SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 5, 2017

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. HENRY J. SCUDDER, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1009/16

CA 15-02060

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

RJW ENTERPRISES, INC., A DIVISION OF PRIMALYN ENTERPRISES, INC., PLAINTIFF-RESPONDENT,

V ORDER

P.J. SIMAO, LIBERTY SACKETTS HARBOR LLC, IVES HILL COUNTRY CLUB, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

CENTOLELLA LYNN D'ELIA & TEMES LLC, SYRACUSE (DAVID C. TEMES OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PHILLIPS LYTLE LLP, ROCHESTER (MARK J. MORETTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered February 12, 2015. The order, among other things, granted plaintiff's motion for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties, and filed in the Monroe County Clerk's Office on April 26, 2017,

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

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

1190

CAF 14-02243

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

IN THE MATTER OF EMILY W., EVAN W. AND KAYLEE W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MICHAEL S., RESPONDENT, AND REBECCA S., RESPONDENT-APPELLANT. (APPEAL NO. 1.)

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

LAUREN CREIGHTON, BUFFALO, FOR PETITIONER-RESPONDENT.

AYOKA A. TUCKER, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered November 17, 2014. The order denied the motion of respondent Rebecca S. for an order requiring petitioner to return the subject children to her.

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

Memorandum: Respondent mother appeals from four orders concerning the five subject children entered in proceedings pursuant to Family Court Act article 10-A. In appeal No. 1, the mother appeals from an order, entered after an evidentiary hearing, in which Family Court denied without prejudice her motion seeking the return to her custody of three of the children, i.e., Emily W., Evan W., and Kaylee W. In appeal No. 2, the mother appeals, as limited by her brief, from so much of an order, entered after a hearing, in which the court extended placement of Kaylee W. with her biological father, a nonparty. In appeal Nos. 3 and 4, the mother appeals, as limited by her brief, from so much of each order, entered after a hearing, in which the court extended the placement of Ava W. and Michael S., Jr. We affirm the order in each appeal.

As an initial matter, we agree with the mother that her appeals are not moot. In denying the mother's motion to terminate placement or in extending placement, the court made a new finding in each appeal that the mother had failed to remedy the issues that had led to the initial finding of neglect, and we conclude that the new finding in each appeal may have enduring consequences for the parties (*see Matter*

of Donegan v Torres, 126 AD3d 1357, 1358, *lv denied* 26 NY3d 905). Thus, the mother's appeals from the orders in appeal Nos. 1 through 4 are not moot.

Contrary to petitioner's contentions in appeal No. 2 with respect to Kaylee W., there is no indication in the record that the mother consented to the subsequent Family Court Act article 6 custody order. Contrary to the contention of the Attorneys for the Children in appeal Nos. 2 through 4, whether the order of fact-finding and disposition has expired is immaterial inasmuch as the permanency hearing orders on appeal have superseded that order (*see Matter of Jacelyn TT. [Tonia TT.–Carlton TT.]*, 80 AD3d 1119, 1120; *Matter of Destiny HH.*, 63 AD3d 1230, 1231, *lv denied* 13 NY3d 706).

Turning to the merits, with respect to appeal No. 1, a motion to terminate a placement "must be denied if, following a hearing, it is determined that continued placement serves the purposes of Family [Court] Act article 10 - namely, 'to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being' " (*Matter of Owen AA.*, 64 AD3d 953, 954, quoting § 1011; *see* § 1065 [a]). We conclude that the mother failed to carry her burden of proving that it would be in her children's best interests to return them to her custody. The mother has maintained regular contact with the respondent father of Michael S., Jr. (hereafter, father), and it appears from the record that such contact has only reinforced and continued the tumultuous relationship that gave rise to the domestic violence underlying the neglect proceeding. Furthermore, the mother has prolonged the relationship with the father even though one of her children now seeks counseling owing to the emotional trauma it caused, and in spite of the father's failure to complete any of the items on his plan for services. "[A]lthough [the mother has] completed certain counseling and parenting services, the record establishes that no progress has been made to overcome the specific problems which led to the removal of the child[ren]" (*Matter of Carson W. [Jamie G.]*, 128 AD3d 1501, 1501, *lv dismissed* 26 NY3d 976 [internal quotation marks omitted]; *see also Owen AA.*, 64 AD3d at 954-955). Thus, "we find no basis to disturb [the court]'s conclusion that the child[ren]'s best interests warrant [their] continued placement" (*Matter of Kasja YY. [Karin B.]*, 69 AD3d 1258, 1259, *lv denied* 14 NY3d 711). We have considered the mother's remaining contentions in appeal No. 1 and conclude that they are without merit.

Similarly, with respect to appeal Nos. 2 through 4, we reject the mother's contention that the court abused its discretion in extending placement for Kaylee W., Ava W., and Michael S., Jr. "In order to establish the need for continued placement, the agency must establish both that such continued placement is in the child's best interests and that the parents are presently unable to care for the child" (*Matter of Vanessa Z.*, 307 AD2d 755, 755). Here, petitioner established at the hearing that the mother's regular interactions with the father indicate that her completion of domestic violence training was a formality that did not result in any meaningful change to her lifestyle (*see Matter of Catherine MM. v Ulster County Dept. of Social Servs.*, 293 AD2d 778, 779). Indeed, the mother admitted to having

consented to the modification of an order of protection in her favor and against the father so that they could "be together" (*cf. Matter of Sunshine A.Y.*, 88 AD2d 662, 662). "The fact that [the mother] presented conflicting evidence to the court does not require a different result" (*Matter of Kerensa D.* [appeal No. 2], 278 AD2d 878, 879, *lv denied* 96 NY2d 707). We accord great weight and deference to the court's determinations, "including its drawing of inferences and assessment of credibility," and we will not disturb those determinations where, as here, they are supported by the record (*Matter of Shaylee R.*, 13 AD3d 1106, 1106).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

1191

CAF 15-00678

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

IN THE MATTER OF KAYLEE W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

REBECCA S., RESPONDENT-APPELLANT,
AND MICHAEL S., RESPONDENT.
(APPEAL NO. 2.)

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

LAUREN CREIGHTON, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered March 6, 2015. The order, among other things, continued the placement of the subject child.

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

Same memorandum as in *Matter of Emily W.* ([appeal No. 1] ___ AD3d ___ [May 5, 2017]).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

1192

CAF 15-00679

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

IN THE MATTER OF AVA W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

REBECCA S., RESPONDENT-APPELLANT,
AND MICHAEL S., RESPONDENT.
(APPEAL NO. 3.)

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

LAUREN CREIGHTON, BUFFALO, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered March 6, 2015. The order, among other things, continued the placement of the subject child with petitioner.

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

Same memorandum as in *Matter of Emily W.* ([appeal No. 1] ___ AD3d ___ [May 5, 2017]).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

1193

CAF 15-00680

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

IN THE MATTER OF MICHAEL S., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

REBECCA S., RESPONDENT-APPELLANT,
AND MICHAEL S., RESPONDENT.
(APPEAL NO. 4.)

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

LAUREN CREIGHTON, BUFFALO, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered March 6, 2015. The order, among other things, continued the placement of the subject child with petitioner.

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

Same memorandum as in *Matter of Emily W.* ([appeal No. 1] ___ AD3d ___ [May 5, 2017]).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

85

CA 16-00947

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

IN THE MATTER OF THE EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION.

DONALD J. TERWILLIGER, ADMINISTRATOR OF THE ESTATE OF DONALD R. TERWILLIGER, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BEAZER EAST, INC., THE COMPANY, FORMERLY KNOWN AS KOPPERS COMPANY, INC., ET AL., DEFENDANTS, AND HONEYWELL INTERNATIONAL, INC., SUCCESSOR IN INTEREST TO WILPUTTE COKE OVEN DIVISION OF ALLIED CHEMICAL CORPORATION, DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ & PONTERIO, LLC, BUFFALO (DENNIS P. HARLOW OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), dated March 7, 2016. The order denied the motion of defendant Honeywell International, Inc., successor in interest to the Wilputte Coke Oven Division of Allied Chemical Corporation, for summary judgment dismissing the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the complaint against defendant Honeywell International, Inc., successor in interest to Wilputte Coke Oven Division of Allied Chemical Corporation, is dismissed.

Memorandum: In this products liability and negligence action, plaintiff, as administrator of the estate of Donald R. Terwilliger (decedent), seeks damages for injuries sustained by decedent as a result of his exposure to asbestos and coke oven emissions while employed at the Bethlehem Steel plant (Bethlehem) in Lackawanna, New York. Defendant Honeywell International, Inc. (Honeywell) was sued as the successor in interest to Wilputte Coke Oven Division of Allied Chemical Corporation (Wilputte), the designer and builder of five coke oven batteries, Nos. 5 through 9, at Bethlehem.

Honeywell moved for summary judgment seeking dismissal of the

complaint, which, as relevant on appeal, alleged products liability theories in the second and fourth causes of action. Initially, we note that plaintiff conceded in a postargument submission that the first, third and sixth causes of action should be dismissed, and the fifth cause of action is not asserted against Honeywell. Thus, the only two causes of action at issue are the second and fourth causes of action. We further note at the outset that plaintiff does not contend that Honeywell failed to meet its initial burden, and neither party contends that there are issues of fact. Thus, we are presented with a pure question of law on undisputed facts.

In support of those parts of its motion for summary judgment dismissing the second and fourth causes of action, Honeywell contended that the coke oven batteries are not products for purposes of products liability theories and that Wilputte's contract with Bethlehem was one predominantly for services, not the sale of a product placed into the stream of commerce. In denying the motion, Supreme Court rejected those contentions, concluding that the coke ovens are "products" subject to products liability theories and that the transaction between Wilputte and Bethlehem was "more like the sale of goods than a contract for services." Honeywell appeals, and we reverse.

We begin our analysis by noting that, in *Matter of City of Lackawanna v State Bd. of Equalization & Assessment of State of N.Y.* (16 NY2d 222, 226-227), the Court of Appeals concluded, when discussing the nature of these coke oven batteries, that "[t]here is no doubt that, by common-law standards, these structures would be deemed real property. Their magnitude, their mode of physical annexation to the land and the obvious intention of the owner that such annexation be permanent would, indeed, compel that conclusion."

Using the construction of Battery No. 9 as an example, Honeywell's submissions established that the construction of a coke oven battery was a multistage process that took place over approximately 18 months. The overall construction of the battery would have taken approximately 1,460,000 hours of labor to complete over six phases. Phase One involved, among other things, the construction of the foundation and oven deck slab, requiring approximately 15,000 hours of labor over a 100-day period, and 14,000 cubic yards of reinforced concrete and 45,000 hours involving operating engineers and trade persons over a 210-day period. Phase Two was the brick and structural work phase, and involved the construction of a quench tower and a 300-foot coal conveyer system, the latter requiring 3,300 tons of structural steel and 4,400 hours involving operating engineers and ironworkers over a period of 9 to 12 months. The period of labor for the brick work of Battery No. 9 was approximately 520,000 hours over a 180-day period. Phases Three (involving plumbers, steam fitters and electricians), Four (involving HVAC installation) and Five (involving installation of the quench, charging and pusher tracks) would have, collectively, required 452,000 hours of labor to complete. Finally, Phase Six, which involved the construction of offices, a control room, bathrooms and a locker room, would have taken 60 to 90 days and 25,000 to 30,000 hours of labor to complete.

In light of the foregoing, we conclude that service predominated the transaction herein and that it was a contract for the rendition of services, i.e., a work, labor and materials contract, rather than a contract for the sale of a product (*see Hart v Moray Homes*, 158 AD2d 890, 891-892; *Ben Constr. Corp. v Ventre*, 23 AD2d 44, 45; *see generally Perlmutter v Beth David Hosp.*, 308 NY 100, 104-108, *rearg denied* 308 NY 812). We further conclude that a coke oven, installed as part of the construction of the "great complex of masonry structures" at Bethlehem (*City of Lackawanna*, 16 NY2d at 227), permanently affixed to the real property within a coke oven battery, does not constitute a "product" for purposes of plaintiff's products liability causes of action (*see Papp v Rocky Mtn. Oil & Minerals, Inc.*, 236 Mont 330, 340-341, 769 P2d 1249, 1256).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

160

CA 15-01971

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

JIMMIE LARKE, III, AND JUSTIN LARKE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TINA MCCARY MOORE, INDIVIDUALLY AND AS EXECUTRIX
OF THE ESTATE OF MELVIN E. MOORE, DECEASED, ING
RELIASTAR LIFE INSURANCE COMPANY, AND ING U.S. INC.,
ALSO KNOWN AS VOGA FINANCIAL, INC.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

JOY A. KENDRICK, BUFFALO, FOR PLAINTIFFS-APPELLANTS.

LITCHFIELD CAVO, LLP, NEW YORK CITY (MICHAEL K. DVORKIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ING RELIASTAR LIFE INSURANCE COMPANY, AND ING U.S. INC., ALSO KNOWN AS VOGA FINANCIAL, INC.

Appeal from an amended order of the Supreme Court, Erie County (Shirley Troutman, J.), entered January 20, 2015. The amended order, among other things, granted the motion to dismiss of defendant Tina McCary Moore, individually and as executrix of the estate of Melvin E. Moore, deceased, and dismissed the complaint against all defendants.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by reinstating the complaint against defendant ReliaStar Life Insurance Company, incorrectly sued herein as ING ReliaStar Life Insurance Company, and defendant VOYA Financial, Inc., incorrectly sued herein as ING U.S. Inc., also known as Voga Financial, Inc., and as modified the amended order is affirmed without costs.

Memorandum: In appeal No. 1, plaintiffs appeal from an amended order that, among other things, granted the motion to dismiss of defendant Tina McCary Moore, individually and as executrix of the estate of Melvin E. Moore (decedent), and dismissed the complaint against all defendants. In appeal No. 2, plaintiffs appeal from an amended order denying their motion for leave to renew and/or reargue their opposition to Moore's motion to dismiss.

As a preliminary matter we note that, insofar as the amended order in appeal No. 2 denied the motion for leave to reargue, it is not appealable, and we therefore dismiss the appeal to that extent on that ground (*see Gaiter v City of Buffalo Bd. of Educ.*, 142 AD3d 1349,

1350; *Indus PVR LLC v MAA-Sharda, Inc.*, 140 AD3d 1666, 1667, *lv dismissed in part and denied in part* 28 NY3d 1059). With respect to that part of plaintiffs' motion seeking leave to renew, we affirm the amended order in appeal No. 2. A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2], [3]; *see Doe v North Tonawanda Cent. Sch. Dist.*, 91 AD3d 1283, 1284). Here, Supreme Court properly determined that plaintiffs " 'failed to offer a valid excuse for failing to submit the new material' " in opposition to Moore's original motion to dismiss (*Jones v City of Buffalo Sch. Dist.*, 94 AD3d 1479, 1479; *see Linden v Moskowitz*, 294 AD2d 114, 116, *lv denied* 99 NY2d 505).

With respect to appeal No. 1, we conclude that the court properly dismissed the complaint as against Moore. It is well established that "a fraud-based action must be commenced within six years of the fraud or within two years from the time the plaintiff[s] discovered the fraud or 'could with reasonable diligence have discovered it' " (*Sargiss v Magarelli*, 12 NY3d 527, 532, quoting CPLR 213 [8]; *see also* CPLR 203 [g]). In their complaint, plaintiffs alleged that, during his life, decedent, plaintiffs' uncle, had named them as beneficiaries on a life insurance policy issued by defendant ReliaStar Life Insurance Company (RLIC), incorrectly sued herein as ING ReliaStar Life Insurance Company. Plaintiffs further alleged that "through fraud, undue influence, and/or coercion shortly before [decedent] passed away on April 21, 2008, while he was physically and mentally incapacitated as a result of terminal cancer[,]" Moore "procured" a change in the policy, i.e., she became the beneficiary thereof, replacing plaintiffs. Thus, according to plaintiffs' complaint, any alleged fraud by Moore occurred prior to decedent's death on April 21, 2008. Plaintiffs, however, did not commence the action until six years later, on April 21, 2014, i.e., more than six years from the date of the alleged fraud. Plaintiffs were therefore required to show that their fraud cause of action was timely pursuant to the two-year discovery exception (*see Brooks v AXA Advisors, LLC* [appeal No. 2], 104 AD3d 1178, 1180, *lv denied* 21 NY3d 858; *Vilsack v Meyer*, 96 AD3d 827, 828). Contrary to plaintiffs' contention, the "record supports the court's determination that plaintiffs possessed knowledge of facts from which they reasonably could have discovered the alleged fraud soon after it occurred, and in any event more than two years prior to the commencement of the action" (*Brooks*, 104 AD3d at 1180; *see Giarratano v Silver*, 46 AD3d 1053, 1056; *Prestandrea v Stein*, 262 AD2d 621, 622-623).

Plaintiffs nevertheless contend that, because they rejected Moore's answer and treated it as a nullity (*see* CPLR 3022), they were entitled to a default judgment against Moore and Moore's motion to dismiss pursuant to CPLR 3211 (a) (5) was precluded by CPLR 3211 (e). We reject that contention. Moore timely served an answer and counterclaim in which she raised the affirmative defense that plaintiffs did not commence their action within the applicable statute of limitations. Although Moore's answer did not contain the requisite

verification (*see* CPLR 3020 [b] [1]), plaintiffs in this case "proceeded on the theory that [they] had to prove [their] claim[s] as if [they] stood controverted. [They] did not seek to proceed as if upon a default" (*Matter of McDonald [Luppino]*, 100 AD3d 1349, 1350 [internal quotation marks omitted]). Furthermore, plaintiffs waived any objection to the lack of verification by waiting nearly two months to reject the answer (*see Rozz v Law Offs. of Saul Kobrick, P.C.*, 134 AD3d 920, 921-922; *Cherubin Antiques, Inc. v Matiash*, 106 AD3d 861, 862; *McDonald*, 100 AD3d at 1350). We therefore conclude that plaintiffs failed to act with "due diligence" as required by CPLR 3022.

We agree with plaintiffs, however, that the court erred in sua sponte dismissing the complaint against RLIC and its parent company, defendant VOYA Financial, Inc. (VOYA), incorrectly sued herein as ING U.S. Inc., also known as Voga Financial, Inc. We therefore modify the amended order accordingly. "[I]n the absence of a CPLR 3211 (a) motion by [RLIC and VOYA], the court was without authority to search the record and dismiss any claims against [them]" (*Torrance Constr., Inc. v Jaques*, 127 AD3d 1261, 1263; *see Mann v Rusk*, 14 AD3d 909, 910; *see also Mercedes-Benz Credit Corp. v Dintino*, 198 AD2d 901, 902).

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

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

161

CA 16-00109

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

JIMMIE LARKE, III, AND JUSTIN LARKE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TINA MCCARY MOORE, INDIVIDUALLY AND AS EXECUTRIX
OF THE ESTATE OF MELVIN E. MOORE, DECEASED, ING
RELIASTAR LIFE INSURANCE COMPANY, AND ING U.S. INC.,
ALSO KNOWN AS VOGA FINANCIAL, INC.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

JOY A. KENDRICK, BUFFALO, FOR PLAINTIFFS-APPELLANTS.

LITCHFIELD CAVO, LLP, NEW YORK CITY (MICHAEL K. DVORKIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ING RELIASTAR LIFE INSURANCE COMPANY, AND ING U.S. INC., ALSO KNOWN AS VOGA FINANCIAL, INC.

Appeal from an amended order of the Supreme Court, Erie County (Shirley Troutman, J.), entered December 16, 2015. The amended order denied plaintiffs' motion for leave to renew and/or reargue.

It is hereby ORDERED that said appeal from the amended order insofar as it denied leave to reargue is unanimously dismissed and the amended order is affirmed without costs.

Same memorandum as in *Larke v Moore* ([appeal No. 1] ___ AD3d ___ [May 5, 2017]).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

264

KA 12-00113

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYSHON DAYS, DEFENDANT-APPELLANT.

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

RAYSHON DAYS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered August 24, 2011. The appeal was held by this Court by order entered February 13, 2015, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (125 AD3d 1508). The proceedings were held and completed (Thomas J. Miller, J.).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment to a determinate term of 20 years and the period of postrelease supervision to a period of 2½ years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). We previously held the case, reserved decision, and remitted the matter to County Court to afford defendant a reasonable opportunity to present his contentions in support of his motion to withdraw his plea (*People v Days*, 125 AD3d 1508). Upon remittal, the court conducted a hearing on that part of defendant's motion seeking to withdraw the plea on the ground that it was induced by defense counsel's misleading advice with respect to a possible justification defense. Following the hearing, the court denied the motion.

We reject the contention of defendant in his main and pro se supplemental briefs that the court erred in limiting the scope of the hearing on his motion. "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry 'rest[s] largely in the discretion of the Judge to whom the motion is made' " (*People v Brown*, 14 NY3d 113, 116, quoting *People v Tinsley*, 35 NY2d

926, 927). Here, consistent with the remittal, "the court provided defendant with ample opportunity to present his claims in support of the motion to withdraw his plea" (*People v Green*, 122 AD3d 1342, 1343-1344).

Contrary to the further contention in the main and pro se supplemental briefs, we conclude that the court did not abuse its discretion in denying without a hearing that part of defendant's motion seeking withdrawal of the plea on the ground that he was coerced into pleading guilty by defense counsel's implicit threat to abandon his representation of defendant unless defendant paid him an additional fee (*cf. People v Harinarin*, 33 AD3d 455, 456, *lv denied* 8 NY3d 846). Defendant was afforded a "reasonable opportunity to present his contentions," and we conclude that nothing further was required with respect to that ground (*Tinsley*, 35 NY2d at 927; *see People v Hampton*, 142 AD3d 1305, 1306-1307, *lv denied* 28 NY3d 1124). We also reject the contention in the main and pro se supplemental briefs that defendant was coerced into pleading guilty by defense counsel's advice concerning his sentencing exposure (*see People v Humber*, 35 AD3d 1209, 1209, *lv denied* 8 NY3d 923).

We reject the further contention in the main and pro se supplemental briefs that the court abused its discretion in denying the motion insofar as it was premised upon defense counsel's allegedly inaccurate advice concerning the availability of a justification defense. The court was entitled to resolve matters of credibility in favor of defense counsel and against defendant (*see People v Bodah*, 67 AD3d 1195, 1196, *lv denied* 14 NY3d 838), and to conclude, based upon defense counsel's testimony, that defendant was provided accurate advice (*see People v Darden*, 57 AD3d 1522, 1523, *lv denied* 12 NY3d 815). Finally, with respect to the remittal, we conclude that the remaining contention in the main and pro se supplemental briefs is not properly before us inasmuch as it was raised for the first time following our remittal (*see People v Muridi M.*, 140 AD3d 1642, 1643, *lv denied* 28 NY3d 934).

Turning to the issues that were raised but not addressed when the matter was previously before us, we conclude that, as the People correctly concede, defendant's waiver of the right to appeal is invalid inasmuch as the court's minimal inquiry "was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Box*, 96 AD3d 1570, 1571, *lv denied* 19 NY3d 1024 [internal quotation marks omitted]). We reject the contention in defendant's main brief that the court erred in refusing to suppress his statement to the police. "Although defendant was detained and questioned by police for approximately [18] hours, 'that does not, by itself, render the statement involuntary' . . . [where, as h]ere, . . . defendant waived his *Miranda* rights, there were several breaks in the questioning, and defendant was provided with food and drink . . . and, in addition, he slept during one of the breaks" (*People v McWilliams*, 48 AD3d 1266, 1267, *lv denied* 10 NY3d 961). To the extent that the contention in defendant's pro se

supplemental brief that he was denied effective assistance of counsel survives the guilty plea, we conclude that it lacks merit. Defendant "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effective assistance of [defense] counsel" (*People v Dale*, 142 AD3d 1287, 1290, *lv denied* 28 NY3d 1144 [internal quotation marks omitted]; *see People v Ford*, 86 NY2d 397, 404).

Defendant contends that the court erred in enhancing his sentence based upon his failure to sign a written waiver of the right to appeal, and the People correctly concede that point. We note that defendant failed to preserve his contention for our review because he "failed to object to the enhanced sentence or move to withdraw [the] plea or to vacate the judgment of conviction on that ground" (*People v Fumia*, 104 AD3d 1281, 1281, *lv denied* 21 NY3d 1004), but we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). While waiving the right to appeal was a condition of the plea bargain, the execution of a written waiver was not, and thus the court was not empowered to enhance the sentence on that ground (*see People v McClemore*, 276 AD2d 32, 35). We therefore modify the judgment by reducing the term of imprisonment from a determinate term of 25 years to a determinate term of 20 years, and the period of postrelease supervision from 5 years to 2½ years, in accordance with the plea agreement. As so modified, the sentence is not unduly harsh or severe.

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

283

CA 16-01578

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN,

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GERALDINE H. BURGWARDT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RANDY F. BURGWARDT, DEFENDANT-RESPONDENT.

JOHN FENZ, WEST SENECA, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (SHARON STERN GERSTMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DEMARIE & SCHOENBORN, P.C., BUFFALO (WILLIAM E. SZCZEPANSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), dated October 7, 2015 in this declaratory judgment action. The order denied plaintiff's motion for summary judgment on the complaint.

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

Memorandum: Plaintiff and her husband (decedent) commenced this declaratory judgment action against defendant, their son, seeking, inter alia, a declaration that they were the lawful owners of the subject premises and that a deed transferring the subject premises to defendant must be canceled. We note at the outset that decedent passed away during the pendency of the action and, pursuant to a stipulated order, plaintiff was permitted to proceed as the sole plaintiff in the action.

Before conducting any discovery, plaintiff and decedent moved for summary judgment on the complaint, contending that, although defendant had been granted power of attorney for plaintiff and decedent under a Statutory Short Form Power of Attorney ([POA] General Obligations Law § 5-1513), he was not granted written authority to make a gift to himself of their real property under the requisite statutory gifts rider (*see* § 5-1514 [1]). They thus contended that defendant lacked the specific written authority to gift the real property to himself (§ 5-1514 [4] [b]), and that the purported conveyance violated the statute of frauds (*see* § 5-703). Additionally, they contended that the conveyance of the property violated section 5-1514 (5) because the conveyance, which was made pursuant to a POA, was not "in the best interest of the principal." We conclude that Supreme Court properly denied the motion.

"A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties" (*Brad H. v City of New York*, 17 NY3d 180, 185). " 'Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide' " (*Innophos, Inc. v Rhodia, S.A.*, 10 NY3d 25, 29; *see also Van Kipnis v Van Kipnis*, 11 NY3d 573, 577). These principles of contractual interpretation have been applied to powers of attorney (*see* 2A NY Jur 2d, Agency § 79).

Contrary to plaintiff's contention, the POAs and their attached gifts riders, which "must be read together as a single instrument" (General Obligations Law § 5-1501 [2] [n]), are ambiguous. In the POAs, plaintiff and decedent had authorized defendant, among other things, to make "real estate transactions" on their behalf, and signified their intention to grant defendant authority to make "major gifts and other transfers of [their] property" in accordance with the particular authority specified in the attached gifts riders. The attached gifts riders were executed by plaintiff and decedent, but all of the boxes authorizing defendant to make any gifts, including gifts to himself, were blank. We thus conclude that the instruments are incomplete and internally inconsistent because they express an intention to grant defendant authority to make gifts but then provide no circumstances in which he can exercise any such authority. Indeed, an optional gifts rider is executed only when the principal intends to authorize the agent to make major gifts and analogous transfers of the principal's property (*see* § 5-1514 [1]). Thus, there would have been no need for the gifts riders if plaintiff and decedent did not intend to authorize defendant to make gifts. Inasmuch as "a court should not read a contract so as to render any term, phrase, or provision meaningless or superfluous" (*Givati v Air Techniques, Inc.*, 104 AD3d 644, 645; *see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324), we conclude that the execution and attachment of gifts riders that failed to authorize any gifts created an ambiguity concerning the scope of defendant's authority (*see Boyd v Haritidis*, 239 AD2d 820, 821-822). Parol evidence is thus admissible "to complete the writing" (*Smith v Slocum*, 71 AD2d 1058, 1059; *see Brad H.*, 17 NY3d at 186).

The parol evidence submitted by defendant raises triable issues of fact whether plaintiff and decedent intended to authorize defendant to make a gift to himself of a remainder interest in the real property and, as a result, whether the requirements of General Obligations Law §§ 5-1514 and 5-703 were met.

Entered: May 5, 2017

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 14-00246

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HERBERT FARLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered January 22, 2014. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree as an accessory (Penal Law § 120.10 [1]; *see* § 20.00) in connection with an incident wherein the victim was stabbed by defendant's son, who intervened during a fistfight between defendant and the victim. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), i.e., that, acting alone or in concert with another, defendant caused serious physical injury to the victim by means of a dangerous instrument and that he did so with the intent to cause serious physical injury to the victim, we conclude, based upon our independent review of the evidence, that the "conviction [is] not in accord with the weight of the evidence" (*People v Delamota*, 18 NY3d 107, 117; *see generally Danielson*, 9 NY3d at 349; *People v Bleakley*, 69 NY2d 490, 495). We therefore reverse the judgment and dismiss the indictment.

The evidence established that, in the early evening on the day of the incident, defendant and the victim engaged in a verbal altercation while defendant was walking his dog near a grassy area where the victim, who was homeless, was staying. Several hours later, defendant, his dog, and his adult son returned to the area. The victim and defendant each testified that they had been drinking alcoholic beverages throughout the day and were intoxicated. The

victim testified that he heard someone on the other side of a fence say words to the effect of, "wait here," and then the victim saw defendant and his dog proceed through a hole in the fence to the area where the victim was located. After the men again engaged in a verbal altercation, defendant struck the victim with his fist, and the victim knocked defendant to the ground. Defendant told his dog to "Sick 'em," but the dog only wagged his tail. The victim testified that defendant attempted to strike him two or three more times, and that he knocked defendant to the ground each time.

The victim further testified that he was approached by defendant's son who began to fight with him, while defendant was somewhere behind him, and stabbed him eight times, resulting in life-threatening injuries. The victim's testimony is consistent with defendant's testimony that he had proceeded down a hill to retrieve his dog when his son began fighting with the victim. Defendant also testified that his son carried a pocket knife and that, on one occasion, his son carried a knife while chasing a person who had seriously injured defendant during a bar fight.

Two other witnesses testified that they were sitting on their porch in the vicinity of the incident and heard loud arguing between at least three men, and one of them testified that she heard words to the effect of, "we're going to make you pay for this" and "we're going to hit you or stick you." Another witness testified that he was on the street in front of a bar when he saw a man run toward him, enter a parked car, and drive away at a high rate of speed. That car was later found crashed and abandoned, and DNA evidence established that it had been driven by defendant's son. Shortly after that witness saw the man leave in the vehicle, a second man, with a dog, approached the witness and said words to the effect of, "if a homeless guy comes looking for me, tell him I went into the bar."

Defendant lived in an apartment above the bar, and he called 911 from his apartment and reported that he had been attacked. The police officer who responded to defendant's 911 call testified that defendant said that he had an altercation with a homeless man who was angry because defendant's dog had urinated on the fence, and that the homeless man had knocked him to the ground four or five times. The police officer testified that defendant was bleeding from injuries to his head and elbow, and that there was blood on his shirt. Blood on the hem of the shirt was later determined to be the victim's blood.

Although "all of the elements [of the crime] and necessary findings are supported by some credible evidence," we conclude that an acquittal would not have been unreasonable (*Bleakley*, 69 NY2d at 495; *see Danielson*, 9 NY3d at 348). We therefore must "independently assess all the proof; substitute [our] own credibility determinations for those made by the jury [if necessary]; determine whether the verdict was factually correct; and acquit . . . defendant if [we] are not convinced that the jury was justified in finding that guilt was proven beyond a reasonable doubt" (*Delamota*, 18 NY3d at 116-117; *see Bleakley*, 69 NY2d at 495). Here, defendant was charged as an accessory, and thus the People had to "prove beyond a reasonable doubt

that [defendant] acted with the mental culpability necessary to commit the crime charged and that, in furtherance thereof, he solicited, requested, commanded, importuned, or intentionally aided the principal to commit such crime" (*People v Chardon*, 83 AD3d 954, 956-957, *lv denied* 18 NY3d 857; *see* Penal Law § 20.00). We conclude that the People failed to prove beyond a reasonable doubt that defendant acted with the requisite mental culpability to commit assault in the first degree by causing serious physical injury to the victim by the use of a dangerous instrument, or that he solicited, requested, commanded, importuned or intentionally aided his son in committing the offense (*see Chardon*, 83 AD3d at 957).

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

Entered: May 5, 2017

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 16-01312

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

B. THOMAS GOLISANO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VITOCH INTERIORS LTD., ARTHUR VITOCH AND NORMA J. GOLDMAN, DEFENDANTS-APPELLANTS.

GEIGER AND ROTHENBERG, LLP, ROCHESTER (DAVID ROTHENBERG OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CULLEY MARKS TANENBAUM & PEZZULO, LLP, ROCHESTER (GLENN E. PEZZULO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered May 9, 2016. The order denied defendants' motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Sometime in November or December 2013, plaintiff hired defendants to refurbish his luxury motor yacht. According to plaintiff, defendants were retained to prepare an interior design scheme, including color schemes, new furniture, wall coverings, floor coverings, lighting treatments, and window treatments. As part of the work, defendants were to re-upholster certain existing furniture and refurbish existing built-ins and wall panels, as well as provide new carpeting, draperies, lighting fixtures, paintings, furniture, and bed linens. Plaintiff alleges, inter alia, that defendants promised to charge him "[d]efendants' wholesale cost or [d]efendants' preferred price for all goods and materials." Although plaintiff's wife and the yacht's captain also attested to those terms, there is no writing memorializing the agreement. In total, plaintiff paid defendants $811,067.34 for goods and services for the project, which was completed in June 2014.

Plaintiff commenced this action in September 2015, asserting causes of action for breach of contract and unjust enrichment, and seeking to recoup some of the monies paid for goods and materials. Following some discovery, defendants moved for summary judgment, contending that the contract between the parties was predominantly for the sale of goods, and not for services, and that the contract was therefore governed by article 2 of the Uniform Commercial Code. Defendants further contended that, having accepted all goods sold and

delivered by defendants and paid in full without any reservation of rights, plaintiff is barred under UCC article 2 from recovering any of the purchase price paid. Supreme Court denied the motion, and we affirm.

To establish on their motion that the parties' agreement is governed by UCC article 2, defendants had the burden of establishing as a matter of law that the parties' agreement was " 'predominantly' " one for the sale of goods, as opposed to the furnishing of services (*Levin v Hoffman Fuel Co.*, 94 AD2d 640, 640, *affd* 60 NY2d 665; *see Milau Assoc. v North Ave. Dev. Corp.*, 42 NY2d 482, 486). Defendants therefore had to establish that the parties' "main objective" in their agreement was for defendants to provide plaintiff with such goods (*Ben Constr. Corp. v Ventre*, 23 AD2d 44, 45; *see also Perlmutter v Beth David Hosp.*, 308 NY 100, 104-105, *rearg denied* 308 NY 812). We conclude that defendants failed to meet their burden (*see Zuckerman v City of New York*, 49 NY2d 557, 562). Inasmuch as the transaction was predominantly service-oriented, it falls outside the provisions of UCC article 2 (*see County of Chenango Indus. Dev. Agency v Lockwood Greene Engrs.*, 114 AD2d 728, 729, *appeal dismissed* 67 NY2d 757; *see also Geelan Mechanical Corp. v Dember Constr. Corp.*, 97 AD2d 810, 811), and the motion was therefore properly denied.

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

392

CA 16-01307

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

IN THE MATTER OF DAVID KUBIAK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DANIEL DERENDA, CHIEF OF POLICE, CITY OF BUFFALO POLICE DEPARTMENT, AND CITY OF BUFFALO, RESPONDENTS-RESPONDENTS.

JASON R. DIPASQUALE, BUFFALO, FOR PETITIONER-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (CINDY T. COOPER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered October 27, 2015. The order, inter alia, denied the petition.

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

Memorandum: Respondents discharged petitioner, a Buffalo police officer, before petitioner's 18-month probationary period expired. Petitioner sought arbitration of his discharge and, after the arbitrator upheld the discharge, he commenced this CPLR article 78 proceeding. He contended that respondents' decision to terminate his employment "was arbitrary, capricious and done in bad faith," and that the arbitration award "goes against the substantial weight of the evidence and lacks a sound and substantial basis." Petitioner appeals from an order in which Supreme Court converted the proceeding to one pursuant to CPLR article 75, confirmed the award, and denied the petition.

We reject petitioner's contention that the court erred in converting the proceeding to one pursuant to CPLR article 75. "Although characterized by petitioner as [a proceeding pursuant to CPLR] article 78, the instant proceeding, which seeks petitioner's reinstatement and would, if successful, effectively nullify the arbitrator's decision, is actually in the nature of a CPLR article 75 proceeding seeking to vacate an arbitration award" (*Matter of Rosa v City Univ. of N.Y.*, 13 AD3d 162, 162). "It is well established that the exclusive method for review of an arbitration award which is the result of a voluntary contractual arbitration procedure is contained in CPLR article 75" (*Farino v State of New York*, 55 AD2d 843, 843; *see*

Matter of Rodriguez v New York City Tr. Auth., 269 AD2d 600, 600, *lv denied* 96 NY2d 704). In other words, an arbitrator's award cannot be challenged on the merits through review under article 78 (*see Matter of Dye v New York City Tr. Auth.*, 57 NY2d 917, 920). Consequently, the court properly concluded that petitioner sought to vacate the arbitration award and converted the proceeding to one pursuant to CPLR article 75.

In any event, even assuming, arguendo, that the matter was properly commenced pursuant to CPLR article 78 (*see Matter of Schroeder v New York State Ins. Fund*, 24 AD3d 247, 248), we conclude that the court properly dismissed the proceeding without a hearing. "Petitioner's grounds for annulling the Police Department's termination are without merit. He was a probationary police officer at the time of his dismissal. While in that status, he 'may be dismissed for almost any reason, or for no reason at all' . . . As a probationary employee, petitioner had no right to challenge the termination by way of a hearing or otherwise, absent a showing that he was dismissed in bad faith or for an improper or impermissible reason . . . Petitioner failed to demonstrate either" (*Matter of Swinton v Safir*, 93 NY2d 758, 762-763; *see Matter of Fiore v Town of Whitestown*, 125 AD3d 1527, 1531, *lv denied* 25 NY3d 910).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

422

KA 16-01514

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY JOYCE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 26, 2015. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentences imposed for assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [1] [b]) to determinate terms of imprisonment of 10 years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the first degree (Penal Law § 120.10 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). Defendant's contention that the evidence is legally insufficient to establish that he committed assault in the first degree is not preserved for our review (*see People v Gray*, 86 NY2d 10, 19) and, in any event, is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant's intent to cause serious physical injury may be inferred from the evidence that he fired a weapon directly at the victim from a close range (*see generally People v Brown*, 120 AD3d 954, 956, *lv denied* 24 NY3d 1118; *People v Marquez*, 49 AD3d 451, 451, *lv denied* 10 NY3d 936). The evidence also is legally sufficient to establish that the victim sustained serious physical injury (*see* Penal Law § 10.00 [10]), inasmuch as the victim testified that the shooting resulted in the loss of movement in his arm, which persisted for one year after the incident, as well as the necessity of surgery to repair the arm with a bone graft, metal, and screws (*see People v Lake*, 301 AD2d 432, 433, *lv denied* 99 NY2d 656; *see also People v Andrews*, 24 AD3d 1184, 1185; *People v Irwin*, 5 AD3d 1122, 1123, *lv denied* 3 NY3d 642).

Moreover, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that, " 'on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded' " (*People v Lawrence*, 141 AD3d 1079, 1082, *lv denied* 28 NY3d 1029). With respect to the charges of criminal possession of a weapon in the second degree, we reject defendant's contention that the verdict is against the weight of the evidence on the ground that his possession of the gun was justified under a theory of temporary lawful possession (*see generally People v Holmes*, 129 AD3d 1692, 1694-1695, *lv denied* 26 NY3d 968).

We also reject defendant's contention that Supreme Court erred in precluding defendant from offering testimony concerning the actions committed by one of defendant's neighbors prior to the shooting. The neighbor's alleged actions were not relevant to a justification defense inasmuch as they did not establish any reasonable basis for defendant to believe that the neighbor, or the victim, would use physical force against defendant or his wife (*see generally People v Morgan*, 172 AD2d 414, 414, *lv denied* 78 NY2d 971). Even assuming, arguendo, that defendant feared the victim because of some past conduct by the neighbor, we conclude that, inasmuch as the alleged confrontations with the neighbor occurred years prior to this incident, they are too remote in time to be relevant to defendant's justification defense (*see People v Grady*, 40 AD3d 1368, 1372-1373, *lv denied* 9 NY3d 923).

We further reject defendant's contention that the court erred in refusing to instruct the jury on the defense of justification with respect to the use of nondeadly physical force. Although defendant may have aimed the gun at the victim's raised arm, such action constituted deadly physical force regardless of where defendant aimed the weapon inasmuch as defendant fired a loaded weapon at the victim from a close range (*see generally People v Magliato*, 68 NY2d 24, 29-30; *People v Haynes*, 133 AD3d 1238, 1239, *lv denied* 27 NY3d 998).

Defendant's contention that the court improperly questioned a witness in response to a juror note is not preserved for our review (*see* CPL 470.05 [2]; *People v Brown*, 120 AD3d 1545, 1545-1546, *lv denied* 24 NY3d 1082), and we decline to exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's contention that the submission of the juror note during the testimony of a witness established that the jurors engaged in premature deliberations, inasmuch as there is nothing in the record to indicate that the juror who wrote the note had engaged in disqualifying conduct.

Finally, we agree with defendant, that, in light of his age, his lack of a prior criminal record and other mitigating circumstances, the sentence is unduly harsh and severe. As a matter of discretion in the interest of justice, we therefore modify the judgment by reducing

the sentences imposed for assault in the first degree (Penal Law § 120.10 [1]) and for criminal possession of a weapon in the second degree (§ 265.03 [1] [b]) to determinate terms of imprisonment of 10 years (*see* CPL 470.15 [6] [b]).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

445

KA 15-00535

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT G. CASE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered March 16, 2015. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, assault in the second degree, strangulation in the second degree and unlawful imprisonment in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and as a matter of discretion in the interest of justice, a new trial is granted on the first and sixth counts of the indictment, the fourth count is dismissed, and the fifth count is dismissed without prejudice to the People to re-present any appropriate charges under that count to another grand jury.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of rape in the first degree (Penal Law § 130.35 [1]), assault in the second degree ([felony assault] § 120.05 [6]), strangulation in the second degree (§ 121.12), and unlawful imprisonment in the first degree (§ 135.10), arising from allegations that he forcibly raped his estranged wife in the garage of their former marital residence. Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence because "his motion for a trial order of dismissal was not specifically directed at the grounds advanced on appeal" (*People v Wright*, 107 AD3d 1398, 1401, *lv denied* 23 NY3d 1026; *see People v Gray*, 86 NY2d 10, 19). We nevertheless exercise our power to review his challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We agree with defendant that the conviction of felony assault and strangulation is not supported by legally sufficient evidence with respect to the physical injury element (*see generally People v Bleakley*, 69 NY2d 490, 495). The evidence submitted by the People, i.e., that the victim sustained minor pain, a one-centimeter bruise on

her arm, and a swollen neck, is insufficient to establish either physical impairment or substantial pain (*see* Penal Law § 10.00 [9]; *People v Coleman*, 134 AD3d 1555, 1555-1556, *lv denied* 27 NY3d 963; *Matter of Antonio J.*, 129 AD2d 988, 988; *cf. People v Delaney*, 138 AD3d 1420, 1421, *lv denied* 28 NY3d 928). Consequently, the felony assault count must be dismissed. With respect to the strangulation count, we conclude that the evidence is legally sufficient to support a conviction of the lesser included offense of criminal obstruction of breathing or blood circulation (Penal Law § 121.11). Because there must be a new trial for the reasons discussed below, however, count five of the indictment charging defendant with strangulation in the second degree is dismissed with leave to the People to re-present any appropriate charges under that count to another grand jury (*see generally People v Gonzalez*, 61 NY2d 633, 635).

Contrary to defendant's further contention, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to support the conviction of rape and unlawful imprisonment (*see generally Bleakley*, 69 NY2d at 495). Furthermore, viewing the evidence in light of the elements of the crimes of rape in the first degree and unlawful imprisonment as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to those crimes is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contention that the conviction of unlawful imprisonment must be dismissed based on the merger doctrine (*see People v Hanley*, 20 NY3d 601, 605-606). In any event, that contention is without merit (*see People v Smith*, 47 NY2d 83, 87).

Defendant contends that County Court erred in precluding him from introducing evidence that the victim had previously said, in effect, that she would accuse defendant of rape in order to obtain a divorce from him. Defendant contends that the court further erred in striking the testimony of a witness regarding that statement. Any error in precluding that evidence and striking that testimony is harmless because "the precluded testimony was essentially cumulative of other evidence presented at trial . . . , and . . . defendant was provided a meaningful opportunity to present a complete defense" (*People v Ramsey*, 59 AD3d 1046, 1048, *lv denied* 12 NY3d 858 [internal quotation marks omitted]; *see People v Davis*, 111 AD3d 1302, 1304, *lv denied* 22 NY3d 1137; *see also People v Herring*, 225 AD2d 1065, 1066, *lv denied* 88 NY2d 937). Defendant's contention that he was denied effective assistance of counsel by his attorney's failure to object or seek other corrective action with respect to those alleged errors "is raised for the first time in his reply brief and therefore is not properly before us" (*People v Sponburgh*, 61 AD3d 1415, 1416, *lv denied* 12 NY3d 929; *see People v Spears*, 125 AD3d 1400, 1400, *lv denied* 25 NY3d 1172).

We reject defendant's contention that the court erred in denying

his motion to discharge a sworn juror. During the trial, that juror indicated to a court officer that a courtroom spectator seated near the defense table had befriended the juror on social media, and was attempting to contact the juror. The juror concluded that the spectator was attempting to contact him in order to persuade him to acquit defendant. In order to discharge a sworn juror, the court "must be convinced that the juror's knowledge will prevent [him or] her from rendering an impartial verdict" (*People v Buford*, 69 NY2d 290, 299). "On this record, we are unable to conclude that the court could have been 'convinced' . . . , based on any unequivocal responses of the juror, that the juror was 'grossly unqualified to serve in the case' " (*People v Telehany*, 302 AD2d 927, 928, quoting CPL 270.35 [1]; *cf. People v Maddox*, 175 AD2d 183, 183).

We agree with defendant, however, that the prosecutor engaged in misconduct on several occasions, and we reach defendant's unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Here, the prosecutor engaged in misconduct during her closing statement by repeatedly appealing to the jury's sympathy, asking the jury to do justice and protect the victim by convicting defendant, bolstering the victim's credibility and injecting the prosecutor's personal opinions into the trial. Perhaps most egregiously, in arguing that the jury should reject defendant's testimony that he confessed falsely to the police because he needed to use the bathroom, the prosecutor gave her personal opinion regarding defendant's credibility by stating that she would sit in her own urine rather than falsely admit that she committed a crime. "We can only conclude herein that the prosecutor's 'inflammatory [comments had] a decided tendency to prejudice the jury against the defendant' " (*People v Ballerstein*, 52 AD3d 1192, 1194, quoting *People v Ashwal*, 39 NY2d 105, 110). Consequently, we conclude that the cumulative effect of the prosecutorial misconduct, which substantially prejudiced defendant's rights (*see generally People v Calabria*, 94 NY2d 519, 523), requires reversal.

Furthermore, "[i]n light of the foregoing, we agree with defendant's related contention that he was denied effective assistance of counsel owing to defense counsel's failure to object to the prosecutor's misconduct during summation" (*People v Rozier*, 143 AD3d 1258, 1260, citing *People v Wright*, 25 NY3d 769, 780-783). Defense counsel also failed to object when the prosecutor introduced evidence of prior bad acts despite having failed to seek a ruling regarding the admissibility thereof, most notably the testimony of a sheriff's deputy that, months before this incident, defendant stole the victim's truck and was arrested for driving it while intoxicated while on the way to attack a person with whom he believed the victim was having an affair. Defense counsel also failed to object when the prosecutor cross-examined defendant regarding that issue. Thus, reversal is also required because defense counsel was ineffective in "fail[ing] to object to prejudicial evidence of prior uncharged crimes and bad acts introduced by the prosecutor" (*People v Wiggins*, 213 AD2d 965, 965).

Contrary to defendant's further contention, however, the court did not err in refusing to suppress his statements to the police.

With respect to defendant's contention that he was too intoxicated to waive his rights, the record of the suppression hearing does not establish that, at the time he waived his *Miranda* rights, he was intoxicated " 'to the degree of mania, or of being unable to understand the meaning of his statements' " (*People v Schompert*, 19 NY2d 300, 305, *cert denied* 389 US 874; *see People v Beasley*, 147 AD3d 1549, 1550; *People v Peterkin*, 89 AD3d 1455, 1455, *lv denied* 18 NY3d 885). With respect to defendant's further contention that the interrogating officers used leading questions that prompted him to waive his rights and undermined the voluntariness of the confession, "it cannot be said that the interrogation was fundamentally unfair or that it induced defendant falsely to incriminate himself" (*People v Salgado*, 130 AD2d 960, 961, *lv denied* 70 NY2d 754; *see generally People v Gutierrez*, 96 AD3d 1455, 1455, *lv denied* 19 NY3d 997). Finally, with respect to defendant's contention that his statements were involuntary because he was questioned over a two-hour period, it is axiomatic that the length of the interrogation period "does not, by itself, render the statement[s] involuntary" (*People v Weeks*, 15 AD3d 845, 847, *lv denied* 4 NY3d 892; *see People v Clark*, 139 AD3d 1368, 1369, *lv denied* 28 NY3d 928). Here, viewing "the totality of the circumstances surrounding the interrogation" (*People v Knapp*, 124 AD3d 36, 41 [internal quotation marks omitted]), we conclude that "[t]he record of the suppression hearing supports the court's determination that defendant knowingly, voluntarily and intelligently waived his *Miranda* rights before making the statement[s]" (*People v Irvin*, 111 AD3d 1294, 1295, *lv denied* 24 NY3d 1044, *reconsideration denied* 26 NY3d 930; *see People v Holland*, 126 AD3d 1514, 1515, *lv denied* 25 NY3d 1165).

Defendant's further contentions are academic in light of our determination.

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

455

CA 16-00808

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

PETER D. WATERMAN AND CAROL WATERMAN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CNH AMERICA LLC AND MONROE TRACTOR &
IMPLEMENT CO., INC., DEFENDANTS-RESPONDENTS.

CNH AMERICA LLC, THIRD-PARTY PLAINTIFF,

V

WOODS EQUIPMENT COMPANY, THIRD-PARTY
DEFENDANT-RESPONDENT.

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

NIXON PEABODY LLP, BUFFALO (VIVIAN M. QUINN OF COUNSEL), FOR DEFENDANT-RESPONDENT AND THIRD-PARTY PLAINTIFF CNH AMERICA LLC.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (ALYSSA JORDAN OF COUNSEL), FOR DEFENDANT-RESPONDENT MONROE TRACTOR & IMPLEMENT CO., INC.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (HENRY A. ZOMERFELD OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered July 8, 2015. The order granted in part the motions of defendants and the cross motion of third-party defendant for summary judgment.

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

Memorandum: We conclude, for reasons stated in the decision at Supreme Court, that the motions of defendant-third-party plaintiff, CNH America LLC, and defendant Monroe Tractor & Implement Co., Inc. and the cross motion of third-party defendant were properly granted to the extent that they sought summary judgment dismissing plaintiffs' claims for failure to warn. Any other issues raised by plaintiffs in their notice of appeal are deemed abandoned (*see Beatty v Williams*,

227 AD2d 912, 912; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

468

KA 15-00001

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY BAIRD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered October 14, 2014. 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 [3]), defendant contends that his plea was not knowing and voluntary because County Court did not conduct the requisite further inquiry after he negated an essential element of the crime during the plea colloquy by denying that he threatened the use of a dangerous instrument. At the outset, we note that defendant's contention survives his valid waiver of the right to appeal (*see People v Theall*, 109 AD3d 1107, 1107-1108, *lv denied* 22 NY3d 1159). Nevertheless, even assuming, arguendo, that his contention falls within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666), we conclude that the court "fulfilled its duty to conduct further inquiry to ensure that the plea was entered knowingly, voluntarily and intelligently" (*People v Dash*, 74 AD3d 1859, 1860, *lv denied* 15 NY3d 892 [internal quotation marks omitted]; *see Lopez*, 71 NY2d at 666). Specifically, after the court noted that defendant appeared to have negated the element in question, defendant conferred with his attorney and thereafter admitted that he had a box cutter that was visible outside his pocket, that his hand was inches from the box cutter, and that he told the victim that he did not want to hurt her. Those admissions are sufficient to show that defendant threatened the use of a dangerous instrument, and we therefore conclude that the court properly accepted the plea (*see People v Lawrence*, 118 AD3d 1501, 1502, *lv denied* 24 NY3d 1220; *see also People v Skinner*, 284 AD2d 906, 907; *People v Norman*, 284 AD2d 933, 933-934,

lv denied 96 NY2d 905).

Defendant's further contention that his plea was coerced by his attorney also survives his waiver of the right to appeal, but he failed to preserve it for our review inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction (*see Dash*, 74 AD3d at 1859-1860), and we conclude in any event that it is without merit.

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

478

CA 16-01721

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

RICHARD J. WALLENHORST, II, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JAMES R. WALLENHORST, MICHAEL R. WALLENHORST, SHELIA WALLENHORST, RICHARD J. WALLENHORST, RITA WALLENHORST, ELAINE L. BERG, CARL B. ARNOLD, RICK MAIER, DEFENDANTS-RESPONDENTS,
AND THOMAS N. PRIME, JR., DEFENDANT.

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

ANTONUCCI LAW FIRM LLP, WATERTOWN (DAVID P. ANTONUCCI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS JAMES R. WALLENHORST, MICHAEL R. WALLENHORST, SHELIA WALLENHORST, RICHARD J. WALLENHORST, RITA WALLENHORST AND RICK MAIER.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered May 4, 2016. The order denied plaintiff'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 third counterclaim of defendants James R. Wallenhorst, Michael R. Wallenhorst, Shelia Wallenhorst, Richard J. Wallenhorst, Rita Wallenhorst, and Rick Maier, and as modified the order is affirmed without costs.

Memorandum: This action arises out of the use of beach property, also referred to as lot 28, that is owned by plaintiff and defendants as tenants in common. Plaintiff constructed a concrete retaining wall and deck pavers on a portion of the property, and thereafter commenced this action seeking a declaration confirming his right to construct the wall, thereby preventing defendants from damaging or interfering with his use of the wall. Plaintiff moved for summary judgment seeking, inter alia, the above declaration and dismissal of the second and third counterclaims of James R. Wallenhorst, Michael R. Wallenhorst, Shelia Wallenhorst, Richard J. Wallenhorst, Rita Wallenhorst, and Rick Maier (defendants). Supreme Court denied the motion.

We agree with plaintiff that the court erred in denying that part of his motion seeking dismissal of defendants' third counterclaim,

which alleges breach of contract, and we therefore modify the order accordingly. Plaintiff met his initial burden on the motion by establishing, inter alia, that there is no homeowners' association relating to the joint ownership of the beach property and that there is no written or oral agreement regarding any expenses associated with the property, and defendants failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We otherwise affirm the order for reasons stated in the decision at Supreme Court.

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

481

CA 16-01699

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

IN THE MATTER OF ARBITRATION BETWEEN CITY OF BUFFALO, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

BUFFALO POLICE BENEVOLENT ASSOCIATION, INC., RESPONDENT-RESPONDENT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (MARY B. SCARPINE OF COUNSEL), FOR PETITIONER-APPELLANT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (IAN HAYES OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered November 18, 2015 in a proceeding pursuant to CPLR article 75. The order and judgment, among other things, denied the petition to vacate an arbitration award.

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

Memorandum: Petitioner appeals from an order and judgment denying its petition seeking vacatur of an arbitration award, which determined that petitioner had violated the terms of the subject collective bargaining agreement (CBA) and awarded back pay to petitioner's employee.

On May 31, 2012, petitioner terminated its employee, a police officer with the City of Buffalo Police Department, upon learning from federal authorities that the officer had allegedly confessed to having operated a marijuana "grow operation" prior to and after his becoming an officer. As relevant here, the Buffalo Police Commissioner (Commissioner) served notice of the charges on the officer and then promptly terminated him prior to holding a disciplinary hearing.

Section 12.1 (A) of the CBA provides that "a permanent employee shall not be removed or otherwise subjected to any disciplinary penalty provided in [Article XII] except for . . . misconduct or for committing a felony or any crime involving moral turpitude, *and then only after a hearing upon stated charges*" (emphasis supplied). Dismissal—one of the disciplinary actions available under the terms of the CBA—may be accomplished only after certain procedures are

followed: The employee must be served with a written copy of the charges, after which the employee has 10 days to respond in writing and serve the response on the Commissioner. Within 10 days of receipt of the answer, the Commissioner must conduct an informal conference with the employee concerning the charges. At the conference, the employee may call witnesses to testify on his behalf. At that point, the Commissioner has the authority to dismiss or to withdraw the charges, or to accept a plea of guilty; if the Commissioner does not take any of the aforementioned actions, a formal hearing must be conducted before an impartial hearing officer. At the formal hearing, the party bringing the charges bears the burden of proving them. The hearing officer must then make a record of the hearing and set forth findings and recommendations for referral to the Commissioner for his review and decision.

The day after the officer's termination, respondent filed a grievance on behalf of the officer, asserting that petitioner had violated Article XII of the CBA by summarily terminating the officer without following the aforementioned due process procedures. After the parties took the required procedural steps in an attempt to reach settlement, the matter was submitted to an impartial arbitrator for consideration of two issues, namely, whether petitioner violated the terms of the CBA and, if so, the appropriate remedy. The parties agreed that the factual record would consist of an affidavit from the Commissioner setting forth details of the federal criminal investigation and the Commissioner's reason for terminating the officer. Respondent did not concede the underlying facts in the Commissioner's affidavit, including, as relevant here, the Commissioner's averment that federal authorities had informed him that the officer had confessed to criminal activity.

The arbitrator determined that petitioner had violated the "very clear procedure" delineated in the CBA and awarded the officer back pay. Petitioner commenced the instant CPLR article 75 proceeding to vacate the arbitration award, asserting that it is against public policy and irrational. Respondent filed an answer, and Supreme Court confirmed the award. On appeal, petitioner contends that the arbitration award violates a strong public policy and/or was irrational (*see* CPLR 7511 [b] [1] [iii]; *Matter of Kowaleski [New York State Dept. of Corr. Servs.]*, 16 NY3d 85, 90-91). We conclude that petitioner failed to meet its " 'heavy burden' " of demonstrating that the award should be vacated on either ground (*Matter of Rochester City Sch. Dist. [Rochester Assn. of Paraprofessionals]*, 34 AD3d 1351, 1351, *lv denied* 8 NY3d 807; *see Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336).

At the outset, we note that courts of this State "have long since abandoned their distrust and hostility toward arbitration as an alternative means for the resolution of legal disputes, in favor of a policy supporting arbitration and discouraging judicial interference with either the process or its outcome" (*Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100, AFL-CIO*, 99 NY2d 1, 6, citing *Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 629). Judicial restraint under the "narrow" public policy exception is particularly

warranted in arbitrations involving public employment collective bargaining agreements (*id.* at 7). A court may vacate an award on that ground "where strong and well-defined policy considerations embodied in constitutional, statutory or common law prohibit a particular matter from being arbitrated or certain relief from being granted by an arbitrator" (*Matter of New York State Corr. Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 327, citing *Sprinzen*, 46 NY2d at 631). Vacatur of an award may not be granted "on public policy grounds when vague or attenuated considerations of a general public interest are at stake" (*id.* at 327).

The court properly determined that petitioner's proffered public policy considerations do not preclude the relief granted by the arbitrator. Petitioner's arguments in that regard constitute little more than vague considerations of a general public interest, which are insufficient to support vacatur of the award (*see id.*; *see also City Sch. Dist. of the City of N.Y. v McGraham*, 17 NY3d 917, 919-920; *Matter of Selman v State of New York Dept. of Corr. Servs.*, 5 AD3d 144, 144-145).

Although the underlying facts render the size of the award distasteful—over two years of back pay for a police officer who allegedly confessed to committing crimes both before and after becoming a police officer—"[o]ur [public policy] analysis cannot change because the facts or implications of a case might be disturbing, or because an employee's conduct is particularly reprehensible" (*New York State Corr. Officers & Police Benevolent Assn.*, 94 NY2d at 327). We note, in this instance, that had the due process procedures of the CBA been followed, the likelihood would have been greatly diminished that the officer would have received as large an award for back pay as he did here.

We also conclude that the court properly determined that petitioner failed to establish that the award was irrational, i.e., that there was " 'no proof whatever to justify the award' " (*Matter of Rockland County Bd. of Coop. Educ. Servs. v BOCES Staff Assn.*, 308 AD2d 452, 453; *see Matter of Buffalo Council of Supervisors & Adm'rs, Local No. 10, Am. Fedn. of Sch. Adm'rs [Board of Educ. of City Sch. Dist. of Buffalo]*, 75 AD3d 1067, 1068). The arbitrator considered the narrow issues before him—whether petitioner violated the CBA and, if so, the appropriate remedy for such violation. Given the CBA's language, we conclude that the arbitrator made a rational determination that petitioner violated the CBA and that the officer was entitled to back pay as a result thereof.

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

495

KA 12-01361

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EMMANUEL IBARRONDO, DEFENDANT-APPELLANT.

JEANNIE D. MICHALSKI, CONFLICT DEFENDER, AVON, 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 (Robert B. Wiggins, J.), rendered May 22, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fourth degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Livingston County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the fourth degree (Penal Law § 224.34 [1]). We agree with defendant that County Court erred in refusing to suppress his written statement based on the court's conclusion that the statement was spontaneously made during custodial interrogation. The testimony at the suppression hearing established that defendant was interviewed by an inspector for the New York State Department of Corrections and Community Supervision as part of a drug sale investigation. The interview was conducted in Spanish for defendant's benefit as a non-English speaking individual. After waiving his *Miranda* rights, defendant initially denied having engaged in any culpable conduct. Once defendant was confronted with evidence that his fingerprints had been found on several envelopes containing Suboxone, however, he admitted his involvement, and his admission was reduced to a written statement. This written statement referenced a future inclination to speak with a lawyer. Notably, the court did not address whether defendant knowingly, intelligently and voluntarily waived his *Miranda* rights, or whether defendant had invoked his right to counsel. Instead, the court refused to suppress the written statement on the ground that a particularly inculpatory reference made therein was "spontaneous."

"Volunteered statements are admissible provided the defendant spoke with genuine spontaneity 'and [the statements were] not the

result of inducement, provocation, encouragement or acquiescence, no matter how subtly employed' " (*People v Rivers*, 56 NY2d 476, 479, *rearg denied* 57 NY2d 775, quoting *People v Maerling*, 46 NY2d 289, 302-303). Such statements must be proven to be "spontaneous in the literal sense of that word as having been made without apparent external cause, . . . [and] it must at least be shown that they were in no way the product of an 'interrogation environment' " (*People v Stoesser*, 53 NY2d 648, 650). "Rather, [the statement] must satisfy the test for a blurted out admission, a statement which is in effect forced upon the officer" (*People v Grimaldi*, 52 NY2d 611, 617).

Here, defendant's statement was provoked or encouraged by the presentation or discussion of evidence suggestive of his criminal conduct, and we thus conclude that it cannot be deemed "spontaneous in the literal sense of that word as having been made without apparent external cause" (*Stoesser*, 53 NY2d at 650; *see People v Ramos*, 27 AD3d 1073, 1074-1075, *lv dismissed* 6 NY3d 897; *People v Newport*, 149 AD2d 954, 955-956). "Although there may be other reasons to justify the denial of defendant's motion, the only issues that we may consider on this appeal are those that 'may have adversely affected the appellant' " (*People v Schrock*, 99 AD3d 1196, 1197, quoting CPL 470.15 [1]; *see People v Concepcion*, 17 NY3d 192, 194-195; *People v LaFontaine*, 92 NY2d 470, 473-474, *rearg denied* 93 NY2d 849). We therefore hold this case, reserve decision, and remit the matter to County Court to rule upon any other issues raised by the People in opposition to the motion.

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

497

CAF 15-01557

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

IN THE MATTER OF JASON GREELEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

GRETCHEN TUCKER AND KARA GREELEY,
RESPONDENTS-RESPONDENTS.

HEATHER A. TOMES, DELEVAN, FOR PETITIONER-APPELLANT.

FERN S. ADELSTEIN, OLEAN, FOR RESPONDENT-RESPONDENT KARA GREELEY.

JENNIFER M. LORENZ, ATTORNEY FOR THE CHILDREN, LANCASTER.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered August 10, 2015 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted custody of the subject children to respondent Gretchen Tucker.

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

Memorandum: On appeal from an order that, inter alia, granted custody of the subject children to respondent maternal grandmother (grandmother), petitioner father contends that the grandmother failed to establish the requisite extraordinary circumstances. We reject that contention.

It is well settled that, "as between a parent and nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" (*Matter of Stent v Schwartz*, 133 AD3d 1302, 1303, *lv denied* 27 NY3d 902 [internal quotation marks omitted]; *see Matter of Bennett v Jeffreys*, 40 NY2d 543, 544). The evidence at the hearing established that, since the father and respondent mother separated in 2007, the father never had primary physical placement of the children and did not file a petition for custody for another seven years. Twice since then, when the mother was unable to have primary physical placement of the children, the father consented to award the grandmother custody of the children. During that time, he played a minimal role in the children's lives and made no contact with them for as long as 1½ years at a time. The grandmother, by contrast, has provided them with a stable home, where

they reside with their mother, half brother, and uncle. According deference to Family Court's factual findings and credibility determinations (*see Matter of Mildred PP. v Samantha QQ.*, 110 AD3d 1160, 1161-1162), we conclude that the court properly found extraordinary circumstances inasmuch as the father failed to maintain substantial, repeated and continuous contact with the children (*see Matter of Carpenter v Puglese*, 94 AD3d 1367, 1368-1369; *see also Matter of Laura M. v Nicole N.*, 143 AD3d 722, 723).

Although the father correctly contends that the court made no determination with respect to the best interests of the children, we conclude that reversal is not required on that ground. The record is sufficient for this Court to make such a determination, and we do so in the interest of judicial economy and the children's well-being (*see Matter of Cole v Nofri*, 107 AD3d 1510, 1512, *appeal dismissed and lv denied* 22 NY3d 1083; *Matter of Howell v Lovell*, 103 AD3d 1229, 1231). Upon our review of the relevant factors (*see Fox v Fox*, 177 AD2d 209, 210), we conclude that it is in the children's best interests to award the grandmother primary physical custody. Although the custodial arrangement has been unstable throughout the children's lives, the grandmother has continuously provided them with a stable home whenever needed. The grandmother's country home was recently renovated and the children have their own bedrooms, whereas the father over the years has resided with a series of paramours and has acknowledged that he does not have a plan if his current living situation changes. While living with the grandmother, the children have developed a close relationship with their half brother who also lives there. The grandmother has facilitated the children's schooling and extracurricular activities, whereas the father did not know the names of their teachers or pediatrician. Moreover, the grandmother is financially stable, owns her own home, and is employed full time as a registered nurse.

The father failed to preserve for our review his further contention that the Attorney for the Children failed to advocate for the children's position concerning custody or to request a *Lincoln* hearing, and thus provided ineffective assistance of counsel (*see Matter of Lopez v Lugo*, 115 AD3d 1237, 1237-1238). The father also failed to preserve for our review his contention that the court should have held a *Lincoln* hearing inasmuch as he did not request one (*see Matter of Thillman v Mayer*, 85 AD3d 1624, 1625).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

498

CAF 15-00225

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

IN THE MATTER OF JOSEPH M., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JOSEPH M., SR., RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered January 6, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: Respondent father appeals from an order that, inter alia, revoked a suspended judgment entered upon his admission that he had permanently neglected the subject child, and terminated the father's parental rights. It is well settled that, where Family Court "determines by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights" (*Matter of Ronald O.*, 43 AD3d 1351, 1352). Here, although the record from the hearing on petitioner's motion to revoke the suspended judgment establishes that the father made minimal progress on some of the conditions of the suspended judgment, " 'literal compliance with the terms of the suspended judgment will not suffice to prevent a finding of a violation. A parent must [also] show that progress has been made to overcome the specific problems which led to the removal of the child[ ]' " (*Matter of Maykayla FF. [Eugene FF.]*, 141 AD3d 898, 899; *see Matter of Erie County Dept. of Social Servs. v Anthony P.*, 45 AD3d 1384, 1385). Contrary to the father's contention, the record establishes that he failed to demonstrate such progress, and that he continues to deny the existence of the problems that led to the removal of the subject child. Consequently, we agree with petitioner that the court's "finding after a hearing that [the father] violated

the conditions of the suspended judgment is supported by a preponderance of the evidence" (*Matter of Robert T.*, 270 AD2d 961, 961, *lv denied* 95 NY2d 758; *see Matter of Krystal M. [Kathleen M.-M.]*, 4 AD3d 764, 764). The father's further contention that the court prematurely revoked the suspended judgment is without merit (*see Matter of Emily A. [Gina A.]*, 129 AD3d 1473, 1474-1475).

We reject the father's contention that he was denied the right to due process when the court curtailed his cross-examination of a witness at the hearing. The cross-examination that the father's attorney was attempting to pursue "was properly excluded as 'too remote and speculative' " (*Matter of Michael U. [Marcus U.]*, 110 AD3d 821, 822; *see Matter of Mi-Kell V.*, 226 AD2d 810, 810-811; *see also People v Poole*, 55 AD3d 1349, 1350, *lv denied* 11 NY3d 929).

The father further contends that certain records were not properly admitted because they were not certified pursuant to section 1046 (a) (iv) of the Family Court Act. The father waived that contention with respect to two of petitioner's exhibits because he specifically withdrew his objection to the validity of the certification regarding those exhibits (*see generally Matter of Dyandria D.*, 22 AD3d 354, 354-355, *lv denied* 6 NY3d 704). In any event, the father's contention is without merit with respect to all of the records at issue. Section 1046 (a) by its terms applies "[i]n any hearing under [articles 10 and 10-A]" of the Family Court Act, but the hearing at issue was part of a permanent neglect proceeding pursuant to article six of the Family Court Act and Social Services Law § 384-b.

We reject the father's further contention that the court erred in granting petitioner access to his mental health records. It is well settled that "a party's mental health records are subject to discovery where that party has placed his or her mental health at issue" (*Matter of Richard SS.*, 29 AD3d 1118, 1124). Here, by denying that he needed to comply with that part of the suspended judgment directing him to undergo mental health treatment, the father placed his mental health at issue.

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

502

CA 16-01846

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

BRUCE T. CHILLIS, AS ADMINISTRATOR OF THE ESTATE OF DONNIE M. HOLLAND, DECEASED, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

DOUGLAS A. BRUNDIN, JR., CRNA, DOUGLAS R. SILLART, M.D., MAPLE-GATE ANESTHESIOLOGISTS, P.C., AND BRIAN E. MCGRATH, M.D., DEFENDANTS-APPELLANTS-RESPONDENTS.

CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS DOUGLAS A. BRUNDIN, JR., CRNA, DOUGLAS R. SILLART, M.D., AND MAPLE-GATE ANESTHESIOLOGISTS, P.C.

FELDMAN KIEFFER, LLP, BUFFALO (JAMES E. EAGAN OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT BRIAN E. MCGRATH, M.D.

MARSH ZILLER LLP, BUFFALO (LINDA J. MARSH OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeals and cross appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered September 28, 2016. The order denied the respective motions of defendants for summary judgment dismissing the complaint against them and the cross motion of plaintiff for partial summary judgment on liability.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant Brian E. McGrath, M.D. and dismissing the complaint against him, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice and wrongful death action seeking damages arising from the death of his brother (decedent), a 29-year-old man who died during surgery performed by defendants to remove a mass from his buttocks.

Defendant Brian E. McGrath, M.D. (McGrath), who was decedent's orthopedic surgeon, contends that Supreme Court erred in denying his motion for summary judgment dismissing the complaint against him. We agree, and we therefore modify the order accordingly. "[O]n a motion for summary judgment, a defendant in a medical malpractice action bears the initial burden of establishing either that there was no

deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the [patient's] injuries" (*Bagley v Rochester Gen. Hosp.*, 124 AD3d 1272, 1273). McGrath met his burden by submitting a detailed affirmation establishing that his care and treatment of decedent in recommending and performing surgery was consistent with the accepted standard of care (*see Macaluso v Pilcher*, 145 AD3d 1559, 1560; *O'Shea v Buffalo Med. Group, P.C.*, 64 AD3d 1140, 1140-1141, *appeal dismissed* 13 NY3d 834). The burden then shifted to plaintiff to raise an issue of fact by submitting a physician's affidavit establishing both a departure from the accepted standard of care and proximate cause (*see Bagley*, 124 AD3d at 1273). Plaintiff failed to meet that burden inasmuch as he submitted the affirmation of an anesthesiologist who failed to establish how he was familiar with the accepted standard of care for an orthopedic surgeon. Although a medical expert need not be a specialist in a field to offer an opinion concerning the accepted standards of care in that field, a physician offering an opinion outside his or her particular field must lay a foundation to support the reliability of that opinion (*see Shectman v Wilson*, 68 AD3d 848, 849-850; *see also Diel v Bryan*, 71 AD3d 1439, 1440). We thus reject plaintiff's contention on his cross appeal that the court erred in denying that part of his cross motion for partial summary judgment on liability against McGrath.

We further conclude that the court properly denied the motion of the remaining defendants, who were decedent's anesthesia providers, for summary judgment dismissing the complaint against them. Those defendants met their initial burden inasmuch as they established a lack of causation by submitting the certified report of an expert pathologist, who opined that decedent died of a brain condition unrelated to the surgery (*see generally Manswell v Montefiore Med. Ctr.*, 144 AD3d 564, 565), thus shifting the burden of proof to plaintiff. In opposition, plaintiff's expert anesthesiologist opined that the remaining defendants deviated from the accepted standard of care and that their deviation proximately caused decedent's death. Plaintiff's expert stated that decedent sustained a "massive intraoperative hemorrhage" and died of extreme blood loss on the operating room table and, according to the relevant medical records, decedent's "blood pressure was unmeasurable as early as 11:40 [a.m.]" and "no transfusion was begun until almost an hour later."

The remaining defendants contend that plaintiff's expert failed to establish that he was qualified to rebut the opinion of their expert pathologist as to the cause of death (*see generally Shectman*, 68 AD3d at 849-850). It is well established, however, that " 'there may be more than one proximate cause of an injury' " (*Mazella v Beals*, 27 NY3d 694, 706), and we conclude that, under the circumstances of this case, plaintiff's expert laid a proper foundation for his opinion that blood loss was a proximate cause of decedent's death. Thus, plaintiff raised an issue of fact and the court properly denied the remaining defendants' motion on that ground. We likewise conclude that the court properly denied that part of plaintiff's cross motion for partial summary judgment on liability against those defendants (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Contrary to the further contention of the remaining defendants, they failed to meet their burden of establishing as a matter of law that plaintiff sustained no damages and thus failed to establish their entitlement to summary judgment dismissing the complaint against them on that ground as well (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). In a wrongful death action, damages are limited to "fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought" (EPTL 5-4.3 [a]). "Pecuniary loss" refers to "the economic value of the decedent to each distributee at the time decedent died" (*Huthmacher v Dunlop Tire Corp.*, 309 AD2d 1175, 1176; *see Milczarski v Walaszek*, 108 AD3d 1190, 1190), including "loss of income and financial support, loss of household services, loss of parental guidance, as well as funeral expenses and medical expenses incidental to death" (*Milczarski*, 108 AD3d at 1190). In the limited excerpts of plaintiff's deposition testimony that were submitted in support of the motion, plaintiff testified that it was difficult to estimate how much of decedent's funeral expenses were paid by plaintiff, and that decedent provided plaintiff with money during decedent's lifetime.

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

503

CA 16-01090

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

NATASHA D. WALLACE, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF NATHANIEL DEMARIO WALLACE, AN INFANT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

M&C HOTEL INTERESTS, INC., BUFFALO RHM OPERATING LLC, AND CDL HOTELS USA, INC., DEFENDANTS-RESPONDENTS.

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

GOLDBERG SEGALLA LLP, BUFFALO (KATHLEEN J. MARTIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered January 12, 2016. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: In this negligence action arising from an incident in which plaintiff's son suffered a near-drowning in a hotel pool, plaintiff appeals from an order granting defendants' motion for summary judgment dismissing the complaint. We affirm.

The complaint, as amplified by the bill of particulars, alleges that defendants were negligent in, inter alia, failing to provide lifeguards or otherwise adequately supervise bathers using the hotel pool, allowing the pool to be overcrowded, and allowing a dangerous condition to exist on the premises, i.e., in allowing a group of children to play games in and around the pool. We note at the outset that plaintiff on appeal has abandoned any challenge to the dismissal of her claim that defendants were negligent in allowing an excessive number of bathers in the pool (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Defendants met their initial burden with respect to the lifeguard and bather supervision claims by submitting the relevant section of the New York State Sanitary Code (Sanitary Code), which provides that, "[w]hen a swimming pool . . . is part of a temporary residence or a campground, as defined in Part 7 of this Title, the operator must

provide either Supervision Level IIa, IIb, III, or IV aquatic supervision. When Supervision Level III or IV is selected, on-premise CPR certified staff is not required" (10 NYCRR 6-1.23 [1] [i]). Hotels are temporary residences within the meaning of the regulation (*see* 10 NYCRR 7-1.1 [j]), and the parties correctly agree that the term "on-premise CPR certified staff" is synonymous with lifeguards (*see* 10 NYCRR 6-1.31). Defendants also submitted a report from the Erie County Department of Health, indicating that the "Hotel Pool employs Supervision Level IV" and that defendants met all the requirements for the use of that level of supervision. On appeal, plaintiff does not challenge the finding that the pool at issue was properly designated Supervision Level IV under the regulation. Consequently, Supreme Court properly granted the motion insofar as defendants sought summary judgment dismissing the claims arising from failure to provide lifeguards and poolside supervision inasmuch as the Sanitary Code provides that defendants had no duty to provide that level of supervision. Indeed, "[i]t is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff" (*Pulka v Edelman*, 40 NY2d 781, 782, *rearg denied* 41 NY2d 901; *see e.g. Olson v Brunner*, 261 AD2d 922, 923, *lv denied* 94 NY2d 759; *cf. Villar v Howard*, 126 AD3d 1297, 1299, *affd* 28 NY3d 74).

We further conclude that the court properly granted defendants' motion with respect to the remaining claims, in which plaintiff alleges that defendants were negligent in permitting a dangerous condition to exist on the premises, i.e., a group of children running and jumping in the pool area. "It is beyond dispute that landowners and business proprietors have a duty to maintain their properties in reasonably safe condition . . . It is also clear that this duty may extend to controlling the conduct of third persons who frequent or use the property, at least under some circumstances" (*Di Ponzio v Riordan*, 89 NY2d 578, 582-583). Specifically, "[l]andowners 'have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control' " (*O'Callaghan v Jones*, 283 AD2d 949, 949, quoting *D'Amico v Christie*, 71 NY2d 76, 85). Here, even assuming, arguendo, that there is an issue of fact whether the injuries sustained by plaintiff's son were proximately caused by that dangerous condition, i.e., when one of the other children bumped into him and knocked him under the water, rather than by him taking in too much water, getting cramps, or simply being unable to swim well enough to stay afloat, we conclude that "defendants met their initial burden by establishing that they were not aware of the need to exercise control over [the children,] and that they did not have the opportunity to do so" (*Brown v Roblee*, 57 AD3d 1494, 1495; *see D'Amico*, 71 NY2d at 85; *cf*. *Lasek v Miller*, 306 AD2d 835, 836). Plaintiff failed to raise a triable issue of fact in opposition (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

The parties' contentions regarding assumption of the risk are

moot in light of our determination.

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

509

CA 16-02040

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

AMANDA STOWE, AS PARENT AND NATURAL GUARDIAN OF LEGEND STOWE AND EMMANUEL STOWE, INFANTS UNDER THE AGE OF 14 YEARS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KAREN FURNESS, DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (RYAN K. CUMMINGS OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID P. FELDMAN, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), entered January 28, 2016. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this negligence action on behalf of her infant children against defendant, her former landlord, to recover damages for injuries that the children allegedly sustained as a result of lead paint exposure. We conclude that Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint. As the court properly determined, there is an issue of fact whether defendant had actual or constructive notice of the hazardous condition (*see generally Chapman v Silber*, 97 NY2d 9, 21-22). Defendant stated in an affidavit that she renovated and repainted the apartment in 2009, learned of the lead paint condition for the first time in 2014, and immediately asked plaintiff's family to move out so that she could remediate the property. In opposition, plaintiff submitted the affidavit of a prior tenant, who stated that the Orleans County Department of Health detected dangerously high lead levels in chipped paint at the apartment in 2006, and that she told defendant about those results at that time. We conclude that the affidavit of the prior tenant, in combination with the deposition testimony of plaintiff's husband that he informed defendant sometime after 2009 of chipping paint in the apartment, creates an issue of fact sufficient to preclude summary judgment. Contrary to defendant's contention, the out-of-court statements contained in the prior tenant's affidavit are not hearsay because they were not offered for the truth of the matters asserted, i.e., the presence of flaking and

chipping lead paint in the apartment (*see generally Nucci v Proper*, 95 NY2d 597, 602), but instead were offered to establish that defendant had notice thereof.

We reject defendant's further contention that she is entitled to summary judgment on the ground that plaintiff's conduct was a superseding cause of the children's injuries. Although a defendant in such a case may assert a defense that the plaintiff created or exacerbated the lead paint condition (*see M.F. v Delaney*, 37 AD3d 1103, 1105), the fact that plaintiff and her children failed to vacate the premises for two months after discovering the lead paint condition does not establish such a defense as a matter of law.

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

516

KA 14-00727

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES REED, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered November 14, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that the firearm seized from his residence by his parole officer was the product of an unlawful search and that County Court therefore erred in refusing to suppress it. We reject that contention inasmuch as "the record supports the court's determination that the search was 'rationally and reasonably related to the performance of the parole officer's duty' and was therefore lawful" (*People v Johnson*, 94 AD3d 1529, 1531-1532, *lv denied* 19 NY3d 974, quoting *People v Huntley*, 43 NY2d 175, 181).

Here, the parole officer testified that he received information in a bulletin from an information-sharing collaboration of various law enforcement agencies that an individual with defendant's name was the suspect in a recent shooting of a former parolee. That information, coupled with the parole officer's knowledge of the weapons charge underlying defendant's parole status, defendant's history of gang involvement, and the current feud between the gang to which the shooting victim belonged and defendant's gang, provided the parole officer with a reasonable basis to believe that a firearm would be located in the residence (*see generally People v Rounds*, 124 AD3d 1351, 1351, *lv denied* 25 NY3d 107; *People v Nappi*, 83 AD3d 1592, 1593-1594, *lv denied* 17 NY3d 820; *People v Felder*, 272 AD2d 884, 884, *lv*

denied 95 NY2d 905). The court thus properly determined that the search initiated by the parole officer was rationally and reasonably related to the parole officer's duty "to detect and to prevent parole violations for the protection of the public from the commission of further crimes" (*Huntley*, 43 NY2d at 181; *see Nappi*, 83 AD3d at 1593-1594). Contrary to defendant's further contention, the record supports the court's determination that " 'the assistance of police officers at the scene did not render the search a police operation' " (*People v Farmer*, 136 AD3d 1410, 1411, *lv denied* 28 NY3d 1027; *see Rounds*, 124 AD3d at 1351).

Finally, to the extent that defendant challenges the credibility of the parole officer's testimony, we "afford deference to the court's determination that the parole officer's testimony was credible" (*Johnson*, 94 AD3d at 1532), and we conclude that there is no basis on this record to disturb the court's determination.

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

518

KA 13-00166

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD C. FEDRICK, JR., DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered January 14, 2013. The judgment convicted defendant, upon a jury verdict, of attempted robbery in the first degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [3]) and assault in the second degree (§ 120.05 [2]). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is legally sufficient evidence to establish defendant's intent to commit a robbery. Defendant asked the victim about the amount of drugs that he was seeking to purchase, and the victim replied that he wanted $100 worth. Minutes later, defendant jabbed the victim in the back with a sharp instrument, told the victim to "give it up," and stabbed the victim when he tried to flee. The evidence of defendant's conduct, along with the surrounding circumstances, is legally sufficient to establish that he intended to rob the victim (*see People v Martinez*, 22 NY3d 551, 556-557, 568; *People v Barbuto*, 126 AD3d 1501, 1503, *lv denied* 25 NY3d 1159).

The remainder of defendant's challenges to the sufficiency of the evidence are not preserved for our review inasmuch as defendant's motion for a trial order of dismissal was not " 'specifically directed' " at the grounds now raised on appeal (*People v Gray*, 86 NY2d 10, 19). 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 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 contention that Supreme Court failed to provide defense counsel with meaningful notice of a jury note, in violation of the procedure set forth in *People v O'Rama* (78 NY2d 270). The jury note was "ministerial in nature and therefore require[d] only a ministerial response" (*People v Nealon*, 26 NY3d 152, 161), and thus the *O'Rama* procedure was not implicated (*see People v Williams*, 142 AD3d 1360, 1362, *lv denied* 28 NY3d 1128).

Defendant failed to preserve for our review his contention that the court erred in failing to instruct the jury to consider the counts against defendant separately from the counts against his codefendant at this joint trial, inasmuch as defendant failed to request a specific charge or object to the charge as given (*see* CPL 470.05 [2]; *People v Miller*, 137 AD3d 1712, 1713, *lv denied* 27 NY3d 1153; *People v Gega*, 74 AD3d 1229, 1231, *lv denied* 15 NY3d 851, *reconsideration denied* 15 NY3d 920). 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]). Defense counsel's failure to request a missing witness charge did not render his assistance ineffective (*see People v Myers*, 87 AD3d 826, 828, *lv denied* 17 NY3d 954).

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

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

522

CAF 16-00507

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

IN THE MATTER OF NATAYLIA C.B. AND
SABASTION C.B.
---------- MEMORANDUM AND ORDER
ONONDAGA COUNTY DEPARTMENT OF CHILDREN
AND FAMILY SERVICES, PETITIONER-RESPONDENT;

CHRISTOPHER B., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

ARLENE BRADSHAW, ATTORNEY FOR THE CHILDREN, SYRACUSE.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered March 2, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights to the subject children.

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

Memorandum: In appeal No. 1, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject children on the ground of permanent neglect. In appeal No. 2, the father appeals from an order denying in part the father's motion to settle the record on appeal in appeal No. 1. Contrary to the father's contention in appeal No. 2, we conclude that Family Court did not abuse its discretion in settling the record (*see Kalbfliesh v McCann*, 129 AD3d 1671, 1672, *lv denied* 26 NY3d 907).

With respect to the order in appeal No. 1, the father failed to preserve for our review his contention that the petition is "jurisdictionally defective because it failed to set forth the requisite diligent efforts of petitioner to encourage and strengthen the parental relationship" (*Matter of Abraham C.*, 55 AD3d 1442, 1442-1443, *lv denied* 12 NY3d 701). In any event, the petition "sufficiently specified the agency's efforts," which included arranging visitation with the children, consulting with the father about developing a service plan, and reviewing his progress (*Matter of*

Ana M.G. [Rosealba H.], 74 AD3d 419, 419; *see Abraham C.*, 55 AD3d at 1443).

Contrary to the father's contention, his admission that he failed to plan adequately for the children's long-term care was sufficient to establish permanent neglect (*see generally Matter of Jason H. [Lisa K.]*, 118 AD3d 1066, 1067; *Matter of Adam L. [Marie L.-K.]*, 97 AD3d 581, 582), inasmuch as "[t]he failure of an incarcerated parent to provide any realistic and feasible alternative to having the child[ren] remain in foster care until the parent's release from prison . . . supports a finding of permanent neglect" (*Matter of Alex C., Jr. [Alex C., Sr.]*, 114 AD3d 1149, 1150, *lv denied* 23 NY3d 901 [internal quotation marks omitted]). Furthermore, "in view of the father's admissions of permanent neglect, the court was not required to determine whether petitioner exercised diligent efforts to strengthen and encourage the parental relationship" (*Matter of Shadazia W.*, 52 AD3d 1330, 1331, *lv denied* 11 NY3d 706).

We reject the father's further contention that he was denied effective assistance of counsel. Counsel cannot be deemed ineffective " 'merely because the attorney counseled [the father] to admit the allegations in the petition' " (*Matter of Michael W.*, 266 AD2d 884, 884-885; *see Matter of Leo UU.*, 288 AD2d 711, 713, *lv denied* 97 NY2d 609), and it is clear from the record "that [the father's] decision to admit to the allegations of permanent neglect was a matter of strategy" (*Matter of Yusef P.*, 298 AD2d 968, 969; *see Matter of Brandon B. [Scott B.]*, 93 AD3d 1212, 1213, *lv denied* 19 NY3d 805).

Finally, we reject the father's contention that the court should have entered a suspended judgment rather than terminating his parental rights. In light of "the positive living situation" of the children while residing with their foster parents, "the absence of a more significant relationship" between the children and the father, "and the uncertainty surrounding both when [the father] would be released from prison and where he would reside," the court properly determined that further delay was not in the best interests of the children and that termination of the father's parental rights was warranted (*Matter of Jazmyne II. [Frank MM.]*, 144 AD3d 1459, 1461, *lv denied* ___ NY3d ___ [Mar. 23, 2017]; *see Matter of Bayley W. [Patrick K.]*, 146 AD3d 1097, 1101).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

523

CAF 16-02010

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

IN THE MATTER OF NATAYLIA C.B. AND
SABASTION C.B.
---------- MEMORANDUM AND ORDER
ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND
FAMILY SERVICES, PETITIONER-RESPONDENT;

CHRISTOPHER B., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

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

ARLENE BRADSHAW, ATTORNEY FOR THE CHILDREN, SYRACUSE.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered September 28, 2016. The order settled the record on appeal.

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

Same memorandum as in *Matter of Nataylia C.B.* ([appeal No. 1] ___ AD3d ___ [May 5, 2017]).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

526

CA 16-01969

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

ANNIE MOSLEY, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 117444.)

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

BRENNA BOYCE, PLLC, ROCHESTER (WILLIAM P. SMITH, JR., OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Renee Forgensi Minarik, J.), entered February 10, 2016. The interlocutory judgment apportioned liability 75% to defendant and 25% to claimant.

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

Memorandum: Claimant commenced this action seeking damages for injuries she allegedly sustained when she slipped and fell on ice and snow on a walkway leading to the entrance to the Orleans Correctional Facility during visiting hours at that facility. After a nonjury trial, the Court of Claims found defendant 75% liable for the accident. Defendant appeals, and we affirm.

"On appeal from a judgment entered after a nonjury trial, this Court has the power 'to set aside the trial court's findings if they are contrary to the weight of the evidence' and to render the judgment we deem warranted by the facts" (*Black v State of New York* [appeal No. 2], 125 AD3d 1523, 1524; *see Baba-Ali v State of New York*, 19 NY3d 627, 640; *Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170). We must give due deference, however, to the court's evaluation of the credibility of the witnesses and quality of the proof (*see Black*, 125 AD3d at 1524-1525), and review the record in the light most favorable to sustain the judgment (*see City of Syracuse Indus. Dev. Agency*, 20 AD3d at 170). "Moreover, '[o]n a bench trial, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence' " (*Black*, 125 AD3d at 1525; *see City of Syracuse Indus. Dev. Agency*, 20 AD3d at 170).

"It is well established that '[a] landowner must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk' " (*Ferguson v Rochester City Sch. Dist.*, 99 AD3d 1184, 1185, quoting *Basso v Miller*, 40 NY2d 233, 241). Nevertheless, "[a]lthough a landowner owes a duty of care to keep his or her property in a reasonably safe condition, he 'will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter' " (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1020-1021, quoting *Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735; *see Hanifan v COR Dev. Co., LLC*, 144 AD3d 1569, 1569; *Gilbert v Tonawanda City Sch. Dist.*, 124 AD3d 1326, 1327). "A reasonable time is that period within which the [defendant] should have taken notice of the icy condition and, in the exercise of reasonable care, remedied it by clearing the sidewalk or otherwise eliminating the danger" (*Valentine v City of New York*, 86 AD2d 381, 383, *affd* 57 NY2d 932).

We conclude that a fair interpretation of the evidence supports the court's determination that defendant was 75% at fault for the accident. There is no dispute that the snow and ice-covered walkway constituted a dangerous condition, and we reject defendant's contention that the storm in progress doctrine absolves it of liability. There was no evidence that it was snowing at the time of or shortly before the accident. A watch commander log stated that it was snowing approximately two hours before the accident, but there is no evidence in the record of any snowfall after that time. The evidence further established that, although the sidewalk was cleared approximately two hours before the accident, there was snow and ice on the sidewalk at the time of the accident. Contrary to defendant's contention, that evidence does not establish that it continued snowing after the sidewalk was cleared inasmuch as it was just as likely that the wind blew snow from the adjacent field onto the sidewalk. Defendant failed to establish that the storm in progress doctrine should apply under those circumstances because it failed to establish that high winds accompanied the snowfall on the day of the accident (*cf. Gilbert*, 124 AD3d at 1327; *Powell v MLG Hillside Assoc.*, 290 AD2d 345, 345). Rather, the testimony established that wind would blow snow onto the sidewalk "[a]ll the time" and was in the nature of a recurring dangerous condition (*see Anderson v Great E. Mall, L.P.*, 74 AD3d 1760, 1761-1762; *see generally Frechette v State of New York*, 129 AD3d 1409, 1410-1412).

We reject defendant's further contention that its snow removal efforts on the morning of the accident were reasonable under the circumstances. The evidence established that the sidewalk was shoveled approximately two hours before the accident and again shortly after the accident, and there is a fair interpretation of the evidence that salt was not applied to the sidewalk until after the accident. Given that defendant had knowledge of the time that visiting hours at the facility were to begin that morning and that snow would often blow onto the sidewalk from the adjacent field, we conclude that its

"remedial efforts were plainly insufficient to render the walkway reasonably safe" (*Ferguson*, 99 AD3d at 1187).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

530

CA 15-01043

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF THE APPLICATION OF HSBC BANK USA, N.A., TRUSTEE, PETITIONER-RESPONDENT,

MEMORANDUM AND ORDER

FOR THE JUDICIAL SETTLEMENT OF THE INTERMEDIATE AND FINAL ACCOUNTS AS TRUSTEES OF TRUST BY GRACE M. KNOX, DATED DECEMBER 26, 1934, GRANTOR, FOR THE BENEFIT OF GRACIA M. CAMPBELL (FORMERLY KNOWN AS GRACIA C. FLICKINGER), FOR THE PERIOD FROM AUGUST 15, 1971 TO JUNE 15, 2012.

GRACIA E. CAMPBELL, CLARISSA VAIDA, AND HEATHER BYRNE, RESPONDENTS-APPELLANTS.

(APPEAL NO. 1.)

LAWRENCE J. KONCELIK, JR., EAST HAMPTON, FOR RESPONDENTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (AMANDA L. LOWE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered May 5, 2015. The order, among other things, granted petitioner's motion for attorneys' fees and costs and denied respondents' cross motion to disgorge fees.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking attorneys' fees and costs, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for a determination of reasonable attorneys' fees and costs in accordance with the following memorandum: In appeal Nos. 1 through 3, respondents appeal from orders granting petitioners' motion for additional attorneys' fees and costs in connection with their petition in the proceeding underlying appeal No. 3 and their amended petitions in the proceedings underlying appeal Nos. 1 and 2 seeking, inter alia, to approve the final accounts for three trusts and for attorneys' fees and costs related to the administration of those trusts. As a preliminary matter, we note that respondents' contentions related to the nonfinal orders and decrees entered May 27, 2014 are reviewable on their appeals from the final orders granting additional attorneys' fees and costs (*see* CPLR 5501 [a] [1]; *Burke v Crosson*, 85 NY2d 10, 15). In those nonfinal orders and decrees, Supreme Court, inter alia, granted the petition and amended petitions seeking to settle the respective accounts of the three trusts.

Respondents contend that the court erred in granting the petition and amended petitions because the court-ordered deadline to file objections to the petition and amended petitions, i.e., April 30, 2014, was stayed by operation of CPLR 3211 (f) when respondents served by mail on April 29, 2014 a motion to dismiss the petition and amended petitions pursuant to CPLR 3211 (a). That contention is not properly before us, however, because it is raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985; *see also Sargent v Mammoser*, 117 AD3d 1533, 1534).

Respondents also contend that the award of additional attorneys' fees and costs in excess of $500,000 for 20 months of motion practice is not reasonable. It is well settled that, in determining the proper amount of attorneys' fees and costs, the court "should consider the time spent, the difficulties involved in the matters in which the services were rendered, the nature of the services, the amount involved, the professional standing of the counsel, and the results obtained" (*Matter of Potts*, 213 App Div 59, 62, *affd* 241 NY 593; *see Matter of Chase Manhattan Bank [University of Rochester]*, 68 AD3d 1670, 1671). Because the court failed to make any findings with respect to those factors, we are unable to review the court's implicit determination that the fees and costs are reasonable (*cf. Chase Manhattan Bank*, 68 AD3d at 1671). We therefore modify the orders in appeal Nos. 1 through 3 by denying those parts of the motion seeking additional attorneys' fees and costs, and we remit the matter to Supreme Court for findings with respect to reasonable additional attorneys' fees sought by petitioners, following a hearing, if necessary (*see Matter of Rose BB.*, 16 AD3d 801, 803).

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

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

531

CA 15-01046

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF THE APPLICATION OF MELISSA C. ENGLAND AND BENJAMIN K. CAMPBELL, AS PERSONAL REPRESENTATIVES OF THE ESTATE OF HAZARD K. CAMPBELL, SR., AND HSBC BANK USA, N.A., AS CO-TRUSTEES, PETITIONERS-RESPONDENTS,

MEMORANDUM AND ORDER

FOR THE JUDICIAL SETTLEMENT OF THE INTERMEDIATE ACCOUNT AS TRUSTEES OF TRUST BY MARJORIE KNOX CAMPBELL, DATED DECEMBER 29, 1934, GRANTOR, FOR THE BENEFIT OF HAZARD K. CAMPBELL, SR., MARJORIE K. CAMPBELL AND GRACIA M. CAMPBELL, FOR THE PERIODS FROM DECEMBER 29, 1934 TO NOVEMBER 5, 1972 AND NOVEMBER 5, 1972 TO SEPTEMBER 24, 2011.

GRACIA E. CAMPBELL, CLARISSA VAIDA, AND HEATHER BYRNE, RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

LAWRENCE J. KONCELIK, JR., EAST HAMPTON, FOR RESPONDENTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (AMANDA L. LOWE OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered May 5, 2015. The order, among other things, granted petitioners' motion for attorneys' fees and costs and denied respondents' cross motion to disgorge fees.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking attorneys' fees and costs, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for a determination of reasonable attorneys' fees and costs in accordance with the same memorandum as in *Matter of HSBC Bank USA, N.A.* (*Campbell*) ([appeal No. 1] ___ AD3d ___ [May 5, 2017]).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

532

CA 15-01047

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF THE APPLICATION OF MELISSA C. ENGLAND AND BENJAMIN K. CAMPBELL, AS PERSONAL REPRESENTATIVES OF THE ESTATE OF HAZARD K. CAMPBELL, SR., AND HSBC BANK USA, N.A., AS CO-TRUSTEES, PETITIONERS-RESPONDENTS,

MEMORANDUM AND ORDER

FOR THE JUDICIAL SETTLEMENT OF THE FIRST INTERMEDIATE ACCOUNT AS TRUSTEES OF TRUST BY MARJORIE K.C. KLOPP, DATED OCTOBER 11, 1961, GRANTOR, FOR THE BENEFIT OF THE ISSUE OF GRACIA M. CAMPBELL (FORMERLY KNOWN AS GRACIA C. FLICKINGER), FOR THE PERIOD FROM OCTOBER 11, 1961 TO MAY 9, 2012.

GRACIA E. CAMPBELL, CLARISSA VAIDA, AND HEATHER BYRNE, RESPONDENTS-APPELLANTS.
(APPEAL NO. 3.)

LAWRENCE J. KONCELIK, JR., EAST HAMPTON, FOR RESPONDENTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (AMANDA L. LOWE OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered May 5, 2015. The order, among other things, granted petitioners' motion for attorneys' fees and costs and denied respondents' cross motion to disgorge fees.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking attorneys' fees and costs, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for a determination of reasonable attorneys' fees and costs in accordance with the same memorandum as in *Matter of HSBC Bank USA, N.A.* (*Campbell*) ([appeal No. 1] ___ AD3d ___ [May 5, 2017]).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

540

KA 14-00968

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMARIO SMITH, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered November 22, 2013. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). Defendant's conviction stemmed from the shooting of a 19-year-old victim at point-blank range with a shotgun. Contrary to defendant's contention, viewing the elements of the crime in light of the charge to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Even assuming, arguendo, that a different verdict would not have been unreasonable because defendant was identified as the shooter only by his two accomplices, we nevertheless conclude that the jury did not "fail[ ] to give the evidence the weight it should be accorded" (*id.*). The credibility concerns that defendant raises on appeal with respect to the testimony of the accomplices were thoroughly explored on cross-examination. Furthermore, the testimony of the accomplices was sufficiently corroborated by other evidence, particularly the testimony of an eyewitness who described the shooter as of "medium build," which fit the description of only defendant, and the testimony of another witness to whom defendant admitted several weeks after the shooting that "he had to teach [the victim] a lesson because [the victim] wasn't playing by the rules."

Because the evidence is legally sufficient to support the conviction, defendant is precluded from challenging on appeal the instructions the prosecutor gave to the grand jury (*see People v*

Gibson, 137 AD3d 1657, 1658, *lv denied* 27 NY3d 1151; *People v Cotton*, 120 AD3d 1564, 1565-1566, *lv denied* 27 NY3d 963). In any event, we conclude that the failure of the prosecutor to instruct the grand jury that the testimony of the accomplices required corroboration did not impair the integrity of the grand jury (*see* CPL 210.35 [5]), inasmuch as the testimony of the accomplices was corroborated by defendant's admission of culpability to a nonparticipant (*see People v White*, 147 AD2d 967, 967; *see generally People v Burgin*, 40 NY2d 953, 954). Thus, the error did not "prejudice the ultimate decision reached by the [g]rand [j]ury" (*People v Elioff*, 110 AD3d 1477, 1477, *lv denied* 22 NY3d 1040 [internal quotation marks omitted]).

We reject defendant's contention that the prosecutor acted in bad faith by calling a witness whom he knew would not testify in accordance with the sworn statement the witness gave to the police within 24 hours of the murder (*see People v Jablonski*, 176 AD2d 1242, 1242). Prior to the commencement of the trial, County Court questioned the witness with respect to the contents of his statement to the police, i.e., that he saw the victim talking to defendant, whom he identified by his street name, moments before he heard a gunshot, and that he was "100% sure" that it was defendant whom he saw talking to the victim. The statement also reflected that the witness knew the female accomplice, whom he also identified by name. The witness told the court that the police detectives who took the statement were "mixed up" because he was not an eyewitness to the murder; however, he agreed with the court that he was obligated to tell the truth when called to testify. Thus, "there is no indication that the prosecutor called [the witness] in 'bad faith' simply to use [his] presence to introduce prior statements that would otherwise be inadmissible" (*id.*; *cf. People v Mitchell*, 57 AD3d 1308, 1310). During his trial testimony, the witness denied that he knew either defendant or the female accomplice and denied that he had ever heard their names or seen them before. The court therefore properly permitted the prosecutor to impeach the witness insofar as the witness had provided a sworn statement to the police that he knew the names of defendant and the female accomplice. Such impeachment was proper because the witness gave "testimony upon a material issue of the case [tending] to disprove the position of" the People that it was the defendant, and not the male accomplice, who shot the victim (CPL 60.35 [1]; *see People v Berry*, 27 NY3d 10, 17; *People v Saez*, 69 NY2d 802, 804). Inasmuch as the only eyewitness evidence identifying defendant as the shooter was provided by his accomplices, the witness's testimony "affirmatively damage[d] the [People's] case" (*Saez*, 69 NY2d at 804). Furthermore, the court properly instructed the jury that it could consider the evidence regarding the contents of the statement, which was not admitted in evidence (*see* CPL 60.35 [2]; *cf. Berry*, 27 NY3d at 18), only for the purpose of impeaching the credibility of the witness, and not for its truthfulness (*see Berry*, 27 NY3d at 18).

We reject defendant's further contention that the court erred in denying as untimely his request for a missing witness charge, which was made the day after proof was closed (*see People v Muscarella*, 132 AD3d 1288, 1290, *lv denied* 26 NY3d 1147). In any event, defendant failed to meet his burden that he was entitled to the missing witness

charge inasmuch as the testimony of the witness at issue would have been cumulative of other testimony that the male accomplice had sold marihuana to the witness a few hours prior to the victim's murder (*see id.*).

Defendant contends that he was denied a fair trial by prosecutorial misconduct on summation, but we note that he failed to object to any of the comments he now raises on appeal, and thus his contention is not preserved for our review (*see People v Cooper*, 134 AD3d 1583, 1586). In any event, defendant's contention is without merit. Although we agree with defendant that certain remarks made by the prosecutor were improper, particularly that the jury "owed a duty" to the victim and the people of the community (*see People v Garner*, 145 AD3d 1573, 1574), we nevertheless conclude that the improper remarks were not so egregious that defendant was denied a fair trial (*see id.*). We conclude that the remaining comments at issue were either a fair comment on the evidence or a fair response to defense counsel's summation, and thus those comments did not exceed the bounds of legitimate advocacy (*see People v Miller*, 104 AD3d 1223, 1224, *lv denied* 21 NY3d 1017). "Because the alleged improper remarks did not deny defendant a fair trial, he was not denied effective assistance of counsel based upon defense counsel's failure to object to those remarks" (*Cooper*, 134 AD3d at 1586). We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

541

KA 14-00722

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH J. GAMBALE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, A.J.), rendered September 6, 2013. The judgment convicted defendant, upon a jury verdict, of robbery in the first 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: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]). Defendant contends that County Court should have suppressed a parole officer's identification of him as the person committing the robbery depicted in a surveillance video on the basis that the police-staged procedure was unduly suggestive. The evidence at the suppression hearing established that, as part of his investigation into an armed robbery of a hotel that was captured on surveillance video, a police investigator called a parole officer and inquired about her role as a parole officer for defendant and her familiarity with him. Upon confirming that the parole officer was familiar with defendant, the investigator proceeded to ask her to report to the police department in order to view the video and to determine if she recognized anyone depicted therein. The parole officer identified defendant as the person committing the robbery. The court denied defendant's motion to suppress, ruling that the procedure was not unduly suggestive. That ruling was error.

Preliminarily, neither defendant's general objection to undue suggestiveness in that part of his omnibus motion seeking suppression of the identification nor his arguments to the hearing court were sufficient to preserve for our review his contention that the identification procedure was unduly suggestive as a result of the investigator's conversation with the parole officer. Defendant "failed to raise that specific contention either as part of his omnibus motion . . . or at the *Wade* hearing" (*People v Morman*, 145

AD3d 1435, 1435-1436). We note, however, that the court made factual findings regarding the investigator's pre-identification conversation with the parole officer, and drew a legal conclusion that, based upon the totality of the circumstances, the procedure was not inherently suggestive because there was no influence or suggestion by the investigator and the procedure was not otherwise tainted. We therefore conclude that the court "expressly decided the question raised on appeal," thereby preserving defendant's specific contention for our review (CPL 470.05 [2]; *see People v Prado*, 4 NY3d 725, 726, *rearg denied* 4 NY3d 795; *People v Davis*, 69 AD3d 647, 648-649; *cf. People v Graham*, 25 NY3d 994, 997; *Morman*, 145 AD3d at 1435-1436).

With respect to the merits, it is well settled that "a pretrial identification procedure that is unduly suggestive violates a defendant's due process rights and is not admissible" (*People v Marshall*, 26 NY3d 495, 503 [internal quotation marks omitted]; *see People v Chipp*, 75 NY2d 327, 335, *cert denied* 498 US 833). " '[T]here is nothing inherently suggestive' in showing a witness a surveillance video depicting the defendant and other individuals, provided that the 'defendant was not singled-out, portrayed unfavorably, or in any other manner prejudiced by police conduct or comment or by the setting in which [the defendant] was taped' " (*People v Davis*, 115 AD3d 1167, 1169, *lv denied* 23 NY3d 1019, quoting *People v Edmonson*, 75 NY2d 672, 676-677, *rearg denied* 76 NY2d 846, *cert denied* 498 US 1001). As the Court of Appeals has explained, however, when the police employ an identification procedure whereby a noneyewitness is confronted with a recording for the purpose of determining whether the noneyewitness is able to identify the perpetrator as a person with whom he or she is familiar, "[t]he only apparent risk with such a witness [is] that the police might suggest that the voice [or person depicted] on the recording [is] that of a particular acquaintance" (*People v Collins*, 60 NY2d 214, 220).

Here, we agree with defendant that, contrary to the court's determination that "[t]here was no influence or suggestion" by the investigator, the evidence establishes that the investigator suggested to the parole officer prior to her identification that the person depicted committing the robbery on the surveillance video was defendant (*cf. Collins*, 60 NY2d at 220, *affg* 84 AD2d 35, 39-40). Instead of requesting the parole officer's assistance in identifying someone from the video without preemptively disclosing the subject of his investigation, the investigator engaged in a conversation "about her being a parole officer for [defendant]." During the conversation, the investigator "asked [the parole officer] if she was familiar with [defendant]." The parole officer responded that she had "lots of contact" with defendant, so the investigator proceeded to ask her to "come down and view a video." The investigator subsequently met with the parole officer at the police department and asked her to view the video to determine if she recognized anyone, and the parole officer identified defendant as the person committing the robbery. We conclude that the investigator, by contacting the parole officer and inquiring about her familiarity with defendant prior to the parole officer's viewing of the video, engaged in the type of undue suggestiveness identified in *Collins* inasmuch as his comments

improperly suggested to the parole officer that the person she was about to view was a particular acquaintance of hers, i.e., defendant (*see id.* at 220).

Contrary to the People's contention, we conclude that the investigator "singled out" defendant inasmuch as he asked the parole officer about her familiarity with defendant only and, upon receiving an affirmative response, then asked her to view the video. The People's contention that the investigator's comments were not unduly suggestive because there were other people depicted in the video whom the parole officer could have identified, e.g., guests leaving and entering the hotel, and hotel clerks and managers, is without merit inasmuch as there is only one perpetrator depicted committing an armed robbery (*cf. Davis*, 115 AD3d at 1167, 1169). We reject the People's further contention that the error may be deemed harmless. Even assuming, arguendo, that the evidence was overwhelming, it cannot be said that there is no reasonable possibility that the parole officer's identification of defendant as the perpetrator of the robbery in the video—the only such identification of defendant at trial given the inability of the hotel staff to identify him—might have contributed to the jury's verdict convicting defendant (*see generally People v Crimmins*, 36 NY2d 230, 237).

The People nonetheless contend, consistent with the alternative ground that they asserted in opposition to the motion, that the court properly refused to suppress the parole officer's identification inasmuch as it was merely confirmatory. In its suppression ruling, however, the court focused exclusively on whether the procedure was unduly suggestive, and failed to rule on the "separate and analytically distinct" issue whether the identification was confirmatory (*People v Garrett*, 23 NY3d 878, 885 n 2, *rearg denied* 25 NY3d 1215; *see generally People v Bolden*, 197 AD2d 528, 529, *lv denied* 82 NY2d 922), i.e., whether, "as a matter of law, the [parole officer was] so familiar with . . . defendant that there [was] 'little or no risk' that police suggestion could lead to a misidentification" (*People v Rodriguez*, 79 NY2d 445, 450). "CPL 470.15 (1) precludes [this Court] from reviewing an issue that was either decided in an appellant's favor or was not decided by the trial court" (*People v Ingram*, 18 NY3d 948, 949; *see People v LaFontaine*, 92 NY2d 470, 473-474, *rearg denied* 93 NY2d 849; *People v Rainey*, 110 AD3d 1464, 1466). We therefore hold the case, reserve decision, and remit the matter to County Court to rule upon that issue based on the evidence presented at the suppression hearing.

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

547

CA 16-01883

PRESENT: PERADOTTO, J.P., LINDLEY, TROUTMAN, AND SCUDDER, JJ.

DAVID AHERN AND ARDIS AHERN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, DEFENDANT-APPELLANT.

ROBERT P. STAMEY, CORPORATION COUNSEL, SYRACUSE (MARY D'AGOSTINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARRIS & PANELS, SYRACUSE (MICHAEL W. HARRIS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered April 19, 2016. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiffs commenced this negligence action seeking damages for injuries allegedly sustained by David Ahern (plaintiff) when he tripped and fell on a broken curb. Viewing the evidence in the light most favorable to plaintiffs (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503), we conclude that Supreme Court properly determined that plaintiffs raised an issue of fact sufficient to defeat defendant's motion seeking summary judgment dismissing the complaint. Defendant met its initial burden by establishing that it did not receive prior written notice of the allegedly dangerous or defective condition, and the burden therefore shifted to plaintiffs to demonstrate "as relevant here, that defendant affirmatively created the defect through an act of negligence . . . that immediately result[ed] in the existence of a dangerous condition" (*Simpson v City of Syracuse*, 147 AD3d 1336, 1337 [internal quotation marks omitted]). In opposition to the motion, plaintiffs submitted evidence that plaintiff was very familiar with the condition of the walk and curb both before and after excavation work performed by defendant inasmuch as he had parked on that street almost daily for approximately 10 years. Plaintiff testified that he observed the area immediately after construction fencing was removed and noticed that the curb had been damaged. Plaintiff also testified that no other repairs took place at the site from the time of the excavation until his fall approximately six months later. We therefore conclude that plaintiffs raised an issue of fact whether defendant's affirmative act of

negligence " 'immediately result[ed] in the existence of a dangerous condition' " (*Yarborough v City of New York*, 10 NY3d 726, 728; *cf. Duffel v City of Syracuse*, 103 AD3d 1235, 1236).

Contrary to defendant's further contention, it is not entitled to summary judgment because the alleged dangerous condition is open and obvious. "The fact that a dangerous condition is open and obvious does not negate the duty to maintain premises in a reasonably safe condition, but, rather, bears only on the injured person's comparative fault" (*Bax v Allstate Health Care, Inc.*, 26 AD3d 861, 863; *see Custodi v Town of Amherst*, 81 AD3d 1344, 1346-1347, *affd* 20 NY3d 83).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

553

TP 16-01783

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

IN THE MATTER OF MICHAEL D. DEMARCO, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,
RESPONDENT.

NORMAN P. DEEP, CLINTON, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Oneida County [Bernadette T. Clark, J.], entered July 1, 2016) to review a determination of respondent. The determination, among other things, suspended petitioner's license to operate a used vehicle dealership.

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

Memorandum: Petitioner, the operator of a registered used automobile dealership, commenced this CPLR article 78 proceeding seeking to annul the determination that he violated Vehicle and Traffic Law §§ 415 (9) (c) and 417, as well as 15 NYCRR 78.13 (c) (13). We reject petitioner's contention that the determination is not supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182).

At the hearing before the Administrative Law Judge (ALJ), respondent presented the testimony and report of its investigator establishing that a certified inspector in the geographical area of petitioner's dealership was engaged in a "clean scanning" operation in which the inspector used an electronic device known as a "simulator" to generate false inspection certificates for various vehicles that otherwise could not pass the requisite emissions inspection. According to the investigator, the inspector admitted that he performed "clean scans" at night in the rear bays that he rented from an inspection facility, and that he had made his fraudulent operation known. The inspector was engaged exclusively in illegitimate inspections. When interviewed by the investigator, petitioner admitted that he had experienced problems in getting the monitors of a particular vehicle to set, and he did not deny that the vehicle was

unable to legitimately pass an emissions inspection. At the hearing, petitioner specified that he could not get the monitors to set even after driving the vehicle for 400 or 500 miles and spending approximately $300 on parts. Upon speaking with others in the area, petitioner was informed that the inspector would be able to take care of the issue at night and get the vehicle to pass inspection. The vehicle was given to the inspector, who returned it to petitioner a couple of days later with an inspection certificate in the front seat. The inspector informed petitioner that he merely resealed the gas cap. Petitioner sold the vehicle to a customer approximately one month later, as evidenced by the Retail Certificate of Sale referencing the inspection certificate that petitioner had obtained from the inspector.

Upon consideration of the foregoing evidence and, in particular, petitioner's persistent problems with the vehicle and his decision to actively seek out the inspector's services upon the advice of others in the area after the inspector had started "clean scanning" vehicles at night from the rear of an inspection facility, we conclude that the ALJ could reasonably and logically infer from the circumstances that petitioner knew that the inspector would generate a false inspection certificate for the vehicle (*see generally Matter of Klein v Sobol*, 167 AD2d 625, 628, *lv denied* 77 NY2d 809; *Matter of Lyon Coram Auto Body v New York State Dept. of Motor Vehs.*, 147 AD2d 564, 565). Although petitioner denied knowledge that the inspector would use a simulator to "clean scan" the vehicle at the time he sought the inspector's services, such testimony presented an issue of credibility, which the ALJ was in the best position to assess, and "his 'role in assessing such credibility will not be disturbed by this Court' " (*Matter of Abramson v New York State Dept. of Motor Vehs.*, 302 AD2d 885, 886). We thus conclude that the determination that petitioner violated Vehicle and Traffic Law § 415 (9) (c) by engaging in fraudulent practice is supported by substantial evidence.

We further conclude that there is substantial evidence supporting the ALJ's determination that petitioner, upon selling the vehicle, falsely certified that the vehicle was roadworthy in violation of Vehicle and Traffic Law § 417 and 15 NYCRR 78.13 (c) (13) when, in fact, the emissions system had not been inspected and was not in good working order (*see Matter of G&S Mgt., Inc. v Fiala*, 94 AD3d 1577, 1578).

Petitioner also contends that he was denied due process because the ALJ relied on evidence inapplicable to the charges against him. We reject that contention. Having reviewed the decision in its entirety, we conclude that the ALJ's references in the findings of fact to other vehicles contained in the investigator's report that did not belong to petitioner constitute mere clerical errors that do not warrant reversal, and that the ALJ unequivocally sustained the charges based upon petitioner's sale of petitioner's vehicle (*see generally Matter of Bazin v Novello*, 301 AD2d 975, 976).

Finally, we reject petitioner's challenge to the suspension of

his dealer registration for 90 days. " 'The public has a right to be protected against deceitful practices by an auto dealer' " and, under the circumstances here, we conclude that "the penalty is not 'so disproportionate to the offense as to be shocking to one's sense of fairness' " (*Matter of T's Auto Care, Inc. v New York State Dept. of Motor Vehs. Appeals Bd.*, 15 AD3d 881, 881; *see Abramson*, 302 AD2d at 886; *Matter of Precise Auto Elec. v Commissioner of Motor Vehs.*, 151 AD2d 680, 681).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

571

CA 16-00385

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

IN THE MATTER OF JASON PHILLIPS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered December 22, 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 commenced this proceeding seeking to annul a determination finding him guilty, following a tier III hearing, of violating inmate rules 101.10 (7 NYCRR 270.2 [B] [2] [i] [engaging in sexual acts]), 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusing a direct order]), and 180.10 (7 NYCRR 270.2 [B] [26] [i] [violating a visitation procedure]). Petitioner appeals from a judgment dismissing the petition.

At the outset, with regard to petitioner's contention that Supreme Court erred in determining that the record of the administrative hearing was sufficient to permit meaningful judicial review even in the absence of a certain videotape that was misplaced following the hearing and determination, we note that the videotape has since been found by respondent and has been forwarded to us for our in camera review. This is thus not a case in which respondent has failed to provide a complete record of the administrative proceedings (*see* CPLR 7804 [e]), thereby precluding meaningful review of the determination and warranting a granting of the petition and an annulment of the determination (*see generally Matter of Tolliver v Fischer*, 125 AD3d 1023, 1023-1024, *lv denied* 25 NY3d 908; *Matter of Farrell v New York State Off. of the Attorney Gen.*, 108 AD3d 801, 801-802).

Contrary to petitioner's contention, the court did not err in concluding that the Hearing Officer was not biased against him and that the determination did not flow from such alleged bias (*see Matter of Jones v Annucci*, 141 AD3d 1108, 1109; *Matter of Barnes v Annucci*, 140 AD3d 1779, 1779; *Matter of Colon v Fischer*, 83 AD3d 1500, 1501-1502; *see also Matter of Green v Sticht*, 124 AD3d 1338, 1339, *lv denied* 26 NY3d 906). Petitioner failed to exhaust his administrative remedies with regard to his contention that the Hearing Officer improperly excluded him from the hearing room, and we therefore have no discretionary power to reach that contention (*see generally Matter of Gray v Annucci*, 144 AD3d 1613, 1614; *Matter of Sabino v Hulihan*, 105 AD3d 1426, 1426; *Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071, *appeal dismissed* 81 NY2d 834).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

572

CA 16-01895

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

IN THE MATTER OF ARBITRATION BETWEEN CITY OF BUFFALO, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

BRAND-ON SERVICES, INC., RESPONDENT.

MORTON H. WITTLIN, INTERVENOR-PLAINTIFF-APPELLANT.

FREID AND KLAWON, WILLIAMSVILLE (ADAM B. CONNERS OF COUNSEL), FOR INTERVENOR-PLAINTIFF-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered January 11, 2016. The judgment granted petitioner's motion to dismiss the complaint of intervenor-plaintiff Morton H. Wittlin.

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

Memorandum: Intervenor-plaintiff Morton H. Wittlin commenced this action against petitioner, the City of Buffalo (City), seeking a declaration that he has a valid security interest in certain floating docks in the Erie Basin Marina. The City moved to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action and for a declaration that ownership of the floating docks is free and clear of any right or interest possessed by Wittlin. Supreme Court granted the City's motion, dismissed the complaint, and made the declaration sought by the City.

As a preliminary matter, we note that because this is a declaratory judgment action, the court erred in dismissing the complaint (*see Tumminello v Tumminello*, 204 AD2d 1067, 1067; *see generally Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954). In any event, we conclude that the court erred in granting the substantive relief sought by the City. Contrary to the City's view, its evidentiary submissions do not conclusively establish that the City owned the docks in 2009 and that Wittlin does not have a valid security interest in the docks (*see Donald Braasch Constr. Inc. v State Ins. Fund*, 98 AD3d 1302, 1302-1304*; Pittsford Plaza Co. LP v TLC*

W. LLC, 45 AD3d 1272, 1273-1274*; see generally Fillman v Axel*, 63 AD2d 876, 876).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

573

CA 16-01210

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

SUZANNE M. GALLAGHER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, DEFENDANT,
AND COUNTY OF ERIE, DEFENDANT-RESPONDENT.

MCMAHON, MARTINE & GALLAGHER, LLP, BROOKLYN (PATRICK W. BROPHY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ELIZABETH M. BERGEN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered January 28, 2016. The order granted that part of the motion of defendant County of Erie seeking an award of attorney's fees.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and that part of the motion of defendant County of Erie seeking attorney's fees is denied.

Memorandum: Plaintiff commenced this premises liability action seeking to recover damages for injuries she sustained when she fell from her bicycle while trying to avoid colliding with a fence that was blocking a bike path allegedly owned by the County of Erie (defendant). Approximately 11 months after answering the complaint, defendant requested that plaintiff stipulate to allow defendant to amend its answer to include an affirmative defense based on General Obligations Law § 9-103. When plaintiff refused, defendant moved for leave to amend its answer and for attorney's fees incurred in bringing the motion based upon plaintiff's conduct in refusing to stipulate to the amendment. Supreme Court granted that part of defendant's motion seeking leave to amend its answer, and plaintiff appeals from a subsequent order granting the remainder of defendant's motion and awarding defendant attorney's fees in the amount of $3,705. We reverse.

A court may award attorney's fees as a penalty for frivolous conduct (*see* 22 NYCRR 130-1.1 [a]). As relevant to this appeal, "conduct is frivolous if . . . it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" (22 NYCRR 130-1.1 [c] [1]). In our view, plaintiff's conduct was not frivolous because it was not

completely without merit.

Although leave to amend pleadings ordinarily is "freely given upon such terms as may be just" (CPLR 3025 [b]), "leave 'should not be granted where . . . the proposed amendment lacks merit' " (*Oneida Indian Nation v Hunt Constr. Group, Inc.*, 108 AD3d 1195, 1196). Here, defendant sought leave to amend its answer to assert an affirmative defense based on the immunity afforded to landowners who permit others to use their property for certain enumerated recreational activities (*see* General Obligations Law § 9-103). In opposition to defendant's motion, plaintiff contended that the proposed affirmative defense lacked merit because such immunity generally does not extend to a government entity that operates and maintains property that is kept open to the public for those enumerated activities (*see Ferres v City of New Rochelle*, 68 NY2d 446, 451-454; *Baker v County of Oswego*, 77 AD3d 1348, 1349). Thus, plaintiff's conduct was not frivolous inasmuch as she opposed defendant's motion on appropriate grounds and based her opposition on well-settled case law, regardless of whether plaintiff's opposition to the motion was unlikely to succeed (*see Matter of Bozer v Higgins*, 204 AD2d 979, 980).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

579

TP 16-01824

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

IN THE MATTER OF ALEKSANDR KLIMOV, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
NEW YORK STATE DEPARTMENT OF TRANSPORTATION,
RESPONDENTS.

CHIACCHIA & FLEMING, LLP, HAMBURG (LISA A. POCH OF COUNSEL), FOR PETITIONER.

AARON M. WOSKOFF, BRONX, FOR RESPONDENT NEW YORK STATE DIVISION OF HUMAN RIGHTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JOSEPH M. SPADOLA OF COUNSEL), FOR RESPONDENT NEW YORK STATE DEPARTMENT OF TRANSPORTATION.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Deborah A. Chimes, J.], entered June 14, 2016) to review a determination of respondent New York State Division of Human Rights. The determination, among other things, dismissed petitioner's claims of unlawful discrimination based on national origin.

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

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 seeking to annul that part of the determination of respondent New York State Division of Human Rights (SDHR) that dismissed his complaint to the extent that he alleged unlawful discrimination based on national origin. SDHR filed a cross petition seeking to confirm and enforce that part of the determination finding that respondent New York State Department of Transportation (employer) unlawfully retaliated against petitioner, awarding him compensatory damages, and imposing a civil fine on the employer. The proceeding arises from a complaint filed by petitioner after the employer declined to promote him to a supervisory position. Petitioner was born in the former Soviet Union, and English is his second language.

Our review of an administrative determination made after a hearing is limited to whether it is supported by substantial evidence

(*see Matter of Town of Islip v New York State Pub. Empl. Relations Bd.*, 23 NY3d 482, 492; *Matter of Russo v New York State Div. of Human Rights*, 137 AD3d 1600, 1600). "An administrative agency's determination need not be the only rational conclusion to be drawn from the record[, and] the existence of other, alternative rational conclusions does not warrant annulment of the agency's conclusion" (*Matter of Jennings v New York State Off. of Mental Health*, 90 NY2d 227, 239). It is well settled that, "in making a substantial evidence determination, we do not weigh the evidence or assess the credibility of the testimony presented" (*Matter of DeOliveira v New York State Pub. Empl. Relations Bd.*, 133 AD3d 1010, 1011 [internal quotation marks omitted]; *see Matter of Chenango Forks Cent. Sch. Dist. v New York State Pub. Empl. Relations Bd.*, 21 NY3d 255, 267).

We conclude that there is substantial evidence to support the determination that the employer did not discriminate against petitioner based on national origin. Even assuming, arguendo, that petitioner met his burden of establishing a prima facie case of discrimination based on national origin, we conclude that the employer "presented a legitimate, independent and nondiscriminatory reason to support its decision to offer the position to another employee" (*Matter of Scheuneman v New York State Div. of Human Rights*, 147 AD3d 1523, 1524; *see generally Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305). At the hearing, members of the employer's interview committee testified that petitioner was not selected for promotion based on their concerns that he could not communicate effectively in the English language. Contrary to petitioner's contention, an employment determination based solely on a person's ability to communicate in the English language is not based on national origin when such skills are "reasonably related" to the position (*Fragante v City & County of Honolulu*, 888 F2d 591, 596-597, *cert denied* 494 US 1081; *see Velasquez v Goldwater Mem. Hosp.*, 88 F Supp 2d 257, 262; *see generally People v Aviles*, 28 NY3d 497, 502-503).

We agree with the employer that the cross petition must be dismissed as moot inasmuch as there is no dispute that the employer has satisfied its obligations under the determination (*see generally Matter of Clark v New York State Dept. of Corr. & Community Supervision*, 138 AD3d 1331, 1332).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

580

CA 16-01413

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

IN THE MATTER OF ROCHESTER EASTSIDE RESIDENTS FOR APPROPRIATE DEVELOPMENT, INC., AND IGATOPSFY, LLC, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, CITY OF ROCHESTER ZONING BOARD OF APPEALS, ROCHESTER CITY PLANNING COMMISSION, CITY OF ROCHESTER DIRECTOR OF PLANNING AND ZONING, STEVE CLEASON, ALDI, INC., CRLYN ACQUISITIONS, LLC, CBL, LLC, ET AL., RESPONDENTS-RESPONDENTS.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PETITIONERS-APPELLANTS.

BRIAN F. CURRAN, CORPORATION COUNSEL, ROCHESTER (MAUREEN K. GILROY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS CITY OF ROCHESTER, CITY OF ROCHESTER ZONING BOARD OF APPEALS, ROCHESTER CITY PLANNING COMMISSION, AND CITY OF ROCHESTER DIRECTOR OF PLANNING AND ZONING.

WOODS OVIATT GILMAN LLP, ROCHESTER (REUBEN ORTENBERG OF COUNSEL), FOR RESPONDENTS-RESPONDENTS ALDI, INC., CRLYN ACQUISITIONS, LLC, AND CBL, LLC.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered May 24, 2016 in a proceeding pursuant to CPLR article 78. The judgment dismissed the amended petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul the negative declaration issued by respondent City of Rochester Director of Planning and Zoning under the State Environmental Quality Review Act ([SEQRA] ECL art 8) with respect to the proposed construction of an ALDI supermarket. We agree with petitioners that Supreme Court should have granted the amended petition.

As a threshold matter, we agree with petitioners that the court erred in determining that they lack standing to bring this proceeding. The record establishes that petitioner Igatopsfy, LLC owns property

that is less than 300 feet from the property line of the proposed construction project, and thus Igatopsfy is "arguably within the zone of interest to be protected by [SEQRA] . . . and [has] standing to seek judicial review without pleading and proving special damage, because adverse effect or aggrievement can be inferred from the proximity" (*Matter of Ontario Hgts. Homeowners Assn. v Town of Oswego Planning Bd.*, 77 AD3d 1465, 1466 [internal quotation marks omitted]; *see Matter of Shapiro v Town of Ramapo*, 98 AD3d 675, 677, *lv dismissed* 20 NY3d 994). The record further establishes that petitioner Rochester Eastside Residents for Appropriate Development, Inc. (RERAD) has "associational or organizational standing" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 775). Two members of RERAD own property that is less than 500 feet from the property line of the proposed construction project, and thus they have standing to sue (*see Shapiro*, 98 AD3d at 677; *Ontario Hgts. Homeowners Assn.*, 77 AD3d at 1466; *see generally Society of Plastics Indus.*, 77 NY2d at 775), and RERAD established the other two requirements for associational or organizational standing set forth in *Society of Plastics Indus.* (*see generally id.* at 775).

We further agree with petitioners that the negative declaration did not contain a " 'reasoned elaboration' of the basis for [the] determination" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417). "It is well settled that SEQRA's procedural mechanisms mandate strict compliance, and anything less will result in annulment of the lead agency's determination of significance" (*Matter of Dawley v Whitetail 414, LLC*, 130 AD3d 1570, 1571; *see Matter of King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 347). The lead agency must "set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation" (6 NYCRR 617.7 [b] [4]; *see generally Jackson*, 67 NY2d at 417). The purpose of that regulation "is to focus and facilitate judicial review and . . . to provide affected landowners and residents with a clear, written explanation of the lead agency's reasoning at the time the negative declaration is made" (*Dawley*, 130 AD3d at 1571). Here, despite the undisputed presence of preexisting soil contamination on the project site, the negative declaration set forth no findings whatsoever with respect to that contamination. The document containing the purported reasoning for the lead agency's determination of significance, which was prepared subsequent to the issuance of the negative declaration, does not fulfill the statutory mandate (*see id.*; *cf. Matter of Hartford/North Bailey Homeowners Assn. v Zoning Bd. of Appeals of Town of Amherst*, 63 AD3d 1721, 1723, *lv denied in part and dismissed in part* 13 NY3d 901). Contrary to respondents' contention, the developer's promise to remediate the contamination before proceeding with construction did not absolve the lead agency from its obligations under SEQRA (*see generally Matter of Penfield Panorama Area Community v Town of Penfield Planning Bd.*, 253 AD2d 342, 349-350).

We therefore reverse the judgment and grant the amended petition, thereby annulling the negative declaration and vacating the variances granted by respondent City of Rochester Zoning Board of Appeals and

the special use permit granted by respondent Rochester City Planning Commission. In light of our determination, we do not reach petitioners' remaining contentions.

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

587

KA 14-00060

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN C. DAGGETT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered October 30, 2013. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of assault in the second degree (Penal Law § 120.05 [2]). He was acquitted of a greater charge of attempted assault in the first degree (§§ 110.00, 120.10 [1]). At trial, it was undisputed that defendant stabbed the victim with an object, identified at times as a stick or a fire poker, causing injuries. In his statements to law enforcement officers as well as his testimony before the grand jury, all of which were admitted in evidence at trial, defendant contended that he stabbed the victim in self-defense, alleging that the victim and two others were threatening to attack him. On appeal, defendant contends that Supreme Court erred in several respects when instructing the jury on the justification defense.

First, he contends that the court impermissibly reduced the People's burden of proof when it instructed the jury that, in order to find that the People had failed to disprove the defense of justification, the jury had to find that the victim "*and* others" were using or about to use deadly physical force on defendant, rather than using the words "or others" (emphasis added). Defendant failed to object to the charge as given to the jury, and his contention that the justification charge impermissibly reduced the People's burden of proof is subject to the rules of preservation (*see People v Benjamin*, 204 AD2d 996, 996, *lv denied* 83 NY2d 1002; *see also People v Polk*, 118 AD3d 564, 565-566, *lv denied* 23 NY3d 1066; *People v Caldwell*, 196 AD2d

760, 761, *lv denied* 82 NY2d 892; *People v Vasquez*, 176 AD2d 444, 444, *lv denied* 79 NY2d 865; *see generally People v Autry*, 75 NY2d 836, 839; *People v Thomas*, 50 NY2d 467, 471-472). In any event, even assuming, arguendo, that the court used an "obviously incorrect word[]" when it charged the jury in the conjunctive versus the disjunctive (*People v Murphy*, 128 AD2d 177, 185, *affd* 70 NY2d 969), we conclude that any error is harmless inasmuch as defendant, in his admissions, repeatedly contended that the victim and two others were threatening to attack him (*see generally People v Crimmins*, 36 NY2d 230, 241-242). We thus conclude that defendant failed to establish that defense counsel was ineffective in failing to object to the court's use of that word inasmuch as there was a legitimate reason for defense counsel's failure to object to the charge as given (*see People v Rivera*, 71 NY2d 705, 709; *see also People v Carter*, 21 AD3d 1295, 1296, *affd* 7 NY3d 875).

Defendant's second challenge to the court's instruction on justification is that the court erred in failing to instruct the jury that defendant had no duty to retreat in his dwelling. Inasmuch as defendant failed to request such an instruction or object to the instruction as given, he has failed to preserve his contention for our review (*see People v Fagan*, 24 AD3d 1185, 1187; *People v Shaut*, 261 AD2d 960, 961, *lv denied* 93 NY2d 1045; *People v Sanchez*, 131 AD2d 606, 608, *lv denied* 70 NY2d 717). In any event, we conclude that his contention lacks merit because there is no reasonable view of the evidence that defendant was in his dwelling at the time of the assault (*see People v Aiken*, 4 NY3d 324, 329-330). We thus likewise reject defendant's contention that defense counsel was ineffective in failing to request such an instruction or object to the instruction as given (*see e.g. People v Johnson*, 136 AD3d 1338, 1339, *lv denied* 27 NY3d 1134; *People v Peterkin*, 89 AD3d 1455, 1456-1457, *lv denied* 18 NY3d 885).

Defendant's third challenge to the justification charge is that the court erred in failing to instruct the jury that it was to cease deliberating and report a verdict of not guilty on all counts if it found defendant not guilty by reason of justification on the top count (*see generally People v Castro*, 131 AD2d 771, 773-774). Defendant, however, failed to request such an instruction or object to the instruction as given and thus failed to preserve that contention for our review (*see People v Velez*, 131 AD3d 129, 133; *People v Palmer*, 34 AD3d 701, 703-704, *lv denied* 8 NY3d 848; *People v Green*, 32 AD3d 364, 365, *lv denied* 7 NY3d 902). We note, however, that there was "overwhelming evidence disproving justification, including forensic evidence [disproving defendant's version of the events] and the testimony of [a] . . . witness who observed the incident," and we decline to exercise our power to reach the issue as a matter of discretion in the interest of justice (*Palmer*, 34 AD3d at 703-704; *see* CPL 470.15 [6] [a]). We further conclude that defense counsel was not ineffective in failing to request such an instruction or object to its absence. The absence of such an instruction did not, in our view, " 'deprive defendant of a fair trial or affect the outcome' " (*People v Jackson*, 140 AD3d 1771, 1772, *lv denied* 28 NY3d 931; *see generally*

People v Caban, 5 NY3d 143, 152).

Defendant further contends that the court should have precluded the People from using at trial the oral statements he made during a recorded interview at the police station because the People's CPL 710.30 notice was untimely. Although defendant did not receive a copy of the DVD within the 15-day time period required by CPL 710.30 (2), he filed a motion to suppress the contents of the DVD after expiration of the 15-day period and before he actually received a copy of the DVD. By moving for suppression at a time when he was aware of the People's failure to comply with the 15-day period, defendant waived his right to challenge the People's failure to comply with that time period (*see* CPL 710.30 [3]; *see generally People v Bernier*, 141 AD2d 750, 751-752, *affd* 73 NY2d 1006).

Defendant also contends that the court should have precluded the People from using the statements at trial because the CPL 710.30 notice was defective inasmuch as it identified the incorrect officer to whom defendant's statements were made. We reject that contention. On the first day of the suppression hearing, i.e., after defendant had moved to suppress the statements on the DVD, defense counsel noted that the defense had only recently been given a copy of the DVD. Until that time, defense counsel was not aware that the CPL 710.30 notice had listed the wrong officer. Defense counsel thus sought preclusion based on that previously unknown defect. We reject the People's contention that, by his earlier motion to suppress, defendant waived his right to challenge a defect in the CPL 710.30 notice of which he could not have been aware at the time the suppression motion was filed (*see Bernier*, 73 NY2d at 1008; *People v Miles*, 163 AD2d 330, 331-332). Nevertheless, we conclude that the court properly denied the motion to preclude. It is well settled that "the primary purpose of the notice requirement is to implement the constitutional guarantees by alerting the defendant to the possibility that evidence identifying him as the person who committed the crime may be constitutionally tainted and subject to a motion to suppress" (*People v Collins*, 60 NY2d 214, 219). Here, the notice served that purpose inasmuch as defendant was able to, and did, timely move to suppress the statements in the DVD. The incorrect name of the officer who conducted the interview did not change the substance of the notice or the ability of defense counsel to make a timely motion for a hearing (*see People v Ocasio*, 183 AD2d 921, 922-923, *lv denied* 80 NY2d 932).

Defendant further contends that he was denied a fair trial by prosecutorial misconduct on summation, identifying two particular statements that he contends denigrated the defense and constituted improper vouching for a witness. That contention is not preserved for our review (*see People v Simmons*, 133 AD3d 1275, 1277, *lv denied* 27 NY3d 1006; *People v Smith*, 11 AD3d 899, 900, *lv denied* 3 NY3d 761) and, in any event, it lacks merit. We conclude that the prosecutor's conduct "was not so egregious as to deny defendant a fair trial" (*People v White*, 291 AD2d 842, 843, *lv denied* 98 NY2d 656; *see People v Choi*, 137 AD3d 808, 810, *lv denied* 27 NY3d 1130).

Viewing the evidence in light of the elements of the crime as

charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We have reviewed defendant's remaining challenges to the effectiveness of counsel and conclude that they lack merit. The "evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

588

KA 15-01221

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON WILLIAMS, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered May 27, 2015. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (four counts) and grand larceny in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of four counts of robbery in the first degree (Penal Law § 160.15 [1], [2] [two counts], [4]) and one count of grand larceny in the fourth degree (§ 155.30 [8]), defendant challenges the legal sufficiency of the evidence to support the robbery convictions, contending that the testimony of his accomplice was not sufficiently corroborated. Defendant concedes that he failed to preserve that challenge for our review and, in any event, we reject defendant's contention. The accomplice's testimony was corroborated by, inter alia, the testimony of other witnesses, certain physical and DNA evidence, and the testimony of his girlfriend that defendant told her that he committed a robbery with the accomplice (*see generally* CPL 60.22 [1]; *People v Reome*, 15 NY3d 188, 191-192; *People v Lipford*, 129 AD3d 1528, 1529, *lv denied* 26 NY3d 1041). We also reject defendant's contention that defense counsel was ineffective for failing to preserve his legal sufficiency challenge for our review. "A defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). 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 further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We further reject defendant's contention that County Court erred in denying his pro se motion pursuant to CPL 330.30 without conducting a hearing, and without assigning new counsel. Initially, we note that, although defendant's motion purportedly sought relief pursuant to CPL 330.30 (3) based on newly discovered alibi evidence, the motion was in fact pursuant to CPL 330.30 (1), inasmuch as he alleged that he was denied effective assistance of counsel because he and his attorney "didn't agree upon a[n] alibi [defense]" and there were people in defendant's notice of alibi "who weren't even contacted by [counsel]." Defendant's motion involved matters outside the record and thus his "CPL 330.30 (1) motion was an improper vehicle to raise such a claim" (*People v McClassling*, 143 AD3d 528, 529, *lv denied* 28 NY3d 1148). Consequently, "the court properly denied the motion without assigning new counsel" (*id*.). Furthermore, even assuming, arguendo, that defense counsel took an adverse position on the motion, we conclude that reversal is not required based on the court's failure to assign new counsel because the comments of defense counsel had no impact on the fact that defendant's motion was inappropriate under CPL 330.30 (*see generally McClassling*, 143 AD3d at 529; *People v Collins*, 129 AD3d 1676, 1677, *lv denied* 26 NY3d 1038).

Defendant's contention that the photo arrays used to identify him were unduly suggestive is preserved for our review only in part, inasmuch as he did not preserve for our review his contention regarding his allegedly "hostile" facial characteristics or expressions (*see e.g. People v VanVleet*, 140 AD3d 1633, 1634, *lv denied* 28 NY3d 938). In any event, we conclude that defendant's contention lacks merit. The photo arrays shown to two witnesses were not unduly suggestive inasmuch as they did not " 'create a substantial likelihood that the defendant would be singled out for identification' " (*People v Gonzales*, 145 AD3d 1432, 1434). Defendant also failed to preserve for our review his contention that his statements to the police were rendered involuntary based on an "unorthodox inquiry procedure" (*see* CPL 470.05 [2]) and, in any event, that contention also lacks merit. The court properly determined, based on the totality of the circumstances, that the People met their burden of demonstrating voluntariness beyond a reasonable doubt (*see generally People v Guilford*, 21 NY3d 205, 208). Contrary to defendant's related contention, there is no basis for concluding that the recorded statements should be suppressed because they were not accurately recorded (*see People v Pearson*, 20 AD3d 575, 576, *lv denied* 5 NY3d 831).

Finally, the sentence is not unduly harsh or severe.

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

593

CA 16-01777

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

JUSTIN COFFEE, PLAINTIFF-APPELLANT,

V ORDER

TANK INDUSTRY CONSULTANTS, INC., AND WORLDWIDE INDUSTRIES CORP., DEFENDANTS.

WORLDWIDE INDUSTRIES CORP., THIRD-PARTY PLAINTIFF,

V

CDK INDUSTRIES, INC., THIRD-PARTY DEFENDANT-RESPONDENT.

STANLEY LAW OFFICES, SYRACUSE (STEPHANIE VISCELLI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (BRADY O'MALLEY OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered April 26, 2016. The order denied the motion of plaintiff to compel disclosure and granted the cross motion of third-party defendant for a protective order.

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

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

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

598

CA 15-01383

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

MARILYN RODRIGUES, MADELINE RODRIGUES
AND ANIBAL RODRIGUES, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ROBERT LESSER, ET AL., DEFENDANTS,
JOSEPH J. TIMPANO, AS ADMINISTRATOR OF THE
ESTATE OF MARIO BEVIVINO, DECEASED, AND
ANTONIA BEVIVINO, DEFENDANTS-RESPONDENTS.

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (ANDREW BOUGHRUM OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BAILEY, KELLEHER & JOHNSON, P.C., ALBANY (SYMA AZAM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered May 7, 2015. The order, insofar as appealed from, upon reargument, granted in part the motion for summary judgment of decedent, Mario Bevivino, and defendant Antonia Bevivino and dismissed the complaint against Mario Bevivino to the extent it alleged claims for the period of August 1992 through September 15, 1992.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in its entirety with respect to decedent, Mario Bevivino, and the complaint is reinstated against defendant Joseph J. Timpano, as administrator of decedent's estate.

Memorandum: Plaintiffs commenced this action seeking damages for injuries they sustained as a result of their exposure to lead paint as children. The exposure allegedly occurred when they resided at various apartments rented by their mother, including one owned by decedent, Mario Bevivino, who died during the pendency of this action, and defendant Antonia Bevivino, his wife. The administrator of decedent's estate has been substituted as a defendant for decedent. Plaintiffs alleged that the Bevivinos were negligent in their ownership and maintenance of the apartment and in their abatement of the lead paint hazard. The Bevivinos moved for summary judgment dismissing the complaint against them, and Supreme Court granted the motion with respect to Antonia but denied it with respect to decedent. They subsequently moved for leave to reargue the motion and, upon reargument, the court granted the motion in part with respect to

decedent, dismissing plaintiffs' claims for the time period from the date of first occupancy to the date on which decedent was notified by the Oneida County Department of Health of a lead-paint hazard. We agree with plaintiffs that the court erred, upon reargument, in granting the motion in part with respect to decedent.

"In order '[t]o establish that a landlord is liable for a lead-paint condition, a plaintiff must demonstrate that the landlord had actual or constructive notice of, and a reasonable opportunity to remedy, the hazardous condition' " (*Wood v Giordano*, 128 AD3d 1488, 1489). Where, as here, there is no evidence that the landlord had actual notice, plaintiffs may establish that the landlord had constructive notice of such condition by demonstrating that the landlord "(1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment" (*Chapman v Silber*, 97 NY2d 9, 15). Here, it is undisputed that decedent retained a right of entry and assumed a duty to make repairs, but the remaining *Chapman* factors are in dispute.

By submitting the deposition testimony of plaintiffs' mother, wherein she testified that she told decedent that she would be living at the residence with her young children, decedent and Antonia raised a triable issue of fact on the fifth *Chapman* factor. Similarly, decedent's own deposition testimony raised a triable issue of fact on the second *Chapman* factor inasmuch as he testified that the subject residence was old, that lead was taken out of gasoline in 1970, and he "must have known" that laws regarding lead started to come out in the 1970s (*see generally id.* at 22). Even assuming, arguendo, that decedent and Antonia met their initial burden on the third and fourth *Chapman* factors, we conclude that plaintiffs raised triable issues of fact by submitting " 'evidence from which it may be inferred that [decedent] knew that paint was peeling on the premises' . . . , and 'evidence from which a jury could infer that [decedent] knew or should have known of the dangers of lead paint to children' " (*Bowman v Zumpano*, 132 AD3d 1357, 1358; *see Manford v Wilber*, 128 AD3d 1544, 1544-1545, *lv dismissed* 26 NY3d 1082).

Finally, the present contentions concerning the negligent abatement cause of action against decedent are not properly before us in the absence of a cross appeal by decedent and Antonia (*see Matter of Sheldon v Jaroszynski*, 142 AD3d 762, 762).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

607

KA 15-00124

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEX S. DUMBLETON, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (SHIRLEY A. GORMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered November 13, 2014. 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] [v]), defendant contends that County Court erred in enhancing his sentence based on a violation of the plea agreement without first conducting a hearing pursuant to *People v Outley* (80 NY2d 702). Although defendant's contention survives his valid waiver of the right to appeal (*see People v Scott*, 101 AD3d 1773, 1773, *lv denied* 21 NY3d 1019), defendant did not preserve that contention for our review inasmuch as "he failed to object to the alleged enhanced sentence and did not move to withdraw his plea or vacate the judgment of conviction on that ground" (*People v Epps*, 109 AD3d 1104, 1105; *see People v Mills*, 90 AD3d 1518, 1518, *lv denied* 18 NY3d 960), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

617

CA 16-02043

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

IN THE MATTER OF MARGARET WOOSTER, CLAYTON S. "JAY" BURNEY, JR., LYNDA K. STEPHENS AND JAMES E. CARR, PETITIONERS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

QUEEN CITY LANDING, LLC, RESPONDENT-RESPONDENT-APPELLANT, CITY OF BUFFALO PLANNING BOARD AND CITY OF BUFFALO COMMON COUNCIL, RESPONDENTS-RESPONDENTS. (PROCEEDING NO. 1.)

IN THE MATTER OF BUFFALO NIAGARA RIVERKEEPER, INC., PETITIONER-APPELLANT-RESPONDENT,

V

CITY OF BUFFALO, RESPONDENT-RESPONDENT, AND QUEEN CITY LANDING, LLC, RESPONDENT-RESPONDENT-APPELLANT. (PROCEEDING NO. 2.) (APPEAL NO. 1.)

ARTHUR J. GIACALONE, BUFFALO, AND LIPPES & LIPPES, FOR PETITIONERS-APPELLANTS-RESPONDENTS.

HOPKINS SORGI & ROMANOWSKI PLLC, BUFFALO (MARC A. ROMANOWSKI OF COUNSEL), AND DUKE HOLZMAN PHOTIADIS & GRESENS LLP, FOR RESPONDENT-RESPONDENT-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (JESSICA M. LAZARIN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeals and cross appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered October 11, 2016 in these proceedings pursuant to CPLR article 78. The judgment denied the motions of respondents to dismiss the petition and amended petition for lack of standing, and granted the motions of respondents to dismiss the petition in proceeding No. 2 and the amended petition in proceeding No. 1, except insofar as it alleged that respondents violated the performance bond provisions of General City Law §§ 27-a (7) and 33 (8) (a).

It is hereby ORDERED that the judgment so appealed from is

unanimously affirmed without costs.

Memorandum: Petitioners Margaret Wooster, Clayton S. "Jay" Burney, Jr., Lynda K. Stephens, and James E. Carr (collectively, Wooster petitioners) and Buffalo Niagara Riverkeeper, Inc. (Riverkeeper) commenced these CPLR article 78 proceedings seeking, among other things, to annul the negative declaration issued by respondent City of Buffalo Planning Board (Planning Board) under the State Environmental Quality Review Act ([SEQRA] ECL art 8) with respect to the proposed construction of Queen City Landing (project) in Buffalo's Outer Harbor area. Respondent Queen City Landing, LLC (QCL), the developer of the project, plans to construct a mixed-use facility that will include a 23-story tower containing nearly 200 residential units. In appeal No. 1, petitioners appeal and QCL cross-appeals from a judgment that denied respondents' motions to dismiss Riverkeeper's petition and the Wooster petitioners' amended petition for lack of standing, and granted respondents' motions to dismiss the petition and amended petition except insofar as the Wooster petitioners claimed that respondents violated the performance bond provisions of General City Law §§ 27-a (7) and 33 (8) (a). In appeal No. 2, the Wooster petitioners appeal from a judgment that granted those parts of respondents' motions to dismiss the Wooster petitioners' performance bond claim. We affirm in both appeals.

Addressing first the cross appeal in appeal No. 1, we reject QCL's contention that petitioners do not have standing to challenge the SEQRA determination. The allegations in the affidavits of petitioners Wooster, Burney and Carr, read in the context of the amended petition (*see Matter of Sierra Club v Village of Painted Post*, 26 NY3d 301, 311 n 4), establish that they engage in "repeated, not rare or isolated use" of the Outer Harbor for recreation, study and enjoyment, thereby showing that the threatened environmental and ecological harm to that area, which includes aquatic and terrestrial wildlife habitats and two nature preserves, "will affect them differently from 'the public at large' " (*Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 305; *see Matter of Long Is. Pine Barrens Socy., Inc. v Central Pine Barrens Joint Planning & Policy Commn.*, 113 AD3d 853, 856). Contrary to QCL's contention, the alleged injuries are " 'real and different from the injur[ies] most members of the public face' " (*Sierra Club*, 26 NY3d at 311, quoting *Save the Pine Bush, Inc.*, 13 NY3d at 306). Furthermore, the threatened environmental and ecological harm to the area caused by the development of the project falls within the zone of interests sought to be protected by SEQRA (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773; *Long Is. Pine Barrens Socy., Inc.*, 113 AD3d at 856). Inasmuch as at least one of the Wooster petitioners has standing, it is not necessary to address QCL's challenges to any other individual petitioner (*see Matter of Humane Socy. of U.S. v Empire State Dev. Corp.*, 53 AD3d 1013, 1017 n 2, *lv denied* 12 NY3d 701; *see also Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 813, *cert denied* 540 US 1017). Contrary to QCL's further contention, Supreme Court properly concluded that Riverkeeper, through the affidavits of its members, met the requirements to establish organizational standing (*see generally*

Society of Plastics Indus., 77 NY2d at 775; *Long Is. Pine Barrens Socy., Inc.*, 113 AD3d at 856).

On the merits, however, we conclude that the court properly dismissed the petition and amended petition. Contrary to petitioners' contention in appeal No. 1, the Planning Board was properly designated as the lead agency (*see generally* 6 NYCRR 617.2 [u]; *Matter of Coca-Cola Bottling Co. of N.Y. v Board of Estimate of City of N.Y.*, 72 NY2d 674, 680). There is a conflict between that part of the Buffalo City Code providing that respondent City of Buffalo Common Council (Common Council) had an "[a]utomatic designation of lead agency" for actions that, like this project, are undertaken within the Buffalo Coastal Special Review District (Buffalo City Code § 168-7 [A] [2] [d]), and that part of the Buffalo City Code automatically designating the Planning Board as lead agency for actions undertaken for subdivision developments and site plan review (*see* § 168-7 [A] [1] [a], [b]). Although arguably either the Common Council or the Planning Board could have been designated as the lead agency, the Planning Board had oversight of subdivision approval and site plan review, and was responsible for preparing a report of recommendations to the Common Council on QCL's application for a "restricted use permit" describing "considerations involving air and water quality, coastal management, flood hazards and environmental impact of the proposed uses" (§ 511-67 [A] [4]; *see* § 511-55 [C]). Under these circumstances, the Planning Board was properly designated lead agency (*see Matter of Schodack Concerned Citizens v Town Bd. of Town of Schodack*, 148 AD2d 130, 134, *lv denied* 75 NY2d 701; *cf. Matter of Price v Common Council of City of Buffalo*, 3 Misc 3d 625, 629-632; *see also* ECL § 8-0111 [6]).

Contrary to petitioners' further contention, the court properly concluded that the Planning Board did not abdicate its responsibilities as lead agency. Although members of the strategic planning department from respondent City of Buffalo (City) filled out part of the full environmental assessment form and prepared the negative declaration, the Planning Board was entitled to rely on the information provided by such experts, and the record establishes that it "fully retained and exercised its role as the lead agency assessing the environmental impact of the [project]" (*Akpan v Koch*, 75 NY2d 561, 575; *see Matter of Mombaccus Excavating, Inc. v Town of Rochester, N.Y.*, 89 AD3d 1209, 1211-1212, *lv denied* 18 NY3d 808). We reject petitioners' contention that the Planning Board improperly deferred its review of site contamination to other agencies (*cf. Matter of Penfield Panorama Area Community v Town of Penfield Planning Bd.*, 253 AD2d 342, 349-350).

We also reject petitioners' contention that the Planning Board failed to comply with the requirements of SEQRA in issuing the negative declaration. The record establishes that the Planning Board took the requisite hard look and provided a reasoned elaboration of the basis for its determination regarding the potential impacts of the project on aesthetic resources and community character, particularly with respect to the height of the building (*see Matter of Frigault v Town of Richfield Planning Bd.*, 107 AD3d 1347, 1350; *Matter of Schweichler v Village of Caledonia*, 45 AD3d 1281, 1283, *lv denied* 10

NY3d 703); migratory birds, especially in light of the project's conformance with accepted governmental guidelines to mitigate bird impacts (*cf. Matter of Wellsville Citizens for Responsible Dev., Inc. v Wal-Mart Stores, Inc.*, 140 AD3d 1767, 1769; *see generally Matter of Granger Group v Town of Taghkanic*, 77 AD3d 1137, 1142-1143, *lv denied* 16 NY3d 781; *Matter of East End Prop. Co. #1, LLC v Kessel*, 46 AD3d 817, 822, *lv denied* 10 NY3d 926); and traffic (*see Wellsville Citizens for Responsible Dev., Inc.*, 140 AD3d at 1768-1769; *Matter of Schaller v Town of New Paltz Zoning Bd. of Appeals*, 108 AD3d 821, 823). The Planning Board's consideration of the contaminant remediation and stormwater management components of the project, which would minimize pollutants running off into the lake, supports its determination that "[n]o other potentially significant impacts to plants or animals were identified," which would include impacts on aquatic wildlife. Furthermore, to the extent that the project's potential impacts on aquatic wildlife were not specifically discussed in the negative declaration, it is well established that " 'the lead agency need not consider every conceivable [environmental] impact' " (*Matter of Ellsworth v Town of Malta*, 16 AD3d 948, 950; *see Save the Pine Bush, Inc.*, 13 NY3d at 307; *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417). The record thus establishes that the Planning Board complied with the requirements of SEQRA in issuing the negative declaration and, contrary to petitioners' further contention, we conclude that the "designation as a type I action does not, per se, necessitate the filing of an environmental impact statement . . . , nor was one required here" (*Matter of Mombaccus Excavating, Inc.*, 89 AD3d at 1211).

Petitioners also contend that the rezoning of the project site from industrial to commercial use was arbitrary and capricious because QCL unreasonably delayed for eight years before complying with the June 2008 conditional rezoning resolution that provided that the rezoning would not be effective until QCL filed a certified copy of the resolution with the Erie County Clerk's Office. We reject that contention. Here, the resolution did not specify a time for compliance, and QCL has not sought nor received an open-ended exemption from the condition (*cf. Matter of Gjerlow v Graap*, 43 AD3d 1165, 1168). Rather, in conjunction with its present plan for the project, QCL complied with the condition by filing a certified copy of the resolution with the Erie County Clerk in April 2016. Petitioners' contention provides no basis upon which to conclude that the rezoning was affected by an error of law, was arbitrary and capricious, or an abuse of discretion (*see generally* CPLR 7803 [3]).

We further conclude that, contrary to petitioners' contention, the Common Council's issuance of the restricted use permit to QCL, which is entitled to great deference, has a rational basis, is not arbitrary and capricious, and is supported by substantial evidence (*see* Buffalo City Code § 511-55; *see also* §§ 511-41 [A]; 511-67 [A], [C]; *see generally Matter of North Shore F.C.P., Inc. v Mammina*, 22 AD3d 759, 759-760). Petitioners also contend that the restricted use permit for a 23-story building violated the City's "Green Code," i.e., the Unified Development Ordinance (UDO), which was enacted during the

pendency of this appeal, and provides that the project is situated in a zone that does not permit towers and has a maximum building height of six stories. We reject that contention. The ordinance provides that where, as here, a previously granted approval was lawfully issued prior to the effective date of the UDO, the action authorized thereby may be undertaken.

Finally, contrary to the contention of the Wooster petitioners in appeal No. 2, we conclude that the court properly dismissed their claim that respondents violated the performance bond provisions of General City Law §§ 27-a (7) and 33 (8) (a).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

618

CA 16-02077

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

IN THE MATTER OF MARGARET WOOSTER, CLAYTON S. "JAY" BURNEY, JR., LYNDA K. STEPHENS AND JAMES E. CARR, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

QUEEN CITY LANDING, LLC, CITY OF BUFFALO PLANNING BOARD AND CITY OF BUFFALO COMMON COUNCIL, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

ARTHUR J. GIACALONE, BUFFALO, AND LIPPES & LIPPES, FOR PETITIONERS-APPELLANTS.

HOPKINS SORGI & ROMANOWSKI PLLC, BUFFALO (MARC A. ROMANOWSKI OF COUNSEL), FOR RESPONDENT-RESPONDENT QUEEN CITY LANDING, LLC.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (JESSICA M. LAZARIN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS CITY OF BUFFALO PLANNING BOARD AND CITY OF BUFFALO COMMON COUNCIL.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered November 9, 2016 in this CPLR article 78 proceeding. The judgment granted those parts of respondents' motions to dismiss the claim of petitioners alleging that respondents violated the performance bond provisions of General City Law §§ 27-a (7) and 33 (8) (a).

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

Same memorandum as in *Matter of Wooster v Queen City Landing, LLC* ([appeal No. 1] ___ AD3d ___ [May 5, 2017]).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

619

CA 16-01958

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

LLOYD PICHE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SYNERGY TOOLING SYSTEMS, INC., C.V.M. ELECTRIC, INC., DEFENDANTS-RESPONDENTS, AND N. CHOOPS PAINTING AND DECORATING, INC., DEFENDANT.

SYNERGY TOOLING SYSTEMS, INC., THIRD-PARTY PLAINTIFF,

V

AMHERST ACOUSTICAL, INC., THIRD-PARTY DEFENDANT.

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

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ROBERT E. SCOTT OF COUNSEL), FOR DEFENDANT-RESPONDENT SYNERGY TOOLING SYSTEMS, INC. AND THIRD-PARTY PLAINTIFF.

GOLDBERG SEGALLA LLP, BUFFALO (DANIEL T. HUNTER OF COUNSEL), FOR DEFENDANT-RESPONDENT C.V.M. ELECTRIC, INC.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered December 23, 2015. The order, among other things, granted the motion of defendant-third-party plaintiff for partial summary judgment dismissing the Labor Law § 240 (1) claim and denied plaintiff's cross motion for partial summary judgment on liability on that claim against defendant-third-party plaintiff.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion and reinstating the Labor Law § 240 (1) claim against defendant-third-party plaintiff Synergy Tooling Systems, Inc. and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he fell while wearing stilts in order to install ceiling tile. We explained in a prior appeal that plaintiff fell when he stepped on a flexible electrical wire conduit that was on the floor (*Piche v Synergy Tooling Sys., Inc.*, 134 AD3d 1439, 1440).

Defendant-third-party plaintiff Synergy Tooling Systems, Inc. (defendant) moved for partial summary judgment dismissing the Labor Law § 240 (1) claim against it, and plaintiff cross-moved for partial summary judgment on liability on that claim against defendant. Although we reject plaintiff's contention that Supreme Court erred in denying his cross motion, we agree with plaintiff that the court erred in granting defendant's motion. We therefore modify the order accordingly.

Even assuming, arguendo, that defendant established its entitlement to judgment on the theory that plaintiff's fall was caused solely by stepping on the conduit, i.e., a "separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first place" (*Cohen v Memorial Sloan-Kettering Cancer Ctr.*, 11 NY3d 823, 825; *see Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 101, *rearg denied* 25 NY3d 1195), we nevertheless conclude that plaintiff raised an issue of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In his affidavit submitted in opposition to defendant's motion, plaintiff clarified his deposition testimony with respect to why and how he fell (*see Cox v McCormick Farms, Inc.*, 144 AD3d 1533, 1534). Plaintiff was installing the last of eight ceiling tiles in a room. He explained in his deposition and in his affidavit that his work was obstructed by electrical wiring and conduit in the ceiling that had not been properly secured, thereby leaving limited space in which to install the tile, which measured two feet by four feet. With his arms fully extended overhead while attempting to move and secure the electrical wiring and conduit, he lost his balance and was forced to step backwards, at which point his right stilt came into contact with the conduit and he fell. Thus, plaintiff raised an issue of fact whether his "injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant height differential" while he was attempting to secure the electrical wiring and conduit in the ceiling in order to install the ceiling tile (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603), and were not solely caused by the presence of the conduit on the floor (*cf. Nicometi*, 25 NY3d at 101; *Melber v 6333 Main St.*, 91 NY2d 759, 763-764; *McNabb v Oot Bros., Inc.*, 64 AD3d 1237, 1238-1239).

With respect to plaintiff's cross motion, we conclude that he failed to establish his entitlement to judgment as a matter of law inasmuch as his submissions failed to eliminate any issues of fact with respect to whether his injuries were caused solely by the presence of the conduit on the floor (*see Zuckerman*, 49 NY2d at 562; *see generally Nicometi*, 25 NY3d at 101).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

626

CA 16-01369

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

MAGGIE D. ARRINGTON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LARRY COHEN, DEFENDANT-APPELLANT.

HAGELIN SPENCER LLC, BUFFALO (MEGAN F. ORGANEK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie Court (Joseph R. Glownia, J.), entered April 7, 2016. The order denied the motion of defendant for summary judgment dismissing the complaint.

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 first cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when defendant's dog bit her face. We agree with defendant that Supreme Court erred in denying that part of his motion seeking summary judgment dismissing the first cause of action, alleging common-law negligence (*see Lista v Newton*, 41 AD3d 1280, 1282), and we therefore modify the order accordingly. We further conclude, however, that the court properly denied that part of the motion seeking summary judgment dismissing the second cause of action, for strict liability, inasmuch as "[d]efendant's own submissions in support of the motion raise a triable issue of fact whether [his] dog had vicious propensities and, if so, whether [he] knew or should have known of those propensities" (*Lewis v Lustan*, 72 AD3d 1486, 1486; *see generally Collier v Zambito*, 1 NY3d 444, 446). Defendant submitted the records of a dog daycare facility stating that defendant's dog "snapped at" and "growl[ed] at" other dogs "for no reason," and that the dog "continued to growl and snap" as he was led out of the room by an employee. The records reflect that defendant was notified of the dog's behavior by telephone. The dog was described in the records as "unpredictable," and was not permitted to return to the daycare facility following the three-day trial period. Defendant also submitted plaintiff's deposition testimony wherein she testified that, on the night of the incident, defendant saw that the dog "nipped at" plaintiff when she entered defendant's home, and shortly thereafter

the dog bit plaintiff's face.

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

629

KA 15-01176

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT J. KUNZ, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (John L. DeMarco, J.), dated May 22, 2015. 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*.). Contrary to defendant's contention, County Court properly assessed 15 points under risk factor 11 for a history of drug or alcohol abuse inasmuch as "[t]he statements in the case summary and presentence report with respect to defendant's substance abuse constitute reliable hearsay supporting the court's assessment of points under th[at] risk factor" (*People v Ramos*, 41 AD3d 1250, 1250, *lv denied* 9 NY3d 809; *see People v Jackson*, 134 AD3d 1580, 1580). The SORA guidelines justify the addition of 15 points under risk factor 11 "if an offender has a substance abuse history *or* was abusing drugs and or [*sic*] alcohol at the time of the offense" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 15 [2006] [emphasis added]). Indeed, "[a]n offender need not be abusing alcohol or drugs at the time of the instant offense to receive points" for that risk factor (*id.*; *see People v Lewis*, 50 AD3d 1567, 1568, *lv denied* 11 NY3d 702; *see generally People v Palmer*, 20 NY3d 373, 377-378).

Here, according to the presentence report, defendant "started using marihuana as a teenager," and "he used this substance regularly" (*see People v Merkley*, 125 AD3d 1479, 1479; *People v Carswell*, 8 AD3d 1073, 1073, *lv denied* 3 NY3d 607). The extent and regularity of defendant's marihuana use was bolstered by a previous diagnosis of "Cannabis Abuse," which was also noted in the presentence report.

Moreover, “defendant was required to attend drug and alcohol treatment while incarcerated, thus further supporting the court’s assessment of points for a history of drug or alcohol abuse” (*People v Mundo*, 98 AD3d 1292, 1293, *lv denied* 20 NY3d 855; *see People v Perez*, 138 AD3d 1081, 1081, *lv denied* 27 NY3d 913). Defendant also admitted that he “last used marihuana in October of 2002,” which was proximate in time to his arrest for the underlying offense (*see Lewis*, 50 AD3d at 1568). Although defendant completed an Alcohol and Substance Abuse Treatment Program, a “ ‘recent history of abstinence while incarcerated is not necessarily predictive of his behavior when no longer under such supervision’ ” (*People v Vangorder*, 72 AD3d 1614, 1614; *see Jackson*, 134 AD3d at 1580-1581; *People v Urbanski*, 74 AD3d 1882, 1883, *lv denied* 15 NY3d 707).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

630

KA 15-00403

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT J. PROPST, ALSO KNOWN AS ROBERT JOSEPH PROPST, ALSO KNOWN AS ROBERT PROPST, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY 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 March 2, 2015. The judgment convicted defendant, upon his plea of guilty, of robbery 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 his plea of guilty of robbery in the second degree (Penal Law § 160.10), defendant contends that his waiver of the right to appeal is invalid because it was not knowingly, voluntarily, and intelligently entered. We reject that contention. The record establishes that County Court engaged defendant "in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Carr*, 147 AD3d 1506, 1506 [internal quotation marks omitted]). Furthermore, the plea colloquy, together with the written waiver of the right to appeal (*see People v Gibson*, 147 AD3d 1507, 1507; *see generally People v Ramos*, 7 NY3d 737, 738), adequately apprised defendant that "the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256; *see Carr*, 147 AD3d at 1506). The valid waiver of the right to appeal with respect to both the conviction and the sentence forecloses defendant's challenge to the severity of his sentence (*see Lopez*, 6 NY3d at 255-256; *Carr*, 147 AD3d at 1506; *cf. People v Maracle*, 19 NY3d 925, 928).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

639

CAF 15-01654

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

IN THE MATTER OF BROOKLYN S.

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

MEMORANDUM AND ORDER

STAFANIA Q., RESPONDENT,
AND DEVIN S., RESPONDENT-APPELLANT.

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

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

ELIZABETH SCHENCK, ATTORNEY FOR THE CHILD, SYRACUSE.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered September 4, 2015 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent Devin S. neglected the subject child.

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

Memorandum: Respondent father appeals from an order adjudging that he neglected his child pursuant to Family Court Act article 10. Contrary to the father's contention, Family Court's finding that he neglected his child is supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]). According to the undisputed evidence, the father abused illicit substances, including heroin. Generally, such evidence would constitute "prima facie evidence that a child of or who is the legal responsibility of [the father] is a neglected child" (§ 1046 [a] [iii]). A parent may, however, rebut the presumption of neglect where the parent establishes that he or she "is voluntarily and *regularly* participating in a recognized rehabilitative program" (*id.* [emphasis added]). "[T]he issue of whether [a parent] was 'voluntarily and regularly participating' in [a treatment] program is a factual one" (*Matter of Keira O.*, 44 AD3d 668, 670). Here, although the evidence established that the father had voluntarily begun a rehabilitative treatment program, "the evidence does not support a finding that [he] was . . . regularly participating in [that] program" (*Matter of Luis B.*, 302 AD2d 379, 379). Rather, the evidence established that he attended only a third of his appointments. Moreover, as the court correctly found, the fact that

the father "tested positive for drug use while participating in the program . . . establish[es] imminent risk to the child[ ]'s physical, mental and emotional condition" (*Matter of Messiah T. [Karen S.]*, 94 AD3d 566, 566; *see Matter of Brandon R. [James U.]*, 114 AD3d 1028, 1029; *see generally Keira O.*, 44 AD3d at 670).

In addition, the finding of neglect is supported by evidence that "the father was aware of the mother's drug use during the time when she was responsible for the child's care, and that he failed to intervene" (*Matter of Sadiq H. [Karl H.]*, 81 AD3d 647, 648). The child, who was born with a positive toxicology for opiates, remained hospitalized for "neonatal abstinence syndrome." During that time, the child was to be weaned off the opiates by morphine management. Despite medical intervention, however, the child's condition worsened, causing medical professionals to suspect that the mother, who was breastfeeding the child, was still using illicit substances. A sample of the mother's breast milk tested positive for morphine, codeine, and heroin metabolites. When presented with the results of the testing, the father admitted that the mother had "gone on a bender" the weekend before. Inasmuch as a finding of neglect has been supported where a mother has been observed breastfeeding a child while having a high blood alcohol level (*see Matter of Maranda LaP.*, 23 AD3d 221, 222; *Matter of W. H.*, 158 Misc 2d 788, 790), we conclude that the father's failure to intervene to prevent the mother from nursing the child is further evidence of neglect (*see Sadiq H.*, 81 AD3d at 648).

The father further contends that the court erred in admitting in evidence hospital records that allegedly contained inadmissible hearsay and in permitting a witness to testify based on that inadmissible hearsay. The father's objection to the testimonial evidence was sustained, and the father did not make any further hearsay objections. We thus conclude that he did not preserve his contention that any additional testimony from that witness constituted inadmissible hearsay (*see Matter of Britiny U. [Tara S.]*, 124 AD3d 964, 965). Moreover, the hospital records were admitted without objection, and thus any challenge to the admission of those records is not preserved for our review (*see Matter of Cory S. [Terry W.]*, 70 AD3d 1321, 1322). In any event, even if the court erred in admitting the alleged hearsay evidence, we conclude that the error is harmless inasmuch as "the record otherwise contains ample evidence supporting [the] [c]ourt's determination" (*Matter of Kenneth C. [Terri C.]*, 145 AD3d 1612, 1612; *see Matter of Bentleigh O. [Jacqueline O.]*, 125 AD3d 1402, 1403, *lv denied* 25 NY3d 907).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

650

TP 16-01796

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

IN THE MATTER OF TROY WASHINGTON, PETITIONER,

V MEMORANDUM AND ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered October 4, 2016) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 107.10 (7 NYCRR 270.2 [B] [8] [i]) and as modified the determination is confirmed without costs and respondent is directed to expunge from petitioner's institutional record all references to the violation of that inmate rule.

Memorandum: Petitioner commenced this CPLR article 78 proceeding, transferred to this Court pursuant to CPLR 7804 (g), seeking to annul the determination, following a tier III hearing, that he violated various inmate rules. As respondent correctly concedes, the determination that petitioner violated inmate rule 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference with employee]) is not supported by substantial evidence. We therefore modify the determination by granting the petition in part and annulling that part of the determination finding that petitioner violated that rule, and we direct respondent to expunge from petitioner's institutional record all references thereto. Inasmuch as petitioner has already served the penalty and there was no recommended loss of good time, there is no need to remit the matter to respondent for reconsideration of the penalty.

Contrary to petitioner's contention, the determination finding that he violated the remaining three inmate rules is supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139). Petitioner failed to exhaust his administrative remedies with respect to his further contention that the Hearing Officer was biased against him because he failed to raise it in his administrative appeal, and this Court "has no discretionary power to reach [it]" (*Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071, *appeal dismissed* 81 NY2d 834).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

651

KA 15-02093

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HEATH E. JUNE, DEFENDANT-APPELLANT.

RICHARD L. SULLIVAN, BUFFALO, FOR DEFENDANT-APPELLANT.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Oswego County Court (Donald E. Todd, J.), dated March 10, 2014. The order determined that defendant is a level two 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 two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court did not err in assessing 20 points against him under the risk factor for a continuing course of sexual misconduct. " '[T]he court was not limited to considering only the crime of which defendant was convicted in making its determination' " (*People v Davis*, 145 AD3d 1625, 1626). Here, we conclude that the reliable evidence presented at the hearing, including the victim's grand jury testimony and her statement to the police, was "sufficient to establish that defendant engaged in a continuing course of sexual misconduct with that victim" (*People v Whyte*, 89 AD3d 1407, 1408; *see generally People v Hubel*, 70 AD3d 1492, 1493).

We also reject defendant's further contention that a downward departure from the presumptive risk level was warranted in this case. Although the court may "depart" from the presumptive risk level, "[t]he expectation is that the [risk assessment] instrument will result in the proper classification in most cases so that departures will be the exception – not the rule" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]). While "[a]n offender's response to treatment, if exceptional, can be the basis for a downward departure" (*id.* at 17), defendant's participation and moderate success in treatment programs does not demonstrate that his response was exceptional (*see People v Pendleton*, 112 AD3d 600, 601, *lv denied* 22 NY3d 861; *People v Watson*, 95 AD3d 978, 979; *People v*

Parker, 81 AD3d 1304, 1304, *lv denied* 16 NY3d 713). Furthermore, defendant's self-serving statements regarding his progress carry little if any weight (*see People v Martinez*, 104 AD3d 924, 924-925, *lv denied* 21 NY3d 857). We therefore conclude that " 'defendant failed to prove by a preponderance of the evidence that his response to treatment was exceptional' " (*People v Butler*, 129 AD3d 1534, 1535, *lv denied* 26 NY3d 904).

Finally, to the extent that defendant contends that the court should have considered his marriage, new apartment and recent employment in determining whether a downward departure was warranted, we further conclude that "[d]efendant's 'stable lifestyle' was already taken into account by the risk assessment instrument" (*People v Cabrera*, 91 AD3d 479, 480, *lv denied* 19 NY3d 801).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

652

KA 15-00454

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVYN MICHAEL KREMBEL, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Joanne M. Winslow, J.), entered February 4, 2015. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Defendant was presumptively a level two risk based on the risk assessment instrument, but Supreme Court determined that defendant is a level three risk based on the presumptive override for a prior felony sex crime conviction. We reject defendant's contention that the court erred in failing to grant a downward departure to a level one risk inasmuch as defendant failed to establish by a preponderance of the evidence the existence of mitigating factors not adequately taken into account by the guidelines (*see People v Reber*, 145 AD3d 1627, 1627-1628). "In determining whether to depart from a presumptive risk level, the hearing court weighs the aggravating or mitigating factors alleged by the departure-requesting party to assess whether, under the totality of the circumstances, a departure is warranted" (*People v Howard*, 27 NY3d 337, 341). Such departures "are 'the exception, not the rule' " (*id.*). We conclude that defendant's mental or physical impairments, and the absence of past sexual contact with children, do not warrant a downward departure. Indeed, these factors were present before defendant committed the crimes underlying this proceeding, but they did not prevent him from committing those offenses.

Inasmuch as defendant does not dispute that he was previously convicted of a felony sex crime, and thus is presumptively a level

three risk (*see People v Edmunds*, 133 AD3d 1332, 1332, *lv denied* 26 NY3d 918), we do not address defendant's further contention that the court erred in its initial assessment of points before the application of the presumptive override.

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

653

KA 07-00150

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GLENN A. PENDERGRAPH, 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 November 29, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [2]). Defendant's contention that he was denied a fair trial based upon prosecutorial misconduct is unpreserved for our review inasmuch as defendant did not object to any of the alleged instances of misconduct (*see* CPL 470.05 [2]; *People v Smith*, 129 AD3d 1549, 1549, *lv denied* 26 NY3d 971). In any event, we conclude that "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Hendrix*, 132 AD3d 1348, 1348, *lv denied* 26 NY3d 1145 [internal quotation marks omitted]).

We reject defendant's contention that he was denied effective assistance of counsel. With respect to the alleged instances of prosecutorial misconduct, inasmuch as they were not so egregious as to deprive defendant of a fair trial, "defense counsel's failure to object thereto did not deprive defendant of effective assistance of counsel" (*id.* at 1348). With respect to the remaining instances of alleged ineffective assistance, we conclude that defendant has failed to demonstrate a lack of strategic or other legitimate explanations for defense counsel's alleged shortcomings (*see generally People v Benevento*, 91 NY2d 708, 713). Moreover, considering the evidence, the law and the circumstances of this case, viewed in totality and as of the time of the representation, we conclude that defendant received

meaningful representation (*see People v Rivera*, 112 AD3d 1288, 1288, *lv denied* 23 NY3d 1024; *see generally People v Baldi*, 54 NY2d 137, 147).

We further reject defendant's contention that County Court erred in denying his motion to set aside the verdict pursuant to CPL 330.30 without a hearing inasmuch as defendant failed to show that the alleged newly discovered evidence could not have been discovered prior to trial in the exercise of reasonable diligence (*see People v Thomas*, 136 AD3d 1390, 1391, *lv denied* 27 NY3d 1140, *reconsideration denied* 28 NY3d 974).

Defendant failed to preserve for our review his contention that the court's *Molineux* ruling deprived him of a fair trial (*see People v Thomas*, 85 AD3d 1572, 1572, *affd* 21 NY3d 226), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, the sentence is not unduly harsh or severe.

Entered: May 5, 2017

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 16-00869

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY J. VOGT, DEFENDANT-APPELLANT.

LAW OFFICES OF MATTHEW J. RICH, P.C., ROCHESTER (MATTHEW J. RICH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered June 8, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]). Defendant's contention that his plea was not knowingly, voluntarily and intelligently entered is not preserved for our review because defendant "did not move to withdraw the plea or to vacate the judgment of conviction" (*People v Laney*, 117 AD3d 1481, 1482), but we agree with defendant that his recitation of the facts underlying the charge cast significant doubt upon his guilt insofar as it negated the element of intent, and thus this case "falls within the narrow exception to the preservation requirement" (*People v Bertollini* [appeal No. 2], 141 AD3d 1163, 1164). Nevertheless, we affirm, inasmuch as County Court conducted the requisite inquiry to ensure that defendant's plea was knowing and voluntary (*see People v Lopez*, 71 NY2d 662, 666). Here, while defendant's initial statements regarding his intent to injure the victim " 'trigger[ed] the trial court's duty to conduct a further inquiry to ensure that defendant's plea was knowingly and voluntarily made' " (*People v Bonacci*, 119 AD3d 1348, 1349, *lv denied* 24 NY3d 1042, quoting *People v McNair*, 13 NY3d 821, 822-823), we conclude that the court "properly conducted such an inquiry and that 'defendant's responses to the court's subsequent questions removed [any] doubt about [his] guilt' " (*id.*; *see People v Ocasio*, 265 AD2d 675, 677-678). Contrary to defendant's further contention, the court had no duty to engage in an additional inquiry regarding a possible justification defense. " '[N]othing [defendant] said [during the plea colloquy] raised the possibility of a viable

justification defense' " (*People v Manor*, 121 AD3d 1581, 1582, *affd* 27 NY3d 1012; *see People v Wilson*, 107 AD3d 532, 532, *lv denied* 22 NY3d 1160, *reconsideration denied* 23 NY3d 1069; *cf. People v Ponder*, 34 AD3d 1314, 1315), and the court "had no duty to conduct an inquiry concerning the potential defense of [justification] based upon comments made by defendant during the . . . sentencing proceeding" (*People v Phillips*, 30 AD3d 911, 911, *lv denied* 7 NY3d 869).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court

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

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CAF 16-00204

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

IN THE MATTER OF LAURALEE PFALZER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOHN E. PFALZER, JR., RESPONDENT-RESPONDENT.

BRIDGET L. FIELD, ROCHESTER, FOR PETITIONER-APPELLANT.

POPE LAW FIRM, PLLC, WILLIAMSVILLE (PAUL T. BUERGER, JR., OF COUNSEL), FOR RESPONDENT-RESPONDENT.

JEFFREY D. OSHLAG, ATTORNEY FOR THE CHILDREN, BATAVIA.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered December 22, 2015 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: Petitioner mother appeals from an order that dismissed her petition seeking modification of a judgment of divorce that awarded joint custody of the subject children to the parties and primary residential placement to respondent father. The mother's contention that Family Court erred in failing to conduct a *Lincoln* hearing is not preserved for our review (*see Bielli v Bielli*, 60 AD3d 1487, 1487, *lv dismissed* 12 NY3d 896; *Matter of Nielsen v Nielsen*, 225 AD2d 1050, 1050, *lv denied* 88 NY2d 805). In any event, the mother's contention is without merit inasmuch as "[a]n in camera interview is not warranted where, as here, a court has before it sufficient information to determine the wishes of the children" (*Bielli*, 60 AD3d at 1487; *see Matter of Gallo v Gallo*, 138 AD3d 1189, 1191). We reject the mother's contention that she was deprived of her right to effective assistance of counsel based on her attorney's failure to request a *Lincoln* hearing. As noted, "there is no indication that [he] would have succeeded in obtaining a *Lincoln* hearing" even if he had requested one (*Matter of Venus v Brennan*, 103 AD3d 1115, 1117). Furthermore, the mother's attorney could have believed that a *Lincoln* hearing would produce harmful evidence against the mother, and we therefore conclude that the mother failed to "demonstrate the absence of strategic or other legitimate explanations for" her attorney's alleged shortcoming in failing to request a *Lincoln* hearing (*Matter of Brown v Gandy*, 125 AD3d 1389, 1390 [internal quotation marks

omitted]). Contrary to the mother's further contention, " 'the failure to call particular witnesses does not necessarily constitute ineffective assistance of counsel–particularly where the record fails to reflect that the desired testimony would have been favorable' " (*Matter of Bennett v Abbey*, 141 AD3d 882, 884). In our view, the mother's contention is "impermissibly based on speculation, i.e., that favorable evidence could and should have been offered on [her] behalf" (*Matter of Devonte M.T. [Leroy T.]*, 79 AD3d 1818, 1819; *see Matter of Coleman v Millington*, 140 AD3d 1245, 1248).

Lastly, we reject the mother's contention that the court erred in dismissing her petition without conducting an inquiry into the best interests of the children. We conclude that "there is a sound and substantial basis in the record for Family Court's determination that the mother failed to make the requisite evidentiary showing of a change in circumstances to warrant an inquiry into whether the best interests of the child[ren] would be served by modifying the existing custody arrangement" (*Matter of Thompson v Thompson*, 124 AD3d 1354, 1354).

Entered: May 5, 2017

Frances E. Cafarell
Clerk of the Court