. SCUDDER, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1313

CA 15-00967

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

IN THE MATTER OF TINA BOUNDS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF CLIFTON SPRINGS ZONING BOARD OF APPEALS, AND MARY ANNA MORROW,
RESPONDENTS-RESPONDENTS.

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

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (MARY JO S. KORONA OF COUNSEL), FOR RESPONDENT-RESPONDENT VILLAGE OF CLIFTON SPRINGS ZONING BOARD OF APPEALS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Ontario County (Craig J. Doran, A.J.), entered January 29, 2015 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing her petition to annul the issuance of a special use permit to respondent Mary Anna Morrow. The record establishes that, for over 45 years, Morrow and her husband operated a home improvement business out of a building located on their residential property in the Village of Clifton Springs. Following the enactment of the Village of Clifton Springs Zoning Ordinance (Zoning Ordinance), the business became a "grandfathered" nonconforming business use. Following the death of Morrow's husband in 2011, a former employee continued working out of the building and completing work for the Morrows' clients. As that work was winding down, Morrow reached an agreement with another individual to permit him to operate an HVAC business out of the building, and that business moved in and began operations. When Morrow applied for a building permit to make nonstructural changes to the building to accommodate the HVAC business, the Code Enforcement Officer denied the building permit on the ground that Morrow needed a special use permit. Morrow thus applied for a special use permit and, following public hearings, respondent Village of Clifton Springs Zoning Board of Appeals (ZBA), granted the special use permit.

We reject petitioner's contention that the ZBA misapplied section 120-55 of the Zoning Ordinance. Where, as here, the ordinance permits the ZBA to interpret its requirements (*see* Zoning Ordinance § 120-46 [B] [3]), " 'specific application of a term of the ordinance to a particular property is . . . governed by the [ZBA's] interpretation unless unreasonable or irrational' " (*Matter of Libolt v Town of Irondequoit Zoning Bd. of Appeals*, 66 AD3d 1393, 1394, quoting *Matter of Frishman v Schmidt*, 61 NY2d 823, 825). Section 120-55 of the Zoning Ordinance provides, in pertinent part, that the ZBA may permit "any nonconforming use of a structure" to "be changed to another nonconforming use, provided that the [ZBA] . . . shall find that the proposed use is equally appropriate or more appropriate to the district than the existing nonconforming use"; however, "[w]hen a nonconforming use of a structure . . . is discontinued or abandoned for six (6) consecutive months or for eighteen (18) months during any three-year period . . . , the structure . . . shall not thereafter be used except in conformity with the regulations of the district in which it is located" (Zoning Ordinance § 120-55 [C], [E]). The Zoning Ordinance does not define the terms "discontinued" and "abandoned." In such circumstances, an abandonment or discontinuance does not occur "unless there has been a complete cessation of the nonconforming use" (*Matter of Marzella v Munroe*, 69 NY2d 967, 968; *see Glacial Aggregates LLC v Town of Yorkshire*, 72 AD3d 1644, 1646, *appeal dismissed* 16 NY3d 760; *Matter of Town of Johnsburg v Town of Johnsburg Zoning Bd. of Appeals*, 299 AD2d 796, 799-800; *cf. Matter of Toys "R" Us v Silva*, 89 NY2d 411, 420). We conclude that the ZBA's determination that Morrow did not discontinue or abandon the nonconforming business use of the property was a reasonable application of section 120-55, and we therefore reject petitioner's related contention that Supreme Court erred in refusing to disturb that determination.

Contrary to petitioner's further contention, we conclude that the ZBA's determination is supported by substantial evidence. We note that the ZBA's determination "must be sustained if it has a rational basis and is supported by substantial evidence" (*Toys "R" Us*, 89 NY2d at 419). In that respect, " '[t]he duty of weighing the evidence and making the choice rests solely upon the [administrative agency]. The courts may not weigh the evidence or reject the choice made by [such agency] where the evidence is conflicting and room for choice exists' " (*id.* at 424, quoting *Matter of Stork Rest. v Boland*, 282 NY 256, 267). "A record contains substantial evidence to support an administrative determination when reasonable minds could adequately accept the conclusion or ultimate fact based on the relevant proof" (*Matter of Brauch v Johnson*, 19 AD3d 799, 800 [internal quotation marks omitted]). Substantial evidence is "more than mere speculation or conjecture, but less than a preponderance of the evidence" (*Matter of Joseph v Johnson*, 27 AD3d 563, 563; *see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180).

At the public hearings before the ZBA, Morrow stated that her late husband's home improvement business continued after his death in November 2011 and that, as of September 2013, she was still in the process of winding down the business. Morrow further stated that a former employee of the home improvement business continued to work out

of the building on her property from November 2011 to January 2012, when another individual moved his HVAC business into the building. In light of that evidence, we discern no basis to disturb the ZBA's determination that there had not been a discontinuance or abandonment of Morrow's nonconforming business use.

Finally, we reject petitioner's contention that Morrow's failure to present records of ongoing business activity constitutes a basis to set aside the ZBA's determination. Although it was appropriate for the ZBA to request such records (*see generally Toys "R" Us*, 89 NY2d at 423-424), Morrow's failure to produce them did not, as a matter of law, render the ZBA's determination arbitrary and capricious.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

1316

CA 15-00962

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

JANE DOE, AN INFANT, BY HER PARENT AND NATURAL GUARDIAN, ROBERTA DOE AND ROBERTA DOE, INDIVIDUALLY, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ROCHESTER CITY SCHOOL DISTRICT, DEFENDANT-RESPONDENT.

SEGAR & SCIORTINO, PLLC, ROCHESTER (JENNIFER LUNSFORD OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

EDWIN LOPEZ-SOTO, GENERAL COUNSEL, ROCHESTER (MICHAEL E. DAVIS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered August 19, 2014. The order denied plaintiffs' motion for leave to amend their notice of claim, complaint and bill of particulars.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Jane Doe, a special needs student in defendant, Rochester City School District (District), as the result of an alleged assault and rape at Dr. Freddie Thomas High School (Freddie Thomas). Doe reported the crimes to the Rochester Police Department on March 16, 2012, the date they allegedly occurred, and identified her assailant as an African-American student enrolled at East High School (East). She also reported that the attack occurred at lunchtime in the girls' restroom adjacent to the cafeteria at Freddie Thomas. Using video surveillance footage from Freddie Thomas and East during its investigation, the District determined that the accused rapist could not have committed the acts alleged by Doe.

Doe thereafter reported to the police that her assailant was a white student with brown hair, green eyes, and a small scar on his neck. She identified the location of the attack as the girls' locker room adjacent to the gym at Freddie Thomas and the time of the attack as the afternoon. The District, again using video surveillance recordings, investigated Doe's allegations.

Plaintiffs timely filed a notice of claim that alleged,

consistent with Doe's second report of the incident, that Doe was forcibly assaulted and raped in a locker room at Freddie Thomas. Plaintiffs further alleged that Doe's injuries were the result of the District's negligence in failing to provide Doe with adequate supervision in accordance with her Individualized Education Program (IEP). At the time of the incident, the IEP required, inter alia, that the District provide Doe with transportation between her home and East, where she was enrolled as a student. In addition, the IEP required the District to provide Doe with an aide who would accompany her at all times throughout the school day. Plaintiffs allege that on the day of the attack, Doe walked to Benjamin Franklin High School (Franklin), which she did not attend, entered the school office, and asked to go to Freddie Thomas, which she also did not attend. A teacher allegedly drove her from Franklin to Freddie Thomas, where Doe remained for the entire school day without supervision.

Following the commencement of the action, Doe testified at her deposition that her assailant was an adult African-American male. Doe recalled that he wore a name tag and she believed that he was a janitor employed at Freddie Thomas. She testified that he raped her under the bleachers on the athletic field at Freddie Thomas after school hours. Plaintiffs thereafter moved for permission to amend their notice of claim, complaint, and bill of particulars to conform to Doe's deposition testimony. We conclude that Supreme Court erred in denying the motion.

"Pursuant to [General Municipal Law] section 50-e (6), a court in its discretion may permit the correction of a notice of claim where there has been a 'mistake, omission, irregularity or defect made in good faith . . . , provided it shall appear that the other party was not prejudiced thereby' " (*Betette v County of Monroe*, 82 AD3d 1708, 1710). We conclude that Doe's documented delays in cognitive and social functioning, together with her fear of the assailant and post traumatic stress disorder allegedly resulting from the attack, provide a good faith basis for the amendment sought by plaintiffs (*see generally id.*).

We further conclude that the District is not prejudiced by the proposed amendment. Contrary to the contention of the District, the amendment sought by plaintiffs does not make "substantive changes in the theory of liability" (*Mahase v Manhattan & Bronx Surface Tr. Operating Auth.*, 3 AD3d 410, 411). Plaintiffs' theory of liability in the original notice of claim was that Doe suffered injury as the result of the District's negligent failure to provide the level of supervision that it had previously determined was necessary for her, i.e., door-to-door transportation and an aide to accompany her at all times throughout the school day. Plaintiffs' claim remains that defendant was negligent in failing to supervise Doe, regardless of the identity of her assailant or the precise location of the attack.

Further, we reject defendant's claim of prejudice based upon its loss of video surveillance footage of the location of the assault and rape specified by Doe at her deposition. Defendant was on notice that Doe was at Freddie Thomas the entire day that the incident occurred,

and it had "sufficient information to conduct a meaningful examination into the claim under the circumstances" (*Kim L. v Port Jervis City Sch. Dist.*, 40 AD3d 1042, 1044). Any prejudice suffered by the District when its video surveillance recordings were overwritten was the consequence of its own failure to preserve evidence that it knew or should have known was potentially relevant.

Finally, we conclude that the court should have permitted plaintiffs to amend the complaint and bill of particulars. "A party may amend a pleading at any time by leave of court, and such leave shall be freely given (CPLR 3025 [b]), unless prejudice would result to the nonmoving party or the proposed amendment is lacking in merit" (*Bobrick v Bravstein*, 116 AD2d 682, 682). The proposed amendment was not lacking in merit, nor would it result in prejudice to the District (*see Fusca v A & S Constr., LLC*, 84 AD3d 1155, 1157-1158, *lv dismissed* 18 NY3d 837).

All concur except CARNI, J., who dissents and votes to affirm in accordance with the following memorandum: I respectfully dissent. The service of a notice of claim is a condition precedent to suit. "The primary purpose served by the notice is prompt investigation and preservation of evidence of the facts and circumstances out of which claims arise" (*Matter of Ziecker v Town of Orchard Park*, 70 AD2d 422, 427, *affd* 51 NY2d 957). A notice of claim may be amended only to correct good faith and nonprejudicial technical mistakes, omissions, or defects, but it may not be amended to substantively change the nature of the claim (*see* General Municipal Law § 50-e [6]). It is well settled that substantive changes to the facts, including, inter alia, the situs of the incident, are not technical in nature and are not permitted as amendments to the notice of claim (*see Ahmed v New York City Hous. Auth.*, 119 AD3d 494, 495-496). Indeed, where the municipality is misled by the erroneous notice of claim to conduct an investigation at the wrong situs, that circumstance alone results in serious prejudice (*see Eherts v County of Orange*, 215 AD2d 524, 525, *lv denied* 86 NY2d 708; *Martire v City of New York*, 129 AD2d 567, 567, *lv denied* 70 NY2d 609). With respect to leave to serve a late notice of claim, the 1976 amendments to General Municipal Law § 50-e, liberalizing the conditions upon which, and the time within which, leave to serve a late notice of claim may be granted, expressly direct that whether the public corporation did or did not have knowledge be accorded great weight (*see Ziecker*, 70 AD2d at 427).

Because the relevant dates and time periods are critical to the analysis, I set them forth at the outset. Plaintiffs first alleged that Doe was assaulted on March 16, 2012, at lunchtime in the girls' restroom near the cafeteria. She identified her assailant by name and described him as a known male friend of hers and a fellow student. Defendant, Rochester City School District (District), and the Rochester Police Department promptly investigated the incident. The District reviewed and retained video surveillance depicting the area outside of the girls' restroom near the cafeteria, and it empirically demonstrated that the incident could not have happened as Doe described. The video was shown to the Rochester Police.

On April 5, 2012, after being confronted by the Rochester Police with the District's video evidence, Doe changed her story. She then alleged that the assault happened in the girls' locker room. This time, the assailant was described as a white male with brownish hair and a small scar on the left side of his neck. She alleged that she met this individual in the school library. The District again reviewed and retained video surveillance that depicted the area outside of the girls' locker room at the time and place alleged by Doe. That video was also shown to the Rochester Police, and the investigating officer noted in his report on April 17, 2012, that the video depicted Doe walking towards the gym alone and that no one followed her into the girls' locker room. Additionally, the Rochester Police determined that there were no white males who fit the description given by Doe enrolled at Dr. Freddie Thomas High School (Freddie Thomas).

On June 1, 2012, plaintiffs' counsel made a telephone request to the Rochester Police for the investigation file concerning Doe's alleged assault. There is no indication in this record that plaintiffs' counsel made a request to the District that it preserve any particular video recording or all of the District's video recordings at every location at Freddie Thomas on March 16, 2012.

On June 11, 2012, plaintiffs served a verified notice of claim which alleged that Doe was assaulted in a locker room by an unknown male who she believed was a student at Freddie Thomas. On October 24, 2012, the District conducted a General Municipal Law § 50-h hearing. At that hearing, Doe testified that the assailant had "brown" skin and "black curly hair" and did not have any marks or scars on his body that Doe observed. However, Doe did report for the first time that the assailant had a "little black circle" on his neck. Doe testified that the assault took place in the restroom near the cafeteria.

Plaintiffs commenced this action on January 28, 2013. The complaint failed to identify any location where the assault allegedly occurred. On May 29, 2014, more than two years after the alleged incident, Doe testified at an examination before trial that she was assaulted by a male employee, who was "new" to the school, by the name of "Mr. Lee." According to Doe's testimony, she agreed to meet "Mr. Lee" after school, outside of the building near the bleachers for the soccer field. Doe described "Mr. Lee" as a black adult male in his "late 30s or 40s." According to Doe, "Mr. Lee" did not have any marks or tattoos, but he did wear glasses.

On July 2, 2014, more than two years after the alleged incident, plaintiffs moved for leave to amend the notice of claim pursuant to General Municipal Law § 50-e (6), or in the alternative, leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5), and for leave to amend the complaint and the bill of particulars pursuant to CPLR 3025 (b).

In seeking that relief, plaintiffs offered no evidence or explanation of why the District would not be prejudiced by the changes in the notice of claim. It is well settled that it is a plaintiff's

burden in the first instance to establish the lack of prejudice when moving for leave to serve a late notice of claim under General Municipal Law § 50-e (5) (*see Matter of Kelley v New York City Health & Hosps. Corp.*, 76 AD3d 824, 829; *Matter of Lauray v City of New York*, 62 AD3d 467, 467). Moreover, plaintiffs' reply papers failed to so much as mention the issue of prejudice to the District.

Notably, in addition to the overwrite of all other video recordings by the District's routine business practice, by the time plaintiffs moved for the instant relief, Freddie Thomas had been closed and the staff had either been relocated to different schools or had left the employ of the District. Moreover, the District was unable to identify any employee at Freddie Thomas on March 16, 2012, who fit the name or physical description given by Doe more than two years after the alleged incident.

The District contends that it has been substantially prejudiced by delay and the amorphous evolution of Doe's version of the incident. I agree. I respectfully disagree with the conclusion of the majority that "any prejudice suffered by the District was the result of its own failure to preserve evidence that it knew or should have known was potentially relevant." I first point out that the period within which to serve a notice of claim is 90 days (*see* Education Law § 3813 [2]; General Municipal Law § 50-e [1] [a]). The District's policy at the time of the incident was to retain all security system video recordings for 90 days. I can find no fault with that policy. Here, the District retained the video directly relevant to Doe's first version of the alleged incident. Moreover, the District retained the video recording relevant to Doe's second version of the attack. It was not until more than two years later that Doe changed her story to a third version, which once again alleged a different attacker, a different location, and a different time. The District fully cooperated with the Rochester Police in the investigation of Doe's first and second versions of the incident. The District was never advised by the Rochester Police to preserve all video recordings from all school locations. Plaintiffs' counsel had an opportunity to make such a request but failed to do so.

I also respectfully disagree with the majority's conclusion that the identity of the assailant or the precise location of the attack is not relevant because plaintiffs' claim remains that defendant was negligent in failing to supervise Doe. That proposition requires the premature determination that the attack actually occurred on school premises and/or while school was in session. Importantly, the District's diligence in investigating the first version established that the attack could not have happened where and when Doe reported. The District's further diligence in investigating Doe's second version again unequivocally established that the attack did not occur where and when Doe reported. In my view, Doe's delay and evolving and misleading descriptions of her attacker and the time and place of the alleged attack may have deprived a very diligent defendant of the ultimate defense, to wit: the attack did not happen on school premises and/or at a time when the District had a duty to supervise Doe. The prejudice to the District is palpable.

I am not unmindful of Doe's status as a "special needs" student. However, under the circumstances, the failure to provide the District with accurate and reliable essential facts has resulted in an unusually high degree of prejudice to the District in defending this action which, in my view, serves to substantially outweigh Doe's disability (*see generally Matter of Donald E. v Gloversville Enlarged Sch. Dist.*, 191 AD2d 749, 751). It is well settled that the determination whether to permit service of a late notice of claim or to permit an amendment to the notice of claim is discretionary, and will not be disturbed absent a clear abuse of that discretion (*see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539; *Mazza v City of New York*, 112 AD2d 921, 922). In light of the foregoing, I conclude that Supreme Court did not abuse its discretion, and I would affirm the court's order denying leave to serve a late notice of claim and/or to amend the notice of claim.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

1356

CAF 14-01002

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

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

V MEMORANDUM AND ORDER

DOMINGO A. AGRAMONTE, RESPONDENT-RESPONDENT.

STEPHANIE N. DAVIS, ESQ., ATTORNEY FOR THE
CHILDREN, APPELLANT.

IN THE MATTER OF DOMINGO A. AGRAMONTE,
PETITIONER-RESPONDENT,

V

MARIA M. GUILLERMO, RESPONDENT-APPELLANT.

STEPHANIE N. DAVIS, ESQ., ATTORNEY FOR THE
CHILDREN, APPELLANT.

IN THE MATTER OF DOMINGO A. AGRAMONTE,
PETITIONER,

V

MARIA M. GUILLERMO, RESPONDENT.

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

STEPHANIE N. DAVIS, ATTORNEY FOR THE CHILDREN, OSWEGO, APPELLANT PRO SE.

PAUL M. DEEP, UTICA, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Oneida County (Julia M. Brouillette, R.), entered May 8, 2014 in proceedings pursuant to Family Court Act articles 6 and 8. The order, among other things, awarded Domingo A. Agramonte sole legal custody of the subject children.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the fourth, sixth,

seventh, and eighth ordering paragraphs, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Oneida County, for further proceedings in accordance with the following memorandum: Petitioner-respondent mother commenced this proceeding seeking to modify a prior order of custody and visitation. She appeals from an order that, following a hearing, granted respondent-petitioner father's cross petition by awarding him sole custody of the parties' children, with supervised visitation to the mother. Contrary to the mother's contention, Family Court properly granted the cross petition. "A party seeking a change in an established custody arrangement must show 'a change in circumstances which reflects a real need for change to ensure the best interest[s] of the child' " (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417). Although the court did not specifically address whether the mother established a change in circumstances, its determination that the mother failed to establish that sole custody should be granted to her, rather than to the father, "is the product of 'careful weighing of [the] appropriate factors' . . . , and it has a sound and substantial basis in the record" (*Matter of McLeod v McLeod*, 59 AD3d 1011, 1011; *see Matter of Gugino v Tsvasman*, 118 AD3d 1341, 1342; *Fox v Fox*, 177 AD2d 209, 211). Likewise, although the court did not specifically address whether the father established a change in circumstances, we conclude that the father established the requisite change in circumstances (*see Matter of John P.R. v Tracy A.R.*, 13 AD3d 1125, 1125).

We reject the mother's further contention that the court's evidentiary rulings with respect to the audio recordings made by a police detective contemporaneously with his investigation of allegations of a sexual assault against one of the children violated her Sixth Amendment Confrontation Clause and Due Process rights under the New York and United States Constitutions. Family Court matters are civil in nature and the Confrontation Clause applies only to criminal matters (*see Matter of Q.-L. H.*, 27 AD3d 738, 739). The mother failed to preserve for our review her contention that the court erred in admitting hearsay evidence in the form of a detective's audio recording containing, inter alia, statements by the mother (*see Matter of Thomas M.F. v Lori A.A.*, 63 AD3d 1667, 1668, *lv denied* 13 NY3d 703) and, in any event, that contention is without merit.

We agree with the mother, however, that the court erred in admitting the audio recording of the confession of the perpetrator of a sexual assault against one of the children. The relevant issue before the court was not the guilt or innocence of the perpetrator. Rather, it was the mother's lack of cooperation with the investigation into that crime, and her obstruction of law enforcement investigation efforts, that was relevant. We conclude, however, that the error is harmless inasmuch as it does not appear from the court's decision that the court relied on the recording (*see Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401-1402, *lv denied* 21 NY3d 862).

The mother correctly concedes that she failed to preserve her contention that the court erred in admitting evidence concerning the

perpetrator's youthful offender status because such disclosure violated the confidentiality requirements of CPL 720.35. In any event, we conclude that the mother lacks standing to challenge the unauthorized disclosure (*see generally Soucie v County of Monroe*, 736 F Supp 33, 35).

We reject the mother's further contention that the order, including the requirement that visitation be supervised, is not supported by a sound and substantial basis in the record. We conclude that the court properly determined that there was a substantial change in circumstances that warranted modification of the existing joint custody order in the best interests of the children. It is well settled that "a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Dubuque v Bremiller*, 79 AD3d 1743, 1744; *see Matter of Green v Bontzolakes*, 83 AD3d 1401, 1402, *lv denied* 17 NY3d 703). Here, the record establishes, inter alia, the mother's obstruction of law enforcement efforts to investigate a sexual assault against one of the children, her attempts to sabotage the father's relationship with the children, and her placement of her own needs above those of the children (*see Matter of Howell v Lovell*, 103 AD3d 1229, 1231-1232; *Matter of Krywanczyk v Krywanczyk*, 236 AD2d 746, 747). We thus conclude that the determination of the court has a sound and substantial basis in the record and should not be disturbed (*see Matter of Ingersoll v Platt*, 72 AD3d 1560, 1561).

We agree with the mother and the Attorney for the Children that the provisions of the order limiting the mother's visitation to supervised telephone access one day per week for a maximum of 20 minutes, and to a minimum of three hours of supervised visitation per month was unduly restrictive and thus not in the best interests of the children (*see Matter of Nathaniel T.*, 97 AD2d 973, 974). We therefore modify the order by vacating the visitation schedule, and we remit the matter to Family Court to determine a more appropriate supervised visitation schedule (*see generally Matter of Fox v Fox*, 93 AD3d 1224, 1226). We further agree with the mother that the court improperly delegated its authority to the father to determine the location of the supervised visitation, the person or persons to supervise the mother's visitation, and whether any additional family members may attend visitation with the mother (*see generally Matter of Green v Bontzolakes*, 111 AD3d 1282, 1284). We therefore further modify the order by vacating those provisions, and we remit the matter to Family Court for the additional purpose of determining the location of supervised visitation, the supervisor or supervisors of the visitation, and whether additional family members, if any, may accompany the mother to visitation.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

1430

CA 15-01030

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

JEFFREY S. TOBEY, PLAINTIFF-RESPONDENT,

V ORDER

WINDSONG RADIOLOGY GROUP, P.C., AND TERESA J. SMALL, M.D., DEFENDANTS-APPELLANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (J. MARK GRUBER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (CRAIG R. WATSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order the Supreme Court, Erie County (John M. Curran, J.), entered March 2, 2015. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment.

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

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

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CA 15-01144

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

LISA L. SLOCUM, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PROGRESSIVE NORTHWESTERN INSURANCE COMPANY,
DEFENDANT-RESPONDENT.

STANLEY LAW OFFICES, SYRACUSE (ANTHONY MARTOCCIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald F. Cerio, Jr., A.J.), entered January 21, 2015. The order denied plaintiff's motion for summary judgment and denied as moot defendant's cross motion to compel discovery.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, plaintiff's motion is granted, judgment is granted in favor of plaintiff as follows:

> It is ADJUDGED and DECLARED that defendant is obligated to provide supplemental uninsured/underinsured motorist coverage to plaintiff,

and the matter is remitted to Supreme Court, Onondaga County, for further proceedings on defendant's cross motion.

Memorandum: Plaintiff was injured in a motor vehicle accident on July 29, 2012, when the vehicle in which she was a passenger was hit from behind by a vehicle operated by a nonparty tortfeasor. At the time, plaintiff was a named insured on an automobile insurance policy issued by defendant to plaintiff's mother. On September 11, 2012, plaintiff learned that the coverage limit of the tortfeasor's insurance policy was $50,000. On June 6, 2013, plaintiff underwent cervical fusion surgery. In August 2014, more than two years after the accident, plaintiff notified defendant of the accident and sought coverage under the supplemental uninsured/underinsured motorist (SUM) endorsement of the policy. Defendant disclaimed coverage on the ground that plaintiff failed to provide timely notice of her SUM claim pursuant to the terms of the policy, and plaintiff commenced this action and thereafter moved for summary judgment seeking a declaration that she is entitled to SUM coverage under the policy. Defendant

opposed the motion, contending that plaintiff's failure to notify it of her SUM claim in a timely manner vitiated coverage, and cross-moved to compel disclosure of plaintiff's medical records. Supreme Court denied plaintiff's motion, determining that plaintiff failed to demonstrate that defendant had not been prejudiced by plaintiff's "two-plus year delay" in notifying defendant of the accident. The court also denied defendant's cross motion as moot.

We conclude that the court erred in denying plaintiff's motion. Initially, we reject plaintiff's contention that her delay in notifying defendant of the accident was reasonable. Here, the policy required that notice be given to defendant "[a]s soon as practicable," which means, "in the SUM context, . . . that 'the insured must give notice with reasonable promptness after the insured knew or should reasonably have known that the tortfeasor was underinsured' " (*Rekemeyer v State Farm Mut. Auto. Ins. Co.*, 4 NY3d 468, 474). Plaintiff became aware of the limits of the tortfeasor's policy in September 2012, and she learned the extent of her injuries at least by June 2013, when she underwent cervical fusion surgery. Under the circumstances, we conclude that it was unreasonable for plaintiff to wait until August 2014 to notify defendant of her SUM claim (*see Matter of State Farm Mut. Auto. Ins. Co. [Hernandez]*, 275 AD2d 989, 989; *see generally Matter of Metropolitan Prop. & Cas. Ins. Co. v Mancuso*, 93 NY2d 487, 494-495).

We agree with plaintiff, however, that she is entitled to coverage based on Insurance Law § 3420 (a) (5). Effective January 2009, an insurer may not deny coverage based on untimely notice "unless the failure to provide timely notice has prejudiced the insurer" (*id.*), and prejudice is not established "unless the failure to timely provide notice materially impairs the ability of the insurer to investigate or defend the claim" (§ 3420 [c] [2] [C]). Further, "[i]n any action in which an insurer alleges that it was prejudiced as a result of a failure to provide timely notice," the burden of proof is on the insurer to prove that it has been prejudiced "if the notice was provided within two years of the time required under the policy" (§ 3420 [c] [2] [A]).

We conclude in the context of this summary judgment motion that plaintiff met her initial burden by establishing that she provided notice within two years of the time required under the policy and that defendant was not prejudiced by the delay. As noted, plaintiff learned the limits of the tortfeasor's insurance coverage on September 11, 2012, and that date was the earliest "time required under the policy" for plaintiff to provide notice (Insurance Law § 3420 [c] [2] [A]; *see Rekemeyer*, 4 NY3d at 474). Plaintiff provided defendant with notice of the accident in August 2014, less than two years later. Thus, prejudice to defendant is not presumed under Insurance Law § 3420 (c) (2) (C).

Plaintiff also established as a matter of law that defendant was not prejudiced by her delay in providing notice, thus shifting the burden to defendant to raise an issue of fact. We conclude that defendant failed to meet that burden by demonstrating that its ability

to investigate or defend the claim has been "materially impair[ed]" (Insurance Law § 3420 [c] [2] [C]; *cf. Atlantic Cas. Ins. Co. v Value Waterproofing, Inc*., 918 F Supp 2d 243, 255-256). Although defendant submitted an affidavit from one of its claims representatives asserting that it was prejudiced because of its inability to examine the vehicles involved in the accident, it is reasonable to conclude that the vehicles would have been repaired in the time between the accident and the date that plaintiff was required to give notice under the policy. Defendant therefore failed to establish that it would have had the opportunity to inspect the damage to the vehicles even if plaintiff had provided it with timely notice of her SUM claim. Although defendant's claims representative further asserted that defendant suffered prejudice because it was unable to conduct an examination under oath or an independent medical examination of plaintiff before she underwent cervical fusion surgery in June 2013, we conclude that defendant's submissions fail to establish that postsurgery examinations and plaintiff's medical records will not yield the information sought.

Finally, in light of our determination, we remit the matter to Supreme Court to determine the merits of defendant's cross motion.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

23

KA 12-02357

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENANCIO VASQUEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered March 23, 2012. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [b]). Defendant was sentenced to a determinate term of incarceration of five years to be followed by 10 years of postrelease supervision. The valid waiver by defendant of his right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256; *People v Hidalgo*, 91 NY2d 733, 737). In any event, we conclude that the sentence is not unduly harsh or severe.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

29

KA 13-02055

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMONE SAVAGE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered November 12, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, the motion to suppress physical evidence and supplemental motion to suppress statements are granted, the indictment is dismissed, and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in refusing to suppress physical evidence, i.e., a handgun, and his subsequent oral statements to the police because the police lacked an objective, credible reason to justify their initial approach and request for information. We agree.

The testimony at the suppression hearing established that at approximately 6:30 p.m. on January 18, 2013, a Buffalo police officer and his partner were conducting a traffic stop in the parking lot of a gas station when they observed defendant and two other men walking down the sidewalk on the other side of the street in a “higher crime area.” According to the officer, defendant was “staring” at him and his partner or at their marked patrol vehicle. Upon concluding the traffic stop, the officers crossed the street in their vehicle in order to drive alongside the men, the officer asked, “what’s up, guys?” from the rolled-down passenger window, and defendant then put his head down and started walking away at a faster pace. The officer thereafter observed defendant drop a gun holster to the ground and,

after exiting the vehicle and picking up the holster, the officer saw defendant discard a handgun into nearby bushes. The officer's partner positioned the patrol vehicle to cut off defendant's path of travel, and defendant was eventually apprehended.

In evaluating police conduct, a court "must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter" (*People v Nicodemus*, 247 AD2d 833, 835, *lv denied* 92 NY2d 858; *see People v De Bour*, 40 NY2d 210, 222-223). At the first level of a police-civilian encounter, i.e., a request for information, a police officer may approach an individual "when there is some objective credible reason for that interference not necessarily indicative of criminality" (*De Bour*, 40 NY2d at 223), and "[t]he request may 'involve[] basic, nonthreatening questions regarding, for instance, identity, address or destination' " (*People v Garcia*, 20 NY3d 317, 322, quoting *People v Hollman*, 79 NY2d 181, 185). Although the first level "sets a low bar for an initial encounter" (*People v Barksdale*, 26 NY3d 139, 143), the Court of Appeals has nevertheless observed that, "[i]n determining the legality of an encounter under *De Bour* and *Hollman*, it has been crucial whether a nexus to [defendant's] conduct existed, that is, whether the police were aware of or observed conduct which provided a particularized reason to request information. The fact that an encounter occurred in a high crime vicinity, without more, has not passed *De Bour* and *Hollman* scrutiny" (*People v McIntosh*, 96 NY2d 521, 526-527).

Here, we conclude that the officers engaged in a level one approach and request for information when they concluded the traffic stop after observing defendant and the other men walking down the sidewalk, crossed the street in their marked patrol vehicle in order to drive alongside the men, and asked them the basic, nonthreatening question, "what's up, guys?" (*see People v Howard*, 129 AD3d 1654, 1654; *People v Johnston*, 103 AD3d 1202, 1203, *lv denied* 21 NY3d 912; *People v Carr*, 103 AD3d 1194, 1194). Contrary to the People's contention, it cannot be said, under such circumstances, that the officers' approach and inquiry was merely a "friendly greeting" that did not constitute a request for information (*cf. People v Thornton*, 238 AD2d 33, 35).

We agree with defendant that the officers' conduct was not justified from its inception. We conclude that merely staring at or otherwise looking in the direction of police officers or a patrol vehicle in a high crime area while continuing to proceed on one's way, absent any indicia of nervousness, evasive behavior, or other movements in response to seeing the police, i.e., "attendant circumstances . . . sufficient to arouse the officers' interest" (*De Bour*, 40 NY2d at 220), is insufficient to provide the police with the requisite "objective, credible reason, not necessarily indicative of criminality" to justify a level one encounter (*Hollman*, 79 NY2d at 184; *see De Bour*, 40 NY2d at 223; *cf. e.g. Matter of Demitrus B.*, 89 AD3d 1421, 1421-1422; *Matter of Steven McC.*, 304 AD2d 68, 72-73, *lv denied* 100 NY2d 511; *People v Randolph*, 278 AD2d 52, 52, *lv denied* 96 NY2d 762). Here, beyond the fact that defendant had stared at the

police in a "higher crime area" while continuing to walk down the sidewalk, the officers testified to no further observations of defendant or the other men that drew their attention (*cf. People v White*, 117 AD3d 425, 425, *lv denied* 23 NY3d 1044; *People v Sims*, 106 AD3d 1473, 1473, *appeal dismissed* 22 NY3d 992; *Johnston*, 103 AD3d at 1203; *Randolph*, 278 AD2d at 52) and, to the extent that the court found that defendant displayed any nervous or evasive behavior upon initially seeing the officers, we conclude that such a finding is unsupported by the record. We agree with defendant that the officers lacked other attendant circumstances to arouse their interest inasmuch as the encounter occurred at 6:30 in the evening rather than late at night and there was automobile traffic in the area at that time (*cf. De Bour*, 40 NY2d at 220; *People v Riddick*, 70 AD3d 1421, 1422, *lv denied* 14 NY3d 844). The suppression hearing testimony further established that the officers were not responding to a dispatch with a description of a suspect in the area matching defendant's appearance (*cf. Howard*, 129 AD3d at 1654; *People v Burnett*, 126 AD3d 1491, 1491-1492). We thus conclude that the officers lacked an objective, credible reason for the level one approach and request for information (*see People v Laviscount*, 116 AD3d 976, 978-979, *lv denied* 24 NY3d 962; *People v Larmond*, 106 AD3d 934, 934, *lv denied* 21 NY3d 1043; *Matter of Michael F.*, 84 AD3d 468, 468). Thus, the court erred in refusing to suppress the handgun and defendant's subsequent oral statements to police.

In light of our determination that the court should have granted defendant's motion seeking to suppress physical evidence and his supplemental motion seeking to suppress his oral statements to police, defendant's guilty plea must be vacated (*see Riddick*, 70 AD3d at 1424). Further, inasmuch as our determination results in the suppression of all evidence in support of the crime charged, the indictment must be dismissed (*see People v Hightower*, ___ AD3d ___, ___ [Feb. 11, 2016]). We therefore remit the matter to Supreme Court for proceedings pursuant to CPL 470.45.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

61

CA 15-00668

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

ROLAND E. STUART, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PEGGY L. STUART, DEFENDANT-RESPONDENT.

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

THE LAW OFFICE OF GUY A. TALIA, ROCHESTER (GUY A. TALIA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered May 29, 2014 in a divorce action. The judgment, among other things, awarded defendant spousal maintenance and directed plaintiff to pay $2,000 for defendant's counsel fees.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the award of maintenance to $850 per month and vacating the award of counsel fees, and as modified the judgment is affirmed without costs.

Memorandum: In this matrimonial action, plaintiff husband appeals from a judgment of divorce insofar as it directed him to pay maintenance to defendant wife in the amount of $1,116 per month for 7½ years and awarded defendant $2,000 in counsel fees. We agree with plaintiff that the maintenance award is excessive and should be reduced. Plaintiff's monthly income consists of Social Security benefits in the amount of $1,509 and $466.29 from his pension, for a total of $1,975.29. After paying maintenance along with child support, plaintiff has only $252.59 per month upon which to live. Although plaintiff, who is 66, should be able to find employment to supplement his income, having voluntarily retired from a job that paid him $46,594.03 annually, it is unlikely that he will be able to earn enough to afford the amount of maintenance awarded by Supreme Court.

Having considered all of the relevant factors set forth in Domestic Relations Law § 236 (B) (6) (a), including the limited income and earning potential of plaintiff, we modify the judgment by reducing the maintenance award to $850 per month, which more accurately " 'reflects an appropriate balancing of [defendant's] needs and [plaintiff's] ability to pay' " (*McCarthy v McCarthy*, 57 AD3d 1481, 1482; *see generally Cameron v Cameron*, 238 AD2d 925, 925). We

perceive no basis in the record to reduce the term of maintenance set by the court.

Finally, we agree with plaintiff that the court failed to comply with Domestic Relations Law § 237 when it ordered him to pay $2,000 in counsel fees. Domestic Relations Law § 237 (b) provides that, before an award of counsel fees may be made, "[b]oth parties to the action or proceeding and their respective attorneys[] shall file an affidavit with the court detailing the financial agreement[] between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses." An affidavit of that type is not included in the record for either party. Although the court referenced defendant's total counsel fees as being $6,120, the court had no support for that amount beyond the reference thereto in defendant's proposed findings of fact. "[B]ecause [defendant] did not submit documentation identifying the services rendered by her attorney or the fees incurred, the court was precluded from awarding attorney's fees to her" (*Weinheimer v Weinheimer*, 100 AD3d 1565, 1566; *see Rizzo v Rizzo*, 120 AD3d 1400, 1405; *Cervone v Cervone*, 74 AD3d 1268, 1269). We therefore further modify the judgment by vacating the award of counsel fees.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

80

CA 14-02205

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

IN THE MATTER OF THE ESTATE OF SHIRLEY T. TROMBLEY, DECEASED.

THOMAS F. TROMBLEY, AS ADMINISTRATOR C.T.A. OF THE ESTATE OF SHIRLEY T. TROMBLEY, DECEASED, PETITIONER-APPELLANT; MEMORANDUM AND ORDER

BONNIE M. MARTIN, RESPONDENT-RESPONDENT.

MICHAEL F. YOUNG, LOWVILLE, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PETITIONER-APPELLANT.

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (STEPHEN W. GEBO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Lewis County (Charles C. Merrell, S.), entered February 13, 2014. The order directed respondent to pay $8,588.46 to the Estate of Shirley T. Trombley, deceased.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the petition seeking a determination that the entire value of the certificates of deposit constitutes an asset of the Estate of Shirley T. Trombley, and as modified the order is affirmed without costs, and the matter is remitted to Surrogate's Court, Lewis County, for further proceedings in accordance with the following memorandum: Petitioner commenced this proceeding on March 5, 2013 pursuant to SCPA 2103 seeking the discovery and delivery of certain assets that allegedly belong to the Estate of Shirley T. Trombley. Petitioner and respondent are decedent's children, and petitioner is the executor of decedent's estate. We agree with petitioner that Surrogate's Court erred in determining that one half of the value of three of decedent's certificates of deposit (CDs) were gifts to respondent. Although there is a statutory presumption that a disposition of personal property to two or more persons creates in them a tenancy in common (*see* EPTL 6-2.2 [a]), respondent stood in a fiduciary relationship with decedent as her power of attorney, and it is undisputed that the CDs were funded solely by decedent (*see Matter of Timoshevich*, 133 AD2d 1011, 1012). Under such circumstances, "it was incumbent upon [respondent] to show that decedent's will was not overborne and that she intended to make a gift of [one half of the value of the CDs] to [respondent]" (*id*. at 1012-1013). Here, respondent did not make the requisite showing, and we therefore deem the full value of the CDs to

be assets of decedent's estate. We therefore modify the order accordingly, and we remit the matter to Surrogate's Court for further proceedings consistent with this decision.

We reject petitioner's further contention that the Surrogate erred in dismissing as untimely his claims for a return to decedent's estate of certain real property that had belonged to decedent, but which she had transferred to respondent, insofar as those claims were based on breach of fiduciary duty, unjust enrichment, and constructive trust. A claim for breach of fiduciary duty such as the one asserted herein is subject to a six-year statute of limitations (*see* CPLR 213 [1]; *Bouley v Bouley*, 19 AD3d 1049, 1051), and the claim accrues when the fiduciary openly repudiates his or her obligation or the fiduciary relationship has otherwise been terminated (*see People v Ben*, 55 AD3d 1306, 1308). Here, the Surrogate correctly determined that the instant claim for breach of fiduciary duty accrued when decedent died in January 2004 inasmuch as her death terminated respondent's power of attorney (*see* General Obligations Law § 5-1511 [1] [a]).

Petitioner's claims based on unjust enrichment and constructive trust are also subject to a six-year statute of limitations and accrue upon the "occurrence of the wrongful act giving rise to a duty of restitution" (*Boardman v Kennedy*, 105 AD3d 1375, 1376 [internal quotation marks omitted]; *see Matter of Thomas*, 124 AD3d 1235, 1239). We agree with respondent that the statute of limitations began to run for both claims when she repudiated any intention of conveying the real property to petitioner or decedent's estate in February 2006 (*see Zane v Minion*, 63 AD3d 1151, 1153-1154; *Dombek v Reiman*, 298 AD2d 876, 876-877).

We similarly reject petitioner's contention that respondent is equitably estopped from asserting a statute of limitations defense where respondent fraudulently delayed proper distribution of the estate's assets. Here, petitioner failed to establish that he was "induced by fraud, misrepresentations or deception to refrain from filing a timely action" (*Pecoraro v M & T Bank Corp.*, 11 AD3d 950, 951-952 [internal quotation marks omitted]) and, in any event, the record establishes that petitioner was aware in 2006 of respondent's intentions with respect to the real property.

Petitioner's remaining contentions have been raised for the first time on appeal, and they are therefore not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

83

CA 15-00450

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

KHALID S. MAHRAN AND KIDNEY CARE, P.C.,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MICHAEL B. BERGER, ESQ., DEFENDANT-RESPONDENT.

LAW OFFICE OF STEPHEN F. SZYMONIAK, WILLIAMSVILLE (STEPHEN F. SZYMONIAK OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (CHARLES C. SWANEKAMP OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John A. Michalek, J.), entered October 29, 2014. The order and judgment granted the motion of defendant for summary judgment, denied the cross motion of plaintiffs for partial summary judgment and dismissed the complaint.

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

Memorandum: In late 2004, plaintiff Khalid S. Mahran (Mahran) offered a doctor, who was completing her residency, an opportunity to join his medical practice, plaintiff Kidney Care, P.C. The doctor, a noncitizen of the United States, subsequently entered into a retainer agreement with defendant for the purpose of obtaining legal assistance in acquiring certain immigration documents that would permit her to practice medicine in the United States. Defendant, among other things, filed an application for the immigration documents, stating that he represented the doctor as the prospective employee and plaintiffs as the sponsoring employer. The application was approved on November 7, 2005. At some point, a dispute arose between Mahran and the doctor over the terms of their employment agreement. When the dispute arose, the doctor's employment with plaintiffs was jeopardized and, consequently, so was her immigration status. Defendant ultimately obtained government approval allowing the doctor to secure employment at a hospital in another state. Plaintiffs commenced this action on November 26, 2008, alleging that defendant committed legal malpractice and breach of contract. We conclude that Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint.

Initially, contrary to plaintiffs' contention, we conclude that

"the court properly granted defendant's motion with respect to the second cause of action, for breach of contract, because it was duplicative of the malpractice cause of action" (*Rich Prods. Corp. v Kenyon & Kenyon, LLP*, 128 AD3d 1532, 1534).

With respect to the cause of action for legal malpractice, we further conclude that the court properly granted that part of the motion seeking summary judgment dismissing it on the ground that it was time-barred. "A cause of action for legal malpractice accrues when the malpractice is committed" (*Priola v Fallon*, 117 AD3d 1489, 1489 [internal quotation marks omitted]), and must be interposed within three years thereafter (*see* CPLR 214 [6]; *McCoy v Feinman*, 99 NY2d 295, 301). Even assuming, arguendo, that there is no question of fact with respect to the existence of an attorney-client relationship between defendant and plaintiffs, we conclude that defendant established that any malpractice occurred, at the latest, on November 7, 2005, when his representation of plaintiffs ceased upon his successful completion of the specific task for which he was initially retained, i.e., acquiring the immigration documents necessary for the doctor to commence employment with plaintiffs (*see Priola*, 117 AD3d at 1489; *International Electron Devices [USA] LLC v Menter, Rudin & Trivelpiece, P.C.*, 71 AD3d 1512, 1512). Defendant thus met his initial burden of establishing that this action, commenced on November 26, 2008, was time-barred (*see International Electron Devices [USA] LLC*, 71 AD3d at 1512).

"The burden then shifted to plaintiffs to raise a triable issue of fact whether the statute of limitations was tolled by the continuous representation doctrine" (*id.*), and plaintiffs "failed to meet that burden inasmuch as [they] failed to present the requisite clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney to toll the statute of limitations" (*Priola*, 117 AD3d at 1490 [internal quotation marks omitted]). The continuous representation doctrine does not apply here inasmuch as there was no continuity of services provided by defendant to plaintiffs in conjunction with the application for the doctor's immigration documents, and no mutual understanding that plaintiffs required further legal work in that regard (*see M.G. McLaren, P.C. v Massand Eng'g, L.S., P.C.*, 51 AD3d 878, 878). Indeed, despite Mahran's assertions, his unilateral belief that defendant continued to represent plaintiffs after the immigration application process was completed is insufficient to establish the existence of a continuing relationship (*see Chinello v Nixon, Hargrave, Devans & Doyle, LLP*, 15 AD3d 894, 895). Although the completion of that process provided the prerequisite conditions for the doctor's employment, the dispute that arose between Mahran and the doctor with respect to the employment agreement constituted a separate contractual matter concerning those parties only, and we conclude that any evidence of subsequent contact between defendant and Mahran with respect to that dispute is not indicative of a continuing attorney-client relationship, and thus is insufficient to raise an issue of fact (*see M.G. McLaren, P.C.*, 51 AD3d at 878). To the extent that plaintiffs contend that the statute of limitations should be tolled during the period of defendant's continuing representation of the doctor, that contention is without

merit (*see Glamm v Allen*, 57 NY2d 87, 94; *TVGA Eng'g, Surveying, P.C. v Gallick* [appeal No. 2], 45 AD3d 1252, 1257). We thus conclude that, "[i]nasmuch as the attorney-client relationship between plaintiff[s] and [defendant] ended more than three years before the action was commenced, the cause of action for legal malpractice was untimely" (*TVGA Eng'g, Surveying, P.C.*, 45 AD3d at 1257).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

90

KA 15-01074

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

CURTIS HUDGINS, DEFENDANT-RESPONDENT.

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

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (EVAN B. HANNAY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), dated August 22, 2014. The order granted that part of the motion of defendant to dismiss the first count of the superseding indictment.

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

Memorandum: The People appeal from an order granting that part of defendant's motion to dismiss the first count of the superseding indictment, charging him with criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). After defendant was arrested and charged with possessing crack cocaine, the People presented evidence to a grand jury, which insofar as relevant here, issued a superseding indictment charging that crime, among other crimes. Defendant moved to dismiss the superseding indictment based on the alleged insufficiency of the evidence presented to the grand jury, and Supreme Court granted the motion in part by dismissing the first count of the superseding indictment. We affirm.

The testimony at the grand jury established that, following a traffic stop, a large plastic bag containing 32 individually-packaged bags of marihuana and $750 was found in defendant's pocket, and a separate bag containing 1.6 grams of cocaine was found in his cap. One officer testified for the People that a drug user, as compared to a drug seller, would not possess that amount of cocaine, and that a drug user would not possess cocaine without also having utensils with which to consume it, and defendant did not possess such utensils.

We reject the People's contention that the court erred in determining that the evidence was insufficient to make out a prima facie case that defendant possessed the 1.6 grams of cocaine with the

intent to sell it. Although "defendant's possession of a 'substantial' quantity of drugs can be cited as circumstantial proof of an intent to sell . . . , it cannot be said as a matter of law that the quantity of uncut and unpackaged [cocaine] possessed in this case permitted an inference that defendant intended to sell [it]. More than mere possession of a modest quantity of drugs, not packaged for sale and unaccompanied by any other saleslike conduct, must be present for such an inference to arise" (*People v Sanchez*, 86 NY2d 27, 35; *see People v Nellons*, 133 AD3d 1258, 1259). We note that the "modest quantity of drugs" referenced in the above quote was 3 1/4 ounces of cocaine (*Sanchez*, 86 NY2d at 35), far more than the quantity of cocaine possessed by defendant herein, which amounted to less than one eighth of one ounce (*cf. People v Smith*, 213 AD2d 1073, 1074; *see generally People v Smith [Nicole]*, 74 AD3d 1249, 1250; *People v Lamont*, 227 AD2d 873, 875).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

105

CA 15-01122

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

JOSEPH KING, III,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

MALONE HOME BUILDERS, INC.,
DEFENDANT-RESPONDENT-APPELLANT.

WELCH, DONLON & CZARPLES PLLC, CORNING (MICHAEL A. DONLON OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (JAMES W. CUNNINGHAM OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered February 25, 2015. The order, among other things, conditionally granted that part of plaintiff's motion for partial summary judgment with respect to liability under Labor Law § 240 (1).

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiff's motion in its entirety and dismissing defendant's 12th affirmative defense and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law action seeking damages for injuries he sustained when he fell through an unguarded stairwell opening while performing framing work as part of the construction of a single family residence. Plaintiff moved for partial summary judgment on liability under Labor Law § 240 (1) and dismissal of defendant's 12th affirmative defense, in which defendant asserted that plaintiff was its special employee and thus that workers' compensation benefits were plaintiff's sole remedy. Defendant cross-moved for summary judgment dismissing the complaint based on, inter alia, its 12th affirmative defense. Supreme Court conditionally granted that part of plaintiff's motion with respect to liability under Labor Law § 240 (1), but denied defendant's cross motion and the remainder of plaintiff's motion on the ground that there was an issue of fact whether plaintiff was the special employee of defendant at the time of his fall. Plaintiff appeals and defendant cross-appeals.

On the date of plaintiff's fall, he was employed by John A. Hollands Construction Co. (Hollands) as a framer. Hollands and

defendant had a business relationship whereby Hollands would, from time to time, perform framing work for defendant at defendant's residential construction projects. After his fall at defendant's project, plaintiff filed for workers' compensation benefits. Plaintiff filed a Workers' Compensation Board Form C-3 and identified Hollands as his employer. In turn, Hollands appeared in the workers' compensation case and raised the defense that plaintiff was the special employee of defendant. At a preliminary hearing, the administrative law judge (ALJ) directed that defendant be placed on notice, and the matter was scheduled for defendant's "appearance." Defendant's insurance carrier, on defendant's behalf, filed a "Notice That Right to Compensation is Controverted." Thereafter, the ALJ conducted an evidentiary hearing on the special employee issue. Defendant appeared by a Workers' Compensation Board licensed representative, and the testimony of four witnesses was taken through direct and cross-examination. Those four witnesses are the same witnesses who were identified and/or deposed by counsel in this action. Following the hearing, the ALJ determined that plaintiff remained in the employ of Hollands at all relevant times and that the special employee doctrine was inapplicable. Notably, the ALJ's decision "discharged and removed" defendant from further notice.

In support of that part of his motion seeking to dismiss defendant's 12th affirmative defense, plaintiff contended that defendant was collaterally estopped from asserting that defense based on the prior Workers' Compensation Board determination. We agree with plaintiff that the court erred in determining that collateral estoppel did not apply to the Workers' Compensation Board determination, and we therefore modify the order by granting plaintiff's motion in its entirety.

It is well settled that collateral estoppel is applicable to quasi-judicial determinations of administrative agencies, including the Workers' Compensation Board (*see Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246, 255; *Ryan v New York Tel. Co.*, 62 NY2d 494, 499; *Vitello v Amboy Bus Co.*, 83 AD3d 932, 933). A determination of employment status made by the Workers' Compensation Board can have preclusive effect in a subsequent personal injury action (*see Malmon v East 84th Apt. Corp.*, 67 AD3d 566, 567). A quasi-judicial determination of an administrative agency is entitled to collateral estoppel effect "where the issue a party seeks to preclude in a subsequent civil action is identical to a material issue that was necessarily decided by the administrative tribunal and where there was a full and fair opportunity to litigate before that tribunal" (*Auqui*, 22 NY3d at 255). Here, contrary to defendant's contentions, we conclude that there is an identity of issue that was necessarily decided in the proceedings before the Workers' Compensation Board, and that issue is decisive in the present action. The issue whether defendant was plaintiff's special employer, albeit for the purposes of insurance carrier liability, was the issue directly addressed and resolved by the Workers' Compensation Board (*see Langdon v WEN Mgt. Co.*, 147 AD2d 450, 452). We further conclude that defendant had a full and fair opportunity to contest that issue (*see id.*). Defendant had notice, appeared as a party, served a pleading and fully

participated in the evidentiary hearing while represented by a duly authorized Workers' Compensation Board representative (*see* Workers' Compensation Law § 24-a). Thus, contrary to defendant's contention, its involvement in the Workers' Compensation Board proceeding was more than passive, and the Board's decision is final and conclusive (*see O'Connor v Midiria*, 55 NY2d 538, 541; *Malmon*, 67 AD3d at 567; *see generally Liss v Trans Auto Sys.*, 68 NY2d 15, 21).

With respect to defendant's cross appeal from the order insofar as it granted that part of plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240 (1), plaintiff established that he was injured while working at a building that was under construction, that he fell through an open, unfinished stairwell, and that he was not provided with any safety devices to prevent or break his fall. In response, defendant failed to raise a triable issue of fact, and we thus conclude that the court properly granted that part of plaintiff's motion (*see Perkins v Loewentheil & Daughters*, 282 AD2d 510, 511; *see generally Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524, *rearg denied* 65 NY2d 1054). We reject defendant's contention that plaintiff's conduct was the sole proximate cause of the accident (*see Cody v State of New York*, 52 AD3d 930, 931; *Brandl v Ram Bldrs., Inc.*, 7 AD3d 655, 656).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

106

CA 15-01168

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

FRANK J. MAHIQUES AND DIANNE MAHIQUES,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

COUNTY OF NIAGARA, ET AL., DEFENDANTS,
AND IGT, DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a revised final judgment of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered May 6, 2015 in a personal injury action. The revised final judgment, among other things, awarded plaintiffs the sum of $187,500.

It is hereby ORDERED that the revised final judgment so appealed from is unanimously vacated, the order entered July 10, 2012 is vacated and the order entered March 22, 2012 is modified on the law by vacating the sanctions imposed, the answer of defendant IGT is reinstated, and plaintiffs are granted an adverse inference charge against defendant IGT as a sanction for the spoliation of evidence, and as modified the order is affirmed without costs in accordance with the following memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Frank J. Mahiques (plaintiff) when he was struck by a pane of glass that fell from a video slot machine at a casino. Plaintiffs moved, inter alia, to strike defendant IGT's answer as a sanction for spoliation with respect to the destruction of the machine. Supreme Court granted the motion and, as sanctions, struck IGT's answer and granted plaintiffs partial summary judgment on liability (March order). In a later order (July order), the court denied IGT's motion for, inter alia, leave to renew its opposition to plaintiffs' motion for spoliation sanctions. IGT now appeals from the ensuing judgment, which brings up for review the March order and the July order (*see* CPLR 5501 [a] [1]). We agree with IGT that the court abused its discretion in its choice of sanctions.

Although we agree with plaintiffs that a spoliation sanction was warranted, under the circumstances presented we conclude that the court abused its discretion in striking IGT's answer and granting

plaintiffs partial summary judgment on liability. The accident occurred on December 16, 2005, and plaintiff commenced this action in 2007 against the John Doe Corporation and several other defendants, including the Seneca Nation of Indians, the Seneca Gaming Corporation, and the Seneca Gaming Authority (collectively, casino defendants), who owned and operated the casino at issue. The action was dismissed against the casino defendants based on their sovereign immunity, which is not at issue in this appeal. IGT was substituted as a defendant in place of John Doe Corporation, and was served with the "supplemental complaint" (complaint) in 2008, which alleged, inter alia, that IGT negligently designed, manufactured, marketed, sold, and serviced the subject machine. Plaintiffs did not request that IGT maintain the condition of the subject machine until August 2010, however, and they did not seek to examine it until 2011. IGT then informed plaintiffs that the machine was one of several video slot machines that had been removed from the casino in 2008 at the casino defendants' request to create more open space in the casino, and that the subject machine and approximately 140 other machines were scrapped in the normal course of business in June 2008.

" 'Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126' . . . 'The Supreme Court has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence' . . . It may, under appropriate circumstances, impose a sanction 'even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided [the party] was on notice that the evidence might be needed for future litigation' . . . The nature and severity of the sanction depends upon a number of factors, including . . . the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of the evidence, and the degree of prejudice to the opposing party" (*Samaroo v Bogopa Serv. Corp.*, 106 AD3d 713, 714). Although a court may, as one of the possible sanctions for spoliation of evidence, enter "an order striking out pleadings or parts thereof" (CPLR 3126 [3]), "[g]enerally, striking a pleading is reserved for instances of willful or contumacious conduct" (*Dean v Usine Campagna*, 44 AD3d 603, 605). In instances in which a party negligently loses or destroys evidence, the "party seeking a sanction pursuant to CPLR 3126 such as . . . dismissal is required to demonstrate that a litigant . . . negligently[] dispose[d] of crucial items of evidence . . . before the adversary ha[d] an opportunity to inspect them . . . , thus depriving the party seeking a sanction of the means of proving his [or her] claim or defense. The gravamen of this burden is a showing of prejudice" (*Koehler v Midtown Athletic Club, LLP*, 55 AD3d 1444, 1445 [internal quotation marks omitted]; *see Simet v Coleman Co., Inc.*, 42 AD3d 925, 926).

Here, we conclude that plaintiffs established that some sanction is warranted because IGT negligently failed to preserve the machine, but plaintiffs failed to show that the destruction of the machine was intentional or contumacious, to warrant the sanctions imposed by the court. To the contrary, the only evidence in the record concerning

this issue is that IGT scrapped the machine in the normal course of business, as part of the removal and destruction of a large number of machines to create additional space in the casino. In addition, IGT established that the machine was removed from the casino at the request of the casino's owners, who were no longer parties to this action, which belies plaintiffs' contention that IGT removed and destroyed the machine for litigation purposes.

Contrary to plaintiffs' further contention, they failed to establish that the machine was destroyed before they had an opportunity to inspect it, and thus plaintiffs failed to establish that the extreme sanctions of striking IGT's answer and granting plaintiffs partial summary judgment on liability against IGT were warranted (*see Koehler*, 55 AD3d at 1445). The evidence in the record establishes that plaintiffs did not request that the machine be preserved or attempt to view it in the two years after the accident and prior to the commencement of the action (*see Piazza v Great Atl. & Pac. Tea Co.*, 300 AD2d 381, 382; *cf. Gitlitz v Latham Process Corp.*, 258 AD2d 391, 391), nor did they do so in the ensuing year between when the action was commenced and the machine was scrapped. Indeed, plaintiffs did not seek to examine the machine for an additional two years after IGT was joined as a defendant. Consequently, we conclude that IGT's destruction of the machine did not occur "before the adversary ha[d] an opportunity to inspect" it (*Koehler*, 55 AD3d at 1445 [internal quotation marks omitted]; *see Rios v Johnson V.B.C.*, 17 AD3d 654, 656; *see also Russo v BMW of N. Am., LLC*, 82 AD3d 643, 644). Thus, although IGT was properly sanctioned because it was negligent in failing to ensure that the machine was preserved once it was on notice that it might be needed for litigation (*see Iannucci v Rose*, 8 AD3d 437, 438; *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 53), there is no evidence that it was destroyed before plaintiffs had an opportunity to inspect it, to warrant the severe sanctions that the court imposed.

We also agree with IGT that the destruction of the machine did not deprive plaintiffs of the ability to establish their causes of action, and thus they did not make the requisite showing of prejudice arising from the loss of the evidence to warrant the extreme sanctions imposed by the court (*see Koehler*, 55 AD3d at 1445). We reject plaintiffs' contention that the destruction of the machine deprived them of the ability to present a prima facie case on any of their causes of action, most notably their strict products liability claim based on a manufacturing defect. A necessary element of that claim is that the product was defective when it left the manufacturer's control (*see Rosado v Proctor & Schwartz*, 66 NY2d 21, 25-26; *Nichols v Agway, Inc.*, 280 AD2d 889, 889-890; *George Larkin Trucking Co. v Lisbon Tire Mart*, 210 AD2d 899, 900). Given the length of time from the manufacturing date to the date of the accident, as well as the additional length of time from the date of the accident to the date on which plaintiffs first sought access to the machine, we conclude that plaintiffs failed to establish that their ability to prove their case was severely impaired by the destruction of the machine rather than by the passage of time and the adjustments that were made to the machine in the interim. Indeed, the evidence submitted by both parties with

respect to the motion establishes that the machine was repaired immediately after the accident, and thus "there was no possibility of inspecting [the glass] as [it] had been installed at the time of the accident" (*Merrill v Elmira Hgts. Cent. Sch. Dist.*, 77 AD3d 1165, 1167). Furthermore, we note that, in addition to a video recording of the glass falling on plaintiff, plaintiffs also possessed reports of similar accidents involving identical machines in other locations. Plaintiffs thus had available circumstantial evidence in support of their manufacturing defect claim, which they may use in support of that claim (*see Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 41-42). That evidence may also be used by plaintiffs to attempt to establish the remaining causes of action in the complaint. Thus, the level of prejudice to plaintiffs based on the destruction of the machine was not sufficiently " 'severe' " to warrant striking IGT's answer and granting plaintiffs partial summary judgment on liability (*Kirschen v Marino*, 16 AD3d 555, 556).

Instead, we conclude that, under the circumstances of this case, " 'the court should have considered a less severe sanction, which we now provide' . . . We conclude that an adverse inference charge against [IGT] is an appropriate sanction for the spoliation of evidence" (*Tomasello v 64 Franklin, Inc.*, 45 AD3d 1287, 1288; *see Koehler*, 55 AD3d at 1445; *Ifraimov v Phoenix Indus. Gas, LLC*, 4 AD3d 332, 334; *see generally Ortega v City of New York*, 9 NY3d 69, 76), and we therefore modify the March order accordingly.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

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KA 12-01987

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PHILIP FINCH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered August 28, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress physical evidence is granted, the indictment is dismissed, and the matter is remitted to Onondaga County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that County Court erred in refusing to suppress physical evidence, i.e., heroin, found in the vehicle in which he was a passenger and on his person because the police arrested him without probable cause. We agree.

It is well established that, "[i]n evaluating police conduct, the court must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter" (*People v Nicodemus*, 247 AD2d 833, 835, *lv denied* 92 NY2d 858). Here, there is no dispute that the vehicle was effectively seized when the police positioned their patrol cars to block the vehicle from backing out and leaving the parking lot (*see People v Layou*, 71 AD3d 1382, 1383). Contrary to defendant's contention, however, we conclude that the seizure was lawful inasmuch as "the totality of the information known to the police at the time of the stop of [the vehicle] 'supported a reasonable suspicion of criminal activity . . . [, i.e.,] that quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at

hand' " (*People v Andrews*, 57 AD3d 1428, 1429, *lv denied* 12 NY3d 850). Indeed, the evidence at the suppression hearing established that the police had reasonable suspicion that at least one occupant of the vehicle was involved in an earlier violent home invasion burglary in which the suspects had sought drugs and money, and that said occupant had attempted to arrange a drug transaction with an investigator at the location of the seizure (*see People v Strahin*, 114 AD3d 1284, 1284, *lv denied* 23 NY3d 968).

We nonetheless agree with defendant that he was unlawfully arrested without probable cause prior to the police finding packets of heroin in plain view in the vehicle. Although "[i]t is well established that not every forcible detention constitutes an arrest" (*People v Drake*, 93 AD3d 1158, 1159, *lv denied* 19 NY3d 1102), we conclude that defendant was arrested when an officer, with his weapon drawn, opened the unlocked front seat passenger door of the vehicle, physically removed defendant, had him lie down on the ground, handcuffed and searched him, and placed him in a patrol vehicle (*see People v Lee*, 110 AD3d 1482, 1484; *Nicodemus*, 247 AD2d at 835). "Under such circumstances, 'a reasonable [person] innocent of any crime, would have thought' that he [or she] was under arrest" (*Lee*, 110 AD3d at 1484, quoting *People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851). Contrary to the People's contention and the court's determination, the officer's conduct " 'went beyond merely ordering defendant from [the vehicle]. [He] took the additional "protective measures" of frisking defendant, handcuffing him and placing him in a police car . . . [S]uch an intrusion amounts to an arrest[,] which must be supported by probable cause' " (*People v Williams*, 79 AD3d 1653, 1654, *affd* 17 NY3d 834; *see People v Johnson*, 102 AD2d 616, 625, *lv denied* 63 NY2d 776). Inasmuch as the police lacked probable cause to arrest defendant before the officer returned to the vehicle and discovered the packets of heroin, the court should have suppressed that evidence, as well as the evidence subsequently found on defendant's person, as fruit of the poisonous tree (*see Lee*, 110 AD3d at 1484). We therefore vacate defendant's guilty plea, and " 'because our determination results in the suppression of all evidence in support of the crimes charged, the indictment must be dismissed' " (*id.*).

Finally, we dismiss the appeal to the extent that defendant challenges the severity of his sentence (*see People v Heatherly*, 132 AD3d 1277, 1279). "Defendant has completed serving [his] sentence, including any period of postrelease supervision, and, therefore, that part of the appeal is moot" (*id.*).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

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KA 14-01610

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

TAVARIS MOXLEY, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Alex R. Renzi, J.), dated July 25, 2014. The order granted defendant's motion to suppress tangible evidence.

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

Memorandum: The People appeal from an order granting defendant's motion seeking suppression of tangible evidence seized pursuant to a search warrant. On March 10, 2014, a murder was committed in a residence on Grafton Street in Rochester, New York. Police investigation revealed that defendant and the victim's nephew had been driven to the Grafton Street residence on the day of the murder. The police obtained a search warrant to "ping" defendant's cell phone, and it was discovered that defendant's phone appeared to be "at or in the area of 283-285 Lincoln Ave[nue]" from March 12, 2014 to March 14, 2014. Further investigation revealed that defendant was observed meeting with persons in vehicles in the driveway of 285 Lincoln Avenue for not more than five minutes at a time. However, no one was observed entering or leaving the dwelling at 285 Lincoln Avenue. The police further learned that the utilities for the 285 Lincoln Avenue residence were not registered in defendant's name. Defendant was, however, a Facebook "friend" of the person to whom the utilities were registered. Based upon the above information, inter alia, the police applied for a search warrant for 285 Lincoln Avenue. County Court (Piampiano, J.) determined that there was "probable cause for believing that the property described [in the warrant] is evidence of a crime of Murder . . . and Criminal Possession of a Weapon." The search warrant authorized the police to search 285 Lincoln Avenue and its curtilage in order to find and seize: blood-related evidence; "a black knit hat, black sweat pants, grey hoodie, and black boots"; and defendant's cell phone and the contents of that cell phone. When the

search warrant was executed, two unrelated handguns and more than 16 ounces of marihuana were recovered from 285 Lincoln Avenue. Defendant was indicted by a grand jury and charged with two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]), and one count of criminal possession of marihuana in the second degree (§ 221.25). Following a suppression hearing, Supreme Court (Renzi, J.) granted defendant's motion. We affirm and dismiss the indictment.

We reject the People's contention that there was reasonable cause to believe defendant possessed evidence or contraband relating to the Grafton Street murder and reasonable cause to believe that the evidence or contraband would be located at 285 Lincoln Avenue. It is well settled that a search warrant may be issued only upon a showing of probable cause to believe that a crime has occurred, is occurring, or is about to occur (*see generally People v Mercado*, 68 NY2d 874, 875-876, *cert denied* 479 US 1095), and where there is sufficient evidence from which to form a reasonable belief that evidence of the crime may be found inside the location sought to be searched (*see People v Bigelow*, 66 NY2d 417, 423). Here, we conclude that the Supreme Court properly determined that the application for the search warrant contained no specific factual allegations that tied the location of 285 Lincoln Avenue to the evidence sought to be seized; failed to establish any dominion and control of 285 Lincoln Avenue by defendant; and failed to tie defendant to the Grafton Street murder, or to his possession of evidence or contraband pertaining to that murder (*see generally People v Masters*, 33 AD2d 637, 637; *People v Lawrence*, 31 AD2d 712, 713-714).

In light of our determination, "the indictment must be dismissed [inasmuch as] the unsuccessful appeal by the People precludes all further prosecution of defendant for the charges contained in the accusatory instrument" (*People v Felton*, 171 AD2d 1034, 1034, *affd* 78 NY2d 1063; *see* CPL 450.50 [2]).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

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KA 13-01683

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON L. GIBSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered April 2, 2013. The judgment convicted defendant, after a nonjury trial, of criminal possession of a weapon in the second degree, aggravated unlicensed operation of a motor vehicle in the third degree and a traffic infraction.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed on count two of the indictment and imposing a definite sentence of 30 days of imprisonment on that count, to run concurrently with the sentences imposed on the remaining counts, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and aggravated unlicensed operation of a motor vehicle in the third degree (Vehicle and Traffic Law § 511 [1] [a]). Defendant contends that County Court erred in refusing to suppress his statement to the police and tangible evidence, i.e., a loaded firearm, seized from the passenger of his vehicle. We reject that contention. "Affording great deference to the court's resolution of credibility issues at the suppression hearing" (*People v Eron*, 119 AD3d 1358, 1359, *lv denied* 24 NY3d 1083), we conclude that the record supports the court's finding that the police lawfully stopped defendant's vehicle for having an inadequate muffler in violation of Vehicle and Traffic Law § 375 (31) (*see People v Estivarez*, 122 AD3d 1292, 1292-1293, *lv denied* 26 NY3d 967; *see generally People v Wright*, 98 NY2d 657, 658-659). We also reject any challenge by defendant to the legality of the police search that resulted in the seizure of the firearm from the passenger. We conclude that defendant " 'lacks standing to challenge the search of [the passenger], since [defendant] was not the person against whom the

search was directed[,] and he cannot complain that his constitutional privacy protections have been infringed as a result of [the search of the passenger]' " (*People v Hogue*, 133 AD3d 1209, 1212; *see People v Douglas*, 23 AD3d 1151, 1152, *lv denied* 6 NY3d 812; *People v Peterson*, 245 AD2d 815, 817 n 1).

By making only a general motion for a trial order of dismissal, defendant failed to preserve for our review his contention that the trial evidence is legally insufficient to establish that he possessed the firearm (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention lacks merit (*see People v Hailey*, 128 AD3d 1415, 1416, *lv denied* 26 NY3d 929; *see generally People v Bleakley*, 69 NY2d 490, 495). Moreover, inasmuch as defendant's conviction is " 'supported by legally sufficient trial evidence, [his] challenges to . . . the instructions given during [the grand jury] proceeding are precluded' " (*People v Cotton*, 120 AD3d 1564, 1566).

Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Even assuming, arguendo, that a different verdict would not have been unreasonable (*see Danielson*, 9 NY3d at 348), we conclude that, "[b]ased on the weight of the credible evidence, the court . . . was justified in finding . . . defendant guilty beyond a reasonable doubt" (*id.*). Contrary to defendant's contention, the testimony of the passenger with respect to defendant's possession of the firearm "was not incredible as a matter of law, i.e., 'impossible of belief because it [was] manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*Hailey*, 128 AD3d at 1417; *see People v Carr*, 99 AD3d 1173, 1174, *lv denied* 20 NY3d 1010). We further conclude that, to the extent that the People's evidence included improper bolstering testimony, any error in admitting that testimony is harmless (*see People v Robinson*, 21 AD3d 1413, 1414, *lv denied* 5 NY3d 885; *see generally People v Crimmins*, 36 NY2d 230, 241-242). We reject defendant's further contention that he was denied meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, although not raised by defendant, we note that the sentence imposed on count two of the indictment, i.e., a six-month definite term of imprisonment for the charge of aggravated unlicensed operation of a motor vehicle in the third degree, an unclassified misdemeanor, is illegal (*see* Vehicle and Traffic Law § 511 [1] [b]; *see also* Penal Law § 70.15 [3]). Inasmuch as we cannot allow an illegal sentence to stand (*see People v Daniels*, 125 AD3d 1432, 1433, *lv denied* 25 NY3d 1071, *reconsideration denied* 26 NY3d 928), in the interest of judicial economy, we exercise our inherent authority to correct the illegal sentence (*see id.*). We therefore modify the judgment by vacating the sentence imposed on count two of the indictment and imposing a definite sentence of 30 days of imprisonment on that count, to run concurrently with the sentences imposed on the remaining counts (*see People v Brown*, 132 AD3d 1274, 1275; *Daniels*,

125 AD3d at 1433).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

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KA 12-01254

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON PAIGE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a resentence of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered July 5, 2012. Defendant was resentenced upon his conviction of robbery in the first degree, burglary in the first degree, robbery in the second degree and burglary in the second degree.

It is hereby ORDERED that the resentence so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: In 2000, defendant was convicted in Supreme Court and County Court, upon his pleas of guilty, of various violent felonies charged in four separate indictments and a superior court information, and the respective courts imposed determinate sentences without postrelease supervision. At subsequent resentencing proceedings, Supreme Court reimposed the original sentences, again without postrelease supervision, upon the consent of the People (*see* Penal Law § 70.85; *People v Bennefield* [appeal No. 2], 109 AD3d 1152, 1153-1154, *lv denied* 22 NY3d 1087), and defendant appeals from each resentence. He was resentenced in appeal Nos. 1 through 3 and appeal No. 5 to concurrent determinate terms of imprisonment, the longest of which are terms of 20 years. He was resentenced in appeal No. 4 to a determinate term of imprisonment of five years for burglary in the first degree (§ 140.30 [4]), to run consecutively to the other resentences.

Defendant contends in each appeal that the resentences must be vacated because he was improperly sentenced as a first violent felony offender rather than a second violent felony offender (*see generally People v Halsey*, 108 AD3d 1123, 1124-1125; *People v Stubbs*, 96 AD3d 1448, 1450, *lv denied* 19 NY3d 1001). We agree. It was apparent throughout the pendency of these matters that defendant had a prior

violent felony conviction, and therefore, at resentencing, "the People were required to file a second [violent] felony offender statement in accordance with CPL [400.15] and, if appropriate, the court was required to sentence defendant as a second [violent] felony offender" (*People v Griffin*, 72 AD3d 1496, 1497). Inasmuch as " '[i]t is illegal to sentence a known predicate felon as a first offender' " (*id.*), we reverse the resentence in each appeal and remit the matters to Supreme Court for resentencing in compliance with CPL 400.15 (*see generally Halsey*, 108 AD3d at 1124-1125; *Griffin*, 72 AD3d at 1497).

Although defendant is correct that the five-year term of imprisonment imposed in appeal No. 4 for burglary in the first degree is illegal for a second violent felony offender (*see* Penal Law § 70.04 [3] [a]), that circumstance does not entitle him to an opportunity to withdraw his plea with respect to each appeal at this juncture (*cf. generally People v Ciccarelli*, 32 AD3d 1175, 1176). Rather, if the court upon remittal determines that defendant must be sentenced as a second violent felony offender, it must either impose a legal sentence in a manner that ensures that he receives the benefit of his plea agreement or allow the parties the opportunity to withdraw from that agreement (*see generally People v Collier*, 22 NY3d 429, 432-434).

In view of our determination, we do not address defendant's remaining contention.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

123

KA 12-01255

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON PAIGE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a resentence of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered July 5, 2012. Defendant was resentenced upon his conviction of robbery in the first degree (three counts) and burglary in the first degree.

It is hereby ORDERED that the resentence so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the same memorandum as in *People v Paige* ([appeal No. 1] ___ AD3d ___ [Mar. 25, 2016]).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

124

KA 12-01256

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON PAIGE, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

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

Appeal from a resentence of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered July 5, 2012. Defendant was resentenced upon his conviction of robbery in the first degree, burglary in the first degree, and burglary in the second degree.

It is hereby ORDERED that the resentence so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the same memorandum as in *People v Paige* ([appeal No. 1] ___ AD3d ___ [Mar. 25, 2016]).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

125

KA 12-01257

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON PAIGE, DEFENDANT-APPELLANT.
(APPEAL NO. 4.)

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

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

Appeal from a resentence of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered July 5, 2012. Defendant was resentenced upon his conviction of burglary in the first degree.

It is hereby ORDERED that the resentence so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the same memorandum as in *People v Paige* ([appeal No. 1] ___ AD3d ___ [Mar. 25, 2016]).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

126

KA 12-01258

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON PAIGE, DEFENDANT-APPELLANT.
(APPEAL NO. 5.)

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

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

Appeal from a resentence of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered July 5, 2012. Defendant was resentenced upon his conviction of attempted rape in the first degree.

It is hereby ORDERED that the resentence so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the same memorandum as in *People v Paige* ([appeal No. 1] ___ AD3d ___ [Mar. 25, 2016]).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

134

CA 15-00082

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

WILLIAM HOTALING, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DELONE CARTER, DEFENDANT-RESPONDENT.

SIDNEY P. COMINSKY TRIAL LAWYERS, LLC, SYRACUSE (JENNIFER CAGGIANO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from a judgment of the Supreme Court, Onondaga County (James P. Murphy, J.), entered March 17, 2014. The judgment, among other things, awarded plaintiff the sum of $43,688.14 as against defendant.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying defendant's motion and reinstating the claim for punitive damages, and the matter is remitted to Supreme Court, Onondaga County, for a new trial on the issue of punitive damages only, and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained as a result of being assaulted by defendant while both were students at Syracuse University. Prior to trial, Supreme Court granted plaintiff's motion for summary judgment on the issue of liability with respect to the assault cause of action and granted defendant's motion to strike plaintiff's claim for punitive damages. The jury awarded plaintiff $40,000 for past pain and suffering and made no award for future pain and suffering. Plaintiff moved to set aside the verdict on the ground that, inter alia, it was inadequate in all respects. The court denied the motion and entered judgment against defendant in the sum of $43,688.14. Plaintiff now appeals.

Contrary to plaintiff's contention, the court did not abuse its discretion in precluding a campus security officer from narrating during his testimony a video surveillance recording of the incident. Notably, the security officer did not witness the incident (*cf. People v Boyd*, 97 AD3d 898, 899, *lv denied* 20 NY3d 1009). Although under certain circumstances a witness may be permitted to give opinion testimony concerning particular persons, places, or things depicted in a properly authenticated surveillance video (*see People v Russell*, 79 NY2d 1024, 1025; *People v Ray*, 100 AD3d 933, 933, *lv denied* 20 NY3d 1103), we reject plaintiff's contention that the court should have

permitted the security officer to provide the jury with an open-ended narration or explanation of the events depicted in the video.

We reject plaintiff's further contention that the award of $40,000 for past pain and suffering "deviates materially from what would be reasonable compensation" (CPLR 5501 [c]). Defendant submitted at trial abundant medical evidence establishing that plaintiff exaggerated his injuries and had promptly and fully recovered from them. Thus, we conclude that the award of $40,000 for past pain and suffering did not deviate materially from what would be reasonable compensation (*see generally Minscher v McIntyre*, 277 AD2d 435, 436, *lv denied* 96 NY2d 717). Contrary to plaintiff's further contention, the court properly denied that part of his motion seeking to set aside the verdict with respect to the award of damages for future pain and suffering. The jury's decision not to award damages for future pain and suffering "was based upon a fair interpretation of the evidence . . . , with consideration given to the credibility of the witnesses and the drawing of reasonable inferences therefrom," and we discern no basis in the record to disturb the jury's resolution of credibility issues against plaintiff (*Raso v Jamdar*, 126 AD3d 776, 777; *see Abdelkader v Shahine*, 66 AD3d 615, 616-617).

We agree with plaintiff, however, that the court erred in granting defendant's motion to strike his claim for punitive damages. It is well settled that punitive damages may be awarded in an action to recover damages for assault (*see Matthews v Garrett*, 303 AD2d 563, 563; *Buggie v Cutler*, 222 AD2d 640, 642, *lv denied* 88 NY2d 807; *Falcaro v Kessman*, 215 AD2d 432, 432-433). Here, we conclude that defendant's plea allocution and conviction of harassment in the second degree (Penal Law § 240.26), which arose out of the same events alleged in this action, were sufficient to raise a jury question on the issue of punitive damages. We therefore modify the judgment by denying defendant's motion and reinstating the claim for punitive damages, and we remit the matter to Supreme Court for a trial on that claim.

We have considered plaintiff's remaining contentions and conclude that they are without merit when viewed in the context of the compensatory damages trial. In light of our determination, we decline to prospectively address the admissibility of evidence with respect to punitive damages inasmuch as appropriate review may be conducted only after the trial on remittal and "when the propriety of the challenged ruling[s] can be assessed, not speculatively, but in the context of [their] application to a concrete factual controversy" (*Hargrave v Presher*, 221 AD2d 677, 678; *see also Strait v Ogden Med. Ctr.*, 246 AD2d 12, 14).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

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KA 14-01680

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICIA BEEBE, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (RICHARD W. YOUNGMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered September 18, 2014. The judgment convicted defendant, upon a jury verdict, of reckless endangerment in the second degree.

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

Memorandum: On appeal from a judgment convicting her following a jury trial of reckless endangerment in the second degree (Penal Law § 120.20), defendant contends that her sentence, a one-year jail term, is unduly harsh and severe. We reject that contention. Although defendant has no prior criminal record and had been gainfully employed prior to her arrest on the underlying charges, her conduct in this case was egregious and endangered the lives of at least two people, one of whom sustained an injury to her leg. Moreover, it does not appear from a review of the sentencing minutes and the presentence report that defendant feels any remorse. Under the circumstances, we perceive no basis to exercise our power to modify her sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Defendant failed to preserve for our review her remaining contention that County Court, in imposing the maximum sentence, improperly considered the alleged conduct relating to the count of the indictment for which she was acquitted (*see* CPL 470.05 [2]). In any event, that contention is not supported by the record.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

141

KA 14-00411

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROGELIO MUESES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered January 23, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and unlawful possession of marihuana.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and unlawful possession of marihuana (§ 221.05). We reject defendant's contention that County Court erred in refusing to suppress physical evidence seized from defendant and his vehicle. The evidence at the suppression hearing established that the police officers had an objective, credible reason to approach defendant's parked vehicle, which was located in a park known for drugs, prostitution and underage drinking (*see People v Ocasio*, 85 NY2d 982, 984; *People v Cintron*, 125 AD3d 1333, 1334, *lv denied* 25 NY3d 1071). One of the officers testified that he noticed a pile of tobacco next to the driver's door, which in the officer's experience was indicative of marihuana use, and both officers testified that they detected the aroma of marihuana when they got close to the vehicle. The officers were justified in opening the driver's door based upon their observations outside the vehicle and their inability to see into the vehicle's interior (*see People v David L.*, 56 NY2d 698, 700, *revg on dissent* 81 AD2d 893, 895-896, *cert denied* 459 US 866; *People v Funderbunk*, 122 AD3d 515, 516, *lv denied* 25 NY3d 1201). The question to defendant whether he had "more weed" was supported by a reasonable suspicion that he was engaged in criminal activity (*see People v Phillips*, 46 AD3d 1021, 1023, *lv denied* 10 NY3d 815). He responded to that question by producing a bag of marihuana and, "[a]lthough defendant was not placed under arrest at

the time of the search, we nevertheless conclude that the officer[s] had probable cause to search the vehicle" (*People v Harrington*, 30 AD3d 1084, 1085, *lv denied* 7 NY3d 848; *see People v Chestnut*, 43 AD2d 260, 261-262, *affd* 36 NY2d 971).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

142

KA 11-02190

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROGER COONEY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, MULDOON, GETZ & RESTON (JON P. GETZ 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 (Melchor E. Castro, A.J.), rendered July 1, 2011. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Same memorandum as in *People v Cooney* ([appeal No. 2] ___ AD3d ___ [Mar. 25, 2016]).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

143

KA 11-02191

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROGER COONEY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, MULDOON, GETZ & RESTON (JON P. GETZ 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 (Melchor E. Castro, A.J.), rendered July 1, 2011. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: In appeal No. 1, defendant was convicted following a jury trial of robbery in the first degree (Penal Law § 160.15 [3]) and, in appeal No. 2, he was convicted following the same jury trial of robbery in the second degree (§ 160.10 [2] [a]). The charges arose from separate incidents in which defendant took merchandise without paying for it and, when confronted by the asset protection personnel outside of each store, he engaged in activity that resulted in the indictments charging these robbery offenses. Contrary to defendant's contention, Supreme Court (Valentino, J.) did not abuse its discretion in granting the People's motion to consolidate the indictments (*see People v Bankston*, 63 AD3d 1616, 1616-1617, *lv denied* 14 NY3d 885). The court properly determined that the indictments were joinable pursuant to CPL 200.20 (5), that the nature and quantity of the evidence for each offense was comparable, and that defendant failed to make a convincing showing that he had important testimony to give with respect to the indictment charging robbery in the second degree and a strong need to refrain from testifying with respect to the indictment charging robbery in the first degree (*see Bankston*, 63 AD3d at 1616-1617).

We reject defendant's further contention that the court erred in refusing to suppress evidence seized from defendant following a

traffic stop. Defendant's vehicle was observed in an empty parking lot by police two days after the second offense was committed and, when the police approached the vehicle, defendant drove away. The court properly determined that the officer who stopped defendant's vehicle was authorized to act on the strength of the information conveyed by another police agency of the description of the vehicle and the very distinctive license plate under the "fellow officer" rule (*see generally People v Rosario*, 78 NY2d 583, 588, *cert denied* 502 US 1109; *People v Robinson*, 134 AD3d 1538, 1539). Contrary to defendant's contention that the officer lacked reasonable suspicion to stop the vehicle, we conclude that "the distinctive nature of the vehicle is a significant factor that provided the police with reasonable suspicion that defendant may have been involved in the robbery" (*People v Dearmas*, 48 AD3d 1226, 1227, *lv denied* 10 NY3d 839 [internal quotation marks omitted]).

We reject defendant's contention that the conviction of robbery in the first degree is not supported by legally sufficient evidence. The evidence, when viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), established that defendant was observed by two employees through video surveillance secreting in the waistband of his pants two packages of Dr. Scholls shoe inserts, and secreting in his front pants pocket a package of Hillshire Farms sausages, and then leaving the store without paying for those items. When store employees confronted defendant in the parking lot, one of the employees observed the packages of shoe inserts when defendant lifted his shirt and observed a bulge in his pants pocket consistent with the package of sausage. Defendant waved a knife with a 2- to 3-inch blade at that employee when the employee demanded that he return the merchandise before he entered his car and drove away. Contrary to defendant's contention, the employee named in the indictment as the owner of the property had a possessory right superior to that of defendant, "who had no right of possession whatsoever" (*People v Hutchinson*, 56 NY2d 868, 869; *see People v Sweney*, 55 AD3d 1350, 1351, *lv denied* 11 NY3d 901; *cf. People v Wilson*, 93 NY2d 222, 225-226). We reject defendant's contention that the People failed to prove the element of "uses or threatens the immediate use of a dangerous instrument" (Penal Law § 160.15 [3]). Video evidence established that defendant was detained by the employee in the parking lot immediately after he left the store, at which time he retained the property by threatening the use of the knife (*see People v Gordon*, 23 NY3d 643, 652 n 4; *People v Carrel*, 99 NY2d 546, 547-548). Although the items were not recovered, the evidence is legally sufficient to establish that defendant forcibly retained them (*see Gordon*, 23 NY3d at 652). By failing to move to dismiss the indictment on the ground that the knife did not constitute a dangerous instrument, defendant failed to preserve that contention for our review (*see People v Williams*, 125 AD3d 1300, 1301, *lv denied* 26 NY3d 937). In any event, that contention is without merit (*see People v Simmons*, 128 AD3d 1379, 1379, *lv denied* 26 NY3d 935). Viewing 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 with respect to robbery in the first degree (*see generally People v Bleakley*, 69 NY2d 490, 495).

We agree with defendant, however, that the verdict with respect to the count of robbery in the second degree is against the weight of the evidence on the element of physical injury. We therefore reverse the judgment in appeal No. 2 and dismiss that indictment. An employee testified that, as a result of a physical struggle with defendant after he was detained, the employee sustained a cut on the knuckle of his left ring finger, which he treated with an antibiotic ointment and a bandage for one week. "Physical injury" is defined as an "impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]). "Factors relevant to an assessment of substantial pain include the nature of the injury, *viewed objectively*, the victim's subjective description of the injury and his or her pain, whether the victim sought medical treatment, and the motive of the offender" (*People v Haynes*, 104 AD3d 1142, 1143, *lv denied* 22 NY3d 1156 [emphasis added]; *see People v Chiddick*, 8 NY3d 445, 447). The employee testified that the cut was "very painful," that the pain, which subsided the day after the incident, lasted a few days, and that the cut was completely healed in one week. He testified that he did not seek medical treatment and did not miss any time from his job as a result of the injury. Upon the exercise of our "special power . . . to affirmatively review the record; independently assess all of the proof; substitute [our] own credibility determinations for those made by the jury . . . ; [and] determine whether the verdict was factually correct," we conclude that the element of physical injury was not proved beyond a reasonable doubt (*People v Delamota*, 18 NY3d 107, 116-117; *see People v Facey*, 115 AD2d 11, 18, *affd* 69 NY2d 836; *People v Ferrer*, 84 AD3d 1396, 1396-1397; *see generally Matter of Philip A.*, 49 NY2d 198, 200). We thus conclude that the jury "failed to give the evidence the weight that it should be accorded" (*Bleakley*, 69 NY2d at 495).

We respectfully disagree with our dissenting colleague that a conviction may be reduced to a lesser included offense upon a determination that the verdict is against the weight of the evidence. As we explained in *People v Heatley* (116 AD3d 23, 29, *appeal dismissed* 25 NY3d 933), "CPL 470.20 (5) provides that the determination by an intermediate appellate court that a verdict is against the weight of the evidence requires dismissal of the indictment . . . [T]he power to reduce a conviction to a lesser included offense is limited to cases in which it is determined that the evidence 'is not legally sufficient to establish the defendant's guilt of an offense of which he [or she] was convicted but is legally sufficient to establish his [or her] guilt of a lesser included offense' (CPL 470.15 [2] [a])." Thus, we conclude that "CPL 420.20 (5) requires dismissal of the indictment if it is determined that the verdict is against the weight of the evidence" (*id.* at 31). Indeed, the Court of Appeals has explained that "[a]n important judicial bulwark against an improper criminal conviction is not only the restrictive scope of review undertaken during a sufficiency analysis, but the protection provided by weight of the evidence examination in an intermediate appellate court. This special power requires the court to . . . determine whether the verdict was factually correct[,] and *acquit* a defendant if the court is not convinced that the jury was justified in finding that guilt was proven beyond a reasonable doubt" (*Delamota*, 18 NY3d at 116-117

[emphasis added]; *see People v Romero*, 7 NY3d 633, 644 n 2). As we explained in *Heatley* (116 AD3d at 30), "if the legislature had intended to provide the same relief to modify a judgment in the event that the weight of the evidence failed to support the conviction but supported a lesser included offense, it would have done so."

In light of our determination, defendant's contention that certain evidence related to this offense should have been precluded is academic.

Defendant further contends that he was penalized for exercising his right to trial when County Court (Castro, A.J.) sentenced him to a harsher sentence than that allegedly offered by the court at the close of the People's proof. We are unable to review that contention because the record is silent with respect to whether a plea offer was made, and thus it must be raised by way of a motion pursuant to CPL 440.10 (*see People v Robinson*, 221 AD2d 1029, 1029). We note, however, that "there is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to a trial" (*People v Brink*, 78 AD3d 1483, 1485, *lv denied* 16 NY3d 742, *reconsideration denied* 16 NY3d 828). The sentence is not unduly harsh and severe.

All concur except CENTRA and LINDLEY, JJ., who dissent and vote to modify in accordance with the following memorandum: We respectfully dissent in appeal No. 2. Although we agree with the majority that the verdict with respect to robbery in the second degree under Penal Law § 160.10 (2) (a) is against the weight of the evidence because the People failed to prove beyond a reasonable doubt that the victim sustained a physical injury during the commission of the crime or defendant's immediate flight therefrom, we do not agree that the indictment should be dismissed. Instead, in our view, the conviction should be reduced to the lesser included offense of robbery in the third degree (§ 160.05). For the reasons stated in the concurrence in *People v Heatley* (116 AD3d 23, 32-39, *appeal dismissed* 25 NY3d 933), we see no reason in law or logic that a conviction may not in a proper case be reduced to a lesser included offense upon a determination that the verdict is against the weight of the evidence with respect to a particular element of the charged crime (*see e.g. People v Santiago*, 97 AD3d 704, 706-707, *affd* 22 NY3d 740), just as we reduce a conviction that is not based on legally sufficient evidence.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

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KA 12-02153

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY T. HENDERSON, JR., ALSO KNOWN AS BUTTER,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered September 26, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that County Court erred in summarily denying his pro se motion to withdraw his plea. We agree. In support of his motion, which was made at sentencing, defendant repeatedly asserted that his attorney advised him before he pleaded guilty that he could withdraw his plea at any time prior to sentencing. Although defense counsel responded that he advised defendant to plead guilty in order to take advantage of what he believed to be an advantageous plea offer, he did not deny that he told defendant that his plea could be withdrawn. The court denied the motion without a hearing and imposed the promised sentence.

It is well settled that permission to withdraw a guilty plea rests largely within the court's discretion (*see People v Brown*, 14 NY3d 113, 116), and " 'refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea' " (*People v Hamilton*, 122 AD3d 1439, 1439; *see People v Zimmerman*, 100 AD3d 1360, 1362, *lv denied* 20 NY3d 1015). "Only in the rare instance will a defendant be entitled to an evidentiary hearing" (*People v Tinsley*, 35 NY2d 926, 927). Here, if defendant was advised by counsel that he could withdraw his plea prior to sentencing, as he alleged and counsel did not deny, then his plea was not voluntarily and intelligently entered because it was based at least in part upon his mistaken

understanding of the law. Under the circumstances, we conclude that defendant's motion was not "patently insufficient on its face" to permit the court to deny it summarily (*People v Mitchell*, 21 NY3d 964, 967; *see generally People v Smith*, 122 AD3d 1300, 1301-1302, *lv denied* 25 NY3d 1172).

We note that our decision in *People v Montgomery* (63 AD3d 1635, *lv denied* 13 NY3d 798) is not to the contrary. The defendant in that case likewise moved to withdraw his plea, contending that his attorney told him that he retained the right to withdraw his plea at any time prior to sentencing. Although we held therein that the court properly denied the motion without a hearing, the record on appeal shows that the parties stipulated that, if called as a witness, the defense attorney would testify that he never told defendant that he could withdraw his plea prior to sentencing. We wrote that "[t]he issue whether defense counsel made the alleged statement presented a credibility issue that the court was entitled to resolve against defendant after affording him a reasonable opportunity to be heard" (*id.* at 1636). Here, there is no such stipulation, and we therefore do not know what defense counsel would have said if he had been asked whether he advised defendant that he could withdraw his plea. We thus conclude that a hearing is required, and we hold the case, reserve decision and remit the matter to County Court for that purpose.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

147

CAF 14-02133

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

IN THE MATTER OF DANIEL T. HILL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

VICKI L. TROJNOR, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

MAUREEN N. POLEN, ROCHESTER, FOR RESPONDENT-APPELLANT.

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

LISA A. BLAIR, ATTORNEY FOR THE CHILD, AUBURN.

Appeal from an order of the Family Court, Cayuga County (Mark H. Fandrich, A.J.), entered September 15, 2014 in a proceeding pursuant to Family Court Act article 8. The order granted an order of protection against respondent.

It is hereby ORDERED that the order so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law without costs and the petition is dismissed.

Memorandum: In appeal No. 1, respondent mother appeals from a two-year order of protection issued pursuant to Family Court Act article 8. The mother correctly concedes that her challenges to the order are not preserved for our review (*see* CPLR 4017), but we exercise our power to review those challenges as a matter of discretion in the interest of justice (*see generally Matter of Commissioner of Social Servs. v Turner*, 99 AD3d 1244, 1245). We agree with the mother that Family Court erred in issuing an order of protection without adhering to the procedural requirements of Family Court Act § 154-c (3) (*see Matter of Daniel W. v Kimberly W.*, 135 AD3d 1000, 1002), inasmuch as the court did not make a finding of fact that petitioner father was entitled to an order of protection based upon "a judicial finding of fact, judicial acceptance of an admission by [the mother] or judicial finding that the [mother] has given knowing, intelligent and voluntary consent to its issuance" (§ 154-c [3] [ii]; *see Daniel W.*, 135 AD3d at 1002). On the merits, moreover, the evidence was insufficient to establish any of the family offenses alleged in the petition, and thus the petition should have been dismissed on that ground (*see Matter of Tauriello v Thompson*, 84 AD3d 824, 825; *Matter of London v Blazer*, 2 AD3d 860, 861).

In appeal No. 2, the mother appeals from an order granting the father's amended petition to modify the custody and visitation provisions of the divorce judgment and subsequent order of custody and visitation. Contrary to the mother's contention, we conclude that there is a sound and substantial basis in the record for the court's determination that there had been "a change in circumstances which reflects a real need for change to ensure the best interest[s] of the child[ren]" (*Matter of Chrysler v Fabian*, 66 AD3d 1446, 1447, *lv denied* 13 NY3d 715 [internal quotation marks omitted]). At a minimum, the evidence concerning the parties' acrimonious relationship established that joint custody was no longer appropriate (*see Matter of Betro v Carbone*, 50 AD3d 1583, 1584). In addition, evidence of the mother's efforts to alienate the children from the father and her unstable and erratic behavior support the award of physical custody to the father (*see generally Sheridan v Sheridan*, 129 AD3d 1567, 1568).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

148

CAF 14-02134

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

IN THE MATTER OF DANIEL T. HILL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

VICKI L. TROJNOR, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

MAUREEN N. POLEN, ROCHESTER, FOR RESPONDENT-APPELLANT.

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

LISA A. BLAIR, ATTORNEY FOR THE CHILD, AUBURN.

Appeal from an order of the Family Court, Cayuga County (Mark H. Fandrich, A.J.), entered November 18, 2014 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole legal and physical custody of the parties' children to petitioner.

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

Same memorandum as in *Matter of Hill v Trojnor* ([appeal No. 1] ___ AD3d ___ [Mar. 25, 2016]).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

153

CA 15-00876

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

LISA BLANCHFIELD, PLAINTIFF-RESPONDENT,

V ORDER

CLINTON COMMONS VENTURES, LLC, ITS AGENTS, SERVANTS, AND/OR EMPLOYEES, DEFENDANT-APPELLANT. (APPEAL NO. 1.)

LAW OFFICES OF THERESA J. PULEO, SYRACUSE (MICHELLE M. DAVOLI OF COUNSEL), FOR DEFENDANT-APPELLANT.

PETER M. HOBAICA, LLC, UTICA (PETER W. HOBAICA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered November 20, 2014. The order denied the motion of defendant for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

154

CA 15-00877

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

LISA BLANCHFIELD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CLINTON COMMONS VENTURES, LLC, ITS AGENTS, SERVANTS, AND/OR EMPLOYEES, DEFENDANT-APPELLANT. (APPEAL NO. 2.)

LAW OFFICES OF THERESA J. PULEO, SYRACUSE (MICHELLE M. DAVOLI OF COUNSEL), FOR DEFENDANT-APPELLANT.

PETER M. HOBAICA, LLC, UTICA (PETER W. HOBAICA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered April 6, 2015. The order granted the motion of defendant for leave to renew, and upon renewal, adhered to the prior determination denying defendant's motion for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell on a tile floor in her apartment. Defendant owned the apartment building and plaintiff rented Unit 4, where the accident occurred. Plaintiff alleged that a leaking water pipe in her apartment caused several inches of water to accumulate on the tile floor, which contributed to her fall. Plaintiff also alleged that a similar plumbing problem had occurred in Unit 1 in her apartment building less than a year prior to her accident.

Supreme Court denied defendant's motion for summary judgment dismissing the complaint, concluding that issues of fact existed whether defendant was aware of the allegedly defective condition of the plumbing in the apartment building prior to plaintiff's accident. Defendant thereafter moved for leave to renew its motion, relying upon the deposition testimony of the tenant who resided in Unit 1. The court granted the motion and, upon renewal, adhered to its prior determination.

At the outset, we reject plaintiff's contention that the court erred in granting defendant's renewal motion. Defendant offered a reasonable excuse for its failure to proffer the deposition testimony of the Unit 1 tenant in support of the original motion, and "we cannot say that Supreme Court abused its discretion in granting [defendant's renewal] motion" (*Premo v Rosa*, 93 AD3d 919, 921).

On the merits, we conclude that the court erred in denying defendant's renewed motion in its entirety. Defendant met its burden of establishing that it did not create the dangerous condition by submitting evidence that the allegedly defective plumbing was installed by an independent contractor (*see Richardson v Simone*, 275 AD2d 576, 576). In addition, "[d]efendant met [its] initial burden with respect to actual notice by submitting evidence that [it] was not aware of the allegedly dangerous condition, and plaintiff failed to raise a triable issue of fact in opposition" (*Quigley v Burnette*, 100 AD3d 1377, 1378). We therefore modify the order accordingly.

Defendant, however, failed to meet its initial burden with respect to constructive notice, and thus the court properly denied its renewed motion to that extent. Contrary to defendant's contention, the deposition testimony of the tenant in Unit 1 concerning her plumbing problems did not establish as a matter of law that defendant lacked constructive notice of the plumbing problem that contributed to plaintiff's accident. While the problems in Unit 1 and Unit 4 were not identical, evidence that defendant was aware of a dangerous and defective condition of the plumbing in one part of the apartment building was sufficient to raise an issue of fact whether defendant may be charged with constructive notice of a dangerous and defective condition in another part of the building (*see Bush v Mechanicville Warehouse Corp.*, 69 AD3d 1207, 1208-1209; *Gutz v County of Monroe*, 221 AD2d 838, 839; *Dukes v 800 Grand Concourse Owners*, 198 AD2d 13, 14). Contrary to defendant's contention, the deposition testimony of the Unit 1 tenant does not establish that the problems in her apartment were so dissimilar and unrelated to the failure of the plumbing in plaintiff's apartment that "a finding that defendant had constructive notice would be pure speculation" (*Carpenter v J. Giardino, LLC*, 81 AD3d 1231, 1233, *lv denied* 17 NY3d 710).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

164

CA 15-00552

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

JOSHUA M. BERNER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JAMES A. LITTLE AND GREAT LAKES MOTOR CORP., DOING BUSINESS AS MERCEDES-BENZ OF BUFFALO, DEFENDANTS-RESPONDENTS.

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

LAW OFFICES OF JOHN WALLACE, BUFFALO (JOHN WALLACE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), entered February 18, 2015. The judgment adjudged that plaintiff has no cause of action against defendants.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the motorcycle he was driving collided with a vehicle operated by James A. Little (defendant) and owned by defendant Great Lakes Motor Corp., doing business as Mercedes-Benz of Buffalo. The record establishes that the accident occurred when plaintiff, who was admittedly driving his motorcycle approximately 10 miles per hour in excess of the posted speed limit, crested a small hill and, applying only his rear brake, was unable to stop before he collided with the vehicle operated by defendant, who was backing out of a driveway. Plaintiff contended at trial that defendant failed to yield the right-of-way when entering the roadway, in violation of Vehicle and Traffic Law § 1143, and that defendant's negligence was a proximate cause of the accident. The jury found that defendant was negligent, but determined that his negligence was not a substantial factor in causing the accident. After the jurors had been discharged, plaintiff moved to set aside the verdict as inconsistent. Supreme Court denied the motion in a "judgment, decision and order," and a final judgment was thereafter entered.

We note at the outset that, although plaintiff appeals from the "judgment, decision and order," which was subsumed in the subsequent judgment, we exercise our discretion to treat the notice of appeal as

valid and deem the appeal to be from the judgment (*see* CPLR 5520 [c]; *Kovalsky-Carr Elec. Supply Co., Inc. v Hartford Cas. Ins. Co.*, 130 AD3d 1534, 1534).

With respect to the alleged inconsistency between the jury's finding of negligence but no proximate cause, plaintiff failed to preserve his contention for our review inasmuch as he did not raise that issue until after the jury had been discharged (*see Mazella v Beals*, 124 AD3d 1328, 1328; *Krieger v McDonald's Rest. of N.Y., Inc.*, 79 AD3d 1827, 1828, *lv dismissed* 17 NY3d 734; *Schley v Steffans*, 79 AD3d 1753, 1753). If the alleged inconsistency had been raised in a timely manner, "the trial court could have taken corrective action before the jury was discharged, such as resubmitting the matter to the jury" (*Barry v Manglass*, 55 NY2d 803, 806, *rearg denied* 55 NY2d 1039).

In any event, to the extent that we may address plaintiff's contention in the context of his challenge to the weight of the evidence (*see Skowronski v Mordino*, 4 AD3d 782, 782), we conclude that the verdict was not inconsistent. "A verdict is not against the weight of the evidence merely because the jury finds a defendant negligent but determines that his or her negligence is not a proximate cause of the accident" (*Santillo v Thompson*, 71 AD3d 1587, 1588). Instead, "[a] jury's finding that a party was at fault but that such fault was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably intertwined as to make it logically impossible to find negligence without also finding proximate cause" (*Garrett v Manaser*, 8 AD3d 616, 617; *see Todd v PLSIII, LLC–We Care*, 87 AD3d 1376, 1377).

Here, there was evidence in the record that defendant backed out of the driveway before he was aware of plaintiff's oncoming motorcycle (*see Passamondi v Hunt*, 80 AD2d 889, 889), and that plaintiff could have avoided the collision if he had not been speeding as he approached the hill (*see* Vehicle and Traffic Law § 1180 [e]) or if he had applied his front brake as well as his rear brake. "Resolution of the inconsistency between plaintiff's claim that he could not avoid the collision and the evidence suggesting that sufficient time existed during which the collision could have been avoided properly belonged to the jury" (*Acovangelo v Brundage*, 271 AD2d 885, 887), and "defendant[s are] entitled to the presumption that the jury adopted the view that the plaintiff's conduct was the sole proximate cause of the accident" (*Rubino v Scherrer*, 68 AD3d 1090, 1092).

Finally, plaintiff contends that the verdict must be set aside because the jury foreperson signed his name to the last three questions of the verdict sheet and appeared to apportion fault, despite the direction of the court and the instruction on the jury sheet to stop deliberating if the jury found, as it did, that defendant's negligence was not a substantial factor in causing the accident. None of the other jurors signed his or her name to those questions, and plaintiff refused the court's offer, made while the jurors were still in the jury room gathering their belongings, to question the jurors about the matter. Plaintiff therefore effectively

waived his contention that the jury's apportionment of fault rendered the verdict inconsistent. Plaintiff's contention that it would have been improper for the court to recall the discharged jurors is not properly before us because it is raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In any event, plaintiff cites no authority prohibiting a court from asking questions of a discharged jury in order to clarify a verdict already rendered, and we could find none.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

165

CA 15-01363

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

CARMINE DURANTE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL HOGAN AND HEATHER PISTON,
DEFENDANTS-APPELLANTS.

SANTACROSE & FRARY, ALBANY (ERIN K. SKUCE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CERIO LAW OFFICES, SYRACUSE (MICHAEL D. ROOT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered October 22, 2014. The order denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when the vehicle he was driving was rear-ended by a vehicle owned by defendant Heather Piston and operated by defendant Michael Hogan. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). We note at the outset that, although plaintiff failed to allege in his bill of particulars that he sustained a serious injury under any specific category set forth in the statute, the parties addressed the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories in their motion papers and briefs on appeal, and we likewise address those categories.

The court properly denied the motion. Defendants' own submissions raise triable issues of fact with respect to each of the categories of serious injury. Turning first to the 90/180-day category, we conclude that the report of the physician who conducted an independent medical examination (IME) of plaintiff raises triable issues of fact whether plaintiff sustained "a medically determined injury or impairment of a non-permanent nature" (Insurance Law § 5102 [d]; *see Zeigler v Ramadhan*, 5 AD3d 1080, 1081). In addition, the deposition testimony of plaintiff, submitted by defendants in support of the motion, raises triable issues of fact whether he had "been curtailed from performing his usual activities to a great extent"

during the statutory period (*Licari v Elliott*, 57 NY2d 230, 236; *see Rienzo v La Greco*, 11 AD3d 1038, 1039).

With respect to the remaining categories, "[a]lthough defendants contended in support of their motion that [plaintiff's] injuries were attributable to [a] prior accident[], they failed to submit evidence establishing as a matter of law that the injuries were entirely attributable to [that] prior accident[] and were not exacerbated by the accident in question" (*Benson v Lillie*, 72 AD3d 1619, 1620; *see Fanti v McLaren*, 110 AD3d 1493, 1494). Indeed, the physician who conducted the IME acknowledged that imaging studies of plaintiff's spine showed a more severe condition following the accident in question than prior to that accident. In addition, during his deposition plaintiff adequately explained a three-month gap in treatment (*see Garza v Taravella*, 74 AD3d 1802, 1803).

Inasmuch as defendants failed to meet their initial burden on the motion, there is no need to consider the sufficiency of plaintiff's opposition thereto (*see Summers v Spada*, 109 AD3d 1192, 1193).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

169

KA 14-00612

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DYLAN J. HAWKINS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered January 9, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

171

KA 14-01399

PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HARVEY BLACK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered August 4, 2014. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of sexual abuse in the first degree (Penal Law § 130.65 [1]). Defendant failed to seek dismissal of a sworn juror on the ground that the juror was grossly unqualified, and thus he failed to preserve for our review his contention that County Court erred in refusing to grant that relief (*see* CPL 470.05 [2]; *People v Swank*, 109 AD3d 1089, 1090, *lv denied* 23 NY3d 968). 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]). Additionally, we reject defendant's contention that he was deprived of defense counsel's judgment in deciding whether to request the court to charge the jury with a lesser-included offense. Defense counsel originally requested a lesser-included offense charge, but after an off-the-record discussion with defendant, defense counsel agreed to forgo such a charge. Furthermore, during the charge conference, defendant confirmed that he had adequate time to confer with defense counsel regarding the lesser-included offense charge, and defense counsel agreed to forgo the charge on the record. The record therefore demonstrates that, "after discussing the issue at length, defense counsel agreed with or acceded to defendant's position" (*People v Gottsche*, 118 AD3d 1303, 1304-1305, *lv denied* 24 NY3d 1084), and we conclude that "there is nothing in the record to establish that the decision to forgo the submission of lesser-included offenses was made solely in deference to defendant, that it was against the advice of defendant's counsel, or that it was inconsistent with defense

counsel's trial strategy" (*id.* at 1304).

Defendant also contends that the evidence is legally insufficient to support the conviction, and that the verdict is against the weight of the evidence inasmuch as the People failed to prove the element of forcible compulsion. Defendant failed to preserve his legal sufficiency contention for our review because his motion for a trial order of dismissal "was not specifically directed" at that ground (*People v Vassar*, 30 AD3d 1051, 1052, *lv denied* 7 NY3d 796; *see People v Gray*, 86 NY2d 10, 19). In any event, contrary to defendant's contention, we conclude that the evidence, viewed in the light most favorable to the People, is legally sufficient to establish that he subjected the victim to sexual contact by forcible compulsion (*see People v Gibson*, 134 AD3d 1512, 1513). 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 further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's further contention that he was denied effective assistance of counsel. Defendant has failed to establish the absence of any strategic or other legitimate explanation for defense counsel's alleged errors during voir dire of the jury (*see generally People v Caban*, 5 NY3d 143, 152), or for defense counsel's failure to call an expert witness (*see People v Maxey*, 129 AD3d 1664, 1665). We also reject defendant's contention that he was deprived of the right to effective assistance of counsel based on defense counsel's cross-examination of prosecution witnesses (*see People v Williams*, 110 AD3d 1458, 1459-1460, *lv denied* 22 NY3d 1160), as "[s]peculation that a more vigorous cross-examination might have [undermined the credibility of a witness] does not establish ineffectiveness of counsel" (*People v Bassett*, 55 AD3d 1434, 1438, *lv denied* 11 NY3d 922 [internal quotation marks omitted]). Thus, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant has failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct inasmuch as he did not object to any alleged instances thereof (*see People v Jemes*, 132 AD3d 1361, 1362-1363, *lv denied* 26 NY3d 1110), and we decline to exercise our power to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). In any event, we conclude that none of the prosecutor's comments on summation were so egregious as to deprive defendant of a fair trial (*see People v Paul*, 78 AD3d 1684, 1684-1685, *lv denied* 16 NY3d 834), and defense counsel's failure to object to those comments did not deprive defendant of effective assistance of counsel (*see People v Koonce*, 111 AD3d 1277, 1279).

Defendant's contention that the court erred in handling a note received from a juror during the trial is not preserved for our review (*see generally People v Nealon*, 26 NY3d 152, 160; *People v Starling*, 85 NY2d 509, 516), 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]). Finally, defendant's sentence is not unduly harsh or severe.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

172

KA 12-01262

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MOHAMED L. DIALLO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON 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 (James J. Piampiano, J.), rendered February 24, 2012. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]). Contrary to defendant's contention, County Court did not err in refusing to suppress statements defendant made to a police officer without receiving *Miranda* warnings. The court properly determined that defendant, who had been shot in the leg and was in the hospital awaiting treatment, was not in custody at the time (*see People v Carbonaro*, 134 AD3d 1543, 1546-1547; *People v Rounds*, 124 AD3d 1351, 1352, *lv denied* 25 NY3d 1077). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We agree with defendant, however, that reversal is required on the ground that the court erred in granting the People's request to charge the jury on the issue of constructive possession. Defendant was charged with reckless endangerment in the first degree and four counts of criminal possession of a weapon in the second degree for his possession of a revolver and a semiautomatic pistol, but he was convicted of the counts relating only to possession of the revolver. At trial, a witness for the People described hearing gunshots and

observing from her apartment window an individual wearing a white hoody with an object in his hand. She saw a flash from the end of the object and heard a loud bang. She walked away from the window to call 911, and when she returned she saw a second individual in a dark shirt raise his arm while the man in the white hoody was lying on the ground. The man in the dark shirt then kicked the other man in the face before the police arrived. When the police responded to the scene, they found defendant, who was wearing a white hoody and had been shot, lying down in a parking lot with a revolver approximately five feet away from him and a semiautomatic pistol approximately 15 feet away from him. A second man ran from the scene carrying a bag that contained money. A defense witness testified that he heard gunshots and observed someone with a dark shirt hiding against a wall, and there "appeared to be an old school revolver in his hand." The witness testified that he did not see the man in the white hoody with a weapon. DNA evidence connected defendant to the revolver, but not the semiautomatic pistol.

"To meet their burden of proving defendant's constructive possession of the [revolver], the People had to establish that defendant exercised dominion or control over [the revolver] by a sufficient level of control over the area in which [it was] found" (*People v Mattison*, 41 AD3d 1224, 1225, *lv denied* 9 NY3d 924 [internal quotation marks omitted]; *see People v Manini*, 79 NY2d 561, 573-574). Here, we conclude that there is no view of the evidence that defendant had constructive possession of the revolver (*see People v Nevins*, 16 AD3d 1046, 1047, *lv denied* 4 NY3d 889, *cert denied* 548 US 911). Defendant's "mere presence in an area where" the revolver was found "is not sufficient to establish that he exercised such dominion and control as to establish constructive possession" (*People v Knightner*, 11 AD3d 1002, 1004, *lv denied* 4 NY3d 745 [internal quotation marks omitted]). We further conclude that the error is not harmless inasmuch as we cannot determine if the verdict was based upon defendant's physical possession of the revolver or his constructive possession of it (*see People v Kims*, 24 NY3d 422, 438; *People v Martinez*, 83 NY2d 26, 35, *cert denied* 511 US 1137).

In light of our determination to grant a new trial, we do not consider defendant's remaining contention regarding the sentence.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

174

KA 13-01196

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERICK EVANS, ALSO KNOWN AS DERRICK EVANS,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered February 21, 2013. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, criminal mischief in the fourth degree and petit larceny.

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 burglary in the second degree (Penal Law § 140.25 [2]), criminal mischief in the fourth degree (§ 145.00 [1]), and petit larceny (§ 155.25). We reject defendant's contention that Supreme Court erred in refusing to suppress identification evidence on the ground that the photo array was unduly suggestive. The photographs portray men with similar physical features. "The fact that defendant's photograph has a slightly lighter background than the others does not support the conclusion that the identification procedure was unduly suggestive" (*People v Burns*, 186 AD2d 1015, 1016, *lv denied* 81 NY2d 837; *see People v Gray*, 186 AD2d 1058, 1058, *lv denied* 81 NY2d 840). For the first time on appeal, defendant also contends that the photo array was unduly suggestive because the number under his photograph was not from the same sequence of numbers under the other photographs. Defendant did not raise that contention in the hearing court and, therefore, it is not preserved for our review (*see People v Bakerx*, 114 AD3d 1244, 1247-1248, *lv denied* 22 NY3d 1196). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant contends that trial counsel failed to conduct an adequate pretrial investigation because he did not obtain a video surveillance recording of the crime scene. Defendant's contention

involves matters outside the record and, as such, is properly the subject of a CPL article 440 motion (*see generally People v Monaghan*, 101 AD3d 1686, 1686, *lv denied* 23 NY3d 965). We recognize that defendant's CPL 330.30 motion to set aside the verdict, which is included in the record on appeal, raised this issue. We conclude, however, that the record is not sufficiently developed to permit resolution of defendant's contention (*see People v Bahr*, 96 AD3d 1165, 1166, *lv denied* 19 NY3d 1024; *People v Green*, 92 AD3d 894, 896, *lv denied* 19 NY3d 961). Finally, the sentence is not unduly harsh or severe.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

175

CAF 15-00427

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

IN THE MATTER OF CHLOE W.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

AMY W., RESPONDENT-APPELLANT.

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

STEPHEN J. RILEY, LITTLE VALLEY, FOR PETITIONER-RESPONDENT.

PAMELA THIBODEAU, ATTORNEY FOR THE CHILD, WILLIAMSVILLE.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered February 5, 2015 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child and placed the child in the custody of petitioner.

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, Cattaraugus County, for a new hearing on the petition.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order that, inter alia, determined that she had neglected the subject child and placed the child in the custody of petitioner. Initially, we reject the mother's contention that Family Court lacked subject matter jurisdiction over the petition under the Uniform Child Custody Jurisdiction and Enforcement Act, which is codified in Domestic Relations Law article 5-A. Shortly before the subject child was born, the mother relocated from New York to Pennsylvania, where she stayed with a cousin until the child was born. Two days after the child was born, petitioner commenced this neglect proceeding. We conclude that the court properly exercised jurisdiction over the petition on the ground that "the child and [her] family have a significant connection with New York" (*Mazur v Mazur*, 207 AD2d 61, 66, *lv denied* 85 NY2d 803). We note in particular that the mother maintained an apartment in New York while she was at her cousin's residence, that she attended mental health counseling and parenting classes in New York before the child was born, and that most of her family resides in New York.

We agree with the mother, however, that the court erred in admitting into evidence at the fact-finding hearing a 2012 evaluation of the mother by a forensic psychologist who did not testify at the hearing. The report constitutes hearsay (*see Matter of Berrouet v Greaves*, 35 AD3d 460, 461) and, contrary to petitioner's contention, it did not qualify for admission under Family Court Act § 1046 (a) (iv). We further conclude that the error cannot be deemed harmless given that the court quoted extensively from the report in its decision and that the determination of neglect was based largely on findings contained within the report (*see Matter of Dillon S.*, 249 AD2d 984, 984; *Matter of Raymond J.*, 224 AD2d 337, 337-338). We therefore reverse the order and remit the matter to Family Court for a new fact-finding hearing.

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

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

176

CAF 14-01177

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

IN THE MATTER OF JEREMY SALETTA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JESSICA LYNN VECERE, RESPONDENT-APPELLANT.

IN THE MATTER OF JESSICA LYNN VECERE,
PETITIONER-APPELLANT,

V

JEREMY SALETTA, RESPONDENT-RESPONDENT.

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

MARK LEWIS, CHEEKTOWAGA, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

JENNIFER PAULINO, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered May 29, 2014 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded Jeremy Saletta custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent-petitioner mother appeals from an order awarding custody of the subject child to petitioner-respondent father. We reject the mother's contention that Family Court committed reversible error in referencing during its bench decision its own out-of-court observations of the mother. Although we agree with the mother that such references constituted error (*see Silberman v Antar*, 236 AD2d 385, 385), we conclude that the error is harmless because the "decision is fully supported by facts within the record" (*Matter of Treider v Lamora*, 44 AD3d 1241, 1243, *lv denied* 9 NY3d 817; *see Matter of Kayla J. [Michael J.]*, 74 AD3d 1665, 1668; *see also Matter of Nicole VV.*, 296 AD2d 608, 613, *lv denied* 98 NY2d 616). Contrary to the mother's further contention, we conclude that the court's decision properly set forth the grounds for its determination (*see Matter of*

Jose L.I., 46 NY2d 1024, 1025-1026; *Matter of Zarhianna K. [Frank K.]*, 133 AD3d 1368, 1369; *cf. Matter of Rocco v Rocco*, 78 AD3d 1670, 1671).

We further conclude that the court's determination to award custody of the subject child to the father is supported by a sound and substantial basis in the record. It is well settled that " '[a] concerted effort by one parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent' " (*Matter of Amanda B. v Anthony B.*, 13 AD3d 1126, 1127; *see Matter of Viscuso v Viscuso*, 129 AD3d 1679, 1681). Here, there is a sound and substantial basis in the record for the court's conclusion that the mother interfered with the father's relationship with the child by, inter alia, denying the father access to the child.

The mother further contends that the court erred in admitting in evidence status update reports relating to the father's completion of a court-ordered drug and alcohol evaluation. While we agree with the mother that those reports were improperly admitted in evidence inasmuch as "there was no indication that the records were certified to comply with CPLR 4518 pursuant to CPLR 3122-a" (*Sheridan v Sheridan*, 129 AD3d 1567, 1567), we nonetheless conclude that the error was harmless "because the record otherwise contains ample admissible evidence to support the court's determination" (*Matter of Matthews v Matthews*, 72 AD3d 1631, 1632, *lv denied* 15 NY3d 704).

Lastly, the mother's contention that the father failed to establish the paternity of the child is raised for the first time on appeal, and therefore, that contention is not properly before us (*see Matter of Voorhees v Talerico*, 128 AD3d 1466, 1467, *lv denied* 25 NY3d 915).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

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CA 15-00521

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

BRENDA READING AND JAMES KRANZ,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ANDREW FABIANO, M.D., AND KALEIDA HEALTH,
DOING BUSINESS AS MILLARD FILLMORE GATES
HOSPITAL, DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, LANCASTER (MICHAEL R. DRUMM OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered August 25, 2014. The order denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries allegedly sustained by Brenda Reading (plaintiff) when Andrew Fabiano, M.D. (defendant), a resident in neurosurgery at defendant Kaleida Health, doing business as Millard Fillmore Gates Hospital, applied a skin preparation solution to plaintiff during surgery to remove a pituitary tumor located near plaintiff's optic nerve. We reject defendants' contention that Supreme Court erred in denying their motion for summary judgment dismissing the complaint. Defendants failed to meet their initial burden of establishing the absence of any departure from good and accepted medical practice or that plaintiff was not injured by any such departure (*see Sawyer v Kaleida Health*, 112 AD3d 1341, 1341).

It is well established that a medical "resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene" (*Wulbrecht v Jehle*, 92 AD3d 1213, 1214 [internal quotation marks omitted]). Here, however, the affidavit of defendants' expert provided only conclusory assertions, i.e., assertions unsupported by any specific factual references, that defendant did not exercise any

independent judgment (*see Wulbrecht v Jehle*, 89 AD3d 1470, 1471). Furthermore, defendants submitted the deposition testimony of defendant, wherein he testified that he applied the solution based solely on what he believed to be a safe distance from plaintiff's eyes. Thus, defendants' own submissions raise an issue of fact whether defendant exercised independent judgment (*see Sawyer*, 112 AD3d at 1341). On the issue of proximate cause, defendants' expert improperly relied upon a disputed fact—specifically, that plaintiff's eye injuries were not caused by chemicals—in opining that defendants did not cause plaintiff's injuries (*see Reiss v Sayegh*, 123 AD3d 787, 789). In view of our determination, we do not consider the sufficiency of plaintiffs' submissions in opposition to the motion (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

187

CA 14-01845

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

CITIMORTGAGE, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JESSICA L. PETRAGNANI, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

DAVIDSON FINK LLP, ROCHESTER (WILLIAM A. SANTMYER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered June 26, 2014. The order and judgment denied the motion of plaintiff to vacate an order and judgment of dismissal.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the motion is granted, the order and judgment entered February 25, 2014 is vacated, and the complaint is reinstated.

Memorandum: In this mortgage foreclosure action, plaintiff appeals from an order and judgment that denied its motion seeking to vacate an order and judgment entered February 25, 2014, in which Supreme Court sua sponte dismissed the complaint after plaintiff missed by one week a deadline set forth in a scheduling order to file an application for an order of reference. We agree with plaintiff that the court erred in denying the motion. "The court erred in dismissing the complaint sua sponte inasmuch as '[u]se of the [sua sponte] power of dismissal must be restricted to the most extraordinary circumstances, and no such extraordinary circumstances are present in this case' " (*BAC Home Loans Servicing, LP v Maestri*, 134 AD3d 1593, ___). Although "a litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer*, 94 NY2d 118, 123), we conclude that missing a single deadline by one week does not "warrant the court's exercise of its power to dismiss a complaint sua sponte" (*MidFirst Bank v Eddy*, 125 AD3d 1458, 1459; *cf. Andrea v Arnone, Hedin, Casker, Kennedy & Drake Architects & Landscape Architects, P.C. [Habiterra Assoc.]*, 5 NY3d 514, 521).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

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CA 15-00186

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

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

V MEMORANDUM AND ORDER

PAUL VANDERPOOL, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (DIANE S. GASTLE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered October 10, 2014 in a proceeding pursuant to Mental Hygiene Law article 10. The order granted respondent's motion to conduct a written deposition.

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

Memorandum: In this proceeding pursuant to Mental Hygiene Law article 10, petitioner appeals in appeal No. 1 from an order that granted respondent's motion to conduct a limited deposition upon written questions of the victim of the qualifying offense. We agree with petitioner that Supreme Court erred in granting the motion. Respondent's motion papers make clear that his intent in seeking to depose the victim is to relitigate the issue of his use of force in the commission of the qualifying offense. That is specifically prohibited by Mental Hygiene Law § 10.07 (c) inasmuch as respondent has been convicted of the qualifying offense (*see Matter of State of New York v Geoffrey P.*, 100 AD3d 911, 912, *lv denied* 20 NY3d 862). Indeed, we note that respondent's conviction of the qualifying offense was based on his voluntary plea of guilty to attempted rape in the first degree "[b]y forcible compulsion" (Penal Law § 130.35 [1]; *see* § 110.00).

Respondent has also failed to demonstrate good cause for the issuance of a judicial subpoena upon the victim (*see* Mental Hygiene Law § 10.08 [g]). Although respondent contends that he demonstrated such good cause because petitioner's experts allegedly relied upon the victim's hearsay statements concerning the circumstances of the

qualifying offense, and they will testify about those hearsay statements at trial, we conclude that the experts' reliance on such hearsay is not improper inasmuch as "the evidence of reliability [of that hearsay] was the criminal justice adjudication unfavorable to [respondent]" (*Matter of State of New York v Floyd Y.*, 22 NY3d 95, 109).

Finally, in light of our determination in appeal No. 1, we dismiss as moot petitioner's appeal from the order in appeal No. 2 denying its subsequent motion for leave to renew and reargue.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

192

CA 15-00235

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

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

V MEMORANDUM AND ORDER

PAUL VANDERPOOL, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (DIANE S. GASTLE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered January 13, 2015 in a proceeding pursuant to Mental Hygiene Law article 10. The order, insofar as appealed from, denied the motion of petitioner seeking leave to renew and reargue.

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

Same memorandum as in *State of New York v Vanderpool* ([appeal No. 1] ___ AD3d ___ [Mar. 25, 2016]).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

197

KA 14-00956

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY MILLS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered May 12, 2014. The judgment convicted defendant, upon a nonjury verdict, of burglary in the second degree (four counts).

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

Memorandum: On appeal from a judgment convicting him after a nonjury trial of four counts of burglary in the second degree (Penal Law § 140.25 [2]), defendant challenges the validity of his waiver of a jury trial. Defendant failed to preserve that challenge for our review (*see People v Hailey*, 128 AD3d 1415, 1415-1416, *lv denied* 26 NY3d 929; *see generally People v Padro*, 75 NY2d 820, 821, *rearg denied* 75 NY2d 1005, *rearg dismissed* 81 NY2d 989). In any event, we conclude that defendant's challenge is without merit inasmuch as " 'the record establishes that defendant's waiver was knowing, voluntary and intelligent' " (*Hailey*, 128 AD3d at 1416; *see People v Moran*, 87 AD3d 1312, 1312, *lv denied* 19 NY3d 976).

Defendant contends that County Court erred in refusing to suppress evidence obtained pursuant to an arrest of defendant because the police lacked probable cause to arrest him. We reject defendant's contention, inasmuch as "the police had probable cause to arrest him on the basis of statements [of his accomplice] implicating him in the crime" (*People v Luciano*, 43 AD3d 1183, 1183, *lv denied* 9 NY3d 991; *see People v Berzups*, 49 NY2d 417, 426-427; *People v Fulton*, 133 AD3d 1194, 1195, *lv denied* 26 NY3d 1109). We also reject defendant's contention that evidence recovered during a search of his residence should have been suppressed on the ground that his fiancé did not consent to the search. We conclude that the People met their burden of establishing at the suppression hearing that the police reasonably

believed that defendant's fiancé had the authority to consent to the search of the residence (*see People v Adams*, 53 NY2d 1, 8, *rearg denied* 54 NY2d 832, *cert denied* 454 US 854; *People v Plumley*, 111 AD3d 1418, 1419, *lv denied* 22 NY3d 1140), and that she voluntarily consented to the search (*see generally People v Gonzalez*, 39 NY2d 122, 128; *People v May*, 100 AD3d 1411, 1412, *lv denied* 20 NY3d 1063). The testimony of defendant's fiancé at the suppression hearing that she did not voluntarily consent to the search raised an issue of credibility that the court was entitled to resolve against defendant (*see generally People v Prochilo*, 41 NY2d 759, 761; *People v Twillie*, 28 AD3d 1236, 1237, *lv denied* 7 NY3d 795).

We reject defendant's further contention that the testimony of his accomplice was not sufficiently corroborated and thus that the conviction is not supported by legally sufficient evidence. The record establishes that the People presented sufficient evidence to satisfy the corroboration requirement, including, inter alia, evidence that several items stolen during the burglaries were found in defendant's residence (*see* CPL 60.22 [1]; *People v Reome*, 15 NY3d 188, 191-192; *People v Cortez*, 81 AD3d 742, 742-743, *lv denied* 16 NY3d 894). Contrary to defendant's contention, viewing the evidence in light of the elements of the crime of burglary in the second degree in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Contrary to defendant's further contention that corrective action is required because the court failed to specify whether the sentences would run consecutively or concurrently, the record establishes that the court sentenced defendant to consecutive terms of incarceration for the first and second counts of burglary in the second degree, and that the sentences for the third and fourth counts would run concurrently. Finally, the sentence is not unduly harsh or severe.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

199

KA 13-00159

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY D. SAMUEL, DEFENDANT-APPELLANT.

DIANNE C. RUSSELL, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered July 2, 2012. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (two counts), robbery in the second degree (two counts), kidnapping in the second degree, assault in the second degree (two counts) and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for a suppression hearing.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, kidnapping in the second degree (Penal Law § 135.20) and two counts of robbery in the first degree (§ 160.15 [2], [4]), arising from an incident occurring in a two-unit apartment building in the City of Rochester. In response to a 911 call, Rochester police officers responded to the building and found a man bound at the wrists and bleeding from several wounds. The man reported that he had been attacked by several people, some of whom were still in the building. The officers surrounded the building and apprehended defendant and others as they left the building. The officers then performed what they described as a security sweep of the building, during which they noted, inter alia, the presence of masks, guns, and other apparent items of evidence. The officers then withdrew and obtained a search warrant for the building, which resulted in the seizure of numerous objects that were introduced in evidence at defendant’s trial.

Defendant submitted omnibus motions seeking, among other relief, suppression of the evidence seized pursuant to the search warrant. He also made several requests for the warrant application, all of which were denied by the prosecution, and he made several motions or requests for an order directing the prosecution to turn over that

application, which were denied by County Court (Piampiano, J.). After an in camera review of the search warrant application, County Court also denied, without a hearing, defendant's motion to suppress the evidence seized pursuant to the search warrant. During the trial before Supreme Court (Moran, J.), when the prosecution sought to introduce evidence seized during the execution of the search warrant, defendant orally moved to suppress the items seized pursuant to the warrant, contending for the first time that the warrant was improperly issued because it was based on evidence that was obtained during the earlier warrantless search, which defendant contended was conducted in violation of *Payton v New York* (445 US 573) and its progeny. Based on the trial testimony regarding the conduct of the prewarrant security sweep, Supreme Court concluded, sua sponte, that exigent circumstances justified the warrantless search and denied the motion without a hearing.

Defendant contends on appeal that, inter alia, County Court and Supreme Court erred in refusing to suppress the evidence seized during the execution of the warrant because it was the fruit of the prior unconstitutional search of his home. We conclude that Supreme Court erred in denying, without a hearing, defendant's midtrial suppression motion.

Initially, defendant contends that County Court erred in refusing to suppress the fruits of the search warrant without conducting a hearing. In his motion papers, defendant contended only that the warrant was not based on probable cause, without reference to any prior activity. It is well settled that a "challenge to the facial sufficiency of a written warrant application presents an issue of law that does not require a hearing, and the court properly determines the merits of such a challenge 'by reviewing the affidavits alone in order to determine whether they establish probable cause' " for the search (*People v Carlton*, 26 AD3d 738, 738, quoting *People v Dunn*, 155 AD2d 75, 80, *affd* 77 NY2d 19, *cert denied* 501 US 1219). Defendant failed to preserve for our review his present contention that County Court erred in upholding the warrant because it was based on evidence obtained during a prior unconstitutional search, "inasmuch as defendant failed to raise it either in his motion papers or before the suppression court" (*People v Fuentes*, 52 AD3d 1297, 1298, *lv denied* 11 NY3d 736; *see People v Facen*, 117 AD3d 1463, 1463-1464, *lv denied* 23 NY3d 1020). In any event, we conclude that the allegations in defendant's moving papers did not contain sufficient allegations of fact to warrant a hearing on that contention (*see People v Ferron*, 248 AD2d 962, 963, *lv denied* 92 NY2d 879; *see generally People v Jones*, 95 NY2d 721, 725).

Defendant further contends that County Court erred in concluding that the officers were aware of the apartment building's design before the security sweep. Defendant failed to preserve that contention for our review, inasmuch as he did not challenge the warrant in County Court on that ground (*see People v Williams*, 127 AD3d 612, 612; *People v Demus*, 82 AD3d 1667, 1667-1668, *lv denied* 17 NY3d 815). Furthermore, defendant did not join in a challenge to the search warrant made by a codefendant's attorney on that ground, and it is

well settled that a "[d]efendant cannot rely on the request of a codefendant to preserve the claimed . . . error" (*People v Buckley*, 75 NY2d 843, 846; *see People v Cabassa*, 79 NY2d 722, 730, *cert denied sub nom. Lind v New York*, 506 US 1011). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We agree with defendant, however, that Supreme Court erred in denying without a hearing his midtrial motion to suppress the fruits of the search warrant. Defendant's motion was made shortly after the prosecution belatedly provided the search warrant application, which demonstrated that the police officers had searched the building before they obtained the search warrant and used the information gained in the initial search in their application for the warrant. It is well settled that police officers may not conduct an unconstitutional warrantless search and then use the fruits of that search to obtain a warrant (*see e.g. People v Perez*, 266 AD2d 242, 243, *lv dismissed* 94 NY2d 923; *see also People v Bartholomew*, 132 AD3d 1279, 1281). To the contrary, such a procedure "undermines the very purpose of the warrant requirement and cannot be tolerated" (*People v Burr*, 70 NY2d 354, 362, *cert denied* 485 US 989; *see People v Marinez*, 121 AD3d 423, 424).

Here, Supreme Court, based on its view of the trial testimony, concluded sua sponte that exigent circumstances justified the protective security sweep of the building, and thus summarily determined that the information gained by the officers during that search could properly be considered by the issuing magistrate in determining whether there was probable cause to issue the search warrant. That was error. As previously noted herein, defendant's oral motion to suppress challenged the warrant on the ground that it was based on information that was obtained in violation of his constitutional rights under *Payton v New York* (445 US 573). In determining whether a hearing is required pursuant to CPL 710.60, "the sufficiency of defendant's factual allegations should be evaluated by (1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) defendant's access to information" (*People v Mendoza*, 82 NY2d 415, 426). We note that the motion was not required to be made in writing, as would be required for a pretrial motion to suppress (*see* CPL 710.60 [1]) and, because it was properly "made orally in open court" during trial, the court was required, "where necessary, [to] conduct a hearing as provided in [CPL 710.60 (4)], out of the presence of the jury if any, and make findings of fact essential to the determination of the motion" (CPL 710.60 [5]).

We conclude that a hearing was necessary herein. Defendant's allegation that the search was of his home was sufficient "to demonstrate a personal legitimate expectation of privacy in the searched premises" (*People v Wesley*, 73 NY2d 351, 357; *cf. People v Scully*, 14 NY3d 861, 864). The People failed to preserve for our review their current contention that, as Supreme Court sua sponte determined, the security sweep was justified by the emergency doctrine, in order to ensure that there were no more victims or perpetrators in the building (*see generally People v Sylvester*, 129 AD3d 1666, 1666-1667, *lv denied* 26 NY3d 1092; *People v Whitley*, 68

AD3d 790, 791, *lv denied* 14 NY3d 807). We note, however, that Supreme Court made its sua sponte determination before the People had an opportunity to make any argument on the merits, and that the People had raised this contention in response to an earlier motion by a codefendant. In any event, the People's current contention merely " 'raise[s] a factual dispute on a material point which must be resolved before the court can decide the legal issue' of whether evidence was obtained in a constitutionally permissible manner" (*People v Burton*, 6 NY3d 584, 587; *cf. Scully*, 14 NY3d at 864). Thus, before ruling on the motion, "it was incumbent upon [Supreme C]ourt to conduct a hearing to determine whether there were sufficient exigent circumstances [or other factors such as an ongoing emergency situation that would] justify the . . . warrantless entry" into the building (*People v Chamlee*, 120 AD3d 417, 419). Therefore, we hold the case, reserve decision, and remit the matter to Supreme Court for a hearing on defendant's midtrial suppression motion.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

201

CAF 14-01538

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF RICHARD C. KIRKPATRICK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JESSICA LYNN KIRKPATRICK, RESPONDENT-APPELLANT.

IN THE MATTER OF JESSICA LYNN KIRKPATRICK,
PETITIONER-APPELLANT,

V

RICHARD C. KIRKPATRICK, RESPONDENT-RESPONDENT.

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

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

MICHELE A. BROWN, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered July 22, 2014 in proceedings pursuant to Family Court Act article 6. The order, among other things, dismissed the petition of Jessica Lynn Kirkpatrick and granted in part the petition of Richard C. Kirkpatrick to modify a prior court order.

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

Memorandum: In these proceedings under Family Court Act article 6, respondent-petitioner mother appeals from an order modifying the existing visitation arrangement by directing that she have supervised visitation with the parties' child and dismissing her petition for petitioner-respondent father's violation of a prior order. The mother's contention that Family Court erred in issuing a temporary order suspending visitation pending trial is rendered moot by the court's issuance of a final order of visitation (*see generally Matter of Viscuso v Viscuso*, 129 AD3d 1679, 1682; *Matter of Jones v Tucker*, 125 AD3d 1273, 1273).

Contrary to the mother's further contention, the court did not err in admitting testimony concerning the child's out-of-court

statements under the excited utterance exception to the hearsay rule (*see People v Miller*, 115 AD3d 1302, 1303-1304, *lv denied* 23 NY3d 1040; *see generally People v Caviness*, 38 NY2d 227, 230-232). In any event, any error in admitting the statements is harmless, inasmuch as there is "a sound and substantial basis in the record for . . . Family Court's determination, without consideration of the statements, that it was not in the [child's] best interests to have unsupervised contact with [her] mother" (*Matter of Lane v Lane*, 68 AD3d 995, 998). Here, the father established that the relationship between the child and the mother had deteriorated significantly since the last order allowing the mother unsupervised visitation, to the point where the child no longer wanted to have visitation with the mother.

Furthermore, even assuming, arguendo, that the court erred in admitting the mother's medical records, we note that the court did not rely on the records in its decision, and "there is a sound and substantial basis in the record for the court's determination to order supervised visitation" (*Matter of Rice v Cole*, 125 AD3d 1466, 1467, *lv denied* 26 NY3d 909). Finally, the court did not abuse its discretion in failing to impose sanctions for the father's violation of the 2012 order and in dismissing the mother's contempt petition (*see generally Matter of Anderson v Barlow*, 256 AD2d 1234, 1235).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

204

CAF 14-01946

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF ASHLEY B. AND KAMAU B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LAVERN B., RESPONDENT-APPELLANT.

IN THE MATTER OF MICHAEL F.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

LAVERN B., RESPONDENT-APPELLANT.

IN THE MATTER OF CAMERON N.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

LAVERN B., RESPONDENT-APPELLANT.

IN THE MATTER OF WILLIE B.,
PETITIONER-RESPONDENT,

V

LAVERN B., RESPONDENT-APPELLANT,
AND ERIE COUNTY DEPARTMENT OF SOCIAL
SERVICES, RESPONDENT-RESPONDENT.

ALAN BIRNHOLZ, LAKE WORTH, FLORIDA, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES AND RESPONDENT-RESPONDENT.

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

SHEILA SULLIVAN DICKINSON, ATTORNEY FOR THE CHILDREN, BUFFALO.

BERNADETTE HOPPE, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 2, 2014 in proceedings pursuant to

Family Court Act articles 6 and 10. The order, inter alia, determined that respondent Lavern B. neglected Ashley B. and Kamau B. and derivatively neglected Michael F. and Cameron N.

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

Memorandum: In these proceedings pursuant to Family Court Act articles 6 and 10, respondent mother appeals from an order finding that she neglected her two older children and derivatively neglected the other two children. We reject the mother's contention that Family Court's findings of neglect and derivative neglect are not supported by a preponderance of the evidence (*see* § 1046 [b] [i]). It is well settled that section 1012 (f) (i), which defines neglect, "imposes two requirements for a finding of neglect . . . 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" (*Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [internal quotation marks omitted]). Here, a preponderance of the evidence supports the court's finding that, among other things, the mother forced the two older children to leave the house for days at a time without planning for their care, which repeatedly resulted in their living in shelters or on the streets with no supervision, thereby placing them in imminent risk of harm (*see Matter of Debraun M.*, 34 AD3d 587, 587, *lv dismissed* 8 NY3d 955; *see also Matter of Chantel ZZ.*, 279 AD2d 669, 671). Although the mother testified that she did not force the older children to leave the home for extended periods, "[w]here, as here, issues of credibility are presented, the hearing court's findings must be accorded great deference" (*Matter of Todd D.*, 9 AD3d 462, 463; *see Matter of Holly B. [Scott B.]*, 117 AD3d 1592, 1592), and we find no reason to reject the court's credibility determinations.

Furthermore, that evidence "supports the finding of derivative neglect with respect to [the two younger children inasmuch as] the impaired level of parental judgment . . . shown by [the mother's] behavior created a substantial risk" of imminent danger to the younger children as well (*Matter of Peter C.*, 278 AD2d 911, 911 [internal quotation marks omitted]; *see Matter of Kennedie M. [Douglas M.]*, 89 AD3d 1544, 1545, *lv denied* 18 NY3d 808; *Matter of Devre S. [Carlee C.]*, 74 AD3d 1848, 1849). The mother's actions " 'demonstrated a fundamental defect in [her] understanding of the duties and obligations of parenthood and created an atmosphere detrimental to the physical, mental and emotional well-being of' " the younger children (*Matter of Cory S. [Terry W.]*, 70 AD3d 1321, 1322).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

208

CA 15-01382

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND SCUDDER, JJ.

ALEX C. MILLER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KIRK HOWARD, ET AL., DEFENDANTS,
AND AMORE'S USED CARS & REPAIRS, INC.,
DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (WILLIAM K. KENNEDY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANCIS M. LETRO, BUFFALO (CAREY BEYER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Paula L. Feroleto, J.), entered October 31, 2014. The order granted the motion of plaintiff pursuant to CPLR 603 for a separate trial on the issue of the negligence of defendant Amore's Used Cars & Repairs, Inc.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the vehicle in which he was a passenger collided with a tree. Plaintiff alleged theories of liability with respect to the collision, and he alleged that Amore's Used Cars & Repairs, Inc. (defendant) was negligent in repairing the vehicle such that it was responsible for the injuries caused by the failure of the passenger air bag to deploy. Supreme Court previously granted the motion of defendant County of Cattaraugus to bifurcate the trial, granting bifurcation of the "issue of negligence on each of the separate theories of liability as to each defendant, with the damages phase of the trial to proceed at a later date before a separate jury." Plaintiff thereafter moved for a separate trial on the issue of defendant's negligence, contending that the issues of liability for the collision were distinct from the issue of negligence with respect to the repair of the vehicle, and that the injuries sustained by plaintiff as the result of the failure of the air bag to deploy are capable of practicable division. Defendant appeals from an order granting the motion, and we now affirm.

"In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any

claim, or of any separate issue" (CPLR 603). "The determination of a severance motion under CPLR 603 'is a matter of judicial discretion which will not be disturbed on appeal absent an abuse of discretion or prejudice to a substantial right of the party seeking severance' " (*Utica Mut. Ins. Co. v American Re-Insurance Co.*, 132 AD3d 1405, 1405). Even where a plaintiff "will to some extent rely on the same evidence" (*Abbondandolo v Hitzig*, 282 AD2d 224, 225), severance is appropriate where " 'individual issues predominate, concerning particular circumstances applicable to each [defendant], . . . [and there] is the possibility of confusion for the jury' " (*Gittino v LCA Vision*, 301 AD2d 847, 847-848). Here, the allegations of negligence with respect to defendant do not relate to the occurrence of the accident itself, but they instead concern the repair and maintenance history of the vehicle prior to the collision. Under these circumstances, we conclude that the court did not abuse its discretion in granting plaintiff's severance motion (*see Utica Mut. Ins. Co.*, 132 AD3d at 1406).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

209

CA 15-00453

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, AND SCUDDER, JJ.

CHARLES TERWILLIGER AND HELEN TERWILLIGER,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

MAX CO., LTD., MAX USA CORP.,
DEFENDANTS-APPELLANTS-RESPONDENTS,
AND NUMAX, INC., DEFENDANT.
(APPEAL NO. 1.)

GOLDBERG SEGALLA, LLP, BUFFALO (JOHN P. FREEDENBERG OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (ANNE B. RIMMLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT CHARLES TERWILLIGER.

LAW OFFICES OF RICHARD S. BINKO, CHEEKTOWAGA (RICHARD S. BINKO OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT HELEN TERWILLIGER.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered November 12, 2014. The order, inter alia, granted in part and denied in part the motion of defendants for summary judgment.

It is hereby ORDERED that said cross appeal from the order insofar as it granted that part of defendants' motion with respect to the claim for breach of implied warranty of merchantability/fitness for ordinary purposes is unanimously dismissed (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985) and the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action alleging, inter alia, strict products liability and seeking damages for injuries sustained by Charles Terwilliger (plaintiff), an employee of HMT Enterprises Unlimited (HMT), a company owned by his wife, plaintiff Helen Terwilliger. Plaintiff was injured when a pneumatic nail gun used by another HMT employee accidentally came into contact with plaintiff's head and fired a three-inch nail into his skull and brain. The nail gun was manufactured by defendant MAX Co., Ltd. and distributed by defendant MAX USA Corp. (MAX defendants), and was sold by defendant Numax, Inc. By the order in appeal No. 1, Supreme Court granted in part the motion of defendants seeking summary judgment dismissing the complaint by dismissing the first and second causes of action to the extent that they allege failure to warn, and the third

cause of action, for breach of express and implied warranty for both ordinary purposes and a specific purpose. The court denied the motion insofar as defendants sought summary judgment dismissing the first and second causes of action to the extent that they allege design defect. The MAX defendants appeal and plaintiffs cross-appeal from that order. In appeal No. 2, defendants appeal from an order that, inter alia, granted only those parts of plaintiffs' motions for leave to reargue defendants' motion with respect to the claim for breach of the "implied warranty of merchantability/fitness for ordinary purposes," and reinstated the third cause of action to that extent. We affirm the orders in both appeal Nos. 1 and 2.

It is undisputed that the subject nail gun operates in two ways: by the contact trip, also called the "bump" mode, in which the operator holds the depressed trigger and the nails are fired each time the contact arm touches the work surface; and by the "sequential fire" mode, in which the nail is fired after the contact arm touches the work surface and the trigger is pulled, firing one nail each time that process is repeated. Plaintiffs allege that the design of the nail gun is defective because it is equipped with the bump mode, rather than with only the sequential fire mode; and that the sequence of trigger activation, which determines the mode of operation, causes operator confusion as to which mode of operation is in use, which they allege happened here. As relevant herein, they also allege liability under the theories of failure to warn, design defect and breach of express and implied warranties for ordinary purposes and for a specific purpose.

Defendants sought summary judgment dismissing the complaint on the grounds that the dual function of the nail gun meets the applicable standards approved by the American National Standard for Power Tools (ANSI); that the warnings were appropriate; and that, in any event, the employee had extensive experience in the use of nail guns and thus there was no causal connection between the employee's alleged lack of warning information and the accident. Although defendants failed to establish that HMT received the manual for the two nail guns it acquired, which contained the instruction that the operator was not to touch the trigger unless he/she intended to drive a fastener, it is undisputed that a warning on the nail gun is the recommended ANSI warning to, inter alia, "Keep fingers AWAY from trigger when not driving fasteners to avoid accidental firing."

"Generally, the adequacy of the warning in a products liability case based on failure to warn is, in all but the most unusual circumstances, a question of fact to be determined at trial" (*Johnson v Delta Intl. Mach. Corp.*, 60 AD3d 1307, 1309 [internal quotation marks omitted]). Here, however, defendants established that the employee had used nail guns for approximately five years prior to the accident and that he was aware of the specific hazard that caused plaintiff's injury, i.e., that the nail gun would fire a nail if the contact arm touched something while the trigger was depressed. Thus, defendants established as a matter of law that "any warning would have been superfluous" with respect to the employee (*Wesp v Carl Zeiss, Inc.*, 11 AD3d 965, 968; *see Call v Banner Metals, Inc.*, 45 AD3d 1470,

1471). We therefore reject plaintiffs' contention on their cross appeal in appeal No. 1 that the court erred in granting that part of defendants' motion with respect to the claims for failure to warn. We also reject plaintiffs' contention that the court erred in granting that part of defendants' motion with respect to the claim for breach of an implied warranty for a specific purpose in the third cause of action. Defendants established as a matter of law that HMT did not seek to use the nail gun in a way other than for its ordinary purposes (*cf. Simmons v Washing Equip. Tech.*, 78 AD3d 1645, 1646), and plaintiffs failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We next address the appeal of the MAX defendants from the order in appeal No. 1. We conclude that, with respect to plaintiffs' claims for design defect, defendants met their initial burden of establishing that the nail gun was reasonably safe. Their expert engineer explained, inter alia, that the nail gun complied with industry standards set forth by ANSI, and opined that providing only one method of operation would reduce the functional utility of the nail gun (*see Wesp*, 11 AD3d at 967; *cf. Chamberlain v MAC Trailer Mfg., Inc.*, 128 AD3d 1336, 1337-1338).

We further conclude, however, that plaintiffs raised an issue of fact sufficient to defeat the motion with the affidavit of their expert professional engineer. Plaintiffs' expert opined to a reasonable degree of engineering certainty that the nail gun is defective "because it did not have[,] as a sole means of actuation, a full sequential trip trigger" and instead also provided for the option for a "contact trip" or a bump trigger. The expert explained that the center of gravity of the nail gun causes the operator to maintain a finger on the trigger when lowering the nine-pound gun, as was the case here; that the sequence of the use of the trigger to determine the mode of operation causes operator confusion as to which mode of operation is in use, which he opined happened here based upon the testimony of the employee that he thought the nail gun was in sequential fire mode; that government safety studies he reviewed found a much higher rate of injury when the nail gun was in the bump mode; and that tests he performed and studies he reviewed established that the utility of the bump mode does not outweigh the danger of its use because it is "only 10% faster" than the sequential fire mode (*see Schneider v Verson Allsteel Press Co.*, 236 AD2d 806, 806; *cf. Rutherford v Signode Corp.*, 11 AD3d 922, 923, *lv denied* 4 NY3d 702). " 'Where, as here, a qualified expert opines that a particular product is defective or dangerous, describes why it is dangerous, explains how it can be made safer, and concludes that it is feasible to do so, it is usually for the jury to make the required risk-utility analysis' " (*Pierre-Louis v DeLonghi Am., Inc.*, 66 AD3d 859, 861-862).

Contrary to the further contention of the MAX defendants, defendants failed to establish that HMT was aware that a safety trigger was available that would restrict the use of the nail gun to a sequential fire mode. They therefore failed to establish that they are relieved from liability for design defect on the ground that HMT

was in a position to "balance the benefits and the risks of not having the safety device" (*Scarangella v Thomas Built Buses*, 93 NY2d 655, 661; *see Campbell v International Truck & Engine Corp.*, 32 AD3d 1184, 1185).

We reject defendants' contention in appeal No. 2 that the court erred in reinstating the claim for breach of implied warranty for ordinary purposes inasmuch as that claim and the claims for design defect are based on largely identical evidence (*see Fritz v White Consol. Indus.*, 306 AD2d 896, 897-898; *cf. Wesp*, 11 AD3d at 967-968; *see generally Denny v Ford Motor Co.*, 87 NY2d 248, 254-263, *rearg denied* 87 NY2d 969).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

210

CA 15-00897

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, AND SCUDDER, JJ.

CHARLES TERWILLIGER AND HELEN TERWILLIGER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MAX CO., LTD., MAX USA CORP., AND NUMAX, INC.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

GOLDBERG SEGALLA, LLP, BUFFALO (JOHN P. FREEDENBERG OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (ANNE B. RIMMLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT CHARLES TERWILLIGER.

LAW OFFICES OF RICHARD S. BINKO, CHEEKTOWAGA (RICHARD S. BINKO OF COUNSEL), FOR PLAINTIFF-RESPONDENT HELEN TERWILLIGER.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered January 20, 2015. The order, insofar as appealed from, granted in part the motions of plaintiffs for leave to reargue and, upon reargument, denied that part of the motion of defendants seeking summary judgment dismissing the claim of breach of implied warranty of merchantability/fitness for ordinary purposes.

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

Same memorandum as in *Terwilliger v Max Co., Ltd.* ([appeal No. 1] ___ AD3d ___ [Mar. 25, 2016]).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

211

CA 15-00802

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND SCUDDER, JJ.

DARA R. CUNNINGHAM, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ARLYN C. CUNNINGHAM, JR., DEFENDANT-RESPONDENT.

IN THE MATTER OF DARA R. CUNNINGHAM,
PETITIONER-APPELLANT,

V

ARLYN C. CUNNINGHAM, JR., RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

MICHAEL STEINBERG, ROCHESTER, FOR PLAINTIFF-APPELLANT AND PETITIONER-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-RESPONDENT AND RESPONDENT-RESPONDENT.

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

Appeal from an order of the Supreme Court, Yates County (Dennis F. Bender, A.J.), dated July 24, 2014. The order, inter alia, awarded sole legal custody of the parties' child to defendant-respondent and dismissed plaintiff-petitioner's family offense petition.

It is hereby ORDERED that said appeal insofar as it challenges the award of custody to defendant-respondent is unanimously dismissed, and the order is affirmed without costs.

Same memorandum as in *Cunningham v Cunningham* ([appeal No. 3] ___ AD3d ___ [Mar. 25, 2016]).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

212

CA 15-00804

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND SCUDDER, JJ.

DARA R. CUNNINGHAM, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ARLYN C. CUNNINGHAM, JR., DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

MICHAEL STEINBERG, ROCHESTER, FOR PLAINTIFF-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Yates County (Dennis F. Bender, A.J.), entered February 13, 2015. The order denied the motion of plaintiff seeking leave to renew.

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

Same memorandum as in *Cunningham v Cunningham* ([appeal No. 3] ___ AD3d ___ [Mar. 25, 2016]).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

213

CA 15-01609

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND SCUDDER, JJ.

DARA R. CUNNINGHAM, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ARLYN C. CUNNINGHAM, JR., DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

MICHAEL STEINBERG, ROCHESTER, FOR PLAINTIFF-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Yates County (Dennis F. Bender, A.J.), entered July 24, 2015 in a divorce action. The judgment, insofar as appealed from, awarded defendant sole legal custody of the parties' child.

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

Memorandum: These consolidated appeals arise from litigation that began when plaintiff-petitioner (mother) commenced an action for divorce and ancillary relief against defendant-respondent (father). Within that pending action, the father filed an order to show cause seeking custody of the parties' child, and the mother filed a family offense petition against the father. In appeal No. 1, the mother appeals from an order that, inter alia, granted custody of the parties' child to the father and dismissed her family offense petition and, in appeal No. 2, she appeals from a further order that denied her motion for leave to renew with respect to the prior order. In appeal No. 3, she appeals from a judgment of divorce that, insofar as appealed from, awarded sole legal custody of the parties' child to the father.

Initially, we dismiss the appeal from that part of the order in appeal No. 1 awarding custody of the parties' child to the father, and we also dismiss appeal No. 2, because the right of appeal from those orders terminated upon entry of the final judgment (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988). The issues in those appeals are brought up for review on appeal from the final judgment in appeal No. 3 (*see* CPLR 5501 [a] [1]). We note, however, that the part of the order in appeal No. 1 that dismissed the mother's family offense petition constituted the final resolution of that petition,

and thus that part of the appeal from the order in appeal No. 1 is properly before us.

We reject the mother's contention in appeal No. 1 that Supreme Court erred in dismissing her family offense petition. "The determination whether [the father] committed a family offense was a factual issue for the court to resolve, and '[the] court's determination regarding the credibility of witnesses is entitled to great weight on appeal and will not be disturbed [where, as here, it is] supported by the record' " (*Matter of Martin v Flynn*, 133 AD3d 1369, 1370; *see Matter of Megyn J.B. v Cory A.D.*, 113 AD3d 1086, 1086).

In appeal No. 3 and the parts of all of the other appeals that are brought up for review on appeal from the final judgment, we reject the mother's contention that the court erred in awarding custody of the parties' child to the father. It is well settled that, when making a child custody determination, "the court must consider all factors that could impact the best interests of the child, including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of each parent to provide for the child's emotional and intellectual development and the wishes of the child . . . No one factor is determinative because the court must review the totality of the circumstances" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695; *see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174; *Matter of Cross v Caswell*, 113 AD3d 1107, 1107). "A court's custody determination, including its evaluation of a child's best interests, is entitled to great deference and will not be disturbed [where, as here,] it is supported by a sound and substantial basis in the record" (*Sheridan v Sheridan*, 129 AD3d 1567, 1568; *see Matter of Burns v Herrod*, 132 AD3d 1336, 1337; *Matter of LaMay v Staves*, 128 AD3d 1485, 1485-1486). The court's determination is supported by the evidence in the record, including that the mother placed the child in a home-schooling program in order to permit the mother to relocate with the child in contravention of the court's prior orders, and that the mother is only home schooling the child a maximum of one day per week. In addition, we see no reason to overturn the court's determination not to credit the mother's version of the events underlying her claims of domestic violence and sexual abuse.

The mother's contentions with respect to the Attorney for the Child are not properly before us because they are raised for the first time in her reply brief (*see Matter of Warren v Miller*, 132 AD3d 1352, 1354; *Matter of Yorimar K.-M.*, 309 AD2d 1148, 1149).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

214

OP 15-01306

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF BOHDAN S. CHOMYN, PETITIONER,

V MEMORANDUM AND ORDER

M. WILLIAM BOLLER, AN ACTING SUPREME COURT JUSTICE IN HIS CAPACITY AS LICENSING OFFICER FOR PISTOL PERMITS IN ERIE COUNTY, CHRISTOPHER L. JACOBS, AS ERIE COUNTY CLERK, AND WILLMER FOWLER, JR., IN HIS CAPACITY AS PISTOL PERMIT SUPERVISOR, ERIE COUNTY CLERK'S OFFICE, RESPONDENTS.

JAMES OSTROWSKI, BUFFALO, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT M. WILLIAM BOLLER, AN ACTING SUPREME COURT JUSTICE IN HIS CAPACITY AS LICENSING OFFICER FOR PISTOL PERMITS IN ERIE COUNTY.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (JEREMY C. TOTH OF COUNSEL), FOR RESPONDENTS CHRISTOPHER L. JACOBS, AS ERIE COUNTY CLERK, AND WILLMER FOWLER, JR., IN HIS CAPACITY AS PISTOL PERMIT SUPERVISOR, ERIE COUNTY CLERK'S OFFICE.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to review a determination of respondents. The determination revoked petitioner's pistol permit.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination revoking his pistol permit. We reject the contention of petitioner that he was denied his right to due process. " 'It is well settled that a formal hearing is not required prior to the revocation of a pistol permit [where, as here,] the licensee is given notice of the charges and has an adequate opportunity to submit proof in response' " (*Matter of Cuda v Dwyer*, 107 AD3d 1409, 1409; *see Matter of Strom v Erie County Pistol Permit Dept.*, 6 AD3d 1110, 1111).

Contrary to petitioner's further contention, we conclude that the determination is neither arbitrary and capricious nor an abuse of discretion. "It is well established that '[a licensing officer] is

vested with broad discretion in determining whether to revoke a pistol permit and may do so for any good cause,' including 'a finding that the petitioner lack[s] the essential temperament or character which should be present in one entrusted with a dangerous instrument . . . , or that he or she does not possess the maturity, prudence, carefulness, good character, temperament, demeanor and judgment necessary to have a pistol permit' " (*Matter of Peters v Randall*, 111 AD3d 1391, 1392). Here, petitioner was involuntarily committed to a mental health facility after threatening police officers when they responded to an activated security alarm at his residence, his medical records indicate that he suffered from paranoia and delusions and exhibited poor insight and judgment, and petitioner made incoherent statements and demonstrated aggressive behavior before the Hearing Officer (*see Matter of Mazzone v Czajka*, 8 AD3d 788, 788; *Matter of Pelose v County Ct. of Westchester County*, 53 AD2d 645, 645, *appeal dismissed* 41 NY2d 1008).

Finally, petitioner's contention that the revocation of his pistol permit violates his rights under the Second and Fourteenth Amendments of the United States Constitution is without merit (*see Cuda*, 107 AD3d at 1410; *Matter of Kelly v Klein*, 96 AD3d 846, 847-848; *see also Kachalsky v County of Westchester*, 701 F3d 81, 93-101, *cert denied* ___ US ___, 133 S Ct 1806).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

215

CA 15-00835

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND SCUDDER, JJ.

THE WALTON & WILLET STONE BLOCK, LLC,
AND THOMAS J. MILLAR, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF OSWEGO COMMUNITY DEVELOPMENT OFFICE
AND CITY OF OSWEGO, DEFENDANTS-RESPONDENTS.

KIRWAN LAW FIRM, P.C., SYRACUSE (TERRY J. KIRWAN, JR., OF COUNSEL),
FOR PLAINTIFFS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, OSWEGO (DOUGLAS M. MCRAE OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered February 4, 2015. 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 appeal from an order that granted defendants' motion for summary judgment dismissing the complaint. Plaintiffs commenced this action seeking specific performance of a Contract for Purchase (contract) entered into between defendants as sellers and plaintiff The Walton & Willet Stone Block, LLC (Walton) and Fowler Gardella Construction, LLC (FGC) as buyers. FGC and plaintiff Thomas J. Millar, in a joint venture, submitted a proposal for the redevelopment of a building on property owned by defendants, and defendants chose FGC and Millar as the preferred developers of the property.

We agree with defendants that plaintiffs may not individually seek enforcement of the contract without FGC. Plaintiffs and FGC had a joint venture, and "the legal consequences of a joint venture are equivalent to those of a partnership" (*Gramercy Equities Corp. v Dumont*, 72 NY2d 560, 565). It is well settled that " 'a partnership cause of action belongs only to the partnership itself or the partners jointly, and that an individual member of the partnership may only sue and recover on a partnership obligation on the partnership's behalf' " (*Gmerek v Scrivner, Inc.*, 221 AD2d 991, 991). Thus, any breach of the contract would relate to plaintiffs' and FGC's joint interest, and plaintiffs cannot individually seek enforcement of the contract without FGC (*see e.g. Scott v KeyCorp*, 247 AD2d 722, 724).

Defendants met their initial burden of establishing their entitlement to judgment as a matter of law by submitting the resolution naming the joint venture of FGC and Millar as the preferred developers of the property, the Option Agreement and the contract listing Walton and FGC as the buyers, and the affidavit of Paul Fowler, a managing member of FGC, averring that FGC was no longer involved in any project relating to the property. Plaintiffs failed to raise an issue of fact concerning whether FGC was a member of Walton and thus in effect a plaintiff in the lawsuit (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). In opposition to the motion, plaintiffs submitted affidavits of Millar and Sean Gardella, the other managing member of FGC, contending that FGC was a member of Walton based on Gardella's execution of a unanimous written consent. Plaintiffs failed to produce the written consent, however, and Millar's and Gardella's bare allegation that FGC is a member of Walton is belied by, inter alia, Fowler's affidavit and reply affidavit. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise an issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

216

CA 15-01316

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND SCUDDER, JJ.

MARY L. BARRON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NORTHTOWN WORLD AUTO, NORTHTOWN WORLD AUTO CENTRE, L.L.C., AND GEORGE H. BALDUF, DEFENDANTS-RESPONDENTS.

WILLIAM MATTAR P.C., WILLIAMSVILLE (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JOSHUA P. RUBIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered January 28, 2015. The order, insofar as appealed from, granted those parts of the motion of defendants seeking summary judgment dismissing the complaint insofar as it alleged, as amplified by the bill of particulars, that plaintiff sustained a serious injury under the permanent consequential limitation of use and significant limitation of use categories, and considered plaintiff's cross motion for partial summary judgment on the issue of negligence to be moot.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, defendants' motion is denied in part, the complaint, as amplified by the bill of particulars, is reinstated with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d), and plaintiff's cross motion is granted.

Memorandum: In this action to recover damages for injuries sustained as the result of a rear-end motor vehicle collision, plaintiff appeals from an order granting the motion of defendants for summary judgment dismissing the complaint and denying plaintiff's cross motion for partial summary judgment on the issue of defendant driver's negligence. At the outset, we note that plaintiff contends only that she sustained a permanent consequential limitation of use and a significant limitation of use of her left shoulder, thereby abandoning her other particularized claims of serious injury (*see Austin v Rent A Ctr. E., Inc.*, 90 AD3d 1542, 1543; *Yoonessi v Givens*, 39 AD3d 1164, 1165; *see also Ciesinski v Town of Aurora*, 202 AD2d 984, 984). We agree with plaintiff that Supreme Court erred in granting

defendants' motion insofar as the complaint, as amplified by the bill of particulars, alleges that plaintiff sustained a serious injury within the meaning of those two categories. Even assuming, arguendo, that defendants met their initial burden on the motion with respect to those categories (*see Virella v Allstate Home Care of Buffalo, Inc.*, 59 AD3d 1100, 1101; *Sconiers v Barber*, 51 AD3d 1403, 1404), we nonetheless conclude that plaintiff raised triable issues of fact concerning the nature, extent and cause of the alleged pain and limitations in her shoulder, to which she underwent surgery within about three months of the accident (*see Kellerson v Asis*, 81 AD3d 1437, 1437-1438; *Parkhill v Cleary*, 305 AD2d 1088, 1088-1089).

We further conclude that the court erred in denying plaintiff's cross motion for partial summary judgment on the issue of defendant driver's negligence in operating his vehicle at the time of the accident, which occurred in heavy traffic on the approach to a New York State Thruway toll barrier. It is well established that a " 'rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle, and imposes a duty on the operator of the moving vehicle to come forward with an adequate, [nonnegligent] explanation for the accident' " (*Borowski v Ptak*, 107 AD3d 1498, 1498; *see Kabir v County of Monroe*, 68 AD3d 1628, 1633-1634, *affd* 16 NY3d 217). Here, plaintiff met her burden of demonstrating that defendant driver was negligent and that such negligence was a proximate cause of the accident. Defendant driver, in admitting that he drove a vehicle with a missing brake pedal pad, and claiming that his foot slipped onto the accelerator when he attempted to brake, failed to present a nonnegligent explanation and thus failed to raise a triable issue of fact sufficient to defeat the cross motion (*see Kabir*, 68 AD3d at 1633-1634).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

219

KA 11-02357

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LORENZO D. WILLIAMS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, TREVETT CRISTO SALZER & ANDOLINA P.C. (ERIC M. DOLAN 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 (Melchor E. Castro, A.J.), rendered September 30, 2011. The judgment convicted defendant, upon a jury verdict, of offering a false instrument for filing in the first degree, offering a false instrument for filing in the second degree, and practicing or appearing as attorney-at-law without being admitted and registered.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to dismiss the indictment pursuant to CPL 30.30 is granted, and the indictment is dismissed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of offering a false instrument for filing in the first degree (Penal Law § 175.35), offering a false instrument for filing in the second degree (Penal Law § 175.30), and two counts of practicing or appearing as an attorney-at-law without being admitted and registered (Judiciary Law § 478). The convictions arose from defendant filing two notices of retainer and appearance with the New York State Workers' Compensation Board.

We agree with defendant that County Court erred in denying that part of his omnibus motion seeking to dismiss the indictment pursuant to CPL 30.30. Initially, we note that the People failed to preserve for our review their present contention that they discharged their duty under CPL 30.30 on March 7, 2006 inasmuch as they failed to raise it in the court below (*see People v Garcia*, 296 AD2d 509, 510; *see generally People v Pallagi*, 91 AD3d 1266, 1267) and, thus, this Court has no power to review that contention (*see* CPL 470.15 [1]; *People v Concepcion*, 17 NY3d 192, 195; *People v LaFontaine*, 92 NY2d 470, 474, *rearg denied* 93 NY2d 849).

In opposition to defendant's CPL 30.30 application, the People contended that the period from May 1, 2006 to March 9, 2011 in which defendant was absent from the jurisdiction was not chargeable to them. "A defendant must be considered absent whenever his location is unknown and he is attempting to avoid apprehension or prosecution, or his location cannot be determined by due diligence" (CPL 30.30 [4] [c] [i]). "The police are not required to search for a defendant indefinitely, but they must exhaust all reasonable investigative leads as to his or her whereabouts" (*People v Devore*, 65 AD3d 695, 697; *see People v Petrianni*, 24 AD3d 1224, 1224-1225). Here, the People "failed to prove either that the defendant was attempting to avoid apprehension or that his location could not be determined by due diligence, a necessary predicate for an exclusion based upon the defendant's absence" (*Devore*, 65 AD3d at 696). As a result, the period from May 1, 2006 to March 9, 2011 should not have been excluded from the speedy trial calculation. We therefore grant that part of defendant's omnibus motion seeking to dismiss the indictment pursuant to CPL 30.30.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

222

KA 11-00100

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT C. MOORER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, TREVETT CRISTO SALZER & ANDOLINA P.C. (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered November 17, 2010. The judgment convicted defendant, upon a jury verdict, of reckless endangerment 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, following a jury trial, convicting him of reckless endangerment in the first degree (Penal Law § 120.25) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Contrary to defendant's contention, the verdict with respect to reckless endangerment in the first degree is not against the weight of the evidence. Viewing the elements of that crime as charged to the jury, we conclude that the elements were proved beyond a reasonable doubt (*see People v Danielson*, 9 NY3d 342, 349). The evidence established that defendant fired a rifle with large caliber ammunition from a distance of 12 to 15 feet at a 45-degree angle toward a group of children playing soccer at an apartment complex and, "in doing so, he created a grave risk of death under circumstances evincing a depraved indifference to human life" (*People v Collins*, 70 AD3d 1366, 1367, *lv denied* 14 NY3d 839; *see People v Payne*, 71 AD3d 1289, 1290, *lv denied* 15 NY3d 777; *People v Lobban*, 59 AD3d 566, 566, *lv denied* 12 NY3d 818; *cf. People v Stanley*, 108 AD3d 1129, 1131, *lv denied* 22 NY3d 959). Even assuming, arguendo, that a different verdict would not have been unreasonable (*see generally People v Bleakley*, 69 NY2d 490, 495), we conclude that the jury did not fail to give the evidence the weight it should be accorded (*see Collins*, 70 AD3d at 1367).

We reject defendant's contention that County Court erred in permitting the People to offer testimony regarding a second rifle and

ammunition for both rifles, which were retrieved by the police from the open trunk of defendant's car, inasmuch as that evidence was relevant to show defendant's intent to use the weapon he had fired against another person (*see People v Madera*, 103 AD3d 1197, 1199-1200, *lv denied* 21 NY3d 1006). We further conclude that the probative value of that evidence is not outweighed by its alleged prejudicial effect (*see generally People v Dorm*, 12 NY3d 16, 19). Defendant failed to object to the testimony regarding the military capability of the ammunition and thus failed to preserve for our review his contention that the court erred in permitting that testimony on the ground that its prejudicial effect outweighed the probative value (*see People v Garcia-Santiago*, 60 AD3d 1383, 1383, *lv denied* 12 NY3d 915; *People v Eades*, 198 AD2d 905, 905, *lv denied* 83 NY2d 804). In any event, we conclude that the contention is without merit.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

223

KA 13-00554

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRICK MILLER, ALSO KNOWN AS DERERICK MILLER,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered February 8, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]). We reject defendant's contention that the conviction is not supported by legally sufficient evidence. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a "valid line of reasoning and permissible inferences [that] could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial" (*People v Williams*, 84 NY2d 925, 926; *see People v Hines*, 97 NY2d 56, 62, *rearg denied* 97 NY2d 678). Contrary to defendant's contention, there was legally sufficient evidence establishing possession of the shotgun at issue inasmuch as an eyewitness testified that he observed defendant wrap the shotgun in a towel or T-shirt and place it behind the witness's place of employment. Furthermore, "in view of the uncontradicted evidence that[,] when subsequently test-fired, the gun . . . [was] found to be operable" (*People v Cavines*, 70 NY2d 882, 883; *see People v Hailey*, 128 AD3d 1415, 1416, *lv denied* 26 NY3d 929), defendant's contention that the People failed to establish the operability of the shotgun with legally sufficient evidence is without merit.

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

further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "Great deference is accorded to the [jury]'s opportunity to view the witnesses, hear the testimony and observe demeanor" (*id.*; *see People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831; *People v Sorrentino*, 12 AD3d 1197, 1197-1198, *lv denied* 4 NY3d 748), and, here, we perceive no reason to disturb the jury's credibility determinations.

"Defendant failed to preserve for our review his challenge to the jury charge on identification inasmuch as he failed to object to that charge" (*People v Sweney*, 55 AD3d 1350, 1352, *lv denied* 11 NY3d 901; *see generally People v Robinson*, 88 NY2d 1001, 1001-1002). We decline to exercise our power to review that challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention, the showup identification procedure was not unduly suggestive, and thus the court properly denied his motion to suppress the in-court identification by the witness. Although showup procedures are generally disfavored (*see People v Ortiz*, 90 NY2d 533, 537), they are permitted where, as here, they are reasonable under the circumstances, " 'that is, when conducted in close geographic and temporal proximity to the crime[,] and the procedure used was not unduly suggestive' " (*People v Woodard*, 83 AD3d 1440, 1441, *lv denied* 17 NY3d 803, quoting *People v Brisco*, 99 NY2d 596, 597).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contention, and we conclude that it is without merit.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

226

CAF 13-02190

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

IN THE MATTER OF LINDA SPECHT, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS L. LAMOREAUX, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Monroe County (John B. Gallagher, Jr., J.), entered November 14, 2013 in a proceeding pursuant to Family Court Act article 4. The order, among other things, sentenced respondent to one year in jail.

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

Memorandum: Respondent appeals from an order sentencing him to one year in jail upon a determination by Family Court that he violated the conditions of a sentence of probation. The court had imposed the sentence of probation after finding that respondent had willfully failed to comply with an order of child support. The appeal, by which respondent challenges only the legality of the term of incarceration, has been rendered moot by the fact that respondent has served the sentence in its entirety (*see Matter of Dubois v Piazza*, 107 AD3d 1587, 1588).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

227

CAF 14-02001

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

IN THE MATTER OF YVETTE NOBLE, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

LEON C. BROWN, SR., RESPONDENT-RESPONDENT.

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

SUSAN B. MARRIS, ATTORNEY FOR THE CHILD, MANLIUS.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered October 17, 2014 in a proceeding pursuant to Family Court Act article 6. The order dismissed the amended petition.

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, Onondaga County, for further proceedings in accordance with the following memorandum: Petitioner mother commenced this proceeding seeking to modify a prior order pursuant to which respondent father had sole legal and primary physical custody of the parties' daughter, who was born in August 2000. Family Court granted the father's motion to dismiss the proceeding at the close of the mother's case on the ground that the mother failed to establish a sufficient change in circumstances to warrant an inquiry into the best interests of the child. The mother appeals.

We conclude that the court abused its discretion in denying the mother's request that it conduct a *Lincoln* hearing before ruling on the father's motion (*see Matter of Yeager v Yeager*, 110 AD3d 1207, 1209-1210; *Matter of Minner v Minner*, 56 AD3d 1198, 1199; *cf. Matter of Walters v Francisco*, 63 AD3d 1610, 1611; *see generally Matter of Lincoln v Lincoln*, 24 NY2d 270, 271-274). Such a hearing may be conducted "during or after fact-finding" (*Matter of Jessica B. v Robert B.*, 104 AD3d 1077, 1078 n), and may be used to support an allegation of a change in circumstances (*see Matter of Nelson v Morales*, 104 AD3d 1299, 1300). The decision whether to conduct such a hearing is discretionary, but it is "often the preferable course" to conduct one (*Yeager*, 110 AD3d at 1209; *see Minner*, 56 AD3d at 1199).

In this case, the child was 14 years old at the time of trial and expressed a preference to live with the mother, the Attorney for the

Child did not oppose a *Lincoln* hearing, and many of the changed circumstances alleged by the mother concerned matters within the personal knowledge of the child but not that of the mother or her witnesses. Under those circumstances, we conclude that a *Lincoln* hearing would have provided the court with " 'significant pieces of information [it needed] to make the soundest possible decision' " (*Walters*, 63 AD3d at 1611, quoting *Lincoln*, 24 NY2d at 272; *see Yeager*, 110 AD3d at 1209-1211; *Matter of Stramezzi v Scozzari*, 106 AD3d 748, 749-750; *Matter of Oddo v Collins*, 100 AD3d 1512, 1512-1513). We therefore reverse the order and remit the matter to Family Court for further proceedings and a new determination on the mother's amended petition (*see Minner*, 56 AD3d at 1199; *see generally Oddo*, 100 AD3d at 1512-1513; *Matter of Flood v Flood*, 63 AD3d 1197, 1199), and "[w]e take no position as to what the new determination should be" (*Stramezzi*, 106 AD3d at 750).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

229

CAF 15-00199

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

IN THE MATTER OF LESLEY SHEPHARD,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ERICK O. RAY, RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, HANCOCK ESTABROOK, LLP, SYRACUSE (JAMES P. YOUNGS OF COUNSEL), PRO BONO APPEALS PROGRAM, ALBANY, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Monroe County (Paul M. Riordan, R.), entered December 8, 2014 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

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

Memorandum: Respondent appeals from an order of protection issued upon a finding that he committed a family offense, i.e., that he engaged in conduct that would constitute the offense of harassment in the second degree (Penal Law § 240.26 [3]). "A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person . . . [h]e or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose" (*id.*). The "intent [element] may be inferred from conduct as well as the surrounding circumstances" (*People v Kelly*, 79 AD3d 1642, 1642, *lv denied* 16 NY3d 832 [internal quotation marks omitted]). We agree with respondent that the evidence of intent is legally insufficient and, thus, petitioner did not meet her burden of establishing by a fair preponderance of the evidence that respondent's conduct constituted the alleged offense (*see* Family Ct Act § 832).

Initially, we note that "the expiration of the order of protection does not moot the appeal because the order still imposes significant enduring consequences upon respondent, who may receive relief from those consequences upon a favorable appellate decision" (*Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 671; *see Matter of Fisher v Hofert*, 126 AD3d 1391, 1391).

The Referee found that respondent committed a family offense,

i.e., harassment in the second degree, based upon the Referee's conclusion that respondent told petitioner during a lengthy telephone call that he did not know what he would do if he saw her with another man, sent her two or three text messages stating that he hoped to reconcile with her, and then left on petitioner's car several mementos that petitioner had given him along with the message that he would "never forget [her], bye." Notwithstanding the Referee's implicit finding that petitioner was upset by the communications, "her reaction is immaterial in establishing [respondent]'s intent" (*People v Caulkins*, 82 AD3d 1506, 1507). Furthermore, although "[t]he requisite intent may be inferred from the surrounding circumstances" (*Matter of Shana SS. v Jeremy TT.*, 111 AD3d 1090, 1091, *lv denied* 22 NY3d 862; *see Christina KK. v Kathleen LL.*, 119 AD3d 1000, 1002), the circumstances here failed to establish that respondent acted with the requisite intent. Even crediting the Referee's credibility determinations that respondent engaged in the conduct described above, we conclude that such conduct was comprised of relatively innocuous acts that were insufficient to establish that respondent engaged in a course of conduct with the intent to harass, alarm or annoy petitioner (*see Matter of Christina MM. v George MM.*, 103 AD3d 935, 936-937). Inasmuch as the Referee concluded that petitioner failed to establish by a fair preponderance of the evidence that respondent had committed either of two other family offenses alleged in the petition, we dismiss the petition. Respondent's remaining contention is moot in light of our determination.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

233

CA 15-00896

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

DAVID MADDEX AND YVONNE MADDEX,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

E.E. AUSTIN & SON, INC., DEFENDANT-RESPONDENT.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (A. PETER SNODGRASS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (KENNETH A. PATRICIA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered March 18, 2015. The order denied the motion of plaintiffs for judgment pursuant to CPLR 4401 and for judgment pursuant to CPLR 4404 (a).

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

Memorandum: In this Labor Law § 240 (1) action, plaintiffs sought a directed verdict pursuant to CPLR 4401 at the close of proof, asserting that they were entitled to a determination as a matter of law that defendant violated section 240 (1) by failing to provide a proper safety device to David Maddex (plaintiff). Plaintiffs moved for the same relief pursuant to CPLR 4404 (a) following a jury verdict in defendant's favor and, in the alternative for an order directing a new trial on the ground that the verdict is against the weight of the evidence. We conclude that Supreme Court properly denied the motions.

Plaintiff was injured when he and two coworkers attempted to unload a gang box at the work site from a "cube van." Plaintiff remained in the bed of the van and held a handle of the gang box, acting as a counterweight, while the coworkers lowered the approximately 500-pound gang box toward the ground, approximately five feet below the bed of the van. The evidence established that the force of gravity caused the gang box to slide to the pavement below and flip over onto its top. Before plaintiff could release the handle, he was propelled out of the van, over the gang box, and onto the pavement approximately 10 to 15 feet from the van. Plaintiffs sought a directed verdict at the close of proof on the grounds that plaintiff was injured as a result of the application of the force of gravity and that defendant failed to provide any safety device as

required by section 240 (1). Although we agree with plaintiffs that the accident falls within the purview of section 240 (1) as a gravity-related accident (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603-604), we conclude that the court properly determined, viewing the evidence in the light most favorable to defendant, that there was a rational basis by which the jury could find in favor of defendant (*see Brown v Concord Nurseries, Inc.* [appeal No. 2], 53 AD3d 1067, 1067-1068). Indeed, we note that the evidence introduced by plaintiffs at trial presented conflicting views as to the availability of a safety device and, under such circumstances, there was no basis for the court to grant plaintiffs a directed verdict pursuant to CPLR 4401. Likewise, the court properly denied that part of plaintiffs' motion seeking judgment notwithstanding the verdict pursuant to CPLR 4404 (a).

We further conclude that the court properly denied that part of plaintiffs' motion alleging that the verdict is against the weight of the evidence. It is well settled that "[a] verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence" (*Sauter v Calabretta*, 103 AD3d 1220, 1220 [internal quotation marks omitted]), and that is not the case here. Furthermore, a court should not substitute its judgment for that of the jury where, as here, the verdict is one that could have been rendered by reasonable people upon conflicting evidence, and great deference is accorded to the jury's credibility determinations (*see id.*).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

240

CA 14-01773

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

WENDOVER FINANCIAL SERVICES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JO-ANN RIDGEWAY, AS EXECUTRIX AND BENEFICIARY UNDER THE LAST WILL AND TESTAMENT OF AMELIA DONVITO, ALSO KNOWN AS AMELIA C. DONVITO, DECEASED, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS.

ROSICKI, ROSICKI & ASSOCIATES, P.C., PLAINVIEW (EDWARD RUGINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SCACCIA LAW FIRM, SYRACUSE (DANTE M. SCACCIA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered June 23, 2014. The order granted the motion of defendant-respondent to dismiss the complaint against her.

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

Memorandum: Plaintiff commenced this action to foreclose a reverse mortgage executed by decedent in 1999. "Reverse mortgages are designed to allow elderly homeowners to borrow money against the accumulated equity in their homes and, unlike traditional mortgages, 'the borrower in a reverse mortgage receives periodic payments (or a lump sum) and need not repay the outstanding loan balance until certain triggering events occur' . . . The triggering event generally involves the death of the borrower or the sale of the home" (*OneWest Bank, FSB v Smith*, 135 AD3d 1063, 1063). Here, the triggering event was the death of decedent on May 12, 2006. In a prior, related appeal, we concluded that a prior foreclosure action that plaintiff commenced against decedent was a nullity because " 'the dead cannot be sued' " (*Wendover Fin. Servs. v Ridgeway*, 93 AD3d 1156, 1157). We also concluded that the caption could not properly be amended pursuant to CPLR 305 (c) to substitute decedent's estate for decedent because decedent was never a party to the action (*id.*). Plaintiff thereafter commenced the instant action on December 10, 2013.

Contrary to plaintiff's contention, Supreme Court properly granted the motion of defendant-respondent (defendant) pursuant to CPLR 3211 (a) (5) and dismissed the complaint against her as barred by

the six-year statute of limitations (*see* CPLR 213 [4]). "[D]efendant had 'the initial burden of establishing prima facie that the time in which to sue ha[d] expired' . . . , and thus was required 'to establish . . . when the plaintiff's cause of action accrued' " (*Larkin v Rochester Hous. Auth.*, 81 AD3d 1354, 1355). Defendant established that, pursuant to the mortgage agreement, "the principal sum and interest shall become due upon," inter alia, the death of the mortgagor, i.e., decedent, which occurred on May 12, 2006, and that defendant received a notice of default and demand for payment sent from a nonparty that serviced the mortgage on June 29, 2006. "[T]he statute of limitations . . . was triggered when the party that was owed money had the right to demand payment, not when it actually made the demand" (*Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765, 771). Thus, the cause of action accrued on May 12, 2006, even if plaintiff was unaware that the event entitling it to relief had occurred (*see Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 403; *Gower v Weinberg*, 184 AD2d 844, 845). "Statutes of [l]imitation are statutes of repose representing a *legislative* judgment that . . . occasional hardship . . . is outweighed by the advantage of barring stale claims" (*Ely-Cruikshank Co.*, 81 NY2d at 404 [internal quotation marks omitted]). We note that, even following dismissal of its first action by this Court as a nullity, plaintiff delayed in commencing the instant action, and thus "there is no injustice on the facts of this case" (*id.*).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

241

KA 13-00047

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERARD ALLEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered November 7, 2012. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that his plea was not voluntarily, knowingly, and intelligently entered because a potential defense was raised prior to the plea proceeding. Defendant failed to preserve that contention for our review because he did not move to withdraw his plea or to vacate the judgment of conviction, and this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666) inasmuch as nothing in the plea colloquy calls into question the voluntariness of the plea or casts significant doubt on defendant's guilt (*see People v Wilson*, 115 AD3d 1229, 1229, *lv denied* 23 NY3d 969). To the extent that defendant contends that the potential defense was raised in the presentence report, defendant likewise failed to preserve that contention for our review (*see People v Young*, 281 AD2d 950, 950, *lv denied* 96 NY2d 909). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

242

KA 14-00078

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BANGALY CHELLEY, ALSO KNOWN AS DENIS CHELLEY,
DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (M. William Boller, A.J.), entered December 3, 2013. The order summarily denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from an order summarily denying his motion pursuant to CPL 440.10 to vacate the judgment convicting him of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), contending that he was entitled to a hearing on his claim that he was deprived of effective assistance of counsel at trial. In denying the motion, Supreme Court properly concluded that most of defendant's challenges to his attorney's performance are based on matters in the record that were, or could have been, raised on defendant's direct appeal. Defendant was therefore not entitled to a hearing on those allegations of ineffective assistance of counsel (*see* CPL 440.10 [2] [a], [c]; *People v Vigliotti*, 24 AD3d 1216, 1216-1217).

With respect to the alleged instance of ineffective assistance of counsel based on matters outside the record, defendant contends that his attorney was ineffective because he failed to call one of the witnesses listed on defendant's alibi notice. In support of his motion, however, defendant "neither submitted an affidavit from [the witness] to show that [s]he would have corroborated [defendant's alibi], nor explained his failure to do so" (*People v Ozuna*, 7 NY3d

913, 915; *see generally People v Ford*, 46 NY2d 1021, 1023). In addition, the record establishes that defense counsel called the other two witnesses listed on the alibi notice, and there is no indication that the testimony of the uncalled witness would have been anything but cumulative (*see People v Fax*, 232 AD2d 734, 736, *lv denied* 89 NY2d 942). Under the circumstances, defendant failed to demonstrate " 'the absence of strategic or other legitimate explanations' " for defense counsel's failure to call the witness (*People v Benevento*, 91 NY2d 708, 712). In sum, "[c]onsidering all of the circumstances, including that defendant's motion was decided by a [justice] who, having presided over defendant's trial, was familiar with the facts . . . , we cannot conclude that [Supreme] Court abused its discretion in denying the motion without a hearing" (*People v Hoffler*, 74 AD3d 1632, 1635, *lv denied* 17 NY3d 859).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

244

KA 14-00478

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DELONCE BRAILSFORD, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered December 20, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted strangulation in the second degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted strangulation in the second degree (Penal Law §§ 110.00, 121.12) and criminal possession of a weapon in the fourth degree (§ 265.01 [2]). Although we agree with defendant that the waiver of the right to appeal does not encompass his challenge to the severity of the sentence (*see People v Peterson*, 111 AD3d 1412, 1412), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

246

KA 15-01274

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN R. DETTELIS, DEFENDANT-APPELLANT.

MICHAEL L. D'AMICO, BUFFALO, FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (AMBER L. KERLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered January 21, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the declaration of delinquency is vacated and the sentence of probation is reinstated.

Memorandum: On appeal from a judgment revoking his sentence of probation imposed upon his conviction of driving while intoxicated (Vehicle and Traffic Law § 1192 [2]) and imposing a sentence of incarceration, defendant contends that County Court erred in finding that he violated a condition of his probation. We agree.

" 'A violation of probation proceeding is summary in nature and a sentence of probation may be revoked if the defendant has been afforded an opportunity to be heard' " (*People v Wheeler*, 99 AD3d 1168, 1169, *lv denied* 20 NY3d 989). The People have the burden of establishing by a preponderance of the evidence that defendant violated the terms and conditions of his probation (*see* CPL 410.70 [3]; *Wheeler*, 99 AD3d at 1169-1170; *People v Cangialosi*, 277 AD2d 897, 897).

Here, the evidence at the hearing established that defendant had an argument with a court clerk at the town courthouse over obtaining access to certain paperwork, which resulted in defendant being asked to leave the courthouse. Following that incident, a police officer, who expressly disclaimed that he was conducting an investigation, was dispatched to defendant's residence to advise defendant not to return to the courthouse and to have his attorney contact the court going forward. With respect to the interaction at his residence, defendant testified that the police officer inquired as to what had occurred at

the courthouse, acted as though he was there to assist defendant, and thereafter accompanied defendant and his wife back to the courthouse to facilitate their ability to vote because it was election day. We defer to the court's determination crediting the testimony of defendant's probation officer that defendant did not notify the probation department about his contact with the police officer (*see Wheeler*, 99 AD3d at 1170; *People v Perna*, 74 AD3d 1807, 1807, *lv denied* 17 NY3d 716). Contrary to the People's contention, however, the terms of defendant's probation did not require that he notify the probation department about "any contact" with the police (*cf. People v Murray*, 12 AD3d 838, 839, *lv denied* 4 NY3d 766). Rather, the subject probation condition required that defendant "notify [a] [p]robation [o]fficer within 48 hours if [he was] arrested or questioned by any law enforcement officials." Under the particular facts of this case, we conclude that the evidence at the hearing does not establish that the interaction between defendant and the police officer amounted to defendant being "questioned," which would have triggered his obligation to notify a probation officer. The court's finding that defendant violated a condition of his probation is therefore not supported by a preponderance of the evidence (*see* CPL 410.70 [3]; *People v Greiner*, 256 AD2d 1132, 1132, *lv denied* 93 NY2d 873; *cf. People v Pomales*, 37 AD3d 1098, 1098, *lv denied* 8 NY3d 949).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

247

KA 12-01252

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COREY T. KIMMY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered March 26, 2012. The judgment convicted defendant, upon a jury verdict, of attempted kidnapping in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of attempted kidnapping in the second degree (Penal Law §§ 110.00, 135.20), defendant contends that he was deprived of his right to present a defense when, during defense counsel's summation, County Court instructed the jury to disregard a comment made by defense counsel that was central to the defense. Defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]). In any event, we conclude that any error in the court's instruction is harmless inasmuch as the court immediately thereafter "permitted defendant to make the same point, expressed in different language" (*People v Vasquez*, 288 AD2d 17, 17, *lv denied* 97 NY2d 734).

We also reject defendant's related contention that he was deprived of his right to present a defense when, during cross-examination of a prosecution witness, the court precluded defense counsel from referring to the initial police description of the incident as an assault or an attempted assault, as opposed to an attempted kidnapping. The initial description of the incident was given before defendant was arrested and police investigation was complete and thus was irrelevant to the issues to be determined by the jury. Defense counsel was not otherwise prevented from asserting that defendant committed nothing more than a mere assault. Indeed, that argument was made repeatedly at trial by defense counsel.

Defendant failed to preserve for our review his contention that

the evidence is legally insufficient to establish that he attempted to kidnap the victim inasmuch as his motion for a trial order of dismissal was not directed at that alleged defect in the proof (*see generally People v Gray*, 86 NY2d 10, 19). In any event, we reject that contention. The evidence at trial established that defendant left his vehicle running in the middle of the street, with the door open, and grabbed and assaulted the 13-year-old victim in a sexual manner as she tried to ride her bicycle around him. Although defendant, who had been seen "cruising" the neighborhood at the same time of day in the two weeks prior to the crime, ran away when the victim resisted and yelled for help, he later gave a statement to police that he intended to "take" the victim "depending on how she reacted" to his assault. Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences that could lead a rational person to the conclusion reached by the jury based on the evidence at trial, i.e., that defendant attempted to kidnap the victim (*see generally People v Bleakley*, 69 NY2d 490, 495). We further conclude that the verdict is not against the weight of the evidence (*see generally id.*). 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 it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally People v Ohse*, 114 AD3d 1285, 1286-1287, *lv denied* 23 NY3d 1041).

We have reviewed defendant's remaining contentions and conclude that none requires reversal or modification of the judgment.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

248

CAF 15-01315

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF RUSTY W. TUTTLE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TRACY S. TUTTLE, RESPONDENT-APPELLANT.

BRUCE R. BRYAN, SYRACUSE, FOR RESPONDENT-APPELLANT.

SWARTZ LAW FIRM, WATERTOWN, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR PETITIONER-RESPONDENT.

MICHELLE M. SCUDERI, ATTORNEY FOR THE CHILD, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Diana D. Trahan, R.), entered April 29, 2015 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded primary physical residence of the parties' child to petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that granted petitioner father's petition seeking modification of the custody and visitation provisions of the parties' judgment of divorce. The mother contends that Family Court erred in considering events predating the divorce judgment in determining whether there was a significant change in circumstances to warrant an inquiry into the best interests of the child. We reject that contention. Here, the parties' oral stipulation regarding custody was incorporated into the judgment of divorce nine months later. Where a party seeks modification of a custody order entered upon the parties' stipulation, the party must demonstrate a change in circumstances from the date of the stipulation, and here the stipulation predates the divorce judgment (*see Matter of Hight v Hight*, 19 AD3d 1159, 1160). Contrary to the mother's contention, the court properly concluded that there had been a sufficient change in circumstances whether measured from the date of the oral stipulation or the date of the judgment of divorce (*see generally* § 652 [b]; *Hight*, 19 AD3d at 1160). "[W]hile not dispositive, the express wishes of older and more mature children can support the finding of a change of circumstances" (*Matter of Burch v Willard*, 57 AD3d 1272, 1273), and here the Attorney for the Child advised the court of her client's strong preference to live with her

father. In addition, the mother's efforts to undermine the father's relationship with the child and his participation in decisions concerning the child's welfare constitute a sufficient change in circumstances to warrant inquiry into the child's best interests (*see Matter of Cornick v Floreno*, 130 AD3d 1170, 1171-1172; *Matter of O'Loughlin v Sweetland*, 98 AD3d 983, 984).

Also contrary to the mother's contention, there is a sound and substantial basis in the record for the court's determination that it is in the child's best interests to award the father primary physical residence of the child and to award visitation with the mother (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174). Although the court found that both parents were fit and had the financial resources to support the child, the court determined that the mother's ability to foster the child's intellectual and emotional development was called into question by her lack of awareness of or concern for the child's declining performance in school. Most significantly, the court determined that the mother attempted to undermine the father's relationship with the child, while the father did not engage in such behavior. " 'It is well settled . . . that [a] concerted effort by one parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent' " (*Matter of LaMay v Staves*, 128 AD3d 1485, 1485).

The mother failed to preserve for our review her further contention that she was denied a fair hearing (*see Matter of Tracy v Tracy*, 309 AD2d 1252, 1253), and her contention that the court erred in awarding unreasonably limited visitation also is not properly before us because it is based upon matters outside the record on appeal (*see Matter of Gridley v Syrko*, 50 AD3d 1560, 1561).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

251

CAF 14-02043

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF RUSSELL D. BROOKINS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CATHERINE MARY MCCANN, RESPONDENT-APPELLANT.

MARY R. HUMPHREY, NEW HARTFORD, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered September 29, 2014 in a proceeding pursuant to Family Court Act article 4. The order revoked a suspended sentence and committed respondent to jail for a period of six months for her willful failure to obey a child support order.

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

Memorandum: Respondent appeals from an order revoking a suspended sentence and committing her to jail for a period of six months for her willful failure to obey a child support order. In a prior order, Family Court confirmed the Support Magistrate's determination that the violation of the child support order was willful and imposed a sentence of six months, which it suspended on the condition that respondent pay $75 per month, commencing on a certain date. It is undisputed that respondent failed to make the first monthly payment, but instead made two payments on the date on which the second payment was due. Respondent's contention that the court erred in revoking the suspended sentence and committing her to jail is moot inasmuch as she has served her sentence (*see Matter of Davis v Williams*, 133 AD3d 1354, 1355; *Matter of Ontario County Support Collection Unit v Falconer*, 132 AD3d 1354, 1355). Respondent's remaining contentions are not properly before us because she failed to appeal from the order confirming the determination that her violation of the child support order was willful (*see Davis*, 133 AD3d at 1355).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

252

CAF 14-00048

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF GREGORY O. BRANDON, SR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BOBBIE L. KING, RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Gail A. Donofrio, J.), entered December 12, 2013 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, modified a prior consent order by directing that the mother have limited supervised visitation with the parties' child, and otherwise continued joint custody and primary physical residence with petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, modified a prior consent order by directing that the mother have limited supervised visitation with the parties' child, and otherwise continued joint custody and primary physical residence with petitioner father. The mother does not challenge Supreme Court's determination that there was a significant change in circumstances, and thus we address only the issue whether the court's custody and visitation determination is in the child's best interests (*see Matter of Van Court v Wadsworth*, 122 AD3d 1339, 1340, *lv denied* 24 NY3d 916). Although the court "erred in failing 'to set forth those facts essential to its decision' . . . , 'the record is sufficiently complete for us to make our own findings of fact in the interests of judicial economy and the well-being of the child[ ]' " (*Matter of Williams v Tucker*, 2 AD3d 1366, 1367, *lv denied* 2 NY3d 705; *see Matter of Mathewson v Sessler*, 94 AD3d 1487, 1489, *lv denied* 19 NY3d 815). Upon our review of the relevant factors (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174; *Fox v Fox*, 177 AD2d 209, 210), we conclude that it is in the child's best interests that the father retain primary physical residence and that the mother have limited supervised visitation.

Here, the mother admitted that she had been on probation following a conviction of endangering the welfare of a child for

leaving the child unattended, that she smoked marihuana while on probation, and that she was arrested for possessing marihuana after the police responded to a disturbance that occurred when the mother went to the father's residence in violation of an order of protection. The mother also admitted that she pleaded guilty to harassment following a "road rage" incident that resulted in a physical altercation outside the vehicle while the child was in the back seat. In addition, the record establishes that the mother was unable to maintain a stable and safe home environment inasmuch as she moved frequently, and she resorted to heating an apartment with an open oven. Moreover, although the mother often volunteered in the child's preschool classroom and visited him during lunch, school staff members testified that the mother was disruptive and argumentative during some of the visits, and that there were instances of inappropriate treatment of the child. The record establishes that the father also engaged in various forms of improper conduct, often involving mistreatment of the mother, but we nevertheless conclude that the mother's behavior consistently placed the child at risk, whereas the father has provided a more stable home environment and is better able to provide for the child's emotional and intellectual development (*see generally Matter of St. Pierre v Burrows*, 14 AD3d 889, 891-892).

With respect to the mother's contention that she was denied effective assistance of counsel, we note that, " 'because the potential consequences are so drastic, the Family Court Act affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings' " (*Matter of Brown v Gandy*, 125 AD3d 1389, 1390). We are unable to review the mother's contention to the extent that it involves matters outside the record on appeal (*see Matter of Chamas v Carino*, 119 AD3d 564, 565). To the extent that the record permits review of her contention, we conclude that the mother did not " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712; *see Brown*, 125 AD3d at 1390-1391).

Finally, the mother's contention that the court violated her constitutional rights is not preserved for our review (*see Matter of Beebe v Beebe*, 298 AD2d 843, 843-844) and, in any event, it lacks merit.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

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CA 15-01290

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

JEAN BRIDENBAKER AND GARRY K. CONNORS, AS ADMINISTRATORS OF THE ESTATE OF MATTHEW RYAN CONNORS, DECEASED, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, BUFFALO POLICE DEPARTMENT AND OFFICER JAMES T. REESE, DEFENDANTS-APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HOGAN WILLIG, PLLC, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered October 29, 2014. The order, among other things, denied defendants' motion for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages arising from the death of their son (decedent), who was shot and killed by defendant Officer James T. Reese, an officer employed by defendant Buffalo Police Department. The amended complaint asserts causes of action for wrongful death, conscious pain and suffering, negligent hiring, training, and supervision, battery, and the violation of decedent's constitutional and civil rights pursuant to 42 USC § 1983, based on the alleged use of excessive force by Officer Reese in attempting to arrest decedent for robbery. Defendants moved for summary judgment dismissing the amended complaint, and plaintiffs moved to compel production of Reese's entire employment file for in camera review. Supreme Court denied defendants' motion and granted plaintiffs' motion. We affirm.

The record establishes that, shortly before he was shot by Reese, decedent was seen by several witnesses brandishing what appeared to be a large handgun while robbing a pharmacy. Witnesses saw decedent leaving the scene of the robbery in a vehicle, the license plate number of which was conveyed to police. Reese and other officers responded to the address to which the vehicle was registered, and Reese was informed that decedent had just arrived and had run to his

upstairs apartment. According to Reese, he followed decedent into his apartment, and decedent spun around and pointed what appeared to be a large handgun at him. Reese grabbed the gun with his left hand and a struggle ensued, during which decedent allegedly yelled that Reese was "going to have to kill" him. As decedent turned, Reese began to lose his grip on the gun and started to fall. Reese, allegedly fearing for his life, fatally shot decedent in the back with his service weapon, which was in his right hand. The weapon in decedent's hand turned out to be a pellet gun.

We conclude that the court properly denied defendants' motion for summary judgment dismissing the amended complaint. Defendants have abandoned on appeal any contention with respect to the negligent hiring, training, and supervision cause of action (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984), and the remaining causes of action are based on the alleged excessiveness of the force used by Reese in his confrontation with decedent. "Claims that law enforcement personnel used excessive force in the course of an arrest are analyzed under the Fourth Amendment and its standard of objective reasonableness" (*Ostrander v State of New York*, 289 AD2d 463, 464; *see Williams v City of New York,* 129 AD3d 1066, 1066). "The use of force must be judged 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,' recognizing that 'police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation' " (*Holland v City of Poughkeepsie*, 90 AD3d 841, 844, quoting *Graham v Connor*, 490 US 386, 396-397). The decision to use deadly force will be deemed objectively reasonable if the officer has probable cause to believe that the person against whom it is used " 'poses a significant threat of death or serious physical injury to the officer or others' " (*Williams*, 129 AD3d at 1067). "If found to be objectively reasonable, the officer's actions are privileged under the doctrine of qualified immunity" (*Holland*, 90 AD3d at 844).

Defendants, relying on Reese's version of the confrontation, met their initial burden of demonstrating as a matter of law that Reese's use of deadly force against decedent was objectively reasonable and protected by qualified immunity. We conclude, however, that the court properly denied defendants' motion because plaintiffs raised a triable issue of fact. In cases such as this, "given the difficult problem posed by a suit for the use of deadly force, in which 'the witness most likely to contradict [the police officer's] story—the person shot dead—is unable to testify[,] . . . the court may not simply accept what may be a self-serving account by the police officer.' . . . Rather, the court must also consider 'circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably' " (*O'Bert v Vargo*, 331 F3d 29, 37). Furthermore, it is well settled that our function on a motion for summary judgment is issue finding, not issue determination (*see e.g. Potter v Polozie*, 303 AD2d 943, 944).

As plaintiffs contend, there is evidence in the record that

decedent, who had suffered allegedly disabling back injuries in a car accident, may have been physically incapable of engaging in the struggle described by Reese. The record also includes a statement from another police officer, in which he stated that Reese had told him that decedent beat Reese with the gun. That statement contradicts Reese's testimony that he immediately grabbed the gun when decedent spun around and faced him with it. Further, Reese's captain allegedly told decedent's father immediately after the shooting that the shooting had been an "accident," as opposed to a justified shooting. Finally, although Reese testified that he had never met decedent before the shooting, other witnesses asserted not only that Reese had met decedent, but that he had beaten decedent and harassed him in the months leading to the shooting because of an altercation that decedent allegedly had with Reese's wife.

Finally, we conclude that the court did not abuse its "broad discretion to control discovery" by granting plaintiffs' motion to compel production of Reese's entire personnel file (*Voss v Duchmann*, 129 AD3d 1697, 1698).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

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CA 15-00588

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF THE APPLICATION OF MAUREEN BOSCO, EXECUTIVE DIRECTOR, OF CENTRAL NEW YORK PSYCHIATRIC CENTER, PETITIONER-RESPONDENT, MEMORANDUM AND ORDER

FOR AN ORDER AUTHORIZING THE INVOLUNTARY TREATMENT OF AWET G., A PATIENT AT CENTRAL NEW YORK PSYCHIATRIC CENTER, CONSECUTIVE NO. 595912, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (MICHAEL H. MCCORMICK OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered March 17, 2015. The order granted the petition seeking authorization to administer medication to respondent over his objection.

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

Memorandum: Respondent appeals from an order granting the petition seeking authorization to administer medication to respondent over his objection. Respondent contends that the order authorizing medication over objection was improperly granted pursuant to 14 NYCRR 527.8 inasmuch as he had been voluntarily taking his medications prior to the hearing. We agree that Supreme Court erred in granting the order inasmuch as the record establishes that respondent withdrew his objection to the treatment approximately two months before the petition was filed (*see* 14 NYCRR 527.8 [c] [6]; *see also* 14 NYCRR 527.8 [c] [5] [ii] [b] [3]; *see generally Matter of Jay S. [Barber]*, 118 AD3d 803, 805).

Frances E. Cafarell

Entered: March 25, 2016

Clerk of the Court

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

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CA 15-00501

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF ELAM SAND & GRAVEL CORP.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF WEST BLOOMFIELD ZONING BOARD OF
APPEALS, SUE S. STEWART, NEIGHBORS TO SUPPORT
WEST BLOOMFIELD, AND CITIZENS TO SUPPORT WEST
BLOOMFIELD, RESPONDENTS-RESPONDENTS.

HOPKINS SORGI & ROMANOWSKI PLLC, EAST AURORA (PETER SORGI OF COUNSEL), FOR PETITIONER-APPELLANT.

BOYLAN CODE LLP, ROCHESTER (DAVID K. HOU OF COUNSEL), FOR RESPONDENT-RESPONDENT TOWN OF WEST BLOOMFIELD ZONING BOARD OF APPEALS.

NIXON PEABODY LLP, ROCHESTER (TERENCE L. ROBINSON, JR., OF COUNSEL), FOR RESPONDENTS-RESPONDENTS SUE S. STEWART, NEIGHBORS TO SUPPORT WEST BLOOMFIELD, AND CITIZENS TO SUPPORT WEST BLOOMFIELD.

Appeal from a judgment (denominated order) of the Supreme Court, Ontario County (Craig J. Doran, A.J.), entered November 28, 2014 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of respondent Town of West Bloomfield Zoning Board of Appeals (ZBA) denying its application for a use variance to operate a sand and gravel mine. Contrary to petitioner's contention, Supreme Court properly dismissed the petition upon determining that the denial of the application for a use variance had a rational basis, and was not arbitrary and capricious.

It is undisputed that, at the time petitioner entered into a lease with the landowner, mining was a permitted use provided that a special use permit was obtained. However, before a special use permit was issued to petitioner, the West Bloomfield Town Board passed a resolution adopting a moratorium on sand and gravel mining operations in the Town and ultimately adopted a local law that, inter alia, prohibited mining in the R-1 Low Density district where the subject property is located. Petitioner then applied for a use variance.

After considering the information provided by petitioner, as well as that provided by an engineer retained by the ZBA to review the application and by opponents of the application, the ZBA determined, inter alia, that petitioner failed to establish three of the four factors constituting the unnecessary hardship required for the issuance of a use variance (*see* Town Law § 267-b [2] [b]). Specifically, the ZBA determined that petitioner failed to establish that the property could not realize a reasonable return with permitted uses; that the hardship was unique to the property and does not apply to a substantial portion of the district or neighborhood; and that issuing the variance would not alter the essential character of the neighborhood (*see id.*).

It is well established that "[c]ourts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure . . . 'It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them' " (*Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613). We conclude that the court properly determined that the ZBA's determination has a rational basis and is not arbitrary and capricious (*see* CPLR 7803 [3]). Contrary to petitioner's contention, we further conclude that the determination is not affected by an error of law inasmuch as the ZBA properly applied the factors constituting unnecessary hardship set forth in Town Law § 267-b (2) (b). We note that, although petitioner provided expert testimony with respect to those factors, "it is the 'sole province of the ZBA . . . as administrative factfinder' to resolve issues of credibility" (*Matter of HoliMont, Inc. v Village of Ellicottville Zoning Bd. of Appeals*, 112 AD3d 1315, 1315). In view of our determination that the ZBA's determination with respect to Town Law § 267-b (2) (a) was not affected by an error of law, we need not address petitioner's contention concerning the Town Code.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

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CA 15-01322

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

WILLIAM J. NICHOLAS AND JOANN NICHOLAS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

WAL-MART STORES, INC.,
DEFENDANT-RESPONDENT-APPELLANT,
MLB CONTRACTORS, INC., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANT-APPELLANT.

O'CONNOR, O'CONNOR, BRESEE & FIRST, P.C., ALBANY (CAROL E. CRUMMEY OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

DOLCE PANEPINTO, P.C., BUFFALO (ANNE M. WHEELER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered January 29, 2015. The order, inter alia, granted in part the motion of defendant Wal-Mart Stores, Inc. for summary judgment with respect to the Labor Law § 200 claim and common law negligence cause of action against it and denied the motion of defendant MLB Contractors, Inc. for summary judgment dismissing the complaint and any cross claims against it.

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

Memorandum: We affirm for reasons stated in the decision at Supreme Court. We write only to note that, "[w]here, as here, the worker's injuries result from a dangerous condition at the work site rather than from the manner in which the work is performed, the general contractor or owner 'may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and [has created or has] actual or constructive notice of the dangerous condition' " (*Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1248). Here, there is no dispute that defendant MLB Contractors, Inc. did not create the dangerous condition, but we conclude that it failed to meet its initial burden of establishing with respect to the common-law negligence cause of action and the Labor Law § 200 claim against it that it did not have control over the work site, or that it lacked actual or constructive notice of the allegedly dangerous condition

(*see Carrasco v Weissman*, 120 AD3d 531, 533; *see also Bannister v LPCiminelli, Inc.*, 93 AD3d 1294, 1295).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

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CA 15-01309

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

BETT A. STRANSKY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY DIPALMA AND PAMELA DIPALMA,
DEFENDANTS-APPELLANTS.

FREID AND KLAWON, WILLIAMSVILLE (ADAM B. CONNERS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JOSEPH G. MAKOWSKI, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered October 20, 2014. The order and judgment granted the motion of plaintiff for summary judgment in lieu of complaint, denied the cross motion of defendants for summary judgment dismissing the action and awarded money damages to plaintiff.

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

Memorandum: Plaintiff commenced this action by way of a motion for summary judgment in lieu of complaint seeking judgment on an unpaid promissory note executed by defendants in the amount of $35,000. Defendants cross-moved for summary judgment dismissing the action, contending that the interest rate on the promissory note is usurious as a matter of law under General Obligations Law § 5-501 and Banking Law § 14-a. We agree with defendants that Supreme Court erred in granting the motion but conclude that the court properly denied the cross motion. We therefore modify the order and judgment accordingly.

Pursuant to the note, dated August 29, 2011, defendants promised to pay plaintiff $35,000 plus interest of 15%. The note required only monthly interest payments until April 12, 2012, when defendants were required to pay the balance of the note in full. Plaintiff commenced this action in May 2014, alleging that defendants failed to pay the sums due under the note and seeking damages of $35,000 plus interest. In support of defendants' cross motion for summary judgment dismissing the action, defendant Jeffrey DiPalma asserted in an affidavit that, although the face amount of the note is $35,000, the actual amount of the loan was $30,000, and the additional $5,000 was withheld by plaintiff as a "loan fee." Defendants also submitted, inter alia, a

copy of a check payable to them from plaintiff, dated August 29, 2011, in the amount of $30,000. According to defendants, the actual interest rate on the $30,000 loan is 17.5%, which exceeds the 16% maximum rate permitted by law. In opposition to the cross motion, plaintiff did not dispute defendants' assertions about the $5,000 loan fee. Instead, plaintiff argued that the promissory note is complete on its face, and defendants therefore may not raise an issue of fact by parol evidence. Plaintiff further argued that defendants' evidence was hearsay in nature and thus inadmissible. We conclude that there is an issue of fact whether the interest rate is usurious, and that neither party is entitled to summary judgment at this stage of the proceedings. In accordance with CPLR 3213, "the moving and answering papers shall be deemed the complaint and answer, respectively."

We reject at the outset plaintiff's contention that the evidence submitted by defendants should not be considered because the note is clear and unambiguous on its face. Although parol evidence is generally inadmissible to vary the terms of a promissory note that is otherwise clear on its face (*see e.g. Fleet Bank of N.Y. v Rozanski*, 216 AD2d 938, 938, *lv denied* 87 NY2d 804; *see generally W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162), here, "defendants have the burden of establishing their affirmative defense of usury, and it is well settled that parol evidence is admissible to show the illegal nature of a contract" (*Pink v Kaplan, Inc.*, 252 App Div 490, 492; *see Von Haus v Soule*, 146 App Div 731, 734; *Aaron v Mattikow*, 146 F Supp 2d 263, 266-267). Indeed, if the law were otherwise, the usury laws could easily be avoided.

Thus, in view of the parol evidence with respect to plaintiff's retention of fees, defendants raised an issue of fact whether the interest rate was greater than 16% and therefore usurious (*see* General Obligations Law § 5-501 [1]; Banking Law § 14-a [1]). Because fees retained by lenders are included as interest (*see* General Obligations Law § 5-501 [2]; Banking Law § 14-a [2]), the $5,000 allegedly retained by plaintiff would make the interest rate on the note 16.67% ($5,000/$30,000) based on that retained fee alone, and even greater if the *actual* interest charged were considered (*see Oliveto Holdings, Inc. v Rattenni*, 110 AD3d 969, 972).

We similarly reject plaintiff's contention that defendants failed to submit evidence in admissible form in opposition to the motion for summary judgment in lieu of complaint. The affidavit of defendant Jeffrey DiPalma is based on his personal knowledge of the facts alleged, and thus does not constitute hearsay (*see Pintor v 122 Water Realty, LLC*, 90 AD3d 449, 451). Finally, plaintiff's contention that defendants should be estopped from raising the defense of usury is raised for the first time on appeal and is thus not properly before us (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

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CA 15-01236

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

WILLIAM SPATH, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF BENJAMIN W. SPATH, AN INFANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STORYBOOK CHILD CARE, INC., DAVID L. CLEARY, MISTY ZAMBUTO AND MICHAEL ROSS, DEFENDANTS-APPELLANTS.

BURKE, SCOLAMIERO, MORTATI & HURD, LLP, ALBANY (LIA B. MITCHELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BRENNA BOYCE PLLC, ROCHESTER (DONALD G. REHKOPF OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered October 14, 2014. In its order, entered after a bifurcated bench trial on liability, the court determined that defendants Storybook Child Care, Inc. and Michael Ross were negligent and that their negligence was a substantial factor in causing the injuries sustained by plaintiff's child.

It is hereby ORDERED that said appeal by defendants David L. Cleary and Misty Zambuto is unanimously dismissed and the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages for traumatic head injuries allegedly sustained by his son while he was at a daycare center operated by defendant Storybook Child Care, Inc. (Storybook). Defendants appeal from an order in which Supreme Court found, following a bifurcated bench trial on liability, that Storybook and defendant Michael Ross, a Storybook employee and the child's primary caregiver while at the daycare center, were negligent, and that their negligence was a substantial factor in causing the child's injuries. We note at the outset that the appeal insofar as taken by defendants David L. Cleary and Misty Zambuto must be dismissed because they are not aggrieved by the order (*see* CPLR 5511). We affirm the order.

Plaintiff did not present any eyewitness to the child being injured, and the medical testimony presented at trial did not establish the precise timing or mechanism of injury. Plaintiff presented testimony from the child's mother that the child's head was

fine before she left the child in the care of Storybook and Ross (defendants) and that, upon returning to the daycare center at the end of the day, she observed that the child was red, his head was wet, and Ross was acting "nervous or weird." Defendants presented testimony that no one witnessed any injury to the child and that he may have injured himself at home that morning, prior to being placed in defendants' care.

We reject defendants' contention that the court's determination of liability is against the weight of the evidence. Where, as here, direct evidence of a defendant's negligence is not available, a plaintiff may nevertheless establish defendant's negligence through circumstantial evidence (*see Gayle v City of New York*, 92 NY2d 936, 937; *see also Tenkate v Moore*, 274 AD2d 934, 936). In such instances, the plaintiff "need not positively exclude every other possible cause of" the alleged injury (*Gayle*, 92 NY2d at 937). Rather, "[a] prima facie case of negligence based on circumstantial evidence is established [where, as here,] plaintiff's evidence proves that it is 'more likely' or 'more reasonable' that the injury was caused by defendant's negligence than by some other agency" (*New York Tel. Co. v Harrison & Burrowes Bridge Contrs.*, 3 AD3d 606, 608; *see generally Tenkate*, 274 AD2d at 936). Further, the decision of the court following a bench trial should not be disturbed on appeal "unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially [where, as here,] the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495, *rearg denied* 81 NY2d 835 [internal quotation marks omitted]; *see Livingston v State of New York*, 129 AD3d 1660, 1660, *lv denied* 26 NY3d 903).

Defendants further contend that the court erred in admitting evidence that Ross had been involved in two other incidents involving children under his care at the daycare center, on the ground that it was inadmissible evidence of a prior bad act. We reject that contention, inasmuch as the evidence was relevant to plaintiff's negligent supervision and negligent retention causes of action (*see DeJesus v DeJesus*, 132 AD3d 721, 722). Defendants' contention that the court erred in excluding written statements made by employees of the daycare center in connection with the internal investigation of the incident at issue also is without merit, inasmuch as defendants failed to establish that such statements were made in the regular course of the daycare center's business (*see* CPLR 4518 [a]).

Defendants failed to preserve for our review their contention that the court erred in admitting the opinions and conclusions contained in the police report because they failed to object at trial to the testimony of the investigator who authored the police report (*see Matter of State of New York v Wilkes* [appeal No. 2], 77 AD3d 1451, 1452). We note in any event that defendants waived their contention by stipulating to the admission of the redacted police report in evidence at trial (*see generally Wittman v Wittman*, 302 AD2d 914, 914). Finally, although defendants contend that the court abused its discretion in drawing an adverse inference against them based on

the failure of defendant Misty Zambuto to testify, we note that the court's decision does not indicate that the court in fact drew any such inference.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

260

CA 15-00800

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

RUTH SOBIERAJ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KELCEY L. SUMMERS AND GARY E. SUMMERS,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

DENNIS J. BISCHOF, LLC, WILLIAMSVILLE (DENNIS J. BISCHOF OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BURGIO, KITA , CURVIN & BANKER, BUFFALO (WILLIAM J. KITA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Timothy J. Drury, J.), entered January 5, 2015. The order and judgment granted the cross motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries she sustained in a motor vehicle accident. Plaintiff moved for partial summary judgment on the issue of negligence, and defendants cross-moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as a result of the accident (*see* Insurance Law § 5102 [d]). In appeal No. 1, plaintiff appeals from an order and judgment granting defendants' cross motion and, in appeal No. 2, she appeals from an order insofar as it denied that part of her motion for leave to renew her opposition to defendants' cross motion.

At the outset, we note that the parties conceded at oral argument of this appeal that the only issue before us is whether plaintiff's alleged injuries were caused by the motor vehicle accident. We agree with plaintiff that Supreme Court erred in granting defendants' cross motion inasmuch as defendants failed to meet their initial burden. Here, defendants' own expert concluded that plaintiff sustained a temporary cervical muscle strain in the accident and that plaintiff denied any preexisting complaints of pain in her neck (*see Clark v Aquino*, 113 AD3d 1076, 1076). Furthermore, the opinion of that expert "that plaintiff's condition was the result of degenerative changes

predating the accident[] fails to account for evidence that plaintiff had no complaints of pain prior to the accident" (*Thomas v Huh*, 115 AD3d 1225, 1226). Because defendants failed to meet their initial burden on the cross motion, there is no need to consider the sufficiency of plaintiff's opposing papers (*see Summers v Spada*, 109 AD3d 1192, 1193).

In light of our determination in appeal No. 1, plaintiff's appeal from the order in appeal No. 2 must be dismissed as moot.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

261

CA 15-00808

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

RUTH SOBIERAJ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KELCEY L. SUMMERS AND GARY E. SUMMERS,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

DENNIS J. BISCHOF, LLC, WILLIAMSVILLE (DENNIS J. BISCHOF OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BURGIO, KITA , CURVIN & BANKER, BUFFALO (WILLIAM J. KITA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered April 29, 2015. The order, insofar as appealed from, denied that part of the motion of plaintiff for leave to renew her opposition to the cross motion of defendants.

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

Same memorandum as in *Sobieraj v Summers* ([appeal No. 1] ___ AD3d ___ [Mar. 25, 2016]).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

262

CA 15-00974

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

DANIELLE WRIGHT, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF ERIC WRIGHT, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, CITY OF BUFFALO POLICE DEPARTMENT, CITY OF BUFFALO POLICE DEPARTMENT EMPLOYEES, JOHN DOE 1 THROUGH 10, DEFENDANTS-APPELLANTS.

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

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (HARRY J. FORREST OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered February 19, 2015. The order, insofar as appealed from, denied that part of the motion of defendants for summary judgment with respect to the causes of action for "wrongful arrest/false imprisonment" and battery, as well as the derivative cause of action.

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

Memorandum: Defendants appeal from an order insofar as it denied that part of their motion for summary judgment dismissing the causes of action for "wrongful arrest/false imprisonment" and battery, as well as the derivative cause of action. The action arose from an incident in which members of defendant City of Buffalo Police Department responded to a call to assist emergency personnel at the home of plaintiff and her husband (decedent). Defendants contend on appeal that Supreme Court should have granted their motion for summary judgment dismissing the complaint in its entirety. We affirm.

It is undisputed that decedent had suffered a grand mal seizure and that he refused the requests of emergency personnel and plaintiff to be transported to the hospital for medical treatment. It is also undisputed that decedent was agitated and angry with the people requesting his compliance with emergency personnel. Finally, it is undisputed that the police placed handcuffs on decedent, who was then transported by ambulance to a hospital. At the hospital, it was

determined that decedent's shoulders were dislocated and that he sustained, inter alia, a fracture and torn tendons in his left shoulder, requiring two surgeries. Plaintiff alleges that decedent's injuries were the result of the excessive force utilized by the police in restraining decedent.

Defendants contend with respect to the cause of action for "wrongful arrest/false imprisonment" that the confinement of decedent was privileged because they were authorized to take decedent into custody pursuant to Mental Hygiene Law § 9.41 (*see generally Martinez v City of Schenectady*, 97 NY2d 78, 85), and that they are therefore protected from liability based on qualified immunity (*see Kravitz v Police Dept. of City of Hudson*, 285 AD2d 716, 717-718). In support of that part of the motion, defendants submitted the deposition testimony of police personnel who stated that, based upon the information provided to them by the emergency personnel and plaintiff as well as their own observations, they determined that decedent should be taken into custody pursuant to Mental Hygiene Law § 9.41 and transported to a hospital for evaluation because of the danger to himself in refusing necessary medical treatment.

Mental Hygiene Law § 9.41 provides in relevant part that "[a]ny . . . police officer . . . may take into custody any person who appears to be mentally ill and is conducting himself or herself in a manner which is likely to result in serious harm to the person or others." " 'To be entitled to qualified immunity, it must be established that it was objectively reasonable for the police officer[s] involved to believe that [their] conduct was appropriate under the circumstances, or that officers of reasonable competence could disagree as to whether [their] conduct was proper' " (*Rew v County of Niagara*, 115 AD3d 1316, 1318). Here, defendants submitted evidence establishing that their conduct " 'was undertaken in the exercise of reasoned professional judgment of the officers' " (*Bower v City of Lockport*, 115 AD3d 1201, 1203, *lv denied* 24 NY3d 905). However, they also submitted plaintiff's deposition testimony and her testimony at the General Municipal Law § 50-h hearing, as well as decedent's testimony at the section 50-h hearing and the deposition testimony of a neighbor who witnessed the events, thereby raising an issue of fact whether decedent "had a mental illness and that he was conducting himself in a manner likely to result in serious harm to himself or others" (*Smolian v Port Auth. of N.Y. & N.J.*, 128 AD3d 796, 799). Specifically, plaintiff testified that a paramedic suggested to the police that they afford decedent some time in which to recover from the effects of the seizure, and the neighbor testified that, after the police lifted decedent from the chair, decedent said, "[O]k, I'll go, I'll go." Decedent testified that he said that he would go to the hospital but that he needed "some time to really just get [his] bearings and just figure out what's going on." We therefore conclude that the court properly denied that part of defendants' motion with respect to the "wrongful arrest/false imprisonment" cause of action because defendants failed to eliminate all issues of fact whether the determination to take decedent into custody pursuant to Mental Hygiene Law § 9.41 was reasonable (*see Smolian*, 128 AD3d at 799), and thus that they were protected from liability based on qualified immunity.

We further conclude that the court properly denied that part of defendants' motion with respect to the battery cause of action because defendants failed to eliminate issues of fact whether the police officers in question used excessive force when taking decedent into custody (*see Holland v City of Poughkeepsie*, 90 AD3d 841, 846). " 'Claims that law enforcement personnel used excessive force in the course of an arrest are analyzed under the Fourth Amendment and its standard of objective reasonableness' . . . 'Because of its intensely factual nature, the question of whether the use of force was reasonable under the circumstances is generally best left for a jury to decide' " (*Combs v City of New York*, 130 AD3d 862, 864-865; *see Holland*, 90 AD3d at 844; *cf. Pacheco v City of New York*, 104 AD3d 548, 549-550). Inasmuch as defendants submitted conflicting versions regarding the amount of force used by the police in placing handcuffs on decedent, they failed to eliminate all triable issues of fact whether the use of force was reasonable (*see Combs*, 130 AD3d at 865).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

263

KA 14-02105

PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN JAMISON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 21, 2014. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We reject defendant's contention that Supreme Court erred in assessing 30 points against him based on a 1986 conviction. Defendant's challenge to that conviction is not properly before us on this appeal from the SORA determination (*see generally People v Buniek*, 121 AD3d 659, 659, *lv denied* 24 NY3d 914; *People v Clavette*, 96 AD3d 1178, 1179, *lv denied* 20 NY3d 851; *People v Ayala*, 72 AD3d 1577, 1578, *lv denied* 15 NY3d 816). Defendant moved pursuant to CPL 440.10 (1) (h) to vacate that conviction before the SORA determination, but the court denied the motion, and defendant did not seek permission from this Court to appeal from that order (*see* CPL 450.15 [1]; 460.15 [1]). We reject defendant's further contention that the court erred in assessing 10 points against him for failure to accept responsibility. Although defendant pleaded guilty to assault and rape, he made statements denying the rape to a probation officer preparing the presentence report, and he again denied the rape in a letter to the court approximately one month before his release. Defendant made subsequent statements to a therapist that he "takes responsibility for the physical aspects of his offense," but "[t]he court properly concluded that defendant's statement[s] did not reflect a genuine acceptance of responsibility as required by the risk assessment guidelines developed by the Board [of Examiners of Sex Offenders]" (*People v Kyle*, 64 AD3d 1177, 1178, *lv*

denied 13 NY3d 709 [internal quotation marks omitted]).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

265

KA 14-00929

PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HORACE D. WHIPSET, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered May 13, 2014. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of robbery in the second degree (Penal Law § 160.10 [1]), arising from an incident in which defendant and another individual robbed money from the victim after repeatedly punching him. 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 (*see generally People v Bleakley*, 69 NY2d 490, 495). Although there were inconsistencies between the victim's testimony and his prior statements regarding the amount of money taken, his testimony "was not so inconsistent as to be incredible as a matter of law" (*People v Smith*, 73 AD3d 1469, 1470, *lv denied* 15 NY3d 778). "Testimony will be deemed incredible as a matter of law only where it is 'manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*id.* at 1470; *see People v Stroman*, 83 AD2d 370, 372-373), and that is not the case here. "Further, it is well settled that credibility issues are best resolved by the jury" (*Smith*, 73 AD3d at 1470; *see People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831), and we perceive no basis to disturb its determination. Finally, considering the nature of the crime, we conclude that the sentence is not unduly harsh or severe.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

266

KA 15-00260

PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM BUCCI, DEFENDANT-APPELLANT.

SESSLER LAW PC, GENESEO (STEVEN D. SESSLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered January 15, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [b] [ii]), defendant contends that County Court erred in failing to conduct an evidentiary hearing or to make further inquiry into his allegations before denying his motion to withdraw his guilty plea. We reject that contention. "Only in the rare instance will a defendant be entitled to an evidentiary hearing [on such a motion] . . . The defendant should be afforded a reasonable opportunity to present his contentions and the court should be enabled to make an informed determination" (*People v Tinsley*, 35 NY2d 926, 927; *see People v Harris*, 63 AD3d 1653, 1653, *lv denied* 13 NY3d 744). Here, defendant was afforded the requisite opportunity to present his contentions (*see People v Wolf*, 88 AD3d 1266, 1267-1268, *lv denied* 18 NY3d 863), and his claims of innocence and coercion were belied by his statements during the plea colloquy (*see People v Ivey*, 98 AD3d 1230, 1231, *lv denied* 20 NY3d 1012; *People v McKoy*, 60 AD3d 1374, 1374, *lv denied* 12 NY3d 856). Defendant therefore failed to raise "a legitimate question as to the voluntariness of the plea" (*People v Brown*, 14 NY3d 113, 116), and the court did not abuse its discretion in concluding that no further inquiry was necessary (*see People v Strasser*, 83 AD3d 1411, 1411; *see generally People v Mitchell*, 21 NY3d 964, 966-967).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

268

KA 15-00310

PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMIE R. O'DELL, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered October 27, 2014. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and resisting arrest.

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

Memorandum: Defendant Jamie R. O'Dell (Jamie) appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [3]) and resisting arrest (§ 205.30). Defendant Doreena L. O'Dell (Doreena), Jamie's mother, appeals from a judgment convicting her upon a jury verdict of obstructing governmental administration in the second degree (§ 195.05). Jamie and Doreena were charged by the same indictment, and a joint jury trial was held. Their convictions stem from their conduct after the police made a warrantless entry into their home. A neighbor witnessed Jamie and a woman fighting in his driveway, Jamie threatened to kill the woman, and Jamie and the woman entered his home. When the police arrived at the home, Doreena would not allow them into the house, but the police forced their way into the home in order to check on the welfare of the occupants. A struggle ensued with the officers and defendants, and an officer was injured.

We reject defendants' contentions that Supreme Court (Affronti, J.) erred in not suppressing the observations of the officers after they made the warrantless entry into the home. "[T]he exclusionary rule does not require suppression of what police saw and heard when defendant[s], in being confronted in [their] home following an alleged *Payton* violation, undertook the commission of a new and independent crime" (*People v Ellis*, 4 AD3d 877, 878, *lv denied* 3 NY3d 639, *reconsideration denied* 3 NY3d 673; *see People v Kohorst*, 34 AD3d 1249,

1250, *lv denied* 8 NY3d 947; *see generally People v Dory*, 59 NY2d 121, 126-127; *People v Abruzzi*, 52 AD2d 499, 504, *affd* 42 NY2d 813, *cert denied* 434 US 921). Even assuming, arguendo, that the observations of the police were subject to suppression under the circumstances of this case (*see generally People v Rossi*, 80 NY2d 952, 954, *rearg denied* 81 NY2d 835), we reject defendants' alternative contention that the court erred in denying suppression without a hearing. "Defendant[s] failed to make a sufficient factual showing to require a hearing" (*People v Hodge*, 2 AD3d 1428, 1429, *lv denied* 2 NY3d 741; *see* CPL 710.60 [3] [b]; *People v Haskins*, 86 AD3d 794, 795, *lv denied* 17 NY3d 903). Based on the evidence submitted by defendants in support of their motions, the court properly concluded that "the police were justified in entering the house under the emergency exception to the warrant requirement" (*Hodge*, 2 AD3d at 1429; *see generally People v Doll*, 21 NY3d 665, 670-671, *rearg denied* 22 NY3d 1053, *cert denied* ___ US ___, 134 S Ct 1552).

We agree with defendants, however, that the court (Moran, J.) improperly removed certain elements of the crimes from the jury's consideration. "It is well settled that all the elements of an indicted crime which are not conceded by defendant or defendant's counsel must be charged" (*People v Flynn*, 79 NY2d 879, 881; *see People v Martin*, 36 AD3d 717, 718; *People v Milhouse*, 246 AD2d 119, 123). Thus, the jury was to determine, with respect to Jamie, whether the police were "performing a lawful duty" (Penal Law § 120.05 [3]; *see People v Rivera*, 46 AD3d 349, 350, *lv denied* 10 NY3d 815), and whether the arrest was "authorized" (§ 205.30) and, with respect to Doreena, whether the police were "performing an official function" (§ 195.05; *see People v Greene*, 221 AD2d 559, 560). When counsel for Jamie attempted to cross-examine an officer regarding the need for a warrant to enter the home, the court sua sponte instructed the jury that "[t]he [c]ourt has ruled that no search warrant was required under these circumstances." The court thereby improperly removed the abovementioned elements from the jury's consideration (*see generally Milhouse*, 246 AD2d at 123; *Greene*, 221 AD2d at 560). We therefore reverse the convictions and grant a new trial. In light of our determination, we do not consider Jamie's remaining contention.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

269

KA 15-00311

PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOREENA L. O'DELL, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered November 10, 2014. The judgment convicted defendant, upon a jury verdict, of obstructing governmental administration in the second degree.

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

Same memorandum as in *People v O'Dell* (___ AD3d ___ [Mar. 25, 2016]).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

270

KA 13-00051

PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARQUES KING, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered October 4, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress the evidence seized from defendant's person is granted, and the matter is remitted to Onondaga County Court for further proceedings on the indictment.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39), defendant contends, inter alia, that County Court erred in denying that part of his omnibus motion seeking to suppress evidence seized from his person. We agree.

The evidence at the suppression hearing established that, at approximately 3:35 a.m., in an area known for drug activity, two police officers happened upon the scene of a hand-to-hand transaction between defendant and a female. The female was then observed to place an object "in her left bra area." Upon seeing the officers, defendant and the female "immediately separated and moved away." The two officers separately approached defendant and the female. When asked why he was at that location at that time in the morning, defendant informed the officer that he was visiting an older woman who was sitting on a nearby porch. That woman, however, denied knowing defendant. At that point the officer asked defendant for permission to "check[] him," and defendant consented. Although the officer did not find anything on defendant's person, the officer placed defendant, uncuffed, in the backseat of the patrol vehicle.

Meanwhile, the second officer was speaking with the female, and he observed a bag with a "beige chunky substance" tucked into her shoelace. The woman admitted purchasing cocaine from defendant, removed a bag of what appeared to the officer to be cocaine, and informed the officer that defendant "had crack cocaine between his buttocks."

At that point, the two officers removed defendant from the patrol vehicle and performed a second pat-down search of his person. During that search, one of the officers felt "a hard unknown object between his buttocks." Although defendant stated that he would remove the object, he attempted to secrete the object even further into "his rectum," resulting in a struggle between defendant and the officers. Defendant was then transported to the police station, at which time a strip search was conducted and the officers recovered "a section of plastic [containing cocaine] at the rear of his body between his buttocks."

Following the suppression hearing, the court determined that, although defendant was illegally detained, there was no need to suppress the cocaine seized from defendant's person. The court concluded that the information from the female at the scene, in conjunction with the officers' observations, gave the officers probable cause to arrest defendant and "provided a significant intervening circumstance, independent of the illegal detention, that attenuated the connection between the detention and the seizure of the crack cocaine [and served] to dissipate the taint of the illegality." On this appeal, defendant contends that the court erred in finding that the seizure of the cocaine from his person was attenuated from the unlawful detention.

As a preliminary matter, we note that, "[s]ince we are reviewing a judgment on the defendant's appeal, and the issue of whether the defendant was [unlawfully detained] was not decided adversely to him, we are jurisdictionally barred from considering" the People's contention that the police officers' encounter with defendant was lawful at its inception and at every stage thereafter (*People v Harris*, 93 AD3d 58, 66, *affd* 20 NY3d 912; *see* CPL 470.15 [1]; *People v Concepcion*, 17 NY3d 192, 195).

We agree with defendant that the court erred in determining that the seizure of evidence from his person was attenuated from the taint of the illegality (*see People v Williams*, 79 AD3d 1653, 1655, *affd* 17 NY3d 834, 836; *cf. People v Alexander*, 189 AD2d 189, 195-196; *People v Emrick*, 89 AD2d 787, 788). "While the effect of illegally initiated police intrusion may potentially become attenuated, as a practical matter there is rarely opportunity for the attenuation of primary official illegality in the context of brief, rapidly unfolding street or roadside encounters predicated on less than probable cause . . . [O]nce a wrongful police-initiated intrusion is established, suppression of closely after-acquired evidence appears to follow ineluctably" (*People v Packer*, 49 AD3d 184, 186, *affd* 10 NY3d 915).

In view of our determination, we do not reach defendant's

remaining contentions.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

272

CAF 14-02008

PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

IN THE MATTER OF LUCILLE A. SOLDATO, COMMISSIONER, ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF APRIL M. DAVIS, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JASON J. CARINGI, RESPONDENT-APPELLANT.

MARY R. HUMPHREY, NEW HARTFORD, FOR RESPONDENT-APPELLANT.

TRACY L. PUGLIESE, ROME, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered October 31, 2014 in a proceeding pursuant to Family Court Act article 4. The order, among other things, confirmed the Support Magistrate's determination that respondent had willfully failed to obey a court order.

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, Oneida County, for a new hearing.

Memorandum: In this proceeding pursuant to Family Court Act article 4, respondent father appeals from an order finding him in willful violation of a child support order and imposing a suspended sentence of six months of incarceration. We agree with the father that he was denied his right to counsel at the hearing before the Support Magistrate to determine whether he was in willful violation of the support order, and we reject petitioner's contention that the issue requires preservation (*see Matter of Girard v Neville*, ___ AD3d ___ [Mar. 18, 2016]).

At the parties' initial appearance, the Support Magistrate informed the father only that he had "the right to hire a lawyer [or] talk for [himself]," asked the father to choose between those options, and conducted no further inquiry when the father chose to proceed pro se. The Support Magistrate thus failed to inform the father of his right to have counsel assigned if he could not afford to retain an attorney (*see* Family Ct Act § 262 [a] [vi]; *Matter of Wilder v Bufe*, 25 AD3d 827, 828), and also failed to engage the father in the requisite searching inquiry concerning his decision to proceed pro se and thereby ensure that the father was knowingly, intelligently and voluntarily waiving his right to counsel (*see Girard*, ___ AD3d at ___;

Matter of Storelli v Storelli, 101 AD3d 1787, 1788; *see generally Matter of Seifert v Pastwick*, 118 AD3d 1503, 1504). We therefore reverse the order and remit the matter to Family Court for a new hearing (*see Storelli*, 101 AD3d at 1788). In light of our determination, we do not reach the father's remaining contention.

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

273

CAF 14-00484

PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

IN THE MATTER OF SUSAN RICHARDS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

WINDSOR C. RICHARDS, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered November 21, 2012 in a proceeding pursuant to Family Court Act article 4. The order denied respondent's objections to an order of the Support Magistrate.

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

Memorandum: Respondent father appeals from an order denying his written objections to the order of the Support Magistrate finding him in willful violation of a child support order. Preliminarily, contrary to the father's contention, the gaps in the hearing transcript attributable to inaudible portions of the audio recording are not so significant as to preclude appellate review (*see Matter of Van Court v Wadsworth*, 122 AD3d 1339, 1340, *lv denied* 24 NY3d 916). Contrary to the father's further contention, petitioner mother was not required to provide a written record detailing the missed child support payments, and her unequivocal testimony that the father failed to pay any child support from October 1995 to December 2004 is sufficient (*cf. Matter of Cox v Cox*, 181 AD2d 201, 204-205). The father, on the other hand, testified that he paid child support by check during the time period in question, but he failed to submit any documentary evidence in support of that assertion. In light of the Support Magistrate's superior position to assess the credibility of the witnesses (*see DeNoto v DeNoto*, 96 AD3d 1646, 1648), we see no reason to disturb the determination that the father willfully violated the child support order.

Finally, to the extent that the father contends that the mother waived her right to future child support payments by accepting from him certain items and benefits, including property tax payments, his contentions to that effect are not properly before us because he failed to raise them in his written objections to the Support Magistrate's order (*see Matter of Farruggia v Farruggia*, 125 AD3d

1490, 1490; *Matter of Porter v D'Adamo*, 113 AD3d 908, 909-910).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

274

CAF 14-01280

PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

IN THE MATTER OF AMARIESE L. AND GREGORY L.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TIFFANY N., RESPONDENT-APPELLANT.

IN THE MATTER OF LAMARIO N.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

TIFFANY N., RESPONDENT-APPELLANT.

IN THE MATTER OF TAMARA N.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

TIFFANY N., RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 27, 2014 in a proceeding pursuant to Family Court Act article 10. The order, among other things, determined that respondent violated orders of disposition and derivatively neglected Tamara N.

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

Memorandum: Respondent mother appeals from an order finding that she violated two orders of disposition in underlying neglect proceedings and derivatively neglected her youngest child. Contrary to the mother's contention, petitioner established by a preponderance of the evidence that the mother violated the orders of disposition (*see* Family Ct Act § 1072 [a]; *Matter of Dashaun G. [Diana B.]*, 117 AD3d 1526, 1528, *lv dismissed* 24 NY3d 951; *Matter of Aimee J.*, 34 AD3d

1350, 1350-1351). Pursuant to the orders, the mother agreed, inter alia, to not be under the influence of any substance, to complete a mental health assessment, to complete an alcohol and substance abuse evaluation and treatment, and to enforce a stay-away order of protection against the father of two of her children. Petitioner submitted evidence that the mother had consumed alcohol, did not complete a mental health assessment, and did not enforce the order of protection. Contrary to the mother's further contention, the court properly found that petitioner established by a preponderance of the evidence that the mother derivatively neglected her youngest child (*see Matter of Burke H. [Tiffany H.]*, 117 AD3d 1568, 1568; *Matter of Sasha M.*, 43 AD3d 1401, 1401-1402).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

277

CA 15-00759

PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

SHARON JORDAN-PARKER AND CLARK PARKER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, ET AL., DEFENDANTS,
AND DESTRO & BROTHERS CONCRETE COMPANY, INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

LAW OFFICES OF EUGENE C. TENNEY, PLLC, BUFFALO (NATHAN C. DOCTOR OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (ALYSSA L. JORDAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered February 25, 2015. The order granted the motion of defendant Destro & Brothers Concrete Company, Inc., for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Sharon Jordan-Parker (plaintiff) when she tripped and fell over the base of a construction sign that had been placed on the sidewalk near the corner of South Park Avenue and Dorrance Avenue in Buffalo. The sign had been used in connection with a construction project undertaken by defendant City of Buffalo (City). Defendant Destro & Brothers Concrete Company, Inc. (Destro) was the general contractor and defendant DiDonato Associates, P.E., P.C. (DiDonato) was the consultant engineer on the project. Destro moved for summary judgment dismissing the complaint against it, and DiDonato and the City moved for summary judgment dismissing the complaint and cross claims against them. Supreme Court, in separate orders, granted the motions of Destro (appeal No. 1), DiDonato (appeal No.2), and the City (appeal No. 3). We affirm in all three appeals.

Defendants met their initial burden on their respective motions of establishing as a matter of law that the condition that caused plaintiff's injury was open and obvious and not inherently dangerous (*see Koepke v Deer Hills Hardware, Inc*. 118 AD3d 957, 958). Defendants submitted, inter alia, the deposition of plaintiff, wherein

she testified that she noticed the base of the sign immediately before she fell (*see Kaufmann v Lerner N.Y., Inc.*, 41 AD3d 660, 661; *Connor v Taylor Rental Ctr.*, 278 AD2d 270, 270), and photographs of the accident scene showing that there was sufficient room on the sidewalk to allow pedestrians to avoid the base of the sign (*see Lazar v Burger Heaven*, 88 AD3d 591, 591). In opposition to the motion, plaintiffs asserted that defendants failed to comply with regulations applicable to the project, but their unsubstantiated and nonspecific assertions in that regard were insufficient to raise a triable issue of fact (*see generally Matthews v Vlad Restoration Ltd.*, 74 AD3d 692, 693).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

278

CA 15-00760

PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

SHARON JORDAN-PARKER AND CLARK PARKER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, ET AL., DEFENDANTS,
AND DIDONATO ASSOCIATES, P.E., P.C.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

LAW OFFICES OF EUGENE C. TENNEY, PLLC, BUFFALO (NATHAN C. DOCTOR OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 9, 2015. The order granted the motion of defendant DiDonato Associates, P.E., P.C., for summary judgment.

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

Same memorandum as in *Jordan-Parker v City of Buffalo* ([appeal No. 1] ___ AD3d ___ [Mar. 25, 2016]).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

279

CA 15-00761

PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

SHARON JORDAN-PARKER AND CLARK PARKER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 3.)

LAW OFFICES OF EUGENE C. TENNEY, PLLC, BUFFALO (NATHAN C. DOCTOR OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CARTAFALSA, SLATTERY, TURPIN & LENOFF, BUFFALO (PATRICIA A. HUGHES OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 11, 2015. The order granted the motion of defendant City of Buffalo for summary judgment.

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

Same memorandum as in *Jordan-Parker v City of Buffalo* ([appeal No. 1] ___ AD3d ___ [Mar. 25, 2016]).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

282

CA 15-00773

PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, AND TROUTMAN, JJ.

THE WHARTON ASSOCIATES, INC., DOING BUSINESS
AS REMAX 1ST COMMERCIAL,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

CONTINENTAL INDUSTRIAL CAPITAL LLC, AND TECH
PARK OWNER LLC, DEFENDANTS-RESPONDENTS-APPELLANTS.

BRIAN R. HENZEL PLLC, PITTSFORD (BRIAN R. HENZEL OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (AMY L. DIFRANCO OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT CONTINENTAL INDUSTRIAL CAPITAL LLC.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (STACEY E. TRIEN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT TECH PARK OWNER LLC.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered July 23, 2014. The order granted that part of plaintiff's motion seeking summary judgment against both defendants, denied that part of plaintiff's motion seeking attorneys' fees and denied the cross motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion for summary judgment against defendant Tech Park Owner LLC, and granting in part the cross motion and dismissing the amended complaint against that defendant, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this breach of contract action seeking brokerage commissions. Plaintiff moved for summary judgment against defendants, and for an award of attorneys' fees, and defendants cross-moved for summary judgment dismissing the amended complaint against them. Plaintiff now appeals and defendants cross-appeal from an order granting that part of plaintiff's motion for summary judgment, denying that part of plaintiff's motion for attorneys' fees, and denying defendants' cross motion.

Defendant Continental Industrial Capital LLC (CIC) entered into a lease agreement (Lease) with a tenant on property that it owned, and which was subsequently sold to defendant Tech Park Owner LLC (Tech

Park). At the same time it entered into the Lease, CIC signed a Commission Agreement with plaintiff, pursuant to which CIC agreed to pay plaintiff a commission for leasing the property to the tenant. The Commission Agreement provided that plaintiff was also entitled to a commission if the tenant occupied additional space (unless the tenant was represented by another broker) or the tenant exercised any option under the Lease or renewed the Lease. When CIC sold the property to Tech Park, Tech Park expressly assumed the Lease. Tech Park and the tenant subsequently entered a "FIRST AMENDMENT TO LEASE AGREEMENT" (Amendment), but plaintiff was not paid any brokerage commission.

We agree with Tech Park that Supreme Court erred in granting that part of the motion for summary judgment against it and erred in denying that part of the cross motion seeking summary judgment dismissing the amended complaint against it, and we therefore modify the order accordingly. "Absent an affirmative assumption, a grantee is only liable for those covenants that run with the land" (*Longley-Jones Assoc. v Ircon Realty Co.*, 67 NY2d 346, 348; *see Gurney, Becker & Bourne v Bradley*, 101 AD2d 1012, 1012-1013). "There is no question that [a] brokerage agreement is not a covenant running with the land" (*Gurney, Becker & Bourne*, 101 AD2d at 1013; *see Longley-Jones Assoc.*, 67 NY2d at 348). Here, Tech Park did not expressly assume the Commission Agreement, and it is therefore not liable for the payment of any brokerage commission to plaintiff (*see Longley-Jones Assoc.*, 67 NY2d at 348; *Gurney, Becker & Bourne*, 101 AD2d at 1012-1013; *cf. Dysal, Inc. v Hub Props. Trust*, 92 AD3d 826, 828).

We reject CIC's contention that the court erred in granting that part of the motion for summary judgment against it and erred in denying that part of the cross motion seeking summary judgment dismissing the amended complaint against it. Plaintiff met its burden of establishing its entitlement to judgment as a matter of law by submitting the Commission Agreement and the Amendment (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). The Amendment renewed the Lease for an additional five years and expanded the tenant's premises, thus triggering the provisions in the Commission Agreement for the payment of a commission to plaintiff. In opposition to the motion, CIC failed to raise a triable issue of fact that the Amendment constituted a novation (*see Allied Irish Banks, P.L.C. v Young Men's Christian Assn. of Greenwich*, 105 AD3d 516, 517; *see generally Flaum v Birnbaum*, 120 AD2d 183, 192).

Finally, we reject plaintiff's contention that the court erred in denying that part of its motion seeking an award of attorneys' fees. "Under the general rule, attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule" (*Mount Vernon City Sch. Dist. v Nova Cas. Co.*, 19 NY3d 28, 39 [internal quotation marks omitted]). "[T]he court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise" (*id.* [internal quotation marks and emphasis omitted]; *see Colonial Sur. Co. v Genesee Val. Nurseries,*

Inc., 94 AD3d 1422, 1423). Here, while the Lease contains a provision for the recovery of attorneys' fees, plaintiff is seeking to enforce its rights pursuant to the Commission Agreement, which does not contain any such provision (*see Schwartz v Rosenberg*, 67 AD3d 770, 771-772).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

283

CA 15-01327

PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

LATANYA Y. STAMPS AND RONALD STAMPS, JR.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

PATRICK D. PUDETTI, DEFENDANT-APPELLANT.

CONNORS CORCORAN & BUHOLTZ PLLC, ROCHESTER (EILEEN E. BUHOLTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (RICHARD P. AMICO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered December 16, 2014. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part of the written decision entered December 16, 2014 finding that plaintiff raised triable issues of fact on the significant disfigurement category of serious injury and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for personal injuries allegedly sustained by Latanya Y. Stamps (plaintiff) when a vehicle operated by defendant rear-ended the vehicle being operated by plaintiff. In their original bill of particulars, plaintiffs alleged that plaintiff had suffered various injuries including a "cervical sprain and strain," a "lumbosacral strain and sprain," disc bulging and disc protrusions at various levels of the cervical spine, narrowing of the spinal canal, and neural foraminal stenosis. Plaintiffs further alleged that plaintiff suffered a serious injury under the permanent consequential limitation of use and significant limitation of use categories of serious injury (*see* Insurance Law § 5102 [d]). In a separate order preceding the order on this appeal, Supreme Court awarded plaintiffs partial summary judgment on the issue of negligence.

Before that order was entered, however, defendant filed the instant motion for summary judgment seeking dismissal of plaintiffs' complaint for failure to meet the serious injury threshold and for failure to incur economic loss exceeding basic economic loss. In opposition to the motion, plaintiffs submitted, inter alia, a

"supplemental verified bill of particulars" in which they added an allegation that plaintiff had sustained a serious injury under the significant disfigurement category of serious injury (Insurance Law § 5102 [d]). Defendant objected to plaintiffs' attempt to " 'supplement' " their bill of particulars in opposition to the motion.

Supreme Court granted defendant's motion insofar as it concerned plaintiffs' claims for economic loss, but denied the motion "in all other respects." In its decision supporting the order, the court wrote that the evidence submitted by plaintiffs raised triable issues of fact on all three categories of serious injury. Only defendant appeals.

We agree with defendant that plaintiffs improperly asserted a "new injury" in their "supplemental verified bill of particulars" (CPLR 3043 [b]; *see Schreiber v University of Rochester Med. Ctr.*, 74 AD3d 1812, 1812; *cf.* CPLR 3042 [b]; *Tate v Colabello*, 58 NY2d 84, 86-87), and that the court erred in considering that new category of serious injury inasmuch as it was raised for the first time in opposition to defendant's motion for summary judgment (*see Christopher V. v James A. Leasing, Inc.*, 115 AD3d 462, 462; *see also Guzek v B & L Wholesale Supply, Inc.*, 126 AD3d 1506, 1507; *Robinson v Schiavoni*, 249 AD2d 991, 992). We thus conclude that the claim of significant disfigurement was not cognizable by the court (*see Torres v Dwyer*, 84 AD3d 626, 626), that it was error for the court to consider the new injury claim (*see Christopher V.*, 115 AD3d at 462), and that the court should have disregarded evidence related to that category of serious injury (*see MacDonald v Meierhoffer*, 13 AD3d 689, 689). To the extent that the court's order incorporated the court's written decision addressing the merits of that category of serious injury, we vacate that part of the court's order.

We nevertheless agree with plaintiff that the court properly denied defendant's motion for summary judgment with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury. Even assuming, arguendo, that defendant met his initial burden on the motion, we conclude that plaintiffs raised triable issues of fact by submitting the reports of treating physicians and independent medical examiners "who relied upon objective proof of plaintiff's injury, provided quantifications of plaintiff's loss of range of motion along with qualitative assessments of plaintiff's condition, and concluded that 'plaintiff's injur[ies] [were] significant, permanent, and causally related to the accident' " (*Moore v Gawel*, 37 AD3d 1158, 1159; *see Frazier v Keller*, 64 AD3d 1161, 1162; *Harris v Carella*, 42 AD3d 915, 916; *see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350). Contrary to defendant's contention, to the extent that there may have been a gap in treatment between October 2010 and June 2011, that purported gap is not fatal to plaintiff's claims where, as here, plaintiff explained that her insurance could not cover her treatment anymore, and that she was therefore compelled to pay for it herself (*see Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 906-907, *rearg denied* 22 NY3d 1102; *Garza v Taravella*, 74 AD3d 1802, 1803; *cf. Smyth v McDonald*, 101 AD3d

1789, 1790-1791).

Finally, we conclude that, contrary to defendant's contention, the court did not err in considering the affirmed expert report of a certified orthopedic spinal surgeon, which was submitted by plaintiffs in opposition to defendant's motion. Inasmuch as that expert report constitutes the affirmed statement of a physician, it has "the same force and effect as an affidavit" (CPLR 2106 [a]). Moreover, because the surgeon also holds a Ph.D. in mechanical and aerospace engineering, he was "qualified to offer an opinion regarding the biomechanics or physics of the collision" (*Russell v Pulga-Nappi*, 94 AD3d 1283, 1284; *see Anderson v Persell*, 272 AD2d 733, 735).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court

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

287

CA 14-02176

PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF LARRY BILLINGER, CONSECUTIVE NO. 75001,
FROM CENTRAL NEW YORK PSYCHIATRIC CENTER
PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF
MENTAL HEALTH AND NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENTS-RESPONDENTS.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (BENJAMIN D. AGATA OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Joseph E. Fahey, A.J.), entered October 29, 2014 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, directed that petitioner shall continue to be confined to a secure treatment facility.

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

Memorandum: Petitioner appeals from an order, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he currently suffers from a mental abnormality under Mental Hygiene Law § 10.03 (i) and directing that petitioner continue to be confined to a secure treatment facility (*see* § 10.09 [h]). We affirm.

We reject petitioner's contention that the evidence is not legally sufficient to establish that he requires confinement. Respondents' evidence consisted of the report and testimony of a psychologist who evaluated petitioner and opined that petitioner suffers from pedophilic disorder of a nonexclusive type, antisocial personality disorder, and borderline intellectual functioning, and that, as a result of those mental abnormalities, petitioner has serious difficulty controlling his disposition to sexually offend, thereby requiring his confinement. Respondents' expert also opined

that petitioner remains at the "relatively early" "Phase II" of his treatment at the Central New York Psychiatric Center, that petitioner does not have an adequate relapse prevention plan, and that petitioner's risk of sexual recidivism was high as indicated by a Static-99R score of 8. Upon our review of the record, we conclude that respondents established by the requisite clear and convincing evidence that petitioner "suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (Mental Hygiene Law § 10.03 [e]; *see Matter of State of New York v Robert F.*, 25 NY3d 448, 454-455; *Matter of State of New York v Floyd Y.*, 135 AD3d 70, 74-75; *Matter of State of New York v Richard TT.*, 132 AD3d 72, 76-79, *appeal dismissed* 26 NY3d 994). To the extent that petitioner contends that the determination is against the weight of the evidence, we reject that contention. Supreme Court "was in the best position to evaluate the weight and credibility of the conflicting [expert] testimony presented . . . , and we see no reason to disturb the court's decision to credit the testimony of [respondents'] expert[]" (*Matter of State of New York v Parrott*, 125 AD3d 1438, 1439, *lv denied* 25 NY3d 911 [internal quotation marks omitted]).

Entered: March 25, 2016

Frances E. Cafarell
Clerk of the Court