SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 10, 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

58

CA 14-02022

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

IN THE MATTER OF COUNTY OF ORLEANS,
PETITIONER-PLAINTIFF-RESPONDENT,

V ORDER

NIRAV R. SHAH, M.D., M.P.H., COMMISSIONER,
NEW YORK STATE DEPARTMENT OF HEALTH, AND
NEW YORK STATE DEPARTMENT OF HEALTH,
RESPONDENTS-DEFENDANTS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (CHRISTOPHER E. BUCKEY OF COUNSEL), AND NANCY ROSE STORMER, P.C., UTICA, FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered October 1, 2014 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, insofar as appealed from, granted the petition-complaint in part, annulled the determination of respondents-defendants and directed respondents-defendants to allow petitioner-plaintiff's claims for reimbursement.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the petition-complaint is denied in its entirety, and judgment is granted in favor of respondents-defendants as follows:

> It is ADJUDGED AND DECLARED that section 61 of part D of section 1 of chapter 56 of the Laws of 2012 has not been shown to be unconstitutional (*see Matter of County of Chemung v Shah*, ___ NY3d ___ [Oct. 27, 2016]).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

679

CA 15-00701

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

BERTRAM PAYNE, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 115204.)

BERTRAM PAYNE, CLAIMANT-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Renee Forgensi Minarik, J.), dated February 13, 2015. The judgment dismissed the claim after a trial.

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

Memorandum: Claimant, an inmate at a correctional facility, commenced this action seeking damages for injuries he sustained when he slipped and fell on a puddle of water in the hallway outside of his housing unit. We reject claimant's contention that the determination of the Court of Claims dismissing the claim following a trial is against the weight of the evidence. " 'While it is well settled that this Court has the authority to independently consider the weight of the evidence on an appeal in a nonjury case, deference is still afforded to the findings of the Court of Claims where, as here, they are based largely on credibility determinations' " (*Janczylik v State of New York*, 126 AD3d 1485, 1485). Here, the court credited the testimony and evidence presented at trial establishing that correction officers obtained notice of the condition only 15 minutes prior to the incident and were waiting for a housing porter to arrive and clean the area when claimant fell. The court's determination that the 15-minute delay in removing the water was not unreasonable under the circumstances is not against the weight of the evidence (*see Diaz v State of New York*, 256 AD2d 1010, 1010).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

692

KA 13-02063

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAKOTA J. LYNN, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM 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 October 30, 2013. The judgment convicted defendant, upon her plea of guilty, of falsifying business records in the first degree (two counts) and petit larceny (two counts).

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of two felony counts of falsifying business records in the first degree (Penal Law § 175.10), and two misdemeanor counts of petit larceny (§ 155.25). Contrary to defendant's contention, the record establishes that County 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 Ripley*, 94 AD3d 1554, 1554, *lv denied* 19 NY3d 976 [internal quotation marks omitted]; *see People v Wright*, 66 AD3d 1334, 1334, *lv denied* 13 NY3d 912; *see generally People v Lopez*, 6 NY3d 248, 256), and the court did not conflate the waiver of the right to appeal with the rights defendant was automatically forfeiting upon her plea (*see Lopez*, 6 NY3d at 256; *Ripley*, 94 AD3d at 1554). We reject defendant's contention that her waiver of the right to appeal is invalid because the court did not explain exceptions to the waiver (*see People v Bizardi*, 130 AD3d 1492, 1492, *lv denied* 27 NY3d 992; *People v Kosty*, 122 AD3d 1408, 1408, *lv denied* 24 NY3d 1220), or ensure that a written waiver was obtained (*see People v Oberdorf*, 136 AD3d 1291, 1292, *lv denied* 27 NY3d 1073; *People v Irvine*, 42 AD3d 949, 949-950, *lv denied* 9 NY3d 962).

Defendant further contends that the court erred in refusing to suppress her statement to the police because she was questioned in a secured office complex and was never given her *Miranda* rights. That

contention does not survive the valid waiver of the right to appeal (*see People v Kemp*, 94 NY2d 831, 833; *People v Carpenter*, 13 AD3d 1193, 1193, *lv denied* 4 NY3d 797).

Defendant contends that she did not knowingly, voluntarily, and intelligently enter her plea of guilty inasmuch as the court failed to ensure that she had a full understanding of her plea as evidenced by her "yes" or "no" answers and lack of narrative responses. That contention, however, is a challenge to the factual sufficiency of the plea allocution and thus "is encompassed by [the] valid waiver of the right to appeal" (*Kosty*, 122 AD3d at 1408; *see People v Seaberg*, 74 NY2d 1, 10; *Irvine*, 42 AD3d at 950).

Defendant also contends that she "substantially complied" with the terms and conditions of her interim probation and that the court therefore should have permitted her, in accordance with her plea agreement, to withdraw her guilty plea with respect to the two felony counts. That contention is without merit (*see People v Gibson*, 52 AD3d 1227, 1227). At the time of the plea, the court conditioned vacatur of that part of the guilty plea covering the two felony counts upon, inter alia, defendant's successful completion of interim probation. It is undisputed, however, that defendant failed to complete interim probation successfully. We conclude that the "summary hearing conducted by the court was sufficient pursuant to CPL 400.10 (3) to enable the court to 'assure itself that the information' " upon which it was basing its determination that defendant failed to complete interim probation successfully, as well as the sentence to be imposed on defendant, was " 'reliable and accurate' " (*People v Rollins*, 50 AD3d 1535, 1536, *lv denied* 10 NY3d 939; *see People v Wissert*, 85 AD3d 1633, 1633-1634, *lv denied* 17 NY3d 956; *see also Gibson*, 52 AD3d at 1227).

Finally, defendant contends that the bargained-for sentence is unduly harsh and severe. We note that the court indicated at the time of sentencing that defendant could appeal the sentence. We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

722

CAF 13-01822

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

IN THE MATTER OF MARY R.F., MIRABELLA H. AND MIRAJ M.

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

CAYUGA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER-RESPONDENT;

ANGELA I., RESPONDENT-APPELLANT.

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

DAVID P. ELKOVITCH, AUBURN, FOR PETITIONER-RESPONDENT.

ROBERT A. DINIERI, ATTORNEY FOR THE CHILDREN, CLYDE.

Appeal from an order of the Family Court, Cayuga County (Thomas G. Leone, J.), entered September 9, 2013 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had neglected the subject children.

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

Memorandum: In this Family Court Act article 10 proceeding, respondent mother appeals from an order finding that she neglected her children. The mother contends that Family Court erred in denying her motion to dismiss the petition at the close of petitioner's proof on the ground that petitioner failed to prove by a preponderance of the evidence that the children were neglected. We reject that contention. "While the burden of proving abuse or neglect always rests with petitioner, upon a motion to Family Court to dismiss a Family Court Act article 10 petition at the close of petitioner's case, 'the proper inquiry [is] whether petitioner [has] made out a prima facie case, thereby shifting the burden to respondent[] to rebut the evidence of parental culpability' " (*Matter of Camara R.*, 263 AD2d 710, 712). We conclude that petitioner met its initial burden by establishing that the mother's home was maintained in an unsafe and unsanitary condition (*see Matter of Nathifa B.*, 294 AD2d 432, 433, *lv denied* 98 NY2d 616), and that the mother failed to follow up with the primary care physician of one of the children as instructed by hospital emergency department providers after they examined the child for an alleged incident of sexual abuse (*see Matter of Andrei S.*, 47 AD3d 721, 721; *Matter of Notorious YY.*, 33 AD3d 1097, 1098). Upon our review of the entire record, we further conclude that there is a sound and

substantial basis for the court's ultimate determination that the children were neglected, i.e., in that they were "in imminent danger of impairment as a result of the failure of [the mother] to exercise a minimum degree of care" in providing proper supervision or guardianship (§ 1012 [f] [i] [B]; *see Matter of Jeromy J. [Latanya J.]*, 122 AD3d 1398, 1398-1399, *lv denied* 25 NY3d 901).

The mother's contention that the Attorney for the Children had a conflict of interest that adversely impacted her representation of the children is raised for the first time on appeal and thus is unpreserved for our review (*see Matter of Wood v Hargrave*, 292 AD2d 795, 796, *lv denied* 98 NY2d 608; *see also Matter of Carrieanne G.*, 15 AD3d 850, 850, *lv denied* 4 NY3d 709).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

724

CA 16-00041

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

IN THE MATTER OF MODERN DISPOSAL, INC.,
PETITIONER-APPELLANT,

V ORDER

TOWN OF CHEEKTOWAGA AND WASTE MANAGEMENT OF
NEW YORK, LLC, RESPONDENTS-RESPONDENTS.

RICHARD A. PALUMBO, PITTSFORD, FOR PETITIONER-APPELLANT.

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

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR RESPONDENT-RESPONDENT WASTE MANAGEMENT OF NEW YORK, LLC.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered December 3, 2015 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

732

KA 14-01976

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GILBERT CRUZ, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered August 28, 2014. The judgment convicted defendant, upon his plea of guilty, of rape 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 rape in the second degree (Penal Law § 130.30 [1]), defendant contends that his waiver of the right to appeal is not valid, and he challenges the severity of the sentence. We agree with defendant that the waiver of the right to appeal is invalid because Supreme Court failed to advise him properly of the potential period of postrelease supervision (*see generally People v Lococo*, 92 NY2d 825, 827; *People v Thomas*, 272 AD3d 985, 985-986). Nevertheless, we conclude that the sentence, including the term of postrelease supervision, is not unduly harsh or severe. We note, however, that both the certificate of conviction and the uniform sentence and commitment form incorrectly recite that defendant was convicted of attempted rape in the second degree rather than the completed crime. The certificate of conviction and the uniform sentence and commitment form must therefore be amended to correct that clerical error (*see People v Peyatt*, 140 AD3d 1680, 1680, *lv denied* 28 NY3d 935; *People v Maloney*, 140 AD3d 1782, 1783).

Frances E. Cafarell

Entered: November 10, 2016

Clerk of the Court

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

740

KA 15-00038

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BYRON BUZA, DEFENDANT-APPELLANT.

LAW OFFICES OF PETER K. SKIVINGTON PLLC, GENESEO (DANIEL R. MAGILL 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 (Robert B. Wiggins, J.), rendered January 6, 2015. The judgment convicted defendant, after a nonjury trial, of criminal possession of marihuana in the second degree and criminal possession of a controlled substance in the seventh degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of criminal possession of marihuana in the second degree (Penal Law § 221.25) and criminal possession of a controlled substance in the seventh degree (§ 220.03).

Upon receiving information that a certain residence in the Town of Springwater might be housing drugs, Sheriff's deputies from the Livingston County Sheriff's Office proceeded to the residence to investigate. No one was home when the deputies arrived, but an investigator located defendant, whom the investigator believed to be an occupant of the residence, working at a nearby ski resort. Defendant accompanied the investigator to the residence where defendant signed a form containing boilerplate language giving his consent for "the above named officer(s) to conduct a complete search of the premises and property." That form further stated: "The above said officer(s) further have my permission to take from my premises and property, any letters, papers, materials or any other property or things which they desire as evidence for criminal prosecution in the case or cases under investigation." In addition, the form listed the deputies' names, defendant's name, and the address to be searched. Before the deputies presented the completed form for defendant's signature, it was read to him.

After he signed the form, defendant led the deputies into the residence through a door that, according to their trial testimony, may or may not have been unlocked. During the ensuing search, defendant told the deputies that one of the three bedrooms of the residence "belonged to, or was rented to" another person, whom the deputies believed to be defendant's roommate. After speaking with that person by telephone, an investigator "obtain[ed] a search warrant for the residence and [that other person]'s room." A search of the residence uncovered approximately six pounds of marihuana and an undetermined quantity of mushrooms containing psilocin, a controlled substance. The majority of the marihuana and mushrooms were found in plastic containers stored in a closet adjacent to the living room.

Contrary to defendant's contention, we conclude that the verdict is based on legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We nonetheless agree with defendant's further contention that County Court erred in failing to preclude evidence of an admission that he allegedly made, but for which the People did not provide a CPL 710.30 notice. The People served on defendant a CPL 710.30 notice of their intent to offer defendant's admissions as evidence at trial and attached a police report to the notice. The police report referenced defendant's statement to the deputies, during the search, that one of the bedrooms belonged to another person. At trial, however, the court permitted an investigator to testify that defendant "explained where his [own] room was," referring to another of the bedrooms. Inasmuch as the CPL 710.30 notice did not cover that statement, the court's ruling on that point was error (*see* CPL 710.30 [1]; *see also People v Lopez*, 84 NY2d 425, 428; *People v Pallagi*, 91 AD3d 1266, 1268). That error permitted the court to conclude that defendant was an occupant of the residence and, consequently, to find that defendant had constructive possession of the drugs found therein (*see People v Slade*, 133 AD3d 1203, 1205-1207, *lv denied* 26 NY3d 1150).

Contrary to the People's contention, defendant's statement was not pedigree information exempt from the CPL 710.30 notice requirement. Generally, an inculpatory statement of a defendant concerning his or her address is exempt from the notice requirement if elicited through routine administrative questioning, as long as the questioning is not designed to elicit an incriminating response (*see People v Velazquez*, 33 AD3d 352, 353, *lv denied* 7 NY3d 929; *People v Baker*, 32 AD3d 245, 250, *lv denied* 7 NY3d 865). Here, the People failed to establish that defendant's statement concerning his residency was elicited through such routine administrative questioning. In any event, we conclude that any question that may have prompted defendant's statement was likely, in the context of the police search in progress, "to elicit [an] incriminating admission[]" with respect to the possessory crimes with which defendant was charged (*People v Rodney*, 85 NY2d 289, 293; *see Slade*, 133 AD3d at 1206;

Velazquez, 33 AD3d at 354).

We disagree with our dissenting colleagues that the language in the consent to search form contains "specific admissions regarding [defendant's] dominion and control of the residence." To the contrary, the deputies prepared that form themselves by inserting defendant's name, as well as the address of the place to be searched, into a form that already contained boilerplate language—what one testifying Sheriff's deputy called "our permission to search document." In our view, that consent alone was not overwhelming evidence that defendant exercised dominion and control over the premises (*see generally People v Siplin*, 29 NY2d 841, 842). Moreover, defendant's conduct during the course of the investigation was equally consistent with a person who was merely familiar with the subject residence, as it was with an occupant thereof. Indeed, there was no evidence that the investigators observed a name on a mailbox, keys in defendant's possession, or framed items displaying his name or image (*cf. People v Davis*, 101 AD3d 1778, 1779-1780, *lv denied* 20 NY3d 1060; *People v Edwards*, 39 AD3d 1078, 1079-1080), nor was there evidence that the investigators recovered any property or papers from the residence, aside from one Christmas gift, that bore defendant's name or other indicia of ownership, such as photo identification, a prescription, or utility bills or other mail (*cf. People v Holland*, 126 AD3d 1514, 1515, *lv denied* 25 NY3d 1165; *People v Patterson*, 13 AD3d 1138, 1139, *lv denied* 4 NY3d 801). Given the above, we are compelled to conclude that the investigator's testimony with respect to defendant's statement of residency was a pivotal component of the People's case in establishing defendant's residency at the premises and, thus, defendant's constructive possession of the drugs. Unlike our dissenting colleagues, we therefore cannot conclude that the court's error in admitting defendant's statement is harmless (*see Slade*, 133 AD3d at 1206-1207).

All concur except PERADOTTO, J.P., and SCUDDER, J., who dissent and vote to affirm in the following memorandum: Although we agree with the majority that County Court erred in failing to preclude the testimony regarding defendant's statement to the police explaining where his own room was located in the residence because the People's CPL 710.30 notice did not include that statement, we do not agree on this record that the error requires reversal of the judgment of conviction and a new trial. We respectfully dissent because, in our view, the error was harmless, and therefore the judgment should be affirmed.

The record does not support the majority's conclusion that defendant's statement to the police about the location of his room was the linchpin of the People's case establishing that defendant was an occupant of the residence and thus had constructive possession of the drugs found therein. Here, the evidence established that, after two investigators responded to the residence to investigate and found that no one was home, one of the investigators located defendant at a nearby ski resort, they had a brief conversation there, and defendant then agreed to come back to the residence. Defendant drove his ATV and was followed by the investigator in his patrol vehicle. The two

investigators then asked defendant whether he would provide them with permission to look inside the residence. After some conversation and contemplation, defendant verbally agreed.

Contrary to the majority's conclusion, defendant did not merely provide a generic consent to search without more; rather, he signed a detailed written consent form—the knowing and voluntary execution of which he has never challenged—wherein he made specific admissions regarding his dominion and control over the residence. On the consent form, which contained defendant's name and date of birth as well as the address of the residence, defendant stated that he was informed by the investigators of his "constitutional right not to have a search made of the premises and property owned by [him] and/or under [his] care, custody and control, without a search warrant." Defendant further stated that he willingly gave his permission for the investigators to conduct a complete search of the premises and property, and "to take from [his] premises and property" any items desired as evidence for a criminal prosecution. Defendant thus acknowledged through the duly executed and detailed consent form that the residence was under his dominion and control.

In addition to returning to the residence in the lead and thereafter providing his consent to search the residence over which he had control, defendant's further actions and the evidence discovered by the police were also entirely consistent with defendant's occupancy of the residence. After consenting to the search, defendant led the investigators through the door of the residence. Although the investigators may have initially thought that they had consent to search the entire residence, it was subsequently established that one of the rooms "belonged to, or was rented to" another person that one of the investigators characterized as defendant's "roommate." Defendant then contacted that person by cell phone and, after speaking with him, that same investigator left the residence and obtained a search warrant for the entire residence, including the other person's room. Defendant's consent thus had extended only to the common areas of the residence. As noted by the majority, most of the marihuana and mushrooms recovered during the search were found in plastic containers stored in a closet adjacent to the living room. In part of the living room, the police also found a tin containing mushrooms and affixed with a handwritten note bearing the message, "Byron[,] Merry Xmas!"

Based on the foregoing, we conclude that the error in admitting defendant's unnoticed statement is harmless. Considering the above-mentioned evidence in totality without reference to the error and, particularly, though not exclusively, defendant's admissions in the consent form that he maintained custody and control of the residence, we conclude that the evidence of defendant's constructive possession of the subject drugs is overwhelming (*see generally People v Fineout*, 139 AD3d 1394, 1395-1396). There is no significant probability that the court would have acquitted defendant in the absence of the testimony regarding his statement to the investigators explaining the location of his room in the residence (*see generally People v Arafet*,

13 NY3d 460, 467; *People v Crimmins*, 36 NY2d 230, 241-242).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

769.1

CAF 16-00175

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

IN THE MATTER OF JAMIE J.

WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; OPINION AND ORDER

MICHELLE E.C., RESPONDENT-APPELLANT.

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., GENEVA (KATHARINE F. WOODS OF COUNSEL), FOR RESPONDENT-APPELLANT.

GARY LEE BENNETT, LYONS, FOR PETITIONER-RESPONDENT.

SEAN D. LAIR, ATTORNEY FOR THE CHILD, SODUS.

JAMES S. HINMAN, P.C., ROCHESTER (JAMES S. HINMAN OF COUNSEL), FOR INTERVENORS-RESPONDENTS.

ROBERT A. DINIERI, CLYDE, FOR INTERESTED PARTY DAVID URBAS.

Appeal from an order of the Family Court, Wayne County (Daniel G. Barrett, J.), entered January 26, 2016 in a proceeding pursuant to the Family Court Act. The order, inter alia, continued the placement of the subject child with petitioner.

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

Opinion by SCUDDER, J.:

We review, as a matter of first impression at the appellate level, whether Family Court retains subject matter jurisdiction to conduct a permanency hearing pursuant to the provisions of Family Court Act article 10-A where, as here, the petition pursuant to Family Court Act article 10 alleging that the child is a neglected child has been dismissed. We conclude that it does.

I

On November 10, 2014, the court directed the temporary removal of respondent mother's one-week-old child from her care pursuant to Family Court Act § 1022. Petitioner commenced a proceeding against the mother pursuant to Family Court Act article 10, alleging that the child was a neglected child on the ground that the child was at imminent risk of harm based upon the mother's alleged inability to

provide proper care for the child due to, inter alia, a lack of housing and the mother's inability to care for her own medical needs. Following a permanency hearing in June 2015, the court granted petitioner's application for continued placement "until the completion of the next permanency hearing or pending further orders of this court" and directed that the mother remain under the supervision of petitioner. The fact-finding hearing on the neglect petition was conducted on December 1 and 2, 2015, more than one year after the petition was filed. The court denied petitioner's application to amend the petition to conform the pleadings to the proof pursuant to section 1051 (b) and determined that "any offer of proof beyond November 10, 2014 would not be relevant in the fact-finding but may be relevant at the Permanency Planning Hearing and/or Dispositional Hearing." The court dismissed the petition by decision dated December 21, 2015 and order entered January 19, 2016 on the ground that, with respect to the one week in which the child was in the mother's care, "petitioner has failed to prove by a preponderance of the evidence that the child's physical, mental or emotional condition was impaired or in imminent danger of being impaired. Even if that were proven[,] [p]etitioner has failed to prove by a preponderance of the evidence that [the mother] failed to exercise a minimum degree of care." Petitioner did not appeal from that order.

Thereafter, the parties engaged in correspondence with the court with respect to whether the court had authority to proceed with the permanency hearing scheduled for January 19, 2016 in light of the order dismissing the neglect petition. The mother sought by order to show cause an order dismissing the permanency petition and vacating the temporary order placing the child with petitioner. That application was opposed by petitioner, the child's father, and the Attorney for the Child on the ground that the court had jurisdiction to conduct the permanency hearing pursuant to Family Court Act § 1088. The court denied the requested relief in the mother's order to show cause. After petitioner presented evidence at the permanency hearing, the mother consented to an order continuing placement of the child with petitioner on the ground that the best interests and safety of the child would be served by continued placement because the child would be at risk of neglect if returned to the mother. She nevertheless reserved her right to challenge the court's exercise of subject matter jurisdiction to conduct a permanency hearing after the neglect petition had been dismissed. We note in any event that "[i]t is blackletter law that a[n order] rendered without subject matter jurisdiction is void, and that the defect may be raised at any time and may not be waived" (*Lacks v Lacks*, 41 NY2d 71, 75, *rearg denied* 41 NY2d 862). Thus, to that extent, this appeal is properly before us.

II

We reject the mother's contention on appeal that the court lacked subject matter jurisdiction to conduct the permanency hearing following dismissal of the neglect petition, based upon our interpretation of the statutory language contained in article 10-A of the Family Court Act.

Article 10-A of the Family Court Act was enacted in 2005 "to establish uniform procedures for permanency hearings for all children who are placed in foster care . . . pursuant to[, inter alia,] section one thousand twenty-two . . . of this act . . . It is meant to provide children placed out of their homes timely and effective judicial review that promotes permanency, safety and well-being in their lives" (§ 1086). It is clear that, in the event that the court dismisses a petition alleging that a child is an abused or neglected child, the court lacks jurisdiction to impose a dispositional remedy pursuant to sections 1052 through 1057 (*see Matter of Rasha B.*, 139 AD2d 962, 963; *see also Matter of Lebraun H. [Brenda H.]*, 111 AD3d 1439, 1440). Nevertheless, article 10-A, which applies only to those matters in which a child has been placed in petitioner's custody (*see* § 1086; *cf. Lebraun H.*, 111 AD3d at 1439; *Rasha B.*, 139 AD2d at 963), explicitly provides that "the court shall maintain jurisdiction over the case until the child is discharged from placement" (§ 1088). It further provides that the court "shall" make a determination whether the placement shall be terminated or whether the permanency goal should be approved or modified, based "upon the proof adduced [at the permanency hearing] . . . *and in accordance with the best interests and safety of the child*, *including whether the child would be at risk of abuse or neglect if returned to the parent*" (§ 1089 [d] [1], [2] [i] [emphasis added]).

We note that there is no provision in Family Court Act article 10-A that provides for the termination of the child's placement with petitioner when a neglect or abuse petition is dismissed. We further note that the authority cited by the dissent with respect to the legislative scheme of article 10 predated the enactment of article 10-A (*see Matter of Edwin SS.*, 302 AD2d 754, 754-755; *Matter of Amanda SS.*, 284 AD2d 588, 589, *lv denied* 97 NY2d 606; *Matter of Brandon C.*, 237 AD2d 821, 822; *Matter of Anthony YY.*, 202 AD2d 740, 741; *Matter of Dina V.*, 86 AD2d 875, 875), or did not implicate the provisions of article 10-A (*see Lebraun H.*, 111 AD3d at 1440). Thus, we respectfully disagree with our dissenting colleagues that article 10-A did not provide for the continuation of the court's subject matter jurisdiction, despite the dismissal of the article 10 petition.

We recognize that the silence of the Legislature with respect to the scenario presented in this case may be interpreted in either of two ways: if the Legislature had intended that the placement end upon the dismissal of the article 10 petition, it would have said so; or, based on the absence of a provision addressing the scenario at issue here, the Legislature did not intend to overturn the long-established rule of law with respect to article 10 that a temporary placement under, inter alia, section 1022 ended with the dismissal of a neglect or abuse petition inasmuch as the court lacked jurisdiction to impose a dispositional order pursuant to article 10 (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 74). Nevertheless, "[a] statute must be read and given effect as it is written by the Legislature, not as the court may think it should or would have been written if the Legislature had envisaged all of the problems and complications which might arise in the course of its administration" (Statutes § 73,

Comment at 148; *see Murphy v Board of Educ. of N. Bellmore Union Free Sch. Dist.*, 104 AD2d 796, 798, *affd* 64 NY2d 856). We therefore conclude, based upon the plain language of the provisions of Family Court Act article 10-A, that the court obtains jurisdiction as a result of a placement with petitioner pursuant to section 1022 (*see* § 1088), and that the court is required to make a determination whether to return the child to the parent based upon the best interests and safety of the child, including whether the child would be at risk of abuse or neglect if the child were to return to the parent (*see* § 1089 [d] [1], [2] [i]). Thus, we conclude that the court retained jurisdiction to conduct the permanency hearing despite the dismissal of the neglect petition. Moreover, our interpretation of the statutory provisions of article 10-A comports with the longstanding principle that "an overarching consideration always obtains for children to be returned to biological parents, if at all possible and responsible . . . When that cannot be done, the emphasis shifts to securing permanent, stable solutions and settings" (*Matter of Dale P.*, 84 NY2d 72, 77).

III

The mother also contends, inter alia, that her substantive due process rights were violated by the continued placement of the child with petitioner in the absence of a finding of neglect. Although we share the concern of our dissenting colleagues that the mother's right to raise her child must be protected, that contention is not properly before us on this appeal because the order was entered upon the consent of the parties (*see Matter of Adney v Morton*, 68 AD3d 1742, 1742), and the mother retained the right to challenge on appeal only the court's exercise of subject matter jurisdiction to conduct a permanency hearing. If the mother's contention was properly before us, we would agree with our dissenting colleagues that the contention was preserved for our review, but we would nevertheless reject it. Were we to review the mother's contention that she cannot be deprived of the right to raise her child in the absence of a finding of neglect, we would conclude that her substantive due process rights were protected by the provisions of Family Court Act article 10-A.

It is well established that "[f]undamental constitutional principles of due process and protected privacy prohibit governmental interference with the liberty of a parent to supervise and rear a child except upon a showing of overriding necessity . . . [T]he State may not deprive a natural parent of the right to the care and custody of a child absent a demonstration of[, inter alia], unfitness . . . Legislation which authorizes the removal of a child from the parent without the requisite showing of such extraordinary circumstances constitutes an impermissible abridgement of fundamental parental rights" (*Matter of Marie B.*, 62 NY2d 352, 358; *see Santosky v Kramer*, 455 US 745, 753). Because the court was required to determine, following a hearing, whether the child would be at risk of abuse or neglect if returned to the mother (*see* Family Court Act § 1089 [d]), and the evidence at the hearing clearly supported the court's determination that the child would be at such a risk, we would conclude that the requisite "overriding necessity" was established

here (*Marie B.*, 62 NY2d at 358), and thus that the mother's substantive due process rights were not violated.

IV

Accordingly, we conclude that the order determining that the best interests of the child would be served by continued placement in petitioner's custody on the ground that the child was at risk of abuse or neglect in the event she was returned to the mother should be affirmed.

NEMOYER and CURRAN, JJ., concur with SCUDDER, J.; WHALEN, P.J., dissents and votes to vacate the order in accordance with the following Opinion, in which SMITH, J., concurs:

We respectfully dissent. Petitioner commenced this proceeding pursuant to Family Court Act article 10 alleging, inter alia, that the subject child was neglected by respondent mother. Following a fact-finding hearing, Family Court concluded that petitioner failed to meet its burden of establishing neglect by a preponderance of the evidence and dismissed the petition. It is well established that, "[i]f the court finds that the facts adduced at the hearing are insufficient to support the petition, as was the case here, *that is the end of the matter*" (*Matter of Rasha B.*, 139 AD2d 962, 962 [emphasis added]). Pursuant to the legislative scheme of article 10, absent a finding of abuse or neglect, the court lacks any jurisdictional basis to block, delay, or impose conditions on the return of the child (*see Matter of Amanda SS.*, 284 AD2d 588, 589, *lv denied* 97 NY2d 606; *Matter of Brandon C.*, 237 AD2d 821, 822; *Matter of Dina V.*, 86 AD2d 875, 875; *see also Matter of Lebraun H. [Brenda H.]*, 111 AD3d 1439, 1440; *Matter of Edwin SS.*, 302 AD2d 754, 754-755; *Matter of Anthony YY.*, 202 AD2d 740, 741).

We cannot agree with the majority that the enactment of Family Court Act article 10-A abrogated that settled law and extended the subject matter jurisdiction of Family Court beyond the dismissal of the neglect petition. The jurisdictional provision of article 10-A, section 1088, provides in relevant part that, "[i]f a child is placed pursuant to section . . . one thousand twenty-two . . . of this act, . . . the case shall remain on the court's calendar and the court shall maintain jurisdiction over the case until the child is discharged from placement and all orders regarding supervision, protection or services have expired." It is undisputed that the child was placed pursuant to section 1022, and we agree with the majority that the events triggering the termination of the court's article 10-A jurisdiction did not occur, i.e., the child was not discharged from placement (*see* § 1089 [d] [1]), and pursuant to a prior permanency hearing order the mother was under the supervision of petitioner, subject to an order of protection, and receiving services.

The language of section 1088, considered in isolation, appears to confer continuing jurisdiction regardless of the outcome of the underlying article 10 proceeding. We are mindful that, in accordance with established rules of statutory construction, we must construe the

language of the statute "so as to give effect to the plain meaning of the words used" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208). At the same time, however, we conclude that, under the circumstances here, giving effect to the "plain language . . . would require us to interpret the statute in a manner that would render it unconstitutional" (*Pines v State of New York*, 115 AD3d 80, 92, *appeal dismissed* 23 NY3d 982; *see People v Couser*, 258 AD2d 74, 80, *affd* 94 NY2d 631; McKinney's Cons Laws of NY, Book 1, Statutes § 150 [c]). The majority's application of the plain language of Family Court Act § 1088 effectively sanctions the use of the temporary order issued in an ex parte proceeding (*see* § 1022 [a] [i]) as the jurisdictional predicate for petitioner's ongoing, open-ended intervention in the parent-child relationship *after* the neglect petition was dismissed on the merits.

We agree with the mother that, under these circumstances, the court's exercise of jurisdiction pursuant to article 10-A resulted in the violation of her fundamental right to raise her child. As a preliminary matter, we do not agree with the majority that the mother's due process contention is not properly before us. Throughout the Family Court proceeding, the mother consistently and repeatedly argued that, following the dismissal of the neglect petition, the failure to terminate the subject child's foster care placement and return her to the mother's care constituted a violation of the mother's due process right to raise the child without interference from petitioner or the court.

As the majority acknowledges, " 'the interest of parents in the care, custody and control of their children . . . is perhaps the oldest of the fundamental liberty interests,' and any infringement of that right 'comes with an obvious cost' " (*Matter of Brooke S.B. v Elizabeth A.C.C.*, 28 NY3d 1, 10, quoting *Troxel v Granville*, 530 US 57, 64-65). Moreover, "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State" (*Santosky v Kramer*, 455 US 745, 753). Here, the subject child was removed from the mother's care pursuant to a temporary ex parte order, following which a hearing was conducted, no adjudication of neglect was made, and the neglect petition was dismissed on the merits. Construing article 10-A as authorizing the continued placement of the subject child, premised entirely upon the initial removal without the requisite showing of neglect or other extraordinary circumstances (*see Matter of Bennett v Jeffreys*, 40 NY2d 543, 546), clearly results in an abridgment of the mother's fundamental parental rights (*see Matter of Marie B.*, 62 NY2d 352, 358).

Accordingly, for the foregoing reasons, we conclude that the court lacked subject matter jurisdiction to enter the permanency hearing order on appeal, and the order therefore should be vacated.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

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KA 13-02138

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VERNIEL L. WILSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, MULDOON, GETZ & RESTON (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

VERNIEL L. WILSON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered November 1, 2013. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, robbery in the second degree and attempted robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]), robbery in the second degree (§ 160.10 [1]), and attempted robbery in the second degree (§§ 110.00, 160.10 [1]), defendant contends that County Court erred in refusing to suppress the identifications of him by the victims on the grounds that he was unlawfully detained by the police and that the showup procedures were unduly suggestive. We reject that contention. "The police had reasonable suspicion to stop and detain defendant for a showup identification based on . . . a radio transmission providing a general description of the perpetrator[s] of [the] crime[s, the] proximity of the defendant to the site of the crime[s], the brief period of time between the crime[s] and the discovery of the defendant near the location of the crime[s], and the [officers'] observation of the defendant, who matched the radio-transmitted description [of one of the perpetrators]" (*People v Owens*, 39 AD3d 1260, 1261, *lv denied* 9 NY3d 849 [internal quotation marks omitted]; *see People v Smith*, 128 AD3d 1434, 1434, *lv denied* 26 NY3d 1011; *People v Mitchell*, 118 AD3d 1417, 1418, *lv denied* 24 NY3d 963; *People v Evans*, 34 AD3d 1301, 1302, *lv denied* 8 NY3d 845). With respect to the showup procedures, we conclude that they were not unduly suggestive. "[T]he victim[s']

observation of defendant being removed from a patrol car, and the fact that defendant was handcuffed, did not render the showup[s] unduly suggestive as a matter of law" (*Smith*, 128 AD3d at 1435; *see People v Boyd*, 272 AD2d 898, 899, *lv denied* 95 NY2d 850; *People v Aponte*, 222 AD2d 304, 304-305, *lv denied* 88 NY2d 980).

Contrary to defendant's contention, defense counsel was not ineffective for failing to call a cross-racial identification expert at trial (*see White v Georgia*, 293 Ga 635, 636-637; *see generally People v Jones*, 85 AD3d 612, 614, *affd* 21 NY3d 449), especially considering that defendant was identified both by an individual of the same race and by an individual of a different race. Nor was counsel ineffective in failing to timely request a missing witness charge. Defendant was acquitted of the charge relating to the missing witness, and thus he suffered no prejudice from counsel's alleged misstep in that regard (*see People v Santana*, 114 AD3d 557, 558, *lv denied* 23 NY3d 1067; *see generally People v Stultz*, 2 NY3d 277, 284, *rearg denied* 3 NY3d 702; *People v Glanda*, 18 AD3d 956, 960, *lv denied* 6 NY3d 754, *reconsideration denied* 6 NY3d 848).

In his pro se supplemental brief, defendant contends that the court erred in admitting testimony that violated his constitutional right of confrontation (*see Crawford v Washington*, 541 US 36, 50-54). As defendant correctly concedes, however, that contention is not preserved for our review, 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]). We have reviewed defendant's remaining contentions, including the additional claim of ineffective assistance of counsel asserted in his pro se supplemental brief, and we conclude that they lack merit.

Entered: November 10, 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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CAF 15-00691

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

IN THE MATTER OF KRISTIN M. DAWLEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SEAN T. DAWLEY, RESPONDENT-RESPONDENT.

IN THE MATTER OF SEAN T. DAWLEY,
PETITIONER-RESPONDENT,

V

KRISTIN M. DAWLEY, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered March 24, 2015 in a proceeding pursuant to Family Court Act article 6. The order granted the violation of visitation petition of Kristin M. Dawley, as amended, and granted the violation of visitation petition of Sean T. Dawley.

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

Same memorandum as in *Matter of Dawley v Dawley* ([appeal No. 2] ___ AD3d ___ [Nov. 10, 2016]).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

782

CAF 15-00692

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

IN THE MATTER OF KRISTIN M. DAWLEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SEAN T. DAWLEY, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

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

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered March 24, 2015 in a proceeding pursuant to Family Court Act article 6. The order dismissed with prejudice the petition of petitioner seeking to modify a prior consent order with respect to respondent's visitation with the subject children.

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

Memorandum: In appeal No. 2, petitioner mother appeals from an order that dismissed with prejudice her petition seeking to modify a prior consent order with respect to respondent father's visitation with the subject children. While this appeal was pending, Family Court entered an order upon the consent of the parties that resolved the relevant visitation issues, thereby rendering this appeal moot (*see Matter of Warren v Hibbs*, 136 AD3d 1306, 1306, *lv denied* 27 NY3d 909). We conclude that the exception to the mootness doctrine does not apply (*see id.*; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

The mother has not raised any contentions with respect to the order in appeal No. 1, and we therefore dismiss that appeal (*see Abasciano v Dandrea*, 83 AD3d 1542, 1545; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

784

CA 15-02182

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

WILLIAM SCRUTON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ACRO-FAB LTD., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

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

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ANTHONY R. BRIGHTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered March 20, 2015. The order, insofar as appealed from, granted that part of the motion of plaintiff for partial summary judgment on the issue of liability against defendant Acro-Fab Ltd. pursuant to Labor Law § 240 (1).

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action to recover damages for injuries he sustained when he fell to the ground from atop the outer wall of a building extension being constructed for Acro-Fab Ltd. (defendant), after one of the roof trusses that plaintiff was installing started to tip over. We agree with defendant that Supreme Court erred in granting that part of plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240 (1).

It is well settled that in order to establish entitlement to judgment as a matter of law on the issue of liability under Labor Law § 240 (1), the plaintiff "must establish that the statute was violated and that such violation was a proximate cause of his [or her] injury" (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433, *rearg denied* 25 NY3d 1211; *see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289). "Liability under section 240 (1) does not attach when the safety devices that [the] plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and [the] plaintiff knew he [or she] was expected to use them but for no good reason chose not to do so, causing an accident"

(*Gallagher v New York Post*, 14 NY3d 83, 88). Under those circumstances, the "plaintiff's own negligence is the sole proximate cause of his [or her] injury" (*id.*; *see Cahill*, 4 NY3d at 39-40).

Where the plaintiff's submissions in support of the motion raise a triable issue of fact whether his or her own actions were the sole proximate cause of the injury, the plaintiff has failed to make a prima facie showing of entitlement to judgment as a matter of law on the issue of liability because "if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation" (*Blake*, 1 NY3d at 290; *see Banks v LPCiminelli, Inc.*, 125 AD3d 1334, 1335; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). In this case, plaintiff's submissions raised triable issues of fact whether plaintiff knew that he was expected to use a readily available ladder at the work site to perform his task, but for no good reason chose not to do so, and whether he would not have been injured had he not made that choice (*see Cahill*, 4 NY3d at 40; *Banks*, 125 AD3d at 1335; *see generally Gallagher*, 14 NY3d at 88). Contrary to the analysis of the dissent, inasmuch as plaintiff raised such issues of fact through his own submissions, the burden never shifted to defendant, and denial of the motion was required "regardless of the sufficiency of the opposing papers" (*Alvarez*, 68 NY2d at 324).

All concur except CENTRA, J.P., and CURRAN, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent from the conclusion of our colleagues that Supreme Court erred in granting that part of plaintiff's motion seeking partial summary judgment against Acro-Fab Ltd. (defendant) on the issue of liability under Labor Law § 240 (1). In our view, plaintiff met his burden by establishing "that the statute was violated and that such violation was a proximate cause of his injury" (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433), and defendant failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). We therefore would affirm the order.

Plaintiff's accident occurred while he was nailing down roof trusses on a building extension being constructed for defendant. At the time of his fall, plaintiff was standing with one foot on the top of the building's outer wall and one foot on a truss to perform that work. When that unsecured truss came free, plaintiff lost his balance, fell to the ground, and sustained injuries. In meeting his burden, plaintiff established that defendant failed to furnish, place, and operate any safety device to protect him from falling while he was installing the roof trusses (*see Luna v Zoological Socy. of Buffalo, Inc.*, 101 AD3d 1745, 1745-1746; *Kuhn v Camelot Assn., Inc.* [Appeal No. 2], 82 AD3d 1704, 1705; *Williams v City of Niagara Falls*, 43 AD3d 1426, 1427; *Whiting v Dave Hennig, Inc.*, 28 AD3d 1105, 1106). Specifically, plaintiff established that, while a ladder may have been present at the work site, "none had been erected for plaintiff's specific task" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 519, *rearg denied* 65 NY2d 1054). We conclude, alternatively, that plaintiff met his burden of establishing a violation of the statute under the theory that the unsecured truss upon which he was partially standing in order to do his work collapsed, thereby causing him to

fall and sustain injuries (*see Ewing v Brunner Intl., Inc.*, 60 AD3d 1323, 1323; *Bradford v State of New York*, 17 AD3d 995, 997).

The burden then shifted to defendant to raise a triable issue of fact whether there was a violation of Labor Law § 240 (1) (*see Gallagher v New York Post*, 14 NY3d 83, 88). In our view, this burden includes the requirement that defendant establish triable questions of material fact as to the "sole proximate cause defense" (*Piotrowski v McGuire Manor, Inc.*, 117 AD3d 1390, 1392) because "if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290). In other words, inasmuch as it is "conceptually impossible for a statutory violation (which serves as a proximate cause for plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury" (*id.*), the sole proximate cause issue must be addressed after a statutory violation is prima facie established but before concluding that the violation was a proximate cause of the injury. Defendant therefore bore the burden to establish a triable question of material fact as to all of the elements of the "sole proximate cause defense," i.e., whether plaintiff knew that he was expected to use a readily available ladder to perform his work, but for no good reason chose not to do so, and whether he would not have been injured had he not made that choice (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40). We conclude that defendant failed to submit such evidence. Even assuming, arguendo, that defendant raised a triable issue of fact that a ladder was readily available to plaintiff because it was nearby on the work site, defendant failed to submit any evidence that one had been erected for plaintiff's specific task (*see Zimmer*, 65 NY2d at 519), or that plaintiff had been instructed to use the ladder that plaintiff's employer had identified during his deposition (*see Handville v MJP Contrs., Inc.*, 77 AD3d 1471, 1473). Further, the employer's vague and conclusory testimony that he "trained" his "workers" to use a ladder when doing the work performed by plaintiff is, in our view, insufficient to create a triable question of fact whether plaintiff knew he was supposed to use a ladder to perform the job in question. We submit that this general reference to "training" does not fulfill defendant's duty to ensure proper protection for plaintiff and is far less than the job site "standing order" rejected by the Court of Appeals in *Gallagher* as a basis for finding a triable question of fact regarding whether plaintiff knew he was supposed to use a particular safety device (14 NY3d at 88).

To the extent that the majority relies on plaintiff's lengthy experience performing the type of work in question, the generalized evidence here does not raise a triable question of fact whether plaintiff knew he was supposed to use the ladder. The record does not contain any evidence regarding the manner in which plaintiff was purportedly trained to perform the work in question and, based on our reading of the record, there is no evidence that plaintiff had ever previously used a ladder to do the type of work in question and, in fact, plaintiff testified that he had not done so.

Further, even assuming, arguendo, that a ladder was erected for

plaintiff's specific task and he knew he should have used it, we conclude that defendant has failed to raise a triable question of material fact that plaintiff chose not to use it "for no good reason" (*Cahill*, 4 NY3d at 40). Plaintiff testified that use of a ladder was precluded "purely (as) a speed issue," but the record reflects that he complained about the excessive speed of the work shortly before his fall and that his employer was solely responsible for setting the pace of the work to be accomplished. We submit that, under such circumstances, plaintiff's election to try to stay up with the pace of the work is not something for which he may alone be faulted.

In our view, plaintiff established a statutory violation of Labor Law § 240 (1), defendant failed to raise a triable question of fact on that issue or the "sole proximate cause defense," and inasmuch as there is no dispute that plaintiff's injuries were proximately caused by his fall, we would affirm the court's order granting partial summary judgment to plaintiff.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

792

CA 16-00019

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

MILTON GRINAGE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DIANE DURAWA AND DANIEL DURAWA, DEFENDANTS.

ACA INSURANCE COMPANY, RESPONDENT.

RAMOS & RAMOS, BUFFALO (JOSHUA I. RAMOS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BILLIG LAW, P.C., NEW YORK CITY (SUZANNE M. BILLIG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 25, 2015. The judgment, inter alia, denied the relief plaintiff sought in his order to show cause and directed plaintiff to reimburse respondent ACA Insurance Company in full for Additional Personal Injury Protection benefits paid to plaintiff.

It is hereby ORDERED that the judgment 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 following memorandum: Plaintiff commenced the underlying negligence action against defendants to recover damages for injuries he sustained in a motor vehicle collision. During the pendency of the underlying action, plaintiff's no-fault insurance carrier, ACA Insurance Company, the nonparty respondent herein, paid him additional personal injury protection (APIP) benefits pursuant to their insurance contract. Eventually, defendants' insurance carrier offered to settle plaintiff's claims for the $100,000 limit on defendants' no-fault policy. Plaintiff accepted the offer and, insofar as relevant to the instant appeal, sought by order to show cause a declaration in Supreme Court that respondent's subrogation rights are limited to that portion of the settlement funds allocable to the category of damages for which APIP benefits are meant to compensate, i.e., extended economic loss. Respondent did not oppose the court adjudicating the dispute over its subrogation rights but contended that plaintiff owed it $37,529.27, i.e., the full amount of the benefits paid. The court issued a judgment, denominated an order, that, inter alia, denied the relief plaintiff sought in his order to show cause and directed plaintiff to pay respondent the full amount sought by respondent.

As a preliminary matter, contrary to respondent's contention, this appeal was not rendered moot by plaintiff's tender of payment to respondent inasmuch as the parties' rights will be affected directly by the outcome of the appeal (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714).

Plaintiff contends that, under the "made whole" rule, respondent has no right of subrogation because plaintiff's damages exceed the amount of the settlement. By way of background, the "made whole" rule provides that, if "the sources of recovery ultimately available are inadequate to fully compensate the insured for its loses, then the insurer—who has been paid by the insured to assume the risk of loss—has no right to share in the proceeds of the insured's recovery from the tortfeasor" (*Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577, 581). "In other words, the insurer may seek subrogation against only those funds and assets that remain after the insured has been compensated. This designation of priority interests . . . assures that the injured party's claim against the tortfeasor takes precedence over the subrogation rights of the insurer" (*Fasso v Doerr*, 12 NY3d 80, 87; *see Winkelmann*, 85 NY2d at 581-582). Although we agree with plaintiff that the court erred in refusing to apply that rule, on this record, it is unclear whether the settlement made plaintiff whole.

We also agree with plaintiff's further contention that the court erred in directing plaintiff to pay respondent the full amount of the benefits paid without making a determination as to what portion of the settlement represented his pain and suffering. The purpose of subrogation is "to prevent double recovery by the insured and to force the wrongdoer to bear the ultimate costs" (*Scinta v Kazmierczak*, 59 AD2d 313, 316; *see Aetna Cas. & Sur. Co. v Jackowe*, 96 AD2d 37, 44). Respondent has no right to recoup its losses from damages attributable to plaintiff's pain and suffering (*see Scinta*, 59 AD2d at 316). The contract provides: "In the event of any payment for extended economic loss, the Company is subrogated to the extent of such payments to the rights of the person to whom, or for whose benefit, such payments were made." Under that clause, respondent's right of subrogation extends only to plaintiff's claim for extended economic loss (*see id.* at 317; *see also Allstate Ins. Co. v Stein*, 1 NY3d 416, 423). On this record, however, it is unclear what portion of the $100,000 settlement represents plaintiff's recovery for extended economic loss, or whether such amount exceeds the benefits paid. In addition, we note that the court failed to declare the rights of the parties (*see Kemper Independence Ins. Co. v Ellis*, 128 AD3d 1529, 1530).

We therefore reverse the judgment and remit the matter to Supreme Court for a determination whether plaintiff's damages exceed the amount of the settlement and, if not, what portion of the settlement is attributable to plaintiff's extended economic loss and what portion is attributable to his pain and suffering (*see Dymond v Dunn*, 148 AD2d 56, 59; *Aetna Cas. & Sur. Co.*, 96 AD2d at 46; *see also Matter of Ackerman [Forbes]*, 66 AD2d 1027, 1027), and to enter a judgment declaring the rights of the parties in accordance therewith (*see* CPLR

3001).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

800

KA 10-01823

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VENICE J. NESMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered July 30, 2010. The judgment convicted defendant, upon a jury verdict, of burglary 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 following a jury trial of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that County Court (Crimi, A.J.) abused its discretion in issuing a protective order that allowed the People to withhold from the defense until the time of trial the identity of an eyewitness to the crime, who was referred to in the People's CPL 710.30 notice as "Witness A." We agree. CPL 240.50 (1) provides that a protective order may be issued upon a showing of "good cause," which includes "a substantial risk of physical harm [or] intimidation." Here, the People's moving papers merely asserted in conclusory fashion that there was a substantial risk that Witness A would be harmed and/or intimidated if his or her identity were disclosed, and they offered no evidence in support of that claim (*cf. People v Mileto*, 290 AD2d 877, 879, *lv denied* 97 NY2d 758; *People v Robinson*, 200 AD2d 693, 694, *lv denied* 84 NY2d 831). We further conclude, however, that defendant was not prejudiced by the protective order inasmuch as a notice pursuant to CPL 710.30 need not name an identifying witness (*see People v Poles*, 70 AD3d 1402, 1403, *lv denied* 15 NY3d 808; *see generally People v Lopez*, 84 NY2d 425, 428; *People v Ocasio*, 183 AD2d 921, 922-923, *lv dismissed* 80 NY2d 932), and "[t]here is neither a constitutional nor statutory obligation mandating the pretrial disclosure of the identity of a prosecution witness" (*People v Miller*, 106 AD2d 787, 788; *see generally People v Lynch*, 23 NY2d 262, 272; *People v Stacchini*, 108 AD3d 866, 867). Thus, we conclude that the court's error is harmless inasmuch as the People did not need a protective order to withhold the witness's identity until trial (*see*

generally CPL 470.05 [1]).

Defendant further contends that he was deprived of effective assistance of counsel based on errors in his attorney's presentation of an alibi defense at trial. We reject that contention. Although defendant testified at trial and undermined his alibi defense during direct examination by defense counsel, nothing in the record indicates that defense counsel could have anticipated that defendant would offer the harmful testimony (*see People v Covington*, 44 AD3d 510, 511, *lv denied* 9 NY3d 1032; *see generally People v Henry*, 95 NY2d 563, 566; *People v Crosdale*, 103 AD3d 749, 750, *lv denied* 21 NY3d 1003). Morever, even though defendant's other alibi witness was impeached by a prior statement that she made to a defense investigator, "counsel cannot be held ineffective because the People impeached the alibi witness[ ]" (*People v Wragg*, 26 NY3d 403, 412; *see People v Collins*, 203 AD2d 888, 889, *lv denied* 84 NY2d 934, *reconsideration denied* 85 NY2d 861; *see generally People v Smith*, 82 NY2d 731, 733). Defendant's remaining complaints of ineffectiveness reflect mere disagreements with defense counsel's trial strategy, which do not amount to ineffective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 713).

Finally, we reject defendant's contention that the prosecutor improperly shifted the burden of proof on summation. We note in any event that County Court (Castro, A.J.) repeatedly instructed the jury that the burden of proof on all issues remained with the prosecution (*see People v Matthews*, 27 AD3d 1115, 1116).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

802

KA 13-01729

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CRAIG OWENS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered April 17, 2013. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant's contention, the verdict is not against the weight of the evidence with respect to the element of intent. The evidence established that the victim had been severely beaten over a period of several hours and that, although those injuries would have eventually resulted in her death, the victim was then strangled to death. Thus, 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 a different verdict would have been unreasonable (*see id.* at 348; *People v Bleakley*, 69 NY2d 490, 495).

Contrary to defendant's further contention, County Court did not abuse its discretion in admitting in evidence two photographs depicting the victim's injuries. That evidence was relevant with respect to defendant's intent and the investigating police officer's determination to treat the victim's death as a homicide, and to corroborate the Medical Examiner's testimony regarding the victim's injuries (*see People v Camacho*, 70 AD3d 1393, 1394, *lv denied* 14 NY3d 886).

We nevertheless conclude that a mode of proceedings error occurred and reversal is required because the record fails to show that defense counsel was advised of the contents of a jury note requesting, inter alia, further instruction on reasonable doubt,

murder in the second degree and manslaughter in the first degree (*see People v Mack*, 27 NY3d 534, 541-542, *rearg denied* 28 NY3d 944; *People v Silva*, 24 NY3d 294, 299-300, *rearg denied* 24 NY3d 1216; *People v Walston*, 23 NY3d 986, 989-990). Moreover, because the record does not establish that the court advised defense counsel of the contents of the note, we cannot assume that the court complied with its core responsibilities pursuant to CPL 310.30 and *People v O'Rama* (78 NY2d 270) (*see Silva*, 24 NY3d at 300; *Walston*, 23 NY3d at 990; *see generally People v Nealon*, 26 NY3d 152, 160-162). We therefore reverse the judgment and grant a new trial. In light of our determination, there is no need to address defendant's remaining contention.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

803

CAF 14-00329

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

IN THE MATTER OF LUNDYN S.

CAYUGA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER;

MEMORANDUM AND ORDER

AL-RAHIM S., RESPONDENT.

IN THE MATTER OF VELVIA S., PETITIONER-APPELLANT,

V

CARRIE L., CAYUGA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND AL-RAHIM S., RESPONDENTS-RESPONDENTS.

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

HARRIS BEACH PLLC, BUFFALO (ALLISON A. FIUT OF COUNSEL), FOR RESPONDENT-RESPONDENT CAYUGA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES.

MICHELE R. DRISCOLL, ATTORNEY FOR THE CHILD, AUBURN.

Appeal from an order of the Family Court, Cayuga County (Mark H. Fandrich, A.J.), entered February 7, 2014 in proceedings pursuant to Social Services Law § 384-b and Family Court Act article 6. The order, among other things, denied the petition of Velvia S. seeking custody of the subject child.

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

Memorandum: Petitioner Cayuga County Department of Health and Human Services (DHS) commenced a proceeding seeking to terminate the parental rights of respondent father Al-Rahim S. with respect to the subject child, and the father's mother, petitioner Velvia S. (petitioner), also sought custody of the child. Petitioner now appeals from an order that denied her petition and continued custody of the child with DHS.

Petitioner contends that reversal is required because DHS did not comply with the statutory requirement to contact her and advise her of the pendency of this proceeding and her right to seek to become a

foster parent or obtain custody of the child (*see* Family Ct Act § 1017 [1]). We reject that contention. Even assuming, arguendo, that DHS failed to fulfill its statutory duty to locate the subject child's relatives and inform them of the pendency of the proceeding and of the opportunity for becoming foster parents or for seeking custody of the child, "[u]nder the provisions of article 10 . . . , there is . . . an explicit 'best interests' standard of review" for review of petitions seeking placement of a child with a relative (*Matter of Deborah E.C. v Shawn K.*, 63 AD3d 1724, 1725, *lv denied* 13 NY3d 710; *see* § 1055-b [a] [ii]). On the father's prior appeal from the same order, we rejected his contention that the best interests of the child would be served by awarding custody of her to petitioner, rather than "awarding custody to [DHS] so that the child may be adopted by her foster parents" (*Matter of Lundyn S. [Al-Rahim S.]*, 128 AD3d 1406, 1407-1408). For reasons stated by this Court in the father's prior appeal, we reject petitioner's contention that the best interests of the child would be served by awarding custody to petitioner (*see id.*). In addition, we note that a "nonparent relative of the child does not have 'a greater right to custody' than the child's foster parents" (*Matter of Matthew E. v Erie County Dept. of Social Servs.*, 41 AD3d 1240, 1241; *see Matter of Gordon B.B.*, 30 AD3d 1005, 1006; *see generally Matter of Thurston v Skellington*, 89 AD3d 1520, 1520).

Finally, petitioner contends that she was deprived of effective assistance of counsel because her attorney failed to move to vacate the prior placement order pursuant to Family Court Act § 1061 at the same time that her attorney filed the instant petition seeking custody of the child. Even assuming, arguendo, that petitioner is entitled to assigned counsel or may otherwise raise the issue of effective assistance of counsel (*cf.* § 262; *see generally Matter of Brittni K.*, 297 AD2d 236, 240-241), we reject that contention. "There is no denial of effective assistance of counsel . . . arising from a failure to make a motion or argument that has little or no chance of success" (*Matter of Kelsey R.K. [John J.K.]*, 113 AD3d 1139, 1140, *lv denied* 22 NY3d 866). On a motion pursuant to section 1061, a court may modify or vacate an order of custody upon a showing of good cause (*see generally Matter of Arkadian S. [Crystal S.]*, 130 AD3d 1457, 1457-1458, *lv dismissed* 26 NY3d 995), and "the modified order 'must reflect a resolution consistent with the best interests of the children after consideration of all relevant facts and circumstances, and must be supported by a sound and substantial basis in the record' " (*Matter of Kenneth QQ. [Jodi QQ.]*, 77 AD3d 1223, 1224). Here, because the court properly determined after a hearing that the best interests of the child were served by awarding custody to DHS so that the child may be adopted by her foster parents (*see Lundyn S.*, 128 AD3d at 1407-1408), there is little or no chance that a motion pursuant to section 1061 would have been successful.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

811

CA 15-02033

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

DANIELLE DOTZLER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS S. BUONO, DEFENDANT-APPELLANT.

THE LAW OFFICE OF MATTHEW ALBERT, ESQ., BUFFALO (MATTHEW ALBERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. WILD, ESQ. PLLC, WILLIAMSVILLE (MICHAEL C. WILD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Christopher J. Burns, J.), entered February 4, 2015. The order and judgment granted plaintiff's motion for an order determining that defendant was in contempt of court, imposed a fine, struck defendant's answer and awarded plaintiff a money judgment against defendant.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, defendant's answer is reinstated and the award of judgment is vacated.

Memorandum: In this action to recover damages for an alleged breach of contract, defendant appeals from an order and judgment that found him in contempt of court for failing to comply with a temporary restraining order (TRO), and sua sponte struck his answer and granted plaintiff the relief sought in her complaint. Plaintiff contracted with defendant to purchase defendant's mobile home and made a down payment of $11,000. After defendant allegedly failed to deliver the keys to the mobile home, plaintiff commenced this action seeking to recover the down payment. According to defendant, plaintiff failed to make further payments due under the agreement, and defendant refused to deliver the mobile home. Defendant further alleged that plaintiff forfeited the down payment, and he refused to return it to plaintiff.

Subsequently, plaintiff discovered that defendant had sold the mobile home to a third party. Supreme Court granted plaintiff's application for a TRO that enjoined defendant from "diverting or otherwise alienating the proceeds of the sale of the trailer." Plaintiff served the TRO on defendant's counsel, who then mailed the order to the home address that had been provided to him by defendant. Unbeknownst to defendant's counsel, defendant had moved his residence

and did not receive the TRO before he spent the proceeds from the sale of the mobile home. The court found defendant in contempt of court because he failed to comply with the TRO, and the court sua sponte dismissed defendant's answer and granted plaintiff the relief sought in the complaint. We reverse.

A finding of civil contempt must be supported by four elements: (1) "a lawful order of the court, clearly expressing an unequivocal mandate, was in effect"; (2) "[i]t must appear, with reasonable certainty, that the order has been disobeyed"; (3) "the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party"; and (4) "prejudice to the right of a party to the litigation must be demonstrated" (*Matter of McCormick v Axelrod*, 59 NY2d 574, 583, *order amended* 60 NY2d 652). The party seeking an order of contempt has the burden of establishing those four elements by clear and convincing evidence (*see El-Dehdan v El-Dehdan*, 26 NY3d 19, 29; *Belkhir v Amrane-Belkhir*, 128 AD3d 1382, 1382).

Here, we agree with defendant that plaintiff failed to establish by the requisite clear and convincing evidence that defendant had actual knowledge of the TRO at the time he spent the proceeds from the sale of the mobile home (*see Puro v Puro*, 39 AD2d 873, 873, *affd* 33 NY2d 805). We reject plaintiff's contention that defendant's actual knowledge of the TRO is not necessary here because she served the TRO upon defendant's attorney (*see* CPLR 2103 [b]). "Actual knowledge of a judgment or order is an indispensable element of a contempt proceeding" (*Orchard Park Cent. Sch. Dist. v Orchard Park Teachers Assn.*, 50 AD2d 462, 468, *appeal dismissed* 38 NY2d 911; *see Matter of Howell v Lovell*, 103 AD3d 1229, 1230), and the record establishes that defendant did not receive the TRO before he spent the proceeds from the sale of the mobile home.

We further conclude that the court erred in awarding plaintiff summary judgment without affording adequate notice to defendant (*see Town of Lloyd v Moreno*, 297 AD2d 403, 405; *Clark v New York State Off. of Parks, Recreation & Historic Preserv.*, 288 AD2d 934, 935). We note that neither party moved for summary judgment nor made any request for such relief (*see Clark*, 288 AD2d at 935). During the contempt hearing, the court asked only one question relating to the merits of the action, and we conclude that the court's inquiry did not give the parties notice that the court planned to award summary judgment to plaintiff.

In light of the foregoing, we deny the motion for contempt, reinstate the answer, and vacate the award of judgment.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

814.1

CA 16-00358

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF MYRON WRIGHT, CONSECUTIVE NO. 16906, FROM CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09,
PETITIONER-RESPONDENT,

V ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH AND NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENTS-APPELLANTS.

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

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

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered March 1, 2016 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, directed the discharge of petitioner from the custody of the New York State Office of Mental Health.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

827

KA 14-01245

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERREL A. GOODSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS 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 May 15, 2014. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child and sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, predatory sexual assault against a child (Penal Law § 130.96). Defendant's girlfriend lived in an apartment across the hall from the apartment of the 10-year-old victim's mother. On the night of September 2, 2013, the 10-year-old victim slept at the apartment of defendant's girlfriend. At some point in the evening, defendant's girlfriend left, leaving only defendant, the victim, and the victim's younger sister in the apartment. Later in the night, after the victim and her sister fell asleep, defendant allegedly sexually assaulted the victim. The victim's sister remained asleep during the assault.

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). "The People's case rested largely on the credibility of the victim and, notwithstanding minor inconsistencies in the victim's testimony, there is no basis in the record for us to disturb the jury's determination to credit the victim's testimony" (*People v Chrisley*, 126 AD3d 1495, 1496, *lv denied* 26 NY3d 1007; *see People v Izzo*, 104 AD3d 964, 966-967, *lv denied* 21 NY3d 1005; *see generally People v Childres*, 60 AD3d 1278, 1279, *lv denied* 12 NY3d 913). Moreover, defendant's arguments regarding the credibility of the victim's mother and the lack of

forensic evidence corroborating the victim's testimony are unavailing inasmuch as "the testimony of [the victim] can be enough to support a conviction" (*People v Calabria*, 3 NY3d 80, 82). "Sitting as the thirteenth juror . . . [and] weigh[ing] the evidence in light of the elements of the crime[s] as charged to the other jurors" (*Danielson*, 9 NY3d at 349), we conclude that the jury did not fail to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495; *People v Kalen*, 68 AD3d 1666, 1667, *lv denied* 14 NY3d 842).

Defendant failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct during summation inasmuch as he "either failed to object to the alleged misconduct, or failed to request curative instructions or move for a mistrial when [County Court] sustained his objection[]" (*People v Tolbert*, 283 AD2d 930, 931, *lv denied* 96 NY2d 908; *see People v Galloway*, 54 NY2d 396, 400; *People v Lewis*, 140 AD3d 1593, 1595). "In any event, '[t]he majority of the comments in question were within the broad bounds of rhetorical comment permissible during summations . . . , and they were either a fair response to defense counsel's summation or fair comment on the evidence . . . Even assuming, arguendo, that some of the prosecutor's comments were beyond those bounds, we conclude that they were not so egregious as to deprive defendant of a fair trial' " (*People v Stanley*, 108 AD3d 1129, 1131, *lv denied* 22 NY3d 959; *see People v McEathron*, 86 AD3d 915, 916, *lv denied* 19 NY3d 975).

Contrary to the People's assertion, defendant preserved his contention that the court erred in limiting his cross-examination of the victim regarding a prior, unrelated instance of sexual contact with a different individual (*cf. generally People v Goossens*, 92 AD3d 1281, 1281, *lv denied* 19 NY3d 960), but we conclude that defendant's contention lacks merit. "[T]he questions at issue were 'speculative, and lacked a good faith basis, and the probative value of the matters sought to be elicited was outweighed by the danger that the main issues would be obscured and the jury confused' " (*People v Baker*, 294 AD2d 888, 889, *lv denied* 98 NY2d 708; *see People v Quinones*, 210 AD2d 176, 177).

Defendant failed to preserve for our review his further contention that the court erred in limiting his cross-examination of the victim regarding the omission of certain facts from her direct examination and grand jury testimony and, in any event, that contention is without merit (*see generally People v Bornholdt*, 33 NY2d 75, 88; *People v Lester*, 83 AD3d 1578, 1578-1579, *lv denied* 17 NY3d 818). Defendant likewise failed to preserve for our review his contention that the court violated his constitutional rights by limiting his cross-examination of the victim, inasmuch as he failed to object on those grounds at trial (*see People v Bryant*, 93 AD3d 1344, 1344-1345), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, we reject defendant's contention that he was deprived of effective assistance of counsel. The record establishes that defense counsel made an omnibus motion, made an opening statement with the cogent theory that the victim was incredible, pursued that theory on cross-examination, delivered a summation consistent with that theory, and obtained an acquittal on the top count of the indictment. Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see People v Baldi*, 54 NY2d 137, 147).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

829

CAF 15-00282

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

IN THE MATTER OF DONIELLE L. CHYRECK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOSEPH R. SWIFT, RESPONDENT-RESPONDENT.

IN THE MATTER OF JOSEPH R. SWIFT,
PETITIONER-RESPONDENT,

V

DONIELLE L. CHYRECK, RESPONDENT-APPELLANT.

WAGNER & HART, LLP, OLEAN (JANINE FODOR OF COUNSEL), FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

DEBORAH J. SCINTA, ATTORNEY FOR THE CHILDREN, ORCHARD PARK.

Appeal from an order of the Family Court, Cattaraugus County (Judith E. Samber, R.), entered December 31, 2014 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded primary physical custody of the children to Joseph R. Swift and visitation to Donielle L. Chyreck.

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

Memorandum: Petitioner-respondent mother commenced this proceeding pursuant to article 6 of the Family Court Act, seeking custody of the subject children, and respondent-petitioner father filed a cross petition also seeking custody. Following a hearing, Family Court entered an order that, inter alia, awarded primary physical custody of the subject children to the father and visitation to the mother, and granted the mother secondary decision-making authority with regard to the health, education, and welfare of the children.

We reject the mother's contention that the court did not give proper consideration to her allegations of domestic violence. The record supports the court's determination that the mother's alleged instances of domestic violence by the father, and any alleged negative impact upon the children thereby, were not proved by a preponderance of the evidence (*see Miller v Jantzi*, 118 AD3d 1363, 1363-1364;

Williams v Williams, 78 AD3d 1256, 1257; *see also Matter of Booth v Booth*, 8 AD3d 1104, 1105, *lv denied* 3 NY3d 607). The court's "first-hand assessment of the credibility of the witnesses after an evidentiary hearing . . . is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Dubuque v Bremiller*, 79 AD3d 1743, 1744). Here, we see no basis to disturb the court's credibility determinations.

We reject the mother's further contention that the court erred in granting primary physical custody to the father because he had, in effect, delegated his responsibility to care for the children to the paternal grandmother owing to his work schedule. While it is true that " '[c]ustody options which allow for the direct care and guidance of children by a parent rather than by third parties are naturally preferred' " (*Crowe v Crowe* [appeal No. 2], 176 AD2d 1216, 1216-1217, *lv denied* 79 NY2d 755), that is but one factor in the overall analysis, and a more fit parent will not be deprived of custody simply because the parent assigns day-care responsibilities to a relative owing to work obligations (*see Matter of Wellman v Dutch*, 198 AD2d 791, 792, *appeal dismissed* 82 NY2d 920). Here, the record supports the court's determination that the father "ha[d] assumed greater responsibility for the children's care" since the separation of the parties (*see generally Matter of McGrew v Chase*, 193 AD2d 1119, 1120), and that the children emotionally benefitted from the care they had received from the paternal grandmother and stepgrandfather (*see Matter of Oravec v Oravec*, 89 AD3d 1475, 1475-1476). The record also supports the court's determination that the father's work schedule at his family-owned business could be altered to handle the care of the children as needed (*see Matter of Brady v Brady*, 216 AD2d 660, 660).

We have considered the mother's remaining contentions and conclude that they are without merit. The court's custody determination is supported by a "sound and substantial basis in the record" (*Sheridan v Sheridan*, 129 AD3d 1567, 1568), and our review of the relevant factors establishes that the grant of primary residential custody to the father is in the best interests of the children (*see Cunningham v Cunningham*, 137 AD3d 1704, 1705; *see generally Eschbach v Eschbach*, 56 NY2d 167, 171).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

830

CA 15-02171

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

RYAN P. DENHAESE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BUFFALO SPINE SURGERY, PLLC, DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (ALAN J. BOZER OF COUNSEL), FOR DEFENDANT-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 20, 2015. The order, among other things, denied in part defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: In an action to recover bonuses that had allegedly accrued during plaintiff's employment with defendant, defendant appeals from an order that, inter alia, denied in part its motion for summary judgment dismissing the complaint.

Contrary to defendant's contention, there are questions of fact whether the payment of plaintiff's bonuses were " 'solely and completely a matter of defendant's discretion' " (*Doolittle v Nixon Peabody LLP*, 126 AD3d 1519, 1520). Defendant submitted affidavits from its principal, Dr. Andrew Cappuccino, and from its manager, Dr. Helen Cappuccino, and in those affidavits the doctors denied that they had ever agreed to pay plaintiff a bonus pursuant to a fixed formula. Plaintiff, however, submitted an affidavit in which he averred that he was told by the Drs. Cappuccino that, in addition to his biweekly salary, he would be paid bonuses equaling his revenues less his expenses and 50% of the shared business overhead. In addition, email correspondence submitted by the parties provides additional support for plaintiff's position that defendant had a practice of calculating plaintiff's bonuses in a manner consistent with the formula described by plaintiff. Thus, "given the conflicting evidence and testimony concerning the nature of the . . . bonus[es] and how [they were] presented to . . . plaintiff," Supreme Court properly denied defendant's motion with respect to the cause of action for breach of contract (*Doolittle*, 126 AD3d at 1522). We reject defendant's

contention that judicial estoppel precludes plaintiff from asserting specific terms of the alleged agreement to pay bonuses. We conclude that judicial estoppel does not apply to the facts of this case (*see generally Lorenzo v Kahn*, 100 AD3d 1480, 1482-1483).

Furthermore, inasmuch as there are questions of fact whether a valid agreement exists, we conclude that the court also properly denied the motion with respect to the causes of action for unjust enrichment and quantum meruit (*see generally Pappas v Tzolis*, 20 NY3d 228, 234, *rearg denied* 20 NY3d 1075; *Superior Officers Council Health & Welfare Fund v Empire HealthChoice Assur., Inc.*, 85 AD3d 680, 682, *affd* 17 NY3d 930; *Pulver Roofing Co., Inc. v SBLM Architects, P.C.*, 65 AD3d 826, 827-828).

Contrary to defendant's final contention, the fact that plaintiff labeled his Labor Law cause of action a violation of section 191 rather than section 193 does not warrant dismissal of that cause of action. "Plaintiffs need not label [a] cause of action; in fact, even if the cause of action is labeled incorrectly, it will not be dismissed if the facts alleged constitute a cognizable cause of action" (*Cole v O'Tooles of Utica*, 222 AD2d 88, 90). We conclude that the Labor Law cause of action sets forth a claim under section 193. Inasmuch as there are questions of fact whether the payment of plaintiff's bonuses was solely within the discretion of defendant, we further conclude that defendant has not established its entitlement to summary judgment with respect to that cause of action (*see Doolittle*, 126 AD3d at 1522; *see also Truelove v Northeast Capital & Advisory*, 268 AD2d 648, 649, *affd* 95 NY2d 220).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

858

KA 15-02120

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRY T. SADDLER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CHARLES A. MARANGOLA, MORAVIA, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (NATHAN J. GARLAND OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered November 17, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree and assault 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 criminal contempt in the first degree (Penal Law § 215.51 [b] [v]) and assault in the second degree (§ 120.05 [2]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of aggravated family offense (§ 240.75 [1]). With respect to both appeals, we conclude that the "waiver of the right to appeal is invalid because, based on County Court's statements at the plea proceeding, 'defendant may have erroneously believed that the right to appeal is automatically extinguished upon entry of a guilty plea' " (*People v Prince*, 141 AD3d 1103, 1104, quoting *People v Moyett*, 7 NY3d 892, 893). We nevertheless conclude that neither sentence is unduly harsh or severe.

In appeal No. 1, defendant failed to preserve for our review his challenge to the factual sufficiency of the plea allocution with respect to the assault count because he did not move to withdraw his plea or to vacate the judgment of conviction (*see People v Lopez*, 71 NY2d 662, 665). This case does not fall within the rare exception to the preservation requirement inasmuch as nothing in the plea colloquy "casts significant doubt upon the defendant's guilt [of assault] or otherwise calls into question the voluntariness of the plea" (*id.* at 666; *see People v Rinker*, 141 AD3d 1177, 1177). We decline to exercise our power to review defendant's challenge as a matter of

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

859

KA 15-01169

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DONALD C. PENDLETON, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

NIAGARA COUNTY DISTRICT ATTORNEY'S OFFICE, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), rendered June 17, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted criminal contempt in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Mackey*, 79 AD3d 1680, 1681, *lv denied* 16 NY3d 860).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

860

KA 14-00396

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERWAN B. MCFARLEY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

HUNT & BAKER, HAMMONDSPORT (BRENDA SMITH ASTON 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 December 4, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third 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 a plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]) and, in appeal No. 2, defendant appeals from a judgment convicting him upon a plea of guilty of criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). Contrary to defendant's contention in each appeal, his waivers of the right to appeal were knowingly, voluntarily and intelligently entered. "Taking into account 'the nature and terms of the [plea] agreement and the age, experience and background of [defendant]' . . . , we conclude that the record of the plea colloquy [and the written waivers of the right to appeal] 'establish[ ] that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Rios*, 93 AD3d 1349, 1349, *lv denied* 19 NY3d 966; *see generally People v Lopez*, 6 NY3d 248, 256). Moreover, "[n]o particular litany is required for an effective waiver of the right to appeal" (*People v Burley*, 136 AD3d 1404, 1404, *lv denied* 27 NY3d 993 [internal quotation marks omitted]; *see People v Durodoye*, 113 AD3d 1130, 1131), and we conclude that County Court fulfilled its obligation to "make certain that . . . defendant's understanding of the terms and conditions of [the] plea agreement [was] evident on the face of the record" (*Lopez*, 6 NY3d at 256).

Even assuming, arguendo, that defendant's contention that he was denied effective assistance of counsel at sentencing survives defendant's guilty pleas (*see People v Gregg*, 107 AD3d 1451, 1452) and the valid waivers of the right to appeal (*see People v Rossetti*, 55 AD3d 637, 638; *see also People v Nicholson*, 50 AD3d 1397, 1398-1399, *lv denied* 11 NY3d 834), we conclude that defendant's challenges to counsel's conduct at sentencing do not warrant reversal or modification of the judgments of conviction. Defendant contends that defense counsel coerced him into withdrawing his motion to withdraw the pleas, but that contention involves matters outside the record on appeal and must be raised by way of a motion pursuant to CPL 440.10 (*see e.g. People v Williams*, 124 AD3d 1285, 1286, *lv denied* 25 NY3d 1078; *People v Griffin*, 48 AD3d 1233, 1236, *lv denied* 10 NY3d 840). Defendant further contends that defense counsel failed to investigate a new criminal charge against defendant, which was being used as a basis to modify the terms of the agreed-upon sentence. That contention is also based on matters outside the record and must be raised by way of a motion pursuant to CPL article 440 (*see e.g. Williams*, 124 AD3d at 1286; *Griffin*, 48 AD3d at 1236). With respect to defense counsel's failure to request an *Outley* hearing concerning the validity of the new charge, we conclude that such a failure did not deprive defendant of meaningful representation because "[t]he record establishes that defendant 'receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Coker*, 133 AD3d 1218, 1218-1219, *lv denied* 27 NY3d 995, quoting *People v Ford*, 86 NY2d 397, 404; *see People v Davis*, 302 AD2d 973, 974, *lv denied* 100 NY2d 537).

Finally, while we do not condone defense counsel's statements that he would not listen to defendant and that defendant should engage another attorney if he was unhappy, we cannot conclude that those statements deprived defendant of meaningful representation under the circumstances of this case (*see generally Ford*, 86 NY2d at 404; *People v Baldi*, 54 NY2d 137, 147).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

861

KA 14-00820

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERWAN B. MCFARLEY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

HUNT & BAKER, HAMMONDSPORT (BRENDA SMITH ASTON 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 December 4, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree.

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

Same memorandum as in *People v McFarley* ([appeal No. 1] ___ AD3d ___ [Nov. 10, 2016]).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

862

KA 13-01481

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WILFREDO ROMAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered July 26, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the first degree, criminal sale of a controlled substance in the second degree, criminal possession of a controlled substance in the third degree (seven counts) and criminal possession of a controlled substance in the fourth degree.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

863

KA 10-01429

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH BRYANT, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON 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 (Robert B. Wiggins, A.J.), rendered May 3, 2010. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree, petit larceny and criminal mischief in the third 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 following a jury trial of, inter alia, burglary in the third degree (Penal Law § 140.20). Contrary to defendant's contention, the verdict is not against the weight of the evidence. An eyewitness testified that he observed a man fitting defendant's general description leave a children's clothing store after 9:00 p.m. through the broken front door, carrying several coats. Shortly thereafter, the police received a tip from an identified informant that a man was selling children's coats at a "drug house" approximately one block from the store and, when the police arrived at that location, they found defendant in a room with several children's coats with tags from the store. The store owner testified that she asked the police if she could speak to the suspect seated in the patrol car and, when she did so, the person apologized to her. Thus, 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 a different verdict would have been unreasonable and thus that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Contrary to defendant's further contention, County Court properly refused to suppress the statement defendant made to the owner of the store based on the People's failure to provide a CPL 710.30 notice

with respect to that statement. The store owner was not acting as an agent of the police and therefore no notice pursuant to CPL 710.30 was required (*see People v Jones*, 292 AD2d 792, 792, *lv denied* 98 NY2d 652; *see generally People v Ray*, 65 NY2d 282, 286). The court also properly denied defendant's motion to set aside the verdict pursuant to CPL 330.30 on the ground that the court erred in admitting that statement. "It is well settled that '[t]he basis for vacating a jury verdict prior to sentencing is strictly circumscribed by CPL 330.30 to allow vacatur only if reversal would have been mandated on appeal as a matter of law' " (*People v Shelton*, 111 AD3d 1334, 1334, *lv denied* 23 NY3d 1025), and that is not the case here.

Although the People correctly concede that the police were required to retain the stolen coats until they had given notice to defendant that the coats were being returned to the store owner and had afforded him an opportunity to examine, test or photograph them (*see* Penal Law § 450.10 [1], [2]), we reject defendant's contention that the court abused its discretion in refusing to dismiss the indictment or preclude any evidence regarding the coats. It is well established that the determination of a sanction for a violation of section 450.10 is left to the sound discretion of the court (*see People v Riley*, 19 NY3d 944, 946, *adhered to on rearg* 20 NY3d 980; *People v Kelly*, 62 NY2d 516, 520-521), and that those sanctions are not to be used "if less severe measures can rectify the harm done" by the failure of the police to retain the evidence (*Kelly*, 62 NY2d at 521; *see People v Jenkins*, 98 NY2d 280, 284). Inasmuch as the court determined that there was no bad faith on the part of the police in returning the coats to the store owner and defense counsel argued that there was no forensic evidence connecting defendant to the crime, the court's determination to instruct the jury to infer that there was no fingerprint or DNA evidence on the coats or the hangers was appropriate (*see People v Perkins*, 56 AD3d 944, 945-946, *lv denied* 12 NY3d 786; *see generally People v McCall*, 289 AD2d 1074, 1074, *lv denied* 97 NY2d 757). Defendant's contention that there may have been evidence that exonerated him is entirely speculative. The store owner testified that she did not observe any blood on the coats, and an evidence technician testified that fingerprints could not be obtained from fabric and that it was unlikely that a clear print could be obtained from the hangers based upon their shape and the number of people who would have handled them.

Even assuming, arguendo, that the court erred in admitting in evidence a security video of poor quality that depicted a man walking near the store, we conclude that any error is harmless. The evidence of defendant's guilt is overwhelming, and there is no reasonable probability that defendant would have been acquitted if that evidence was not admitted (*see generally People v Crimmins*, 36 NY2d 230, 241-242). Defendant failed to preserve for our review his contention that the court erred in permitting a police investigator to testify with respect to the contents of the video (*see* CPL 470.05 [2]), and we decline to exercise our power to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, as defendant correctly concedes, reversal of the

judgment in appeal No. 2, convicting him upon his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [1]), is warranted only in the event that the judgment in appeal No. 1 is reversed (*see People v Monroe*, 39 AD3d 1276, 1277, *lv denied* 9 NY3d 867; *see generally People v Pichardo*, 1 NY3d 126, 129), and here we are affirming the judgment in appeal No. 1.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

864

KA 16-00697

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRY T. SADDLER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CHARLES A. MARANGOLA, MORAVIA, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (NATHAN J. GARLAND OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered November 17, 2015. The judgment convicted defendant, upon his plea of guilty, of aggravated family offense.

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

Same memorandum as in *People v Saddler* ([appeal No. 1] ___ AD3d ___ [Nov. 10, 2016]).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

865

KA 13-01530

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TUREMAIL MCCULLOUGH, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Francis A. Affronti, J.), dated July 3, 2013. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Memorandum: Defendant appeals from an order summarily denying his pro se motion pursuant to CPL 440.10 seeking to vacate the judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]), assault in the second degree (§ 120.05 [6]), and grand larceny in the third degree (§ 155.35). On appeal, defendant contends that he was deprived of effective assistance of counsel at trial. We conclude that Supreme Court properly denied the motion without a hearing.

The court properly concluded that it was required to deny the motion with respect to the majority of defendant's claims of ineffective assistance of counsel because they could have been, or were, raised on his direct appeal from the judgment of conviction (*see* CPL 440.10 [2] [a], [c]; *People v Mastowski*, 63 AD3d 1589, 1590, *lv denied* 12 NY3d 927, *reconsideration denied* 13 NY3d 837; *People v Hall*, 28 AD3d 678, 678, *lv denied* 7 NY3d 867).

Defendant's remaining claims were properly rejected on the merits without a hearing. With respect to defendant's claim that his counsel was ineffective in failing to obtain and view a video of an earlier robbery that defendant contends would establish that he was innocent of this crime, the court properly rejected that claim without a hearing because "the moving papers do not contain sworn allegations

substantiating or tending to substantiate all the essential facts" (CPL 440.30 [4] [b]; *see People v Ozuna*, 7 NY3d 913, 915). Defendant did not indicate that he observed that video, and thus his affidavit in support of that part of the motion is "based only on speculation and conjecture" (*People v Studstill*, 27 AD3d 833, 835, *lv denied* 6 NY3d 898).

The court also properly denied the motion without a hearing with respect to defendant's claim that counsel was ineffective in failing to introduce hearsay statements of a witness regarding the perpetrator of that earlier crime. The statements of the witness indicated that the same person perpetrated both crimes and that defendant committed the crime on appeal, and defendant failed "to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's alleged error in failing to introduce evidence tending to establish that defendant committed another crime (*People v Rivera*, 71 NY2d 705, 709). For the same reasons, we conclude that defendant failed to establish that counsel was ineffective in stipulating to the admission of the prior testimony of that witness. Defendant contends that counsel should have attempted to preclude the testimony, but the trial record demonstrates that counsel made effective use of the witness's description of the perpetrator in support of the misidentification defense that was pursued at trial. It is well settled that "mere disagreement with trial strategy is insufficient to establish that defense counsel was ineffective" (*People v Henry*, 74 AD3d 1860, 1862, *lv denied* 15 NY3d 852).

Finally, with respect to defendant's claim that counsel was ineffective because he did not fully explain a plea offer, the record establishes that defendant proclaimed his innocence and flatly rejected that offer. We conclude that the court properly denied the motion without a hearing with respect to that claim "on the ground that the allegations in support of the motion are made solely by defendant, . . . those allegations are unsupported by other evidence and . . . , under all the circumstances, there is no reasonable possibility that such allegations are true" (*People v Santana*, 101 AD3d 1664, 1664-1665, *lv denied* 20 NY3d 1103; *see* CPL 440.30 [4] [d]).

We have considered defendant's remaining claims of ineffective assistance, and we conclude that they are without merit.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

866

KA 13-01991

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOHN E. SABINS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CARA A. WALDMAN, FAIRPORT, 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 June 25, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on August 29, 2016, and by the attorneys for the parties on August 9 and 15, 2016,

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

867

KA 13-01992

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOHN E. SABINS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CARA A. WALDMAN, FAIRPORT, 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 June 25, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on August 29, 2016, and by the attorneys for the parties on August 9 and 15, 2016,

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

868

KA 13-01993

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOHN E. SABINS, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

CARA A. WALDMAN, FAIRPORT, 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 June 25, 2013. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on August 29, 2016, and by the attorneys for the parties on August 9 and 15, 2016,

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

869

KA 13-01994

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOHN E. SABINS, DEFENDANT-APPELLANT.
(APPEAL NO. 4.)

CARA A. WALDMAN, FAIRPORT, 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 June 25, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on August 29, 2016, and by the attorneys for the parties on August 9 and 15, 2016,

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

870

KA 14-00717

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SPENCER WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered November 20, 2013. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Onondaga County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of manslaughter in the first degree (Penal Law § 125.20 [1]). Pursuant to the terms of the plea agreement, defendant entered his guilty plea in satisfaction of the indictment by which he was charged with, inter alia, murder in the second degree (§ 125.25 [1]), and County Court imposed a determinate term of incarceration of 25 years. During discussions over the plea offer, the court addressed the possibility of a jury convicting defendant of the lesser included offense of manslaughter in the first degree by stating: "[Y]ou wouldn't get any better than 25 [years] if you get a manslaughter. That's a big 'if.' " Defendant contends that the court erred in denying his motion to withdraw his guilty plea on the ground that it was coerced. We agree. "[T]he court's statements do not amount to a description of the range of potential sentences but, rather, they constitute impermissible coercion, rendering the plea involuntary and requiring its vacatur" (*People v Kelley*, 114 AD3d 1229, 1230 [internal quotation marks omitted]; *see People v Boyde*, 122 AD3d 1302, 1302-1303). In light of our decision, we do not address defendant's challenge to the severity of his sentence.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

871

KA 10-01430

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH BRYANT, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON 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 L. DeMarco, J.), rendered June 23, 2010. 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.

Same memorandum as in *People v Bryant* ([appeal No. 1] ___ AD3d ___ [Nov. 10, 2016]).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

872

CA 15-01771

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

IN THE MATTER OF KAMLEH S. TEHAN, AS EXECUTRIX OF THE ESTATE OF ROBERT J. TEHAN, DECEASED, PETITIONER-APPELLANT-RESPONDENT, FOR JUDICIAL DISSOLUTION OF TEHAN'S CATALOG SHOWROOMS, INC., RESPONDENT-RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

(APPEAL NO. 1.)

BARCLAY DAMON, LLP, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR PETITIONER-APPELLANT-RESPONDENT.

STEATES, REMMELL, STEATES & DZIEKAN, ESQS., UTICA (CARL S. DZIEKAN OF COUNSEL), FOR RESPONDENT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), dated April 29, 2015. The order denied respondent's motion to dismiss the petition and for summary judgment and denied in part petitioner's cross motion for partial summary judgment.

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

Same memorandum as in *Matter of Tehan* (*Tehan's Catalog Showrooms, Inc.*) ([appeal No. 2] ___ AD3d ___ [Nov. 10, 2016]).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

873

CA 15-01772

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

IN THE MATTER OF KAMLEH S. TEHAN, AS EXECUTRIX OF THE ESTATE OF ROBERT J. TEHAN, DECEASED, PETITIONER-APPELLANT,

MEMORANDUM AND ORDER

FOR JUDICIAL DISSOLUTION OF TEHAN'S CATALOG SHOWROOMS, INC., RESPONDENT-RESPONDENT.

(APPEAL NO. 2.)

BARCLAY DAMON, LLP, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR PETITIONER-APPELLANT.

STEATES, REMMELL, STEATES & DZIEKAN, ESQS., UTICA (CARL S. DZIEKAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered August 3, 2015. The order, among other things, granted respondent's motion for summary judgment dismissing the petition.

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

Memorandum: Petitioner, in her capacity as executrix of the estate of her husband (decedent) commenced this proceeding seeking, inter alia, declaratory relief and dissolution of respondent pursuant to Business Corporation Law § 1104-a. In a prior appeal (*Matter of Tehan v Tehan's Catalog Showrooms, Inc.*, 110 AD3d 1498), this Court affirmed an order that denied respondent's motion insofar as it sought summary judgment dismissing the petition for lack of standing to bring a dissolution proceeding because decedent's estate allegedly did not hold 20% or more of the shares in respondent. That motion was denied without prejudice to renew upon completion of discovery.

Respondent thereafter moved to dismiss the petition pursuant to CPLR 3211 (a) (3) and for summary judgment, and petitioner cross-moved for partial summary judgment dismissing respondent's affirmative defense alleging lack of standing, and seeking the relief sought in the third cause of action in the petition pursuant to Business Corporation Law § 1104-a. In appeal No. 1, petitioner appeals and respondent cross-appeals from an order denying respondent's motion, granting that part of petitioner's cross motion seeking summary judgment dismissing the affirmative defense alleging lack of standing,

and otherwise denying the cross motion.

Following entry of the order in appeal No. 1, respondent again moved for summary judgment dismissing the petition, and petitioner cross-moved for various forms of relief. In appeal No. 2, petitioner appeals from an order granting the motion and denying her cross motion.

At the outset, we note that the appeal from the order in appeal No. 1 must be dismissed inasmuch as that order is subsumed in the final order in appeal No. 2 (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988; *see also* CPLR 5501 [a] [1]). In addition, although respondent's cross appeal must also be dismissed because it is not aggrieved based on the final order in appeal No. 2 granting its motion and dismissing the petition (*see* CPLR 5511; *Matter of Speis v Penfield Cent. Schs.*, 114 AD3d 1181, 1183), we may nevertheless consider its contentions as alternative grounds for affirmance of the order in appeal No. 2 (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546; *Matter of Harnischfeger v Moore*, 56 AD3d 1131, 1131-1132).

We agree with petitioner that Supreme Court erred in granting that part of respondent's motion seeking summary judgment dismissing the first cause of action. That cause of action sought judgment declaring, inter alia, that the shareholders' agreement executed in 1980 by decedent and the other shareholders of respondent had been abandoned, and that respondent had waived its right to redeem the shares held by decedent's estate under the terms of the agreement by, among other things, failing to exercise that right in a timely manner. Even assuming, arguendo, that respondent met its burden of establishing its entitlement to judgment, we conclude that questions of fact remain whether respondent abandoned the agreement (*see Tehan*, 110 AD3d at 1499; *Rosiny v Schmidt*, 185 AD2d 727, 732, *lv denied* 80 NY2d 762), waived its right to redeem decedent's shares (*see Estate of Kingston v Kingston Farms Partnership*, 130 AD3d 1464, 1465), or agreed to toll the time limitations of the agreement (*see generally Beacon Term. Corp. v Chemprene, Inc.*, 75 AD2d 350, 354, *lv denied* 51 NY2d 706). We therefore modify the order in appeal No. 2 accordingly.

The court properly granted that part of respondent's motion seeking summary judgment dismissing the second cause of action, which alleged that respondent breached an agreement with petitioner that was reached orally in August 2011 and later confirmed in a letter in January 2012. Respondent established as a matter of law that the alleged agreement is unenforceable inasmuch as it amounted " 'to no more than an agreement to agree' " (*Anderson v Kernan*, 133 AD3d 1234, 1235; *see Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109-110).

Finally, the court also properly granted that part of respondent's motion seeking summary judgment dismissing the third cause of action, which sought relief under Business Corporation Law § 1104-a based upon respondent's alleged oppressive conduct. As a preliminary matter, we reject respondent's contention that the court

erred in denying that part of its prior motion in appeal No. 1 seeking summary judgment dismissing that cause of action based upon petitioner's alleged lack of standing under section 1104-a and in granting that part of petitioner's cross motion seeking summary judgment dismissing the affirmative defense based upon lack of standing. Respondent did not meet its burden of establishing its entitlement to judgment with respect to petitioner's lack of standing (*see Tehan*, 110 AD3d at 1499). As the court properly concluded, moreover, respondent is estopped from taking a position in this proceeding contrary to the position taken in its tax returns that decedent's estate owned a 20% interest in respondent (*see Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422; *Matter of Frankel*, 123 AD3d 826, 827-828). The court also properly concluded, however, that respondent established its entitlement to judgment dismissing the Business Corporation Law § 1104-a cause of action, and petitioner failed to raise an issue of fact. Viewed in the light most favorable to petitioner, the nonmoving party on this motion for summary judgment (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932), the evidence established that respondent's alleged conduct did not defeat petitioner's reasonable expectations or otherwise amount to oppressive conduct within the meaning of the statute (*see Orloff v Weinstein Enters.*, 247 AD2d 63, 67; *see generally Matter of Kemp & Beatley [Gardstein]*, 64 NY2d 63, 72).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

874

CA 16-00207

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

ELMER G. COX, JR. AND REBECCA A. COX,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MCCORMICK FARMS, INC. AND SYNERGY, LLC,
DEFENDANTS-RESPONDENTS.

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR DEFENDANT-RESPONDENT MCCORMICK FARMS, INC.

FELDMAN KIEFFER, LLP, BUFFALO (STEPHEN M. SORRELS OF COUNSEL), FOR DEFENDANT-RESPONDENT SYNERGY, LLC.

Appeal from an order of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered April 16, 2015. The order, insofar as appealed from, granted the motion of defendant Synergy, LLC, and the cross motion of defendant McCormick Farms, Inc. for summary judgment dismissing the amended complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant Synergy, LLC and the cross motion are denied, and the amended complaint is reinstated.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Elmer G. Cox, Jr. (plaintiff) in a tractor-trailer accident. They appeal from an order that, inter alia, granted the motion of defendant Synergy, LLC (Synergy) and the cross motion of defendant McCormick Farms, Inc. (McCormick) for summary judgment dismissing the amended complaint against them. The evidence submitted in support of and in opposition to the motion and cross motion (collectively, motions) establishes that the accident occurred when plaintiff attempted to drive the tractor-trailer into the driveway of a farm owned by McCormick and operated in part by Synergy, and the trailer's rear wheels entered a ditch, causing the entire tractor-trailer to flip onto its side. We agree with plaintiffs that Supreme Court erred in granting the motions.

"It is beyond dispute that landowners and business proprietors have a duty to maintain their properties in reasonably safe condition"

(*Di Ponzio v Riordan*, 89 NY2d 578, 582). Thus, "a landowner or occupier of land owes a duty to persons coming upon his or her land 'to keep it in a reasonably safe condition, considering all the circumstances, including the purpose of the person's presence on the land and the likelihood of injury' . . . There is, however, 'no duty on the part of a landowner [or occupier of land] to warn against a condition that can readily be observed by those employing the reasonable use of their senses' . . . Where the condition is open and obvious, 'the condition is a warning in itself' " (*Duclos v County of Monroe*, 258 AD2d 925, 926). "[T]he issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question" (*Tagle v Jakob*, 97 NY2d 165, 169; *see McKnight v Coppola*, 113 AD3d 1087, 1087).

Here, although defendants met their burden on the motions of establishing that the ditch that allegedly caused the accident was an open and obvious condition, plaintiffs raised a triable issue of fact whether, at the time of the accident, it was obscured by drifting snow and the removal of the stakes and reflectors that formerly marked its boundaries. Consequently, the issue is "fact-specific and . . . presents a question for resolution by the trier of the fact" (*Centeno v Regine's Originals, Inc.*, 5 AD3d 210, 211; *see generally Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71-72).

Contrary to defendants' contentions, the affidavit of plaintiff was not "an attempt to avoid the consequences of [his] prior deposition testimony by raising feigned issues of fact" (*Taillie v Rochester Gas & Elec. Corp.*, 68 AD3d 1808, 1809 [internal quotation marks omitted]). To the contrary, plaintiff was not asked at his deposition whether the ditch was obscured by snow, and thus the statement in his affidavit is merely " 'more specific' " than his deposition testimony (*Sutin v Pawlus*, 105 AD3d 1293, 1295). Plaintiff's "affidavit . . . did not flatly contradict his prior deposition testimony. Therefore, the affidavit should have been considered in opposition to [the] motion[s]" (*Red Zone LLC v Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048, 1049).

Finally, McCormick contends that we should affirm the order because, in its original motion for summary judgment dismissing the amended complaint against it (McCormick's motion), it established that Synergy had assumed sole control of the premises, thus relieving McCormick from any duty of care. Although the court rejected McCormick's contention, we review it as an alternative ground for affirmance (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 546). "[T]he successful party, who is not aggrieved by the judgment or order appealed from and who, therefore, has no right to bring an appeal, is entitled to raise an error made below, for review by the appellate court, as long as that error has been properly preserved and would, if corrected, support a judgment in his favor" (*id.* at 545-546). Nevertheless, we reject McCormick's contention.

In order to prevail on its motion, McCormick, as the owner of the subject premises, was required "to establish, prima facie, that it

'relinquished complete control' over the property such that its duty to maintain the premises in a reasonably safe condition was extinguished as a matter of law" (*Yehia v Marphil Realty Corp.*, 130 AD3d 615, 616). "Viewing all of the evidence in the light most favorable to the plaintiff[s], as we must on this motion for summary judgment . . . , we cannot say . . . that, as a matter of law, [McCormick established that it] relinquished complete control of the" subject premises (*Gronski v County of Monroe*, 18 NY3d 374, 381, *rearg denied* 19 NY3d 856). Consequently, the court properly denied McCormick's motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

875

CA 15-01912

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

LINDA M. BROWN, AS ADMINISTRATRIX OF THE ESTATE
OF WAYNE BROWN, DECEASED, CLAIMANT-RESPONDENT,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 108961.)

LINDA M. BROWN, CLAIMANT-RESPONDENT,

V

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 110037.)
(APPEAL NO. 1.)

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

THE PALMIERE LAW FIRM, ROCHESTER (MICHAEL S. STEINBERG OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (Nicholas V. Midey, Jr., J.), entered July 20, 2015. The order directed a judgment pursuant to CPLR article 50-B.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

876

CA 15-01913

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

LINDA M. BROWN, AS ADMINISTRATRIX OF THE ESTATE
OF WAYNE BROWN, DECEASED, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 108961.)
(APPEAL NO. 2.)

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

THE PALMIERE LAW FIRM, ROCHESTER (MICHAEL S. STEINBERG OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Nicholas V. Midey, Jr., J.), entered August 6, 2015. The judgment awarded claimant money damages.

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

Memorandum: As noted in a prior appeal (*Brown v State of New York*, 79 AD3d 1579), claimant commenced these consolidated actions, individually and as administratrix of the estate of her husband, Wayne Brown (decedent), seeking damages for her injuries and his wrongful death resulting from a right-angle motor vehicle accident with a pickup truck at the intersection of State Route 350 (Route 350) and Paddy Lane in the Town of Ontario. Decedent, who was operating a motorcycle on which claimant was a passenger, was proceeding northbound on Route 350, and the posted speed limit on that road in that area was 55 miles per hour. Henry S. Friend was operating the pickup truck eastbound on Paddy Lane, which was controlled by a stop sign. The accident occurred after Friend proceeded into the intersection and into the path of the motorcycle. In the actions against defendant, claimant alleged that the intersection was dangerous due to a negligent and improper design; the excessive speed limit on Route 350; and inadequate or nonexistent signage.

Following trial, the Court of Claims concluded that defendant was not entitled to governmental immunity because defendant abandoned its study of the intersection (*see Weiss v Fote*, 7 NY2d 579, 588, *rearg denied* 8 NY2d 934). The court further concluded that the intersection constituted a dangerous condition, due to a vertical curve on Route

350 in the line of sight looking south from Paddy Lane and the speed limit of 55 miles per hour for traffic on Route 350, and that defendant had notice of that dangerous condition. Nevertheless, the court dismissed the claims, concluding that claimant had failed "to establish that defendant's 'failure to complete [the] intersection safety study was a proximate cause of the accident forming the basis of [the] claim[s]' " (*Brown*, 79 AD3d at 1581).

We reversed, writing that "[t]he appropriate inquiry was whether defendant was made aware of a dangerous condition and failed to take action to remedy it" and whether the dangerous condition was a proximate cause of the accident (*id.*). Inasmuch as the court, in its decision, had already determined that claimant had established that the intersection constituted a dangerous condition and that defendant had notice of that dangerous condition, we remitted the matter to the Court of Claims "for a determination on this record of whether the dangerous condition of the intersection because of the vertical curve in the line of sight looking south from Paddy Lane, combined with the speed limit of 55 miles per hour and the absence of four-way stop signs at the intersection, 'may be deemed a proximate cause of the accident' " (*id.* at 1584-1585).

On remittal, the court found that "the sight restrictions created by the vertical curve . . . , when combined with the 55 miles per hour speed limit . . . , prevented [Friend] from observing [the motorcycle] as [it] approached the intersection on Route 350." The court thus concluded that the dangerous condition of the intersection was a proximate cause of the accident. In determining that Friend was not negligent, the court concluded that he "carefully entered the intersection after looking both ways, but simply was unable to see the motorcycle . . . at any time before the accident occurred." The court thus found that defendant was 100% liable for the accident. Following a trial on damages, the court issued the order in appeal No. 1, directing the entry of a CPLR article 50-B judgment, as well as the judgments in appeal Nos. 2 and 3, which awarded claimant damages on behalf of the estate and on her individual claim, respectively.

Defendant now appeals, contending only that the court erred in failing to apportion 75% liability to Friend. Although claimant, in her individual capacity, filed a notice of cross appeal, she does not raise any contentions related thereto, and we deem the cross appeal abandoned and dismissed (*see* 22 NYCRR 1000.12 [b]).

Contrary to claimant's contention, the issue of Friend's alleged contributory negligence is preserved for our review inasmuch as defendant raised that affirmative defense in its amended answer to the claim brought on behalf of decedent's estate and in its answer to claimant's individual claim (*see Palmier v United States Fid. & Guar. Co.*, 135 AD2d 1057, 1059), as well as in posttrial submissions (*see Wolf v Persaud*, 130 AD3d 1523, 1526). Furthermore, we note that the court specifically addressed that issue on remittal. Although defendant did not raise any issue of Friend's contributory negligence on the prior appeal to this Court, that failure was due to the fact that the issue of Friend's contributory negligence was rendered moot

by the court's prior decision and was thus not at issue on the prior appeal (*cf. Hunt v Hunt*, 36 AD3d 1058, 1059, *lv denied* 8 NY3d 812). When we remitted the matter for a de novo determination of the issue of liability based on the existing trial record, the contentions raised by defendant concerning contributory negligence, as raised in the posttrial submissions, were resurrected, and no new proof could " 'have been offered to refute or overcome' " the issue of Friend's contributory negligence (*Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

We nevertheless reject defendant's contention that the court's determination on the apportionment of liability should be modified. "On appeal from a judgment entered after a nonjury trial, this Court has the power 'to set aside the trial court's findings if they are contrary to the weight of the evidence' and to render the judgment we deem warranted by the facts . . . That power may be appropriately exercised, however, only after giving due deference to the court's 'evaluation of the credibility of witnesses and quality of the proof' . . . Moreover, '[o]n a bench trial, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence' " (*Black v State of New York* [appeal No. 2], 125 AD3d 1523, 1524-1525).

Based on the trial record before us, we cannot say that the court's conclusions could not have been reached under any fair interpretation of the evidence. Although Friend was convicted of failure to yield the right-of-way (Vehicle and Traffic Law § 1142 [a]), the mere fact of the conviction is insufficient to establish Friend's negligence as a matter of law (*see Kelley v Kronenberg* [appeal No. 2], 2 AD3d 1406, 1406-1407; *see generally Augustine v Village of Interlaken*, 68 AD2d 705, 711-712, *lv dismissed* 48 NY2d 608, 881). Indeed, only "an unexcused violation of the Vehicle and Traffic Law, if proven, constitutes negligence per se" (*Long v Niagara Frontier Transp. Auth.*, 81 AD3d 1391, 1392, citing *Stalikas v United Materials*, 306 AD2d 810, 811, *affd* 100 NY2d 626).

In view of the dangerous condition of the intersection and the evidence that Friend "exercised reasonable care in an effort to comply with the statute" (*Arms v Halsey*, 43 AD3d 1419, 1420 [internal quotation marks omitted]; *see Aranzullo v Seidell*, 96 AD2d 1048, 1049), we conclude that there is support for the court's determination that Friend's alleged violation of the statute should be excused (*see generally Luck v Tellier*, 222 AD2d 783, 785). Although defendant correctly contends that "drivers have a 'duty to see that which through the proper use of [their] senses [they] should have seen' " (*Huff v Rodriguez*, 45 AD3d 1430, 1431; *see Deering v Deering*, 134 AD3d 1497, 1499), there is evidence from which the court could fairly conclude that Friend would not have been able to observe the motorcycle in time to avoid the collision (*see generally Godfrey v G.E. Capital Auto Lease, Inc.*, 89 AD3d 471, 477, *lv dismissed* 18 NY3d 951, *lv denied* 19 NY3d 816), including evidence concerning the history of right-angle accidents "caused by the same or similar contributing

factors as the accident in which claimant was involved" (*Whiter v State of New York*, 148 AD2d 825, 826, *lv denied* 74 NY2d 613). Contrary to defendant's contention, the evidence of prior similar accidents was properly considered in determining causation (*see id.* at 826-827; *Russell v State of New York*, 268 App Div 585, 588; *see also Hough v State of New York*, 203 AD2d 736, 738-739).

Inasmuch as the court's determination is supported by a fair interpretation of the evidence, we decline to disturb that determination.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

877

CA 16-00299

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

LINDA M. BROWN, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 110037)
(APPEAL NO. 3.)

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

THE PALMIERE LAW FIRM, ROCHESTER (MICHAEL S. STEINBERG OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Nicholas V. Midey, Jr., J.), entered August 6, 2015. The judgment awarded claimant money damages.

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

Same memorandum as in *Brown v State of New York* ([appeal No. 2] ___ AD3d ___ [Nov. 10, 2016]).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

879

CA 16-00267

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

LARRY ITALIA, PLAINTIFF-RESPONDENT,

V ORDER

CLIFFSTAR LLC, ALSO KNOWN AS CLIFFSTAR NEW YORK, LLC, CLIFFSTAR CORPORATION, STAR REAL PROPERTY, LLC, STAR ASSOCIATES FAMILY LIMITED PARTNERSHIP, STAR FAMILY LIMITED PARTNERSHIP AND COTT BEVERAGES INC., DEFENDANTS-APPELLANTS.

COZEN O'CONNOR, NEW YORK CITY (VINCENT POZZUTO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DOLCE PANEPINTO, P.C., BUFFALO (SEAN E. COONEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Michael L. D'Amico, A.J.), entered December 23, 2015. The order, insofar as appealed from, denied the motion of defendants for summary judgment dismissing the complaint and granted in part plaintiff's cross motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 2, 2016,

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

880

CA 15-00366

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

IN THE MATTER OF THE APPLICATION OF ANTHONY LAMONT JACKSON FOR LEAVE TO ASSUME THE NAME OF TONIESHA SISSY JACKSON, PETITIONER-APPELLANT.

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

NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE AND NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

MIK KINKEAD, SYLVIA RIVERA LAW PROJECT, NEW YORK CITY, FOR PETITIONER-APPELLANT.

Appeal from an order of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered December 10, 2014. The order denied the petition for a change of name.

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

Memorandum: Petitioner, an inmate at Groveland Correctional Facility, appeals from an order that denied the petition for a change of name "with leave to re-petition upon Petitioner's release from prison." Supreme Court erred in denying the petition. "A court's authority to review an application for a name change is limited; if 'the petition is true, and . . . there is no reasonable objection to the change of name proposed, . . . the court *shall* make an order authorizing the petitioner to assume the name proposed' " (*Matter of Powell*, 95 AD3d 1631, 1632, quoting Civil Rights Law § 63). The petition satisfies the requirements of Civil Rights Law § 61, and petitioner's incarceration, without more, does not justify denial of the petition. Indeed, respondent New York State Department of Corrections and Community Supervision has received notice of this application and takes no position with respect thereto (*see* § 62 [2]). "Under these circumstances, and absent any indication of fraud, misrepresentation or intent to interfere with others' rights," we conclude that the court should have granted the petition (*Powell*, 95 AD3d at 1632-1633).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

881

CA 15-02032

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

SANDRA RIVERA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROCHESTER GENERAL HEALTH SYSTEM, DOING BUSINESS AS HILL HAVEN REHABILITATION & TRANSITIONAL CARE CENTER, DEFENDANT-RESPONDENT.

WILLIAM MATTAR, P.C., WILLIAMSVILLE (JOHN E. ABEEL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

OSBORN REED & BURKE, LLP, ROCHESTER (JENNIFER M. SCHWARTZOTT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered September 18, 2015. The order granted the motion of defendant for a protective order.

It is hereby ORDERED that the order so appealed from is unanimously reversed in the exercise of discretion without costs, the motion is denied, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she tripped and fell over a wheelchair scale located in a hallway of the second floor of a building owned and operated by defendant. Plaintiff alleged, inter alia, that defendant was negligent in creating and allowing a "tripping hazard to exist in an area regularly traversed by staff, residents and other visitors," failing to warn of the dangerous condition, and "[f]ailing to place the wheelchair scale in an area of the facility where it would not create a tripping hazard." As part of her discovery demands, plaintiff demanded a site inspection and production of the floor plans for the entire building. Defendant sought a protective order limiting the application of the discovery demands to the floor on which the accident occurred. Plaintiff appeals from an order that granted defendant's motion.

"[W]e have repeatedly recognized that '[a] trial court has broad discretion in supervising the discovery process, and its determinations will not be disturbed absent an abuse of that discretion' " (*Daniels v Rumsey*, 111 AD3d 1408, 1409). "We have also repeatedly noted, however, that, where discretionary determinations concerning discovery and CPLR article 31 are at issue, [we] [are] vested with the same power and discretion as [Supreme Court, and thus

we] may also substitute [our] own discretion *even in the absence of abuse*" (*id.* [internal quotation marks omitted]). Under the circumstances of this case, we substitute our own discretion for that of the motion court, and we conclude that the items of discovery requested by plaintiff are "material and necessary" to the prosecution of the action (CPLR 3101 [a]).

Inasmuch as the site inspection, including any photographing and recording that may capture the residents of the building, may impact defendant's proprietary rights and the privacy rights of the residents, and in order to implement plaintiff's offers to limit the use of her discovery requests, we remit the matter to Supreme Court for consideration of reasonable restrictions to be placed on the discovery items requested (*see generally Suchorzepka v Mukhtarzad*, 103 AD3d 878, 879-880).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

882

CA 15-01076

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

IN THE MATTER OF TROY WASHINGTON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered May 13, 2015 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of the Administrative Law Judge (ALJ) revoking his release to parole supervision. Even assuming, arguendo, that petitioner has not abandoned on appeal his contention that the ALJ relied on erroneous information in determining the time assessment to be imposed (*see generally Ciesinski v Town of Aurora,* 202 AD2d 984, 984), we conclude that petitioner failed to preserve that contention for our review inasmuch as he did not bring the alleged error to the ALJ's attention at a time "when the error could [have been] corrected" (*Matter of Kirk v Hammock*, 119 AD2d 851, 854*; see Matter of Bowes v Dennison*, 20 AD3d 845, 846). In any event, there is no indication that the ALJ relied on the allegedly inaccurate information in determining the time assessment to be imposed (*see Matter of Boccadisi v Stanford*, 133 AD3d 1169, 1170-1171; *cf. Matter of Henry v Dennison*, 40 AD3d 1175, 1175).

Contrary to the further contention of petitioner, the 36-month time assessment imposed against him is not excessive. It is well settled that "[t]he Executive Law does not place an outer limit on the length of that assessment, and [respondent's] determination may not be modified upon judicial review in the absence of impropriety" (*Matter of Horace v Annucci*, 133 AD3d 1263, 1265 [internal quotation marks

omitted]; *see* Executive Law § 259-i [3] [f] [x]; [g]; *Matter of Wilson v Evans*, 104 AD3d 1190, 1191). Petitioner was a category 1 violator (*see* 9 NYCRR 8005.20 [c] [1] [v]), and thus "the minimum time assessment [was required to] be either 15 months or a hold to the 'maximum expiration of the sentence, whichever [was] less' " (*Horace*, 133 AD3d at 1265, quoting 9 NYCRR 8005.20 [c] [1]). Under the circumstances of this case, including the nature of the underlying charge as well as the nature of the violations, including the "ongoing" nature of petitioner's drug use, we conclude that there was no impropriety, and thus no reason to modify the 36-month time assessment.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

883

CA 16-00551

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

CAROL J. KOBRIN, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 120337.)

HOGAN WILLIG, PLLC, AMHERST (DIANE R. TIVERON OF COUNSEL), FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered July 6, 2015. The order dismissed the claim.

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

Memorandum: Claimant appeals from an order granting defendant's motion for summary judgment dismissing the claim. Contrary to claimant's contention, we conclude that the Court of Claims properly granted defendant's motion based on claimant's failure to plead the "total sum claimed" (Court of Claims Act § 11 [b]; *see Kolnacki v State of New York*, 8 NY3d 277, 280-281, *rearg denied* 8 NY3d 994; *Lepkowski v State of New York*, 1 NY3d 201, 206-207). There must be strict compliance with the pleading requirements contained in Court of Claims Act § 11 (b) (*see Kolnacki*, 8 NY3d at 280-281; *Lepkowski*, 1 NY3d at 206-207). "Notwithstanding [claimant's] argument that 'the total sum claimed' does not necessarily have to be a dollar figure, it is clear that her claim—entirely lacking any amount of monetary damages—failed to satisfy the requirements of the statute" (*Kolnacki*, 8 NY3d at 280).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

884

CA 16-00208

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

PATRICIA J. CURTO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK LAW JOURNAL AND ALM MEDIA PROPERTIES, LLC, DEFENDANTS-RESPONDENTS.

PATRICIA J. CURTO, PLAINTIFF-APPELLANT PRO SE.

BARCLAY DAMON, LLP, BUFFALO (KARIM A. ABDULLA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Erie County Court (Michael L. D'Amico, J.), dated March 9, 2015. The order affirmed two orders of the Buffalo City Court (Susan M. Eagan, J.) dated November 1, 2012 and November 7, 2012.

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

Memorandum: Plaintiff commenced this action in Buffalo City Court (court) alleging, inter alia, defamation based upon an article that appeared in defendant New York Law Journal regarding an underlying action in federal court that plaintiff commenced against a third party under the Federal Debt Collection Practices Act (FDCPA). In two orders, the court denied plaintiff's motion for a default judgment against defendants and granted defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7), and County Court affirmed the orders. We affirm.

Defendants had 30 days in which to answer the complaint (*see* UCCA 402 [b]) and, contrary to plaintiff's contention, that period ended on a Sunday and was therefore extended until "the next succeeding business day" (General Construction Law § 25-a). Thus, the court properly denied plaintiff's motion seeking a default judgment. The court also properly granted defendants' motion to dismiss the complaint because the alleged defamatory statements were absolutely privileged under Civil Rights Law § 74. It is axiomatic that " 'newspaper accounts of . . . official proceedings must be accorded some degree of liberality' " (*Alf v Buffalo News, Inc.*, 21 NY3d 988, 990). Upon viewing the article as a whole, we conclude that it is a "substantially accurate" report of the federal court's decision (*Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67). Although plaintiff contends that she did not

owe a debt and that defendants' reference to her as a debtor therefore constituted defamation, it is well settled that "there is 'no requirement that the publication report the plaintiff's side of the controversy' " (*Alf*, 100 AD3d 1487, 1489, *affd* 21 NY3d 988). Indeed, the focus of the article was on the court's denial of summary judgment to the defendant on the ground that "a jury could conclude from this [record] that Defendant[] violated the FDCPA." We have reviewed plaintiff's remaining contentions and conclude that they are without merit.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

885

KA 15-00934

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LESTER M. STREETER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

NIAGARA COUNTY DISTRICT ATTORNEY'S OFFICE, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered February 5, 2015. 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]). 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: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

886

KA 15-00838

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KELLY L. MARSHALL, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered December 4, 2013. The judgment convicted defendant, upon her plea of guilty, of murder in the second degree and robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of murder in the second degree (Penal Law § 125.25 [3]) and robbery in the first degree (§ 160.15 [3]), defendant contends that her waiver of the right to appeal is invalid. We reject that contention. Although the form notice signed by defendant recited, among other things, that she had the right to appeal, that form notice does not constitute a proper written waiver of the right to appeal (*see* 22 NYCRR 1022.11 [a]; *People v Finster*, 136 AD3d 1279, 1280, *lv denied* 27 NY3d 1132). We nonetheless conclude that "[t]he plea allocution as a whole establishes that defendant's waiver of the right to appeal was knowing, intelligent, and voluntary" (*People v Brown*, 281 AD2d 962, 962, *lv denied* 96 NY2d 899; *see People v Lopez*, 6 NY3d 248, 256). Contrary to defendant's contention, County Court "did not improperly conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea" (*People v Bentley*, 63 AD3d 1624, 1625, *lv denied* 13 NY3d 742), and we conclude that the record establishes that the court engaged defendant "in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Ripley*, 94 AD3d 1554, 1554, *lv denied* 19 NY3d 976 [internal quotation marks omitted]). The valid waiver of the right to appeal forecloses our review of defendant's contention that the sentence is unduly harsh and severe (*see generally Lopez*, 6 NY3d at 255-256), as well as our review of her contention that the sentence constitutes cruel and unusual punishment (*see People*

v Santilli, 16 AD3d 1056, 1056-1057; *People v Brathwaite*, 263 AD2d 89, 92).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

888

KA 14-02278

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JON T. MAGLIOCCO, ALSO KNOWN AS JON MAGLIOCCO, ALSO KNOWN AS JON J. MAGLIOCCO, 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 July 3, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act 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 *Alford* plea, of criminal sexual act in the third degree (Penal Law § 130.40 [2]). Contrary to defendant's contention, we conclude that he knowingly, voluntarily, and intelligently waived his right to appeal, and that valid waiver encompasses his challenge to the severity of the 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).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

889

KA 14-01732

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DESHAWN E. LARKIN, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (JULIE B. FISKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered August 21, 2014. 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.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

890

KA 15-00933

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LESTER M. STREETER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

NIAGARA COUNTY DISTRICT ATTORNEY'S OFFICE, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered February 5, 2015. 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 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 attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). The People correctly concede that County Court erred in failing to determine whether defendant should be afforded youthful offender status (*see People v Rudolph*, 21 NY3d 497, 501). We therefore hold the case, reserve decision, and remit the matter to County Court to make and state for the record "a determination of whether defendant is a youthful offender" (*id.* at 503).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

891

KA 13-00172

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD J. GARDNER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered October 1, 2012. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and the indictment is dismissed without prejudice to the People to file any appropriate charge.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal contempt in the second degree (Penal Law § 215.50 [3]) as a lesser included offense of criminal contempt in the first degree (§ 215.51 [b] [v]), which was charged in the second count of the indictment. We agree with defendant that Supreme Court erred in conducting the *Sandoval* hearing in his absence (*see People v Favor*, 82 NY2d 254, 267, *rearg denied* 83 NY2d 801; *People v Dokes*, 79 NY2d 656, 660-662). The court's *Sandoval* ruling in this case was not wholly favorable to defendant, and thus "it cannot be said that defendant's presence at the hearing would have been superfluous" (*People v Morrison*, 68 AD3d 1798, 1799). Contrary to the People's contention, although the court placed its *Sandoval* ruling on the record in defendant's presence the morning after the hearing, "[a] mere repetition or recitation in the defendant's presence of what has already been determined in [the defendant's] absence is insufficient compliance with the *Sandoval* rule" (*People v Monclavo*, 87 NY2d 1029, 1031; *see People v Potter*, 114 AD3d 968, 968-969; *Morrison*, 68 AD3d at 1799). Inasmuch as defendant was acquitted of all counts charged in the indictment and was convicted of the lesser included offense of criminal contempt in the second degree, there is nothing remaining to support further criminal prosecution under the accusatory instrument (*see People v Gonzalez*, 61 NY2d 633, 635). Although defendant has already served his sentence, under the circumstances here, we dismiss

the indictment without prejudice to the People to file any appropriate charge (*see generally People v Conceicao*, 26 NY3d 375, 385 n; *People v Pallagi*, 91 AD3d 1266, 1270).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

892

KA 14-01830

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN L. SMITH, ALSO KNOWN AS BRIAN LEE SMITH,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MICHAEL STEINBERG, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Genesee County (Eric R. Adams, A.J.), rendered June 25, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [c]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of aggravated family offense (§ 240.75 [1]). The two matters were covered by a single plea colloquy. Defendant contends in each appeal that Supreme Court erred in enhancing his sentence without an adequate factual basis (*see generally People v Outley*, 80 NY2d 702, 712-713). Defendant failed to preserve that contention for our review inasmuch as "he failed to object to the alleged enhanced sentence[s] and did not move to withdraw his plea or to vacate the judgment[s] of conviction on that ground" (*People v Laurendi*, 126 AD3d 1401, 1402, *lv denied* 26 NY3d 1009 [internal quotation marks omitted]; *see People v Epps*, 109 AD3d 1104, 1105). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant further contends in each appeal that he was denied effective assistance of counsel at sentencing. To the extent that such contention survives his guilty plea, we conclude that it lacks merit (*see People v LaCroce*, 83 AD3d 1388, 1388, *lv denied* 17 NY3d 807). Defendant "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v*

Ford, 86 NY2d 397, 404).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

893

KA 15-00094

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN L. SMITH, ALSO KNOWN AS BRIAN LEE SMITH,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MICHAEL STEINBERG, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Genesee County (Eric R. Adams, A.J.), rendered June 25, 2014. The judgment convicted defendant, upon his plea of guilty, of aggravated family offense.

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

Same memorandum as in *People v Smith* ([appeal No. 1] ___ AD3d ___ [Nov. 10, 2016]).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

894

KA 14-00900

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRENCE REDFIELD, ALSO KNOWN AS TERRANCE,
DEFENDANT-APPELLANT.

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

TERRENCE REDFIELD, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered August 28, 2013. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of sexual abuse in the first degree (Penal Law § 130.65 [4]), defendant contends, inter alia, that the conviction is not supported by legally sufficient evidence. We reject that contention. Viewing the evidence in the light most favorable to the People, we conclude that there is a " 'valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt' " (*People v Acosta*, 80 NY2d 665, 672; *see People v Bleakley*, 69 NY2d 490, 495). Specifically, we conclude that the evidence is legally sufficient to establish that defendant placed his hand on the vagina of the underage victim for the purpose of sexual gratification (*see* §§ 130.00 [3]; 130.65 [4]; *see also People v Chrisley*, 126 AD3d 1495, 1496, *lv denied* 26 NY3d 1007; *People v Graves*, 8 AD3d 1045, 1045, *lv denied* 3 NY3d 674). Moreover, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Contrary to defendant's contention, the trial testimony of the victim " 'was not so inconsistent or unbelievable as to render it incredible as a matter of law' " (*People v Adams*, 59 AD3d 928, 929, *lv denied* 12 NY3d 813; *see People v Black*, 38 AD3d 1283, 1285, *lv denied* 8 NY3d 982).

We reject defendant's contention that Supreme Court erred in permitting the People to adduce evidence of his subsequent immoral conduct towards the victim. Such evidence was relevant to establish the nature of the relationship between defendant and the victim and to place "the charged conduct in context" (*People v Leeson*, 12 NY3d 823, 827; *see People v Maxey*, 129 AD3d 1664, 1665, *lv denied* 27 NY3d 1002, *reconsideration denied* 28 NY3d 933; *People v Young*, 99 AD2d 373, 375; *see also People v Denson*, 26 NY3d 179, 186-188). Such evidence also was relevant to show defendant's motive and intent at the time of the charged offense. The court did not abuse its discretion in concluding that the probative worth of the evidence on those matters outweighed the danger of unfair prejudice to defendant (*see Denson*, 26 NY3d at 186-187; *People v Dorm*, 12 NY3d 16, 19). Concerning the remaining aspects of the court's pretrial ruling, we conclude that the proffered evidence, which concerned the affectionate nature of the relationship between defendant and the victim and defendant's purchase of swimwear for the victim prior to the charged offense, did not constitute *Molineux* evidence (*see generally People v Englert*, 130 AD3d 1532, 1533, *lv denied* 26 NY3d 967, *reconsideration denied* 26 NY3d 1144). We further conclude that the court did not err in admitting that non-*Molineux* evidence pursuant to general principles governing relevancy (*see generally People v Davis*, 43 NY2d 17, 27, *cert denied* 435 US 998).

Contrary to defendant's contention, the prosecutor did not personally vouch for the credibility of the victim and thereby make himself an unsworn witness against defendant (*see People v Moye*, 12 NY3d 743, 744; *People v Typhair*, 12 AD3d 832, 834, *lv denied* 4 NY3d 803; *see generally People v Lovello*, 1 NY2d 436, 438-439). Moreover, the prosecutor's attempts to persuade the jurors as to the credibility of the victim and her account constituted fair comment on the evidence (*see People v Rivera*, 133 AD3d 1255, 1256, *lv denied* 27 NY3d 1154), and fair response to the summation of defense counsel (*see People v Halm*, 81 NY2d 819, 821; *People v Jackson*, 141 AD3d 1095, 1096). Defendant's remaining claims of prosecutorial misconduct are not preserved for our review, and we decline to exercise our power to review those claims as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Smith*, 129 AD3d 1549, 1549-1550, *lv denied* 26 NY3d 971).

We have considered defendant's remaining contentions raised in his main and pro se supplemental briefs and conclude that none warrants reversal or modification of the judgment.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

895

KAH 15-00416

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
RICHIE STOKES, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF PAROLE AND MS. DOLCE,
SUPERINTENDENT, ORLEANS CORRECTIONAL FACILITY,
RESPONDENTS-RESPONDENTS.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered November 19, 2014 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition for a writ of habeas corpus. The appeal has been rendered moot by petitioner's release from custody upon reaching his maximum expiration date (*see People ex rel. Smith v Cully*, 112 AD3d 1316, 1317, *lv denied* 22 NY3d 864; *People ex rel. Reynolds v Artus*, 103 AD3d 1208, 1208-1209; *People ex rel. Baron v New York State Dept. of Corr.*, 94 AD3d 1410, 1410, *lv denied* 19 NY3d 807), and the exception to the mootness doctrine does not apply (*see Reynolds*, 103 AD3d at 1209; *Baron*, 94 AD3d at 1410; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). While this Court has the power to convert the habeas corpus proceeding into a CPLR article 78 proceeding, we decline to do so under the circumstances of this case (*see People ex rel. Walker v Dolce*, 125 AD3d 1305, 1305, *lv denied* 25 NY3d 910; *People ex rel. Green v Smith*, 119 AD3d 1451, 1452).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

896

CAF 14-01978

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

IN THE MATTER OF ROBERT E. TROMBLEY, JR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KRISTIN S. PAYNE, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-RESPONDENT.

FARES A. RUMI, ATTORNEY FOR THE CHILDREN, ROCHESTER.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered October 2, 2014 in a proceeding pursuant to Family Court Act article 6. The order, among other things, directed respondent to pay a fine for three separate events constituting civil contempt.

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

Same memorandum as in *Matter of Trombley v Payne* ([appeal No. 2] ___ AD3d ___ [Nov. 10, 2016]).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

897

CAF 15-00634

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

IN THE MATTER OF ROBERT E. TROMBLEY, JR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KRISTIN S. PAYNE, RESPONDENT-APPELLANT.

IN THE MATTER OF KRISTIN S. PAYNE,
PETITIONER-APPELLANT,

V

ROBERT E. TROMBLEY, JR., RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

FARES A. RUMI, ATTORNEY FOR THE CHILDREN, ROCHESTER.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered March 17, 2015 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted sole custody of the subject children to Robert E. Trombley, Jr.

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

Memorandum: Respondent-petitioner mother has not raised any contentions with respect to the order in appeal No. 1, and we therefore dismiss that appeal (*see Abasciano v Dandrea*, 83 AD3d 1542, 1545; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984). Contrary to the contention of the mother in appeal No. 2, Family Court properly dismissed her cross petition seeking custody because she failed to make the requisite evidentiary showing of a change in circumstances to warrant an inquiry into whether the best interests of the children would be served by modifying the existing custody arrangement (*see Matter of Thompson v Thompson*, 124 AD3d 1354, 1354; *Matter of Miller v Pederson*, 121 AD3d 1598, 1599). Contrary to the mother's further contention, the court's determination to grant in part the petitioner-respondent father's petition and to modify

visitation has a sound and substantial basis in the record (*see Matter of Warren v Miller*, 132 AD3d 1352, 1354).

The court properly denied the mother's objection to the reappointment of the Attorney for the Children (AFC) (*see Matter of Mills v Rieman*, 128 AD3d 1486, 1487; *Matter of Leichter-Kessler v Kessler*, 71 AD3d 1148, 1149; *Matter of Petkovsek v Snyder* [appeal No. 6], 251 AD2d 1087, 1087-1088, *lv dismissed in part and denied in part* 92 NY2d 942). In making an appointment of an AFC, "the court shall, to the extent practicable and appropriate, appoint the same attorney who has previously represented the child" (Family Ct Act § 249 [b]). Inasmuch as there is no support in the record for the mother's contention that the AFC was biased against her, there was no reason for the court to appoint a new AFC (*see generally Matter of Kristi L.T. v Andrew R.V.*, 48 AD3d 1202, 1206, *lv denied* 10 NY3d 716). Finally, the testimony of the father was sufficient to establish that certain audio recordings "accurately represent[ed] the subject matter depicted," and thus they were properly admitted in evidence (*People v Patterson*, 93 NY2d 80, 84; *see Zegarelli v Hughes*, 3 NY3d 64, 69).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

898

CA 15-00861

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF ALFREDO MARQUEZ, CONSECUTIVE NO. 132615, FROM
CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO
MENTAL HYGIENE LAW SECTION 10.09,
PETITIONER-APPELLANT,

V ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF
MENTAL HEALTH AND NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENTS-RESPONDENTS.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Joseph E. Fahey, A.J.), entered April 15, 2015 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, directed the continued confinement of petitioner to a secure treatment facility.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

899

CA 16-00357

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

ROSEMARY WHITE, PLAINTIFF-APPELLANT,

V ORDER

ROMAN CATHOLIC CHURCH OF BOWMANSVILLE,
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 May 20, 2015. The order denied the motion of plaintiff to restore the action to the trial calendar.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

900

CA 15-01753

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

IN THE MATTER OF GROTON COMMUNITY HEALTH CARE CENTER, INC., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

PHILLIP BEVIER, RESPONDENT-APPELLANT.

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

YANG-PATYI LAW FIRM, PLLC, SYRACUSE (JOSEPHINE YANG-PATYI OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered December 9, 2014. The order awarded petitioner a judgment as against respondent in the sum of $44,601.70 with legal fees and costs in the sum of $3,500.

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

Memorandum: This is a special proceeding brought by the owner of a nursing home against the attorney-in-fact for one of its patients. Pursuant to General Obligations Law § 5-1510 (*see also* § 5-1505), the petition sought, inter alia, to compel respondent to account for his alleged self-dealing with respect to his principal's money, and to surcharge him for such alleged breach of fiduciary duty. Respondent appeals from an order that, on petitioner's motion for an order holding respondent in contempt of court and/or entering a default judgment against him for his failure to turn over financial documents and to otherwise account to petitioner pursuant to statute and two prior court orders, directed that judgment be entered against respondent in the sum of $44,601.70, plus $3,500 in legal fees and costs.

Respondent contends that Supreme Court erred in granting the foregoing relief because petitioner's request therefor was made only in a reply affidavit. We reject that contention. The petition specifically set forth the $44,601.70 figure as the unpaid sum due to petitioner for the patient's care and asked that respondent be "surcharged" "in the amount of Petitioner's claim." Thus, the demand that the court surcharge respondent in the amount of the outstanding nursing home bill was not made for the first time in the reply affidavit, but rather had been set forth from the outset of the

proceeding. Although the motion papers asked for a judgment in the larger amount of $50,000, corresponding to the amount of the withdrawals for which respondent had failed to account pursuant to the court's orders, we conclude that the court did not err in limiting petitioner's recovery to the amount actually owed for the patient's nursing home care. In any event, respondent was not prejudiced by being ordered to pay the $44,601.70 requested in the petition and reply affidavit instead of the $50,000 requested in the motion papers.

Moreover, the court's grant of monetary relief to petitioner was appropriate under the circumstances of this case. The object of the proceeding was to compel an accounting by respondent concerning his dealings with the patient's money. When respondent failed or refused continually throughout the proceeding to give a meaningful and satisfactory accounting, the court properly granted the monetary relief demanded in the petition. Respondent has pointed to no legal authority permitting him to forestall indefinitely a determination of the merits of petitioner's monetary claim by refusing to make the accounting that he was obligated to make pursuant to statute and, later, two court orders. The court's award of a money judgment against respondent was proper whether such award is conceived of as an order of default judgment rendered pursuant to CPLR 3215, or as a sanction imposed pursuant to CPLR 3126 for respondent's disobedience of the court's two disclosure orders (*see generally Reynolds Sec. v Underwriters Bank & Trust Co.*, 44 NY2d 568, 571-572; *Tony's Ornamental Iron Works v National Bldg. & Restoration Corp.*, 237 AD2d 909, 909), and/or as a fine for respondent's contempt of court and corresponding calculated effort to defeat, impair, impede, or prejudice petitioner's rights in the proceeding (*see* Judiciary Law §§ 753 [A]; 773; *see also Riverside Capital Advisers, Inc. v First Secured Capital Corp.*, 57 AD3d 870, 871, *lv dismissed* 12 NY3d 842; *see generally Matter of Department of Hous. Preserv. & Dev. of City of N.Y. v Deka Realty Corp.*, 208 AD2d 37, 43).

We reject respondent's contention that the award of $44,601.70 to petitioner was improper because a contempt fine in that amount bears no causal relationship to the contemptuous conduct of respondent. Again, respondent's disregard of the two court orders compelling him to disclose his financial dealings on behalf of the patient and, more particularly, to explain the six large bank withdrawals in question, impaired or impeded petitioner's ability in this accounting/surcharge proceeding to recover the unpaid amount of its bill, thus directly and proximately causing loss or injury to petitioner in the amount of that outstanding bill (*see* Judiciary Law § 773). Finally, we conclude that the court did not err in awarding petitioner $3,500 in legal fees and costs incurred in attempting to enforce respondent's compliance with the court's disclosure orders (*see id.*; *see also Gottlieb v Gottlieb*, 137 AD3d 614, 618).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

901

CA 15-02035

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

LUCIA TERCILIO, PLAINTIFF-APPELLANT,

V ORDER

FREDDY POLL-DELGADO, DEFENDANT-RESPONDENT.

LAW OFFICES OF JOSE PEREZ, P.C., SYRACUSE (JOSE E. PEREZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (DANIEL K. CARTWRIGHT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered July 23, 2015. The order granted the motion of defendant for summary judgment dismissing the complaint and denied the cross motion of plaintiff for partial summary judgment.

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: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

902

CA 16-00082

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

ANTONIO JACKSON, PLAINTIFF,

V MEMORANDUM AND ORDER

CITY OF BUFFALO AND JASON AUSTIN,
DEFENDANTS.

CITY OF BUFFALO, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

TANEKA JACKSON, THIRD-PARTY
DEFENDANT-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JOAN M. RICHTER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (CHRISTOPHER POOLE OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered July 8, 2015. The order denied the motion of third-party defendant for summary judgment dismissing the third-party 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 he sustained while he was a passenger in a vehicle driven by his wife, third-party defendant. Defendant Jason Austin was operating a dump truck pulling an attached trailer, both of which were owned by defendant City of Buffalo. Austin and third-party defendant were traveling in the same direction on Eggert Road when Austin made a right-hand turn and collided with the vehicle driven by third-party defendant, which was to his right.

Supreme Court properly denied third-party defendant's motion seeking summary judgment dismissing the third-party complaint. Third-party defendant failed to meet her initial burden of establishing as a matter of law that the sole proximate cause of the accident was Austin's negligence (*see Burghardt v Cmaylo*, 40 AD3d 568, 569; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). First,

there is a triable issue of fact whether Austin was negligent in making the turn. The road was marked as a two-lane road, i.e., divided by a yellow line, with traffic going in both directions, but third-party defendant testified that the road was wide enough that two drivers could travel in the same lane in the same direction, thereby functionally creating two lanes in the same direction from a single lane. Austin testified that he was driving the truck in the middle of the road, but more towards the curb, before he made his turn. We conclude that there are triable issues of fact whether the road has one or two lanes of travel in the same direction and, if there are two such lanes, whether Austin made an improper right-hand turn from the leftmost lane (*see Secore v Allen*, 27 AD3d 825, 828-829; *cf. Tojek v Root*, 34 AD3d 1210, 1210). Second, even assuming, arguendo, that third-party defendant established as a matter of law that Austin was negligent, she failed to establish that there was nothing she could do to avoid the accident and therefore failed to establish that she was free of comparative fault (*see Deering v Deering*, 134 AD3d 1497, 1498-1499; *Cooley v Urban*, 1 AD3d 900, 901).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

903

CA 16-00317

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

ALBERT FRASSETTO ENTERPRISES,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HARTFORD FIRE INSURANCE COMPANY,
DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (BRIAN R. BIGGIE OF COUNSEL), FOR DEFENDANT-APPELLANT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (JOHN D. CELANI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered July 16, 2015. The order denied 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 granted, the complaint is dismissed, the counterclaim is granted and judgment is granted in favor of defendant as follows:

> It is ADJUDGED and DECLARED that plaintiff's claim for special business income losses under the subject policy is time-barred by the contractual limitation period.

Memorandum: Plaintiff commenced this action seeking to recover lost rents from defendant under an insurance policy providing coverage for, among other things, special business income (SBI) losses due to the interruption of plaintiff's business operations arising from a covered occurrence of direct physical loss of or damage to plaintiff's property. In the complaint, plaintiff sought a declaration with respect to its requested relief in the first cause of action and asserted a cause of action for breach of contract in the second cause of action.

We agree with defendant that Supreme Court erred in denying its motion for summary judgment dismissing the complaint. Defendant met its burden on the motion by establishing that the only fair construction of the policy is that the two-year limitation period contained in the "Property Choice Coverage Part" (coverage part) is a condition that unambiguously applies to the entire coverage part, which includes the SBI coverage form under which plaintiff seeks to

recover (*see Travelers Ins. Co. v Benderson Dev. Co., LLC*, 133 AD3d 1361, 1362; *Blanar v State Farm Ins. Cos.*, 34 AD3d 1333, 1333-1334). It is undisputed that plaintiff failed to commence this action within two years of the covered occurrence of property loss or damage.

Plaintiff nonetheless contends that the two-year limitation period is inapplicable to its claim because the policy period provision restricts the scope of the coverage part such that the SBI coverage form provides separate and distinct coverage not subject to the conditions of the coverage part. Contrary to plaintiff's contention, we conclude that the policy period provision, which provides that "[i]n this [c]overage [p]art, [defendant] only cover[s] direct physical loss or direct physical damage which occurs during the policy period," is entirely consistent with the coverage afforded under the SBI coverage form, which provides that plaintiff's claim would be paid for SBI losses "incur[red] due to the necessary interruption of [its] business operations during the [applicable period] due to direct physical loss of or direct physical damage caused by or resulting from" a covered occurrence. Indeed, " '[t]he purpose of business interruption insurance is to indemnify the insured against losses arising from inability to continue normal business operation and functions due to the damage sustained as a result of the hazard insured against' " (*Cytopath Biopsy Lab. v United States Fid. & Guar. Co.*, 6 AD3d 300, 301). Here, the only fair construction of the policy language is that the SBI coverage form provides coverage for losses incident to the direct physical property damage or loss, i.e., "expense[s] ancillary to and resulting from the covered casualty," not separate and distinct coverage falling outside of the coverage part to which the two-year limitation period condition applies (*815 Park Ave. Owners v Fireman's Ins. Co. of Washington, D.C.*, 225 AD2d 350, 352, *lv denied* 88 NY2d 808). Finally, we reject plaintiff's contention that the language of the policy is ambiguous inasmuch as the interpretation urged by plaintiff "would strain the contract language beyond its reasonable and ordinary meaning" (*Consolidated Edison Co. of N.Y. v United Coastal Ins. Co.*, 216 AD2d 137, 137, *lv denied* 87 NY2d 808 [internal quotation marks omitted]; *see generally Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680; *Loblaw, Inc. v Employers' Liab. Assur. Corp., Ltd.*, 57 NY2d 872, 877).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

904

CA 15-00868

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF MELVIN WALLS, CONSECUTIVE NO. 76930, FROM CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH AND NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Joseph E. Fahey, A.J.), entered April 29, 2015 in a proceeding pursuant to Mental Hygiene Law article 10. The order denied the motion of petitioner to vacate an order for continued confinement.

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

Memorandum: By order entered in December 2013, Supreme Court determined after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d) that petitioner is currently a dangerous sex offender requiring confinement. The court continued petitioner's confinement in a secure treatment facility. Following the decision of the Court of Appeals in *Matter of State of New York v Donald DD.* (24 NY3d 174), petitioner's counsel moved to vacate the above order pursuant to CPLR 5015 (a), contending that the evidence submitted during the annual review hearing is not legally sufficient to support a finding that petitioner suffers from a mental abnormality. The court denied the motion. We affirm.

We conclude that the court did not abuse its discretion in denying petitioner's CPLR 5015 (a) motion (*see Matter of State of New York v Richard TT.*, 132 AD3d 72, 75, *affd* 27 NY3d 718). Contrary to petitioner's contention, the evidence is legally sufficient to establish that he has "a congenital or acquired condition, disease or

disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense" (Mental Hygiene Law § 10.03 [i]). Here, respondents' expert testified that petitioner has such a predisposing condition based on diagnoses of personality disorder, not otherwise specified, with antisocial traits, combined with cocaine and alcohol abuse. Respondents' expert also stated that petitioner exhibited behavior markers of an abnormal sexual interest in nonconsensual sexual behavior. In view of the foregoing, and considering the evidence in the light most favorable to respondents (*see Matter of State of New York v John S.*, 23 NY3d 326, 348, *rearg denied* 24 NY3d 933), we conclude that there is legally sufficient evidence in the record to sustain a finding of mental abnormality (*see* § 10.03 [i]; *Matter of State of New York v Dennis K.*, 27 NY3d 718, 749-750; *Matter of State of New York v Charada T.*, 23 NY3d 355, 359, 362; *Matter of Vega v State of New York*, 140 AD3d 1608, 1608-1609; *Matter of State of New York v Williams*, 139 AD3d 1375, 1377).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

905

CA 15-02008

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

CAROLYN MERRILL, CPA, PLAINTIFF-RESPONDENT,

V ORDER

ROMEO'S RESTAURANT OF ROCHESTER, INC.,
DEFENDANT-APPELLANT.

THOMAS J. RZEPKA, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered July 21, 2015. The order and judgment dismissed with prejudice any and all counterclaims asserted against plaintiff.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see GMAC Mtge., LLC v Guccione*, 127 AD3d 1136, 1137; *Page v Watson*, 304 AD2d 382, 382; *Brannigan v Dubuque*, 199 AD2d 851, 851-852).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

906

CA 15-01869

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

D.H., CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 117862.)

KAREN MURTAGH, EXECUTIVE DIRECTOR, PRISONERS' LEGAL SERVICES OF NEW YORK, ALBANY (JAMES BOGIN OF COUNSEL), FOR CLAIMANT-APPELLANT.

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

Appeal from a judgment of the Court of Claims (Christopher J. McCarthy, J.), entered September 17, 2015. The judgment dismissed the amended claim.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

908

TP 16-00260

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

IN THE MATTER OF SHAWN AVERY, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered February 18, 2016) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

909

TP 16-00115

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

IN THE MATTER OF FRED HARRIS, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered January 14, 2016) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

910

TP 16-00103

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

IN THE MATTER OF SAMUEL WALTON, PETITIONER,

V MEMORANDUM AND ORDER

JOHN COLVIN, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY AND ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS.

SAMUEL WALTON, PETITIONER PRO SE.

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

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, Seneca County [Dennis F. Bender, A.J.], entered January 19, 2016) to review a determination finding after a tier II hearing that petitioner had violated two inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier II disciplinary hearing, that he violated two inmate rules. We reject petitioner's contention that the determination is not supported by substantial evidence. Specifically, the misbehavior report, together with the videotape of the incident and the hearing testimony of the correction officer who prepared the misbehavior report, "constitutes substantial evidence supporting the determination that petitioner violated [the] inmate rule[s]" at issue (*Matter of Oliver v Fischer*, 82 AD3d 1648, 1648). Petitioner's denials of the reported misbehavior presented only an issue of credibility for resolution by the Hearing Officer (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

911

KA 15-01097

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH LAND, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered April 8, 2015. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [2]), defendant contends that County Court erred in accepting his plea of guilty without making further inquiry to ensure that the plea was knowing and voluntary. That contention, which arises out of defendant's assertions to the presentence investigator that he was not involved in the crime and defendant's protestations of the unjustness of his conviction to the court at sentencing, amounts to a challenge to the factual sufficiency of the plea allocution (*see People v Arney*, 120 AD3d 949, 950; *see generally People v Hicks*, 128 AD3d 1358, 1359, *lv denied* 27 NY3d 999). Defendant's challenge is encompassed by the valid waiver of the right to appeal (*see People v McCrea*, 140 AD3d 1655, 1655), and it is not preserved for our review inasmuch as defendant did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Rinker*, 141 AD3d 1177; *see generally People v Lopez*, 71 NY2d 662, 665). This case does not fall within the narrow exception to the preservation requirement articulated in *Lopez* (*see id.* at 666; *People v Brinson*, 130 AD3d 1493, 1493, *lv denied* 26 NY3d 965), but we in any event note that, although not required to do so, the court conducted an inquiry into the validity of the plea based on the statements made by defendant during his presentence interview and at sentencing (*see generally People v Garcia-Cruz*, 138 AD3d 1414, 1415, *lv denied* 28 NY3d 929).

Contrary to defendant's further contention, the sentence is not illegal, and the valid waiver of the right to appeal encompasses the

contention that the sentence is unduly harsh and severe (*see generally People v Lopez*, 6 NY3d 248, 255).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

912

KA 15-01301

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

EDDIE WASHINGTON, DEFENDANT-APPELLANT.

EDDIE WASHINGTON, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL 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 (Thomas J. Miller, J.), entered July 1, 2015. The order denied the motion of defendant pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously affirmed for reasons stated in the decision at County Court.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

915

KA 15-02068

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

RENEE SUSAN BAILEY, DEFENDANT-RESPONDENT.

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

NEW YORK LAW SCHOOL LEGAL SERVICES, NEW YORK CITY (ADELE BERNHARD OF COUNSEL), AND KEITH A. FINDLEY, WISCONSIN INNOCENCE PROJECT, MADISON, WISCONSIN, FOR DEFENDANT-RESPONDENT.

DAVID POLK & WARDWELL LLP, NEW YORK CITY (SHARON KATZ OF COUNSEL, FOR THE INNOCENCE NETWORK, AMICUS CURIAE.

Appeal from an order of the Monroe County Court (James J. Piampiano, J.), dated December 16, 2014. The order granted the motion of defendant pursuant to CPL 440.10 to vacate the judgment convicting her, following a jury trial in 2002, of murder in the second degree based on newly discovered evidence and granted her a new trial.

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

Memorandum: The People appeal from an order granting defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting her, following a jury trial in 2002, of murder in the second degree (Penal Law § 125.25 [4]) based on newly discovered evidence (*see* CPL 440.10 [1] [g]), and granting her a new trial. The evidence at trial included medical testimony from three witnesses that the injuries sustained by the toddler, who was in the custody of defendant, a daycare provider, could have been caused only by shaken baby syndrome (SBS), also known as shaken baby impact syndrome (SBIS), and could not have been caused by a short-distance fall from a chair that was 18 inches in height, as defendant contended. On her direct appeal, we rejected defendant's challenges to the verdict, but we reduced the sentence as a matter of discretion in the interest of justice (*People v Bailey*, 8 AD3d 1024, *lv denied* 3 NY3d 670).

In 2013, defendant moved to vacate the judgment of conviction contending, inter alia, that advances in medicine and science had established that the injuries sustained by the toddler could have been caused by a short-distance fall and that newly discovered evidence

related to another child's alleged observation of the incident established that the toddler had, in fact, jumped or fallen from the chair. Although County Court rejected other grounds for the CPL 440.10 motion, the court granted a hearing on the allegations of newly discovered evidence. Following that hearing, the court granted the motion, vacated the judgment of conviction and granted defendant a new trial (*People v Bailey*, 47 Misc 3d 355). We now affirm.

"It is well settled that on a motion to vacate a judgment of conviction based on newly discovered evidence, the movant must establish, inter alia, that there is newly discovered evidence: (1) which will probably change the result if a new trial is granted; (2) which was discovered since the trial; (3) which could not have been discovered prior to trial; (4) which is material; (5) which is not cumulative; and[] (6) which does not merely impeach or contradict the record evidence . . . Defendant has the burden of establishing by a preponderance of the evidence every fact essential to support the motion" (*People v Backus*, 129 AD3d 1621, 1623, *lv denied* 27 NY3d 991 [internal quotation marks omitted]; *see People v Salemi*, 309 NY 208, 215-216, *cert denied* 350 US 950; *People v White*, 125 AD3d 1372, 1373). The determination of such a motion "rests within the sound discretion of the court" (*Salemi*, 309 NY at 215; *see Backus*, 129 AD3d at 1623-1624; *White*, 125 AD3d at 1373).

The People do not dispute that the allegedly new evidence is material, is not cumulative and does not merely impeach or contradict the record evidence. Rather, the People contend that the evidence submitted at the hearing does not constitute newly discovered evidence and would not change the result if a new trial were granted. We reject the People's contentions.

In general, advancements in science and/or medicine may constitute newly discovered evidence (*see People v Chase*, 8 Misc 3d 1016[A], 2005 NY Slip Op 51125[U], *8; *People v Callace*, 151 Misc 2d 464, 466), and we conclude that defendant established, by a preponderance of the evidence (*see* CPL 440.30 [6]), that "a significant and legitimate debate in the medical community has developed in the past ten years over whether infants [and toddlers] can be fatally injured through shaking alone, . . . and whether other causes [such as short-distance falls] may mimic the symptoms traditionally viewed as indicating shaken baby or shaken impact syndrome" (*Wisconsin v Edmunds*, 308 Wis 2d 374, 385-386, 746 NW2d 590, 596, *review denied* 308 Wis 2d 612, 749 NW2d 663; *cf. People v Caldavado*, 26 NY3d 1034, 1037; *see generally Cavazos v Smith*, ___ US ___, ___, 132 S Ct 2, 10 [Ginsburg, J., dissenting]).

We further conclude that defendant established, by a preponderance of the evidence (*see* CPL 440.30 [6]), that the newly discovered evidence would probably change the result if a new trial were held today. "A motion to vacate a judgment of conviction upon the ground of newly discovered evidence rests within the discretion of the hearing court . . . The 'court must make its final decision based upon the likely cumulative effect of the new evidence had it been presented at trial' " (*People v Deacon*, 96 AD3d 965, 967, *appeal*

dismissed 20 NY3d 1046; *see People v McFarland*, 108 AD3d 1121, 1121, *lv denied* 24 NY3d 1220). Here, the cumulative effect of the research and findings on retinal hemorrhages, subdural hematomas or hemorrhages and cerebral edemas as presented in SBS/SBIS cases and short-distance fall cases supports the court's ultimate decision that, had this evidence been presented at trial, the verdict would probably have been different (*cf. Caldavado*, 26 NY3d at 1037).

We note that the court did not address defendant's contentions concerning evidence related to the child who had allegedly witnessed the incident because those contentions were moot, and we likewise decline to address those contentions on that ground.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

917

KA 14-01709

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARVIN DEJESUS, DEFENDANT-APPELLANT.

DONALD R. GERACE, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered March 3, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated and the matter is remitted to Oneida County Court for further proceedings on the indictment.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]), defendant contends that County Court erred in accepting his plea of guilty without further inquiry into whether defendant was aware of and was waiving any affirmative defense that the gun displayed by his codefendant was unloaded. We conclude that defendant's contention, which goes to whether the plea of guilty was voluntarily, knowingly, and intelligently entered, survives his purported waiver of the right to appeal (*see People v Bizardi*, 130 AD3d 1492, 1492, *lv denied* 27 NY3d 992). Further, although defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve his contention for our review (*see People v Lopez*, 71 NY2d 662, 665), we conclude that this case falls within the rare exception to the preservation requirement (*see id.* at 666; *People v Dukes*, 120 AD3d 1597, 1597-1598). The codefendant's allocution, which in this case was intertwined with that of defendant, raised a potentially viable affirmative defense to the charge, giving rise to a duty on the part of the court, before accepting the guilty plea, to ensure that defendant was aware of that defense and was knowingly and voluntarily waiving it (*see People v Powell*, 278 AD2d 848, 848-849; *see generally People v Mox*, 20 NY3d 936, 938-939). Consequently, we conclude that the court erred in accepting the plea without ensuring that defendant was making an informed decision to waive the potential affirmative defense to the

charge. We therefore reverse the judgment of conviction, vacate the plea, and remit the matter to County Court for further proceedings on the indictment (*see Dukes*, 120 AD3d at 1597-1598).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

918

KA 14-00235

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUDSON WATKINS, DEFENDANT-APPELLANT.

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

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

Appeal, 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 December 18, 2013. The order denied the motion of defendant pursuant to CPL 440.20 (1).

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion is granted, the sentence is set aside and the matter is remitted to Onondaga County Court for resentencing.

Memorandum: Defendant appeals by permission of this Court pursuant to CPL 460.15 from an order denying his motion pursuant to CPL 440.20 (1) seeking to set aside his sentence on the ground that he was improperly adjudicated a persistent felony offender. We agree with defendant that County Court erred in denying the motion upon determining that this issue was previously addressed on the merits (*see* CPL 440.20 [2], [3]). Although defendant has filed four prior CPL article 440 motions, one of which was considered by this Court on appeal (*People v Watkins*, 79 AD3d 1648, *lv denied* 16 NY3d 800), the precise issue raised herein was not addressed by this Court on that appeal or on defendant's direct appeal (*People v Watkins*, 17 AD3d 1083, 1084, *lv denied* 5 NY3d 771). On the merits, we agree with defendant that the court erred in designating him a persistent felony offender because he had not been sentenced to a period of more than one year on two of the three proposed predicate felonies (*see* Penal Law § 70.10 [1] [b] [i]). Although the People are correct that the prior felony convictions of robbery in the second degree (§ 160.10) and attempted burglary in the second degree (§§ 110.00, 140.25) are predicate violent felony offenses that satisfy the requirements to determine that defendant is a persistent violent felony offender (*see* § 70.08 [1] [a]), the record does not establish whether those

convictions meet the criteria of section 70.08 (1) (b), and we therefore decline the People's request to modify defendant's designation. Thus, we reverse the order, grant the motion, vacate the sentence and remit the matter to County Court for resentencing.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

919

CAF 16-00102

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

IN THE MATTER OF ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF CARINA J. PUGH, PETITIONER-APPELLANT,

V ORDER

ADRIAN THOMAS, RESPONDENT-RESPONDENT.

TRACY L. PUGLIESE, ROME, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered June 19, 2015 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of petitioner to the corrected order of a Support Magistrate and confirmed the corrected order.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

920

CAF 15-01292

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

IN THE MATTER OF MICHAEL EDWARD WORTHINGTON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

HOLLY LYNN WORTHINGTON, RESPONDENT-RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN M. WESLEY OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered June 27, 2015 in a proceeding pursuant to Family Court Act article 6. The order summarily dismissed the petition of petitioner seeking to modify a judgment of divorce.

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

Memorandum: Petitioner father appeals from an order summarily dismissing his petition seeking to modify a judgment of divorce, into which a separate "Separation / Opting Out Agreement" was incorporated but not merged. Pursuant to that agreement, respondent mother was granted legal and physical custody of the parties' child, and the father was granted "no parenting time." In his petition, the father sought "to send [his daughter] letters." Although the petition also sought additional relief, as limited by his brief the father "is merely seeking contact via letters," and has thus abandoned any other relief sought in the petition (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984). Inasmuch as the judgment and agreement do not preclude the father from sending letters to his daughter, and that is all the relief he seeks on appeal, we conclude that the father is not aggrieved by the order dismissing his petition (*see* CPLR 5511; *see generally Matter of Lisa M.H. v Gerald C.H.*, 35 AD3d 1188, 1188).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

921

CAF 15-01298

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

IN THE MATTER OF VICTORIA THOMAS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JECARL ARMSTRONG, ET AL., RESPONDENTS,
AND ROSETTA BRYANT, RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), dated June 24, 2015 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted custody of the parties' children to petitioner with supervised visitation to respondent Rosetta Bryant.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that granted custody of the subject children to petitioner, the children's maternal grandmother, with supervised visitation to the mother. "It is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981, quoting *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544). Contrary to the mother's sole contention on appeal, we conclude that the grandmother met her burden of establishing the existence of extraordinary circumstances. The record establishes that the mother suffers from ongoing and chronic mental health issues, "which she has failed to address adequately" (*Matter of Johnson v Streich-McConnell*, 66 AD3d 1526, 1527; *see generally Matter of Beth M. v Susan T.*, 81 AD3d 1396, 1397; *Matter of Brault v Smugorzewski*, 68 AD3d 1819, 1819). The mother also has a history of alcohol abuse (*see Matter of Komenda v Dininny*, 115 AD3d 1349, 1350; *Beth M.*, 81 AD3d at 1397), as well as

a history of " 'persistent neglect of the child[ren]'s health and well-being' " (*Matter of Barnes v Evans*, 79 AD3d 1723, 1723-1724, *lv denied* 16 NY3d 711). The evidence in the record establishes that the mother's issues resulted in an "unfortunate [and] involuntary disruption of custody over an extended period of time" (*Bennett*, 40 NY2d at 546).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

922

CAF 15-01134

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

IN THE MATTER OF RYAN J. ELLIOTT, SR.,
PETITIONER-APPELLANT,

V ORDER

BRITTANY ROSARIO, RESPONDENT-RESPONDENT.

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

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

CATHERINE M. SULLIVAN, ATTORNEY FOR THE CHILDREN, FULTON.

Appeal from an order of the Family Court, Oswego County (James K. Eby, J.), entered June 3, 2015 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted respondent sole legal and physical custody of the subject children, with visitation 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: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

923

CAF 15-01492

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

IN THE MATTER OF JOSHUA HOUSE,
PETITIONER-APPELLANT,

V ORDER

SUSAN O'ROURKE, RESPONDENT-RESPONDENT.

IN THE MATTER OF SUSAN O'ROURKE,
PETITIONER-RESPONDENT,

V

JOSHUA HOUSE, RESPONDENT-APPELLANT.

JOHN J. RASPANTE, UTICA, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

PAUL A. NORTON, CLINTON, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

DOREEN M. ST. THOMAS, ATTORNEY FOR THE CHILD, ROME.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered August 10, 2015 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that Susan O'Rourke shall have primary physical custody of the subject child.

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: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

924

CA 16-00223

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

DARYL A. HANIFAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COR DEVELOPMENT COMPANY, LLC AND LAWN TECH, INC., DEFENDANTS-APPELLANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (L. DAMIEN COSTANZA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DARYL A. HANIFAN, PLAINTIFF-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered April 27, 2015. The order, insofar as appealed from, denied that part of the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell on ice underneath snow in a parking lot owned by defendant COR Development Company, LLC and maintained pursuant to a snow removal contract by defendant Lawn Tech, Inc. Defendants, as limited by their brief on appeal, contend that Supreme Court erred in denying their motion insofar as they sought summary judgment dismissing the complaint. We agree.

It is undisputed that defendants met their initial burden on the motion "by establishing that a storm was in progress at the time of the accident and, thus, that they had no duty to remove the snow and ice until a reasonable time ha[d] elapsed after cessation of the storm" (*Gilbert v Tonawanda City Sch. Dist.*, 124 AD3d 1326, 1327 [internal quotation marks omitted]). In opposition, plaintiff failed to raise a triable issue of fact " 'whether the accident was caused by a slippery condition at the location where [she] fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant[s] had actual or constructive notice of the preexisting condition' " (*Quill v Churchville-Chili Cent. Sch. Dist.*, 114 AD3d 1211, 1212). Even assuming, arguendo, that plaintiff was entitled to rely upon the theory that the icy condition formed prior to the storm upon the melting and refreezing of snow piles created by defendants' plowing practices (*cf. Scanlon v Stuyvesant*

Plaza, 195 AD2d 854, 855-856), we conclude that plaintiff's assertion is based on mere speculation and thus is insufficient to raise an issue of fact (*see Lima v Village of Garden City*, 131 AD3d 947, 948-949; *Baia v Allright Parking Buffalo, Inc.*, 27 AD3d 1153, 1154). Indeed, in surmising that there must have been snow piles throughout the parking lot from prior accumulations, plaintiff relied upon inadmissible printouts from a weather data website (*see Morabito v 11 Park Place LLC*, 107 AD3d 472, 472), as well as defendants' general practices regarding snow removal as set forth in their contract (*see Nadel v Cucinella*, 299 AD2d 250, 252). The record is devoid of competent evidence that any such snow piles existed or, more specifically, that a pile of snow was located near the area of the parking lot where plaintiff fell that had melted and had then refrozen prior to the storm, resulting in the icy condition that caused plaintiff's accident (*see Harvey v Laz Parking Ltd, LLC*, 128 AD3d 1203, 1205; *Perales v First Columbia 1200 NSR, LLC*, 88 AD3d 1213, 1215). Finally, to the extent that plaintiff contends that defendants' snow removal efforts created the hazardous condition because they did not properly care for the area where she fell even though they had treated other areas of the parking lot during the storm, we note that it is well settled that " '[t]he mere failure to remove *all* snow and ice from a . . . parking lot does not constitute negligence' and does not constitute creation of a hazard" (*Wheeler v Grande'Vie Senior Living Community*, 31 AD3d 992, 992-993; *see Glover v Botsford*, 109 AD3d 1182, 1184).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

925

CA 15-00883

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

IN THE MATTER OF BRODERICK HART,
PETITIONER-APPELLANT,

V ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered May 4, 2015 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

927

CA 16-00263

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

POMCO, INC., PLAINTIFF-APPELLANT,

V ORDER

HEALTHEDGE SOFTWARE, INC., DEFENDANT-RESPONDENT.

EDWARD E. KOPKO, LAWYER, P.C., ITHACA (EDWARD E. KOPKO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (MITCHELL J. KATZ OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered August 10, 2015. The order, inter alia, granted that part of defendant's motion for partial summary judgment dismissing the seventh cause of action for specific performance and denied plaintiff's cross motion.

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: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

928

CA 16-00300

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

JOAN STEIN, AS EXECUTRIX OF THE ESTATE OF
MEREDITH M. POWERS, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SARKISIAN BROTHERS, INC., DEFENDANT-APPELLANT.

COOK, WETTER, CLOONAN, KURTZ & MURPHY, P.C., KINGSTON (ERIC M. KURTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

KALTER, KAPLAN, ZEIGER & FORMAN, WOODBOURNE (IVAN KALTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and partial judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered May 19, 2015. The order and partial judgment, insofar as appealed from, denied the motion of defendant Sarkisian Brothers, Inc., seeking summary judgment dismissing the complaint.

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

Memorandum: Plaintiff's decedent commenced this action seeking damages for injuries she sustained when her shoe caught on the bullnose tile used as a transition from a concrete floor in the hallway of an arena to the tile floor in a bathroom, which had an open entrance. It is undisputed that defendant directed subcontractors to install bullnose tile rather than a threshold as provided for in the contract. Contrary to defendant's contention, we conclude that Supreme Court properly determined that plaintiff raised an issue of fact whether it owed a duty of care to decedent because, "while engaged affirmatively in discharging a contractual obligation, [it] creat[ed] an unreasonable risk of harm to others, or increas[ed] that risk" (*Church v Callanan Indus.*, 99 NY2d 104, 111; *see Hannigan v Staples, Inc.*, 137 AD3d 1546, 1549; *see generally Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 141-142). We nevertheless conclude that the court erred in determining that plaintiff raised an issue of fact whether the alleged defect was trivial as a matter of law and thus erred in denying defendant's motion for summary judgment dismissing the complaint.

It is well established that we "must consider 'all the facts and

circumstances presented' . . . before concluding that no issue of fact exists" whether the alleged defect is trivial as a matter of law (*Hutchison v Sheridan Hill House Corp.*, 26 NY3d 66, 77). Such issues of fact include the dimensions of the alleged defect, its appearance and elevation, and the time, place and circumstance of the injury (*see id.*). Here, the record establishes that the bullnose tile was slightly less than one-half of an inch in height and was not the same color as the tile floor. Decedent testified at her deposition that she was standing in the hallway conversing with a group of people, approximately three to four feet from the bathroom, before she turned to walk into the bathroom. She testified that she glanced at the tile floor but did not see the "lip" that caught her shoe and caused her to stumble and be propelled several feet before she struck the towel dispenser. In opposition to defendant's motion, plaintiff provided the expert affidavit of an architect who opined that "such a vertical edge constitutes a snare and a trap for those who might be distracted by the crowd moving in and out of the bathroom." We conclude that the opinion of plaintiff's expert is not sufficient to raise an issue of fact whether the defect is trivial because it is speculative and conclusory on that issue (*see Ciccarelli v Cotira, Inc.*, 24 AD3d 1276, 1277), particularly because there is no indication in the record that anyone other than decedent was entering or leaving the bathroom. Furthermore, "the test established by the case law in New York is not whether a defect is *capable* of catching a pedestrian's shoe. Instead, the relevant questions are whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances" (*Hutchinson*, 26 NY3d at 80). Upon our review of the photos of the alleged defect and in view of the less than ½-inch height of the bullnose tile and the circumstances surrounding decedent's accident (*see Germain v Kohl's Corp.*, 96 AD3d 1474, 1475; *Sharpe v Ulrich Dev. Co., LLC*, 52 AD3d 1319, 1320), we conclude that, although an accident occurred that is "traceable to the defect, there is no liability" because the alleged defect " 'is so slight that no careful or prudent [person] would reasonably anticipate any danger from its existence' " under the circumstances present here (*Hutchinson*, 26 NY3d at 81).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

929

TP 16-00074

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

IN THE MATTER OF BRANDON KING, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered January 12, 2016) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

930

TP 16-00313

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

IN THE MATTER OF MICHAEL FREDERICK, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION LT. DANIEL WALAWENDER, RESPONDENT.

MICHAEL FREDERICK, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered February 24, 2016) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling those parts of the determination finding that petitioner violated inmate rules 102.10 (7 NYCRR 270.2 [B] [3] [i]) and 107.10 (7 NYCRR 270.2 [B] [8] [i]) and vacating the penalty and as modified the determination is confirmed without costs, respondent is directed to expunge from petitioner's institutional record all references to the violation of those inmate rules, and the matter is remitted to respondent for further proceedings in accordance with the following memorandum: Petitioner commenced this CPLR article 78 proceeding, transferred to this Court pursuant to CPLR 7804 (g), seeking to annul the determination, following a tier II hearing, that he violated inmate rules 102.10 (7 NYCRR 270.2 [B] [3] [i] [threats]), 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference with an employee]), and 107.11 (7 NYCRR 270.2 [B] [8] [ii] [harassment]). Petitioner pleaded guilty to violating inmate rule 107.11, and therefore his contention that the determination with respect to that rule is not supported by substantial evidence is without merit (*see Matter of Liner v Fischer*, 96 AD3d 1416, 1417). Respondent correctly concedes that the determination with respect to inmate rules 102.10 and 107.10 is not supported by substantial evidence. We therefore modify the determination and grant the petition in part by annulling those parts of the determination finding that petitioner violated those rules, and we direct respondent to expunge from petitioner's institutional record

all references to the violation of those rules. "Because a single penalty was imposed and the record fails to specify any relation between the violations and that penalty," we further modify the determination by vacating the penalty, and we remit the matter to respondent for imposition of an appropriate penalty on the remaining violation (*Matter of Pena v Goord*, 6 AD3d 1106, 1106). We have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

931

TP 16-00104

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

JEFFREY JOSEPH, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered January 14, 2016) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

933

KA 15-00918

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD GONYEAU, JR., DEFENDANT-APPELLANT.

ROBERT TUCKER, PALMYRA, 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 April 14, 2015. The judgment convicted defendant, upon his plea of guilty, of assault 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 assault in the first degree (Penal Law § 120.10 [1]). Defendant failed to preserve for our review his contention that County Court erred in calculating the expiration date of the order of protection (*see People v Cooke*, 119 AD3d 1399, 1401, *affd* 24 NY3d 1196, *cert denied* ___ US ___, 136 S Ct 542). In any event, that contention lacks merit inasmuch as a period of postrelease supervision may be included in calculating the maximum legal expiration date of an order of protection (*see* CPL 530.12 [5] [A] [ii]; *People v Williams*, 19 NY3d 100, 101-102; *Cooke*, 119 AD3d at 1401). Finally, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

940

CAF 14-01416

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

IN THE MATTER OF KELLY AMES HATCH-WALKER,
PETITIONER-APPELLANT,

V ORDER

AARON MATTHEW WALKER, RESPONDENT-RESPONDENT.

JEANNIE D. MICHALSKI, CONFLICT DEFENDER, GENESEO (HEIDI W. FEINBERG OF COUNSEL), FOR PETITIONER-APPELLANT.

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

WENDY S. SISSON, ATTORNEY FOR THE CHILD, GENESEO.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered July 3, 2014 in a proceeding pursuant to Family Court Act article 6. The order, among other things, determined that the parties shall have joint custody of the subject child.

Now, upon reading and filing the notice of discontinuance signed by the appellant on October 10, 2016, and by the attorneys for the parties on September 26, 29 and 30, 2016,

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

941

CAF 15-01744

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

IN THE MATTER OF NANCY T.

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

LYNN T., RESPONDENT-APPELLANT.

KUSTELL LAW GROUP, LLP, BUFFALO (CARL B. KUSTELL OF COUNSEL), FOR RESPONDENT-APPELLANT.

JANE E. LOVE, MAYVILLE, FOR PETITIONER-RESPONDENT.

NANCY A. DIETZEN, ATTORNEY FOR THE CHILD, FREDONIA.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered September 22, 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 for reasons stated at Family Court.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

943

CAF 15-01812

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

IN THE MATTER OF GAIGE F.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CAROLYN F., RESPONDENT-APPELLANT.

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

ABRAHAM J. PLATT, LOCKPORT, FOR PETITIONER-RESPONDENT.

VINCENT R. GINESTRE, ATTORNEY FOR THE CHILD, NORTH TONAWANDA.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered September 25, 2015 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, granted the petition for the temporary removal of the subject child.

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

Memorandum: Respondent mother appeals from an order entered in a proceeding pursuant to Family Court Act article 10, which granted petitioner's request for the temporary removal of the subject child from the custody of the mother. Petitioner commenced this proceeding against the mother on September 11, 2015, the day the subject child was born, seeking an adjudication of neglect and the child's temporary removal. On or about June 8, 2016, however, the parties entered into a stipulation that returned the subject child to the mother's custody, and provided that the underlying neglect petition would be dismissed if there were no problems during the following three months. "Based upon these subsequent events, this appeal by the mother from the temporary removal order is moot, and the exception to the mootness doctrine does not apply" (*Matter of Skyler R. [Kristy R.]*, 85 AD3d 1238, 1239; *see Matter of Angel C. [Lynn H.]*, 103 AD3d 1246, 1247; *Matter of Nicholas B.*, 26 AD3d 764, 764).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

944

CAF 14-01867

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

IN THE MATTER OF NICKIE M.A. AND LEONEL A.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

PABLO F., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

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

WILLIAM D. BRODERICK, JR., ELMA, FOR INTERVENING FOSTER PARENTS.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered October 8, 2014 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined respondent to be, at most, a notice father.

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

Memorandum: In appeal Nos. 1 and 2, respondent, the putative father of the subject children, contends that Family Court erred in determining, following a hearing, that he is not a father whose consent to the adoption of the respective subject children was required pursuant to Domestic Relations Law § 111. We reject that contention. Section 111 (1) (d) provides that a child born to unmarried parents may be adopted without the consent of the child's father unless the father shows that he "maintained substantial and continuous or repeated contact with the child as manifested by: (i) the payment by the father toward the support of the child . . . , and either (ii) the father's visiting the child at least monthly when physically and financially able to do so . . . , or (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so." Here, respondent testified that, at the time of the hearing, he had been incarcerated for more than two years and had provided the children with no financial support during that time. He further testified that he had not communicated with the children for at least

seven months prior to the hearing.

Contrary to respondent's contention, he was not relieved of his responsibility to provide financial support while he was incarcerated absent a showing of insufficient income or resources (*see Matter of Bella FF. [Margaret GG.—James HH.*], 130 AD3d 1187, 1188), and he "was not relieved of the responsibility to communicate with the child[ren] . . . during the period that [he] was incarcerated" (*Matter of Antonio J.M.*, 32 AD3d 1180, 1181). Respondent's testimony that he sent letters to the caseworker regarding the children was contradicted by the testimony of the caseworker, and we give great deference to the court's determination that the caseworker's testimony was credible (*see Matter of Makia R.J. [Michael A.J.]*, 128 AD3d 1540, 1540-1541). Thus, we conclude that the court properly determined that respondent "was a mere notice father whose consent was not required for the adoption of the subject children" (*id.* at 1540; *see Matter of Ethan S. [Tarra C.—Jason S.]*, 85 AD3d 1599, 1599-1600, *lv denied* 17 NY3d 711; *Matter of Jaleel E.F. [Cheryl S.—Ernest F.]*, 81 AD3d 1302, 1303, *lv dismissed* 17 NY3d 871).

Finally, to the extent that respondent contends that the court erred in excluding certain transcripts from the record on appeal, we note that he "failed to appeal from th[e] order [settling the record], and we are thus unable to address any issue related to the propriety of that order" (*Matter of Caughill v Caughill*, 124 AD3d 1345, 1347; *cf. Kai Lin v Strong Health* [appeal No. 1], 82 AD3d 1585, 1586, *lv dismissed in part and denied in part* 17 NY3d 899, *rearg denied* 18 NY3d 878).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

945

CAF 14-01869

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

IN THE MATTER OF PABLO A.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, MEMORANDUM AND ORDER
PETITIONER-RESPONDENT;

PABLO F., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

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

WILLIAM D. BRODERICK, JR., ELMA, FOR INTERVENING FOSTER PARENTS.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered October 8, 2014 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined respondent to be, at most, a notice father.

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

Same memorandum as in *Matter of Nickie M.A.* (___ AD3d ___ [Nov. 10, 2016]).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

946

CA 16-00236

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

DAVID GOWIN AND JOANNE GOWIN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

AVOX SYSTEMS, INC., DEFENDANT-APPELLANT.

BARCLAY DAMON, LLP, BUFFALO (VINCENT G. SACCOMANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOGAN WILLIG, PLLC, AMHERST (SCOTT MICHAEL DUQUIN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered October 29, 2015. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by David Gowin (plaintiff) when he tripped and fell while unloading a trailer during a delivery to a facility operated by defendant. Plaintiff testified that his fall occurred when he was walking backward out of the trailer while pulling a load on a pallet jack, and his foot caught a "lip" at the edge of the "dock plate" that served as a ramp between the trailer and the loading dock. Defendant appeals from an order denying its motion for summary judgment dismissing the amended complaint, and we affirm. Even assuming, arguendo, that defendant met its initial burden of establishing as a matter of law that the condition of the dock plate was not dangerous or defective (*cf. Maio v John Andrew, Inc.*, 85 AD3d 741, 741-742; *Frazier v Pioneer Cent. Sch. Dist.*, 298 AD2d 875, 875), we conclude that plaintiffs raised a triable issue of fact with respect to that issue (*see Dietzen v Aldi Inc. [New York]*, 57 AD3d 1514, 1514; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to defendant's contention, plaintiffs were under no obligation to rebut the conclusion of defendant's expert with an expert of their own, inasmuch as "expert testimony is not required where[, as here,] the question of whether there is an unsafe condition is within the common knowledge and experience of jurors" (*Infante v Jerome Car Wash*, 52 AD3d 319, 320; *see Sousie v Lansingburgh Boys & Girls Club*, 291 AD2d 619, 620; *Bermeo v Rejai*, 282 AD2d 700, 701; *see*

generally Havas v Victory Paper Stock Co., 49 NY2d 381, 386).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

947

CA 15-01524

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

KERRY A. DONOHUE, FORMERLY KNOWN AS
KERRY A. IVES, PLAINTIFF-RESPONDENT,

V ORDER

AMY BERNSTEIN, DEFENDANT,
AND RICHARD BERNSTEIN, DEFENDANT-APPELLANT.

AMY BERNSTEIN, THIRD-PARTY PLAINTIFF,

V

DAVID J. BECKER, MALACHI DONOHUE AND CHARLES
BAKER, THIRD-PARTY DEFENDANTS.

RICHARD BERNSTEIN, THIRD-PARTY PLAINTIFF,

V

DAVID J. BECKER, MALACHI DONOHUE AND CHARLES
BAKER, THIRD-PARTY DEFENDANTS.
(APPEAL NO. 1.)

RUPP BAASE PFALZGRAF & CUNNINGHAM LLC, BUFFALO (JOSHUA P. RUBIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (RICHARD P. WEISBECK, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered December 2, 2014. The order, among other things, granted plaintiff's motion for leave to reargue and, upon reargument, denied the motion of defendant Richard Bernstein for summary judgment dismissing the amended complaint against him.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on August 26, 2016, and filed in the Cattaraugus County Clerk's Office on September 29, 2016,

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

948

CA 15-01525

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

KERRY A. DONOHUE, FORMERLY KNOWN AS
KERRY A. IVES, PLAINTIFF-RESPONDENT,

V ORDER

AMY BERNSTEIN, DEFENDANT,
AND RICHARD BERNSTEIN, DEFENDANT-APPELLANT.

AMY BERNSTEIN, THIRD-PARTY PLAINTIFF,

V

MALACHI DONOHUE, DAVID J. BECKER, AND CHARLES
BAKER, THIRD-PARTY DEFENDANTS.

RICHARD BERNSTEIN, THIRD-PARTY PLAINTIFF,

V

MALACHI DONOHUE, DAVID J. BECKER AND CHARLES
BAKER, THIRD-PARTY DEFENDANTS.
(APPEAL NO. 2.)

RUPP BAASE PFALZGRAF & CUNNINGHAM LLC, BUFFALO (JOSHUA P. RUBIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (RICHARD P. WEISBECK, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered July 23, 2015. The order, insofar as appealed from, upon reargument, denied in part the motion of defendant Richard Bernstein seeking summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on August 26, 2016, and filed in the Cattaraugus County Clerk's Office on September 29, 2016,

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

951

CA 15-01827

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

ANNA STRANGIO AND ROSARIO STRANGIO,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

T.M. MAGADDINO VASQUEZ, ALSO KNOWN AS TINA MARIE MAGADDINO-VASQUEZ, ALSO KNOWN AS TINA VASQUEZ,
DEFENDANT-RESPONDENT.

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

BARTH SULLIVAN BEHR, BUFFALO (DANIEL CARTWRIGHT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered July 6, 2015. The order, insofar as appealed from, granted in part the motion of defendant for summary judgment and dismissed the complaint, as amplified by the bill of particulars, insofar as it alleged that plaintiff Anna Strangio sustained a serious injury under the permanent consequential limitation of use and significant limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d).

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries that Anna Strangio (plaintiff) allegedly sustained when a vehicle operated by defendant struck a vehicle operated by plaintiff. Following discovery, defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Supreme Court granted the motion with respect to three of the four categories alleged in the complaint, as amplified by the bill of particulars, and plaintiffs contend on appeal that the court erred with respect to two of those three categories, i.e., the permanent consequential limitation of use and significant limitation of use categories. We agree, and we therefore reverse the order insofar as appealed from.

With respect to the permanent consequential limitation of use category, even assuming, arguendo, that defendant met her initial burden of establishing her entitlement to judgment as a matter of law, we conclude that plaintiffs raised an issue of fact by submitting the affirmation of plaintiff's orthopedic surgeon, who measured "significant restrictions in the flexion, extension and rotation of plaintiff's cervical spine [three years] after the accident and opined that those restrictions are permanent" (*Rodriguez v Duggan*, 266 AD2d 859, 859-860; *see Mangano v Sherman*, 273 AD2d 836, 836).

With respect to the significant limitation of use category, we conclude that defendant raised an issue of fact with her own submissions in support of the motion (*see Courtney v Hebeler*, 129 AD3d 1627, 1628; *see generally Harris v Campbell*, 132 AD3d 1270, 1271). Those submissions included evidence that plaintiff's orthopedist and another physician had reviewed an imaging study and found a herniated disc in plaintiff's cervical spine, and defendant also submitted " 'objective evidence of the extent of alleged physical limitations resulting from the disc injury' . . . , i.e., medical records from plaintiff's treating physicians designating numeric percentages of plaintiff's range of motion losses" (*Courtney*, 129 AD3d at 1628; *see generally Pommells v Perez*, 4 NY3d 566, 574). Contrary to defendant's contention, plaintiff's cessation of treatment is not fatal to her claim. Plaintiff offered a reasonable explanation for discontinuing treatment, and she is not required to create "a record of needless treatment" (*Pommells*, 4 NY3d at 574).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

953

TP 16-00315

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

IN THE MATTER OF ARMANDO TORRES, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered March 1, 2016) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

955

KA 15-00924

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DAROLD D. PAGE, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

NIAGARA COUNTY DISTRICT ATTORNEY'S OFFICE, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), entered May 4, 2015. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

956

KA 14-00759

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER J. FREEMAN, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (MELANIE J. BAILEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered March 17, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant was convicted of driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]) and driving while intoxicated, per se, as a class E felony (§§ 1192 [2]; 1193 [1] [c] [i] [A]). The court initially imposed a sentence of two concurrent terms of imprisonment of one year, to be followed by five years of probation. Defendant served his sentence of imprisonment, and thereafter allegedly committed several violations of the terms and conditions of his probation. Following a hearing, County Court revoked the probation component of defendant's sentence and imposed concurrent, indeterminate terms of imprisonment of 1⅓ to 4 years. Defendant now appeals from the judgment associated therewith.

Contrary to defendant's contention, the court "properly determined that the People met their burden of establishing by a preponderance of the evidence that defendant violated the terms and conditions of his probation" (*People v Ortiz*, 94 AD3d 1436, 1436, *lv denied* 19 NY3d 999; *see* CPL 410.70 [3]; *People v Wheeler*, 99 AD3d 1168, 1169-1170, *lv denied* 20 NY3d 989). In addition to other evidence, the People offered testimony from defendant's probation officer and a police officer, both of whom "testified to their direct, personal knowledge of the facts and circumstances surrounding defendant's violation[s] of the terms of probation" (*People v Hogan*, 284 AD2d 655, 655-656, *lv denied* 97 NY2d 641).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

957

KA 15-01396

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JULYNN CRISCUOLO, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (SHIRLEY A. GORMAN 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 August 11, 2015. The judgment convicted defendant, upon her plea of guilty, of driving while intoxicated, a class E felony, and aggravated vehicular assault.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

963

KA 14-01490

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD BRIDGES, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (DANIELLE E. SMITH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered August 4, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree, sexual abuse in the first degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sexual act in the first degree (Penal Law § 130.50 [3]), sexual abuse in the first degree (§ 130.65 [3]), and endangering the welfare of a child (§ 260.10 [1]). Contrary to defendant's contention, County Court engaged him in "an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v James*, 71 AD3d 1465, 1465 [internal quotation marks omitted]; *see People v Tyo*, 140 AD3d 1697, 1698), and the waiver "was not rendered invalid based on the court's failure to require defendant to articulate the waiver in his own words" (*People v Dozier*, 59 AD3d 987, 987, *lv denied* 12 NY3d 815; *see People v Gast*, 114 AD3d 1270, 1270, *lv denied* 22 NY3d 1198). Contrary to defendant's further contention, the record establishes that the waiver of the right to appeal was " 'intended comprehensively to cover all aspects of the case' " (*People v Fisher*, 94 AD3d 1435, 1435, *lv denied* 19 NY3d 973). Defendant's waiver encompasses his challenges to the suppression ruling (*see People v Sanders*, 25 NY3d 337, 342; *People v Kemp*, 94 NY2d 831, 833), and to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

964

KA 15-00734

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

KELLY COOMEY, ALSO KNOWN AS KELLY WALTS,
DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Onondaga County Court (Thomas J. Miller, J.), dated May 8, 2015. The order dismissed the indictment in furtherance of justice pursuant to CPL 210.40 (1).

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

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to dismiss the indictment in the furtherance of justice pursuant to CPL 210.40 (1). "While the question of whether to dismiss an indictment in the furtherance of justice is addressed to the discretion of the trial court, this discretion is not absolute; the issue on appeal is whether the court abused or improvidently exercised its discretionary authority" (*People v Hirsch*, 85 AD2d 902, 902). Contrary to the People's contention, County Court did not abuse or improvidently exercise its discretion in dismissing the indictment charging defendant, a former Child Protective Services caseworker employed by Onondaga County, with, inter alia, tampering with public records in the first degree (Penal Law § 175.25) and falsifying business records in the second degree (§ 175.05 [1]), in connection with certain time records and a case note (*see generally People v Colon*, 86 NY2d 861, 863). The court granted the motion and dismissed the indictment "after carefully reviewing in a [bench] decision all of the criteria listed in CPL 210.40 (1) and finding several of them applicable and compelling" (*People v Herman L.*, 83 NY2d 958, 959; *see People v Rivera*, 108 AD3d 452, 452-453, *lv denied* 22 NY3d 958). The court also based its determination upon its view that defendant would not have been prosecuted if her employer had been successful in procuring termination of her employment at an arbitration proceeding that occurred more than one year prior to commencement of the criminal proceeding, as well as its view that defendant was unfairly targeted

for criminal prosecution based on evidence of wrongdoing on the part of some of defendant's coworkers who were not prosecuted. Finally, the court determined that defendant's resignation from her position was a substantial and appropriate consequence for her actions.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

965

CA 15-01053

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

EARTHA C. SOUTHERN, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN AND ADMINISTRATOR OF THE ESTATE OF MALACHI SOUTHERN, INFANT, DECEASED, PLAINTIFF-APPELLANT,

V ORDER

SENZAN HSU, M.D., CHILDREN'S HOSPITAL OF BUFFALO OF KALEIDA HEALTH, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

EARTHA C. SOUTHERN, PLAINTIFF-APPELLANT PRO SE.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANT-RESPONDENT SENZAN HSU, M.D.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (ELIZABETH G. ADYMY OF COUNSEL), FOR DEFENDANT-RESPONDENT CHILDREN'S HOSPITAL OF BUFFALO OF KALEIDA HEALTH.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered April 9, 2015. The order granted the motions of defendants Senzan Hsu, M.D., and Children's Hospital of Buffalo of Kaleida Health, for summary judgment dismissing all claims and cross claims against them.

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: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

967

CA 15-01035

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

CATHERINE M. HEARY, PLAINTIFF-APPELLANT,

V ORDER

DENISE HIBIT AND ERIK M. HIBIT,
DEFENDANTS-RESPONDENTS.

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

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered May 26, 2015. The order granted the request of defendants for collateral source reductions of a jury verdict.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 29, 2016,

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

968

CA 16-00107

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

CHRISTOPHER J. ZEDICK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STACIA L. NANCE, DAVID V. KNIGHT, DEFENDANTS,
JIM MAZZ AUTO, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

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

RUPP, BAASE, PFALZGRAF, CUNNINGHAM LLC, BUFFALO (THOMAS P. CUNNINGHAM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered October 6, 2015. The order granted the motion of defendant Jim Mazz Auto for summary judgment and dismissed 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 this personal injury action after being involved in a three-vehicle rear-end collision with defendants Stacia L. Nance and David V. Knight. Plaintiff alleged that the rear-end collision was caused by the actions of the unknown operator of a lead vehicle owned by defendant Jim Mazz Auto (Mazz). Mazz moved for summary judgment dismissing the complaint and any cross claims against it on the ground, among others, that the actions of the operator of its vehicle did not proximately cause the accident. Supreme Court granted the motion, and we affirm.

"It is well settled that absent extraordinary circumstances . . . , injuries resulting from a rear-end collision are not proximately caused by any negligence on the part of the operator of a preceding vehicle when the rear-ended vehicle had successfully and completely stopped behind such vehicle prior to the collision" (*Burg v Mosey*, 126 AD3d 1522, 1523 [internal quotation marks omitted]). Here, it is undisputed that plaintiff's vehicle came to a complete stop behind the Mazz vehicle before being rear-ended, and Mazz therefore established its entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiff's reliance on *Tutrani v County of Suffolk* (10 NY3d 906) is misplaced inasmuch as the extraordinary circumstances of that case are not present here (*see*

Paterson v Sikorski, 118 AD3d 1330, 1331; *Schmidt v Guenther*, 103 AD3d 1162, 1162-1163).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

969

CA 16-00098

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

MARGARITA ZULEY, M.D., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ELIZABETH WENDE BREAST CARE, LLC, STAMATIA DESTOUNIS, M.D., PHILIP MURPHY, M.D., POSY SEIFERT, D.O., PATRICIA SOMERVILLE, M.D., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

UNDERBERG & KESSLER LLP, BUFFALO (THOMAS F. KNAB OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (BRIAN J. CAPITUMMINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered November 16, 2015. The order granted the motion of plaintiff to compel defendants-appellants to respond to requests two through five of plaintiff's second notice to produce.

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

Memorandum: On a prior appeal, we modified the order granting summary judgment dismissing the complaint in its entirety by reinstating the cause of action for unjust enrichment against defendants-appellants, and we remitted the matter to Supreme Court to rule on plaintiff's motion to compel further discovery, which it had determined was moot (*Zuley v Elizabeth Wende Breast Care, LLC*, 126 AD3d 1460, *amended on rearg* 129 AD3d 1556). The court granted the motion, and we affirm. It is well established that the court "is vested with broad discretion to supervise discovery and to determine what disclosure is material and necessary" (*Cain v New York Cent. Mut. Fire Ins. Co.*, 38 AD3d 1344, 1344). Generally, "[a]bsent an abuse of discretion, we will not disturb the court's control of the discovery process" (*McCarter v Woods*, 106 AD3d 1540, 1541 [internal quotation marks omitted]). We perceive no abuse of discretion in this case. Although we may substitute our discretion for that of the trial court, even in the absence of an abuse of discretion (*see Smalley v Harley-Davidson Motor Co., Inc.*, 115 AD3d 1369, 1370), we decline to do so

here.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

972

CA 16-00302

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

MICHELLE M. FIGURA AND MATTHEW FIGURA,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TIMOTHY W. FRASIER, DEFENDANT-RESPONDENT,
AND ZAYACHEK MECHANICAL, LTD., DEFENDANT-APPELLANT.

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

WALSH, ROBERTS & GRACE, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Mark Montour, J.), entered September 22, 2015. The order denied the motion of defendant Zayachek Mechanical, Ltd., for summary judgment dismissing the complaint and all cross claims against it.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries Michelle M. Figura (plaintiff) allegedly sustained when her vehicle was rear-ended by a vehicle owned and operated by defendant Timothy W. Frasier, who was employed by Zayachek Mechanical, Ltd. (defendant). According to plaintiffs, Frasier was acting within the scope of his employment at the time of the collision, and defendant is therefore vicariously liable for Frasier's alleged negligence based on the doctrine of respondeat superior. Defendant moved for summary judgment dismissing the complaint and all cross claims against it on the ground that Frasier was not acting within the scope of his employment at the time of the accident. We conclude that Supreme Court erred in denying the motion.

"Under the doctrine of *respondeat superior*, an employer will be liable for the negligence of an employee committed while the employee is acting in the scope of his [or her] employment . . . As a general rule, an employee driving to and from work is not acting in the scope of his [or her] employment . . . Although such activity is work motivated, the element of control is lacking" (*Lundberg v State of New York*, 25 NY2d 467, 470-471, *rearg denied* 26 NY2d 883; *see Swierczynski*

v O'Neill [appeal No. 2], 41 AD3d 1145, 1146-1147, *lv denied* 9 NY3d 812; *see also D'Amico v Christie*, 71 NY2d 76, 88). "Although the issue whether an employee is acting within the scope of his or her employment generally is one of fact, it may be decided as a matter of law in a case such as this, in which the relevant facts are undisputed" (*Carlson v Porter* [appeal No. 2], 53 AD3d 1129, 1131, *lv denied* 11 NY3d 708).

Here, defendant established that Frasier was driving his "personally owned motor vehicle" from his temporary residence to his work site (*Pugsley v Seneca Foods Corp.*, 145 AD2d 953, 953; *see Correa v Baptiste*, 303 AD2d 355, 355), that he was not compensated for his commute (*see Rapini v Geneva Gen. Hosp.*, 233 AD2d 868, 868-869), and that he was not "subject to control in how he chose to convey himself" to work (*Tortora v LaVoy*, 54 AD2d 1036, 1037; *see Matos v Depalma Enters.*, 160 AD2d 1163, 1164). Defendant thus established that it was not exercising any control over Frasier at the time of the accident (*see Lundberg*, 25 NY2d at 470-471; *cf. Makoske v Lombardy*, 47 AD2d 284, 287-288, *affd* 39 NY2d 773).

We conclude that plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to plaintiffs' contention, the mere fact that Frasier carried his own tools in his vehicle was insufficient to "transform the use of the automobile into a special errand [for defendant] or an extension of the employment" (*Matter of Freebern v North Rockland CDA.*, 64 AD2d 300, 303; *cf. Clark v Hoff Bros. Refuse Corp.*, 72 AD2d 936, 937; *Shauntz v Schwegler Bros., Inc.*, 259 App Div 446, 450; *see generally Matter of Trent*, 20 AD2d 948, 948-949). Moreover, the fact that Frasier drove a coworker to work that morning is of no significance because he was not directed to do so, and the carpool was based on the employees' "personal arrangement" (*Jacobi v Fish*, 67 AD3d 1376, 1377; *see Howard v Hilton*, 244 AD2d 912, 913, *lv denied* 91 NY2d 809; *cf. Makoske*, 47 AD2d at 287-288). Finally, the fact that defendant paid for lodging for Frasier while he was at a remote work site also does not require a different finding inasmuch as defendant did not require its employees to stay at the procured hotel, and the employees did not have "to inform defendant of their whereabouts [outside of working hours]" (*Crawford v Westcott Steel Co.*, 188 AD2d 731, 732). We therefore conclude that Frasier was not engaged in employment-related travel at the time of the accident, and thus plaintiffs' reliance on the dual purpose doctrine is misplaced (*see Swierczynski*, 41 AD3d at 1147; *cf. Margolis v Volkswagen of Am., Inc.*, 77 AD3d 1317, 1319). We further conclude that plaintiffs failed to raise a triable issue of fact whether defendant "ha[d] some special interest or derive[d] some special benefit from [Frasier's] use of [his personal] automobile in going to and from work" (*Fitzgerald v Lyons*, 39 AD2d 473, 475; *see Ehlenfield v State of New York*, 62 AD2d 1151, 1152, *lv denied* 44 NY2d 649).

Although plaintiffs submitted evidence that Frasier informed his insurance company that he "was out of town working at the time of the accident," that statement, alone, does not raise a triable issue of

fact inasmuch as "[i]t is the employer and not the employee who must establish the scope of the employee's employment activities . . . [T]his is not controlled by the employee's belief[s]" (*Matter of Tally v Newberry Co.*, 30 AD2d 898, 899, *affd* 25 NY2d 945).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

974

CA 16-01030

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

FRANCES JACKSON AND JOHN JACKSON,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V ORDER

ESTATE OF KENNETH P. SADLER, JR.,
DECEASED, DEFENDANT,
AND COUNTY OF ALLEGANY,
DEFENDANT-APPELLANT-RESPONDENT.

COUNTY OF ALLEGANY, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

TOWN OF SCIO, THIRD-PARTY
DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (MICHAEL P. MCCLAREN OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT AND THIRD-PARTY PLAINTIFF-RESPONDENT.

WELCH, DONLON & CZARPLES, PLLC, CORNING (JACOB P. WELCH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

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

Appeals and cross appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered November 6, 2015. The order granted in part and denied in part the motion of defendant County of Allegany for summary judgment and denied the motion of third-party defendant Town of Scio for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on July 25, 2016, by Thomas P. Brown, A.J., on August 3, 2016, and filed in the Allegany County Clerk's Office on August 5, 2016,

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

975

KA 12-02180

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ARTHUR E. MASON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (PATRICIA L. DZIUBA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered July 18, 2012. The judgment convicted defendant, upon his plea of guilty, of forgery 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 forgery in the second degree (Penal Law § 170.10 [1]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of bail jumping in the second degree (§ 215.56). In 2010, defendant pleaded guilty to forgery and signed a drug court contract providing that, if he completed a drug court program, he would be allowed to withdraw his plea and instead plead guilty to a misdemeanor. The contract further provided that, if defendant was terminated from the program, he would be sentenced to a term of imprisonment. Defendant left the state for several months and, when he was returned on a bench warrant in 2012, he admitted that he violated the drug court contract, pleaded guilty to bail jumping, and was sentenced to consecutive indeterminate terms of imprisonment.

Contrary to the People’s contention in both appeals, defendant did not validly waive his right to appeal. Although the drug court contract contained a written waiver of the right to appeal, County Court did not conduct any colloquy concerning that waiver at the plea proceeding in 2010, and we conclude that the contract alone is insufficient to establish a valid waiver in appeal No. 1 (*see People v Brown*, 140 AD3d 1682, 1683; *People v Jones*, 118 AD3d 1354, 1354, *lv denied* 24 NY3d 961; *see generally People v Bradshaw*, 18 NY3d 257, 265). In addition, during the proceedings in 2012, defendant did not

waive his right to appeal at the time that he admitted to violating the drug court contract and pleaded guilty to bail jumping. He purported to waive that right at sentencing, but the waiver "was not mentioned until after [he] pleaded guilty," and we therefore conclude that it was not effective with respect to either appeal (*People v Blackwell*, 129 AD3d 1690, 1690, *lv denied* 26 NY3d 926; *see People v Ties*, 132 AD3d 558, 558; *cf. People v Collins*, 53 AD3d 932, 933, *lv denied* 11 NY3d 831). Nevertheless, on the merits, we conclude that the sentence in each appeal is not unduly harsh or severe.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

976

KA 13-00481

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ARTHUR E. MASON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (PATRICIA L. DZIUBA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered July 18, 2012. The judgment convicted defendant, upon his plea of guilty, of bail jumping in the second degree.

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

Same memorandum as in *People v Mason* ([appeal No. 1] ___ AD3d ___ [Nov. 10, 2016]).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

977

KA 15-00099

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NEDRA JONES, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 15, 2014. The judgment convicted defendant, upon her plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention, we conclude that her "valid waiver of the right to appeal with respect to both the conviction and sentence encompasses [her] contention that the sentence imposed is unduly harsh and severe" (*People v Rodman*, 104 AD3d 1186, 1188, *lv denied* 22 NY3d 1202; *cf. People v Maracle*, 19 NY3d 925, 928).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

979

KA 15-00601

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK J. DAILEY, DEFENDANT-APPELLANT.

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

NIAGARA COUNTY DISTRICT ATTORNEY'S OFFICE, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara Sheldon Farkas, J.), rendered February 27, 2015. 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 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]). 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: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

983

KA 11-01389

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY HOUGHTALING, DEFENDANT-APPELLANT.

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

JEFFREY HOUGHTALING, DEFENDANT-APPELLANT PRO SE.

R. MICHAEL TANTILLO, SPECIAL PROSECUTOR, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered July 6, 2010. The judgment convicted defendant, upon a jury verdict, of bail jumping 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 bail jumping in the second degree (Penal Law § 215.56). The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction. Contrary to defendant's contention, the People were not required to prove that defendant received notice of the trial date inasmuch as "the crime of bail jumping does not require proof of any culpable mental state" (*People v White*, 115 AD2d 313, 314). In any event, the evidence established that defendant had constructive knowledge of the trial date (*see id.*). We therefore conclude that the People met their burden of presenting legally sufficient evidence to establish defendant's guilt "even in the absence of direct proof that he actually received notice of the [trial] date" (*People v De Stefano*, 29 AD3d 1030, 1031). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's contention that County Court erred in refusing to grant a mistrial when the prosecutor elicited testimony from a witness in violation of the court's *Molineux* ruling. " 'Any prejudice to defendant that might have arisen from the mention of uncharged criminal activity was alleviated when [the c]ourt sustained defendant's objection and gave prompt curative instructions to the

jury' " (*People v Reyes-Paredes*, 13 AD3d 1094, 1095, *lv denied* 4 NY3d 802). Contrary to defendant's further contention, the court properly concluded that it was not required to entertain his pro se motion to dismiss the indictment because at the time defendant made the motion he was represented by counsel (*see People v Rodriguez*, 95 NY2d 497, 501-502) and, in any event, there is no indication in the record that the motion was properly filed in accordance with the requirements of CPL 255.20 (1).

We reject defendant's contention that trial counsel was ineffective in stipulating to the admission of transcripts from the trial at which defendant failed to appear. "[D]efendant has not demonstrated 'the absence of strategic or other legitimate explanations for [defense] counsel's' stipulation" (*People v Johnson*, 30 AD3d 1042, 1043, *lv denied* 7 NY3d 790, *reconsideration denied* 7 NY3d 902, quoting *People v Rivera*, 71 NY2d 705, 709). We also reject defendant's contention that defense counsel was ineffective in moving to set aside the verdict pursuant to CPL 330.30 on the ground that it was not supported by the weight of the evidence. Although we agree with defendant that the motion was without merit inasmuch as trial judges are not authorized to set aside a verdict on that ground (*see People v Carter*, 63 NY2d 530, 536; *People v Lleshi*, 100 AD3d 780, 780, *lv denied* 20 NY3d 1012), defendant was not thereby denied a fair trial (*see generally People v Flores*, 84 NY2d 184, 188-189). The record belies defendant's contention that defense counsel was otherwise ineffective (*see generally People v Demus*, 82 AD3d 1667, 1668, *lv denied* 17 NY3d 815).

Finally, defendant's contention in his main and pro se supplemental briefs that the court should have recused itself is not properly before us inasmuch as it is based upon "facts . . . developed in connection with defendant's [renewed] motion to vacate the conviction pursuant to CPL 440.10, but defendant did not obtain permission to appeal from the order denying that motion" (*People v Russin*, 277 AD2d 880, 881).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

987

CA 15-02127

PRESENT: PERADOTTO, J.P., NEMOYER, CURRAN, AND TROUTMAN, JJ.

EDWARD J. CAZA AND CATHY CAZA,
PLAINTIFFS-APPELLANTS,

V ORDER

L.P. CIMINELLI CONSTRUCTION COMPANY, DEFENDANT,
L.P. CIMINELLI, INC., AND BUFFALO PUBLIC SCHOOLS,
DEFENDANTS-RESPONDENTS.

VIOLA, CUMMINGS & LINDSAY, LLP, NIAGARA FALLS (MICHAEL J. SKONEY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (PATRICK J. HINES OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered September 15, 2015. The order, among other things, granted defendants' motion for summary judgment dismissing plaintiffs' complaint.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

988

CA 16-00362

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

STEPHEN P. FRANCIS, DOING BUSINESS AS EXTREME REALITY BUILDERS, PLAINTIFF-RESPONDENT,

V ORDER

CHRISTOPHER SZCZEPANSKI, ET AL., DEFENDANTS, AND NBT BANK, DEFENDANT-APPELLANT.

HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON (DANIEL R. NORTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRYE & CARBONE LLC, UTICA (RICHARD A. FRYE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

TOD M. LASCURETTES, UTICA, FOR DEFENDANT CHRISTOPHER SZCZEPANSKI.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered June 3, 2015. The order, among other things, denied in part the motion of defendant NBT Bank to dismiss the complaint against it.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on August 8, 2016, and filed in the Oneida County Clerk’s Office on September 20, 2016,

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

995

CA 16-00292

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

EMMA B. SCHUVER, PLAINTIFF-RESPONDENT,

V ORDER

PAMELA LODESTRO, INDIVIDUALLY AND AS EXECUTOR
OF THE ESTATE OF G. MARVIN SCHUVER, DECEASED,
DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

WRIGHT, WRIGHT AND HAMPTON, JAMESTOWN (JOSEPH M. CALIMERI OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRAUTIGAM & BRAUTIGAM, LLP, FREDONIA (DARYL P. BRAUTIGAM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Stephen W. Cass, A.J.), entered May 29, 2015. The order, among other things, denied in part the motion of defendant Pamela Lodestro, individually, and as executor of the Estate of G. Marvin Schuver, to dismiss the amended complaint against her.

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: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

996

CA 15-01410

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

IN THE MATTER OF THE APPLICATION OF PETER J. RUSSELL, INTERIM EXECUTIVE DIRECTOR, OF CENTRAL NEW YORK PSYCHIATRIC CENTER, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JASON TRIPP, A PATIENT AT CENTRAL NEW YORK PSYCHIATRIC CENTER, CONSECUTIVE NO. 21706, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (BRYCE THERRIEN OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered July 20, 2015. The order, inter alia, granted the application of petitioner for authorization to administer medication to respondent over his objection.

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

Memorandum: Respondent appeals from an order granting petitioner's application for authorization to administer medication to respondent over his objection. The order has since expired, rendering this appeal moot (*see Matter of Bosco [Quinton F.]*, 100 AD3d 1525, 1526). Contrary to respondent's contention, this case does not fall within the exception to the mootness doctrine (*see Matter of McGrath*, 245 AD2d 1081, 1082; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

997

KA 13-02158

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES KNIGHTON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered September 23, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of marihuana in the third 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 criminal possession of marihuana in the third degree (Penal Law § 221.20) and, in appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (§ 220.16 [1]). The pleas were entered during one plea proceeding, following the decision of County Court to deny suppression concerning all of the charges after a hearing. We reject defendant's contention that the testimony of the police officers at the suppression hearing was tailored to nullify constitutional objections and was incredible as a matter of law (*see People v Holley*, 126 AD3d 1468, 1469, *lv denied* 27 NY3d 965; *People v James*, 19 AD3d 617, 618, *lv denied* 5 NY3d 829). "Questions of credibility are primarily for the suppression court to determine and its findings will be upheld unless clearly erroneous" (*People v Squier*, 197 AD2d 895, 895, *lv denied* 82 NY2d 904; *see generally People v Prochilo*, 41 NY2d 759, 761). "Nothing about the officer[s'] testimony was unbelievable as a matter of law, manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*James*, 19 AD3d at 618). We therefore discern no basis in the record for disturbing the court's finding that probable cause existed for the traffic stops (*see People v Williams*, 132 AD3d 1155, 1155-1156, *lv denied* 27 NY3d 1157; *People v Hale*, 130 AD3d 1540, 1540, *lv denied* 26 NY3d 1088, *reconsideration*

denied 27 NY3d 998; *People v Mack*, 114 AD3d 1282, 1282, *lv denied* 22 NY3d 1200).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

998

KA 13-02159

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES KNIGHTON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered September 23, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Same memorandum as in *People v Knighton* ([appeal No. 1] ___ AD3d ___ [Nov. 10, 2016]).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

999

KA 15-00018

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

NICHOLE M. MCKERROW, ALSO KNOWN AS NICOLE MCKERROW,
DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO 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 October 8, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1001

KA 15-00728

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

DAVID O. RIVERA, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Victoria M. Argento, J.), entered March 19, 2015. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court erred in denying his request for a downward departure from his presumptive risk level because he met his burden of proving the existence of a mitigating factor to warrant the downward departure, i.e., he had an exceptional response to treatment. We reject that contention. While defendant is correct that "[a]n offender's response to treatment, if exceptional, can be the basis for a downward departure" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 17 [2006]), we conclude that defendant failed to meet his burden of proving by a preponderance of the evidence that his response was exceptional (*see People v Butler*, 129 AD3d 1534, 1534-1535, *lv denied* 26 NY3d 904; *People v Pendleton*, 112 AD3d 600, 601, *lv denied* 22 NY3d 861). In any event, it is well established that "[a] sex offender's successful showing by a preponderance of the evidence of facts in support of an appropriate mitigating factor does not automatically result in the relief requested, but merely opens the door to the SORA court's exercise of its sound discretion upon further examination of all relevant circumstances" (*People v Worrell*, 113 AD3d 742, 743 [internal quotation marks omitted]; *see People v Smith*, 122 AD3d 1325, 1326). Even assuming, arguendo, that defendant established that his response to treatment was exceptional, we nevertheless conclude that the court providently exercised its discretion in

denying defendant's request for a downward departure (*see Smith*, 122 AD3d at 1326).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1003

KA 14-00087

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD THOMAS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD 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 December 18, 2013. The order denied the motion of defendant pursuant to CPL article 440.

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).

Memorandum: We agree with defendant that County Court erred in denying without a hearing his motion pursuant to CPL 440.10 to vacate his judgment of conviction on the ground that he did not receive effective assistance of counsel. Defendant averred that defense counsel failed to advise him that he would be sentenced as a persistent violent felony offender if convicted after a trial, rather than as a second violent felony offender. Defendant further averred that he was prejudiced thereby because he would have accepted a plea offer had he known his actual predicate status. The record indicates that defense counsel, the court, and the People all failed to realize until after the trial started, when there were no further plea negotiations, that defendant would be a persistent violent felony offender if convicted. We conclude that defendant's submissions raise factual issues that require a hearing (*see* CPL 440.30 [5]; *People v Hill*, 114 AD3d 1169, 1170; *People v Wimberly*, 86 AD3d 651, 652-653; *People v Howard*, 12 AD3d 1127, 1127-1128). We therefore reverse the order and remit the matter to County Court to conduct a hearing on defendant's motion.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1005

KA 14-01971

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVON SCOTT, ALSO KNOWN AS “GHOST”,
DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered August 8, 2013. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a plea of guilty of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that his waiver of the right to appeal is not valid and that Supreme Court erred in refusing to suppress statements he made to the police as well as identification testimony from several witnesses. We reject defendant’s contentions.

Contrary to defendant’s contention, “the waiver of the right to appeal was not rendered invalid based on the court’s failure to require defendant to articulate the waiver in his own words” (*People v Dozier*, 59 AD3d 987, 987, *lv denied* 12 NY3d 815). Moreover, the record establishes that the court “describ[ed] the nature of the right being waived without lumping that right into the panoply of trial rights automatically forfeited upon pleading guilty,” and ensured that defendant’s waiver was knowingly, intelligently, and voluntarily entered (*People v Lopez*, 6 NY3d 248, 257; *see e.g. People v McClain*, 112 AD3d 1334, 1335, *lv denied* 23 NY3d 965; *People v Verse*, 61 AD3d 1409, 1409, *lv denied* 12 NY3d 930). Defendant further contends that the waiver of the right to appeal was not knowingly, intelligently, and voluntarily entered based on his mental limitations, including potential learning disabilities. Although the record establishes that defendant “may be learning disabled,” there is no “ ‘indication that defendant was uninformed, confused or incompetent when he’ waived his right to appeal” (*People v DeFazio*, 105 AD3d 1438, 1439, *lv denied* 21

NY3d 1015), nor is there any basis to conclude that the court did not adequately mold its colloquy to the "age, experience and background of the accused" (*People v Seaberg*, 74 NY2d 1, 11).

The valid waiver of the right to appeal forecloses any challenge by defendant to the court's suppression rulings (*see People v Kemp*, 94 NY2d 831, 833; *People v Burley*, 136 AD3d 1404, 1404, *lv denied* 27 NY3d 993).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1007/15

CA 14-01887

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

IN THE MATTER OF COUNTY OF ONEIDA,
PETITIONER-PLAINTIFF-RESPONDENT,

V ORDER

NIRAV R. SHAH, M.D., M.P.H., COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, NEW YORK STATE DEPARTMENT OF HEALTH,
RESPONDENTS-DEFENDANTS-APPELLANTS,
ET AL., RESPONDENTS-DEFENDANTS.
(APPEAL NO. 1.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered July 15, 2014 in a CPLR article 78 proceeding and a declaratory judgment action. The order granted petitioner's motion for leave to conduct disclosure pursuant to CPLR 408.

It is hereby ORDERED that said appeal is dismissed without costs as moot (*see generally Matter of Colonial Sur. Co. v Lakeview Advisors, LLC* [appeal No. 1], 125 AD3d 1292, 1292-1293, *lv denied* 26 NY3d 901).

All concur except VALENTINO, J., who is not participating.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1007

KA 14-00670

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MILES S. MITCHELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered October 29, 2013. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), attempted robbery in the first degree, attempted robbery in the second degree and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1], [3]) and one count of attempted robbery in the first degree (§§ 110.00, 160.15 [4]). Defendant is convicted of acting in concert with two others in the shooting death of the victim, a man the assailants mistakenly believed was having a relationship with the mother of defendant's children. Viewing the evidence in light of the elements of the crime of intentional murder as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's contention, Supreme Court's *Molineux* determination does not constitute reversible error. The evidence that, two weeks before the crimes herein were committed, defendant struck the mother of his children and beat a man who was in a car with her was relevant with respect to his motive and intent to harm a person because of his jealousy and anger (*see People v Willsey*, 148 AD2d 764, 765, *lv denied* 74 NY2d 749). We conclude that the prejudicial effect of that testimony did not outweigh its probative value, and that " 'any prejudice to defendant was minimized by [the court's] limiting instructions' " (*People v Carson*, 4 AD3d 805, 806, *lv denied* 2 NY3d 797). Defendant failed to object when the court permitted a witness, the intended victim, to testify that he had received a telephone call

from a person he did not know and thus his contention that the court committed reversible error by admitting that testimony is not preserved for our review (*see* CPL 470.15 [6] [a]). In any event, we conclude that any error is harmless because the evidence of defendant's guilt is overwhelming, and there is no significant probability that he would have been acquitted in the absence of that testimony (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

We reject defendant's contention that the court erred in denying his challenges for cause with respect to three prospective jurors. With respect to the first prospective juror, the court complied with its obligation to elicit an unequivocal assurance from that prospective juror that he would not draw a negative inference if defendant did not testify (*see People v Williams*, 128 AD3d 1522, 1523, *lv denied* 25 NY3d 1209; *People v Fowler-Graham*, 124 AD3d 1403, 1403-1404, *lv denied* 25 NY3d 1072; *see generally People v Harris*, 19 NY3d 679, 685). The second prospective juror provided an unequivocal assurance that she understood the burdens of proof, i.e., that defendant had no burden of proof, in response to defense counsel's questions (*see People v Parker*, 304 AD2d 146, 154, *lv denied* 100 NY2d 585; *cf. People v Casillas*, 134 AD3d 1394, 1395-1396). Finally, the third prospective juror informed the court that his father had been convicted of a sex offense, but he " 'never expressed any doubt concerning [his] ability to be fair and impartial' " (*People v Roseboro*, 124 AD3d 1374, 1375, *lv denied* 27 NY3d 1005). Furthermore, his "responses were unequivocal despite [his] use of the word 'think' " (*People v Rogers*, 103 AD3d 1150, 1152, *lv denied* 21 NY3d 946).

We agree with defendant, however, that the court erred in failing to reopen the *Huntley* hearing at defense counsel's request with respect to recorded statements that he made to an agent of the police (*see* CPL 60.45 [2] [b] [i], [ii]), i.e., the mother of his children, which were the subject of a protective order until approximately two weeks before trial. Because the admission of those statements at trial cannot be deemed harmless error (*see generally Crimmins*, 36 NY2d at 237), we hold the case, reserve decision and remit the matter to Supreme Court to reopen the *Huntley* hearing with respect to those recorded statements (*see People v Stroman*, 280 AD2d 887, 887).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1008/15

CA 14-02138

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

IN THE MATTER OF COUNTY OF ONEIDA,
PETITIONER-PLAINTIFF-RESPONDENT,

V ORDER

NIRAV R. SHAH, M.D., M.P.H., COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, NEW YORK STATE DEPARTMENT OF HEALTH,
RESPONDENTS-DEFENDANTS-APPELLANTS,
ET AL., RESPONDENTS-DEFENDANTS.
(APPEAL NO. 2.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered July 28, 2014 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment, among other things, annulled the determinations of respondents-defendants-appellants denying petitioner-plaintiff's claims for reimbursement.

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs, the second amended petition-complaint is denied in its entirety, and judgment is granted in favor of respondents-defendants as follows:

> It is ADJUDGED AND DECLARED that section 61 of part D of section 1 of chapter 56 of the Laws of 2012 has not been shown to be unconstitutional (*see Matter of County of Chemung v Shah*, ___ NY3d ___ [Oct. 27, 2016]).

All concur except VALENTINO, J., who is not participating.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1013

CA 15-01958

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

IN THE MATTER OF MALACHI FICEK,
CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

AKRON CENTRAL SCHOOL DISTRICT, SALAMANCA CITY
CENTRAL SCHOOL DISTRICT, RESPONDENTS-APPELLANTS,
ET AL., RESPONDENTS.

CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (CHRISTINE GASSER OF COUNSEL), FOR RESPONDENT-APPELLANT AKRON CENTRAL SCHOOL DISTRICT.

SUGARMAN LAW FIRM, LLP, BUFFALO (BRENNA C. GUBALA OF COUNSEL), FOR RESPONDENT-APPELLANT SALAMANCA CITY CENTRAL SCHOOL DISTRICT.

LEWIS & LEWIS, P.C., JAMESTOWN (JOHN I. LAMANCUSO OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered August 6, 2015. The order granted 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 modified on the law by denying claimant's application with respect to respondent Akron Central School District, and as modified the order is affirmed without costs.

Memorandum: In a case very similar to another case brought before us (*Matter of Candino v Starpoint Cent. Sch. Dist.*, 115 AD3d 1170, *affd* 24 NY3d 925), this appeal involves a wrestler (claimant) at respondent Salamanca City Central School District (Salamanca) alleging that he contracted herpes from another wrestler at respondent Akron Central School District (Akron) during a high school wrestling tournament. Supreme Court granted claimant's application for leave to serve a late notice of claim brought 13 months after the incident. Salamanca and Akron now appeal.

"A timely notice of claim[, i.e., within 90 days after accrual of the claim,] must be served upon a school district before an injured person may commence a tort action against the district" (*Matter of Felice v Eastport/South Manor Cent. Sch. Dist.*, 50 AD3d 138, 143; *see* Education Law § 3813 [2]; General Municipal Law § 50-e [1] [a]). Courts have broad discretion in determining whether to grant an

application for leave to serve a late notice of claim (*see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 535; *Palumbo v City of Buffalo,* 1 AD3d 1032, 1033). " 'In determining whether to grant such leave, the court must consider, inter alia, whether the claimant has shown a reasonable excuse for the delay, whether the [district] had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the [district]' " (*Diez v Lewiston-Porter Cent. Sch. Dist.*, 140 AD3d 1665, 1665; *see Brown v City of Buffalo*, 100 AD3d 1439, 1440-1441; *see generally* General Municipal Law § 50-e [5]; Education Law § 3813 [2-a]).

In support of his application, claimant offered as an excuse for failing to serve a timely notice of claim only the fact that he was an infant at the time he was diagnosed with herpes. " '[N]either infancy alone . . . nor ignorance of the law . . . provides a sufficient excuse for failure to [serve] a timely notice of claim' " (*Le Mieux v Alden High Sch.*, 1 AD3d 995, 996; *see Matter of Saponara v Lakeland Cent. Sch. Dist.*, 138 AD3d 870, 871; *Felice*, 50 AD3d at 150). Claimant did not "demonstrate[] any specific nexus between [his] infancy and [his] delay in serving a late notice of claim" (*Rose v Rochester Hous. Auth.*, 52 AD3d 1268, 1269). The remaining reasons set forth by claimant for failing to serve a timely notice of claim were improperly raised for the first time in his reply papers (*see Matter of Anderson v New York City Dept. of Educ.*, 102 AD3d 958, 959; *see generally Mikulski v Battaglia*, 112 AD3d 1355, 1356). Nevertheless, the failure to offer an excuse for the delay " 'is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [respondents]' " (*Shaul v Hamburg Cent. Sch. Dist.*, 128 AD3d 1389, 1389; *see Terrigino v Village of Brockport*, 88 AD3d 1288, 1288; *Matter of Gilbert v Eden Cent. Sch. Dist.*, 306 AD2d 925, 926).

With respect to the actual knowledge of the essential facts underlying the claim, the evidence established that, shortly after the tournament, Akron became aware that its wrestler had been diagnosed with herpes. Akron notified the Section VI Executive Director, who sent an email to athletic directors notifying them that he was informed of confirmed cases of herpes involving a particular weight class and directing them to have their wrestlers checked for that condition. The evidence also established that Salamanca learned shortly after the tournament that claimant had been diagnosed with herpes. In addition, both Akron and Salamanca were aware that a parent of another student had served a timely notice of claim against Akron, alleging that its wrestler had infected her son.

We reject Salamanca's contention that it did not have actual knowledge of the essential facts constituting the claim. Salamanca had actual knowledge of the injuries or damages sustained by claimant, and this is not a situation where it was unaware of the "the facts . . . underlying the claim" (*Williams*, 6 NY3d at 537; *cf. Diez*, 140 AD3d at 1666; *Le Mieux*, 1 AD3d at 996). We reject Salamanca's further contentions that it would be prejudiced by the late notice (*see Matter of Lindstrom v Board of Educ. of Jamestown City Sch. Dist.*, 24 AD3d

1303, 1304), and that the claim "patently lacks merit" (*Hess v West Seneca Cent. Sch. Dist.*, 15 NY3d 813, 814; *see Matter of Catherine G. v County of Essex*, 3 NY3d 175, 179).

We agree with Akron, however, that it did not have actual knowledge of the essential facts constituting the claim. Akron established that it was not aware until it received claimant's application for leave to serve a late notice of claim that he was allegedly infected with herpes by wrestling Akron's student at the tournament. As with the claimant in *Candino*, claimant here established that, at most, Akron had constructive knowledge of the claim, which is insufficient (*see Candino*, 115 AD3d at 1171-1172). It is well settled that actual knowledge of the claim is the factor that is accorded "great weight" in determining whether to grant leave to serve a late notice of claim (*Santana v Western Regional Off-Track Betting Corp.*, 2 AD3d 1304, 1304-1305; *see Williams*, 6 NY3d at 535; *Matter of Turlington v Brockport Cent. Sch. Dist.*, ___ AD3d ___, ___ [Oct. 7, 2016]). Even if we agree with claimant that Akron suffered no prejudice from the delay, we nevertheless conclude that the court abused its discretion in granting claimant's application for leave to serve a late notice of claim against Akron (*see Candino*, 115 AD3d at 1172), and we therefore modify the order accordingly.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1016

CA 16-00108

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

JULIANNE RIZZO, INDIVIDUALLY, AND ON BEHALF OF NATIONAL VACUUM CORP., NATIONAL MAINTENANCE CONTRACTING CORP., NATIONAL POWER ASSOCIATES CORP., AND NATIONAL RESPONSE & EMERGENCY SERVICES, INC., AND JULIANNE RIZZO CPA, P.C., FORMERLY KNOWN AS ELLEGATE AND RIZZO CPA'S P.C., INDIVIDUALLY AND ON BEHALF OF NATIONAL VACUUM CORP., NATIONAL MAINTENANCE CONTRACTING CORP., NATIONAL POWER ASSOCIATES CORP., AND NATIONAL RESPONSE & EMERGENCY SERVICES, INC., PLAINTIFFS-APPELLANTS,

V ORDER

NATIONAL VACUUM CORP., NATIONAL POWER ASSOCIATES CORP., NATIONAL RESPONSE & EMERGENCY SERVICES, INC., NATIONAL VACUUM ENVIRONMENTAL CORP., JOHN G. KOZLOWSKI, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (DAVID HAKAN ELIBOL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (STEVEN W. KLUTKOWSKI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Mark A. Montour, J.), entered March 26, 2015. The order granted the motion of defendant National Vacuum Corp., for partial summary judgment.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1017

CA 15-02096

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

ZOLTAN SZALAY AND DEBRA SZALAY,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF WEBSTER POLICE DEPARTMENT AND TOWN OF WEBSTER POLICE OFFICER SCOTT SMITH,
DEFENDANTS-RESPONDENTS.

ZOLTAN SZALAY, PLAINTIFF-APPELLANT PRO SE.

DEBRA SZALAY, PLAINTIFF-APPELLANT PRO SE.

SUGARMAN LAW FIRM LLP, BUFFALO (BRENNA C. GUBALA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered August 12, 2015. The order denied the motion of plaintiffs for summary judgment, granted the cross motion of defendants to dismiss the complaint and dismissed the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for personal injuries allegedly sustained by plaintiff Zoltan Szalay during an altercation with defendant police officer. Contrary to plaintiffs' contention, Supreme Court properly granted defendants' cross motion seeking to dismiss the complaint pursuant to, inter alia, CPLR 3211 (a) (8) on the ground that the court lacked jurisdiction because plaintiffs failed to serve a notice of claim as required by General Municipal Law § 50-e (1). It is well established that the service of a notice of claim "is a condition precedent to a lawsuit against a municipal [defendant]" (*Davidson v Bronx Mun. Hosp.*, 64 NY2d 59, 61), and it is undisputed that plaintiffs failed to serve a notice of claim with respect to the incident at issue. Plaintiffs failed to preserve for our review their contention that the Acting Supreme Court Justice should have recused herself because, inter alia, she is a resident of the Town of Webster and her daughter and plaintiffs' daughter were classmates inasmuch as they failed to raise those issues before the court (*see generally Matter of Rath v Melens*, 15 AD3d 837, 837). In any event, plaintiffs' " 'claim of bias is not supported by the record and is thus insufficient to require recusal' " (*Affinity*

Elmwood Gateway Props. LLC v AJC Props. LLC, 113 AD3d 1094, 1096). We have reviewed plaintiffs' remaining contentions and conclude that they are without merit.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1018

TP 16-00258

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

IN THE MATTER OF MAURICE JONES, PETITIONER,

V ORDER

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

MAURICE JONES, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO 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, Seneca County [Dennis F. Bender, A.J.], entered February 16, 2016) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1019

TP 16-00131

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

IN THE MATTER OF RALPH DOMINQUEZ, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered January 20, 2016) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1020

TP 16-00116

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

IN THE MATTER OF JERRY GILLARD, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered January 14, 2016) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1021

KA 15-00042

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIFFANY J. ERNST, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, 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 (Mark H. Fandrich, A.J.), rendered December 16, 2014. The judgment convicted defendant, upon her plea of guilty, of burglary in the third degree and petit larceny.

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

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of burglary in the third degree (Penal Law § 140.20) and petit larceny (§ 155.25), defendant contends that County Court abused its discretion in summarily denying her motion to withdraw her plea at sentencing and "should have inquired further" into her grounds for the motion. Defendant sought to withdraw her plea on the basis that it was not knowingly, voluntarily and intelligently entered. Specifically, defendant contends that she was "confused" at the time of the plea and that the court was aware of her unspecified "mental health issues." We reject defendant's contentions. When first presented with the motion, "the court afforded defendant the requisite 'reasonable opportunity to present [her] contentions' " and explain the basis of the motion (*People v Lindsay*, 134 AD3d 1452, 1452, *lv denied* 27 NY3d 967, quoting *People v Tinsley*, 35 NY2d 926, 927; *see People v Manor*, 121 AD3d 1581, 1582, *affd* 27 NY3d 1012). We conclude that, on this record, nothing more was required before the court decided the motion.

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 inducing the plea" (*People v Watkins*, 107 AD3d 1416, 1416, *lv denied* 22 NY3d 959 [internal quotation marks omitted]; *see* CPL 220.60 [3]; *People v Anderson*, 63 AD3d 1617, 1618, *lv denied* 13 NY3d 858). Here,

defendant's conclusory claims concerning her mental health issues are " 'unsupported by any medical proof, . . . [and do] not raise a sufficient question of fact regarding the voluntariness of [her] plea so as to require an evidentiary hearing' " (*People v Russell*, 79 AD3d 1530, 1531; *see People v McNair* [appeal No. 1], 186 AD2d 1089, 1089, *lv denied* 80 NY2d 1028). Even if one were to credit defendant's self-reports that she suffered from some mental health issues in the past, we note that it is well settled that "[a] history of prior mental illness or treatment does not itself call into question [a] defendant's competence" (*People v Taylor*, 13 AD3d 1168, 1169, *lv denied* 4 NY3d 836; *see People v Young*, 66 AD3d 1445, 1446, *lv denied* 13 NY3d 912). As for defendant's state of mind at the time of the plea, there is nothing in the record to support defendant's assertion that her alleged mental health issues undermined her " 'ability to understand the terms and consequences of [her] guilty plea' " (*People v Tracy*, 125 AD3d 1517, 1518, *lv denied* 27 NY3d 1008), or otherwise "so stripped [her] of orientation or cognition that [s]he lacked the capacity to plead guilty" (*People v Alexander*, 97 NY2d 482, 486; *see People v Wolf*, 88 AD3d 1266, 1267, *lv denied* 18 NY3d 863; *Young*, 66 AD3d at 1446). We therefore conclude that the court did not abuse or improvidently exercise its discretion in denying the motion to withdraw the plea.

Although defendant further contends that her plea was not knowingly, voluntarily, or intelligently entered because "it [was] obvious that [she] was totally confused" at the time of the plea, that contention lacks merit. During the plea colloquy, defendant stated that she was "confused" during a discussion whether she would be eligible for a diversion program. After a lengthy discussion with the court, the prosecutor, and defense counsel concerning her ineligibility for that diversion program, defendant proceeded with the colloquy with no further indication of any confusion (*see People v Ellett*, 245 AD2d 952, 953, *lv denied* 91 NY2d 925). We thus conclude that the court "fulfilled its duty to inquire further" (*People v Swarts*, 64 AD3d 801, 802; *see People v Leonard*, 25 AD3d 925, 925-926, *lv denied* 6 NY3d 850), and the subsequent " 'protestations [of defendant] as to [her] . . . [continued] confusion . . . ring hollow' in light of [her] admissions during the plea colloquy" (*People v McNally*, 59 AD3d 959, 960, *lv denied* 12 NY3d 819, quoting *Alexander*, 97 NY2d at 486; *see People v Hayes*, 39 AD3d 1173, 1175, *lv denied* 9 NY3d 923).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1022

KA 15-00925

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. HEWITT, DEFENDANT-APPELLANT.

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

MICHAEL A. HEWITT, DEFENDANT-APPELLANT PRO SE.

NIAGARA COUNTY DISTRICT ATTORNEY'S OFFICE, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered March 20, 2015. The judgment convicted defendant, upon a jury verdict, of criminal obstruction of breathing or blood circulation (two counts) and assault in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, assault in the third degree (§ 120.00 [1]). Contrary to defendant's contention in his main and pro se supplemental briefs, the People complied with their obligation to be ready for trial within six months of the commencement of the criminal action (*see* CPL 30.30 [1] [a]). The 44-day prereadiness delay between the filing of the felony complaints on November 2, 2013 and the People's announcement of their readiness for trial in open court on December 16, 2013 is well within the sixth-month period (*see People v Goss*, 87 NY2d 792, 797; *People v White*, 93 AD3d 1181, 1181). Although the People acquired new evidence from the victim's cell phone after they announced their readiness for trial, the People's statement of readiness was not illusory because the People could have proceeded to trial without the cell phone evidence by presenting the testimony of the victim and other witnesses (*see People v Brown*, 269 AD2d 809, 809, *affd* 96 NY2d 80; *People v Watkins*, 17 AD3d 1083, 1083, *lv denied* 5 NY3d 771; *People v Bargerstock*, 192 AD2d 1058, 1058, *lv denied* 82 NY2d 751). The period of postreadiness delay between May 15, 2014 and September 15, 2014 is not chargeable to the People because it was the result of "a continuance granted by the court at the request of . . . the defendant or his counsel" (CPL 30.30 [4] [b]; *see People*

v Green, 174 AD2d 1036, 1036, *lv denied* 78 NY2d 966). Even assuming, arguendo, that the 84-day postreadiness delay between September 15, 2014 and December 8, 2014 is chargeable to the People because a death in the prosecutor's family does not constitute an "exceptional circumstance[]" (CPL 30.30 [4] [g]; *see People v DiMeglio*, 294 AD2d 239, 240), the total prereadiness and postreadiness time chargeable to the People is only 128 days. The record therefore establishes that " 'the total period of time chargeable to the People is less than six months' " (*People v Brown*, 82 AD3d 1698, 1699, *lv denied* 17 NY3d 792; *see People v Figueroa*, 15 AD3d 914, 915).

Defendant further contends in his main and pro se supplemental briefs that he was denied his constitutional rights to a speedy trial and due process of law. Upon our review of the relevant factors (*see People v Taranovich*, 37 NY2d 442, 445), we conclude that defendant was not deprived of his constitutional right to a speedy trial (*see People v Brooks*, 140 AD3d 1780, 1780-1781), and we note in particular that " 'there [was] a complete lack of any evidence that the defense was impaired by reason of the delay' " (*People v Walter*, 138 AD3d 1479, 1480, *lv denied*, 27 NY3d 1141; *see People v Schillawski*, 124 AD3d 1372, 1373, *lv denied* 25 NY3d 1207). "Upon considering the *Taranovich* factors, we [further] conclude that the delay did not deprive defendant of his right to due process" (*People v Williams*, 120 AD3d 1526, 1527, *lv denied* 24 NY3d 1090; *see People v White*, 108 AD3d 1236, 1237, *lv denied* 22 NY3d 1044).

Finally, 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).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1031

CAF 15-00547

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

IN THE MATTER OF JEREMY D. OTROSINKA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHRISTIAN HAGEMAN, RESPONDENT-RESPONDENT.

ELIZABETH CIAMBRONE, BUFFALO, FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered March 18, 2015 in a proceeding pursuant to Family Court Act article 6. The order, among other things, dismissed the petition of petitioner seeking visitation with the parties' children.

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

Memorandum: Petitioner father appeals from an order dismissing his petition for visitation and imposing two conditions precedent to any attempt by him to file another petition. Contrary to the father's contention, Family Court did not err in granting the motion of the Attorney for the Children to dismiss the petition. At the time the father filed his petition, he was incarcerated in Michigan, and he admitted that he had at least 10 more years of incarceration before he would be released. Prior to his incarceration, the children had been removed from his care in August 2009 while a neglect proceeding was commenced against him. The father ultimately admitted that he "engaged in inappropriate behavior" with the children's older half sister, and an order of protection preventing any communication between the father and the children expired in February 2012. Even after that order expired, the father had little to no contact *from* the children. We thus conclude that, despite the presumption in favor of visitation (*see Matter of Cierra L.B. v Richard L.R.*, 43 AD3d 1416, 1416-1417), "[a]n evidentiary hearing was not required herein because it is clear from the record that the court possessed sufficient information to render an informed determination that was consistent with the child[ren]'s best interests . . . , particularly in view of the lengthy period of [the father's] incarceration . . . , [and] the virtually nonexistent previous relationship of petitioner with his [children]" following their removal from his custody (*Matter of*

Marmolejo v Calabrese, 23 AD3d 1122, 1123 [internal quotation marks omitted]; *see Matter of Piwowar v Glosek*, 53 AD3d 1121, 1122; *Matter of Bogdan v Bogdan*, 291 AD2d 909, 909).

Contrary to the father's further contention, his constitutional right to due process was not violated. "It is well established that prisoners do not have an absolute constitutional right to be present in their own civil actions" (*Cook v Boyd*, 881 F Supp 171, 175, *affd* 85 F3d 611, *cert denied* 519 US 891, *reh denied* 519 US 1024; *see Matter of Giovannie M.-V.*, 35 AD3d 1244, 1245; *Matter of Danielle M.*, 26 AD3d 748, 748-749, *lv denied* 7 NY3d 703; *see also* Civil Rights Law § 79 [2]). Nevertheless, it is also recognized that, "[u]nlike a basic civil action claim . . . , a person has a fundamental liberty interest in maintaining a parental relationship with his [or her] children" (*Cook*, 881 F Supp at 175). As a result, "[d]ue process must thus be afforded to an individual who is having his [or her] parental rights challenged" (*id.*). We conclude that the father was afforded the requisite due process inasmuch as he was represented by an attorney who participated in the proceedings (*see id.*; *see also Matter of Raymond Dean L.*, 109 AD2d 87, 90). We note that the court attempted to secure the father's presence electronically at the relevant court appearances, but on one occasion was unable to do so when prison officials failed to answer any of the four calls placed by the court to the facility (*see Matter of Earl B.G. v Shenette T.*, 84 AD3d 672, 673). Finally, we also note that the father was not excluded from participation in any hearing, inasmuch "as no hearing was held" (*Matter of Mary GG. v Alicia GG.*, 106 AD3d 1410, 1411, *lv denied* 21 NY3d 863).

Contrary to the father's contention, he was not denied effective assistance of counsel. Although the father's attorney was unable to appear in court for a few of the initial appearances owing to a conflict in her schedule and her maternity leave, she obtained stand-in counsel and appeared on his behalf to argue in opposition to the motion to dismiss. The attorney established that the father had previously lived with the children, wrote to them frequently, and had once received a response from one of the boys. That the attorney's arguments in opposition to the motion and in favor of a hearing were unsuccessful does not establish that the attorney's representation was less than meaningful. Care must be taken "to distinguish between true ineffectiveness and losing tactics or unsuccessful efforts in advancing appropriate [arguments]" (*People v Stultz*, 2 NY3d 277, 283, *rearg denied* 3 NY3d 702; *see Matter of Amanda M.*, 28 AD3d 813, 815). "The record offers no evidence that counsel failed to communicate with the father or that the father provided counsel with any relevant facts other than those alleged in the original petition" (*Matter of Perry v Perry*, 52 AD3d 906, 907, *lv denied* 11 NY3d 707). Under the circumstances of this case, we conclude that the "attorney provided meaningful and competent representation" (*Matter of Ayen v Sain*, 89 AD3d 1440, 1440 [internal quotation marks omitted]; *see Matter of Secrist v Brown*, 83 AD3d 1399, 1400, *lv denied* 17 NY3d 706).

Finally, we agree with the father that the court erred in sua

sponte imposing conditions restricting him from filing new petitions. It is well settled that "[p]ublic policy mandates free access to the courts" (*Matter of Shreve v Shreve*, 229 AD2d 1005, 1006), but " 'a party may forfeit that right if she or he abuses the judicial process by engaging in meritless litigation motivated by spite or ill will' " (*Matter of McNelis v Carrington*, 105 AD3d 848, 849, *lv denied* 21 NY3d 861; *see Matter of Pignataro v Davis*, 8 AD3d 487, 489; *Shreve*, 229 AD2d at 1006). Here, however, there is no basis in the record from which to conclude that the father had engaged in meritless, frivolous, or vexatious litigation, or that he had otherwise abused the judicial process (*see Matter of Price v Jenkins*, 99 AD3d 915, 915; *Matter of Casolari v Zambuto*, 1 AD3d 1031, 1031; *see also Matter of Wieser v Wieser*, 83 AD3d 950, 950-951). We thus modify the order by vacating the second ordering paragraph.

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1032

CAF 15-00294

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

IN THE MATTER OF TRISTYN R.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JACQUELINE Z., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

WENDY G. PETERSON, OLEAN, FOR PETITIONER-RESPONDENT.

MICHAEL D. BURKE, ATTORNEY FOR THE CHILD, OLEAN.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered January 9, 2015 in a proceeding pursuant to Family Court Act article 10. The order, among other things, granted custody of the subject child to the child's maternal aunt and uncle.

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

Same memorandum as in *Matter of Tristyn R. [Jacqueline Z.]* ([Appeal No. 2] ___ AD3d ___ [Nov. 10, 2016]).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1033

CAF 15-00564

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

IN THE MATTER OF TRISTYN R. AND ADDASYN R.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, JENNA W. AND TREVOR W., PETITIONERS-RESPONDENTS;

MEMORANDUM AND ORDER

JOSHUA R., RESPONDENT,
AND JACQUELINE Z., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

WENDY G. PETERSON, OLEAN, FOR PETITIONER-RESPONDENT CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES.

MICHAEL D. BURKE, ATTORNEY FOR THE CHILDREN, OLEAN.

Appeal from an amended order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered March 24, 2015 in a proceeding pursuant to, inter alia, Family Court Act article 10. The amended order, among other things, granted custody of Addasyn R. and Tristyn R. to the children's maternal aunt and uncle.

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

Memorandum: In appeal No. 1, respondent mother appeals from an order of disposition that granted custody of her child, Tristyn R., to the child's maternal aunt and uncle. In appeal No. 2, the mother appeals from an amended order of custody and disposition that, inter alia, adjudged that the mother had violated an order of protection, and granted custody of the children, Tristyn R. and Addasyn R., to the children's maternal aunt and uncle. We note at the outset that the mother's appeal from the order in appeal No. 1 must be dismissed inasmuch as that order was superseded by the subsequent order in appeal No. 2 (*see Matter of Tuttle v Mateo* [appeal No. 3], 121 AD3d 1602, 1603; *Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051).

We reject the mother's contention that the amended order in appeal No. 2 must be vacated. The order of protection directed the mother not to allow respondent father to have unsupervised contact with the children. Family Court credited the testimony that the mother allowed the father to have unsupervised contact with the

children on numerous occasions. " 'According deference to that credibility determination, as we must, we conclude that petitioner established by clear and convincing evidence that [the mother] willfully violated the . . . order of protection' " (*Matter of Schoenl v Schoenl*, 136 AD3d 1361, 1362; *see Matter of Duane H. v Tina J.*, 66 AD3d 1148, 1149; *see also Matter of Da'Shunna M.H. [Delbert W.H.]*, 133 AD3d 1381, 1382; *Matter of William S.*, 231 AD2d 950, 951). We further conclude that the court properly found that there are extraordinary circumstances justifying an inquiry into whether nonparents could obtain custody of the children as against the mother, and that it properly determined that it is in the best interests of the children to be placed in the custody of their maternal aunt and uncle (*see generally Matter of Suarez v Williams*, 26 NY3d 440, 446; *Matter of McNeil v Deering*, 120 AD3d 1581, 1582, *lv denied* 24 NY3d 911; *Matter of Beth M. v Susan T.*, 81 AD3d 1396, 1397).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1035

CA 16-01067

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

ALEX MURDOCK AND JEANNETTEA MURDOCK,
PLAINTIFFS-APPELLANTS,

V ORDER

R&P OAK HILL DEVELOPMENT, LLC,
DEFENDANT-RESPONDENT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (DONYELLE E. CRAPSI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (PATRICK J. HINES OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered September 11, 2015. The order granted in part defendant's motion for summary judgment dismissing the amended complaint and denied plaintiffs' cross motion for partial summary judgment on the Labor Law §§ 240 (1) and 241 (6) claims.

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: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1040

TP 16-00314

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

IN THE MATTER OF ALLAH JUSTICE, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered March 1, 2016) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1042

TP 16-00257

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

IN THE MATTER OF DEVIN GRAY, PETITIONER,

V MEMORANDUM AND ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered February 18, 2016) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated various inmate rules. Petitioner contends that substantial evidence does not support the determination that he violated inmate rule 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusal to obey a direct order]). We reject that contention. The testimony of multiple correction officers who witnessed the incident, along with the documentary evidence considered by the Hearing Officer, "constitutes substantial evidence supporting the determination that petitioner violated [that] inmate rule" (*Matter of Oliver v Fischer*, 82 AD3d 1648, 1648; *see Matter of Jones v Annucci*, 141 AD3d 1108, 1108-1109). Petitioner's testimony that he complied with all direct orders merely raised an issue of credibility for the Hearing Officer (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966).

Petitioner failed to exhaust his administrative remedies with respect to his remaining contentions, and thus this Court "has no discretionary power to reach" them (*Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071, *appeal dismissed* 81 NY2d 834; *see Jones*, 141 AD3d at

1109).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1043

KA 15-00156

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JON ANDERSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered November 17, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]), defendant contends that his waiver of the right to appeal was invalid. We reject that contention inasmuch as the record demonstrates that the waiver was knowingly, intelligently, and voluntarily entered (*see People v Carson*, 64 AD3d 1194, 1194, *lv denied* 13 NY3d 835; *see generally People v Sanders*, 25 NY3d 337, 341-342). Defendant's valid waiver of the right to appeal encompasses both his contention that County Court erred in denying his suppression motion (*see Sanders*, 25 NY3d at 342), and his challenge to the severity of his sentence (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1052

CAF 15-00900

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

IN THE MATTER OF AMY R. CANOUGH,
PETITIONER-RESPONDENT,

V ORDER

TODD R. TRAINHAM, 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, Oswego County (Kimberly M. Seager, J.), entered May 8, 2015 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of respondent to an order of a Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Social Servs. v Rita M.S.*, 94 AD3d 1509, 1510; *see also Matter of Ball v Marshall*, 103 AD3d 1270, 1271).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

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

1082

TP 16-00342

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

IN THE MATTER OF KWOK SZE, PETITIONER,

V ORDER

LINDA GOPPERT, CAPTAIN, MID-STATE CORRECTIONAL FACILITY, RESPONDENT.

KWOK SZE, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF 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, Oneida County [Bernadette T. Clark, J.], entered November 25, 2015) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: November 10, 2016

Frances E. Cafarell
Clerk of the Court

MOTION NO. (511/89) KA 09-01741. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V NATHANIEL PITTMAN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, CURRAN, TROUTMAN, AND SCUDDER, JJ. (Filed Nov. 10, 2016.)

MOTION NO. (1117/03) KA 00-02226. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EDWARD BROWN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND TROUTMAN, JJ. (Filed Nov. 10, 2016.)

MOTION NO. (422/05) KA 03-01490. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARIO WILLIAMS, ALSO KNOWN AS BRAZIL, ZIL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, CURRAN, AND TROUTMAN, JJ. (Filed Nov. 10, 2016.)

MOTION NO. (1166/06) KA 03-01135. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MELVIN J. MOORE, JR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, NEMOYER, AND TROUTMAN, JJ. (Filed Nov. 10, 2016.)

MOTION NO. (585/07) KA 04-01393. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TYRONE MONROE, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J.,

SMITH, CENTRA, PERADOTTO, AND DEJOSEPH, JJ. (Filed Nov. 10, 2016.)

MOTION NO. (1155/12) KA 10-00517. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FRANK GARCIA, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, TROUTMAN, AND SCUDDER, JJ. (Filed Nov. 10, 2016.)

MOTION NO. (724/14) KA 10-01033. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARSHALL D. MYHAND, ALSO KNOWN AS MARSHALL MAYHAND, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: PERADOTTO, J.P., DEJOSEPH, CURRAN, TROUTMAN, AND SCUDDER, JJ. (Filed Nov. 10, 2016.)

MOTION NO. (250/15) KA 11-02600. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V IRA MCCULLARS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Nov. 10, 2016.)

MOTION NO. (197/16) KA 14-00956. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY MILLS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND SCUDDER, JJ. (Filed Nov. 10, 2016.)