SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

APRIL 29, 2016

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. HENRY J. SCUDDER, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1147
CA 15-00220

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

BRIAN LIPPENS, PLAINTIFF-RESPONDENT,

V ORDER

WINKLER BACKEREITECHNIK GMBH, WERNER & PFLEIDERER INDUSTRIELLE BACKTECHNIK GMBH, BAKERY ENGINEERING/WINKLER, INC., DEFENDANTS-APPELLANTS,
WINKLER INTERNATIONAL CORPORATION, ET AL., DEFENDANTS.
(APPEAL NO. 1.)

LECLAIR RYAN, A PROFESSIONAL CORPORATION, NEW YORK CITY (LESLIE F. RUFF OF COUNSEL), FOR DEFENDANTS-APPELLANTS WINKLER BACKEREITECHNIK GMBH AND WERNER & PFLEIDERER INDUSTRIELLE BACKTECHNIK GMBH.

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY P. DIPALMA OF COUNSEL), FOR DEFENDANT-APPELLANT BAKERY ENGINEERING/WINKLER, INC.

MACCARTNEY, MACCARTNEY, KERRIGAN & MACCARTNEY, NYACK (WILLIAM K. KERRIGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered June 16, 2014 in a personal injury action. The order, among other things, denied in part the motions of defendants Bakery Engineering/Winkler, Inc., Winkler Backereitechnik GmbH and Werner & Pfleiderer Industrielle Backtechnik GmbH seeking summary judgment and granted the cross motion of plaintiff for leave to serve an amended complaint.

It is hereby ORDERED that said appeals are unanimously dismissed without costs as moot (*see Sutton Investing Corp. v City of Syracuse*, 12 AD3d 1201).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

1148
CA 15-00221
PRESENT: SMITH, J.P., PERADOTTO, CARNI, WHALEN, AND DEJOSEPH, JJ.

BRIAN LIPPENS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WINKLER BACKEREITECHNIK GMBH, WERNER & PFLEIDERER INDUSTRIELLE BACKTECHNIK GMBH, BAKERY ENGINEERING/WINKLER, INC., DEFENDANTS-APPELLANTS, WINKLER INTERNATIONAL CORPORATION, ET AL., DEFENDANTS.
(APPEAL NO. 2.)

LECLAIR RYAN, A PROFESSIONAL CORPORATION, NEW YORK CITY (LESLIE F. RUFF OF COUNSEL), FOR DEFENDANTS-APPELLANTS WINKLER BACKEREITECHNIK GMBH AND WERNER & PFLEIDERER INDUSTRIELLE BACKTECHNIK GMBH.

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY P. DIPALMA OF COUNSEL), FOR DEFENDANT-APPELLANT BAKERY ENGINEERING/WINKLER, INC.

MACCARTNEY, MACCARTNEY, KERRIGAN & MACCARTNEY, NYACK (WILLIAM K. KERRIGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered November 19, 2014 in a personal injury action. The order, among other things, denied the motions of defendants Bakery Engineering/Winkler, Inc., Winkler Backereitechnik GmbH and Werner & Pfleiderer Industrielle Backtechnik GmbH for summary judgment dismissing plaintiff’s amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion of defendant Bakery Engineering/Winkler, Inc. with respect to the fourth and fifth causes of action in the amended complaint, and dismissing those causes of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a New York State resident, commenced this products liability action seeking damages for injuries he sustained in Rochester, New York, in September 2006 when his arm was caught in a component of a commercial bread-making machine known as a “proofer” during the course of his employment with Wegmans Food Market, Inc. (Wegmans), a nonparty. The proofer was sold to Wegmans in 1994 by defendant Winkler USA LP (Winkler USA). The proofer was manufactured by a German company, Winkler GmbH, which filed for bankruptcy in Germany in 2000. The Winkler GmbH German bankruptcy proceeding

resulted in three separate asset sales, two of which are relevant to this action. Defendant Bakery Engineering/Winkler, Inc. (Bakery) purchased, inter alia, Winkler GmbH's customer lists, customer contracts, accounts receivable, and balance sheet assets. In a separate sale, defendant Winkler Backereitechnik GmbH (Winkler) purchased, inter alia, Winkler GmbH's entire manual and industrial machinery program and equipment, a component program for bread and cookies, as well as an industrial proofing cabinet. Winkler is wholly owned by defendant Werner & Pfleiderer Industrielle Backtechnik GmbH (Werner).

Inasmuch as they did not design, manufacture, sell, or distribute the product at issue, plaintiff's amended complaint against Winkler, Werner, and Bakery is based in part upon theories of successor tort liability. The parties agree that, under German law, a purchaser of assets from a bankruptcy trustee is immune from successor liability for the pre-sale torts of the seller. Thus, Winkler, Werner, and Bakery contend that there can be no successor liability here because, inter alia, they purchased the assets of Winkler USA and/or Winkler GmbH from the German bankruptcy trustee.

Winkler and Werner together, and Bakery separately (hereafter, moving defendants), moved for summary judgment dismissing the amended complaint against them on the ground, inter alia, that comity and choice of law principles require New York courts to apply German bankruptcy law to plaintiff's successor tort liability claims. Supreme Court applied New York's law of successor tort liability and denied both motions. The court also determined that Winkler and Werner failed to meet their burden with respect to the "de facto merger" theory of successor liability under New York law, and that Bakery failed to meet its burden with respect to both the "de facto merger" and "mere continuation" theories of successor liability. Lastly, the court denied that part of Bakery's motion seeking summary judgment dismissing the fourth cause of action based upon failure to warn, and the fifth cause of action based upon the theory that Bakery launched an instrument of harm. We conclude that the court erred in denying those parts of Bakery's motion with respect to the fourth and fifth causes of action, and we therefore modify the order accordingly.

Initially, we reject the moving defendants' contention that comity requires the application of German bankruptcy law to the issue of successor tort liability in this New York action. It is well settled that laws of foreign governments have extraterritorial jurisdiction only by comity (*see J. Zeevi & Sons v Grindlays Bank [Uganda]*, 37 NY2d 220, 227-228, *cert denied* 423 US 866; *see also Huntington v Attrill*, 146 US 657, 669; *Mertz v Mertz*, 271 NY 466, 470). "The principle which determines whether we shall give effect to foreign legislation is that of public policy and, where there is a conflict between our public policy and application of comity, our own sense of justice and equity as embodied in our public policy must prevail" (*J. Zeevi & Sons*, 37 NY2d at 228). Contrary to the public policy reflected by German law, New York's public policy provides for successor tort liability in asset purchase transactions from bankrupt corporations, but only if one or more well-defined exceptions apply

(*see Sweatland v Park Corp.*, 181 AD2d 243, 245-246). In light of the foregoing, we decline to extend comity to German bankruptcy law. We further conclude that, inasmuch as plaintiff is a New York domiciliary and the situs of the alleged tort is in New York (*see Burnett v Columbus McKinnon Corp.*, 69 AD3d 58, 59-60), choice of law principles also compel the application of New York's successor tort liability rules (*see Neumeier v Kuehner*, 31 NY2d 121, 128).

With respect to successor tort liability under New York law, we are concerned here only with the de facto merger and mere continuation exceptions (*see Sweatland*, 181 AD2d at 245-246; *Wensing v Paris Indus.-N.Y.*, 158 AD2d 164, 167). We reject the contention of the moving defendants that there was no de facto merger herein because there was no continuity of ownership. Even assuming, arguendo, that the moving defendants established a lack of such continuity, we conclude that the court nonetheless properly denied the motions (*see Sweatland*, 181 AD2d at 245-246). "Public policy considerations dictate that, at least in the context of tort liability, courts have flexibility in determining whether a transaction constitutes a de facto merger. While factors such as shareholder and management continuity will be evidence that a de facto merger has occurred . . . , those factors alone should not be determinative" (*id.* at 246). Instead, the court should analyze each situation on a case-by-case basis and thus, contrary to the contention of the moving defendants, the presence or absence of continuity of ownership is not determinative (*see id.*).

We likewise reject Bakery's contention that there was no de facto corporate merger herein because it purchased assets from a "natural person," i.e., the German bankruptcy trustee. The asset sale agreement specifically identified "Winkler USA" as the seller. Moreover, the agreement conveyed Winkler USA's inventory, contracts, and commitments with customers, accounts receivable, balance sheet assets, and the exclusive right to use the Winkler logo and name in certain markets. It also obligated Bakery to assume all employees of Winkler USA and obligated Winkler USA to assign to Bakery the lease for Winkler USA's facility in Rockaway, New Jersey. Under those circumstances, we conclude that the court properly denied that part of Bakery's motion based on the theory of de facto merger (*see generally Hoover v New Holland N. Am., Inc.*, 71 AD3d 1593, 1594). We reject Bakery's further contention that it established prima facie entitlement to summary judgment with respect to the mere continuation exception. We conclude that, on this record, Bakery failed to establish that it was not a mere continuation of Winkler USA (*see generally Martorel v Tower Gardens, Inc.*, 74 AD3d 651, 652).

We agree with Bakery, however, that the court erred in denying that part of its motion seeking to dismiss the fourth cause of action based on an alleged failure to warn. We conclude that Bakery met its initial burden by establishing that it did not service or repair the proofer and therefore had no duty to warn (*see Ward v Lithibar-Matik, Inc.*, 6 AD3d 424, 425), and we further conclude that plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*,

49 NY2d 557, 562). We also agree with Bakery that the court erred in denying that part of its motion seeking to dismiss the fifth cause of action based on the theory that, although plaintiff was not a party to the service contract between Bakery and Wegmans, Bakery could still be held liable to plaintiff because Bakery " 'launched a force or instrument of harm' " that injured plaintiff (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141-142, quoting *Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168). Inasmuch as it is undisputed that Bakery did not service or repair the proofer, Bakery established that it did not create or exacerbate any alleged dangerous condition in that machine, and plaintiff failed to raise an issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

Entered: April 29, 2016 Frances E. Cafarell
Clerk of the Court

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

1405
CA 15-00976
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, WHALEN, AND DEJOSEPH, JJ.

SQUARE MAX LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN T. TRICKEY, JR., JOHN T. TRICKEY, JR., INC.,
AND JOHN J. TRICKEY, JR., INC.,
DEFENDANTS-APPELLANTS.

EVANS & FOX LLP, ROCHESTER (MATTHEW M. PISTON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MORGENSTERN DEVOESICK PLLC, PITTSFORD (BRIAN R. HENZEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered January 30, 2015. The order denied defendants' motion to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking dismissal of the first cause of action, and dismissing that cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for breach of contract and fraud. In its first cause of action, plaintiff alleged that defendants breached the parties' purchase and sale contract, along with the covenant of good faith and fair dealing, by making false and misleading statements with respect to the properties they owned. In its second cause of action, plaintiff alleged, inter alia, that defendants made false and misleading statements, which were known by defendants to be false and made with the intent to deceive plaintiff and "to induce it to purchase the [p]roperties based upon incorrect occupancy and rent numbers, and without knowledge" of a lease that was executed by and between defendants. Defendants moved to dismiss the complaint pursuant to CPLR 3211, and Supreme Court denied the motion.

The court erred in denying that part of defendants' motion seeking dismissal of the first cause of action, for breach of contract, and we therefore modify the order accordingly. It is well established that "[a] cause of action based upon a breach of a covenant of good faith and fair dealing requires a contractual obligation between the parties" (*Duration Mun. Fund, L.P. v J.P. Morgan Sec. Inc.*, 77 AD3d 474, 474-475). Here, at the time of the

alleged breach of contract and implied covenant, i.e., when defendants made certain representations regarding vacancy and rental values of the building and when they executed a lease in derogation thereof, there was no contract. Contrary to plaintiff's further contention, there is no viable breach of contract cause of action inasmuch as there is no obligation in the contract to disclose the lease other than through the "due diligence" process set forth in a clause of the contract, which defendants complied with and performed.

The court properly denied, however, that part of defendants' motion seeking dismissal of the second cause of action, for fraud. Preliminarily, although defendants' notice of motion sought dismissal of the complaint pursuant to CPLR 3211 (a) (1), (5), and (7), with respect to the fraud cause of action, defendants' arguments for dismissal concerned only CPLR 3211 (a) (7). Therefore, defendants' present contentions with respect to CPLR 3211 (a) (1) and (5) are not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985) and, in any event, we conclude that they are without merit.

In assessing a motion under CPLR 3211 (a) (7), "[i]t is axiomatic that plaintiff's complaint is to be afforded a liberal construction, that the facts alleged therein are accepted as true, and that plaintiff is to be afforded every possible inference in order to determine whether the facts alleged in the complaint 'fit within any cognizable theory' " (*Palladino v CNY Centro, Inc.*, 70 AD3d 1450, 1451). Here, plaintiff alleged that, during the negotiations of the contract, defendants' representations regarding the occupancy of the building and the rental values for certain floors were false and that plaintiff relied on those representations in executing the contract. Plaintiff further alleged that the representations were known by defendants to be false and were made with the intent to deceive plaintiff. We therefore conclude that plaintiff has stated a claim for fraud inasmuch as it "sufficiently pleaded the elements of a material representation, scienter, justifiable reliance, and damages to support such a claim" (*Flandera v AFA Am., Inc.*, 78 AD3d 1639, 1640-1641; *see Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 122).

In view of our determination, we need not reach defendants' remaining contentions.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

54
CAF 14-00089
PRESENT: SMITH, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ.

IN THE MATTER OF MARY I. WHITNEY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

FRANK JUDGE, RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Gail A. Donofrio, J.), entered December 20, 2013 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

It is hereby ORDERED that the order of protection so appealed from is unanimously affirmed without costs and the findings in the underlying decision dated December 13, 2013 that respondent committed the family offenses of harassment in the first degree and aggravated harassment in the second degree under Penal Law § 240.30 (former [1]) are vacated.

Memorandum: In a proceeding pursuant to Family Court Act article 8, respondent appeals from an order of protection that, after a fact-finding hearing, and upon a related decision, made after the hearing, found that he committed family offenses against petitioner. We note at the outset that respondent's contention that a dispositional hearing was required to permit him an opportunity to contest various aspects of the order of protection is moot. The order of protection expired by its terms on December 19, 2015, and respondent's contentions on appeal concerning the terms of that order "will not, at this juncture, directly affect the rights and interests of the parties" (*Matter of Gansburg v Gansburg*, 127 AD2d 766, 766). We conclude, however, that respondent's challenges to the findings that he committed family offenses are properly before us, " 'in light of enduring consequences which may potentially flow from an adjudication that a party has committed a family offense' " (*Matter of Hunt v Hunt*, 51 AD3d 924, 925).

We agree with respondent that the evidence is legally insufficient to establish that he committed the family offense of harassment in the first degree. We conclude that petitioner did not sustain her burden of establishing by a preponderance of the evidence that respondent "intentionally and repeatedly harasse[d] another

person by following such person in or about a public place or places" (Penal Law § 240.25). We therefore vacate the finding in the underlying decision that respondent committed the family offense of harassment in the first degree (*see Matter of Hodiantov v Aronov*, 110 AD3d 881, 882; *Matter of Sinclair v Batista-Mall*, 50 AD3d 1044, 1044). We also vacate the finding therein that respondent committed the family offense of aggravated harassment in the second degree insofar as that finding is premised on former subdivision (1) of Penal Law § 240.30, inasmuch "as the Court of Appeals has declared that Penal Law § 240.30 (1), as it existed at the time of the decision on the petition, was unconstitutionally vague and overbroad" (*Matter of Pochat v Pochat*, 125 AD3d 660, 661, *lv denied* 25 NY3d 905, citing *People v Golb*, 23 NY3d 455, 467-468, *rearg denied* 24 NY3d 932, *cert denied* ___ US ___, 135 S Ct 1009).

We further conclude, however, that the proof is legally sufficient to establish that respondent committed the family offense of aggravated harassment in the second degree as defined in former subdivision (2) of Penal Law § 240.30. Petitioner testified that, after she had ended their relationship and asked respondent to cease communicating with her, respondent called her, sent her text messages, and left her voicemail messages in an excessive manner. She further testified that respondent threatened her and was verbally abusive during certain telephone calls. The court's "assessment of the credibility of the witnesses is entitled to great weight" (*Matter of Danielle S. v Larry R.S.*, 41 AD3d 1188, 1189), and the record supports the court's determination that petitioner met her burden of establishing by a preponderance of the evidence that respondent committed acts constituting the crime of aggravated harassment in the second degree (§ 240.30 [former (2)]), thus warranting the issuance of an order of protection in favor of petitioner (*see* Family Ct Act § 812 [1]; *Danielle S.*, 41 AD3d at 1189).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

95
CAF 14-01232
PRESENT: WHALEN, P.J., SMITH, CENTRA, CARNI, AND SCUDDER, JJ.

IN THE MATTER OF CINDY L. TUCKER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL L. MILLER, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Yates County (Dennis F. Bender, A.J.), entered November 26, 2013 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

It is hereby ORDERED that the order of protection so appealed from is unanimously affirmed without costs and the finding in the underlying order entered August 23, 2013 that respondent committed the family offense of stalking in the fourth degree (Penal Law § 120.45 [3]) is vacated.

Memorandum: In a proceeding pursuant to Family Court Act article 8, respondent appeals from an order of protection issued in connection with Family Court's determination that he committed acts constituting the family offenses of disorderly conduct and stalking in the fourth degree against petitioner (*see* Family Ct Act § 812 [1]; Penal Law §§ 240.20 [3]; 120.45 [3]). Respondent's contention that the order of protection was overly broad is moot inasmuch as the order of protection has expired by its terms (*see Matter of Gansburg v Gansburg*, 127 AD2d 766, 766). However, respondent also challenges the court's findings in the underlying fact-finding order that he committed family offenses, and those challenges are properly before us " 'in light of enduring consequences which may potentially flow from an adjudication that a party has committed a family offense' " (*Matter of Hunt v Hunt*, 51 AD3d 924, 925).

We reject respondent's contention that the court did not have subject matter jurisdiction because the parties were no longer in an intimate relationship. Both parties testified that they started dating before they moved to New York in February 2012, and that they remained a couple until September 2012. Additionally, although their sexual relationship ended in the fall of 2012, the parties continued to live together on-and-off until the petition was filed in March 2013. We thus conclude that the court properly determined that the

parties' relationship fits within the plain terms of the statute (*see* Family Ct Act § 812 [1] [e]; *Matter of Jessica D. v Jeremy H.*, 77 AD3d 87, 90). We reject respondent's further contention that the evidence is legally insufficient to support a finding that he committed the family offense of disorderly conduct. Petitioner testified that respondent screamed at her in a "harassing" and obscene manner in her place of business on December 20, 2012, in the presence of customers and employees. Moreover, respondent admitted that he screamed at petitioner at her place of business in the presence of customers. The court's "assessment of the credibility of the witnesses is entitled to great weight" (*Matter of Danielle S. v Larry R.S.*, 41 AD3d 1188, 1189), and the record supports the court's determination that petitioner met her burden of establishing by a preponderance of the evidence that respondent committed acts constituting the offense of disorderly conduct, thus warranting the issuance of an order of protection in her favor (*see id.*; *see also* § 812 [1]; Penal Law § 240.20 [3]).

We agree with respondent, however, that the evidence is legally insufficient to establish that he committed the family offense of stalking in the fourth degree. We conclude that petitioner did not meet her burden of establishing by a preponderance of the evidence that respondent "intentionally, and for no legitimate purpose, engage[d] in a course of conduct directed at a specific person, and kn[ew] or reasonably should [have known] that such conduct . . . [was] likely to cause such person to reasonably fear that his or her employment, business or career [was] threatened" (Penal Law § 120.45 [3]). We therefore vacate the finding in the underlying fact-finding order that respondent committed the family offense of stalking in the fourth degree (*see Matter of Hodiantov v Aronov*, 110 AD3d 881, 882).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

152
CA 15-00718
PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND SCUDDER, JJ.

CATHERINE M. HEARY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DENISE HIBIT AND ERIK M. HIBIT,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

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

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (SARAH P. RERA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered February 4, 2015. The order, among other things, granted plaintiff's motion to set aside the jury verdict on the issue of past and future pain and suffering.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law and in the exercise of discretion by vacating the first and second ordering paragraphs and as modified the order is affirmed without costs, and a new trial on damages is granted.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained in a motor vehicle accident. In her bill of particulars, plaintiff alleged that she sustained injuries to her cervical spine that qualified as a serious injury within the meaning of Insurance Law § 5102 (d) under the permanent consequential limitation of use, significant limitation of use and 90/180-day categories. At defendants' request, a neurologist performed an independent medical examination (IME) of plaintiff, and plaintiff thereafter filed a note of issue. After the note of issue was filed, plaintiff underwent spinal fusion surgery. Defendants sent a notice to plaintiff seeking a postsurgical IME by an orthopedist. When plaintiff refused to submit to the requested postsurgical IME, defendants moved, inter alia, to compel her to do so. By the order in appeal No. 2, Supreme Court denied that part of defendants' motion seeking to compel plaintiff to submit to the IME but otherwise granted the motion.

While appeal No. 2 was pending, a jury trial was conducted. The jury rendered a verdict in plaintiff's favor on liability, finding

that she was not negligent and that she sustained a serious injury under each category alleged. The jury also awarded damages for, inter alia, past and future pain and suffering. Plaintiff moved to set aside the verdict with respect to the awards for past and future pain and suffering. By the order in appeal No. 1, the court, inter alia, granted plaintiff's motion and ordered a new trial on damages for past and future pain and suffering unless defendants stipulated to increased awards in those categories.

In appeal No. 2, we conclude that the court erred in denying that part of defendants' motion that sought to compel plaintiff to submit to a postsurgical IME by an orthopedist. "There is no restriction in CPLR 3121 limiting the number of examinations to which a party may be subjected, and a subsequent examination is permissible where the party seeking the examination demonstrates the necessity for it" (*Young v Kalow*, 214 AD2d 559, 559). Here, defendants demonstrated a substantial change of circumstances, i.e., plaintiff's spinal fusion surgery, that necessitated an orthopedic IME (*see Buerger v County of Erie*, 101 AD2d 1025, 1025). Although plaintiff had submitted to an IME by a neurologist, her claimed injuries were both neurological and orthopedic, and defendants were thus entitled to an orthopedic IME (*see Gitto v Scamoni*, 62 AD3d 1232, 1233; *Streicker v Adir Rent A Car*, 279 AD2d 385, 385). Plaintiff, moreover, failed to show that her prosecution of the action would be prejudiced by the additional IME by an orthopedist (*see Streicker*, 279 AD2d at 385). We therefore reverse the order in appeal No. 2 insofar as appealed from, and we grant that part of defendants' motion seeking to compel plaintiff to submit to an IME by an orthopedist.

The error in refusing to compel plaintiff to submit to the postsurgical IME, however, does not affect the jury's verdict with respect to the parties' respective fault. Nor does the error affect the jury's finding that plaintiff sustained a serious injury under the 90/180-day category. "[A] jury's finding that the plaintiff sustained an injury within any of the categories set forth in Insurance Law § 5102 (d) satisfies the no-fault threshold, thereby eliminating that issue from the case and permitting the plaintiff to recover any damages proximately caused by the accident" (*Kelley v Balasco*, 226 AD2d 880, 880; *see Obdulio v Fabian*, 33 AD3d 418, 419). Thus, inasmuch as the jury found that plaintiff sustained a serious injury under the 90/180-day category, and the postsurgical IME would not bear on that category, the error in appeal No. 2 does not warrant disturbing the verdict in appeal No. 1 on liability, i.e., negligence and serious injury (*see generally Ruzycki v Baker*, 301 AD2d 48, 52).

We further conclude, however, that the error in refusing to compel plaintiff to submit to a postsurgical IME by an orthopedist is relevant to the verdict on damages. We therefore exercise our authority under CPLR 4404 (a), which we share with the trial court (*see e.g. Dessasore v New York City Hous. Auth.*, 70 AD3d 440, 441), to grant a new trial on damages only in appeal No. 1, and we modify the

order therein accordingly.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

158
CA 15-00590
PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND SCUDDER, JJ.

CATHERINE M. HEARY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DENISE HIBIT AND ERIK M. HIBIT,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

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

GROSS SHUMAN BRIZDLE & GILFILLAN, P.C., BUFFALO (SARAH P. RERA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered July 21, 2014. The order, insofar as appealed from, denied that part of the motion of defendants to compel plaintiff to submit to an independent medical examination by an orthopedist.

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

Same memorandum as in *Heary v Hibit* ([appeal No. 1] ___ AD3d ___ [Apr. 29, 2016]).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

180
CA 15-00754
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

TERRY DUNN, PLAINTIFF-APPELLANT,

V ORDER

DARNELL GARRETT, NIAGARA FRONTIER TRANSIT
METRO SYSTEM, INC., AND NIAGARA FRONTIER
TRANSPORTATION AUTHORITY, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

CAMPBELL & SHELTON, LLP, EDEN, MAGAVERN MAGAVERN GRIMM, LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAVID J. STATE, GENERAL COUNSEL, BUFFALO (VICKY-MARIE J. BRUNETTE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered October 2, 2014 in a personal injury action. The order denied plaintiff's motion to, inter alia, set aside the jury verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1], [2]).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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CA 15-00755

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

TERRY DUNN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DARNELL GARRETT, NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC., AND NIAGARA FRONTIER TRANSPORTATION AUTHORITY, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

CAMPBELL & SHELTON, LLP, EDEN, MAGAVERN MAGAVERN GRIMM, LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAVID J. STATE, GENERAL COUNSEL, BUFFALO (VICKY-MARIE J. BRUNETTE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (John F. O'Donnell, J.), entered October 17, 2014 in a personal injury action. The judgment awarded plaintiff the sum of $26,605.00 as against defendants.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, those parts of the motion seeking to set aside the verdict and a new trial are granted, and a new trial is granted on the issues of causation, serious injury, and damages.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle she was driving was struck from behind by a passenger bus while the vehicle was stopped at a red light. The bus was operated by defendant Darnell Garrett and owned by the other defendants. Defendants conceded the issue of negligence, and a trial was held on the issues of causation, serious injury, and damages. The jury found that plaintiff did not suffer a serious injury as a result of the accident (*see generally* Insurance Law § 5102), but awarded plaintiff economic damages. Plaintiff moved to set aside the verdict, for a directed verdict on the issue of serious injury, and for a new trial on the issue of damages or, alternatively, for "a new trial as to all remaining issues," but Supreme Court denied that motion. Although plaintiff concedes on appeal that there was sufficient evidence to support the jury's verdict, she contends that the court erred in denying her motion on the grounds that defense counsel's improper attacks on her credibility, along with the court's confusing jury instructions, denied her a fair trial. We agree with plaintiff that she was denied

a fair trial.

It is well settled that a cross-examiner at trial is “bound by the answers of the witness to questions on collateral matters inquired into solely to affect credibility” (Jerome Prince, Richardson on Evidence § 6-305 [Farrell 11th ed 1995]), and extrinsic evidence cannot be used to impeach a witness’s credibility after the witness has provided an answer with which the cross-examiner is unsatisfied (*see Badr v Hogan*, 75 NY2d 629, 634-636; *Muye v Liben*, 282 AD2d 661, 662). Here, defense counsel asked plaintiff during cross-examination whether she had failed an employment-related drug test, a collateral issue relevant only to plaintiff’s credibility. In response, plaintiff testified that the test result was a “false positive” that was proved false upon retesting. Defense counsel then violated the collateral evidence rule when she not only referred to a lack of evidence supporting plaintiff’s assertion, but introduced the drug test result in evidence in an attempt to impeach plaintiff’s credibility (*see Badr*, 75 NY2d at 635; *Huff v Rodriguez*, 88 AD3d 1274, 1275).

The impact of that improper conduct was compounded when defense counsel thereafter questioned defendant’s medical expert, over plaintiff’s objection, about “drug use history” notations in plaintiff’s medical records that, according to the expert, raised questions as to plaintiff’s “credibility.” We conclude that the court erred in permitting the expert to opine on plaintiff’s credibility (*see Kravitz v Long Is. Jewish-Hillside Med. Ctr.*, 113 AD2d 577, 580-581), and further erred in permitting the expert to testify about entries in another doctor’s records concerning allegedly inconsistent details about the accident. Those entries, which defense counsel mentioned in summation, “were germane neither to treatment nor to diagnosis and were therefore not admissible under the business records exception to the hearsay rule” (*Musaid v Mercy Hosp. of Buffalo*, 249 AD2d 958, 959) and, because there is nothing in the record to establish that plaintiff was the source of the information contained in them, the entries are not admissible as admissions (*see id.* at 959-960; *see also Quispe v Lemle & Wolff, Inc.*, 266 AD2d 95, 96).

Finally, despite the court’s pretrial ruling precluding defendants from questioning plaintiff about a personal injury claim she had filed in connection with a prior accident, defense counsel, over objection, asked plaintiff if she had been involved in any “legal action” related to her “neck and/or back condition.” Because evidence of prior accidents and lawsuits related thereto “may not [be used to] . . . demonstrate that plaintiff is litigious and therefore unworthy of belief” (*Molinari v Conforti & Eisele*, 54 AD2d 1113, 1114), it was error for the court to allow that questioning. In our view, the improper attacks on plaintiff’s credibility, viewed as a whole, denied plaintiff a fair trial.

In light of our determination, we need not address plaintiff’s remaining contentions.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

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CA 15-01337

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

UTICA NATIONAL INSURANCE GROUP, AS SUBROGEE OF
MARIANNE ELLIS AND MARK ELLIS,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

OUR TOUCH, INC., DEFENDANT-APPELLANT,
AND ZURICH AMERICAN INSURANCE COMPANY,
DEFENDANT.

CARTAFALSA, SLATTERY, TURPIN & LENOFF, BUFFALO (MICHAEL J. LENOFF OF COUNSEL), FOR DEFENDANT-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered March 6, 2015. The order, among other things, granted plaintiff's motion for partial summary judgment.

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

Memorandum: In this insurance subrogation action, Our Touch, Inc. (defendant) appeals from an order that granted plaintiff's motion for partial summary judgment on the issue of liability and denied defendant's cross motion for summary judgment dismissing the amended complaint and for an order amending the caption to remove former defendant Zurich American Insurance Company (Zurich) therefrom. We conclude that Supreme Court erred in granting plaintiff's motion for partial summary judgment on the issue of liability but properly denied that part of defendant's cross motion seeking summary judgment dismissing the amended complaint. Plaintiff established its entitlement to judgment as a matter of law only on the specific issue that defendant's employee was within the scope of her employment at the time she took a cigarette break (*see Matter of Kontogiannis v Nationwide PC*, 51 AD3d 1180, 1181; *Matter of Pabon v New York City Tr. Auth.*, 24 AD3d 833, 833). Plaintiff failed to establish as a matter of law, however, that any of defendant's employees were responsible for starting the fire and that their conduct fell below the standard of due care (*see Merchants Mut. Ins. Co. v Surrey Elec. Co.*, 130 AD2d 721, 722; *see generally Ugarriza v Schmieder*, 46 NY2d 471, 474).

Additionally, as we concluded on a prior appeal in this matter (*Utica Natl. Ins. Group v Our Touch, Inc.*, 109 AD3d 1182), defendant failed to establish as a matter of law that the acts or omissions of its employees did not cause the fire or did not rise to the level of negligence, and plaintiff in any event raised triable issues of fact (*see Strnad v Garvin*, 64 AD3d 1230, 1230, *affd* 13 NY3d 851; *New York Mun. Ins. Reciprocal v Casella Constr., Inc.*, 105 AD3d 1440, 1441).

Although we decline to disturb the order on appeal insofar as it denied that part of defendant's cross motion seeking to amend the caption, we note that the parties previously agreed, in a "so-ordered stipulation of discontinuance" signed by the court, to the discontinuance of plaintiff's action against Zurich. We note that future papers in the action should reflect that stipulation of discontinuance by listing only current parties to the action.

Entered: April 29, 2016 Frances E. Cafarell
Clerk of the Court

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

185

CA 15-01364

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

ANTHONY DEJESUS AND TAMMY DEJESUS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CEC ENTERTAINMENT, INC., DOING BUSINESS AS
CHUCK E. CHEESE'S, DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, GARDEN CITY (HEATHER ZIMMERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREENE & REID, PLLC, SYRACUSE (EUGENE W. LANE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered May 28, 2015. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking to recover damages for injuries allegedly sustained by plaintiff Anthony DeJesus when he slipped and fell in a parking lot while exiting a restaurant owned by defendant, CEC Entertainment, Inc., doing business as Chuck E. Cheese's. Defendant moved for summary judgment dismissing the amended complaint on the ground that it neither created nor had actual or constructive notice of the allegedly dangerous condition that caused the fall. Supreme Court determined that defendant met its initial burden on the motion by establishing that there was no evidence as to the length of time the allegedly slippery condition existed and that defendant did not have notice of the condition. The court nevertheless denied the motion on the ground that plaintiffs raised triable issues of fact with respect to actual and/or constructive notice. We reverse.

We agree with defendant that it met its initial burden of demonstrating that it had neither actual notice of the alleged slippery condition nor constructive notice of its existence for a sufficient length of time to discover and remedy it because the ice and/or slush was not "visible and apparent" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837), and we conclude that plaintiffs failed to raise a triable issue of fact in opposition (*see Costanzo v*

Woman's Christian Assn. of Jamestown, 92 AD3d 1256, 1258; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We further conclude, contrary to plaintiffs' contention, that the opinions of plaintiffs' meteorologic expert are based on assumptions "that enjoy[] no evidentiary support in the record" (*Stewart v Canton-Potsdam Hosp. Found., Inc*., 79 AD3d 1406, 1408). Although plaintiffs submitted defendant's incident reports involving defendant's patrons falling in the parking lot on prior occasions, none of the reports identified a specific location in the parking lot, and they are therefore insufficient to raise an issue of fact with respect to constructive notice of an alleged recurrent condition (*see Carpenter v J. Giardino, LLC*, 81 AD3d 1231, 1232, *lv denied* 17 NY3d 710; *cf. Lowe v Spada*, 282 AD2d 815, 817). Lastly, inasmuch as the condition was not "visible and apparent," any lack of proof of recent inspections by defendant or the alleged failure of defendant to comply with its "Risk Management/Safety" manual with respect to inspections is irrelevant (*see Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc*., 15 AD3d 857, 857-858).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

190
CA 15-01346
PRESENT: LINDLEY, J.P., DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

ANGELO A. FERRARA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PEACHES CAFÉ LLC, ET AL., DEFENDANTS,
AND COR RIDGE ROAD COMPANY, LLC, ALSO KNOWN
AS COR HOLT ROAD COMPANY, LLC,
DEFENDANT-RESPONDENT.

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

MANNION & COPANI, SYRACUSE (GABRIELLE MARDANY HOPE OF COUNSEL), FOR
DEFENDANT-RESPONDENT AND DEFENDANT NEW YORK LIFE INSURANCE COMPANY.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered January 23, 2015. The order, insofar as appealed from, denied plaintiff's motion for partial summary judgment on its first cause of action and granted that part of the motion of defendant COR Ridge Road Company, LLC, also known as COR Holt Road Company, LLC seeking summary judgment dismissing the first cause of action against it.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant COR Ridge Road Company, LLC, also known as COR Holt Road Company, LLC, is denied in part, the first cause of action is reinstated, plaintiff's motion is granted, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Plaintiff appeals from an order insofar as it denied its motion for partial summary judgment on its first cause of action, for foreclosure on a mechanic's lien under Lien Law § 3, and granted that part of the motion of COR Ridge Road Company, LLC, also known as COR Holt Road Company, LLC (defendant) for summary judgment dismissing the first cause of action against it. According to plaintiff, Supreme Court erred in determining that defendant did not consent to the work its assignor performed on the subject property within the meaning of Lien Law § 3. We agree.

The relevant facts are not in dispute. Defendant owns commercial property in the Town of Webster that it leased to defendant Peaches Café LLC (Peaches), which intended to operate a restaurant on the premises. Pursuant to the written lease, Peaches was obligated to supply "[a]ll electrical work other than items furnished by

[defendant].” The lease further provided that Peaches could not commence construction work on the property without defendant’s consent, and that Peaches could use contractors approved only by defendant. Finally, the lease stated that any alterations, additions, or improvements to the premises “shall at once become a part of the realty and belong to [defendant] and shall be surrendered with the Premises.”

Peaches hired nonparty Quinlan Ferrara Electric, Inc. (Quinlan) to perform the electrical work contemplated by the lease. Although Quinlan performed the work in a satisfactory manner, Peaches was unable to pay for it. Defendant eventually evicted Peaches for nonpayment of rent, and Quinlan filed a mechanic’s lien against the property pursuant to Lien Law § 3. Quinlan thereafter assigned the lien to plaintiff, who commenced this action to foreclose on the lien.

Defendant subsequently moved for summary judgment dismissing, inter alia, the first cause of action, which seeks to enforce the lien under Lien Law § 3. According to defendant, because it did not have any direct dealings with Quinlan and did not explicitly consent to the specific electrical work performed by Quinlan, the lien cannot be enforced against it. Plaintiff, on the other hand, moved for partial summary judgment on the issue of liability on the first cause of action. The court agreed with defendant and, insofar as relevant to this appeal, dismissed the first cause of action.

Lien Law § 3 provides in relevant part that a “contractor . . . who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof . . . shall have a lien . . . upon the real property improved.” For purposes of this provision, a “requirement in a contract between . . . landlord and tenant, that the . . . tenant shall make certain improvements on the premises is a sufficient consent of the owner to charge his property with claims which accrue in making those improvements” (*Jones v Menke*, 168 NY 61, 64; *see De Klyn v Gould*, 165 NY 282, 287). The Court of Appeals subsequently reaffirmed *Jones*’s broad interpretation of section 3 in *McNulty Bros. v Offerman* (221 NY 98), holding that, as long as “the liens have been confined to work called for by the lease[,] . . . the landlords’ estate may be charged to the same extent as if the owners of that estate had ordered the work themselves. In substance, they have made the lessee their agent for that purpose” (*id.* at 106). *Jones* and *McNulty Bros.* have not been overturned or disavowed.

As plaintiff correctly notes, our decision in *Boyle v Paolini Cafeteria & Rest., Inc.* (220 App Div 482) is consistent with the precedents of the Court of Appeals and is virtually indistinguishable from the case at hand. We enforced the lien in *Boyle* because, even though “latitude was allowed to the tenant to determine the character of the alterations and improvements to be made” (*id.* at 485), it was undisputed that “[t]he lease itself authorized the tenant to make the alterations which were made” (*id.* at 484). Consistent with *Boyle*, we more recently observed that “consent [for purposes of Lien Law § 3] may be inferred from the terms of the lease” (*J.K. Tobin Constr. Co.,*

Inc. v David J. Hardy Constr. Co., Inc., 64 AD3d 1206, 1208 [internal quotation marks omitted]).

We acknowledge that our sister Departments have all concluded, at various times, that a lien under Lien Law § 3 is valid only when the property owner directly authorizes the contractor to undertake the relevant improvements (*see Paul Mock, Inc. v 118 E. 25th St. Realty Co.*, 87 AD2d 756, 756, citing *Sager v Renwick Park & Traffic Assn.*, 172 App Div 359, 367, 368; *see also Matell Contr. Co., Inc. v Fleetwood Park Dev., LLC*, 111 AD3d 681, 683; *Interior Bldg. Servs., Inc. v Broadway, 1384 LLC*, 73 AD3d 529, 529; *Drapaniotis v 36-08 33rd St. Corp.*, 48 AD3d 736, 737; *but see Gescheidt & Co., Inc. v Bowery Sav. Bank*, 251 App Div 266, 266-267, *affd* 278 NY 472; *Osborne v McGowan*, 1 AD2d 924, 925). In our view, however, those cases cannot be squared with *McNulty Bros.* and *Jones*, which, of course, we must follow.

Here, it is undisputed that the lease between defendant and Peaches obligated Peaches to install electrical upgrades on the premises in order to effectuate the purpose of the lease, i.e., the creation and operation of a restaurant. It is also undisputed that Peaches hired Quinlan, plaintiff's assignor, to perform the electrical work contemplated by the lease. We therefore conclude that Lien Law § 3 obligates defendant, as the owner of the benefitted property, to pay for the "reasonable value of [Quinlan's] services" (*Scrufari v Cowdrick*, 64 AD2d 1016, 1017; *see McNulty Bros.*, 221 NY at 105-106; *Jones*, 168 NY at 64-65; *Boyle*, 220 App Div at 484-485). In light of our determination, plaintiff is entitled to an inquest on damages with respect to the first cause of action (*see Scrufari*, 64 AD2d at 1017).

Finally, we reject defendant's contention that its responsibility under Lien Law § 3 is extinguished by a provision in the lease that purports to disclaim its liability for any mechanic's lien incurred as a result of work by Peaches. That provision is merely an indemnification clause, and it has no bearing on whether defendant consented to the improvements for purposes of section 3. Indeed, " 'once [the owner and tenant] have given their consent to an improvement, they cannot by any arrangement among themselves cut off the rights of lienors' " (*Grassi & Bro. v Lovisa & Pistoresi, Inc.*, 259 NY 417, 423, quoting *McNulty Bros.*, 221 NY at 105).

We therefore reverse the order insofar as appealed from, deny defendant's motion for summary judgment insofar as it sought dismissal of the first cause of action, reinstate that cause of action, and grant plaintiff's motion. We remit the matter to Supreme Court for an inquest on damages with respect to the first cause of action.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

202
CAF 15-00142
PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF DOMINIC B.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LORETTA B., RESPONDENT-APPELLANT.

EMILY A. VELLA, SPRINGVILLE, FOR RESPONDENT-APPELLANT.

M. MARK HOWDEN, COUNTY ATTORNEY, LITTLE VALLEY (STEPHEN J. RILEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

BRONWYN E. ENDERS, ATTORNEY FOR THE CHILD, OLEAN.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered January 12, 2015 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent had neglected the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Family Court, Cattaraugus County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother contends that Family Court, in granting the petition, erred in relying on a psychological evaluation of the mother that was not received in evidence. We agree. "[I]t is a fundamental requirement of due process that the decision maker's conclusions must rest solely on legal rules and the evidence adduced at the hearing" (*Matter of Kurzon v Kurzon*, 246 AD2d 693, 695). Indeed, although the parties had expressly stipulated that the evaluation would not be used as evidence in any fact-finding hearing in this matter, or as a basis for seeking to amend the neglect petition, the court relied heavily upon the evaluation in reaching its determination. We conclude under the circumstances of this case that a new fact-finding hearing is required based on the court's violation of the mother's right to due process (*see generally Matter of Thor C. [Carol C.]*, 83 AD3d 1585, 1585). We further conclude that the court's failure to afford the mother the opportunity to cross-examine a key witness, i.e., a caseworker for petitioner, constituted a denial of her right to due process, which also requires reversal (*see Matter of Middlemiss v Pratt*, 86 AD3d 658, 659).

We therefore reverse the order and remit the matter to Family

Court for a new hearing on the petition, if warranted. In light of information presented at oral argument of this appeal, it appears that a new hearing may no longer be necessary (*see generally Matter of Michael B.*, 80 NY2d 299, 317-318; *Matter of Dashawn N.*, 111 AD3d 640, 640-641; *Matter of Malik S. [Jana M.]*, 101 AD3d 1776, 1777-1778).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

224

KA 11-00808

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRY L. DRAKE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

GENESEE VALLEY LEGAL AID, INC., GENESEO (JEANNIE D. MICHALSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered June 24, 2010. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree and incest in the third degree (two counts).

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence on the conviction of two counts of incest in the third degree is unanimously dismissed and the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]) and two counts of incest in the third degree (§ 255.25). In appeal No. 2, defendant appeals from a resentence involving the two counts of incest. We note, however, that defendant raises no contention with respect to the resentence in appeal No. 2, and we therefore dismiss the appeal therefrom (*see People v Minemier*, 124 AD3d 1408, 1408).

Contrary to defendant's contention, he implicitly waived his rights under *People v Antommarchi* (80 NY2d 247, *rearg denied* 81 NY2d 759) during jury selection when, after being advised by County Court that he had the right to attend bench conferences, he chose not to do so (*see People v Flinn*, 22 NY3d 599, 601, *rearg denied* 23 NY3d 940). In any event, we note that the bench conference at issue resulted in a juror being dismissed for cause. It is well settled that, "even where a defendant has been erroneously excluded from a sidebar conference with a prospective juror, the error is not reversible if that potential juror has been excused for cause by the court" (*People v Maher*, 89 NY2d 318, 325).

Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence inasmuch as he made only a general motion for a trial order of dismissal rather than one specifically directed at the alleged deficiency in the People's proof (*see People v Hawkins*, 11 NY3d 484, 492; *People v Gray*, 86 NY2d 10, 19). In any event, defendant's contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Defendant's contention that the evidence before the grand jury was legally insufficient with respect to counts two and three of the indictment "is not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence" (CPL 210.30 [6]; *see People v Lee*, 56 AD3d 1250, 1251, *lv denied* 12 NY3d 818).

We reject defendant's further contention that his written statement given to the police should have been suppressed because he allegedly has minimal reading skills and the statement was not read to him by the police. The court was free to credit the testimony of the police officers to the contrary (*see People v Daley*, 207 AD2d 1000, 1000-1001, *lv denied* 84 NY2d 1010), and the record establishes that defendant was able to read the statement that he gave to the police (*see People v Fontanez*, 278 AD2d 933, 934, *lv denied* 96 NY2d 862).

Defendant contends that the court abused its discretion in denying his application to cross-examine the victim about two alleged prior false accusations of misconduct made against others. We conclude that the victim's prior allegation of verbal harassment perpetrated against her by another person, even if false, "fails to suggest a pattern casting substantial doubt on the validity of the present charges" or to "indicate a significant probative relation to such charges" (*People v Blackman*, 90 AD3d 1304, 1310, *lv denied* 19 NY3d 971 [internal quotation marks omitted]). With respect to the complaint the victim made to the police against another person for allegedly calling her names in a department store, we conclude that defendant was attempting to attack the victim's credibility with a specific instance of alleged untruthfulness—a tactic that is per se improper (*see People v Arroyo*, 37 AD3d 301, 301-302, *lv denied* 9 NY3d 839). Nor was the victim's complaint to the police shown to be an act of misconduct affecting her credibility (*see People v Jones*, 115 AD2d 302, 302-303). We thus conclude that the court did not abuse its discretion in denying defendant's application.

Defendant failed to preserve for our review his contention that the court erred in admitting the testimony of the People's expert on child sexual abuse accommodation syndrome (*see People v Englert*, 130 AD3d 1532, 1533, *lv denied* 26 NY3d 967). In any event, that contention is without merit. It is well settled that such testimony is admissible to explain the behavior of child sex abuse victims as long as it is general in nature and does not constitute an opinion that a particular alleged victim is credible or that the charged crimes in fact occurred (*see People v Williams*, 20 NY3d 579, 583-584;

People v Gayden, 107 AD3d 1428, 1428-1429, *lv denied* 22 NY3d 1138). We have reviewed defendant's claims of ineffective assistance of counsel and conclude that they are without merit (*see generally People v Caban*, 5 NY3d 143, 152; *People v Baldi*, 54 NY2d 137, 147). Defendant failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct on summation (*see* CPL 470.05 [2]). In any event, we conclude that his contention lacks merit (*see generally People v Halm*, 81 NY2d 819, 821).

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

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

225
KA 15-01358

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRY L. DRAKE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

GENESEE VALLEY LEGAL AID, INC., GENESEO (JEANNIE D. MICHALSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Livingston County Court (Dennis S. Cohen, J.), rendered September 9, 2010. Defendant was resentenced upon his conviction of incest in the third degree (two counts).

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Drake* ([appeal No. 1] ___ AD3d ___ [Apr. 29, 2016]).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

230

CA 15-01344

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

MICHAEL C. KERWIN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH FUSCO, ET AL., DEFENDANTS,
AND BH DECKER, INC., DEFENDANT-APPELLANT.

JOSEPH FUSCO, ET AL., THIRD-PARTY PLAINTIFFS,

V

SUNSTREAM CORPORATION, THIRD-PARTY DEFENDANT.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (TERANCE WALSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (HARRISON V. WILLIAMS, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered October 27, 2014. The order, inter alia, denied that part of the cross motion of defendant BH Decker, Inc., for summary judgment dismissing the complaint against it.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he fell through a stairway in the house where he resided as a student-tenant in Delhi, New York. Defendant-third-party plaintiff Joseph Fusco (Fusco), the owner of the rental property, entered into a written Property Management Agreement (Agreement) with defendant-third-party plaintiff BH Decker, Inc. (Decker), pursuant to which Decker was to manage the property. Fusco resided in Staten Island, New York, and visited the premises once a year in August when the students returned to begin the fall semester. Under the terms of the Agreement, Decker, which had its place of business in Delhi, New York, was to “manage and operate” the premises “with due diligence and [was] authorized and responsible on behalf of [Fusco] for acts which are reasonably necessary for property management,” including but not limited to inspecting for damage and making contracts for utilities and maintenance as Decker “deemed advisable.” The Agreement designated Decker as the entity that would “field all calls & communications from tenants” and required only that

Decker "advise" Fusco of any "non-emergency" corrections or repairs that Decker deemed necessary.

As a result of prior water damage to the house, the premises were undergoing mold remediation work by third-party defendant Sunstream Corporation (Sunstream) at the time of plaintiff's accident. The written "Proposal" from Sunstream for that work was directed and addressed to Decker. On the day before plaintiff's accident, plaintiff and another tenant of the house noticed a loose stair tread in the stairway. The other tenant called Benjamin Decker, the president of Decker, who came to the building and made repairs to the tread. While Benjamin Decker was at the property, he noticed that Sunstream had removed a closet and structural framing under the staircase while performing mold remediation. Benjamin Decker undertook no further repair or remedial action.

Insofar as relevant to this appeal, Decker cross-moved for summary judgment dismissing the complaint against it, and Supreme Court denied the cross motion. We affirm, although our reasoning differs from that of the court with respect to the issue whether Decker owed a duty to plaintiff to maintain the premises in a reasonably safe condition.

We reject Decker's contention that it did not owe a duty of care to plaintiff because the Agreement with Fusco did not give rise to tort liability in favor of a third party. "Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138). It is well settled that " 'a contractual obligation, standing alone, will impose a duty only in favor of the promisee and intended third-party beneficiaries' " (*id.* at 140), and "will generally not give rise to tort liability in favor of a third party," i.e., a person who is not a party to the contract (*id.* at 138; *see Haberl v Verizon N.Y., Inc.*, 113 AD3d 1129, 1130). There are, however, "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons," i.e., where the contracting party fails to exercise reasonable care in the performance of his or her duties and thereby launches a force or instrument of harm, where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and "where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal*, 98 NY2d at 140; *see Anderson v Jefferson-Utica Group, Inc.*, 26 AD3d 760, 760-761).

In analyzing the three exceptions, we agree with Decker that it met its burden on its cross motion of establishing as a matter of law that the repairs made to the stair tread by Benjamin Decker did not launch a force or instrument of harm by exacerbating the dangerous condition of the stairway or making it less safe (*see Stiver v Good & Fair Carting & Moving, Inc.*, 32 AD3d 1209, 1210-1211, *affd* 9 NY3d 253; *Sniatecki v Violet Realty, Inc.*, 98 AD3d 1316, 1320). We reject Decker's contention, however, that the detrimental reliance exception

is inapplicable as a matter of law. We conclude on this record that there are issues of fact whether plaintiff detrimentally relied on Decker's inspection of the stairway and performance of repairs to the stairway in accordance with Decker's duties under the Agreement (*see All Am. Moving & Stor., Inc. v Andrews*, 96 AD3d 674, 675). Contrary to Decker's further contention, we conclude as a matter of law that the Agreement here is the type of comprehensive and exclusive management agreement that entirely displaced the owner's duty to inspect, repair, and safely maintain the premises for the benefit of the student-tenants (*see Karac v City of Elmira*, 14 AD3d 842, 844; *Tushaj v Elm Mgt. Assoc.*, 293 AD2d 44, 48-49; *see generally Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 588-590). Thus, Decker owed a duty of care to plaintiff under that exception to the general rule (*see Espinal*, 98 NY2d at 140). We reach no conclusion on the issue whether Decker breached that duty.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

231
CA 15-00172
PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

WENDY D. SEARS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STEPHEN J. SEARS, DEFENDANT-RESPONDENT.

DAVIDSON FINK, LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SCHELL LAW, P.C., FAIRPORT (GEORGE A. SCHELL, SR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John M. Owens, J.), entered December 31, 2014. The order, insofar as appealed from, granted defendant's petition in part by directing plaintiff to sign certain letters and to execute and deliver a quitclaim deed transferring certain real property jointly owned by the parties to defendant.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, and the petition is denied insofar as it was granted.

Memorandum: In this postdivorce proceeding, plaintiff wife appeals from an order that granted defendant husband's petition insofar as it sought an order directing the wife to sign certain letters and to execute and deliver to the husband's attorney a certain quitclaim deed, all with the objective of facilitating the husband's refinancing of an existing M&T Bank mortgage in relation to 222.5 acres of a 227-acre property jointly owned by the parties and covered by that mortgage. We now reverse the order insofar as appealed from, and we deny the husband's petition to the extent that the court granted it.

"A matrimonial settlement is a contract subject to principles of contract interpretation" (*Tallo v Tallo*, 120 AD3d 945, 946 [internal quotation marks omitted]), and "[t]he fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent" (*Greenfield v Philles Records*, 98 NY2d 562, 569). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018). "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield*, 98 NY2d at 569; *see Hall v Paez*, 77

AD3d 620, 621). "When interpreting a contract . . . , the court should arrive at a construction that will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (*Trbovich v Trbovich*, 122 AD3d 1381, 1383 [internal quotation marks omitted]; *see Kass v Kass*, 91 NY2d 554, 566-567). Furthermore, "[i]n adjudicating the rights of parties to a contract, courts may not fashion a new contract under the guise of contract construction (*Marlee Sales Corp. v Manufacturers Trust Co.*, 9 NY2d 16)" (*Slatt v Slatt*, 64 NY2d 966, 967, *rearg denied* 65 NY2d 785).

We agree with the wife's contention that the court, under the guise of construing and enforcing the parties' Separation and Property Settlement Agreement (Agreement) in favor of the husband, rewrote the Agreement in such a way as to relieve the husband of his explicit contractual obligations and to defeat the wife's explicit rights thereunder. Indeed, the court's order is irreconcilable with various provisions of the Agreement, which requires that the wife's quitclaim deed of her interest in the 227 acres be held in escrow by the wife's attorney pending any refinancing, and which further requires that the M&T mortgage be discharged of record, or that the wife's name be removed from that mortgage as co-obligor, as part of the refinancing and before the recording of the wife's quitclaim deed. Most important, the court's interpretation of the Agreement permits the husband to forestall indefinitely the listing of the property for sale in whole or in part, which is in derogation of a provision of the Agreement requiring the property to be listed for sale in its entirety soon after December 31, 2013 if, as has transpired, the husband proved unable to refinance the M&T mortgage by that date.

Although the court purported to enforce the Agreement against the wife, we note that the wife undeniably carried out her pertinent contractual obligation, which was merely to execute a quitclaim deed of her interest in the property to the husband and cause that deed to be held in escrow by her attorney pending the closing of any refinancing of the existing mortgage in the husband's name only. Although the husband argues that the wife's stance in the matter violated the covenant of good faith and fair dealing that is implied in any contract entered into in New York (*see generally Dalton v Educational Testing Serv.*, 87 NY2d 384, 389, citing *Van Valkenburgh, Nooger & Neville v Hayden Publ. Co.*, 30 NY2d 34, 45, *cert denied* 409 US 875), the wife cannot be found to have violated the implied covenant of good faith and fair dealing by doing exactly what the Agreement required her to do (*see Dalton*, 87 NY2d at 389).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

234
CA 15-00478
PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

FRANCIS P. OSCIER, PLAINTIFF-RESPONDENT,

V   MEMORANDUM AND ORDER

JOANNE V. MUSTY, DEFENDANT-RESPONDENT-APPELLANT,
ANTHONY J. MINGARELLI, JR.,
DEFENDANT-APPELLANT-RESPONDENT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

COHEN & LOMBARDO, P.C., BUFFALO (CHRISTOPHER R. POOLE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (LEO T. FABRIZI OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

PERLA & PERLA, LLP, BUFFALO (MICHAEL M. METZGER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Jeremiah J. Moriarty, III, J.), entered December 15, 2014. The order denied the cross motion of defendant Anthony J. Mingarelli, Jr., and the cross motion of defendant Joanne V. Musty for summary judgment with respect to the emergency doctrine.

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

Memorandum: These consolidated appeals arise from a negligence action in which plaintiff seeks damages for personal injuries sustained in a motor vehicle accident that allegedly occurred when a vehicle driven by defendant Anthony J. Mingarelli, Jr., struck a vehicle being operated by plaintiff, which was stopped at a stop sign. At a deposition, Mingarelli testified that he swerved to avoid a vehicle driven by defendant Joanne V. Musty, which had proceeded through a stop sign on the opposite side of the intersection from plaintiff and began to enter Mingarelli's lane of travel, and that his vehicle slid on the ice and snow when he took evasive action, resulting in his vehicle striking plaintiff's vehicle. Musty testified at a deposition that she inched slowly into the intersection because her view was blocked, and that she stopped her vehicle before it entered Mingarelli's lane of travel.

Plaintiff commenced this action against Mingarelli, Musty, and

defendant T&T Concrete, Inc. (T&T), alleging that Musty and Mingarelli were negligent and that T&T was vicariously liable for Mingarelli's negligence because it was an owner of the vehicle operated by Mingarelli. In appeal No. 1, Mingarelli appeals and Musty cross-appeals from an order that, inter alia, denied Mingarelli's cross motion for summary judgment dismissing the complaint and all cross claims against him, and denied that part of Musty's cross motion seeking summary judgment dismissing Mingarelli's affirmative defense based on the emergency doctrine. In appeal No. 2, plaintiff appeals and Musty appeals from an order that granted T&T's motion for summary judgment dismissing the complaint against it. In appeal No. 3, Musty appeals from an order that granted T&T's separate motion for summary judgment dismissing Musty's cross claims against it.

In appeal No. 1, Mingarelli contends that Supreme Court erred in denying his cross motion because the emergency doctrine absolved him from liability and, on her cross appeal, Musty contends that the court erred in denying that part of her cross motion for summary judgment dismissing Mingarelli's affirmative defense based on the emergency doctrine. We reject both contentions. Even assuming, arguendo, that Mingarelli met his "initial burden [of] establishing that the emergency doctrine applied, inasmuch as [he testified] that [Musty]'s vehicle unexpectedly crossed over into [his] lane of travel, [that he] had been operating his vehicle in a lawful and prudent manner, and [that he] had little time to react to avoid the collision" (*Shanahan v Mackowiak*, 111 AD3d 1328, 1329; *see Albert v Machols*, 129 AD3d 1481, 1482; *see generally Caristo v Sanzone*, 96 NY2d 172, 174), we conclude that plaintiff and Musty raised a triable issue of fact by submitting Musty's deposition testimony in which she testified that she stopped before she reached the middle of the intersection and did not enter Mingarelli's lane of travel. Furthermore, "[e]ven where an emergency is found to exist, that does not automatically absolve one from liability; a party may still be found negligent if the acts in response to the emergency are found to be unreasonable" (*Davis v Pimm*, 228 AD2d 885, 887, *lv denied* 88 NY2d 815; *see Esposito v Wright*, 28 AD3d 1142, 1143; *see also Heye v Smith*, 30 AD3d 991, 992), and plaintiff and Musty submitted evidence that raised an issue of fact whether Mingarelli acted unreasonably in response to any emergency that may have existed. Given the existence of issues of fact regarding the applicability of the emergency doctrine to this case, the court properly denied both cross motions with respect to that defense. We have considered Musty's remaining contention in appeal No. 1, and we conclude that it is without merit.

Contrary to the contentions of plaintiff and Musty in appeal No. 2 and Musty in appeal No. 3, the court properly granted the motions of T&T for summary judgment dismissing the complaint and all cross claims against it. Plaintiff sought to impose vicarious liability on T&T, contending that it was an owner of the vehicle operated by Mingarelli, who was T&T's sole principal, and Musty's cross motion was based on the same theory of liability. Plaintiff and Musty contended that T&T was liable pursuant to Vehicle and Traffic Law § 388, which states that an owner shall be liable for death or injuries resulting from the negligent use of the vehicle (*see* § 388 [1]), and which further states

that an " 'owner' shall be as defined in section one hundred twenty-eight of this chapter and their liability under this section shall be joint and several" (§ 388 [2]). In support of its motions, T&T submitted evidence including the title to the vehicle, which was in Mingarelli's name, Mingarelli's deposition testimony in which he testified that he used the vehicle for personal use only, evidence establishing that the accident occurred on a Saturday while Mingarelli was not engaged in work activity, his personal insurance policy covering the vehicle, and T&T's corporate insurance policy, which did not cover it. That evidence met T&T's burden on its motions of establishing that Mingarelli "had the sole possessory interest in, as well as dominion and control over, the vehicle at the time of the accident" (*Duger v Estate of Carey*, 307 AD2d 675, 676; *see generally Godfrey v G.E. Capital Auto Lease, Inc.*, 89 AD3d 471, 477, *lv dismissed* 18 NY3d 951, *lv denied* 19 NY3d 816). "Under these circumstances, failure to register the vehicle with the Department of Motor Vehicles [in Mingarelli's name] is not enough to raise an issue of fact in regard to ownership" (*Duger*, 307 AD2d at 676; *cf. Allstate Ins. Co. v Persampire*, 45 AD3d 706, 706-707; *see also Spratt v Sloan*, 280 AD2d 465, 466).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

235
CA 15-00479
PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

FRANCIS P. OSCIER, PLAINTIFF-APPELLANT,

V   MEMORANDUM AND ORDER

JOANNE V. MUSTY, DEFENDANT-APPELLANT,
T&T CONCRETE, INC., DEFENDANT-RESPONDENT,
AND ANTHONY J. MINGARELLI, JR., DEFENDANT.
(APPEAL NO. 2.)

PERLA & PERLA, LLP, BUFFALO (MICHAEL M. METZGER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (LEO T. FABRIZI OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Jeremiah J. Moriarty, III, J.), entered January 12, 2015. The order granted the motion of defendant T&T Concrete, Inc. for summary judgment and dismissed the complaint against it.

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

Same memorandum as in *Oscier v Musty* ([appeal No. 1] ___ AD3d ____ [Apr. 29, 2016]).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

236

CA 15-00480

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

FRANCIS P. OSCIER, PLAINTIFF,

V MEMORANDUM AND ORDER

JOANNE V. MUSTY, DEFENDANT-APPELLANT,
T&T CONCRETE, INC., DEFENDANT-RESPONDENT,
AND ANTHONY J. MINGARELLI, JR., DEFENDANT.
(APPEAL NO. 3.)

LAW OFFICES OF JOHN WALLACE, BUFFALO (LEO T. FABRIZI OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Jeremiah J. Moriarty, III, J.), entered January 12, 2015. The order granted the motion of defendant T&T Concrete, Inc. for summary judgment and dismissed the cross claims against it.

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

Same memorandum as in *Oscier v Musty* ([appeal No. 1] ___ AD3d ____ [Apr. 29, 2016]).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

254
CA 15-00328
PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

KENNETH P. GOLDEN, PLAINTIFF-APPELLANT,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

SASHA PAVLOV-SHAPIRO, M.D., ASSOCIATED
MEDICAL PROFESSIONALS OF NY, PLLC, JEFFREY M.
DESIMONE, M.D., CENTRAL NEW YORK SURGICAL
PHYSICIANS, PC, AND UPSTATE UNIVERSITY HOSPITAL
AT COMMUNITY GENERAL, DEFENDANTS-RESPONDENTS.

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

FAGER AMSLER & KELLER, LLP, SYRACUSE (JOHN P. POWERS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald F. Cerio, Jr., A.J.), entered October 20, 2014. 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: Kenneth Golden (plaintiff) and his wife commenced this medical malpractice action seeking damages for injuries sustained by plaintiff during a laparoscopic-assisted sigmoid colectomy, resulting in the need for postoperative surgery to repair the damage to his ureter that allegedly occurred during the initial surgery. Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint. Defendants met their initial burden with respect to the cause of action for malpractice, and contrary to plaintiff's contention, he failed to raise an issue of fact through his expert's affidavit. It is well settled that, where an expert's " 'ultimate assertions are speculative or unsupported by any evidentiary foundation, . . . [his or her] opinion should be given no probative force and is insufficient to withstand' " a motion for summary judgment (*Bagley v Rochester Gen. Hosp.*, 124 AD3d 1272, 1273). Here, plaintiff's expert acknowledged that the methylene dye test showed no injury to the bladder or ureter, and thus his conclusion that the injury occurred during the initial surgery is based solely on speculation. Similarly, plaintiff's expert opined that defendants deviated from the standard of care without detailing what procedures

or actions should have been undertaken and whether those procedures or actions were required under the applicable standard of care (*see generally id.*). Plaintiff's contention with respect to the applicability of the doctrine of res ipsa loquitur is not properly before us because it is raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). Finally, we reject plaintiff's contention that defendants failed to meet their initial burden on the motion with respect to the issue of informed consent (*see Gray v Williams*, 108 AD3d 1085, 1086), and we likewise reject plaintiff's alternative contention that he raised an issue of fact to defeat the motion with respect to that issue (*cf. Laribee v City of Rome* [appeal No. 1], 254 AD2d 805, 805).

Entered: April 29, 2016 Frances E. Cafarell
Clerk of the Court

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

264
KA 14-01407
PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRICK L. HALL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered March 27, 2013. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree (two counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Niagara County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of assault in the second degree (Penal Law § 120.05 [2]). The plea was in satisfaction of an indictment charging assault in the first degree, assault in the second degree, and criminal possession of a weapon in the third degree. Defendant contends that County Court abused its discretion in denying his motion to withdraw his plea because it was coerced and was not knowingly, intelligently and voluntarily entered owing to the ineffective assistance of counsel. We note at the outset that, even assuming, arguendo, that the waiver of the right to appeal is valid, we nevertheless agree with defendant that his contention survives the plea and the waiver of the right to appeal to the extent that defendant contends that "the plea bargaining process was infected by [the] allegedly ineffective assistance or that [he] entered the plea because of [his] attorney['s] allegedly poor performance" (*People v Gleen*, 73 AD3d 1443, 1444, *lv denied* 15 NY3d 773 [internal quotation marks omitted]; *see People v Davis*, 119 AD3d 1383, 1383, *lv denied* 24 NY3d 960; *People v Judd*, 111 AD3d 1421, 1422-1423, *lv denied* 23 NY3d 1039).

In a letter to the court, defendant alleged that defense counsel forced him to accept the plea offer by informing him, inter alia, that if convicted after trial, the court would sentence him to a term exceeding 20 years. Defense counsel thereafter filed a motion to

withdraw the plea, asserting that "the [p]lea was taken under coercive conditions," inasmuch as "[d]efendant was left with the impression that if he did not plead guilty a consecutive sentence would be imposed for each count contained in the indictment should he be found guilty after trial." At the argument of the motion, defense counsel further stated that he did not represent to defendant that consecutive sentences were a possibility, but rather a certainty. The court denied the motion without a hearing and imposed the agreed-upon sentence.

"It is well settled that permission to withdraw a guilty plea rests largely within the court's discretion" (*People v Henderson*, 137 AD3d 1670, 1670). While an evidentiary hearing is required only in rare instances (*see People v Tinsley*, 35 NY2d 926, 927), "[w]here, [as here,] the record raises a legitimate question as to the voluntariness of the plea, an evidentiary hearing is required" (*People v Brown*, 14 NY3d 113, 116). We agree with defendant that the statements of defense counsel presenting lengthy consecutive sentences as a certainty were erroneous, at least in part, and did not simply "amount to a description of the range of the potential sentences" (*People v Flinn*, 60 AD3d 1304, 1305; *cf*. *People v Bruchanan*, 37 AD3d 169, 169, *lv denied* 8 NY3d 982). However, we cannot determine whether, under the totality of the circumstances, defendant was denied effective assistance of counsel, inasmuch as the record fails to establish whether defendant would have entered the guilty plea if he had been properly advised (*see People v Molina*, 69 AD3d 960, 961; *see generally People v Bonilla*, 6 AD3d 1059, 1060). We therefore conclude that a hearing is required to resolve that issue, and we hold the case, reserve decision, and remit the matter to County Court for that purpose.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

267

KA 14-01503

PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARSHAWN A. MORRIS, ALSO KNOWN AS SLINK,
DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 14, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, rape in the second degree and criminal sexual act 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 murder in the second degree (Penal Law § 125.25 [1]), rape in the second degree (§ 130.30 [1]), and criminal sexual act in the second degree (§ 130.45 [1]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the murder conviction (*see People v Cobb*, 72 AD3d 1565, 1565, *lv denied* 15 NY3d 803). In any event, we conclude that the conviction is supported by legally sufficient evidence with respect to all of the crimes charged (*see People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's further contention, 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 Bleakley*, 69 NY2d at 495).

Contrary to defendant's contention, the verdict sheet, with the inclusion of defendant's nickname—"Slink"—was not substantively annotated in a manner not authorized by CPL 310.20 (2) (*see People v Miller*, 18 NY3d 704, 706). Furthermore, Supreme Court properly denied defendant's *Batson* application inasmuch as the prosecutor clearly provided a race-neutral basis for the challenge, i.e., that the decision-making ability of the prospective juror might be affected by the fact that her aunt had been murdered and that she herself had

previous encounters with the criminal justice system (*see People v Dixon*, 202 AD2d 12, 17-18).

We reject defendant's contention that his *Miranda* waiver was involuntary. Although the evidence establishes that defendant had left an emergency psychiatric unit before waiving his rights, there is no evidence that defendant was mentally ill or otherwise impaired during his interrogation (*see People v Williams*, 279 AD2d 276, 277, *affd* 97 NY2d 735) and, "under the totality of the circumstances," we conclude that defendant's statements were knowingly, intelligently, and voluntarily made (*id.* at 276-277; *see People v Love*, 57 NY2d 998, 999).

Contrary to defendant's contention, the court did not abuse its discretion in admitting in evidence eight photographs of the victim's body. Although the photographs " 'portray[ed] a gruesome spectacle and may [have] tend[ed] to arouse passion and resentment against the defendant in the minds of the jury,' " it cannot be said that such was their "sole purpose" inasmuch as the photographs tended to prove, inter alia, defendant's intent to kill (*People v Pobliner*, 32 NY2d 356, 369-370, *rearg denied* 33 NY2d 657, *cert denied* 416 US 905; *see People v Stevens*, 76 NY2d 833, 836). In addition, "the photographs were admissible to elucidate and corroborate" the testimony of a medical expert insofar as that testimony concerned defendant's intent (*Stevens*, 76 NY2d at 836; *see People v Camacho*, 70 AD3d 1393, 1394, *lv denied* 14 NY3d 886; *People v Jones*, 43 AD3d 1296, 1298, *lv denied* 9 NY3d 991, *reconsideration denied* 10 NY3d 812). The court also properly exercised its discretion in denying defendant's midtrial motion to conduct DNA testing of a latex glove found near defendant's property (*see generally People v Ducret*, 95 AD3d 636, 636, *lv denied* 19 NY3d 996). In any event, defendant may still seek relief on that point by making a motion pursuant to CPL 440.30 (1-a).

Defendant contends that the court erred in refusing to charge criminally negligent homicide as a lesser included offense of murder in the second degree inasmuch as there was a reasonable view of the evidence to support a finding that defendant committed the lesser offense but not the greater, i.e., that defendant was merely negligent in failing to assist the victim as she was allegedly attacked in defendant's apartment by his cousin. We reject that contention. Criminally negligent homicide is a lesser included offense of murder in the second degree (*see People v Brooks*, 163 AD2d 832, 832-833, *lv denied* 76 NY2d 891), but charging the lesser crime would require defendant to have a "familial relationship" with the child victim and, therefore, an affirmative duty to assist her (*People v Myers*, 201 AD2d 855, 856). Here, there is no such familial relationship and, therefore, no such affirmative duty. Thus, even assuming, arguendo, that defendant's cousin attacked the victim, there is no reasonable view of the evidence that defendant committed the lesser offense of criminally negligent homicide (*see generally People v Glover*, 57 NY2d 61, 63-64).

Defendant further contends that he was deprived of a fair trial

based on improper remarks from the prosecutor during the trial regarding his nickname and other remarks made by the prosecutor on summation. Defendant failed to preserve his contention for our review with respect to the majority of instances of alleged misconduct (*see* CPL 470.05 [2]), and we decline to exercise our power to address those instances as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). With respect to those instances of alleged misconduct that defendant preserved for our review, we conclude that reversal is not required (*see generally People v Mack*, 128 AD3d 1456, 1457, *lv denied* 26 NY3d 969).

Contrary to defendant's contention, the court properly declined his request to redact certain information from the presentence report inasmuch as the contested information was ruled on by the court after a *Huntley* hearing and was admitted in evidence at trial. Thus, the court did not sentence defendant based upon unreliable information (*see People v Guevara*, 68 AD3d 1738, 1739), and the sentence is not unduly harsh or severe.

Defendant's remaining contentions have not been preserved for our review, and we decline to exercise our power to reach them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

275
CA 15-01370

PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

DALE S. BAUTER, PLAINTIFF-APPELLANT,

V   ORDER

ROBERT E. COMSTOCK, DEFENDANT-RESPONDENT.

STANLEY LAW OFFICES, SYRACUSE (ROBERT A. QUATTROCCI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN KENT LLC, BUFFALO (KEITH D. MILLER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), dated March 24, 2015. The order, insofar as appealed from, denied the cross motion of plaintiff for summary judgment on the issue of negligence.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on March 22, 2016,

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

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

284
CA 15-01005
PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

MARK ALLEN SHAW, ET AL., PLAINTIFFS,
AND JOSEPH G. TERRIZZI, PLAINTIFF-RESPONDENT,

V   MEMORANDUM AND ORDER

CHESTER VANARSDALE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

GOODELL & RANKIN, JAMESTOWN (ANDREW W. GOODELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

PETER D. CLARK, FREDONIA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered October 17, 2014. The order, among other things, permanently enjoined defendant from placing a dock in waters abutting Elmwood Avenue, from using Elmwood Avenue to store his personal items and from constructing any further structures on Elmwood Avenue, and directed that defendant remove the dock and his personal items within 60 days.

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

Same memorandum as in *Shaw v VanArsdale* ([appeal No. 2] ___ AD3d ___ [Apr. 29, 2016]).

Entered: April 29, 2016   Frances E. Cafarell
                                                                        Clerk of the Court

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

285
CA 15-01006

PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ.

MARK ALLEN SHAW, ET AL., PLAINTIFFS,
AND JOSEPH G. TERRIZZI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHESTER VANARSDALE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

GOODELL & RANKIN, JAMESTOWN (ANDREW W. GOODELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

PETER D. CLARK, FREDONIA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered January 30, 2015. The order adhered to an order entered October 17, 2014.

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

Memorandum: Plaintiff-respondent (plaintiff), et al., commenced this action seeking to enjoin defendant from, inter alia, maintaining a dock at the shore of Chautauqua Lake at the terminus of a "paper street" known as Elmwood Avenue in the Windemere subdivision. Following a nonjury trial on stipulated exhibits and a stipulation that there were no issues of fact, Supreme Court permanently enjoined defendant from, inter alia, placing a dock in the waters abutting Elmwood Avenue, using Elmwood Avenue to store personal items, and from constructing any further structures thereupon.

In appeal No. 1, defendant appeals from an order that granted plaintiffs injunctive relief following the trial. In appeal No. 2, defendant appeals from an order that denied his motion that, although styled as one to "reargue and reconsider," was in effect a motion to set aside the verdict pursuant to CPLR 4404 (b) (*see Matter of Hickey*, 252 AD2d 763, 764, *lv dismissed* 92 NY2d 979). We note at the outset that defendant's appeal from the order in appeal No. 1 must be dismissed because it was superseded by the order in appeal No. 2 (*see Hores v State of New York*, 212 AD2d 581).

With respect to appeal No. 2, we note that defendant is not a riparian landowner, and that his deed contains no express easement to access Chautauqua Lake (*cf. Holst v Liberatore*, 115 AD3d 1216, 1216-1217; *Hush v Taylor*, 84 AD3d 1532, 1533-1534). The record

establishes, however, that the common grantor filed a subdivision map in which certain streets, including Elmwood Avenue, were laid out but never accepted by the municipality, and that defendant's lots abut Elmwood Avenue. In addition, the parties agree that defendant's lots benefit from a "paper street" easement over Elmwood Avenue (*see generally Fischer v Liebman*, 137 AD2d 485, 486-487). The stipulated exhibits establish that Elmwood Avenue provides access to Park Street, an intersecting "paper street," which in turn provides access to a public way. Despite the fact that defendant's lots do not abut Chautauqua Lake, defendant installed a dock at the terminus of Elmwood Avenue at the lakeshore and undertook the storage of various items at the lakeshore on the "paper street," including hammocks, chairs, torches, paddle boats, etc.

We reject defendant's contention that the implied easement created by the "paper street" doctrine entitles him to install a dock or to store his personal property on Elmwood Avenue at the lakeshore. An implied "paper street" easement does not "create a right of way over all the lands of a vendor which may lie, however remote, in the bed of the street. The lands must be contiguous to the lot sold, and there must be some point of limitation" (*Reis v City of New York*, 188 NY 58, 73). Here, inasmuch as the parties have not raised the issue whether the implied "paper street" easement created by the laying out of Elmwood Avenue on the subdivision map provides defendant with the right to otherwise access Chautauqua Lake at the terminus of Elmwood Avenue, we do not reach that issue. We conclude, however, that the court properly determined that the implied easement benefitting defendant's lots in the subdivision does not carry with it the right to install a dock or to store personal property at the lakeshore (*see id.*).

We reject defendant's further contention that plaintiff is estopped by the doctrine of unclean hands from objecting to the placement of defendant's dock because plaintiff allegedly maintained a dock on a "paper street" in the subdivision in the past. Plaintiff testified, however, that he placed his dock on his own lakefront property, and defendant failed to adduce any evidence conclusively establishing that plaintiff's dock was installed on a "paper street" in the subdivision. We therefore conclude that there is no basis for a finding that plaintiff did not come to this equitable action with clean hands (*see Sparkling Waters Lakefront Assn., Inc. v Shaw*, 42 AD3d 801, 804).

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

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

290

KA 14-01138

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES D. JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered January 17, 2014. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the first degree (Penal Law § 130.35 [1]). Contrary to defendant's contention, the record establishes that he knowingly, intelligently and voluntarily waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). The valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see id.* at 255; *People v Lococo*, 92 NY2d 825, 827).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

291

KA 13-00828

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE GARCIA-CRUZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered May 23, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the first degree (Penal Law § 140.30 [3]). We agree with defendant that the waiver of the right to appeal is invalid because "the minimal inquiry made by County Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Jones*, 107 AD3d 1589, 1589, *lv denied* 21 NY3d 1075 [internal quotation marks omitted]; *see People v Amir W.*, 107 AD3d 1639, 1640), and because "there is no basis upon which to conclude that the court ensured 'that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*Jones*, 107 AD3d at 1590, quoting *People v Lopez*, 6 NY3d 248, 256). We nevertheless reject defendant's challenge to the severity of the sentence.

Defendant contends that he was denied his due process right to an interpreter at some proceedings, requiring reversal of the conviction. Upon our review of the record, we conclude that defendant, who was represented by counsel, failed to preserve his contention for our review because he never objected to the absence of an interpreter (*see People v Robles*, 86 NY2d 763, 764-765; *People v Rivera*, 15 AD3d 859, 860, *lv denied* 4 NY3d 856). In any event, we conclude that there was only one preliminary court appearance during which an interpreter may not have been present, and defendant's presence at that appearance was

not required (*see generally People v Dokes*, 79 NY2d 656, 660). Thus, any translation for his benefit would have been unnecessary.

By failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that the plea was not voluntarily entered (*see People v Connolly*, 70 AD3d 1510, 1511, *lv denied* 14 NY3d 886). This case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666) "because nothing in the plea allocution calls into question the voluntariness of the plea or casts 'significant doubt' upon his guilt" (*People v Pitcher*, 126 AD3d 1471, 1472, *lv denied* 25 NY3d 1169, quoting *Lopez*, 71 NY2d at 666). The statements made by defendant during his presentence interview and at sentencing regarding his possible intoxication during the offense did not require the court to conduct an inquiry regarding the voluntariness of the plea (*see People v Arney*, 120 AD3d 949, 950; *Connolly*, 70 AD3d at 1511; *People v Kelly*, 50 AD3d 921, 921, *lv denied* 10 NY3d 960). Further, although defendant's contention that the plea should be vacated because the court misstated the minimum period of postrelease supervision during the plea colloquy does not require preservation (*see People v Brooks*, 128 AD3d 1467, 1468), we conclude that the misstatement did not render the plea involuntary (*see People v Garcia*, 92 NY2d 869, 870-871; *cf. Brooks*, 128 AD3d at 1468).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

292

KA 13-01227

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN S. SMITH, DEFENDANT-APPELLANT.

PATRICIA M. MCGRATH, LOCKPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered June 4, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree (five counts), robbery in the first degree (seven counts), kidnapping in the second degree (three counts), criminal use of a firearm in the first degree (two counts), assault in the first degree, assault in the second degree (two counts), criminal possession of a weapon in the second degree, menacing a police officer or peace officer, grand larceny in the third degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, five counts of burglary in the first degree (Penal Law § 140.30 [2] - [4]) and seven counts of robbery in the first degree (§ 160.15 [1], [3], [4]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). There is no support in the record for defendant's contention that his waiver of the right to appeal was the result of coercion, "particularly considering [County C]ourt's thorough colloquy," the extensive consultations between defendant and defense counsel regarding the waiver, and defendant's affirmative statement that his agreement to the waiver was voluntary (*People v Hayes*, 71 AD3d 1187, 1188, *lv denied* 15 NY3d 852, *reconsideration denied* 15 NY3d 921, citing *People v Holman*, 89 NY2d 876, 878). Here, "[t]here was no effort to conceal error and defendant was fully aware of what the appealable issues were" (*Holman*, 89 NY2d at 878). In addition, defendant obtained a favorable bargain by waiving his right to appeal as a condition of his plea inasmuch as he significantly limited his sentencing exposure (*see People v Evans*, 59 AD3d 216, 216-217, *lv denied* 12 NY3d 816).

"The valid waiver by defendant of the right to appeal encompasses his contention that the court erred in denying his pre-plea recusal motion" (*People v Thorn*, 298 AD2d 900, 901, *lv denied* 99 NY2d 540). Contrary to defendant's further contention, that waiver also encompasses his challenge to the court's order compelling him to provide a buccal swab for DNA analysis (*see generally Lopez*, 6 NY3d at 255; *People v Rodriguez*, 93 AD3d 1334, 1335, *lv denied* 19 NY3d 966) and, in any event, that challenge is forfeited by his plea of guilty (*see People v Tehoke*, 6 AD3d 1173, 1174; *see generally People v Hansen*, 95 NY2d 227, 230-232).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

295
KA 13-00527
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAXIE R. SHIPP, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered January 28, 2013. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [1]). The plea agreement provided that defendant would participate in a judicial diversion program, and that he would be permitted to withdraw his plea and instead plead guilty to a misdemeanor with a promised sentence of no more than three years of probation if he successfully completed a drug treatment program, whereas he would be sentenced to a term of imprisonment if he was unsuccessful in the drug treatment program. The contract for the judicial diversion program provided that defendant was responsible for keeping all of his court dates, and that he could be terminated from the diversion program in the discretion of County Court for any violation of the contract. Defendant was terminated from drug treatment in April 2012 and failed to appear for an ensuing court appearance. He was returned to court on a bench warrant in July 2012, and the court thereafter sentenced him to an indeterminate term of imprisonment.

We reject defendant's contention that the court failed to conduct a sufficient inquiry to determine whether he violated the conditions of his contract for the judicial diversion program before sentencing him (*see generally People v Fiammegta*, 14 NY3d 90, 96-98; *People v Valencia*, 3 NY3d 714, 715-716). Inasmuch as defendant's failure to appear in court after his termination from drug treatment "constituted

a proper basis for the court's finding of noncompliance, it was unnecessary for the court to inquire into defendant's complaints about the suitability of the [treatment] program and the circumstances of his termination" (*People v Matosevic*, 136 AD3d 437, 437; *see Valencia*, 3 NY3d at 715-716; *People v Cruz*, 15 AD3d 240, 240-241, *lv denied* 4 NY3d 852; *see generally People v Ferguson*, 113 AD3d 874, 874-875, *lv denied* 23 NY3d 1061; *People v Hodgins*, 113 AD3d 1134, 1134-1135). We note that defendant has not alleged that he was unaware of the scheduled court appearance, nor has he otherwise explained his failure to appear.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

296

KA 13-01915

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSE F. JOHNSTON, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

JESSE F. JOHNSTON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered May 8, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, burglary in the second degree (three counts), burglary in the third degree and criminal possession of stolen property in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a guilty plea of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and three counts of burglary in the second degree (§ 140.25 [2]). By pleading guilty, defendant forfeited his contention that he was denied his statutory right to a speedy trial (*see People v O'Brien*, 56 NY2d 1009, 1010; *People v Schillawski*, 124 AD3d 1372, 1372-1373, *lv denied* 25 NY3d 1207; *People v Mayo*, 45 AD3d 1361, 1362). Even assuming, arguendo, that defendant's related contention that he was denied effective assistance of counsel based on defense counsel's failure to move to dismiss the indictment pursuant to CPL 30.30 survives his guilty plea (*see generally People v La Bar*, 16 AD3d 1084, 1085, *lv denied* 5 NY3d 764), we conclude that it is without merit. It is well settled that "[a] defendant is not denied effective assistance of . . . 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; *see People v Patterson*, 115 AD3d 1174, 1175-1176, *lv denied* 23 NY3d 1066). Here, any CPL 30.30 motion would have been without merit inasmuch as the People timely declared their readiness for trial and there was no postreadiness delay attributable

to the People (*see People v Jackson*, 132 AD3d 1304, 1305).

Defendant did not move to withdraw his plea or vacate the judgment of conviction and thus failed to preserve for our review his contention that the plea was not voluntarily entered (*see People v Brinson*, 130 AD3d 1493, 1493, *lv denied* 26 NY3d 965). This case does not fall within the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 665) because nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the plea (*see Brinson*, 130 AD3d at 1493). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

We have examined the contentions raised by defendant in his pro se supplemental brief and conclude that, to the extent they have not been addressed herein, they are without merit.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

297

KA 12-02135

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN T. SMITH, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered October 12, 2012. The order denied the motion of defendant pursuant to CPL article 440.

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

Memorandum: Defendant appeals from an order denying, without a hearing, his CPL article 440 motion to vacate the 2007 judgment convicting him following a jury trial of manslaughter in the first degree (Penal Law § 125.20 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [former (2)]) in connection with the shooting death of a man in Rochester (*People v Smith*, 93 AD3d 1345, *lv denied* 19 NY3d 967). Defendant contends that County Court erred in denying his motion because the People violated their *Brady* obligations by failing to disclose the status of a prosecution witness as a paid informant. We reject that contention.

It is well established that "[t]he Due Process Clauses of the Federal and State Constitutions both guarantee a criminal defendant the right to discover favorable evidence in the People's possession material to guilt or punishment," and that "[i]mpeachment evidence falls within the ambit of a prosecutor's *Brady* obligation" (*People v Fuentes*, 12 NY3d 259, 263, *rearg denied* 13 NY3d 766). To make out a successful *Brady* claim, "a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material . . . In New York, where a defendant makes a specific request for [an item of discovery], the materiality element is

established provided there exists a 'reasonable possibility' that it would have changed the result of the proceedings" (*id.; see People v Garrett*, 23 NY3d 878, 885, *rearg denied* 25 NY3d 1215).

Here, there is no dispute that defendant established the first and second elements of the *Fuentes* test inasmuch as the People concede that evidence of the witness's status as a paid informant is favorable to defendant, and that such evidence was suppressed by the prosecution. With respect to the third element, even assuming, arguendo, that defendant made specific requests for information encompassing the witness's status as a paid informant in unrelated cases as well as any compensation that she received in exchange for evidence implicating defendant in the present case, we conclude that, "although [such] information . . . may have provided the defense with additional impeachment material, it cannot be said that there is a reasonable possibility that the result at trial would have been different had the information been disclosed" (*People v Phillips*, 55 AD3d 1145, 1149, *lv denied* 11 NY3d 899; *see People v Sibadan*, 240 AD2d 30, 35-36, *lv denied* 92 NY2d 861). Indeed, the verdict did not turn solely or predominantly on the witness's testimony inasmuch as other evidence established defendant's responsibility for the shooting (*see People v Johnson*, 107 AD3d 1161, 1165-1166, *lv denied* 21 NY3d 1075; *cf. People v Gayden* [appeal No. 2], 111 AD3d 1388, 1389-1390). Even assuming, arguendo, that the witness's testimony was important, we note that her credibility was strongly impeached on far more critical issues, including her ongoing relationship with the only other suspect who reasonably could have been implicated in the shooting (*see Phillips*, 55 AD3d at 1149; *Sibadan*, 240 AD2d at 35).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

299

KA 13-00466

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEAN DELANEY, ALSO KNOWN AS SEAN M. DELANEY,
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 a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered October 9, 2012. The judgment convicted defendant, upon a jury verdict, of aggravated criminal contempt.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of aggravated criminal contempt (Penal Law § 215.52 [1]), defendant contends that County Court abused its discretion in permitting the victim to testify that an order of protection was issued on her behalf, following an incident in which defendant punched through a window in her vehicle. According to defendant, the prejudicial effect of the testimony outweighed its probative value. Defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]; *People v Laracuente*, 21 AD3d 1389, 1390, *lv denied* 6 NY3d 777). In any event, defendant's contention is without merit. The evidence was relevant as "background material to enable the jury to understand the defendant's relationship with the [victim] and to explain the issuance of an order of protection" (*People v Walters*, 127 AD3d 889, 889, *lv denied* 25 NY3d 1209).

We reject defendant's further contention that the conviction is not supported by legally sufficient evidence with respect to the element of physical injury, i.e., "impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]). The victim, who was just over five feet, testified that defendant, who was over six feet, knocked her head into a wall, causing several large "very painful" lumps to form on her head to the right of the crown; that he wrapped his hands around her neck and lifted her; that he threw her to the floor, sat on top of her and forced his fingers into her mouth,

causing pain in three of her lower teeth; and that he kicked her. The victim testified that she had abrasions on her lip; that her lower teeth moved when she pushed them and were still loose at the time of trial; and that she had bruising on her neck, knees and ankles. She described the pain level as a "4" for her arms; a "4 to 6" for her legs; a "9" for her neck and back; and a "5 to 6" for her mouth generally, but a "9" when she ate. The victim altered her diet for approximately one month because of the pain. She sought medical treatment the day after the incident and was prescribed, inter alia, pain medication. Viewing the evidence in the light most favorable to the People, as we must (*see People v Gordon*, 23 NY3d 643, 649), we conclude that the evidence is legally sufficient to establish that the injuries caused the victim substantial pain (*see People v Chiddick*, 8 NY3d 445, 447-448; *People v Stillwagon*, 101 AD3d 1629, 1630, *lv denied* 21 NY3d 1020; *cf. People v Haynes*, 104 AD3d 1142, 1142-1144, *lv denied* 22 NY3d 1156).

Defendant further contends that the verdict is against the weight of the evidence with respect to the element of physical injury. Even assuming, arguendo, that a different verdict would not have been unreasonable based upon the acquittal of defendant with respect to the other counts charged in the indictment (*see generally People v Bleakley*, 69 NY2d 490, 495), we reject defendant's contention. 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 there is no basis upon which to determine that the jury failed to give the evidence the weight it should be accorded (*see Bleakley*, 69 NY2d at 495; *cf. People v Cooney*, 137 AD3d 1665, ___).

Entered: April 29, 2016 Frances E. Cafarell
Clerk of the Court

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

300
CAF 15-01426
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, NEMOYER, AND SCUDDER, JJ.

IN THE MATTER OF BRENDA L. BRUMFIELD,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

GEORGE C.E. BRUMFIELD, RESPONDENT-RESPONDENT.

SCHELL LAW, P.C., FAIRPORT (GEORGE A. SCHELL, SR., OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered November 10, 2014 in a proceeding pursuant to Family Court Act article 4. The order dismissed the violation petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: In February 2010, Family Court entered an order confirming a Support Magistrate's determination that respondent father had willfully violated an order of child support and imposing a sentence of incarceration that was suspended on the condition that the father make his required support payments as well as an additional payment of $500 per month toward accumulated arrears. Petitioner mother then commenced a proceeding in September 2010 alleging that the father had not complied with the terms of the February 2010 order, and the Support Magistrate entered a stipulated order in November 2010 that, inter alia, directed that all outstanding arrears be reduced to judgment. After additional proceedings not at issue here, the mother commenced the instant proceeding in November 2013, again alleging that the father had not complied with the terms of the February 2010 order, and seeking to have the suspended sentence revoked and the father incarcerated. Family Court dismissed the petition, concluding that the Support Magistrate's November 2010 order stood "in lieu of" the suspended sentence inasmuch as the Support Magistrate had "entered judgment for the entire amount of arrears." The court also concluded, in the alternative, that the mother had not shown that the father knowingly violated the February 2010 order in view of "the ongoing nature of [the] case and the complexity of its own history." We agree with the mother that the court erred in summarily dismissing the petition.

Pursuant to Family Court Act § 451 (1), Family Court has

"continuing plenary and supervisory jurisdiction over a support proceeding until [its directives are] completely satisfied" (*Matter of Damadeo v Keller*, 132 AD3d 670, 672), and the suspension of an order of commitment may be revoked at any time "[f]or good cause shown" (§ 455 [1]; *see Matter of Bonneau v Bonneau*, 97 AD3d 917, 917, *lv denied* 19 NY3d 815). Moreover, the entry of a judgment for child support arrears is a form of relief that stands " 'in addition to any and every other remedy which may be provided under the law,' " including the provisions of Family Court Act § 454 (3) (a) authorizing a court to commit a respondent to jail for willfully violating a support order (*Damadeo*, 132 AD3d at 672, quoting § 460 [3]). We thus conclude that an order conditioning a suspended sentence on payments toward accumulated arrears is enforceable even if the arrears are later reduced to judgment, and that the court's determination to the contrary was error (*see generally id.*).

The court's alternative ground for dismissing the petition was also erroneous. The mother made a prima facie showing that the father willfully violated the February 2010 order through her submission of a certified calculation showing that he had not made all of the required payments (*see Matter of Valerie Q. v Arturo H.*, 48 AD3d 1049, 1049; *see generally* Family Ct Act § 454 [3] [a]; *Matter of Powers v Powers*, 86 NY2d 63, 68-69), and the record fails to establish at this juncture that the father's alleged violation of that order was not willful (*see generally Matter of Calvello v Calvello*, 20 AD3d 525, 526; *Matter of Delaware County Dept. of Social Servs. v Brooker*, 272 AD2d 835, 835-836). We therefore reverse the order, reinstate the petition, and remit the matter to Family Court for further proceedings thereon (*see Matter of Coleman v Murphy*, 89 AD3d 1500, 1500-1501).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

301
CAF 14-00882
PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, AND SCUDDER, JJ.

IN THE MATTER OF BARRY A. PUGH,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TAMMY R. RICHARDSON, RESPONDENT-RESPONDENT.

THE GLENNON LAW FIRM, P.C., ROCHESTER (PETER J. GLENNON OF COUNSEL), FOR PETITIONER-APPELLANT.

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

SUSAN LARAGY, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Thomas W. Polito, R.), entered September 9, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded sole custody of the subject child to respondent.

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

Memorandum: Petitioner father appeals from an order that, among other things, denied his petition for a change of custody to him and instead awarded full custody of the parties' child to respondent mother. While this appeal was pending, and purportedly on consent of the parties, Family Court entered an order that newly resolved the custody and visitation issues with respect to the subject child. We conclude that the superseding order renders this appeal moot (*see Matter of Warren v Hibbs*, 136 AD3d 1306, 1306; *Matter of Salo v Salo*, 115 AD3d 1368). We further conclude that the exception to the mootness doctrine does not apply (*see Warren*, 136 AD3d at 1306, citing *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: April 29, 2016 Frances E. Cafarell
Clerk of the Court

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

304

CA 15-00824

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

IN THE MATTER OF LAURA DORFMAN, ROSS JOHN, NEW DIRECTIONS YOUTH AND FAMILY SERVICES, INC., AND MAXINE JIMERSON, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF SALAMANCA BOARD OF PUBLIC UTILITIES, COMMISSION OF CITY OF SALAMANCA BOARD OF PUBLIC UTILITIES, WILLIAM LABUHN, CHAIRMAN OF CITY OF SALAMANCA BOARD OF PUBLIC UTILITIES AND AS COMMISSIONER OF THE COMMISSION OF CITY OF SALAMANCA BOARD OF PUBLIC UTILITIES, JANET KOCH, VICE-CHAIRMAN OF CITY OF SALAMANCA BOARD OF PUBLIC UTILITIES AND AS COMMISSIONER OF THE COMMISSION OF CITY OF SALAMANCA BOARD OF PUBLIC UTILITIES, LANCE HOAG, COMMISSIONER OF THE COMMISSION OF CITY OF SALAMANCA BOARD OF PUBLIC UTILITIES, ANTHONY PROCACCI, COMMISSIONER OF THE COMMISSION OF CITY OF SALAMANCA BOARD OF PUBLIC UTILITIES, KEITH KING, GENERAL MANAGER OF CITY OF SALAMANCA BOARD OF PUBLIC UTILITIES, AND CITY OF SALAMANCA, RESPONDENTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (MAURA C. SEIBOLD OF COUNSEL), FOR PETITIONER-RESPONDENT ROSS JOHN.

Appeal from a judgment (denominated order) of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered July 15, 2014 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

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

Memorandum: Respondents appeal from a judgment granting that part of the petition pursuant to CPLR article 78 seeking a judgment annulling the determination of respondent Commission of City of Salamanca Board of Public Utilities (Commission) that doubled the rates charged for water for consumers with a one-inch or larger water meter in order to raise revenue necessary to meet the obligation of

respondent City of Salamanca Board of Public Utilities (BPU) to make bond payments for the $3.4 million upgrades to the potable water storage system (*see generally* General Municipal Law §§ 402, 412).

Although we conclude that Supreme Court properly annulled the Commission's determination, we disagree with the court that the Commission improperly treated water meter owners differently based upon the size of the water meters. We therefore modify the judgment by vacating the second decretal paragraph, which directed the BPU to refund monthly charges exceeding $20 or "related pricing . . . for meters 1" and above" and to "restructure any price increases for all meters . . . in a fair and equal manner." It is an "elemental proposition that an administrative [determination] will be upheld only if it has a rational basis, and is not unreasonable, arbitrary or capricious" (*New York State Assn. of Counties v Axelrod*, 78 NY2d 158, 166). "When there is a rational basis in the record to support the findings upon which the administrative determination is predicated, the courts have no alternative but to confirm the determination" (*Matter of Moore v Fiori*, 202 AD2d 1007, 1007). Although we agree with respondents that the size of the water meter is a rational basis upon which to determine the charge for water, we conclude that, because the record is silent with respect to facts supporting the Commission's determination to double the rates charged for water for those consumers who have a one-inch or larger meter, i.e., approximately 3% of the consumers, the determination lacks a rational basis (*cf. Matter of Deerpark Farms, LLC v Agricultural & Farmland Protection Bd. of Orange County*, 70 AD3d 1037, 1038-1039; *see generally Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 92-94). Indeed, "[t]he record is devoid of proof in support of the [Commission's] determination," and the court therefore properly annulled it (*Matter of Saviola v Toia*, 63 AD2d 849, 850).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

305

CA 15-01554

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

ANGELA ROSS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER MITCHELL AND SON, INC., BASIC INSTALLATIONS, INC., AND THE MILLS COMPANY, A SUBSIDIARY OF BRADLEY CORPORATION, DEFENDANTS-APPELLANTS-RESPONDENTS.

ALEXANDER MITCHELL AND SON, INC., THIRD-PARTY PLAINTIFF-APPELLANT,

V

BASIC INSTALLATIONS, INC., AND THE MILLS COMPANY, A SUBSIDIARY OF BRADLEY CORPORATION, THIRD-PARTY DEFENDANTS-RESPONDENTS.

GOERGEN, MANSON & MCCARTHY, BUFFALO (KELLY J. PHILIPS OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT ALEXANDER MITCHELL AND SON, INC. AND THIRD-PARTY PLAINTIFF-APPELLANT.

SANTACROSE & FRARY, ALBANY (KEITH M. FRARY OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT AND THIRD-PARTY DEFENDANT-RESPONDENT BASIC INSTALLATIONS, INC.

SUGARMAN LAW FIRM LLP, SYRACUSE (KATHLEEN C. SASSANI OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT AND THIRD-PARTY DEFENDANT-RESPONDENT THE MILLS COMPANY, A SUBSIDIARY OF BRADLEY CORPORATION.

STANLEY LAW OFFICE, SYRACUSE (JON COOPER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered November 26, 2014 in a personal injury action. The order, among other things, denied defendants' motions for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motions of defendant-third-party plaintiff and defendant-third-party defendant The Mills Company, a Subsidiary of Bradley Corporation, in part and dismissing the claims and cross claims alleging strict products liability based on a manufacturing defect against them, and as modified the order is

affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when a bathroom stall door in the women's bathroom at her place of employment fell and struck her. The accident occurred approximately four months after new bathroom stalls were installed as part of a bathroom renovation project undertaken by plaintiff's employer. The bathroom stalls, including the doors and related hardware, were manufactured by defendant-third-party defendant The Mills Company, a Subsidiary of Bradley Corporation (Mills). The general contractor for the renovation project hired defendant-third-party plaintiff Alexander Mitchell and Son, Inc. (Mitchell) to provide the materials for the bathroom stalls and to perform the installation. Mitchell subcontracted the installation work to defendant-third-party defendant Basic Installations, Inc. (Basic). Following plaintiff's accident, Mitchell stored the door in its garage, where it remained for a period of up to six months, after which it inexplicably disappeared.

Mills, Mitchell and Basic appeal from an order that denied their respective motions seeking, inter alia, summary judgment dismissing the amended complaint and cross claims against them. We conclude that Supreme Court properly denied that part of the motion of Mills seeking summary judgment dismissing plaintiff's claims that Mills breached express and implied warranties of merchantability and fitness for use. We reject the contention of Mills that, absent privity, it cannot be liable to plaintiff for breach of warranty. "Privity is not required in a personal injury action for breach of express or implied warranty" (*Cereo v Takigawa Kogyo Co.*, 252 AD2d 963, 964).

The court also properly denied those parts of the motions of Mills and Mitchell seeking summary judgment dismissing plaintiff's strict products liability claims against them to the extent that those claims are based upon an alleged design defect. Mills and Mitchell met their initial burdens by presenting evidence that the bathroom stall door complied with applicable industry standards (*see Wesp v Carl Zeiss, Inc.*, 11 AD3d 965, 967). In response, however, plaintiff submitted evidence that the door and hinges were "not reasonably safe and that it was feasible to design the product in a safer manner," thereby raising triable issues of fact (*Banks v Makita, U.S.A.*, 226 AD2d 659, 661, *lv denied* 89 NY2d 805).

We reach a different conclusion with respect to plaintiff's strict products liability claims against Mills and Mitchell to the extent that they are based upon an alleged manufacturing defect. Mills and Mitchell met their initial burdens by submitting evidence that the stall door and hinges were "manufactured under state of the art conditions according to [Mills's] specifications and that its manufacturing process complied with applicable industry standards. The evidence further demonstrated that each [door and hinge] was individually tested before leaving [Mills's] plant and that[,] in light of such testing and inspection," the door and hinges would have conformed to Mills's specifications when they left the plant (*Ramos v Howard Indus., Inc.*, 10 NY3d 218, 223-224). In response, plaintiff

failed to raise a triable issue of fact. We therefore modify the order by granting those parts of the motions of Mills and Mitchell seeking summary judgment dismissing the strict products liability claims and cross claims based on a manufacturing defect against them.

The court properly denied that part of the motion of Mitchell seeking summary judgment dismissing the negligence claim against it. Mitchell failed to establish as a matter of law that it had no duty to inspect or supervise the installation work, or that it was not negligent in performing such inspection or supervision (*see Troll v Schoonmaker Bros.*, 34 AD2d 1030, 1030-1031). It is well established that "a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof" (*George Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 615).

In any event, we agree with plaintiff that, as an alternative basis for affirmance (*see Town of Massena v Niagara Mohawk Power Corp.*, 45 NY2d 482, 488), Mitchell's loss or destruction of the door further supports the denial of that part of Mitchell's motion seeking summary judgment dismissing plaintiff's negligence claim against it (*see Simmons v Pierce*, 39 AD3d 1252, 1253). The court also properly denied that part of Mitchell's motion seeking conditional indemnification from Mills inasmuch as Mitchell failed to establish as a matter of law that it was not negligent (*see Cook v Orchard Park Estates, Inc.*, 73 AD3d 1263, 1266), and in view of the fact that Mills's inability to inspect the door prejudiced it in opposing that part of Mitchell's motion (*see Scherer v North Shore Car Wash Corp.*, 32 AD3d 426, 428).

The court properly denied Basic's motion inasmuch as Basic failed to establish as a matter of law that it did not " 'launch[ ] a force or instrument of harm' " by negligently performing its installation work (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140; *see Bharat v RPI Indus., Inc.*, 100 AD3d 491, 491). Finally, we reject Basic's contention that it is entitled to dismissal of the amended complaint against it based upon Mitchell's loss or destruction of the door (*see generally Denn v Hardwick*, 97 AD3d 629, 630; *Matter of Landrigen v Landrigen*, 173 AD2d 1011, 1012).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

306

CA 15-00963

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

KIMBERLY LAWTON, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF ORCHARD PARK AND ORCHARD PARK POLICE DEPARTMENT, RESPONDENTS-RESPONDENTS.

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

BARCLAY DAMON, LLP, BUFFALO (JAMES P. DOMAGALSKI OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered November 14, 2014. The order denied the application of claimant for leave to serve a late notice of claim.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the application is granted upon condition that the proposed notice of claim is served within 20 days of the date of entry of the order of this Court.

Memorandum: Claimant appeals from an order denying her application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5) for her claims for, inter alia, false arrest and imprisonment and malicious prosecution. Supreme Court abused its discretion in denying the application. Claimant demonstrated a reasonable excuse for her delay in serving the notice of claim, i.e., the continued pendency until March 2014 of the criminal prosecution against her and, following that, the continued pendency of the child custody litigation that was an outgrowth of the criminal prosecution (*see generally Matter of Ragland v New York City Hous. Auth.*, 201 AD2d 7, 12-13). In any event, the failure to tender a reasonable excuse would not have been fatal to claimant's application inasmuch as respondents had actual knowledge of the essential facts constituting the claim within the 90-day period and, indeed, had actual notice of the facts underlying the claims of false arrest/imprisonment and malicious prosecution at the time of the accrual of those claims (*see Nunez v City of New York*, 307 AD2d 218, 220; *Grullon v City of New York,* 222 AD2d 257, 258). Moreover, respondents " 'made no particularized or persuasive showing that the delay caused [them] substantial prejudice' " (*Casale v Liverpool Cent. Sch. Dist.*, 99 AD3d 1246, 1247; *see Matter of Hall v Madison-Oneida*

County Bd. of Coop. Educ. Servs., 66 AD3d 1434, 1435).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

309
CA 15-01598
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, NEMOYER, AND SCUDDER, JJ.

MARC J. NYHLEN AND STEPHANIE L. ADAMS-NYHLEN,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

TIMOTHY J. GILES, DEFENDANT-APPELLANT-RESPONDENT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

LAW OFFICES OF EUGENE C. TENNEY, PLLC, BUFFALO (EDWARD J. SCHWENDLER, III, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered March 2, 2015. The order denied the motion of defendant for summary judgment.

It is hereby ORDERED that said cross appeal is unanimously dismissed and the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Marc J. Nyhlen (plaintiff) when his vehicle was rear-ended by a vehicle operated by defendant. Plaintiff alleged that, as a result of the accident, he sustained a serious injury under the permanent consequential limitation of use, significant limitation of use and 90/180-day categories (*see* Insurance Law § 5102 [d]). Defendant appeals from an order denying his motion seeking summary judgment dismissing the complaint on the ground that plaintiff's injuries were preexisting, and that plaintiff did not sustain a qualifying injury as a result of the accident. As a preliminary matter, we dismiss plaintiffs' cross appeal because they were not aggrieved by the order on appeal (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544-545; *Lillie v Wilmorite, Inc.*, 92 AD3d 1221, 1222).

We agree with plaintiffs that Supreme Court properly denied the motion because defendant failed to meet his initial burden of establishing that plaintiff did not sustain a qualifying injury as a result of the accident (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Addressing first the significant limitation of use category, we note that defendant submitted plaintiff's deposition testimony and medical records establishing that he had, inter alia, preexisting injuries to the cervical and lumbar spine, as well as the report of an IME physician who opined that plaintiff sustained only a

cervical and lumbar strain as a result of the accident. Nevertheless, defendant also submitted the reports of plaintiff's treating physician, who stated that plaintiff's cervical injuries were "markedly exacerbated" by the accident and that the lumbar injuries were "solely the result of his motor vehicle accident." The reports also provide quantitative assessments of plaintiff's limited range of motion. Thus, defendant failed to eliminate all issues of fact whether plaintiff sustained a significant limitation of use of the cervical and lumbar spine as a result of the accident (*see Clark v Aquino*, 113 AD3d 1076, 1076; *Pugh v Tantillo*, 101 AD3d 1658, 1658-1659).

With respect to the 90/180-day category, defendant also submitted plaintiff's medical records stating that his level of disability varied from between 50% and 100% for 18 months following the accident. Thus, based upon the physician reports and medical records, together with plaintiff's deposition testimony, we conclude that defendant failed to eliminate all issues of fact concerning that category (*see Clark*, 113 AD3d at 1078). Finally, based upon the same reports and records, we conclude that defendant failed to eliminate all issues of fact with respect to the permanent consequential limitation of use category (*see id.* at 1077; *Hedgecock v Pedro*, 93 AD3d 1250, 1252).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

310

KA 13-01427

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANKLIN FURTICK, ALSO KNOWN AS PAUL WINSTON,
ALSO KNOWN AS PAUL FURTICK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered April 19, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

311
KA 15-01071
PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V ORDER

ALDEN FULLER, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), dated February 6, 2015. The order granted the motion of defendant to dismiss an indictment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 4 and 8, 2016,

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

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

314
KA 14-01513
PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC SMITH, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered July 21, 2014. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law §§ 20.00, 120.10 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). We reject defendant's contention that the victim's in-court identification of him should have been precluded because of the People's failure to provide adequate notice pursuant to CPL 710.30. Even assuming, arguendo, that the People failed to comply with the notice provision of CPL 710.30, the record establishes that defendant moved to suppress the identification made by the victim, and that such motion was denied after a *Wade* hearing. Thus, "[s]ince the defendant here moved to suppress the identification testimony [of the victim] and received a full hearing on the fairness of the identification procedure, any alleged deficiency in the notice provided by the People was irrelevant" (*People v Kirkland*, 89 NY2d 903, 905; *see* CPL 710.30 [3]; *People v Green*, 90 AD3d 1151, 1152, *lv denied* 18 NY3d 994; *see generally People v Simpson*, 35 AD3d 1182, 1183, *lv denied* 8 NY3d 990). In any event, we conclude that any error in admitting identification testimony from the victim is harmless. The proof of defendant's guilt is overwhelming, and there is no significant probability that the jury would have acquitted defendant in the absence of the victim's identification of defendant (*see generally People v Arafet*, 13 NY3d 460, 467; *People v Crimmins*, 36

NY2d 230, 241-242).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

315

KA 13-01086

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

ROBERT JACKSON, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Joseph E. Fahey, J.), entered March 12, 2013. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Onondaga County Court for a hearing pursuant to CPL 440.30 (5) in accordance with the following memorandum: Defendant appeals from an order denying, without a hearing, his CPL 440.10 motion to vacate a 2009 judgment convicting him following a jury trial of, inter alia, criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]). In support of his motion, defendant contended that he was deprived of effective assistance of counsel because defense counsel and the attorney for a codefendant who testified against defendant at trial were members of the same law firm. We conclude that County Court erred in denying defendant's motion without a hearing.

"Absent inquiry by the court and consent by the defendant, an attorney may not represent a criminal defendant in a trial at which a star prosecution witness is a codefendant whose plea bargain—including the promise to testify against defendant—was negotiated by a partner in the same firm. In these circumstances defendant is denied his right to effective assistance of counsel" (*People v Mattison*, 67 NY2d 462, 465, *cert denied* 479 US 984). Thus, a defendant is denied effective assistance of counsel where a member of defense counsel's law firm represents a witness who testifies against defendant at trial unless the court conducts a "*Gomberg* inquiry to ascertain that the

facts had been disclosed to defendant and that he [or she] had made a reasoned decision whether to proceed to trial with his [or her] attorney" (*People v Astafan*, 283 AD2d 907, 907; *see People v Ortiz*, 76 NY2d 652, 656; *see generally People v Gomberg*, 38 NY2d 307, 313-314).

Here, in support of his motion, defendant submitted an affidavit from the testifying codefendant, who averred that he and defendant met with defense counsel before the trial in an office that defense counsel shared with the codefendant's attorney, that the two attorneys were members of the same law firm, and that defendant's attorney discussed the codefendant's impending testimony with the express understanding that he would not ask the codefendant any questions at trial that would jeopardize the codefendant's plea agreement. The codefendant thereafter provided testimony that incriminated defendant. We therefore conclude that defendant submitted sufficient evidence on his motion to require a hearing on the issue whether a codefendant testified at trial against defendant after that codefendant's "plea bargain—including the promise to testify against defendant—was negotiated by a partner in the same firm" as defendant's trial attorney (*Mattison*, 67 NY2d at 465).

Contrary to the contention of the People, defendant's failure to submit an affidavit from either of the two attorneys is not fatal to the motion. "[D]efendant's application is adverse and hostile to his trial attorney[and to the other purported member of that attorney's law firm]. To require the defendant to secure an affidavit, or explain his failure to do so, [would be] wasteful and unnecessary" (*People v Radcliffe*, 298 AD2d 533, 534; *see generally People v Campbell*, 81 AD3d 1251, 1251).

Furthermore, we reject the People's contention that defendant failed to establish prejudice arising from the simultaneous representation. The Court of Appeals has noted that, "[i]n the context of joint representation of codefendants, once the presence of an actual conflict situation is established, prejudice is presumed, for courts will not enter into nice calculations as to the amount of prejudice resulting from the conflict" (*People v Harris*, 99 NY2d 202, 210 [internal quotation marks omitted]; *see Mattison*, 67 NY2d at 468). At trial, the codefendant testified and unquestionably incriminated defendant in the crimes of which he was convicted. Furthermore, in support of his motion, defendant submitted evidence tending to establish that an actual conflict existed because his attorney and the codefendant's attorney were members of the same law firm. "Such nonrecord facts are material and if established could entitle defendant to the relief sought. Under these circumstances, [the court] erred in denying the motion without a hearing" (*People v Ferreras*, 70 NY2d 630, 631).

We have not considered defendant's remaining contention, which involves matters outside the record.

Entered: April 29, 2016 Frances E. Cafarell
Clerk of the Court

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

316
KA 12-01923
PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — MEMORANDUM AND ORDER

TINA M. SWITKOWSKI, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET SOMES 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 (Francis A. Affronti, J.), rendered June 20, 2012. The judgment convicted defendant, upon a jury verdict, of reckless assault of a child and reckless assault of a child by a child day care provider.

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

Memorandum: On appeal from a judgment convicting her upon a jury verdict of reckless assault of a child (Penal Law § 120.02 [1]) and reckless assault of a child by a child day care provider (§ 120.01), defendant contends that Supreme Court erred in failing to review recordings that were received in evidence at the *Huntley* hearing. Defendant failed to preserve that contention for our review, however, inasmuch as defense counsel did not object after the court informed defense counsel that it would "not need to hear that audio" because the only legal issue being presented to the court was whether defendant's statements were voluntary (*see* CPL 470.05 [2]; *see also People v Voorhees*, 2 AD3d 1447, 1448, *lv denied* 3 NY3d 663). 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]; *Voorhees*, 2 AD3d at 1448).

Defendant further contends that the court erred in allowing testimony at trial from two paramedics concerning prior, unrelated 911 calls. Although defendant objected to the testimony from one of the paramedics, she did not object to the testimony of the other paramedic and thus did not preserve her challenge to that paramedic's testimony for our review (*see* CPL 470.05 [2]). We nevertheless exercise our power to review the contention with respect to the other paramedic as a matter of discretion in the interest of justice because defendant raises the same challenges for each paramedic's testimony (*see* CPL

470.15 [6] [a]).

The challenged testimony relates to evidence that the paramedics had received other 911 calls from other callers involving similar complaints to the one made by defendant, i.e., concerning a "child choking on milk." In responding to those calls, the paramedics observed that the children were usually "fine" because milk "[was] a liquid. [The children were] going to cough on it . . . [and] breath[e] a little faster." Those other children were "almost always not in a respiratory arrest-type state." The child in this case, however, was lying, unmoving, on the floor, was hypoxic and had bruising on the right temple. The paramedics had not seen a child who was choking on milk exhibiting the symptoms that they observed with regard to the subject child. We conclude that such testimony was properly admitted because fact witnesses, such as the paramedics, may be permitted to provide the jury with general background information concerning their experience regarding a particular subject matter (*see People v Englert*, 130 AD3d 1532, 1533, *lv denied* 26 NY3d 967; *People v Works*, 177 AD2d 978, 978-979).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

317
KA 14-01319
PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAMAR T. ANDERSON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), entered June 27, 2014. The order, inter alia, 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 properly assessed 10 points under risk factor 12 for defendant's failure to genuinely accept responsibility for his conduct as required by the risk assessment guidelines. The People established by clear and convincing evidence that defendant "minimized the underlying sexual offense[,] and . . . denied that he performed the criminal sexual act [that] formed the basis for the conviction during an interview with the Probation Department" (*People v Jewell*, 119 AD3d 1446, 1448, *lv denied* 24 NY3d 905 [internal quotation marks omitted]; *see People v Wilson*, 117 AD3d 1557, 1557, *lv denied* 24 NY3d 902; *People v Baker*, 57 AD3d 1472, 1473, *lv denied* 12 NY3d 706).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

319
KA 14-01511
PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYANT P. SANFORD, DEFENDANT-APPELLANT.

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

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (KRISTYNA S. MILLS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered June 30, 2014. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20). We agree with defendant that the waiver of the right to appeal was not valid inasmuch as the "inquiry made by [County] Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Beaver*, 128 AD3d 1493, 1494 [internal quotation marks omitted]; *see People v McCullars*, 117 AD3d 1480, 1480-1481, *lv denied* 23 NY3d 1040). Although defendant signed a written waiver of the right to appeal, "[t]he court did not inquire of defendant whether he understood the written waiver or whether he had even read the waiver before signing it" (*People v Bradshaw*, 18 NY3d 257, 262; *see People v Donaldson*, 130 AD3d 1486, 1486-1487; *Beaver*, 128 AD3d at 1494). In any event, a valid waiver of the right to appeal would not preclude defendant's contention that his plea was not knowing, intelligent and voluntary (*see People v Wisniewski*, 128 AD3d 1481, 1481, *lv denied* 26 NY3d 937), but defendant failed to preserve that contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Laney*, 117 AD3d 1481, 1482). Furthermore, this case does not fall within the rare exception to the preservation requirement inasmuch as nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the plea (*see People v Lopez*, 71 NY2d 662, 666; *People v Brinson*, 130 AD3d 1493, 1493, *lv denied* 26 NY3d 965).

Finally, we conclude that defendant's contentions that his attorney at the time of his plea had a conflict of interest and that the attorney was ineffective because of that conflict concern matters outside the record on appeal and thus must be raised by way of a motion pursuant to CPL article 440 (*see People v Jackson*, 108 AD3d 1079, 1079, *lv denied* 22 NY3d 997; *People v Pagan*, 12 AD3d 1143, 1144, *lv denied* 4 NY3d 766).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

320
KA 14-01534
PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL BRADFORD, JR., DEFENDANT-APPELLANT.

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

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Steuben County Court (Marianne Furfure, A.J.), rendered July 8, 2014. Defendant was resentenced upon his conviction of murder in the second degree, criminal contempt in the first degree (two counts), aggravated criminal contempt, and offering a false instrument for filing in the first degree.

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

Memorandum: Defendant appeals from a resentence upon his conviction of, inter alia, murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant's contention, County Court properly denied his motion seeking substitution of counsel at the resentencing proceeding. Defendant failed to establish " 'good cause for a substitution,' such as a conflict of interest or other irreconcilable conflict with counsel" (*People v Sides*, 75 NY2d 822, 824; *see People v Brooks*, 37 AD3d 1056, 1057; *People v Welch*, 2 AD3d 1354, 1355, *lv denied* 2 NY3d 747).

Defendant's contentions concerning the assistance of counsel provided at trial are not reviewable on appeal from the resentence (*see People v Smith*, 21 AD3d 1360, 1360; *People v Coble*, 17 AD3d 1165, 1165, *lv denied* 5 NY3d 787; *People v Luddington*, 5 AD3d 1042, 1042, *lv denied* 3 NY3d 643). Finally, we reject defendant's contention that he was denied effective assistance of counsel at the resentencing proceeding (*see Brooks*, 37 AD3d at 1057; *see generally People v Baldi*, 54 NY2d 137, 147).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

321
CA 15-01295

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

IN THE MATTER OF JOHN T. SMOKE AND LYNN SMOKE, INDIVIDUALLY AND DOING BUSINESS AS HIDDEN FALLS SPRING WATER, PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

PLANNING BOARD OF TOWN OF GREIG, RESPONDENT-DEFENDANT-RESPONDENT.

BOND, SCHOENECK & KING, PLLC, UTICA (RAYMOND A. MEIER OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

HRABCHAK & GEBO, P.C., WATERTOWN (MARK G. GEBO OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT.

WOODS OVIATT GILMAN LLP, ROCHESTER (DONALD W. O'BRIEN, JR., OF COUNSEL), FOR CHARLES BENZING AND LORRAINE BENZING, AMICI CURIAE.

Appeal from a judgment (denominated order) of the Supreme Court, Lewis County (Hugh A. Gilbert, J.), entered December 1, 2014 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment, among other things, denied the relief requested in the petition-complaint.

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

Memorandum: Petitioners-plaintiffs (petitioners) are owners of land in the Town of Greig (Town) situated in a rural residential district, and they filed a special permit application seeking permission to install 7,600 feet of underground pipeline for the purpose of transporting water from their property to a "load out" facility in a separate town. It was petitioners' intent to "collect[] water from the naturally occurring aquifer under their land . . . [and] to store such water for the purpose of bulk sale." Initially respondent-defendant, Planning Board of Town of Greig (Planning Board), refused to consider the application, thereby forcing petitioners to commence an initial hybrid CPLR article 78 proceeding and declaratory judgment action. Supreme Court granted that petition-complaint (first petition), in part, by ordering the Planning Board "to consider [the application] on the merits according to lawful procedure and standards." The court declined to address that part of the first petition seeking affirmative relief on the application.

The Planning Board thereafter granted the special permit, with several conditions, only one of which is relevant to the instant appeal, i.e., that "[n]o construction on the pipeline may commence until the use of wells on the other property of the applicant[s] [is] approved for commercial uses by the Town of Greig." Petitioners commenced a second hybrid CPLR article 78 proceeding and declaratory judgment action, by another petition-complaint (second petition), seeking, inter alia, to strike that condition from the special permit and a declaration that the Planning Board was without legal authority to regulate the use of water resources or to require petitioners to secure any additional approval with regard to water extraction from their property. The court consolidated the two proceedings/actions, but denied the relief requested in the second petition as well as petitioners' request for a declaration. We now affirm.

As a preliminary matter, we note that where, as here, "issues of law are limited to whether a determination was affected by an error of law, arbitrary and capricious, an abuse of discretion, or irrational, the issues are subject to review only pursuant to CPLR article 78 . . . Indeed, 'a declaratory judgment action is not an appropriate procedural vehicle for challenging the . . . administrative determination[] [in question], and thus the proceeding/declaratory judgment action . . . is properly only a proceeding pursuant to CPLR article 78' " (*Matter of Legacy at Fairways, LLC v McAdoo*, 67 AD3d 1460, 1461; *see generally Greystone Mgt. Corp. v Conciliation & Appeals Bd. of City of N.Y.*, 62 NY2d 763, 765; *Matter of Custom Topsoil, Inc. v City of Buffalo*, 81 AD3d 1363, 1364, *lv denied* 17 NY3d 709).

Contrary to petitioners' contention, the Water Resources Law (ECL article 15) does not preempt local zoning laws concerning land use. Instead, the Water Resources Law preempts only those local laws that attempt "to regulate withdrawals of groundwater," which "includes all surface and underground water within the state's territorial limits" (*Woodbury Hgts. Estates Water Co., Inc. v Village of Woodbury*, 111 AD3d 699, 702; *see* ECL 15-0103 [1]; *Williams v City of Schenectady*, 115 AD2d 204, 205). The Water Resources Law does not preempt the authority of local governments to "regulate the use of land through the enactment of zoning laws" (*Matter of Norse Energy Corp. USA v Town of Dryden*, 108 AD3d 25, 30, *affd* 23 NY3d 728, *rearg denied* 24 NY3d 981). Considering, as we must, the language of the statute, the statutory scheme as a whole, and the legislative history of the Water Resources Law (*see Matter of Wallach v Town of Dryden*, 23 NY3d 728, 744, *rearg denied* 24 NY3d 981), we conclude that the intent of the legislation was to regulate water extraction "for commercial and industrial purposes" in order to "preserv[e] and protect[ ]" the natural resource (Assembly Introducer Mem in Support, Bill Jacket, L 2011, ch 401 at 5), "to conserve and control the State's water resources" (Division of the Budget Bill Mem, L 2011, ch 401 at 12), "to manage the State's water resources to promote economic growth and address droughts" (New York State Dept of Envtl Conservation Mem, Bill Jacket, L 2011, ch 401 at 14), and to "assure compliance with the Great Lakes Compact which requires that New York regulate all water withdrawals occurring in the New York portion of the Great Lakes

Basin" (Adirondack Council Mem in Support, Bill Jacket, L 2011, ch 401 at 20; *see Williams*, 115 AD2d at 205). Nothing in the legislation or legislative history indicates any intent to preempt the local government's power to regulate "land use within its borders" (*DJL Rest. Corp. v City of New York*, 96 NY2d 91, 96). Here, as in *Wallach* (23 NY3d at 754-755) and *Matter of Frew Run Gravel Prods. v Town of Carroll* (71 NY2d 126, 133), the statute regulates how a natural resource may be extracted but does not regulate where in the Town such extraction may occur.

Although we agree with petitioners that they are not collaterally estopped from challenging the condition (*see generally Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455; *Ryan v New York Tel. Co.*, 62 NY2d 494, 501), we nevertheless agree with the Planning Board and the amici curiae that the Planning Board did not act "illegally or arbitrarily, or abuse[] its discretion" in imposing the challenged condition on the special permit (*Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613). "It is well settled that a zoning board may impose appropriate conditions and safeguards in conjunction with a grant of a special permit" (*Matter of Old Country Burgers Co. v Town Bd. of Town of Oyster Bay*, 160 AD2d 805, 806; *see Matter of Dexter v Town Bd. of Town of Gates*, 36 NY2d 102, 105). "Conditions imposed to protect the surrounding area from a particular land use are consistent with the purposes of zoning, which seeks to harmonize the various land uses within a community" (*Matter of St. Onge v Donovan*, 71 NY2d 507, 516). Here, the condition at issue is that, before the pipeline is constructed, petitioners must obtain approval to use the wells on their property for commercial uses. We recognize that "the separation of business from nonbusiness uses is an appropriate line of demarcation in delimiting permitted uses for zoning purposes. On that basis, business uses most certainly may be excluded from residential districts, whose primary purpose, almost by definition, is to provide an environment for 'safe, healthful and comfortable family life rather than the development of commercial instincts and the pursuit of pecuniary profits' " (*Town of Huntington v Park Shore Country Day Camp of Dix Hills*, 47 NY2d 61, 66, *rearg denied* 47 NY2d 1012; *see Matter of Tarolli v Howe*, 37 NY2d 865, 867).

Contrary to petitioners' contention, our decision in *SCA Chem. Waste Servs. v Board of Appeals of Town of Porter* (75 AD2d 106, *affd* 52 NY2d 963) does not dictate a different result. In that case, permission to use the property for an industrial venture had already been granted. We determined that the pipeline sought to be installed was "[not] part of the industrial process" but, rather, "serve[d] solely as a vehicle for transporting the material after the [industrial] process ha[d] been completed" (*id.* at 109). Here, however, petitioners have not yet obtained permission to use their residential property for a commercial venture. We therefore conclude that the court properly denied the relief requested in the second

petition.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

324
CA 15-01568
PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

ROSE RINALLO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ST. CASIMIR PARISH AND CATHOLIC DIOCESE
OF BUFFALO, DEFENDANTS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (BRIAN R. KRAEMER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered July 1, 2015. 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: Plaintiff commenced this action seeking damages for injuries she sustained when she allegedly tripped and fell on a crack in a step at defendant St. Casimir Parish, a church operated by defendant Catholic Diocese of Buffalo. Defendants moved for summary judgment dismissing the complaint, contending that plaintiff was unable to establish the cause of her fall without engaging in speculation. Defendants appeal from an order denying that motion, and we now affirm.

" 'In a slip and fall case, a defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall' without engaging in speculation" (*Dixon v Superior Discounts & Custom Muffler*, 118 AD3d 1487, 1487; *see Altinel v John's Farms*, 113 AD3d 709, 709-710). In a circumstantial evidence case, however, "[the] plaintiff is not required to exclude every other possible cause of the accident but defendant's negligence . . . , [but the plaintiff's] proof must render those other causes sufficiently remote or technical to enable the jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Smart v Zambito*, 85 AD3d 1721, 1721 [internal quotation marks omitted]; *see Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744).

Here, plaintiff consistently testified that her shoe became caught on a crack in the step, which caused her to fall. Although there were no witnesses to the fall, and plaintiff could not remember seeing the crack at the time of the accident, she testified that the fall occurred in the immediate vicinity of a crack in the step, as revealed by a photograph in the record, "thereby rendering any other potential cause of [her] fall sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Swietlikowski v Village of Herkimer*, 132 AD3d 1406, 1407 [internal quotation marks omitted]; *see Nolan v Onondaga County*, 61 AD3d 1431, 1432).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

325
CA 15-01011
PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF THE ESTATE OF ROBERT L.
WILSON, DECEASED.

CHRISTINE M. WEAVER, EXECUTRIX OF THE
ESTATE OF ROBERT L. WILSON, DECEASED,
PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

KATHLEEN MARY CAMPBELL, EXECUTRIX OF THE
ESTATE OF MARY K. WILSON, DECEASED,
CLAIMANT-RESPONDENT.

LEONARD G. TILNEY, JR., LOCKPORT, FOR PETITIONER-APPELLANT.

DAVID J. MANSOUR, NIAGARA FALLS, FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Niagara County (Sara S. Farkas, S.), entered January 14, 2015. The order determined the claim of Mary K. Wilson against the Estate of Robert L. Wilson, deceased, to be valid.

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

Memorandum: Mary K. Wilson (claimant), the former wife of Robert L. Wilson (decedent), submitted a claim against decedent's estate, seeking to enforce the terms of a property settlement and separation agreement that was incorporated but not merged into their judgment of divorce (hereafter, agreement). The pertinent clause of the agreement provides that decedent "agrees to pay to [claimant] the sum of One Thousand Four Hundred Dollars ($1,400) per month as and for a distributive award for a period of nine years from the date of signing of this Agreement or until such time as [decedent], for any reason, discontinues doing business as Cocktail Bob's Tavern, whichever comes first. In said event, either party may petition a Court of competent jurisdiction for maintenance as provided in Article VII herein." The agreement does not state what should happen to the payments upon the death of either party. The estate denied the claim and filed a petition in Surrogate's Court seeking judicial settlement of the claim, and the Surrogate, pursuant to the parties' stipulation, determined the matter without a hearing (*see generally* SCPA 1809). Petitioner, as executrix of decedent's estate, now appeals from an order in which the Surrogate upheld the claim.

Initially, we note that claimant passed away during the pendency

of this appeal, and respondent, the executrix of claimant's estate, has been substituted as the responding party on appeal.

Contrary to petitioner's contention, we conclude that the Surrogate properly upheld the claim. The validity of the claim depends on the interpretation of the agreement, and it is well settled that " '[a] matrimonial settlement is a contract subject to principles of contract interpretation . . . [, and] a court should interpret the contract in accordance with its plain and ordinary meaning' " (*Tallo v Tallo*, 120 AD3d 945, 946; *see Anderson v Anderson*, 120 AD3d 1559, 1560, *lv denied* 24 NY3d 913). A contract is ambiguous, however, when on its face it "is reasonably susceptible of more than one interpretation" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573) and, in deciding whether a contract is ambiguous, the court " 'should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed' " (*Kass v Kass*, 91 NY2d 554, 566). Finally, "[i]t is well settled that, where a contract is ambiguous, its interpretation remains the exclusive function of the court unless determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence . . . On the other hand, [where, as here,] the equivocality must be resolved wholly without reference to extrinsic evidence[,] the issue is to be determined as a question of law for the court" (*P&B Capital Group, LLC v RAB Performance Recoveries, LLC*, 128 AD3d 1534, 1535 [internal quotation marks omitted]).

Contrary to the contention of both parties, the Surrogate properly concluded that the agreement is ambiguous because it is reasonably susceptible of more than one interpretation. Inasmuch as the clause at issue fixes an amount to be paid for a tangible marital asset, is contained in the part of the agreement titled "Equitable Distribution of Marital Property," and contains no provision terminating the payments upon the death of either party, it could be interpreted in accordance with respondent's position that it is part of equitable distribution. It is well settled that, "in the event of the death of either party, any unpaid equitable distribution is the right or responsibility of the estate of the deceased ex-spouse" (*Grunfeld v Grunfeld*, 255 AD2d 12, 20, *mod on other grounds* 94 NY2d 696; *see Cristando v Lozada*, 118 AD3d 846, 847, *lv denied* 24 NY3d 913). Conversely, the fact that the agreement provides that payments are to continue "until such time as [decedent], for any reason, discontinues doing business as Cocktail Bob's Tavern," and that claimant could then seek maintenance, could be interpreted in accordance with petitioner's position, i.e., that the parties intended the payments to be in lieu of maintenance, which would terminate upon the death of the payor (*see* Domestic Relations Law § 236 [B] [6] [c]; *Hartog v Hartog*, 85 NY2d 36, 50). We agree with petitioner that the Surrogate " 'may not by construction add . . . terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing' " (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475). Here, however, based on our interpretation of the agreement as a whole, we agree with the Surrogate that the payments are part of a distributive award and thus

must continue despite the demise of decedent (*cf. generally Matter of Riconda*, 90 NY2d 733, 738).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

327
CA 15-00105
PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

GENERATIONS CHILD CARE, INC.,
PLAINTIFF-RESPONDENT,

V ORDER

LIVING WORD TEMPLE OF RESTORATION
AND WILLIAM R. TURNER, JR.,
DEFENDANTS-APPELLANTS.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER
(RICHARD GLENN CURTIS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (JEREMY M. SHER OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered October 8, 2014. The order and judgment determined the rights and obligations of the parties pursuant to a certain lease agreement.

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

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

332
TP 15-01582
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 1000, AFSCME, AFL-CIO,
AND ROBERT STANEK, PETITIONERS,

V MEMORANDUM AND ORDER

NEW YORK STATE UNIFIED COURT SYSTEM, RESPONDENT.

LEVENE, GOULDIN & THOMPSON, LLP, BINGHAMTON (MARGARET J. FOWLER OF COUNSEL), FOR PETITIONERS.

JOHN W. MCCONNELL, NEW YORK CITY (PEDRO MORALES 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, Onondaga County [Hugh A. Gilbert, J.], entered September 14, 2015) to review a determination of respondent. The determination found petitioner Robert Stanek guilty of disciplinary charges of misconduct and imposed the penalties of a letter of reprimand, six months' probation and the loss of five days' pay.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul the determination, made after an administrative hearing conducted pursuant to a collective bargaining agreement, suspending Robert Stanek (petitioner) for five days without pay from his employment as a court security officer, based on his violation of several departmental regulations. He also was placed on probation for a period of six months, and was issued a letter of reprimand. Initially, we note that Supreme Court erred in transferring the proceeding to this Court pursuant to CPLR 7804 (g) on the ground that the petition raises a substantial evidence issue. "Respondent's determination was not 'made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law' (CPLR 7803 [4]). Rather, the determination was the result of a hearing conducted pursuant to the terms of the collective bargaining agreement" (*Matter of Ridge Rd. Fire Dist. v Schiano*, 41 AD3d 1219, 1220; *see Matter of Thompson v Jefferson County Sheriff John P. Burns*, 118 AD3d 1276, 1276-1277; *see generally Matter of Colton v Berman*, 21 NY2d 322, 329). Nevertheless, in the interest of judicial economy, we

will retain the matter and consider the petition (*see e.g. Matter W.K.J. Young Group v Zoning Bd. of Appeals of Vil. of Lancaster*, 16 AD3d 1021, 1021; *see also Matter of Marin v Benson*, 131 AD2d 100, 103).

Despite the fact that the petition raises a substantial evidence issue, our review of this administrative determination pursuant to CPLR 7803 (3) is limited to whether the determination was "affected by an error of law or was arbitrary and capricious or an abuse of discretion." A determination "is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts . . . An agency's determination is entitled to great deference . . . and, [i]f the [reviewing] court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency" (*Thompson*, 118 AD3d at 1277 [internal quotation marks omitted]; *see Matter of Brockport Student Govt. v State Univ. of N.Y. at Brockport*, 136 AD3d 1418, 1420). "Moreover, an administrative determination regarding discipline will be afforded heightened deference where a law enforcement agency such as [the court security arm of respondent] is concerned" (*Matter of Fortune v State of N.Y., Div. of State Police*, 293 AD2d 154, 157; *see generally Matter of Smeraldo v Rater*, 55 AD3d 1298, 1299). Here, petitioners do not contend that the determination is affected by an error of law and, viewing the administrative record as a whole (*see Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499), we conclude that the determination is not arbitrary and capricious, or an abuse of discretion. There is evidence in the record that supports the determination, and that evidence was credited by the Hearing Officer and adopted by respondent in its determination.

We reject petitioners' further contention that the penalties imposed constitute an abuse of discretion. It is well settled that "a penalty must be upheld unless it is 'so disproportionate to the offense as to be shocking to one's sense of fairness,' thus constituting an abuse of discretion as a matter of law" (*Matter of Kelly v Safir*, 96 NY2d 32, 38, *rearg denied* 96 NY2d 854, quoting *Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 237). Based on, inter alia, the " 'higher standard of fitness and character [that] pertains to [law enforcement] officers' " (*Matter of Bassett v Fenton*, 68 AD3d 1385, 1387-1388), coupled with petitioner's refusal to accept any responsibility for his conduct, we conclude that the penalties imposed do not shock one's sense of fairness (*see Matter of Franklin v D'Amico*, 117 AD3d 1432, 1434; *see generally Kelly*, 96 NY2d at 38).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

333
KA 13-02198
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYREL RIVERS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered April 30, 2013. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]), and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that the verdict is contrary to the weight of the evidence. 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, although an acquittal would not have been unreasonable, the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). It is well settled that "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]), and we perceive no reason to disturb the jury's resolution of those issues in this case.

We agree with defendant, however, that County Court abused its discretion in reading back the prosecutor's summation without also reading back the defense summation. Initially, we reject the People's contention that defendant failed to preserve his contention for our review. Defendant at least arguably objected to the readback, seeking more time to research the issue, and the court denied the objection. The court then granted the jury's request for the readback and denied defense counsel's request for a contemporaneous readback of the

defense summation. Therefore, the court " 'expressly decided the question raised on appeal,' thus preserving the issue for review" (*People v Smith*, 22 NY3d 462, 465, quoting CPL 470.05 [2]).

Pursuant to CPL 310.30, "the jury can request a reading of not only evidentiary material, but also any material which is pertinent to its deliberation, including the summations, and the trial court must 'give such requested information or instruction as [it] deems proper' " (*People v Velasco*, 77 NY2d 469, 474). We agree with defendant that the court abused its discretion in reading back only the prosecutor's summation under the circumstances presented here. The evidence of defendant's guilt is not overwhelming, and the jurors were clearly divided at times during their deliberations, as demonstrated by their frequent requests for guidance from the court through numerous notes. Indeed, in their seventh note, the note at issue here, they requested a readback of the prosecutor's summation and, in their 11th note, they indicated that they were deadlocked on one of the counts. Under such circumstances, "[b]y rereading only the prosecutor's summation, the court permitted the People an additional opportunity to present their arguments, and their view of the evidence, creating the potential for distracting the jurors from their own recollection of the facts and from the arguments of defense counsel" (*People v Sullivan*, 160 AD2d 161, 163, *lv denied* 76 NY2d 991, *reconsideration denied* 77 NY2d 911). We further conclude that such error is not harmless under these circumstances (*see id.* at 163-164; *see also United States v Arboleda*, 20 F3d 58, 61-62 [2d Cir]). We therefore reverse the judgment and grant a new trial.

Defendant further contends that the court erred in sustaining, on hearsay grounds, the prosecutor's objections to defendant's attempts to introduce into evidence the recordings of certain 911 calls. Inasmuch as we are granting a new trial, we need not address that contention. Nonetheless, in the interest of judicial economy, we note that those recordings were admissible as excited utterance and/or present sense impression exceptions to the hearsay rule. An excited utterance is " 'the product of the declarant's exposure to a startling or upsetting event that is sufficiently powerful to render the observer's normal reflective processes inoperative[,]' preventing the opportunity for deliberation and fabrication" (*People v Carroll*, 95 NY2d 375, 385; *see generally People v Johnson*, 1 NY3d 302, 306). " 'Present sense impression' declarations, in contrast, are descriptions of events made by a person who is perceiving the event as it is unfolding[,] . . . minimiz[ing] the opportunity for [a] calculated misstatement as well as the risk of inaccuracy from faulty memory" (*People v Vasquez*, 88 NY2d 561, 574). Here, many of the recordings at issue were admissible under the excited utterance exception to the hearsay rule because the evidence established that the statements were made while the callers were "under the stress of excitement caused by" the startling or upsetting events that they described (*People v Edwards*, 47 NY2d 493, 497; *see People v Miller*, 115 AD3d 1302, 1303, *lv denied* 23 NY3d 1040). In addition, some of those calls, and the remaining calls, were made by people who described events that were occurring, and the description of the events given by the prosecution witnesses provided the "additional

indicia of reliability" that rendered them admissible under the present sense impression exception (*People v Brown*, 80 NY2d 729, 736; *see People v Ross*, 112 AD3d 972, 973, *lv denied* 22 NY3d 1158; *cf. People v Mulligan*, 118 AD3d 1372, 1373, *lv denied* 25 NY3d 1075).

Defendant's remaining contentions are moot in light of our determination.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

334
KA 13-01611
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHARLESTON PAIGE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered May 16, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

335
KA 12-01367
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH E. CARMEL, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered July 11, 2012. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, criminal possession of a forged instrument in the second degree and criminal possession of stolen property 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, inter alia, burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that the evidence is legally insufficient to support the conviction of burglary because the People failed to present any direct evidence that defendant was the person who entered and stole property from the victims' home. We reject that contention. The People presented evidence establishing that the victims' home was unlawfully entered after they went to sleep at 10:00 p.m. on July 15, 2010 and that various items were taken from their home. At approximately 12:50 a.m. on July 16, 2010, recordings from surveillance cameras at a 24-hour supermarket located 1 ½ miles from the victims' residence showed defendant at the supermarket with a bicycle and a backpack that were stolen from the residence. Moreover, defendant purchased various items at the supermarket using a credit card that was stolen from the residence. We conclude that "[d]efendant's recent and exclusive possession of the property that constituted the fruits of the burglary, and the absence of credible evidence that the crime was committed by someone else, justified the inference that defendant committed the burglary" (*People v Marshall*, 198 AD2d 907, 907, *lv denied* 82 NY2d 898; *see People v Walker*, 125 AD3d 1507, 1507-1508, *lv denied* 25 NY3d 1209). 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 likewise conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's further contention that he was denied effective assistance of counsel. Defendant has failed to establish the absence of any strategic or other legitimate explanation for defense counsel's alleged error in failing to object to identification testimony (*see generally People v Caban*, 5 NY3d 143, 152), and we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

336
KA 14-00307
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD CLARK, DEFENDANT-APPELLANT.

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

DONALD CLARK, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered January 6, 2014. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree (two counts) and criminal possession of stolen property in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reducing the conviction of criminal possession of stolen property in the fourth degree to criminal possession of stolen property in the fifth degree and by vacating the sentence imposed on count three of the indictment and imposing a definite sentence of one year and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment entered upon a jury verdict convicting him of two counts of burglary in the third degree (Penal Law § 140.20) and one count of criminal possession of stolen property in the fourth degree (§ 165.45 [5]). Defendant failed to preserve for our review his contention that his conviction of one of the counts charging burglary in the third degree and the count charging criminal possession of stolen property in the fourth degree is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). We nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Morgan*, 111 AD3d 1254, 1256). We reject defendant's contention with respect to the burglary count. Defendant was identified by two witnesses as one of two men who were seen wheeling two bicycles down a driveway and placing them in the bed of a pickup truck before walking down the street, looking into driveways as

they went. The two witnesses observed one of the men, whom they identified as defendant during a showup procedure based upon his stature and his clothing, return to the vicinity of the truck carrying several items. As a police car approached, in response to the 911 call made by one of the witnesses, the man placed the three items next to a tree. Defendant was apprehended in proximity to those items, and the items were identified by the owners as having been removed from their garage. We conclude that, viewing the evidence in the light most favorable to the People, "there is sufficient evidence to support the jury's inference" that he unlawfully entered a building with the intent to commit a crime therein (*People v Gordon*, 23 NY3d 643, 649; *see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's further contention that the evidence with respect to his knowing possession of the stolen pickup truck is legally insufficient to support the conviction of criminal possession of stolen property in the fourth degree. Viewing the evidence in the light most favorable to the People, i.e., that defendant was observed loading stolen property into a truck that had been stolen within the prior three hours, there is a valid line of reasoning and permissible inferences to lead a rational person to conclude that defendant knew that the truck was stolen (*see generally Gordon*, 23 NY3d at 649; *Bleakley*, 69 NY2d at 495). We agree with defendant, however, that the evidence is legally insufficient to support the conviction of that crime because as the People correctly concede, there was no evidence regarding the value of the truck, a requisite element of that offense (*see generally Morgan*, 111 AD3d at 1256-1257). We further conclude, however, that the evidence is legally sufficient to support the lesser included offense of criminal possession of stolen property in the fifth degree (Penal Law § 165.40), and we therefore modify the judgment accordingly (*see* CPL 470.15 [2] [a]; *People v Pallagi* [appeal No. 1], 91 AD3d 1266, 1270). Because defendant has served the maximum one-year sentence for that offense (*see* Penal Law §§ 70.15 [1]; 70.35), there is no need to remit the matter to Supreme Court for resentencing (*see People v McKinney*, 91 AD3d 1300, 1300). In the interest of judicial economy, we further modify the judgment by vacating the sentence imposed on count three and by imposing the maximum sentence allowed for class A misdemeanor, i.e., a definite sentence of one year (*see id.*). Contrary to defendant's contention, viewing the elements of the crime of burglary in the third degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to those counts 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 he was denied a fair trial by prosecutorial misconduct during summation (*see People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849) and, in any event, that contention is without merit. Although the People correctly concede that certain remarks that denigrated the defense were improper, and we reiterate that we do not condone that type of conduct (*see People v Gibson*, 134 AD3d 1512, 1513), we nevertheless conclude that neither those remarks, nor the other alleged instances of misconduct, were so egregious as to deny

defendant a fair trial (*see People v McAvoy*, 70 AD3d 1467, 1468, *lv denied* 14 NY3d 890; *cf. People v Jones*, 134 AD3d 1588, 1589).

We reject defendant's contention in his main and pro se supplemental briefs that he was denied effective assistance of counsel. We conclude that defendant failed to sustain his burden of establishing "that his attorney 'failed to provide meaningful representation' that compromised 'his right to a fair trial' " (*People v Pavone*, 26 NY3d 629, 647). Indeed, viewing defense counsel's performance in its totality, as we must (*see People v Baldi*, 54 NY2d 137, 147), we conclude that defendant received meaningful representation (*see generally People v Wragg*, 26 NY3d 403, 409). To the extent that defendant raises contentions regarding alleged instances constituting ineffective assistance of counsel in his pro se supplemental brief that are outside the record on appeal, those contentions must be raised by way of a motion pursuant to CPL 440.10 (*see People v Cooper*, 134 AD3d 1583, 1586). We have reviewed the remaining contentions contained in defendant's pro se supplemental brief and conclude that none requires reversal or further modification of the judgment.

We reject defendant's further contention in his main brief that the court erred in denying his motion pursuant to CPL 330.30 (3) to set aside the verdict based upon newly discovered evidence, i.e., a posttrial statement by the Erie County District Attorney that a person who also was apprehended on the night of these crimes and identified by the witnesses as one of the men seen with the bicycles was exonerated. It is undisputed that the prosecutor, an assistant district attorney, stated during his summation that the person was "probably guilty" but explained that there was not sufficient evidence to charge him with these crimes. Even assuming, arguendo, that the District Attorney's remark was admissible in a new trial (*see generally People v Backus*, 129 AD3d 1621, 1623), we conclude that defendant failed to establish that the evidence would probably change the result if a new trial was granted or that the evidence was material, not cumulative and did not merely impeach or contradict the record evidence (*see id.*; *cf. People v Madison*, 106 AD3d 1490, 1492-1494). Finally, the concurrent terms of imprisonment imposed on the burglary counts are not unduly harsh or severe.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

337
KA 12-02268
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK DUDDEN, DEFENDANT-APPELLANT.

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

MARK DUDDEN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered November 1, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance 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 criminal sale of a controlled substance in the second degree (Penal Law § 220.41 [1]). Although we agree with defendant that the waiver of the right to appeal is invalid because " 'the minimal inquiry made by County Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Jones*, 107 AD3d 1589, 1589-1590, *lv denied* 21 NY3d 1075; *see People v Amir W*., 107 AD3d 1639, 1640), we nevertheless affirm the judgment.

Defendant contends that his plea should be vacated because he was coerced into pleading guilty by the court's decision to change the date of his trial. Defendant failed to preserve that contention for our review (*see People v Boyd*, 101 AD3d 1683, 1683; *People v Lando*, 61 AD3d 1389, 1389, *lv denied* 13 NY3d 746), and this case does not fall within the narrow exception to the preservation requirement (*see People v Carlisle*, 50 AD3d 1451, 1451, *lv denied* 10 NY3d 957; *People v Gray*, 21 AD3d 1398, 1399; *cf. People v Lang*, 127 AD3d 1253, 1255; *see generally People v Lopez*, 71 NY2d 662, 666). Contrary to defendant's further contention, the court properly refused to suppress identification evidence upon determining that the undercover officer's

identification of defendant was merely confirmatory (*see generally People v Wharton*, 74 NY2d 921, 922-923). We also reject defendant's challenge to the severity of the sentence.

In his pro se supplemental brief, defendant contends that the court erred in denying his request for a *Darden* hearing. We reject that contention. Where, as here, information is received from a confidential informant but the police officer thereafter makes his or her own observations of criminal activity without further employment of the informant, those observations form the basis for probable cause to arrest, rendering a *Darden* hearing unnecessary (*see People v Darden*, 34 NY2d 177, 180-181, *rearg denied* 34 NY2d 995; *People v Long*, 100 AD3d 1343, 1345-1346, *lv denied* 20 NY3d 1063).

Defendant further contends in his pro se supplemental brief that the court erred in refusing to dismiss or reduce the indictment because the People were improperly permitted to amend the indictment. "[B]y his guilty plea, defendant forfeited any challenge to the alleged amendment of the indictment" (*People v Torres*, 117 AD3d 1497, 1498, *lv denied* 24 NY3d 965). Finally, we conclude that defendant's remaining contention in his pro se supplemental brief lacks merit.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

338
KA 13-00645
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JIMMIE L. JOHNSON, JR., 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 Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered January 22, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts) and menacing a police officer or peace officer (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]). Contrary to defendant's contention, Supreme Court properly refused to suppress evidence, including a handgun, seized by a police officer from defendant's person. A Rochester police officer testified that he stopped defendant's bicycle for a violation of the Vehicle and Traffic Law, and the court's determination to credit that testimony over defendant's evidence to the contrary "is entitled to great deference" (*People v Frazier*, 52 AD3d 1317, 1317, *lv denied* 11 NY3d 788; *see People v Prochilo*, 41 NY2d 759, 761). "Great weight must be accorded to the determination of the suppression court because of its ability to observe and assess the credibility of the witnesses, and its findings should not be disturbed unless clearly erroneous or unsupported by the hearing evidence" (*People v Coleman*, 306 AD2d 941, 941, *lv denied* 1 NY3d 596; *see People v Mateo*, 2 NY3d 383, 414, *cert denied* 542 US 946). Here, the People presented evidence establishing that, as defendant fled the scene, the officer observed him remove an object from his waistband and move his hands in a way that led the officer to conclude that defendant was attempting to chamber a round of ammunition into a semiautomatic handgun, providing the officer with reasonable suspicion to detain defendant (*see People v Curry*, 81 AD3d 1315, 1315, *lv denied* 16 NY3d 858; *People v Wilson*, 5 AD3d 408, 409,

lv denied 2 NY3d 809). Upon observing the weapon in defendant's hand, the officer had probable cause to arrest defendant (*see People v Madrid*, 52 AD3d 530, 531, *lv denied* 11 NY3d 790; *People v Forbes*, 244 AD2d 954, 954, *lv denied* 91 NY2d 941).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

339

KA 14-00638

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER BARBER-MONTEMAYOR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered February 5, 2014. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, petit larceny and criminal possession of stolen property in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of burglary in the second degree (Penal Law § 140.25 [2]), petit larceny (§ 155.25) and criminal possession of stolen property in the fourth degree (§ 165.45 [4]). We conclude that the *Miranda* warnings provided to defendant at the outset of custodial interrogation were not deficient. The "*Miranda* prophylaxis does not require a 'ritualistic incantation of warnings in any particular language or form' " (*People v Snider*, 258 AD2d 929, 930, *lv denied* 93 NY2d 979; *see California v Prysock*, 453 US 355, 359-360). "The inquiry is simply whether the warnings reasonably 'conve[yed] to [a suspect] his [or her] rights as required by *Miranda*' " (*Duckworth v Eagan*, 492 US 195, 203; *see People v Louisias*, 29 AD3d 1017, 1018-1019, *lv denied* 7 NY3d 814). Here, the warnings adequately conveyed that defendant had the right not only to have a lawyer present during the entire questioning but to ask for or access that lawyer at any point during the questioning (*see Florida v Powell*, 559 US 50, 62-63).

County Court did not abuse its discretion in admitting evidence of an uncharged March 4 burglary and theft, as well as evidence of defendant's possession of the stolen guns in the days after that burglary. The People were entitled to establish, in support of the charge of criminal possession of stolen property, when and from where and whom the guns had been stolen. Moreover, the People were entitled to establish, in further support of that charge, that defendant had

been in recent and exclusive possession of the stolen guns. The probative worth of the evidence on those issues outweighed any prejudicial tendency of the proof merely to show defendant's criminal propensity (*see People v Till*, 87 NY2d 835, 836-837; *People v Ely*, 68 NY2d 520, 529). The court also did not err in admitting in evidence the ammunition clip bearing defendant's fingerprint. The "connection between the object and the defendant . . . [was] not so tenuous as to be improbable" (*People v Mirenda*, 23 NY2d 439, 453; *see People v Lopez*, 40 AD3d 1119, 1121).

Defendant failed to preserve for our review his contention that the prosecutor's summation mischaracterized certain identification evidence and thus that he was denied a fair trial by prosecutorial misconduct (*see* CPL 470.05 [2]; *People v James*, 114 AD3d 1202, 1206-1207, *lv denied* 22 NY3d 1199). In any event, there is no merit to the contention that the prosecutor mischaracterized that evidence (*see People v Sweney*, 55 AD3d 1350, 1351, *lv denied* 11 NY3d 901), and we likewise reject defendant's contention that he was denied effective assistance of counsel as a result of defense counsel's failure to object to the comment (*see People v Lyon*, 77 AD3d 1338, 1339, *lv denied* 15 NY3d 954).

Defendant failed to preserve for our review his contention that the court should have severed counts one through three from counts four through six of the indictment, inasmuch as he moved to sever only counts four and five from the remaining counts (*see* CPL 470.05 [2]). Moreover, whereas defendant now contends that the aforementioned evidence of the uncharged March 4 burglary and theft may have been probative of the March 5 burglary, but not of the events of March 7, he argued below that such *Molineux* evidence may have been probative in relation to the March 7 burglary and theft (counts 4 and 5), but not in relation to the March 5 incident or the charge of criminal possession of stolen property (counts 1 through 3 and 6). Additionally, defendant's present contention, i.e., that the counts arising out of the March 5 incident (counts 1 through 3) were not joinable in the first instance with the remaining counts because "not all defendants were jointly charged with every offense" (CPL 200.40 [1] [a]), is raised for the first time on appeal, and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Otherwise, we reject defendant's contention that the counts arising out of the March 5 incident should have been severed from the other counts. The counts were properly joined in the first instance pursuant to CPL 200.20 (2) (c), i.e., as "defined by the same or similar statutory provisions and consequently . . . the same or similar in law," and defendant failed to establish good cause for severance (*see* CPL 200.20 [3]). There was no material variance in the quantity of proof for the separate incidents (*see People v Ford*, 11 NY3d 875, 879). Moreover, "[t]he incidents occurred on different dates and the evidence as to each incident was presented through entirely different witnesses," with the exception of a single witness, who was a codefendant (*id.*). The evidence of the two crimes thus "was readily capable of being separated in the minds of the jury" (*id.*) and, indeed, the jury acquitted defendant of all charges in connection with the March 5

incident.

Defendant failed to preserve for our review his challenge to the sufficiency of the evidence to convict him (*see People v Gray*, 86 NY2d 10, 19). In any event, the evidence is legally sufficient to support the conviction and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant's sentence is not unduly harsh or severe.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

340
CAF 15-00513
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF LONDON J.

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

NIAYA W., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (POLLY E. JOHNSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

COURTNEY S. RADICK, ATTORNEY FOR THE CHILD, OSWEGO.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered March 24, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that terminated her parental rights with respect to the subject child on the ground of permanent neglect. We affirm. Although the mother participated and progressed in some of the services offered by petitioner, petitioner established that the mother did not complete any of those services and failed to " 'address or gain insight into the problems that led to the removal of the child[ ] and continued to prevent the child['s] safe return' " (*Matter of Burke H. [Richard H.]*, 134 AD3d 1499, 1501; *see Matter of Tiara B. [Torrence B.]*, 70 AD3d 1307, 1307, *lv denied* 14 NY3d 709).

The mother failed to preserve for our review her contention that Family Court abused its discretion in not imposing a suspended judgment (*see Matter of Dakota H. [Danielle F.]*, 126 AD3d 1313, 1315, *lv denied* 25 NY3d 909). In any event, we conclude that a suspended judgment was not warranted under the circumstances of this case inasmuch as "any 'progress made by [the mother] in the months preceding the dispositional determination was not sufficient to warrant any further prolongation of the child's unsettled familial status' " (*Matter of Donovan W.*, 56 AD3d 1279, 1280, *lv denied* 11 NY3d

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

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

341
CAF 15-01514
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF GWENDOLYN G. MUOK,
PETITIONER-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH N. MUOK, RESPONDENT-PETITIONER-APPELLANT.

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

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

Appeal from a corrected order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered March 23, 2015 in a proceeding pursuant to Family Court Act article 4. The corrected order denied respondent-petitioner’s objections to an order of the Support Magistrate.

It is hereby ORDERED that the corrected order so appealed from is unanimously modified on the facts and law by granting respondent-petitioner’s second and fourth objections and granting his petition to the extent of imputing income to petitioner-respondent in the amount of $20,000, exclusive of Social Security income, and as modified the corrected order is affirmed without costs and the matter is remitted to Family Court, Oneida County, for further proceedings in accordance with the following memorandum: Respondent-petitioner father appeals from an order denying his written objections to an order of the Support Magistrate that granted petitioner-respondent mother’s petition seeking to modify the order of support based upon the more than 15% increase in the father’s income (*see* Family Ct Act § 451 [3] [b] [ii]), and denied his petition seeking a determination imputing income to the mother in the amount of $100,000. The parties have three children, one living with the father and two living with the mother. We reject the father’s contention that Family Court erred in denying his objections related to the calculation of child support on the amount of income over the statutory cap of $141,000. The Support Magistrate properly considered the disparity in the parties’ incomes and the lifestyle the children would have enjoyed had the marriage remained intact in deciding to include income over the statutory cap in determining the child support obligation (*see* § 413 [1] [f]; *Martin v Martin*, 115 AD3d 1315, 1316; *cf. Antinora v Antinora*, 125 AD3d 1336, 1337-1338; *see generally Matter of Cassano v Cassano*, 85 NY2d 649, 653). Further, the Support Magistrate set forth the basis for her determination not to apply the statutory formula to the amount of income over the statutory cap and related her determination to the

section 413 (1) (f) factors (*cf. Matter of Miller v Miller*, 55 AD3d 1267, 1268; *see generally Cassano*, 85 NY2d at 654-655).

We agree with the father, however, that the court erred in determining that the Support Magistrate did not abuse her discretion in imputing annual income to the mother of $20,000, which included $13,164 that she received in Social Security income. "Trial courts . . . possess considerable discretion to impute income in fashioning a child support award . . . [A] court's imputation of income will not be disturbed so long as there is record support for its determination" (*Belkhir v Amrane-Belkhir*, 118 AD3d 1396, 1398 [internal quotation marks omitted]). Here, there is no record support for the determination not to impute income to the mother.

The record establishes that the mother was 65 years old and had not worked since 2007, when she closed a Montessori school that she operated. The record further establishes that the mother has a bachelor's degree and an MBA, and that she graduated from law school but did not pass the bar exam and was therefore not admitted to the practice of law. The mother testified that, prior to the hearing, she sought only jobs as an attorney, for which she is not qualified. Thus, the mother has not sought employment for which she is qualified since 2007, and it is well settled that "[i]ncome may properly be imputed when there are no reliable records of a parent's actual employment income or evidence of a genuine and substantial effort to secure gainful employment" (*Matter of Monroe County Support Collection Unit v Wills*, 21 AD3d 1331, 1332, *lv denied* 6 NY3d 705). The record is sufficient for us to determine that, based upon her education and experience, the mother has the ability to earn income in the amount of $20,000 per year, exclusive of the Social Security income. We therefore modify the corrected order accordingly, and we remit the matter to Family Court to recalculate the respective child support obligations of the parties and their respective obligations for uninsured medical expenses. We have considered the father's remaining contentions and conclude that they are without merit. In the absence of a cross appeal by the mother, we do not consider her contentions with respect to alleged errors.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

342

CAF 14-02052

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

IN THE MATTER OF TIMOTHY B., HUNTER K.,
BRIANNA K., AND SYLVIA K.

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

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL
SERVICES, PETITIONER-RESPONDENT;

PAUL K., RESPONDENT-APPELLANT,
AND ROBIN K., RESPONDENT.

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

JOHN T. SYLVESTER, MT. MORRIS, FOR PETITIONER-RESPONDENT.

KIMBERLY WHITE WEISBECK, ATTORNEY FOR THE CHILDREN, ROCHESTER.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered October 30, 2014 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that the subject children had been neglected.

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

Memorandum: On appeal from an order adjudging his three children and one stepchild to be neglected, respondent father contends that Family Court failed to "state the facts it deem[ed] essential" to its decision (CPLR 4213 [b]). Even assuming, arguendo, that the court's decision "falls far short of complying" with the statute (*Matter of Kelly G.*, 244 AD2d 709, 709), we nevertheless conclude that "the record is adequate to enable us to make the necessary findings" (*Matter of Markus R.*, 273 AD2d 919, 920; *see Matter of Paulette B.*, 270 AD2d 949, 949; *see also Matter of Airionna C. [Shernell E.]*, 118 AD3d 1430, 1431, *lv denied* 24 NY3d 905, *lv dismissed* 24 NY3d 951).

We reject the father's contention that the children's out-of-court statements were not sufficiently corroborated (*see* Family Ct Act § 1046 [a] [vi]). The statements of each child to petitioner's caseworker provided sufficient cross-corroboration inasmuch as they "tend to support the statements of the others and, viewed together, give sufficient indicia of reliability to each [child's] out-of-court statements" (*Matter of Nicole V.*, 71 NY2d 112, 124; *see Matter of Aimee J.*, 34 AD3d 1350, 1351). " 'The reliability of such corroboration is a determination entrusted in the first instance to [the court's] considerable discretion' " (*Aimee J.*, 34 AD3d at 1351).

In any event, the father's admissions to the caseworker as well as his testimony at the fact-finding hearing were sufficient to corroborate many of the children's statements (*see Matter of Ruthanne F.*, 265 AD2d 829, 830; *Matter of James A.*, 217 AD2d 961, 961).

We reject the further contention of the father and the Attorney for the Children that the evidence, as corroborated, does not establish neglect by a preponderance of the evidence. Family Court Act § 1046 (a) (iii) states that, unless a person is voluntarily and regularly participating in a recognized rehabilitative program, "proof that [such] person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child[.]" Section 1046 (a) (iii) thus creates a presumption of neglect " 'if the parent chronically and persistently misuses alcohol and drugs which, in turn, substantially impairs his or her judgment while [the] child is entrusted to his or her care' " (*Matter of Samaj B. [Towanda H.-B.—Wade B.]*, 98 AD3d 1312, 1313). That presumption "operates to eliminate a requirement of specific parental conduct vis-á-vis the child and neither actual impairment nor specific risk of impairment need be established" (*id.* [internal quotation marks omitted]; *see Matter of Chassidy CC. [Andrew CC.]*, 84 AD3d 1448, 1449).

Based on the evidence at the hearing, we conclude that the finding of neglect is supported by a preponderance of the evidence. The father does not dispute the fact that he was driving while intoxicated at 2:00 p.m. on a Monday afternoon, that he was involved in a motor vehicle accident at that time, and that he was so intoxicated that he was "not able" to perform the field sobriety tests. Morever, the evidence at the hearing also established that, on "a couple different instances," law enforcement officers "had to catch [the father] from falling over or walking into traffic." The corroborated statements of the children established that the father was mean and aggressive when he had been drinking; that he pushed the eldest child to the ground on one occasion when he had been drinking; that there were times when the parents were so intoxicated that the eldest child had to cook for the children; that there were times when the parents were drinking that the eldest child, who had to go to work, made arrangements for the youngest child to go to friends' houses; that there was at least one time when the youngest child hid under furniture when respondents were drinking and fighting; and that the father, who was physically aggressive with one child in particular when the father was drinking, accidently pulled the youngest child's hair while trying to grab the other child. The father's testimony that he and the mother drank alcohol after the children were in bed is belied by the record. The children were well aware of their parents' problems with alcohol and observed their parents intoxicated on multiple occasions during the day and night.

We thus conclude that petitioner established that the father chronically misused alcohol by drinking to the point that he was intoxicated, disoriented, incompetent and irrational (*see Matter of Nasiim W. [Keala M.]*, 88 AD3d 452, 453; *Chassidy CC.*, 84 AD3d at 1449-1450; *cf. Matter of Anna F.*, 56 AD3d 1197, 1198; *see generally Matter of Anastasia L.-D. [Ronald D.]*, 113 AD3d 685, 687-688). The father's failure to rebut the presumption of neglect obviated the requirement that petitioner present evidence establishing actual impairment or risk of impairment (*see Samaj B.*, 98 AD3d at 1313; *Nasiim W.*, 88 AD3d at 453). In any event, we note that the evidence established that the children's "physical, mental or emotional condition[s] [were] impaired or [were] in imminent danger of becoming impaired" as a result of the father's failure to exercise a minimum degree of care in providing the children with proper supervision and guardianship "by misusing alcoholic beverages to the extent that he loses self-control of his actions" (Family Ct Act § 1012 [f] [i] [B]; *see Matter of Heather D.*, 17 AD3d 1087, 1087; *Matter of Megan G.*, 291 AD2d 636, 638-639).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

343
CA 15-01126
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

DWIGHT LAND, III, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, DEFENDANT-APPELLANT,
AND JAMES PAYCHECK, DEFENDANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILIP A. MILCH, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered June 4, 2014. The order denied the motion of defendant County of Erie for summary judgment dismissing the complaint and all cross claims against it.

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

Memorandum: Plaintiff commenced these consolidated negligence actions seeking damages for injuries he allegedly sustained in a motor vehicle accident. We conclude that Supreme Court properly denied the motion of defendant County of Erie (County) for summary judgment dismissing the complaint and all cross claims against it. Plaintiff alleged that the County was negligent in, inter alia, the design, construction, maintenance and operation of the intersection where the accident occurred. "It is well settled that a municipality has a duty 'to construct and maintain its highways in a reasonably safe condition, taking into account such factors as the traffic conditions apprehended, the terrain encountered and fiscal practicality' " (*Demesmin v Town of Islip*, 147 AD2d 519, 520, quoting *Gutelle v City of New York*, 55 NY2d 794, 795; *see Slate v Town of Antwerp*, 278 AD2d 857, 857). In support of its motion, the County failed to establish either that it was not negligent or "that the accident would have occurred regardless of the condition of the" allegedly dangerous road (*Endieveri v County of Oneida*, 35 AD3d 1268, 1269; *see Miller v Howard*, 134 AD3d 1537, 1537-1538). The County further contends that it owes a duty of care only to those persons who obey the rules of the road and, because the court previously determined that plaintiff was negligent, it owed no duty of care to plaintiff. We reject that contention. "No meaningful legal distinction can be made between a traveler who uses [an intersection] with justification and one who uses it negligently insofar as how such conduct relates to whom a duty

is owed to maintain the [intersection]. The comparative fault of the driver, of course, is relevant to apportioning liability" (*Bottalico v State of New York*, 59 NY2d 302, 306; *see generally Stiuso v City of New York*, 87 NY2d 889, 890-891; *Green v County of Allegany*, 300 AD2d 1077, 1077).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

344
CA 15-01412
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

ROMA M. MANDZYK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MANOR LANES AND MANOR LANES II, INC.,
DEFENDANTS-RESPONDENTS.

GIBSON MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL SULLIVAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Jeremiah J. Moriarty, III, J.), entered December 3, 2014. The order granted the motion of defendants for summary judgment, denied the cross motion of plaintiff for partial summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendants' motion in part and reinstating the first cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained as a result of her slip and fall while bowling at premises allegedly owned by defendants. Supreme Court granted defendants' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for partial summary judgment on the issue of defendants' negligence in maintaining the premises, and plaintiff appeals. The court properly granted that part of defendants' motion with respect to the cause of action sounding in private nuisance, a theory that has no applicability to this case (*see generally Bloomingdales, Inc. v New York City Tr. Auth.*, 13 NY3d 61, 66; *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570, *rearg denied* 42 NY2d 1102). The court also properly denied plaintiff's cross motion for partial summary judgment.

We conclude, however, that the court erred in granting defendants' motion with respect to the cause of action for negligence, and we modify the order accordingly. In granting that part of defendants' motion, the court agreed with defendants that they were entitled to judgment because plaintiff could not identify the cause of her fall (*see Nolan v Onondaga County*, 61 AD3d 1431, 1432). That was error. "Although a defendant may establish its prima facie

entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall without engaging in speculation . . . , we conclude that defendant[s] failed to meet that burden here" (*Swietlikowski v Village of Herkimer*, 132 AD3d 1406, 1407 [internal quotation marks omitted]). In any event, and assuming arguendo that defendants met their initial burden, we conclude that plaintiff raised a triable issue of fact concerning the existence of the alleged defect, i.e., the presence of oil on the approach to the lane, and concerning whether defendants affirmatively caused or created that defect or acquired actual or constructive notice of such defect in time to remedy it or warn plaintiff about it (*see Johnson v Transportation Group, Inc.*, 27 AD3d 1135, 1136; *see generally O'Neil v Holiday Health & Fitness Ctrs. of N.Y.*, 5 AD3d 1009, 1009-1010; *Atkinson v Golub Corp. Co.*, 278 AD2d 905, 905-906). Here, plaintiff testified at her deposition that she had seen beads of oil on her bowling ball before she fell, and that she fell in the area in which she released her bowling ball. Further, the bowling alley manager testified at his deposition that beads of oil should not accumulate on the ball, and that their existence might indicate excessive oiling of the lanes. He further testified that the lanes had been recently oiled, and that the oiling machine could drip oil on the approach, thereby necessitating that the oil be wiped up with a rag. Finally, the accident report, which was prepared by the bowling alley manager within 15 or 20 minutes of the accident, recited that plaintiff had "slipped on oil."

We do not address defendants' contention that defendant Manor Lanes II, Inc. is entitled to summary judgment on the ground that it played no part in the ownership or operation of the bowling alley. That contention is advanced for the first time on appeal and therefore is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: April 29, 2016 Frances E. Cafarell
Clerk of the Court

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

345
CA 15-00520
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

WILLIAM WEBER, ET AL., PLAINTIFFS,

V ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION,
DEFENDANT.

PAUL WILLIAM BELTZ, P.C., APPELLANT,

ROBERT B. NICHOLS, ESQ., RESPONDENT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM QUINLAN OF COUNSEL), FOR APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered December 8, 2014. The order divided attorney's fees 15% to Paul William Beltz, P.C., and 85% to Robert B. Nichols, Esq.

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

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

346
CA 15-01462
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

DAVID R. MILES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN/VILLAGE OF EAST ROCHESTER,
DEFENDANT-RESPONDENT.

PHETERSON SPATORICO LLP, ROCHESTER (KAMRAN HASHMI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, ROCHESTER (RAUL E. MARTINEZ OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered November 5, 2014. The order granted the motion of defendant for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for the failure of defendant's employee, i.e., the building inspector, to conduct a proper inspection of the roof that was installed on plaintiff's residence by a building contractor and in issuing a certificate of compliance. Supreme Court properly granted defendant's motion for summary judgment dismissing the amended complaint. It is well settled that, "[t]o sustain liability against a municipality [exercising a governmental function], the duty breached must be more than that owed to the public generally" (*Lauer v City of New York*, 95 NY2d 95, 100; *see Coleson v City of New York*, 24 NY3d 476, 481). Here, plaintiff contends that defendant owed him a special duty of care because defendant voluntarily assumed a duty to plaintiff "beyond what was owed to the public generally" (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426). The elements necessary to establish that a duty has been voluntarily assumed by a municipality are: " '(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agent[] that inaction could lead to harm; (3) some form of direct contact between the municipality's agent[] and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking' " (*Coleson*, 24 NY3d at 481). "A plaintiff must satisfy each of these factors in order to establish a special relationship" (*Applewhite*, 21

NY3d at 431).

Here, we conclude that defendant established as a matter of law that it did not assume an affirmative duty to act on plaintiff's behalf with respect to the dispute he had with the roofing contractor and that plaintiff did not justifiably rely on defendant's alleged actions, and plaintiff failed to raise an issue of fact to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Although defendant's employee indicated to plaintiff that he "had some issues" with the work, he also indicated that he wanted to review the matter further and that he would investigate plaintiff's complaints. That communication does not, "as a matter of law, constitute an action that would lull a plaintiff into a false sense of security or otherwise generate justifiable reliance" that defendant would refuse to issue a certificate of compliance (*Dinardo v City of New York*, 13 NY3d 872, 874). Indeed, "at the heart of most of these 'special duty' cases is the unfairness that the courts have perceived in precluding recovery when a municipality's voluntary undertaking has lulled the injured party into a false sense of security and has thereby induced him either to relax his own vigilance or to forego other available avenues of protection" (*Cuffy v City of New York*, 69 NY2d 255, 261). The record establishes that plaintiff did not in fact "relax his own vigilance or . . . forego other available avenues of protection," inasmuch as he attempted to resolve the dispute with the roofing contractor and retained an independent inspector to determine whether the contractor's work violated State or local building codes (*id.*).

Entered: April 29, 2016 Frances E. Cafarell
Clerk of the Court

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

347
CA 15-01068
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

STANLEY PARKER, FAIRMAN SUTTON, DAVID BAIN,
ELLEN PECK, DOUGLAS WILLIAMS AND ALCID BEAUDIN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF ALEXANDRIA, DEFENDANT-RESPONDENT.

CAMPANY, YOUNG & MCARDLE, PLLC, LOWVILLE (KEVIN M. MCARDLE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SLYE & BURROWS, WATERTOWN (ROBERT J. SLYE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered March 3, 2015 in a declaratory judgment action. The judgment declared invalid Town of Alexandria Local Law No. 2 of 2009, Town of Alexandria Local Law No. 2 of 2014 and the August 10, 2011 resolution of the Town Board of Town of Alexandria.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the first through fourth decretal paragraphs and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking a declaration that Local Law No. 2 of 2014 (2014 Law) was invalid; an injunction preventing defendant, Town of Alexandria (Town), from implementing the 2014 Law; and damages for the health insurance costs that they may have incurred as a result of the Town's adoption of the 2014 Law. In its answer, the Town contended that the 2014 Law was invalid and also contended that Local Law No. 2 of 2009 (2009 Law) and a resolution of the Town Board of the Town, dated August 10, 2011 (2011 Resolution), were invalid. The Town thus sought declarations that the 2009 Law, the 2011 Resolution and the 2014 Law were invalid and that certain plaintiffs were not entitled to the healthcare insurance benefits provided by those legislative enactments.

We note at the outset that, as the Town correctly contends, this is properly only a declaratory judgment action in view of the relief sought by plaintiffs and by the Town in its counterclaim (*see Centerville's Concerned Citizens v Town Bd. of Town of Centerville*, 56

AD3d 1129, 1129). Indeed, both plaintiffs and the Town are challenging only the validity of the legislative enactments, and "[i]t is well established that [a CPLR] article 78 proceeding is not the proper vehicle to test the validity of a legislative enactment" (*Kamhi v Town of Yorktown*, 141 AD2d 607, 608, *affd* 74 NY2d 423; *see Centerville's Concerned Citizens*, 56 AD3d at 1129; *see generally Press v County of Monroe*, 50 NY2d 695, 702).

We conclude that Supreme Court erred in using a summary procedure to award judgment on the cause of action and that part of the counterclaim that sought a judgment declaring those legislative enactments invalid (*see Matter of 24 Franklin Ave. R.E. Corp. v Heaship*, 74 AD3d 980, 980-981). It is well established that "separate procedural rules apply" to declaratory judgment actions and CPLR article 78 proceedings and, inasmuch as the cause of action and counterclaim seek declaratory relief, the court "erred in issuing a judgment declaring [that those legislative enactments are] invalid by using a summary procedure that pertains only to CPLR article 78 proceedings" (*id.*; *see Matter of Ballard v New York Safety Track LLC*, 126 AD3d 1073, 1075; *Matter of Greenberg v Assessor of Town of Scarsdale*, 121 AD3d 986, 989-990). "In the absence of a formalized motion requesting the 'summary determination of the causes of action which seek [to recover damages or] declaratory relief, it is error for [a court] to summarily dispose of those causes of action' " (*Ballard*, 126 AD3d at 1075, quoting *Matter of Rosenberg v New York State Off. of Parks, Recreation & Historic Preserv.*, 94 AD3d 1006, 1008).

Given the summary nature of the proceeding, we do not pass on the merits of the parties' contentions, including the contentions concerning severability, which rest in large part on determinations of the legislative intent of the Town Board when it enacted the 2009 Law, the 2011 Resolution and the 2014 Law (*see generally CWM Chem. Servs., L.L.C. v Roth*, 6 NY3d 410, 423; *Matter of Hynes v Tomei*, 92 NY2d 613, 627, *cert denied* 527 US 1015).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

349

CA 15-01561

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

CHRISTOPHER DANN, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

AUBURN POLICE DEPARTMENT, CITY OF AUBURN,
DEFENDANTS-APPELLANTS,
CAYUGA COUNTY DISTRICT ATTORNEY'S OFFICE, AND
COUNTY OF CAYUGA, DEFENDANTS-RESPONDENTS.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (FRANK W. MILLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JARROD W. SMITH, ESQ., P.L.L.C., JORDAN (JARROD W. SMITH OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered February 26, 2015. The order, among other things, granted that part of defendants' motion seeking summary judgment dismissing the complaint against defendants Cayuga County District Attorney's Office and County of Cayuga and denied that part of defendants' motion seeking to dismiss the malicious prosecution cause of action against defendants Auburn Police Department and City of Auburn.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion with respect to the malicious prosecution cause of action in its entirety and dismissing that cause of action against all defendants and as modified the order is affirmed without costs.

Memorandum: In this action by plaintiff to recover damages from two sets of defendants on various theories, defendants Auburn Police Department and the City of Auburn (City defendants) appeal and plaintiff cross-appeals from an order that, inter alia, granted that part of defendants' motion for summary judgment dismissing the cause of action for malicious prosecution only against defendants Cayuga County District Attorney's Office and County of Cayuga (County defendants). We reject plaintiff's contention on his cross appeal that Supreme Court erred in granting the motion to that extent. The County defendants demonstrated their entitlement to judgment as a matter of law based on their prosecutorial immunity, and plaintiff failed to raise a triable question of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The law provides absolute immunity "for conduct of prosecutors that was 'intimately associated

with the judicial phase of the criminal process' " (*Buckley v Fitzsimmons*, 509 US 259, 270, quoting *Imbler v Pachtman*, 424 US 409, 430; *see Kirchner v County of Niagara*, 107 AD3d 1620, 1622), i.e., conduct that involves " 'initiating a prosecution and . . . presenting the State's case' " (*Johnson v Kings County Dist. Attorney's Off.*, 308 AD2d 278, 285, quoting *Imbler*, 424 US at 431; *see Kirchner*, 107 AD3d at 1623). Although prosecutors are afforded only qualified immunity when acting in an investigative capacity (*see Buckley*, 509 US at 275-276; *Kirchner*, 107 AD3d at 1623; *Claude H. v County of Oneida*, 214 AD2d 964, 965), we reject plaintiff's contention that the prosecutor's actions in this case went beyond "the professional evaluation of the evidence assembled by the police," a function that would not deprive the prosecutor of absolute immunity (*Buckley*, 509 US at 273; *cf. Kirchner*, 107 AD3d at 1623-1624).

We conclude, however, that the court erred in denying that part of the motion for summary judgment dismissing the malicious prosecution cause of action against the City defendants as well. The court should have dismissed that cause of action in its entirety, and we modify the order accordingly. The City defendants demonstrated their entitlement to judgment as a matter of law on the issue whether the police had probable cause to charge plaintiff with assault in the second degree, and plaintiff failed to raise a triable issue of fact (*see Zetes v Stephens*, 108 AD3d 1014, 1015-1016; *Lyman v Town of Amherst*, 74 AD3d 1842, 1842; *see generally Broughton v State of New York*, 37 NY2d 451, 457, *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929). That quantum of suspicion was furnished to the police by the sworn statements of the victim and the victim's brother-in-law, was buttressed by the sworn statement of plaintiff himself, and was further supported by the findings made by the police during their prudent and careful investigation into the incident. "In the context of a malicious prosecution cause of action, probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty" (*Zetes*, 108 AD3d at 1015-1016 [internal quotation marks omitted]; *see Colon v City of New York*, 60 NY2d 78, 82, *rearg denied* 61 NY2d 670). " 'Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely [requires] information sufficient to support a reasonable belief that an offense has been or is being committed' by the suspected individual" (*Torres v Jones*, 26 NY3d 742, 759). It is well established that " 'information provided by an identified citizen accusing another of a crime is legally sufficient to provide the police with probable cause to arrest' " (*Lyman*, 74 AD3d at 1843; *see Zetes*, 108 AD3d at 1016). Moreover, where, as here, "a warrant of arrest [has been] issued by a court of competent jurisdiction, there is 'a presumption that the arrest was [made] on probable cause' " (*Chase v Town of Camillus*, 247 AD2d 851, 852, quoting *Broughton*, 37 NY2d at 458; *see Lyman*, 74 AD3d at 1842-1843), and that the accompanying criminal prosecution was likewise based on probable cause. That "presumption of probable cause 'can be overcome only upon a showing of fraud, perjury or the withholding of evidence' " (*Lyman*, 74 AD3d at 1843), none of which is demonstrated by

plaintiff in this case.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

350
CA 15-01147
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

ROSEMARY WHITE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THE DIOCESE OF BUFFALO, NEW YORK,
DEFENDANT-RESPONDENT.

BROWN CHIARI LLP, LANCASTER (ANGELO S. GAMBINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KATIE RENDA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 31, 2015. The order granted the motion of defendant to dismiss the complaint and denied the cross motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she was bitten by a dog owned by a priest at premises owned by Sacred Heart Roman Catholic Church (Sacred Heart). Supreme Court properly granted defendant's motion to dismiss the complaint for failure to state a cause of action (*see* CPLR 3211 [a] [7]). We reject plaintiff's contention that the complaint alleges a theory that defendant was negligent in its retention and/or supervision of the priest assigned to Sacred Heart. Although "[i]t is axiomatic that plaintiff's complaint is to be afforded a liberal construction, that the facts alleged therein are accepted as true, and that plaintiff is to be afforded every possible inference in order to determine whether the facts alleged in the complaint 'fit within any cognizable theory' " (*Palladino v CNY Centro, Inc.*, 70 AD3d 1450, 1451, quoting *Leon v Martinez*, 84 NY2d 83, 87-88), we conclude that the complaint herein " 'gives not the slightest indication of a theory of liability of negligent supervision [or retention]' " (*Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1770, *affd* 16 NY3d 729). Furthermore, to the extent that plaintiff alleged such a theory in her bill of particulars, it is well established that the "purpose of the bill of particulars is to amplify the pleadings . . . , and [it] 'may not be used to supply allegations essential to a cause of action that was not pleaded in the complaint' " (*Paterra v Arc Dev. LLC*, 136 AD3d

474, 475).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

351
CA 15-01004
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

NICHOLAS L. VASSENELLI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, ET AL., DEFENDANTS,
POMCO GROUP, ALSO KNOWN AS POMCO, INC.,
AND SHARON MILLER, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

BOSMAN LAW FIRM, LLC, CANASTOTA (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON, LLP, SYRACUSE (ROBERT A. BARRER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered March 4, 2015. The order granted the motion of defendants POMCO Group, also known as POMCO, Inc., and Sharon Miller to dismiss the amended complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the third and fourth causes of action against defendants POMCO Group, also known as POMCO, Inc., and Sharon Miller, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a disabled and retired police officer, commenced this action seeking damages for injuries he allegedly sustained in connection with the management of his health care benefits pursuant to General Municipal Law § 207-c. In appeal Nos. 1 through 4, plaintiff appeals from four orders that, respectively, granted defendants’ motions seeking to dismiss the amended complaint against them pursuant to, inter alia, CPLR 3211 (a). The order in appeal No. 1 concerns the motion of defendant POMCO Group, also known as POMCO, Inc. (POMCO), and its employee, defendant Sharon Miller (collectively, POMCO defendants); the order in appeal No. 2 concerns defendant City of Syracuse (City) and current and former City officials and employees (collectively, City defendants); the order in appeal No. 3 concerns defendant PMA Management Corp. (PMA) and its employee, defendant Carol Wahl (collectively, PMA defendants); and the order in appeal No. 4 concerns defendant Sharon Eriksson.

POMCO, PMA and Eriksson each contracted with the City to manage plaintiff’s health care services at various times, beginning in August

2009. Plaintiff previously commenced an action in federal court against defendants, with the exception of the PMA defendants and City defendant Sergeant Michael Mourey. That action ended in a judgment that dismissed with prejudice the federal causes of action, but dismissed the pendent state claims without prejudice to refile in a New York State court, and that judgment was affirmed (*Mullen v City of Syracuse*, 582 Fed Appx 58 [2d Cir 2014]). While the federal appeal was pending, plaintiff commenced the instant action asserting causes of action for, inter alia, promissory estoppel, breach of contract, negligence, intentional and negligent infliction of emotional distress, and retaliation and discrimination under the Americans with Disabilities Act (ADA) (42 USC § 1201 *et seq.*) and the Rehabilitation Act of 1973 (29 USC § 701 *et seq.*).

We note that, contrary to defendants' contentions on appeal, Supreme Court properly determined that plaintiff is not barred by collateral estoppel from asserting the state law causes of action inasmuch as they were not " 'actually litigated, squarely addressed and specifically decided' " in the federal action (*Zayatz v Collins*, 48 AD3d 1287, 1290, quoting *Ross v Medical Liab. Mut. Ins. Co.*, 75 NY2d 825, 826). We also reject the contention of the City defendants that, pursuant to CPLR 205 (a), service was not timely made on three of the individual City defendants. CPLR 205 (a) serves to extend the statute of limitations by a period of six months in the event that the statute of limitations has expired during the pendency of a prior action that has been dismissed but has not been terminated (*see Malay v City of Syracuse*, 25 NY3d 323, 327-329). An action is terminated " 'when appeals as of right are exhausted' . . . or, when discretionary appellate review is granted, upon 'final determination' of the discretionary appeal" (*id.* at 328). Here, service on those defendants was made before the prior action was terminated.

We conclude with respect to each of the four appeals that the court erred in granting those parts of the motions seeking dismissal of the third and fourth causes of action, alleging negligence and gross negligence, on the ground that none of the defendants owed a duty to plaintiff. We therefore modify the order in each appeal accordingly. It is axiomatic that, "[w]hen a court rules on a CPLR 3211 motion to dismiss, it 'must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory' . . . The motion may be granted if 'documentary evidence utterly refutes [the] plaintiff[s'] factual allegations' . . . , thereby 'conclusively establishing a defense as a matter of law' " (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63; *see Leon v Martinez*, 84 NY2d 83, 87-88).

Addressing first the motion of the City defendants, we note that plaintiff alleged that the City defendants denied payment for medications and therapy treatments prescribed by his treating physicians, and substituted their judgment for the medical necessity of those medications and therapy treatments for those of his treating

physicians. In addition, plaintiff alleged that the City defendants made determinations regarding who would provide the 24-hour care plaintiff required, and that the City defendants' decisions caused him harm. Accepting these allegations as true (*see Leon*, 84 NY2d at 87-88), we conclude that the amended complaint alleges that the City defendants assumed a duty to plaintiff regarding management of his health care, which it breached, and which caused him injury in the form of declining health. In other words, plaintiff alleged that the actions of the City defendants "placed [him] in a more vulnerable position than [he] would have been in" had the City defendants paid the bills submitted to it from plaintiff's treatment providers as they had prior to August 2009 (*Heard v City of New York*, 82 NY2d 66, 72, *rearg denied* 82 NY2d 889).

With respect to the motions of the POMCO defendants, the PMA defendants and Eriksson, plaintiff alleged that their actions deprived him of appropriate medical care based upon their respective recommendations to the City defendants regarding what constituted appropriate medical care. He further alleged that those defendants failed to provide the requisite 24-hour care, which resulted in plaintiff sustaining injuries from falls and missing medical and therapy appointments.

It is well established that there are situations in which "a party who enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons: [i.e.,] where the contracting party, in failing to exercise reasonable care in the performance of [the party's] duties, 'launche[s] a force or instrument of harm' " (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140), and thereby "creates an unreasonable risk of harm to others, or increases that risk" (*Church v Callanan Indus.*, 99 NY2d 104, 111). Indeed, "[t]his principle recognizes that the duty to avoid harm to others is distinct from the contractual duty of performance" (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 6, *rearg denied* 22 NY3d 1084). Accepting plaintiff's allegations as true (*see Leon*, 84 NY2d at 87-88), we conclude that the amended complaint alleges that those defendants assumed a duty of care to plaintiff and that, in failing to exercise reasonable care in the performance of their duties, they increased the risk of harm to plaintiff. We note that, contrary to the contention of the PMA defendants, their contract with the City does not bar this action. By the plain terms of that contract, PMA did not contract to administer section 207-c benefits for disabled police officers but, instead, contracted to administer workers' compensation benefits and section 207-a benefits for disabled firefighters.

We further conclude that, although the court properly dismissed the remaining causes of action against the POMCO defendants, the PMA defendants and Eriksson, the court erred in granting those parts of the motion of the City defendants with respect to the first, second and 8th through 12th causes of action. We therefore further modify the order in appeal No. 2 accordingly.

With respect to the first cause of action, for promissory estoppel, we note that the elements of that cause of action are "a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise" (*Zuly v Elizabeth Wende Breast Care, LLC,* 126 AD3d 1460, 1461, *amended on rearg* 129 AD3d 1558 [internal quotation marks omitted]). Plaintiff alleged that, based on his reliance on the City defendants' payment for services and medications prior to August 2009, he failed to apply for Medicare Part B benefits when he became eligible to do so, thereby requiring the payment of significant penalties. Although "[a]s a general rule, estoppel may not be invoked against a governmental body to prevent it from performing its statutory duty or from rectifying an administrative error . . . [, a]n exception to the general rule is 'where a governmental subdivision acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his [or her] position to his [or her] detriment or prejudice' " (*Agress v Clarkstown Cent. Sch. Dist.*, 69 AD3d 769, 771). Accepting plaintiff's allegations as true (*see Leon*, 84 NY2d at 87-88), we conclude that the amended complaint alleges a cause of action for promissory estoppel against the City defendants.

With respect to the second cause of action, for breach of contract, we conclude that the City defendants failed to meet their burden in support of that part of their motion. Because the City defendants failed to provide a copy of the relevant collective bargaining agreement (CBA), they failed to refute plaintiff's allegations that he has a vested right to health benefits pursuant to section 207-c (*see Kolbe v Tibbetts*, 22 NY3d 344, 353), and that the City defendants violated the CBA by reducing his health benefits (*see generally Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326-327).

With respect to the 8th through 12th causes of action, for retaliation pursuant to the ADA and the Rehabilitation Act, it is undisputed that the causes of action alleging retaliation were dismissed with prejudice in the federal action. In his amended complaint, however, plaintiff alleges violations of those Acts based upon conduct that was not alleged as part of the federal action. In fact, the conduct is alleged to have occurred during the pendency of the appeal from the District Court's judgment on August 5, 2013, i.e., from April 2014 through August 2014, well after the conduct alleged in the complaint in the federal action. Thus, we agree with plaintiff that the court erred in determining that those causes of action are barred by collateral estoppel (*see Zayatz*, 48 AD3d at 1289-1290).

We reject plaintiff's contention that the court erred in granting the motion of the City defendants with respect to the seventh cause of action insofar as it alleges intentional infliction of emotional distress against the City defendants. The allegations contained in the complaint " 'fall far short' " of the requisite extreme and outrageous behavior necessary for a cause of action alleging intentional infliction of emotional distress (*Gilewicz v Buffalo Gen. Psychiatric Unit*, 118 AD3d 1298, 1299-1300). Finally, by failing to

raise on appeal any contention with respect to the remaining causes of action or claims alleged in the amended complaint, plaintiff has abandoned any such contentions (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

352
CA 15-01150
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

NICHOLAS L. VASSENELLI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, STEPHANIE A. MINER, IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS MAYOR OF CITY OF SYRACUSE, FRANK L. FOWLER, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS CHIEF OF POLICE FOR CITY OF SYRACUSE, JUDY CULETON, IN HER INDIVIDUAL CAPACITY AS FORMER DIRECTOR OF HUMAN RESOURCES DIVISION OF SYRACUSE POLICE DEPARTMENT, MATTHEW DRISCOLL, IN HIS INDIVIDUAL CAPACITY AS FORMER MAYOR OF CITY OF SYRACUSE, GARY MIGUEL, IN HIS INDIVIDUAL CAPACITY AS FORMER CHIEF OF POLICE FOR CITY OF SYRACUSE, SERGEANT RICHARD PERRIN, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, DAVID BARRETTE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS A DEPUTY CHIEF OF CITY OF SYRACUSE POLICE DEPARTMENT, SERGEANT MICHAEL MOUREY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS THE EMPLOYEE IN CHARGE OF THE MEDICAL SECTION OF CITY OF SYRACUSE POLICE DEPARTMENT, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

BOSMAN LAW FIRM, LLC, CANASTOTA (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COUGHLIN & GERHART, LLP, BINGHAMTON (MARY LOUISE CONROW OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered March 4, 2015. The order granted the motion of defendants-respondents to dismiss the amended complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the 1st through 4th and 8th through 12th causes of action against defendant City of Syracuse and the individual City of Syracuse defendants, and as modified the order is affirmed without costs.

Same memorandum as in *Vassenelli v City of Syracuse* ([appeal No.

1] ___ AD3d ___ [Apr. 29, 2016]).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

353
CA 15-01151
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

NICHOLAS L. VASSENELLI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, ET AL., DEFENDANTS,
PMA MANAGEMENT CORP., AND CAROL WAHL,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 3.)

BOSMAN LAW FIRM, LLC, CANASTOTA (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH MAZURE DIRECTOR WILKINS YOUNG & YAGERMAN, P.C., NEW YORK CITY (DANIEL Y. SOHNEN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered March 4, 2015. The order granted the motion of defendants PMA Management Corp. and Carol Wahl to dismiss the amended complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the third and fourth causes of action against defendants PMA Management Corp. and Carol Wahl, and as modified the order is affirmed without costs.

Same memorandum as in *Vassenelli v City of Syracuse* ([appeal No. 1] ___ AD3d ___ [Apr. 29, 2016]).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

354
CA 15-01153
PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

NICHOLAS L. VASSENELLI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, ET AL., DEFENDANTS,
AND SHARON ERIKSSON, DEFENDANT-RESPONDENT.
(APPEAL NO. 4.)

BOSMAN LAW FIRM, LLC, CANASTOTA (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF BRADY & CARAFA, SYRACUSE (THOMAS P. CARAFA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered March 4, 2015. The order granted the motion of defendant Sharon Eriksson to dismiss the amended complaint against her.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the third and fourth causes of action against defendant Sharon Eriksson, and as modified the order is affirmed without costs.

Same memorandum as in *Vassenelli v City of Syracuse* ([appeal No. 1] ___ AD3d ___ [Apr. 29, 2016]).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

355

KA 14-00797

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CURTIS L. GAINEY, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (John L. DeMarco, J.), entered March 14, 2014. The order determined that defendant is a level one risk pursuant to the Sex Offender Registration Act. The appeal was held by this Court by order entered July 2, 2015, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (130 AD3d 1504). The proceedings were held and completed.

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

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

356
TP 15-01013
PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF KATHLEEN M. GORDON, PETITIONER,

V   MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION AND NEW YORK STATE DIVISION OF HUMAN RIGHTS, RESPONDENTS.

KATHLEEN M. GORDON, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENT NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX, FOR RESPONDENT NEW YORK STATE DIVISION OF HUMAN RIGHTS.

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, Orleans County [James P. Punch, A.J.], dated June 4, 2015) to review a determination of respondent New York State Division of Human Rights. The determination dismissed the complaint of petitioner alleging unlawful discrimination and a hostile work environment.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 and Executive Law § 298 seeking to annul the determination of respondent New York State Division of Human Rights (SDHR), after a hearing, dismissing her complaint alleging unlawful discrimination and a hostile work environment. Petitioner is a correction officer with respondent New York State Department of Corrections and Community Supervision (DOCCS). We conclude that SDHR's determination is supported by substantial evidence and thus must be confirmed (*see generally Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106). "To establish a prima facie case of employment discrimination, petitioner was required to demonstrate that she was a member of a protected class, that she was qualified for her position, that she was terminated from employment or suffered another adverse employment action, and that the termination or other adverse action 'occurred under circumstances giving rise to an inference of discriminatory motive' " (*Matter of Lyons v New York State Div. of*

Human Rights, 79 AD3d 1826, 1827, *lv denied* 17 NY3d 707, quoting *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 306). Here, SDHR's determination that petitioner was not subjected to adverse employment action is supported by substantial evidence. Any change in petitioner's assigned posts at the workplace did not constitute "a materially adverse change in the terms and conditions of employment" (*Forrest*, 3 NY3d at 306; *see Ponterio v Kaye*, 25 AD3d 865, 869, *lv denied* 6 NY3d 714). With respect to the formal counseling that petitioner received with regard to an incident, petitioner admitted that it did not constitute a form of discipline. In any event, petitioner failed to demonstrate that any allegedly adverse employment actions "occurred under circumstances giving rise to an inference of discrimination" (*Forrest*, 3 NY3d at 308; *see Matter of Jackson v Buffalo Mun. Hous. Auth.*, 81 AD3d 1271, 1272).

We further conclude that SDHR's dismissal of petitioner's claim of a hostile work environment is supported by substantial evidence (*see Matter of Ozolins v New York State Dept. of Correctional Servs.*, 78 AD3d 1591, 1591). "Under the Human Rights Law, an 'employer cannot be held liable for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it' " (*Matter of New York State Div. of Human Rights v ABS Elecs., Inc.*, 102 AD3d 967, 968, *lv denied* 24 NY3d 901, quoting *Matter of Totem Taxi v New York State Human Rights Appeal Bd.*, 65 NY2d 300, 305, *rearg denied* 65 NY2d 1054; *see Vitale v Rosina Food Prods.*, 283 AD2d 141, 143). Here, petitioner failed to establish that DOCCS became a party to any discriminatory act. Rather, the record establishes that DOCCS "reasonably investigated complaints of discriminatory conduct and took corrective action" (*Vitale*, 283 AD2d at 143).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

357
KA 15-00649
PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM I. WALTER, DEFENDANT-APPELLANT.

KARPINSKI, STAPLETON & TEHAN, P.C., AUBURN (ADAM H. VANBUSKIRK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered February 5, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the third degree (Penal Law §§ 110.00, 140.20). Insofar as defendant contends that he was denied his right to a speedy trial pursuant to CPL 30.30, we note that, " '[w]hen defendant entered a plea of guilty[,] he forfeited his right to claim that he was deprived of a speedy trial under' " that statute (*People v Schillawski*, 124 AD3d 1372, 1372-1373, *lv denied* 25 NY3d 1207, quoting *People v O'Brien*, 56 NY2d 1009, 1010; *see People v Paduano*, 84 AD3d 1730, 1730).

Furthermore, "[a]lthough defendant's contention that he was deprived of his constitutional right to a speedy trial survives his plea of guilty" (*Schillawski*, 124 AD3d at 1373), we also note that, in his pro se motion, " 'defendant moved to dismiss the indictment on statutory speedy trial grounds only and thus failed to preserve for our review his present contention that he was denied his constitutional right to a speedy trial' " (*id.*; *see People v Weeks*, 272 AD2d 983, 983, *lv denied* 95 NY2d 872). In any event, defendant's contention is without merit. Upon our review of the record in light of the relevant factors (*see People v Taranovich*, 37 NY2d 442, 445), we conclude that those factors would have compelled denial of a motion based on defendant's constitutional right to a speedy trial, and we note in particular that " 'there [was] a complete lack of any evidence that the defense was impaired by reason of the delay' " (*Schillawski*,

124 AD3d at 1373; *see People v Benjamin*, 296 AD2d 666, 667).

Finally, defendant contends that he was denied effective assistance of counsel as a result of defense counsel's failure to make a motion to dismiss the indictment based on the denial of his statutory right to a speedy trial (*see* CPL 30.30 [1] [a]). Defendant's contention is "foreclosed by his plea of guilty because he failed to allege that the plea bargaining process was infected by [the] allegedly ineffective assistance or that [he] entered the plea because of his attorney's allegedly poor performance" (*People v Nieves-Rojas*, 126 AD3d 1373, 1373 [internal quotation marks omitted]; *see People v Wright*, 66 AD3d 1334, 1334, *lv denied* 13 NY3d 912; *see also People v Gleen*, 73 AD3d 1443, 1444, *lv denied* 15 NY3d 773). In any event, we note that the record on appeal is inadequate to enable us to determine whether such a motion would have been successful and whether defense counsel was ineffective for failing to make that motion and thus, defendant's contention must be raised by way of a motion pursuant to CPL article 440 (*see People v Youngs*, 101 AD3d 1589, 1589, *lv denied* 20 NY3d 1105; *Paduano*, 84 AD3d at 1731).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

358

KA 13-01938

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC L. RICHARDSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Ronald H. Tills, A.J.), rendered December 23, 2005. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]), and in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of a separate charge of burglary in the second degree (§ 140.25 [2]). Contrary to the contention of defendant in both appeals, his waiver of the right to appeal was knowingly, voluntarily and intelligently entered (*see generally People v Lopez*, 6 NY3d 248, 256). We conclude, however, that the valid waiver of the right to appeal does not encompass the challenge to the severity of the sentence in each appeal inasmuch as Supreme Court failed to advise defendant "that he was also waiving his right to appeal the harshness of his sentence" (*People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076; *see People v Peterson*, 111 AD3d 1412, 1412). Nevertheless, on the merits, we conclude that the sentence in each appeal is not unduly harsh or severe.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

359
KA 13-01760
PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC L. RICHARDSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Ronald H. Tills, A.J.), rendered December 23, 2005. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Same memorandum as in *People v Richardson* ([appeal No. 1] ___ AD3d ___ [Apr. 29, 2016]).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

360
KA 15-00061
PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — ORDER

CHRIS J. SHERLOCK, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (ELIZABETH N. ENSELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered November 24, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree and criminal contempt in the first degree.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Griffin*, 239 AD2d 936, 936).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

361
KA 15-00209
PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EVAN WELCHER, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered May 22, 2014. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the third degree (Penal Law § 130.25 [1]). Prior to his plea, defendant was tried on an indictment charging him with one count of rape in the first degree (§ 130.35 [2]), but the trial ended when County Court declared a mistrial over defendant's objection upon its determination that the jury was deadlocked. As a preliminary matter, we agree with defendant that the record does not establish that the waiver of the right to appeal was knowing, voluntary and intelligent (*see People v Lopez*, 6 NY3d 248, 256). The court, while advising defendant of the consequences of the plea, merely noted that "there is a waiver of appeal by you, both as to conviction and sentence." Although defendant signed a written waiver of the right to appeal, "a written waiver does not, standing alone, provide sufficient assurances that the defendant is knowingly, intelligently and voluntarily giving up his or her right to appeal" as a condition of the plea agreement (*People v Banks*, 125 AD3d 1276, 1277, *lv denied* 25 NY3d 1159 [internal quotation marks omitted]). Here, "the record establishes that [the c]ourt did not sufficiently explain the significance of the appeal waiver or ascertain defendant's understanding thereof" (*id.*; *cf. People v Ramos*, 7 NY3d 737, 738).

We nevertheless reject defendant's contention that the court abused its discretion in declaring a mistrial and, thus, that the subsequent prosecution was barred by double jeopardy. It is well

established that the determination whether to grant a mistrial when the jury is deadlocked is "entitled to 'great deference' " (*People v Hardy*, 26 NY3d 245, 252). A retrial is barred by double jeopardy, however, "unless there was 'manifest necessity' for the mistrial" (*People v Ferguson*, 67 NY2d 383, 388). Here, the court properly considered "the length and complexity of the trial, the length of the deliberations, the extent and nature of communications between the court and the jury, and the potential effects of requiring further deliberation" (*Matter of Plummer v Rothwax*, 63 NY2d 243, 251; *see Rivera v Firetog*, 11 NY3d 501, 507, *cert denied* 556 US 1193). The court noted that this was a single-count indictment; that the jury had deliberated for 12 hours over three days; and that the jury had indicated in notes to the court on two occasions prior to the final note that it was not able to reach a unanimous verdict. The court questioned the foreperson, who advised the court that further deliberations would be fruitless, and each member of the jury agreed with the foreperson's statements. We therefore conclude that the determination by the court that the jury was deadlocked constituted a manifest necessity for a mistrial, and thus that the subsequent prosecution was not barred by double jeopardy (*see People v Duda*, 45 AD3d 1464, 1465, *lv denied* 10 NY3d 764).

We reject defendant's further contention that the subsequent prosecution was barred by double jeopardy on the ground that the evidence at trial was legally insufficient on the issue whether the victim was "unconscious." Defendant correctly states that, in response to his demand for a bill of particulars, the People limited the theory of proof on the element of physical helplessness to evidence that the victim was "unconscious." As a preliminary matter, we note that, because defendant did not explicitly waive his constitutional double jeopardy claim as a condition of his plea (*see People v Allen*, 86 NY2d 599, 603), he did not waive his contention by pleading guilty (*see People v Prescott*, 66 NY2d 216, 220-221, *cert denied* 475 US 1150). We further note that, for purposes of double jeopardy analysis, rape in the third degree (Penal Law § 130.25 [1]) is the same offense as rape in the first degree (§ 130.35 [2]) (*see People v Biggs*, 1 NY3d 225, 229-230). We nevertheless conclude that, when viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), it is legally sufficient to establish that the victim was unconscious (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant was observed having sexual intercourse with the victim in a backyard during a house party. The victim was not moving and was not responsive to the witnesses who were speaking loudly to her and defendant. The victim required assistance after the witnesses removed defendant from the victim and, although she spoke briefly to one of the witnesses who intervened on her behalf, she had no memory of the incident. Laboratory test results established that the victim's urine was positive for GHB, i.e., gamma hydroxybutyrate, which a forensic toxicologist testified is a central nervous system depressant that may cause a deep state of unconsciousness. We therefore conclude that the evidence was legally sufficient to establish that the victim was unconscious and, therefore, physically helpless (*see People v Yontz*, 116 AD3d 1242,

1242-1243, *lv denied* 23 NY3d 1026; *People v Willard*, 38 AD3d 924, 925).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

362
KA 13-01846
PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM TERRY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered April 18, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the finding that defendant is a second violent felony offender and replacing it with a finding that he is a predicate felony sex offender and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted sexual abuse in the first degree (Penal Law §§ 110.00, 130.65 [3]). We agree with defendant that he did not validly waive his right to appeal because, "[a]lthough the record establishes that defendant executed a written waiver of the right to appeal, there was no colloquy between [Supreme] Court and defendant regarding the waiver of the right to appeal to ensure that it was knowingly, voluntarily and intelligently entered" (*People v Carno*, 101 AD3d 1663, 1664, *lv denied* 20 NY3d 1060). Contrary to the People's contention, the fact that the written waiver stated that defendant "waive[d] . . . [his] right to have the court explain on the record . . . [his] right to appeal and the significance of [his] waiver of appeal" does not compel a different result. " '[A] written waiver does not, standing alone, provide sufficient assurance that the defendant is knowingly, intelligently and voluntarily giving up his right to appeal' " (*People v Banks*, 125 AD3d 1276, 1277, *lv denied* 25 NY3d 1159; *see People v Bradshaw*, 18 NY3d 257, 264-265; *People v Callahan*, 80 NY2d 273, 283).

Defendant contends that the court erred in imposing a supplemental sex offender victim fee because he was not convicted of

an offense contained in article 130 of the Penal Law, but instead was convicted of an attempt to commit such an offense (*see* § 60.35 [1] [b]). Defendant failed to preserve that issue for our review (*see generally People v Arnold*, 107 AD3d 1526, 1528, *lv denied* 22 NY3d 953; *People v Cooper*, 77 AD3d 1417, 1419, *lv denied* 16 NY3d 742), 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]). We reject defendant's alternative contention that the fee should be vacated on the ground that defense counsel's failure to object to the fee constituted ineffective assistance of counsel. Defendant's contention "does not survive his guilty plea because [t]here is no showing that the plea bargaining process was infected by any allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance" (*People v Abdulla*, 98 AD3d 1253, 1254 [internal quotation marks omitted], *lv denied* 20 NY3d 985).

The court sentenced defendant as a second violent felony offender to a determinate term of incarceration of 4 years with 5 years of postrelease supervision. Inasmuch as attempted sexual abuse in the first degree is not a violent felony (*see* Penal Law § 70.02 [1] [d]), we modify the judgment by adjudicating defendant a predicate felony sex offender (*see* § 70.80 [1] [c]; *People v Flores*, 135 AD3d 415, 415; *People v Garcia*, 29 AD3d 255, 264, *lv denied* 7 NY3d 789). Although that issue was not raised by the parties, we cannot allow an illegal sentence to stand (*see People v Hughes*, 112 AD3d 1380, 1381, *lv denied* 23 NY3d 1038; *People v Perrin*, 94 AD3d 1551, 1551). The maximum term of incarceration is four years for both a second violent felony offender (§ 70.04 [2], [3] [d]) and a predicate felony sex offender with a violent predicate felony offense (§ 70.80 [1] [c]; [5] [c]), and we therefore see no reason to remit for resentencing (*see Hughes*, 112 AD3d at 1381; *Perrin*, 94 AD3d at 1551; *People v Terry*, 90 AD3d 1571, 1571-1572; *cf. People v Donhauser* [appeal No. 2], 37 AD3d 1053, 1054). The sentence is not unduly harsh or severe. Although defendant received the maximum period of incarceration, he was sentenced to the minimum period of postrelease supervision, which could have been as much as 15 years (§ 70.45 [2-a] [g]). In light of defendant's significant history of convictions of sex offenses, we see no reason to reduce the sentence.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

363
KA 14-00938
PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL TILLMAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered May 7, 2013. The judgment convicted defendant, upon his plea of guilty, 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 upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [2]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

364
KA 14-00704
PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRADY J. DEMICK, DEFENDANT-APPELLANT.

ARZA FELDMAN, UNIONDALE, FOR DEFENDANT-APPELLANT.

KEITH A. SLEP, DISTRICT ATTORNEY, BELMONT, FOR RESPONDENT.

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered September 30, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). Defendant contends that County Court induced his plea with a promise of granting a “violent felony override,” a promise which defendant maintains the court lacked authority to make (*see People v Ballato*, 128 AD3d 846, 847). Contrary to defendant’s contention, however, the record establishes that “neither [his] eligibility for the shock incarceration program . . . , nor his ultimate admission to that program was a condition of the plea” (*People v Williams*, 84 AD3d 1417, 1418, *lv denied* 17 NY3d 863).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

367

KA 05-02660

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE GOMEZ, ALSO KNOWN AS JIM RAY, ALSO KNOWN AS BOLO, DEFENDANT-APPELLANT.

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

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered November 16, 2005. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, attempted assault in the second degree, assault in the second degree, criminal possession of a weapon in the third degree, criminal mischief in the fourth degree, petit larceny and tampering with physical evidence.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on counts 2, 5, and 8 through 11 of the indictment, and count 1 of the indictment is dismissed without prejudice to the People to re-present any appropriate charge under that count of the indictment to another grand jury.

Memorandum: On a prior appeal, we affirmed the judgment convicting defendant upon a jury verdict of, inter alia, attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [1]) and assault in the second degree (§ 120.05 [2]) (*People v Gomez*, 38 AD3d 1271). We subsequently granted defendant's motion for a writ of error coram nobis on the ground that appellate counsel had failed to raise an issue that may have merit, i.e., whether County Court placed on the record a reasonable basis for restraining defendant before the jury (*People v Gomez*, 122 AD3d 1345), and we vacated our prior order. We now consider the appeal de novo.

We agree with defendant that the court erred in failing to make any findings on the record establishing that defendant needed to wear a stun belt during the trial (*see People v Buchanan*, 13 NY3d 1, 4). Contrary to the People's contention, harmless error analysis is not applicable (*see People v Schrock*, 99 AD3d 1196, 1197). We therefore

reverse the judgment and grant a new trial on counts 2, 5, and 8 through 11 of the indictment, and we dismiss count 1 of the indictment without prejudice to the People to re-present any appropriate charge under that count of the indictment to another grand jury.

We further agree with defendant that a new trial is required based on the court's failure to comply with CPL 310.30 in regard to Court Exhibit 11, a note from the jury during its deliberations. "[T]he '[c]ourt committed reversible error by violating the core requirements of CPL 310.30 in failing to advise counsel on the record of the contents of a substantive jury note before accepting a verdict' " (*People v Brink*, 134 AD3d 1390, 1391; *see People v Kisoon*, 8 NY3d 129, 134-135; *People v Garrow*, 126 AD3d 1362, 1363). Furthermore, "[w]here, as here, 'the record fails to show that defense counsel was apprised of the specific, substantive contents of the note . . . [,] preservation is not required' " (*Brink*, 134 AD3d at 1391, quoting *People v Walston*, 23 NY3d 986, 990). Contrary to the People's contention, the presumption of regularity does not apply to errors of this kind (*see People v Silva*, 24 NY3d 294, 299-300, *rearg denied* 24 NY3d 1216).

Defendant failed to preserve for our review his contention that the conviction of attempted assault in the second degree is based on legally insufficient evidence (*see People v Gray*, 86 NY2d 10, 19) and, in any event, we conclude that it is without merit. The fact that defendant's codefendant was convicted of attempted murder in the second degree and defendant was acquitted of that count but convicted of the lesser included offense of attempted assault in the second degree "does not undermine the inference of accessorial liability" (*People v Dedaj*, 303 AD2d 285, 285, *lv denied* 100 NY2d 580). Viewing the evidence in light of the elements of attempted assault in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict with respect to that count is against the weight of the evidence (*see People v Thomas*, 5 AD3d 305, 307, *lv denied* 2 NY3d 807; *see generally People v Bleakley*, 69 NY2d 490, 495).

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

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

373
CA 15-01415
PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

DONALD J. GARVIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EDWARD C. WOJCIK, JR., DEFENDANT-RESPONDENT.

CHIACCHIA & FLEMING, LLP, HAMBURG (DANIEL J. CHIACCHIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered April 21, 2015 in a personal injury action. The order granted defendant's motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while cutting down a tree on defendant's property. Plaintiff and a third party volunteered to help defendant remove trees from his property. Defendant told the parties which direction a certain tree needed to fall, and the parties decided to delimb the tree first. Using his own chainsaw and defendant's ladder, plaintiff started removing branches from the tree. Defendant positioned the ladder after each branch was removed. Plaintiff had cut almost all the way through one particular branch and commented to defendant and the third party, who were standing on the ground, that the branch was not sagging as he had expected it would. Plaintiff testified that either defendant or the third party or both told him to "just cut it." Plaintiff continued cutting, and then the branch suddenly swung toward him and struck the ladder, causing him to fall to the ground and sustain injuries.

Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint. It is well settled that a landowner owes those on his property a duty of "reasonable care under the circumstances" (*Basso v Miller*, 40 NY2d 233, 241). Here, plaintiff was not injured owing to an unsafe condition on the property, but rather he was injured as "the direct result of the manner in which [he] engaged in a voluntary activity" on the property

(*Jarvis v Eastman*, 202 AD2d 826, 827; *see Macey v Truman*, 70 NY2d 918, 919, *mot to amend remittitur granted* 71 NY2d 949). In support of his motion, defendant failed to establish as a matter of law that his participation in the injury-producing activity was not causally related to the accident (*see Lichtenthal v St. Mary's Church*, 166 AD2d 873, 875; *cf. Macey*, 70 NY2d at 919-920; *Jones v County of Erie*, 121 AD3d 1562, 1562-1563).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

374
CA 15-01179
PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

MICHAEL C. TERRANOVA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PATRICIA TERRANOVA, DEFENDANT-APPELLANT.

VENZON LAW FIRM PC, BUFFALO (CATHARINE M. VENZON OF COUNSEL), FOR DEFENDANT-APPELLANT.

COHEN & LOMBARDO, P.C., BUFFALO (ANDRES D. ORTIZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered October 14, 2014 in a divorce action. The order determined that each party is responsible for his or her own counsel fees.

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

Memorandum: As part of the settlement by stipulation of this matrimonial action, the parties agreed to waive a hearing and to submit their counsel fee applications on a quantum meruit basis. Supreme Court denied both applications, and defendant appeals. We affirm.

"The award of reasonable counsel fees is a matter within the sound discretion of the trial court" (*Decker v Decker*, 91 AD3d 1291, 1291 [internal quotation marks omitted]; *see Dellafiora v Dellafiora*, 54 AD3d 715, 716). "[S]uch awards are intended 'to redress the economic disparity between the monied spouse and the non-monied spouse' " (*Decker*, 91 AD3d at 1291, quoting *O'Shea v O'Shea*, 93 NY2d 187, 190). "In exercising its discretion to award such fees, a court may consider all of the circumstances of a given case, including the financial circumstances of both parties, the relative merit of the parties' positions . . . , the existence of any dilatory or obstructionist conduct . . . , and the time, effort and skill required of counsel" (*Decker*, 91 AD3d at 1291 [internal quotation marks omitted]; *see Blake v Blake* [appeal No. 1], 83 AD3d 1509, 1509).

We conclude that the court providently exercised its discretion in declining to award counsel fees to defendant. The court determined that "both parties were dilatory in the prosecution and ultimate resolution of this matter, and each incurred fees unnecessarily" and,

therefore, found the parties to be equally at fault. "In that regard, we afford great deference to the trial court, which presided over the case from its inception and is more familiar with the parties' positions during settlement negotiations" (*Decker*, 91 AD3d at 1292). "We therefore cannot agree with defendant that the record clearly establishes that plaintiff is more at fault for engaging in obstructionist tactics that led to increased counsel fees" (*id.*).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

375
CA 15-00795
PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND SCUDDER, JJ.

MICHAEL G. MITCHELL, PLAINTIFF,

V MEMORANDUM AND ORDER

CALIN OLAR, COLD SPRING CONSTRUCTION COMPANY,
DEFENDANTS-RESPONDENTS,
ANTHONY M. CRISAFULLI, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

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

BURDEN, GULISANO & HANSEN, LLC, BUFFALO (SARAH HANSEN OF COUNSEL), FOR DEFENDANT-RESPONDENT CALIN OLAR.

CARTAFALSA, SLATTERY, TURPIN & LENOFF, BUFFALO (BRIAN MINEHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT COLD SPRING CONSTRUCTION COMPANY.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered August 21, 2014. The order, insofar as appealed from, granted the motions of defendants Calin Olar and Cold Spring Construction Company seeking to dismiss the cross claim of defendant Anthony M. Crisafulli.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motions of defendants Calin Olar and Cold Spring Construction Company are denied, and the cross claim of defendant Anthony M. Crisafulli is reinstated.

Memorandum: Plaintiff commenced this action seeking damages for personal injuries he sustained in a motor vehicle accident that occurred on October 6, 2010. In his complaint, plaintiff alleged that the accident occurred near a construction site where work was being performed by defendant Cold Spring Construction Company (Cold Spring). Plaintiff further alleged that a Cold Spring employee was directing traffic at the construction site when a vehicle owned and operated by defendant Calin Olar collided with a vehicle owned by defendant Anthony M. Crisafulli, which then collided with a vehicle operated by plaintiff. Plaintiff alleged that his injuries were caused by, inter alia, the negligence of Cold Spring, Olar, and Crisafulli. Crisafulli's answer included a cross claim against Cold Spring and Olar seeking to recover property damages for the destruction of Crisafulli's vehicle. Supreme Court granted the motions of Cold Spring and Olar seeking to dismiss the cross claim on the ground that

the statute of limitations had expired.

We agree with Crisafulli that the court erred in granting the motions of Cold Spring and Olar. Plaintiff commenced the underlying action on September 20, 2013 by filing the complaint (*see* CPLR 203 [c]), which was before the three-year statute of limitations for Crisafulli's property damage claim expired on October 6, 2013 (*see* CPLR 214 [4]). CPLR 203 (d) provides that "[a] defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed." That section applies to cross claims as well as to counterclaims (*see Long v Sowande*, 27 AD3d 247, 248). Thus, although Crisafulli did not answer the complaint until after the limitations period had expired, we conclude that "[t]he cross claim was not barred by the [s]tatute of [l]imitations as that claim was viable at the time the underlying action was commenced" (*Sievert v Morlef Holding Co.*, 220 AD2d 403, 404; *see* CPLR 203 [d]; *Colichio v Bailey*, 77 AD2d 694, 694). Moreover, because Crisafulli's cross claim was viable at the time the underlying action was commenced, there is no need to consider whether the cross claim arose out of the same transaction or occurrence as the claim asserted in the complaint (*see* CPLR 203 [d]; *see generally Bloomfield v Bloomfield*, 97 NY2d 188, 193; *Colichio*, 77 AD2d at 694). Indeed, the cross claim is "recoverable in full . . . regardless of whether it is related to the transaction or occurrence underlying plaintiff's claim" (Vincent C. Alexander, Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C203:9, 2016 Pocket Part at 79; *cf. Harrington v Gage*, 43 AD3d 1393, 1394-1395, *lv dismissed* 10 NY3d 789, *lv denied* 11 NY3d 711; *Town of Amherst v County of Erie*, 247 AD2d 869, 869-870).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

378

CA 14-01928

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

AFTERMATH RESTORATION, INC., PLAINTIFF,

V ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
ALBERT F. STAGER, INC., DEFENDANTS-RESPONDENTS,
AND DAVID DALE, DEFENDANT-APPELLANT.

DAVID DALE, DEFENDANT-APPELLANT PRO SE.

BURGIO, KITA, CURVIN & BANKER, BUFFALO (STEVEN P. CURVIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Diane Y. Devlin, J.), dated June 23, 2014. The judgment denied the motion of defendant David Dale for summary judgment, granted the cross motion of defendants New York Central Mutual Fire Insurance Company and Albert F. Stager, Inc. for summary judgment and declared that New York Central Mutual Fire Insurance Company is not obligated to defend David Dale.

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

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

383
TP 15-01552
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF DAWN M., PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE
AND MALTREATMENT, RESPONDENT.

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [John A. Michalek, J.], entered July 31, 2015) to review a determination of respondent. The determination, inter alia, denied petitioner's request to amend an indicated report of maltreatment with respect to her granddaughters to an unfounded report, and to seal it.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding to review a determination made after a fair hearing that, inter alia, denied her request to amend an indicated report of maltreatment with respect to her granddaughters to an unfounded report, and to seal it (*see* Social Services Law § 422 [8] [a] [v]; [c] [ii]). Contrary to petitioner's contention, we have repeatedly held that it is not " 'improper for the fact-finding determination to be made by a person who did not preside at the . . . hearing' . . . [,] and petitioner was not deprived of due process thereby" (*Matter of Pluta v New York State Off. of Children & Family Servs.*, 17 AD3d 1126, 1127, *lv denied* 5 NY3d 715; *see e.g. Matter of Sarkis v Monroe County Dept. of Human Servs.*, 133 AD3d 1344, 1344).

We reject petitioner's further contention that the Erie County Department of Social Services, CPS Unit (DSS) failed to sustain its burden at the fair hearing of establishing that petitioner committed an act of maltreatment and that such maltreatment was relevant and reasonably related to childcare employment. "It is well established that our review is limited to whether the determination to deny the request to amend and seal the [indicated] report is supported by substantial evidence in the record" (*Matter of Kordasiewicz v Erie*

County Dept. of Social Servs., 119 AD3d 1425, 1426; *see Matter of Mangus v Niagara County Dept. of Social Servs.*, 68 AD3d 1774, 1774, *lv denied* 15 NY3d 705). Substantial evidence is " 'such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact' . . . [, and] hearsay evidence alone, if it is sufficiently reliable and probative, may constitute sufficient evidence to support a determination" (*Kordasiewicz*, 119 AD3d at 1426, quoting *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180; *see Matter of Hattie G. v Monroe County Dept. of Social Servs., Children's Servs. Unit*, 48 AD3d 1292, 1293). "To establish maltreatment, the agency was required to show by a fair preponderance of the evidence that the physical, mental or emotional condition of the child[ren] had been impaired or was in imminent danger of becoming impaired because of a failure by petitioner to exercise a minimum degree of care in providing the child[ren] with appropriate supervision or guardianship" (*Matter of Gerald HH. v Carrion*, 130 AD3d 1174, 1175; *see* Social Services Law § 412 [2] [a]; Family Ct Act § 1012 [f] [i] [B]; 18 NYCRR 432.1 [b] [1] [ii]; *Matter of Brian M. v New York State Off. of Children & Family Servs.*, 98 AD3d 743, 743).

The evidence at the hearing established that petitioner's granddaughters had been sexually abused by the son of petitioner's boyfriend. "[B]ecause the girls were so uncomfortable with [petitioner's boyfriend] being in the home or being around," it was part of the girls' treatment plan that petitioner's boyfriend reside in a "separate houshold[]." Nevertheless, it was undisputed at the hearing that petitioner allowed her boyfriend to perform a "technique" that the family called "Cloud 9." That "technique" involved petitioner's boyfriend running his hands up and down the sides of the girls' bodies, and there was evidence at the hearing that the girls told petitioner that it made them "uncomfortable" and did not want it to continue. The fact that the girls may have recanted other allegations made against petitioner and her boyfriend raised issues of credibility for the factfinder (*see Matter of Mary P. v Helfer*, 17 AD3d 1013, 1014, *amended on rearg on other grounds* 20 AD3d 943), and the factfinder's assessment of credibility will not be disturbed where, as here, "it is supported by substantial evidence" (*Matter of Jeannette LL. v Johnson*, 2 AD3d 1261, 1263; *see Mary P.*, 17 AD3d at 1014). We thus conclude on the record before us that the determination that DSS established by a fair preponderance of the evidence at the fair hearing that petitioner maltreated the subject children and that such maltreatment was relevant and reasonably related to childcare employment is supported by substantial evidence.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

385
KA 14-01745
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. LORRAINE, DEFENDANT-APPELLANT.

KATHLEEN A. KUGLER, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered August 13, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the fourth degree (Penal Law §§ 110.00, 220.09 [1]), defendant contends that County Court abused its discretion in denying his motion to withdraw his plea at sentencing because his plea was not knowingly, voluntarily and intelligently entered. According to defendant, he was under the misunderstanding at the time of the plea that, if he pleaded guilty, other charges pending against him would be dismissed, and the court did not conduct a sufficient inquiry into his misunderstanding to enable it to make an informed decision to deny the motion. Although defendant's contention survives his valid waiver of the right to appeal (*see People v Jackson*, 126 AD3d 1512, 1512, *lv denied* 25 NY3d 1202), we nevertheless conclude that it lacks merit. It is well settled that "[p]ermission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in [the inducement of] the plea" (*People v Robertson*, 255 AD2d 968, 968, *lv denied* 92 NY2d 1053; *see People v Zimmerman*, 100 AD3d 1360, 1361, *lv denied* 20 NY3d 1015). There is no such evidence on this record. Where, as here, "a sentencing court keeps the promises it made at the time it accepted a plea of guilty, a defendant should not be permitted to withdraw his plea on the sole ground that he misinterpreted the agreement. Compliance with a plea bargain is to be tested against an

objective reading of the bargain, and not against a defendant's subjective interpretation thereof" (*People v Cataldo*, 39 NY2d 578, 580; *see People v Guillory*, 81 AD3d 1394, 1395, *lv denied* 16 NY3d 895). Inasmuch as "the plea bargain here is susceptible to but one interpretation," we conclude that the court did not abuse its discretion in denying defendant's motion to withdraw his plea (*Cataldo*, 39 NY2d at 580). Furthermore, defendant was "afforded [a] reasonable opportunity to present his contentions," and the record establishes that the court made "an informed determination" in denying the motion (*People v Tinsley*, 35 NY2d 926, 927; *see People v Alston*, 23 AD3d 1041, 1042, *lv denied* 6 NY3d 752).

Finally, we conclude that the valid waiver of the right to appeal encompasses defendant's challenge to the severity of the bargained-for sentence (*see People v Lopez*, 6 NY3d 248, 256; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Frances E. Cafarell

Entered: April 29, 2016

Clerk of the Court

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

388

KA 13-01451

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL S. LEWIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered June 26, 2013. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child (eight counts), rape in the first degree (7 counts), rape in the second degree (11 counts), rape in the third degree (7 counts), sexual abuse in the first degree and endangering the welfare of a child (four counts).

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

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, eight counts of predatory sexual assault against a child (Penal Law § 130.96), defendant contends that County Court failed to apprehend its power to exercise its discretion in submitting representative counts to the jury inasmuch as the court allowed the prosecutor to select the counts to submit (*see generally* CPL 300.40 [6] [b]). Even assuming, arguendo, that defendant's contention is preserved for our review, we nevertheless reject it. The record establishes that the court engaged in lengthy and detailed discussions with both the prosecutor and defense counsel before determining which counts would be submitted to the jury.

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction of counts seven and eight of the indictment (*see 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 conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We reject defendant's further contention that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). Finally,

the sentence is not unduly harsh or severe.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

389
KA 14-01866

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

ASAD R. HIXON, DEFENDANT-APPELLANT.

KATHLEEN A. KUGLER, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered September 17, 2014. 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: Defendant appeals 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]). The record establishes that defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and his challenge to the severity of the sentence is encompassed by that valid waiver (*see People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Frances E. Cafarell

Entered: April 29, 2016

Clerk of the Court

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

391
KA 14-00760
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — MEMORANDUM AND ORDER

ANDRE SMITH, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered March 26, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. Although the record establishes that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), we conclude that the valid waiver of the right to appeal does not encompass the challenge to the severity of the sentence because Supreme Court failed to inquire on the record whether defendant understood that he was waiving the right to challenge the length of his sentence (*see generally People v Bradshaw*, 18 NY3d 257, 265; *People v Carno*, 101 AD3d 1663, 1664, *lv denied* 20 NY3d 1060). Nevertheless, on the merits, we conclude that the sentence is not unduly harsh or severe.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

392

KA 13-00306

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID S. SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered December 11, 2012. The judgment convicted defendant, upon his plea of guilty, of arson in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of arson in the third degree (Penal Law § 150.10 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

393

KA 14-01242

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSUE ENCARNACION, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered June 10, 2014. The order determined that defendant is a level one risk pursuant to the Sex Offender Registration Act.

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

Memorandum: In appeal No. 1, defendant appeals from an order determining that he is a level one risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), but the only issues raised on appeal concern the order in appeal No. 2, determining that he is a sexually violent offender pursuant to SORA. We thus deem defendant's appeal from the order in appeal No. 1 abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). Defendant contends in appeal No. 2 that Supreme Court erred in conducting the SORA hearing in his absence. We agree. A sex offender has a due process right to be present at a SORA hearing (*see People v David W.*, 95 NY2d 130, 138-140; *People v Gonzalez*, 69 AD3d 819, 819; *see also* § 168-n [3]), and the court "violated the due process rights of defendant when it held the SORA hearing in his absence without verifying that he had received the letter notifying him of the date of the hearing and his right to be present" (*People v Distaffen*, 71 AD3d 1597, 1598). We are thus constrained to reverse the order and remit the matter to Supreme Court for a new hearing and sexually violent offender determination in compliance with Correction Law § 168-n (3).

Defendant's remaining contentions in appeal No. 2 are moot in

light of our determination therein.

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

394
KA 15-00393
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSUE ENCARNACION, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered February 9, 2015. The order determined that defendant is a sexually violent offender pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the same memorandum as in *People v Encarnacion* ([appeal No. 1] ___ AD3d ___ [Apr. 29, 2016]).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

395
KA 15-00074
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

RICHARD D. CASTERLINE, III, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered November 5, 2014. The judgment convicted defendant, upon his plea of guilty, of unlawful manufacture of methamphetamine in the first degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of unlawful manufacture of methamphetamine in the first degree (Penal Law § 220.75) and criminal possession of a controlled substance in the third degree (§ 220.16 [7]). We reject defendant’s contention that he is entitled to specific performance of the original plea agreement inasmuch as he rejected that plea agreement (*see People v Anderson*, 270 AD2d 509, 510-511, *lv denied* 95 NY2d 792; *People v Johnson*, 181 AD2d 832, 832, *lv denied* 80 NY2d 833; *see generally People v McConnell*, 49 NY2d 340, 348-349; *People v Smith*, 93 AD3d 1239, 1239).

Entered: April 29, 2016   Frances E. Cafarell
                                           Clerk of the Court

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

396
KA 15-01572
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAMIE ALTMAN, DEFENDANT-APPELLANT.

JAMIE ALTMAN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from an order of the Monroe County Court (Douglas A. Randall, J.), entered March 2, 2015. The order, insofar as appealed from, issued superceding orders of protection.

It is hereby ORDERED that said appeal is unanimously dismissed (*see* CPL 450.10; *People v Whalen*, 49 AD3d 916, *lv denied* 10 NY3d 940).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

397
CAF 15-00371
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF ROBERT BLASZAK,
PETITIONER-RESPONDENT,

V ORDER

MELISSA BLASZAK, RESPONDENT-RESPONDENT.

DAVID H. FRECH, ESQ., ATTORNEY FOR THE
CHILDREN, APPELLANT.

DAVID H. FRECH, ATTORNEY FOR THE CHILDREN, BUFFALO, APPELLANT PRO SE.

ELIZABETH CIAMBRONE, BUFFALO, FOR PETITIONER-RESPONDENT.

REBECCA J. TALMUD, WILLIAMSVILLE, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered November 10, 2014 in a proceeding pursuant to Family Court Act article 6. The order, among other things, set forth a schedule with respect to the parties' access to the subject children.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 11, 2016,

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

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

399
CAF 14-02220
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF COREY D.B.

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

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

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

COLLEEN S. HEAD, BATAVIA, FOR PETITIONER-RESPONDENT.

JACQUELINE M. GRASSO, ATTORNEY FOR THE CHILD, BATAVIA.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered November 14, 2014 in proceedings pursuant to, inter alia, Social Services Law § 384-b. The order, among other things, transferred the guardianship and custody of the subject child to petitioner.

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

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

400
CAF 14-02221
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF CODY A.B., JR.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

ORDER

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

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

COLLEEN S. HEAD, BATAVIA, FOR PETITIONER-RESPONDENT.

JACQUELINE M. GRASSO, ATTORNEY FOR THE CHILD, BATAVIA.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered November 14, 2014 in proceedings pursuant to, inter alia, Social Services Law § 384-b. The order, among other things, transferred the guardianship and custody of the subject child to petitioner.

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

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

401
CAF 14-02222
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF AUBREY R.B.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; — ORDER

CODY B., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

COLLEEN S. HEAD, BATAVIA, FOR PETITIONER-RESPONDENT.

JACQUELINE M. GRASSO, ATTORNEY FOR THE CHILD, BATAVIA.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered November 14, 2014 in proceedings pursuant to, inter alia, Social Services Law § 384-b. The order, among other things, transferred the guardianship and custody of the subject child to petitioner.

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

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

402
CAF 15-00028
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF WALTER M.

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

MARIE W., RESPONDENT-APPELLANT.

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

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered November 17, 2014 in a proceeding pursuant to Family Court Act article 10. The order, among other things, granted petitioner's motion that reasonable efforts are not required to be made to reunify respondent with the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see generally Matter of Alaysha M. [Agustin M.]*, 89 AD3d 1467, 1467; *Matter of Jaime S.*, 32 AD3d 1198, 1199).

Entered: April 29, 2016   Frances E. Cafarell
Clerk of the Court

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

405
CA 15-01567
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND TROUTMAN, JJ.

KATHLEEN ST. JOHN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WESTWOOD-SQUIBB PHARMACEUTICALS, INC.,
DEFENDANT-APPELLANT.

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

DOLCE PANEPINTO, P.C., BUFFALO (ANNE M. WHEELER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered December 16, 2014. The order, among other things, denied defendant's motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendant's motion in part and dismissing the Labor Law § 241 (6) cause of action insofar as it is premised upon the alleged violation of 12 NYCRR 23-1.7 (d), and (e) (1) and (2), and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries she sustained when she allegedly tripped or slipped on debris while she was attempting to attach lighting equipment to the trailer hitch of a pickup truck. The lighting equipment was being prepared for use in a project to rehabilitate several bridges that were located on a public roadway. The accident occurred in a parking lot that was owned by defendant and was adjacent to the roadway where the bridges were located. Defendant's parent corporation, which is not a party to this action, leased the parking lot to plaintiff's employer for use as a staging area for the project. Defendant appeals from an order that denied its motion for summary judgment dismissing the complaint.

Defendant contends that plaintiff was not entitled to the protections of Labor Law § 241 (6) because the injury did not occur on the construction site. We reject that contention. The protections of Labor Law § 241 (6) "extend[] to areas where materials or equipment are being readied for use" at a construction site (*Gonnerman v Huddleston*, 78 AD3d 993, 995), and the record establishes that the lighting equipment was being prepared in the staging area "for

imminent use in the ongoing construction" project (*Adams v Alvaro Constr. Corp.*, 161 AD2d 1014, 1015; *see Scott v Westmore Fuel Co., Inc.*, 96 AD3d 520, 520; *Gonnerman*, 78 AD3d at 995; *Shields v General Elec. Co.*, 3 AD3d 715, 717).

Contrary to defendant's further contention, it did not establish as a matter of law that it is not a property owner for the purposes of Labor Law § 241 (6). An out-of-possession property owner who does not contract for the injury-producing work may be liable under the Labor Law when there is "some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest" (*Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 51; *see Morton v State of New York*, 15 NY3d 50, 56; *see also Fronce v Port Byron Tel. Co., Inc.*, 134 AD3d 1405, 1406). We conclude that defendant failed to establish that the lease between its parent corporation and plaintiff's employer did not create a sufficient nexus between defendant and plaintiff (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

We reject defendant's contention that collateral estoppel bars plaintiff's Labor Law § 241 (6) cause of action insofar as it is based upon alleged violations of 12 NYCRR 23-1.7 (d), and (e) (1) and (2). In a prior action in the Court of Claims, plaintiff alleged that the State of New York (State) was liable for her injuries under Labor Law § 241 (6) based upon violations of those same regulations. In granting the State's motion for summary judgment dismissing the claim, the Court of Claims concluded, inter alia, that those regulations were not applicable to plaintiff's injury, and we affirmed the order on the alternative ground that the State was not an "owner" for the purposes of liability under § 241 (6) (*St. John v State of New York*, 124 AD3d 1399, 1400). Thus, collateral estoppel does not prevent plaintiff from alleging in this case that her injury was caused by violations of those regulations because there "was an alternative basis for a trial-level decision, [and this C]ourt affirmed the decision without addressing that ruling" concerning the applicability of the regulations (*Tydings v Greenfield, Stein & Senior, LLP*, 11 NY3d 195, 197).

Nevertheless, we agree with defendant that 12 NYCRR 23-1.7 (d), and (e) (1) and (2) are not applicable to the facts of this case, and we therefore modify the order accordingly. The injury-producing work took place in a parking lot, and thus did not take place on a "floor, passageway, walkway, scaffold, platform or other elevated work surface" required to be kept free of slipping hazards within the meaning of section 23-1.7 (d) (*see Bannister v LPCiminelli, Inc.*, 93 AD3d 1294, 1295-1296; *Talbot v Jetview Props., LLC*, 51 AD3d 1396, 1397-1398). The work also did not take place in a "passageway" required to be kept free of tripping and other hazards within the meaning of section 23-1.7 (e) (1) (*see Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250), nor did it take place on a "floor[], platform[] [or] similar area[] where persons work or pass" within the meaning of section 23-1.7 (e) (2) (*see Raffa v City of New York*, 100 AD3d 558, 559; *Bauer v Niagara Mohawk Power Corp.*, 249 AD2d 948, 949). Plaintiff failed to raise a triable issue of fact with respect to the

applicability of those regulations (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Contrary to defendant's contention, 12 NYCRR 23-2.1 (b) is sufficiently specific to support a Labor Law § 241 (6) cause of action (*see Coleman v ISG Lackawanna Servs., LLC*, 74 AD3d 1825, 1826), and Supreme Court properly determined that defendant failed to establish that the regulation is not applicable to the facts of this case (*see generally Arenas v Bon-Ton Dept. Stores, Inc.*, 35 AD3d 1205, 1206; *Kvandal v Westminster Presbyt. Socy. of Buffalo*, 254 AD2d 818, 818-819). Thus, the court properly denied that part of defendant's motion for summary judgment dismissing the Labor Law § 241 (6) cause of action with respect to that regulation.

Defendant also contends that the court erred in denying that part of its motion with respect to the Labor Law § 200 and common-law negligence causes of action. We reject that contention. Where, as here, "a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, [they stem] from a dangerous condition on the premises, [an owner] may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (*Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708; *see Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1416; *see also Finger v Cortese*, 28 AD3d 1089, 1089-1090). In this case, defendant failed to establish that it did not have constructive notice inasmuch as it " 'failed to establish as a matter of law that the condition was not visible and apparent or that it had not existed for a sufficient length of time before the accident to permit [defendant] or [its] employees to discover and remedy it' " (*Steiger*, 104 AD3d at 1249; *see Ozimek*, 83 AD3d at 1416-1417). Although defendant contends that it was not liable because it was an out-of-possession landlord and did not have control over the premises (*see Ferro v Burton*, 45 AD3d 1454, 1454-1455), we conclude that defendant failed to establish that it did not retain sufficient control to be liable for a dangerous condition on the premises (*see generally Meyers-Kraft v Keem*, 64 AD3d 1172, 1173).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

407
CA 15-01387
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND TROUTMAN, JJ.

RANDY SMITHERS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ONEIDA, DEFENDANT-RESPONDENT.

MARK A. WOLBER, UTICA, FOR PLAINTIFF-APPELLANT.

HILTON ESTATE & ELDER LAW, LLC, BOONVILLE (JAMES S. RIZZO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered May 17, 2015. The order, inter alia, granted defendant summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this malicious prosecution action after a Town Justice dismissed a criminal information charging him with public lewdness (Penal Law § 245.00). The Town Justice concluded that the evidence at the bench trial was legally insufficient to establish that plaintiff engaged in a lewd act when he exposed his genitals to his neighbors on a public street. Defendant moved to dismiss the complaint pursuant to CPLR 3211 or, in the alternative, for summary judgment dismissing the complaint pursuant to CPLR 3212. Supreme Court denied the motion insofar as it sought to dismiss the complaint but granted the motion insofar as it sought summary judgment dismissing the complaint. We affirm.

We reject plaintiff's contention that the court was required to give the parties notice that it was treating the motion as one for summary judgment. "[A] court may treat a motion to dismiss as a motion for summary judgment when the parties have otherwise received adequate notice by expressly seeking summary judgment or submitting facts and arguments clearly indicating that they were deliberately charting a summary judgment course" (*Village of Webster v Monroe County Water Auth.*, 269 AD2d 781, 782 [internal quotation marks omitted]; *see generally Mihlovan v Grozavu*, 72 NY2d 506, 508). Here, plaintiff was on notice that defendant was seeking summary judgment in the alternative and, indeed, opposed that part of the motion.

Contrary to plaintiff's further contention, the court properly granted the motion. A plaintiff asserting a cause of action for

malicious prosecution must demonstrate " 'that a criminal proceeding was commenced; that it was terminated in favor of the accused; that it lacked probable cause; and that the proceeding was brought out of actual malice' " (*Kirchner v County of Niagara*, 107 AD3d 1620, 1621; *see Engel v CBS, Inc.*, 93 NY2d 195, 204). In support of its motion, defendant established that it had probable cause to charge plaintiff with public lewdness (*see generally Zetes v Stephens*, 108 AD3d 1014, 1015-1016). "Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty" (*Colon v City of New York*, 60 NY2d 78, 82, *rearg denied* 61 NY2d 670). In her supporting deposition given to the Sheriff, the complainant stated that she and her husband stopped walking to let plaintiff and his dog walk past them, and plaintiff stopped and said "what is your problem." Plaintiff said something else the complainant did not understand before he unzipped his jeans, "pulled his penis out[,] stood there with his penis in his hand[,] and yelled something" else at them. While the Town Justice concluded that the statute required the exposure of genitals in the context of sexual activity, the statute in fact prohibits the exposure of the private or intimate parts of a person's body "in a lewd manner" (Penal Law § 245.00). The allegations by the complainant showed that plaintiff "did not merely expose his private parts, but did so in an offensive manner," which was "sufficient to establish the 'lewd manner' element of public lewdness" (*Matter of Carlos R.*, 78 AD3d 461, 461; *see Matter of Tyrone G.*, 74 AD3d 671, 671; *Matter of Jeffrey V.*, 185 AD2d 241, 241-242). The information provided by the complainant was therefore sufficient to provide the Sheriff with probable cause to arrest plaintiff and charge him with public lewdness (*see generally Lyman v Town of Amherst*, 74 AD3d 1842, 1843). In opposition to the motion, plaintiff failed to raise a triable issue of fact whether defendant had probable cause to commence the criminal prosecution (*see generally Zetes*, 108 AD3d at 1016).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

409
CA 15-01435
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND TROUTMAN, JJ.

PATRICK S. GOLDER, PLAINTIFF-RESPONDENT,

V ORDER

JANETTE C. BENNETT, DEFENDANT-APPELLANT.

SCHELL LAW, P.C., FAIRPORT (GEORGE A. SCHELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES S. HINMAN, P.C., ROCHESTER (JAMES S. HINMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered September 8, 2014. The order denied the application of defendant for an upward modification of child support and the termination of the right of plaintiff to claim a dependency exemption.

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

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

416
KA 13-01516
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MARIE SPRAGUE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered May 14, 2013. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a forged instrument in the second degree (two counts).

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

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

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

419

KA 13-01871

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RASHEEN P. TOWNSEND, DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, SOUTH NEW BERLIN, FOR DEFENDANT-APPELLANT.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered January 15, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal sale of a controlled substance in the third degree (§ 220.39 [1]). We reject the contention that the verdict is against the weight of the evidence on the issue of defendant's identity as the seller of the drugs, or on the issue of the identity and narcotic nature of the substance sold by defendant (*see People v Bleakley*, 69 NY2d 490, 495). We further conclude that County Court did not err in admitting in evidence the drugs and the audiotape recording of the sale (*see People v Hawkins*, 11 NY3d 484, 494; *People v Newman*, 87 AD3d 1348, 1350, *lv denied* 18 NY3d 926; *People v Cleveland*, 273 AD2d 787, 788, *lv denied* 95 NY2d 864; *People v Adams*, 185 AD2d 680, 681, *lv denied* 80 NY2d 926).

Finally, we conclude that the court did not err in refusing to charge criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03) as a lesser included offense under both counts of the indictment. Criminal possession of a controlled substance in the seventh degree is not a lesser included offense of criminal sale of a controlled substance in the third degree (*see People v Davis*, 14 NY3d 20, 23; *People v Yon*, 300 AD2d 1127, 1128, *lv denied* 99 NY2d 621; *People v Young*, 249 AD2d 576, 578-579, *lv denied* 92 NY2d 908). "One need not have dominion or control over a drug in order to offer to sell it to someone else" (*Davis*, 14 NY3d at 23).

Criminal possession of a controlled substance in the seventh degree is a lesser included offense of criminal possession of a controlled substance in the third degree (*see People v Palmer*, 216 AD2d 883, 884, *lv denied* 86 NY2d 799; *see generally People v Glover*, 57 NY2d 61, 63-64), but here there is no reasonable view of the evidence from which the jury could have concluded that defendant possessed the cocaine but did not intend to sell it (*see People v Fairley*, 63 AD3d 1288, 1289-1290, *lv denied* 13 NY3d 743; *People v Shannon*, 254 AD2d 116, 116, *lv denied* 92 NY2d 1054).

Entered: April 29, 2016

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1230/99) KA 98-05449. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EMMANUEL JOHNSON, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., CENTRA, LINDLEY, TROUTMAN, AND SCUDDER, JJ. (Filed Apr. 29, 2016.)

MOTION NO. (1499/05) KA 03-01080. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RONNIE A. DIGGS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, TROUTMAN, AND SCUDDER, JJ. (Filed Apr. 29, 2016.)

MOTION NO. (158/06) KA 03-01725. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TERRIEN WILLIAMS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed Apr. 29, 2016.)

MOTION NOS. (415-416/13) KA 09-01789. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARTIN S. PAULK, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 09-01790. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARTIN S. PAULK, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, NEMOYER, AND SCUDDER, JJ. (Filed Apr. 29, 2016.)

MOTION NO. (1331/14) KA 13-00183. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANDREW T. SPEARS, DEFENDANT-APPELLANT. -- Motion for writ of

error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND SCUDDER, JJ. (Filed Apr. 29, 2016.)

MOTION NO. (236/15) KA 14-01564. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TODD C. MIRABELLA, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND SCUDDER, JJ. (Filed Apr. 29, 2016.)

MOTION NOS. (711.1-711.3/15) KA 12-00753. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ERIC HARRIS, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 03-00716. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ERIC HARRIS, DEFENDANT-APPELLANT. (APPEAL NO. 2.) KA 06-02577. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ERIC HARRIS, DEFENDANT-APPELLANT. (APPEAL NO. 3.) -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CARNI, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed Apr. 29, 2016.)

MOTION NO. (1143/15) CA 15-00737. -- CHAMBERLAIN, D'AMANDA, OPPENHEIMER & GREENFIELD, LLP, PLAINTIFF-APPELLANT-RESPONDENT, V REBECCA P. WILSON, DEFENDANT-RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., PERADOTTO, CARNI, AND DEJOSEPH, JJ. (Filed Apr. 29, 2016.)

MOTION NO. (1168/15) CA 15-00575. -- DARTNELL ENTERPRISES, INC., PLAINTIFF-APPELLANT, V HEWLETT-PACKARD COMPANY (INDIVIDUALLY, AND AS SUCCESSOR-IN-INTEREST TO COMPAQ COMPUTER CORPORATION), DEFENDANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND SCUDDER, JJ. (Filed Apr. 29, 2016.)

MOTION NOS. (1251-1252/15) KA 14-00785. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DONALD W. REINARD, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 15-00527. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DONALD W. REINARD, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND SCUDDER, JJ. (Filed Mar. 21, 2016.)

MOTION NO. (1305/15) CA 15-00978. -- MARK A. LEO, PLAINTIFF-APPELLANT, V NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Apr. 29, 2016.)

MOTION NO. (3/16) KA 12-01682. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V THOMAS B. SIMCOE, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH,

AND SCUDDER, JJ. (Filed Apr. 29, 2016.)

MOTION NO. (6/16) KA 15-00472. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FRANCIS FINSTER, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed Apr. 29, 2016.)

MOTION NO. (15/16) CA 15-01045. -- DEBORAH S. VOSS, PROP-CO, LLC, CLASSI PEOPLE, INC., DOING BUSINESS AS SERTINO'S CAFÉ, AND DREAM PEOPLE, INC., DOING BUSINESS AS SHIVER MODEL, PLAINTIFFS-RESPONDENTS, V THE NETHERLANDS INSURANCE COMPANY, ET AL., DEFENDANTS, AND CH INSURANCE BROKERAGE SERVICES, CO., INC., DEFENDANT-APPELLANT. -- Motion to resettle order denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed Apr. 29, 2016.)

MOTION NO. (17/16) CA 15-00443. -- MARIA A. LEGGO, PLAINTIFF-RESPONDENT, V MARTIN J. LEGGO, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed Apr. 29, 2016.)

MOTION NO. (43/16) TP 15-00056. -- IN THE MATTER OF ANTHONY MEDINA, PETITIONER, V MICHAEL SHEAHAN, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENT. -- Motion for reargument denied. PRESENT: SMITH,

J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Apr. 29, 2016.)

MOTION NO. (48/16) KA 14-00110. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DYLAN SCHUMAKER, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, WHALEN, AND DEJOSEPH, JJ. (Filed Apr. 29, 2016.)

MOTION NO. (56/16) CA 15-01079. -- ADAM DAILEY, PLAINTIFF-RESPONDENT, V LABRADOR DEVELOPMENT CORP., DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Apr. 29, 2016.)

MOTION NO. (135/16) CA 15-01085. -- TATTOOS BY DESIGN, INC., DOING BUSINESS AS "HARDCORE TATOO", AND NICHOLE K. HUDSON, PLAINTIFFS-RESPONDENTS, V MARK KOWALSKI, HANS KULLERKUPP, ERIE COUNTY DEPARTMENT OF HEALTH AND COUNTY OF ERIE, DEFENDANTS-APPELLANTS. -- Motion for reargument or, in the alternative, leave to appeal to the Court of Appeals is granted to the extent that, upon reargument, the memorandum and order entered February 11, 2016 (136 AD3d 1406) is amended by deleting the second sentence of the third paragraph of the memorandum and substituting the following sentence: "Here, Hardcore's owner conceded at her deposition that she had 'no evidence' that any of the statements in the press release were false and that the tattoo artist may have made the statements attributed to him in order to expand his client base, thereby essentially conceding that

plaintiffs could not establish a prima facie case of defamation.” PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Apr. 29, 2016.)

KAH 15-00951. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. KEITH TODD, PETITIONER-APPELLANT, V NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT. -- Judgment unanimously affirmed. Counsel’s motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment [denominated order] of Supreme Court, Wyoming County, Michael M. Mohun, A.J. - Habeas Corpus). PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND SCUDDER, JJ. (Filed Apr. 29, 2016.)

KA 14-00876. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KEVIN COLEY, DEFENDANT-APPELLANT. -- Motion to dismiss granted. Memorandum: The matter is remitted to Oneida County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Apr. 29, 2016.)

KA 15-00324. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL RODRIGUEZ, DEFENDANT-APPELLANT. -- Motion to dismiss granted. Memorandum: The matter is remitted to Erie County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application

of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Apr. 29, 2016.)