SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 9, 2017

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. HENRY J. SCUDDER, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1290/16

CA 16-00578

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

KATHLEEN M. HOLDING AND BRIAN HOLDING,
PLAINTIFFS-RESPONDENTS,

V ORDER

MATTHEW G. BROOKS, ET AL., DEFENDANTS,
AND MGB BUILDING, INC., DEFENDANT-APPELLANT.

HAGELIN SPENCER LLC, BUFFALO (SEAN M. SPENCER OF COUNSEL), FOR DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (KEVIN A. SZANYI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JOSHUA M. HENRY OF COUNSEL), FOR DEFENDANTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered January 22, 2016. The order and judgment, insofar as appealed from, granted the motion of plaintiffs for partial summary judgment on liability against defendant MGB Building, Inc., granted the motion of plaintiffs to dismiss the first, fifth, sixth and eighth affirmative defenses of defendant MGB Building, Inc., and denied the cross motion of defendant MGB Building, Inc., for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 22, 24 and 27, 2017,

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

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

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CA 16-00064

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

NCA COMP, INC., AS ADMINISTRATOR OF CONTRACTORS SELF-INSURANCE TRUST FUND, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

1289 CLIFFORD AVE., DOING BUSINESS AS EMPIRE HEATING & AIR CONDITIONING, ET AL., DEFENDANTS, BABCOCK UTILITIES, INC., MARK CERRONE, INC., AND JO TO MOE, CORP., DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

TREVETT CRISTO SALZER ANDOLINA, P.C., ROCHESTER (ALAN J. DEPETERS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 6, 2015. The order granted the motion of defendants Babcock Utilities, Inc., Mark Cerrone, Inc., and Jo to Moe, Corp. to dismiss plaintiff's complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the complaint against defendants Babcock Utilities, Inc., Mark Cerrone, Inc. and Jo to Moe, Corp. is reinstated.

Memorandum: Plaintiff, the administrator of a group self-insurance trust (GSIT) created pursuant to Workers' Compensation Law § 50 (3-a), commenced this action seeking to collect assessments made against, inter alia, defendants-respondents in appeal Nos. 1 and 2 (hereafter, defendants) calculated upon the fiscal years in which defendants participated in the GSIT. In appeal No. 1, plaintiff appeals from an order that granted the pre-answer motion of defendants Babcock Utilities, Inc., Mark Cerrone, Inc. and Jo to Moe, Corp. pursuant to CPLR 3211 (a) (1), (5) and (7) to dismiss the complaint against them. In appeal No. 2, plaintiff appeals from an order that granted the pre-answer motion of defendant Memminger's Painting, Inc. and the cross motion of defendant Historicon, Inc., both pursuant to CPLR 3211 (a) (1), (5) and (7), seeking dismissal of the complaint against them. Based upon its interpretation of the language of the GSIT agreement, Supreme Court concluded that the assessments at issue were "invalid." We reverse both orders.

"Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88). For the reasons that follow, we agree with plaintiff that the documentary evidence submitted by defendants does not conclusively establish, as a matter of law, that defendants have no contractual liability to pay the assessments at issue. We begin by observing that, contrary to the contention of defendants, our determination in *Metal Goods & Mfrs. Ins. Trust Fund v Advent Tool & Mold, Inc.* (61 AD3d 1412) is not dispositive of the issues in these appeals for the simple reasons that *Metal Goods* arose not in the CPLR 3211 context, but rather in the CPLR 3212 summary judgment context, and the language of the GSIT agreement in *Metal Goods* with respect to how under-funding would be addressed differs substantially and substantively from the GSIT agreement herein. Among other differences, the GSIT in *Metal Goods* only provided for a prospective "rate increase," while the GSIT here provides for an assessment based upon the fiscal years in which a defendant participated, regardless of whether a defendant is actually participating at the time the assessment is made.

In terms of additional factual background with respect to the instant matter, the record establishes that in 1998 defendants and other contractors that were involved in the construction industry and subject to the Workers' Compensation Law with respect to their employees established the GSIT in order to comply with the law and provide workers' compensation benefits to their employees. Thereafter, all defendants made contributions and participated in the GSIT for varying periods of time, and there is no dispute that, by the end of the 2009 fiscal year, all defendants had ceased making contributions to the GSIT.

In 2011, the GSIT ceased all new or prospective workers' compensation coverage operations because it was underfunded and lacked a sufficient income stream to continue operations. Recognizing the precarious financial condition of the GSIT, in March 2014 the trustees ultimately resolved to purchase an "Assumption of Workers' Compensation Policy" (ALP), which would relieve the GSIT and all contractors of any liability for existing claims and continuing benefit obligations. Those liabilities would be shifted to the insurance carrier issuing the ALP upon payment of the agreed premium. The problem for the GSIT, however, was that it did not have sufficient funds on hand to pay the full ALP premium. Thus, in July 2014, the GSIT issued "assessments" to defendants and other contractors in order to raise the additional funds necessary to pay the one-time ALP premium. Defendants refused to pay the assessments, and this litigation ensued.

Article IV, section 4.10 of the 1998 version of the GSIT, entitled "Power To Assess Employers," states in pertinent part that, "[i]n the event that unreserved assets of the Trust are insufficient to meet the obligations of the Trust, the Trustees shall forthwith prepare and implement a plan to require an additional payment by the Employers in the form of an assessment which shall be sufficient to make up any deficiency as determined by the Trustees at that time."

In addition, it provides that "[e]ach Employer who participates in the Trust hereby agrees to pay such assessments to the Trust on Demand regardless of whether or not they are a participant in the Trust at the time the assessment is made."

Importantly, the assessment at issue for each defendant was calculated, in accordance with section 4.11 of the GSIT, only upon the fiscal years in which each contractor actually made contributions to the GSIT.

There is no dispute that the GSIT made payment of short-term benefits to defendants' employees and, at least theoretically on this record, incurred long-term workers' compensation liabilities in the form of continuing medical benefits and wage benefits to employees with permanent disabilities and/or ongoing medical costs lasting well beyond the fiscal years in which defendants made contributions. Those potential long-term liabilities for benefits to defendants' injured employees appear to be the reason for the inclusion of the assessment clause in the GSIT. Without that clause, a contractor could have multiple employees permanently injured and disabled during the period in which it made contributions, and then walk away from any future obligation to assist in the funding of those liabilities if the GSIT became underfunded, simply by ceasing to make contributions.

In 2009, the trustees amended Article I, Definitions, of the GSIT to include section 1.1 (A), which defines the terms active member and inactive member as follows: "Active Member shall mean an employer currently participating in the Trust Fund. Inactive Member shall mean an employer no longer participating in the Trust Fund." In addition, section 4.10, now entitled "Power to Assess Active and Inactive Members," was amended to read as follows: "In the event that assets of the Trust are insufficient to meet the obligations of the Trust, the Trustees shall forthwith prepare and implement a plan to require an additional payment by the Active and Inactive Members in the form of an assessment which shall be sufficient to make up any deficiency as determined by the Trustees at that time. The formula and method of assessment shall be that described in Section 4.11 below. Each Employer who participates in the Trust hereby agrees to pay such assessment to the Trust on Demand regardless of whether or not they are an Active or Inactive Member of the Trust at the time the assessment is made."

Although the language of section 4.11 was also amended in 2009, it did not alter the assessment formula in a significant manner.

Contrary to defendants' contention, we agree with plaintiff that defendants are bound by the amendments to the GSIT agreement made by the trustees in 2009, and thus the court erred in determining that the assessments are invalid. The original GSIT agreement executed in 1998 contained a clause that provided that the GSIT agreement could "be amended in any respect not specifically prohibited in this instrument, from time to time by a majority of all the Trustees serving at that time," which is what transpired here in 2009. Defendants do not contend that the amendments at issue are specifically prohibited by

any other provision in the GSIT.

In any event, even assuming, arguendo, that defendants are not subject to the 2009 amendments, we conclude that the assessments at issue were authorized under section 4.10 of the 1998 version of the GSIT.

Defendants contend that they ceased to be "employers" under the GSIT when they stopped making contributions. According to defendants, because each of them was no longer an "employer" at the time of the assessments, they are not subject to the assessments under the language of the GSIT. We reject that contention. The term "employer" in the GSIT is simply a descriptive label or title assigned to certain parties to the agreement, i.e., contractors or those engaged in the business of supporting the construction industry that had employees to be covered under the GSIT, rather than a title that is determinative of a contractor's rights and obligations under the GSIT at any particular moment in time. In other words, the term "employer" has no legal significance under the plain language of the GSIT other than to provide a descriptive label for the parties to the GSIT that were to make contributions and provide workers' compensation benefits to their employees under the trust agreement.

Moreover, the language of the GSIT in *Metal Goods* specifically provided that "[a]n Employer shall cease to be an Employer within the meaning of this Agreement and Declaration of Trust when he [or she] is no longer obligated to make contributions to the Trust Fund or has ceased to qualify as an Employer hereunder due to failure to make the required contributions or [in] any way ceases to qualify as an eligible Employer" (*Metal Goods*, 19 Misc 3d 608, 615, *affd* 61 AD3d 1412). Here, the 1998 version of the GSIT does not terminate "Employer" status under any clause. Rather, pursuant to sections 6.2 and 6.3 of Article VI, which is entitled "Participation of Employers in the Trust," an "Employer" shall "cease to be a *participating* Employer" when it fails to make contributions, but it is still an "Employer" and subject to reinstatement upon application and approval (emphasis added).

We likewise conclude, for the same reasons, that the 2009 amended version of the GSIT validly authorizes the assessments against defendants.

We further agree with plaintiff that the complaint states a valid cause of action against defendants based upon breach of a contract (*see* CPLR 3211 [a] [7]). The pleading specifies the terms of the agreement, the consideration, the performance by plaintiff and the basis of the alleged breach of the agreement by defendants. In the procedural posture in which this case comes before this Court, we accept as true, as we must, every allegation of the complaint (*see 219 Broadway Corp. v Alexander's, Inc*., 46 NY2d 506, 509), and conclude that it is legally sufficient.

We have considered defendants' remaining contentions and conclude

that they are without merit.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

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CA 16-00066

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

NCA COMP, INC., AS ADMINISTRATOR OF CONTRACTORS SELF-INSURANCE TRUST FUND, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

1289 CLIFFORD AVE., DOING BUSINESS AS EMPIRE HEATING & AIR CONDITIONING, ET AL., DEFENDANTS, MEMMINGER'S PAINTING, INC., AND HISTORICON, INC., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

TREVETT CRISTO SALZER ANDOLINA, P.C., ROCHESTER (ALAN J. DEPETERS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered October 2, 2015. The order granted the motion of defendant Memminger's Painting, Inc. and the cross motion of defendant Historicon, Inc. to dismiss plaintiff's complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion and cross motion are denied, and the complaint against defendants Memminger's Painting, Inc. and Historicon, Inc. is reinstated.

Same memorandum as in *NCA Comp, Inc. v 1289 Clifford Ave., doing business as Empire Heating & Air Conditioning* ([appeal No. 1]) ___ AD3d ___ [June 9, 2017]).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

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KA 16-00510

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY THIBODEAU, DEFENDANT-APPELLANT.

LISA A. PEEBLES, FEDERAL PUBLIC DEFENDER, SYRACUSE, FOR DEFENDANT-APPELLANT.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO, 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 Oswego County Court (Daniel R. King, A.J.), dated March 2, 2016. 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 affirmed.

Memorandum: Defendant appeals from an order denying, after a hearing, his CPL 440.10 motion seeking to vacate a judgment convicting him upon a jury verdict of kidnapping in the first degree (Penal Law § 135.25 [3]). Defendant's conviction arises from the April 3, 1994 abduction of the victim from the convenience store where she worked in the Town of New Haven. The victim has not been heard from since then, nor has her body been found. Defendant and his brother were jointly indicted for the kidnapping but were tried separately, and the People's theory of the case was that they had abducted the victim using a van owned by defendant's brother. Defendant was tried first, beginning in May 1995, and convicted. His brother was subsequently acquitted. We affirmed the judgment of conviction on defendant's direct appeal (*People v Thibodeau*, 267 AD2d 952, *lv denied* 95 NY2d 805).

In February 2013, a woman named Tonya Priest gave a sworn statement to the police alleging that James Steen told her in 2006 that he, Roger Breckenridge, and Michael Bohrer had abducted the victim using a van, brought her to Breckenridge's residence, killed her, and disposed of her body and clothes at a nearby cabin. Steen also allegedly told Priest that Breckenridge's onetime girlfriend, Jennifer Wescott, had been present when they brought the victim to the residence. In March 2013, Priest placed a recorded telephone call to Wescott, and Wescott seemed to confirm that Steen, Breckenridge, and Bohrer had brought the victim to the residence in a van. Wescott,

however, made other seemingly contradictory statements during the call, including that she had, in essence, surmised well after the fact that the victim had been the person in the van, and that, as far as she knew, defendant had killed the victim. When interviewed a few days after the call, Wescott told the police that she had lied to Priest, that she and Breckenridge never lived where Steen allegedly said the victim had been taken, and that she did not have any relevant information about the case. Megan Shaw, who was married to Priest's former husband and had discussed the case with Priest, gave her own statement to the police in 2013 alleging that Steen told her in early 2010 that he had helped dispose of the victim's body after she was killed by members of a motorcycle club.

In 2014, defendant's appellate counsel reviewed the file kept by the trial attorney for defendant's brother and found documents concerning the victim's status as a confidential informant (CI) for the police. Those documents established that a deputy had lost the victim's "CI file," which included her personal information and a photograph, in late 1991 in the parking lot of the same store from which she was abducted in 1994, that another deputy had recovered the file about a month later, and that an investigator had located it in storage about a week before defendant's trial began. Defendant's trial counsel asserted in an affidavit that he had not seen those documents or the CI file itself (collectively, CI information), and that he could have used the CI information at trial to establish that other people had a motive to harm the victim.

Defendant moved in July 2014 to vacate the judgment of conviction based on the People's alleged *Brady* violation in failing to disclose the CI information (*see* CPL 440.10 [1] [h]), and based on newly discovered evidence (*see* CPL 440.10 [1] [g]). Defendant also contended in his reply papers that he was actually innocent. County Court conducted a hearing on the motion.

With respect to the *Brady* claim, defendant's trial counsel testified that he had not seen any of the CI information. The trial prosecutor, by contrast, testified that the deputies' reports concerning the victim's status as a CI and the loss of her file had been made available to the defense in December 1994, and that the investigator's report and CI file had been disclosed the day after the investigator found the file in storage.

With respect to the newly discovered evidence claim, Priest's 2013 statement and a transcript of her recorded call to Wescott were admitted in evidence, but defendant declined to call Priest as a witness at the hearing. Shaw testified consistent with her 2013 statement, and defendant called several other witnesses to testify to admissions allegedly made by Steen, Breckenridge, and Bohrer. In some of the alleged admissions, the declarant described participating in the disposal of the victim's body. In others, the declarant said that he had done something to the victim without specifying what he had done, e.g., "I'll do you as I did [the victim]," and "I will never see a day in prison for what we did to [the victim]." In the remaining alleged admissions, the declarant said things to the effect that

defendant did not commit the crime or that the victim would not be found, but did not directly connect himself to her disappearance.

Defendant also presented the testimony of William Pierce, who testified that he saw a man strike a woman in the head near a van at the store on April 3, 1994, and that he believed, after seeing a photograph of Steen in the newspaper, that Steen was the man he saw. Pierce further testified that the van he saw was not the van owned by defendant's brother. Pierce admitted, however, that he had not reported his observations at any time prior to July 2014, that even then he had initially believed that defendant was the man he saw, and that he had been shown a photo array containing a photograph of Steen from 1988 and was unable to identify him. Pierce had also estimated that the man he saw was 35 to 45 years old. Defendant was 40 years old in April 1994, and Steen was 23.

Steen, who was sentenced to life in prison without parole in 2011 for killing his wife and his cousin in September 2010 (*People v Steen*, 107 AD3d 1608, *lv denied* 22 NY3d 959), testified at the hearing, as did Breckenridge and Bohrer. They each denied abducting the victim or making the admissions attributed to them, and Steen and Breckenridge further testified that they did not know Bohrer in 1994. Wescott testified that she did not know anything about the crime, and that she was 17 years old in April 1994 and did not meet Breckenridge until later that year. There was testimony at the hearing that Priest "always wanted to be the center of attention," and that the police did not think she was credible in light of "discrepancies in her story" and attempts on her part to link the death of her second husband in 2010 to the abduction of the victim; that Breckenridge was likewise known as "a talker" and "an attention getter" who was not to be taken seriously; that Bohrer was mentally unstable and obsessed with the case; and that the motorcycle club referenced in Shaw's testimony did not exist until 2000.

The court denied defendant's motion, concluding, inter alia, that the CI information had been disclosed to his attorney, that the alleged third-party admissions were inadmissible hearsay rather than declarations against penal interest, and that Pierce's testimony was not credible. The court did not specifically address defendant's actual innocence claim.

We reject defendant's contention that the court erred in denying that part of his motion alleging a *Brady* violation. The record supports the court's determination that defendant failed to establish that the CI information was suppressed by the People (*see People v Carrasquillo-Fuentes*, 142 AD3d 1335, 1339, *lv denied* 28 NY3d 1143; *People v Ulrich*, 265 AD2d 884, 884-885, *lv denied* 94 NY2d 799; *see generally* CPL 440.30 [6]; *People v Fuentes*, 12 NY3d 259, 263, *rearg denied* 13 NY3d 766). The conflicting testimony of defendant's trial counsel and the trial prosecutor with respect to whether the CI information was disclosed, as well as the competing inferences to be drawn from documentary and other evidence bearing on the issue, presented an issue of credibility that the court was entitled to resolve in favor of the People (*see People v Cox*, 297 AD2d 589, 589,

lv denied 99 NY2d 557; *see generally People v Campbell*, 106 AD3d 1507, 1508, *lv denied* 21 NY3d 1002). In view of our determination, we do not address the court's alternative grounds for rejecting defendant's *Brady* claim.

We also reject defendant's contention that the court erred in denying that part of his motion alleging newly discovered evidence. The decision whether to vacate a judgment of conviction based on newly discovered evidence is addressed to the sound discretion of the motion court (*see People v Backus*, 129 AD3d 1621, 1623-1624, *lv denied* 27 NY3d 991; *People v Deacon*, 96 AD3d 965, 967, *appeal dismissed* 20 NY3d 1046), and "[i]mplicit in [this] ground for [vacatur] is that the newly discovered evidence be admissible" (*People v Tankleff*, 49 AD3d 160, 182 [internal quotation marks omitted]; *see Backus*, 129 AD3d at 1624).

First, we conclude that the court was entitled to determine, in view of the circumstances of Pierce's identification of Steen, that his testimony was simply not credible (*see People v Jimenez*, 142 AD3d 149, 157; *People v Britton*, 49 AD3d 893, 894, *lv denied* 10 NY3d 956; *People v Watson*, 152 AD2d 954, 955, *lv denied* 74 NY2d 900). A hearing court's credibility determinations are "entitled to great weight" in light of its opportunity to see the witnesses, hear the testimony, and observe demeanor (*People v Smith*, 16 AD3d 1081, 1082, *lv denied* 4 NY3d 891; *see People v Hincapie*, 142 AD3d 886, 886; *see generally People v Bleakley*, 69 NY2d 490, 495), and we do not agree with the dissent that Pierce's testimony presents an appropriate situation for us to substitute our own credibility determination for that of the hearing court (*cf. Tankleff*, 49 AD3d at 178-179).

Next, we conclude that the court properly determined that all of the alleged third-party admissions were hearsay not within any of the exceptions to the hearsay rule and were therefore inadmissible (*see generally People v Brensic*, 70 NY2d 9, 14, *remittitur amended* 70 NY2d 722; *People v Meadow*, 140 AD3d 1596, 1598, *lv denied* 28 NY3d 933, *reconsideration denied* 28 NY3d 972). The hearsay exception for declarations against penal interest applies where (1) the declarant is unavailable to testify; (2) the declarant was aware when making the declaration that it was contrary to his or her penal interest; (3) the declarant had competent knowledge of the relevant facts; and (4) there is "sufficient competent evidence independent of the declaration to assure its trustworthiness and reliability" (*Brensic*, 70 NY2d at 15; *see People v Shortridge*, 65 NY2d 309, 312; *People v Settles*, 46 NY2d 154, 167). "The fourth factor is the 'most important' aspect of the exception" (*People v Shabazz*, 22 NY3d 896, 898). Where a declaration is offered to exculpate the defendant, the standard of admissibility is "more lenient," and " '[s]upportive evidence is sufficient if it establishes a reasonable possibility that the statement might be true' " (*People v Soto*, 26 NY3d 455, 462; *see People v Pierre*, 129 AD3d 1490, 1492; *Deacon*, 96 AD3d at 968).

Even assuming, arguendo, that the willingness of Steen, Breckenridge, Bohrer, and Wescott to testify at the motion hearing

does not preclude the applicability of the exception for declarations against penal interest (*see People v Oxley*, 64 AD3d 1078, 1083-1084, *lv denied* 13 NY3d 941; *cf. People v Sanchez*, 95 AD3d 241, 247-248, *affd* 21 NY3d 216), we conclude that the exception is inapplicable. Several of the alleged admissions did not contain enough incriminating detail to show that the declarant was knowingly speaking against his or her penal interest (*see generally People v Castor*, 99 AD3d 1177, 1180-1181, *lv denied* 20 NY3d 1010), or that he or she had competent knowledge of the underlying facts. More significantly, defendant failed to establish that the alleged admissions were reliable (*see People v Velazquez*, 143 AD3d 126, 135, *lv denied* 28 NY3d 1189; *People v Bedi*, 299 AD2d 556, 556, *lv denied* 99 NY2d 612; *People v Wallace*, 270 AD2d 823, 824, *lv denied* 95 NY2d 806).

Wescott's statements in the recorded call, in particular, made little sense on their face, and she recanted them shortly thereafter (*see People v Buari*, 50 AD3d 483, 484, *lv denied* 11 NY3d 735; *People v Pugh*, 236 AD2d 810, 811, *lv denied* 89 NY2d 1099; *cf. People v Bellamy*, 84 AD3d 1260, 1261-1262, *lv denied* 17 NY3d 813). Even assuming, arguendo, that the court could have reasonably concluded that Wescott truthfully implicated Steen, Breckenridge, and Bohrer in her statements to Priest and then testified falsely at the hearing in an attempt to avoid the consequences of those statements, we conclude that the court was entitled to instead resolve the issue of Wescott's credibility in favor of the People, thereby concluding that her hearing testimony was credible and her initial statements to Priest were not (*see generally Smith*, 16 AD3d at 1082). Unlike our dissenting colleague, we do not believe that Wescott's statements to Priest "bore persuasive assurances of trustworthiness" that would render them admissible despite their hearsay nature (*Chambers v Mississippi*, 410 US 284, 302).

Apart from Pierce's testimony, which we have concluded that the court properly discredited, there was no evidence independent of the alleged admissions that tended to link Steen, Breckenridge, or Bohrer to the crime (*cf. People v DiPippo*, 27 NY3d 127, 137-140; *Oxley*, 64 AD3d at 1082). Moreover, most of defendant's witnesses came forward only after the case attracted renewed media attention in 2014 (*cf. Tankleff*, 49 AD3d at 181-182); most of the alleged admissions were made long after the crime and defendant's conviction (*see generally Shortridge*, 65 NY2d at 313); many of them were inconsistent with each other (*see People v Feliciano*, 240 AD2d 256, 257, *lv denied* 90 NY2d 1011; *People v Nicholson*, 108 AD2d 929, 930; *cf. DiPippo*, 27 NY3d at 138); and, as described above, the hearing testimony cast significant doubt on the credibility of at least Priest, Breckenridge, and Bohrer (*see People v Penoyer*, 135 AD2d 42, 44-45, *affd* 72 NY2d 936; *People v Thompson*, 148 AD2d 763, 764, *lv denied* 74 NY2d 748; *see generally Shortridge*, 65 NY2d at 313). "[T]here is no rule requiring the automatic admission of any hearsay statement" (*People v Hayes*, 17 NY3d 46, 53, *cert denied* 565 US 1095), and " '[c]orroboration of a hearsay declaration is not furnished by merely producing additional hearsay testimony' " with no indicia of reliability (*Matter of Comstock v Goetz Oil Corp.*, 11 AD2d 847, 847; *cf. Chambers*, 410 US 284 at 300-

301). Although defendant presented evidence that trained dogs detected the possible presence of human remains near a "collapsed structure" in the general area where Steen allegedly told Priest the victim's body was buried, no remains were actually found there, and we conclude that the evidence regarding the dogs is too equivocal on its own to show a reasonable possibility that Steen's alleged admission to Priest might be true.

In our view, the alleged weaknesses in the People's trial proof identified by the dissent do not tend to establish that the alleged admissions were reliable. In any event, we conclude that there was compelling circumstantial evidence at trial placing defendant at the store on the morning of the crime. It is undisputed that defendant's brother was there, and, whereas defendant testified at trial that he was not in his brother's company that morning or the previous night, the People presented testimony that defendant and his brother were together at a bar the night before the crime and the van owned by defendant's brother was at defendant's home shortly after the crime was committed. As the hearing court noted, there is no comparable evidence concerning Steen, Breckenridge, or Bohrer.

In view of the inadmissibility of the alleged third-party admissions, we conclude that the court properly determined that the newly discovered evidence was not "of such character as to create a probability that" the verdict would have been more favorable to defendant if it had been received at trial (CPL 440.10 [1] [g]; *see Backus*, 129 AD3d at 1624-1625; *Bedi*, 299 AD2d at 556; *People v Jones* [appeal No. 1], 256 AD2d 1172, 1172, *lv denied* 93 NY2d 972; *cf. People v Wong*, 11 AD3d 724, 725-727).

The remaining evidentiary rulings challenged by defendant did not violate his right to present a defense. Evidence of other crimes committed by Bohrer was not admissible as "reverse *Molineux*" evidence on the issue of identity (*DiPippo*, 27 NY3d at 138), because those crimes were not similar enough to the abduction of the victim to establish a distinctive modus operandi (*see People v Littlejohn*, 112 AD3d 67, 76-77, *lv denied* 22 NY3d 1140; *cf. DiPippo*, 27 NY3d at 139-141). Furthermore, even assuming, arguendo, that "a more relaxed standard" of admissibility governs when a defendant seeks to introduce evidence of other crimes committed by a third party (*DiPippo*, 27 NY3d at 139; *see e.g. State v Garfole*, 76 NJ 445, 452-453, 388 A2d 587, 591), we conclude that the other crimes allegedly committed by Bohrer were too remote from and dissimilar to the instant crime to be relevant to defendant's guilt or innocence (*see People v Schulz*, 4 NY3d 521, 528-529; *People v Willock*, 125 AD3d 901, 902-903, *lv denied* 26 NY3d 1012; *People v Clarkson*, 78 AD3d 1573, 1573-1574, *lv denied* 16 NY3d 829; *see generally Garfole*, 76 NJ at 452-453, 388 A2d at 591). The rest of the evidence in question was properly excluded as speculative (*see People v Gamble*, 18 NY3d 386, 398-399, *rearg denied* 19 NY3d 833; *People v Johnson*, 109 AD3d 1187, 1187-1188, *lv denied* 22 NY3d 1041), or of no more than marginal relevance to the issues at the hearing (*see People v Black*, 90 AD3d 1066, 1067, *lv denied* 18 NY3d 992; *see also People v Williams*, 94 AD3d 1555, 1556-1557).

Finally, we reject defendant's contention that the court erred in "failing to address and grant his actual innocence claim." Given the respective standards of proof for a newly discovered evidence claim and an actual innocence claim (*compare People v Hamilton*, 115 AD3d 12, 24-27 *with* CPL 440.10 [1] [g]; 440.30 [6]), new evidence that is insufficient to create a probability of a more favorable verdict warranting a new trial logically cannot establish a meritorious claim of actual innocence. We thus conclude that the court's rejection of defendant's newly discovered evidence claim, which is supported by the record, constituted an implicit rejection of his actual innocence claim as well (*cf. People v Chattley*, 89 AD3d 1557, 1558), and we affirm the order.

All concur except CENTRA, J., who dissents and votes to reverse in the following memorandum: I respectfully dissent. I agree with the majority that County Court properly rejected that part of defendant's motion alleging a *Brady* violation inasmuch as defendant did not meet his burden of establishing that the alleged *Brady* material was suppressed by the People. I further agree with the majority that the court properly precluded defendant from introducing certain evidence that did not involve third-party admissions. I also agree with the majority that defendant failed to establish his entitlement to relief through an actual innocence claim (*see People v Deacon*, 96 AD3d 965, 970, *appeal dismissed* 20 NY3d 1046). I agree with defendant, however, that he established his entitlement to a new trial based on newly discovered evidence. I would therefore reverse the order, grant the motion, vacate the judgment of conviction, and grant a new trial.

Eighteen-year-old Heidi Allen was working alone at a gas station convenience store on Easter morning, April 3, 1994, when she went missing. Heidi was never found and is presumed dead. In August 1994, defendant and his brother, Richard Thibodeau (Richard), were charged with her kidnapping. After separate jury trials, defendant was convicted of kidnapping in the first degree (Penal Law § 135.25 [3]) and sentenced to an indeterminate term of 25 years to life, and he remains incarcerated. Richard was acquitted.

Trial Evidence

At the trial, the owner of the store, which was at the corner of Route 104 and 104B in the Town of New Haven, testified that the last transaction at the store as reflected on the cash register receipt was the purchase of two packs of cigarettes at 7:42 a.m., and no money was missing from the register. Richard was the customer who made that purchase. There was a purchase at 7:41 a.m. of a pack of cigarettes and two newspapers, which was confirmed by the testimony of that customer. He testified that he arrived at the store after passing a slow-moving van that he identified as a van that belonged to Richard. Richard's GMC van was distinctive in appearance; it was a large white van with black doors on the sides and back, a black stripe down the side, and rust in spots. The customer made his purchase, testifying that there was no one else inside the store besides the clerk.

As the customer was exiting the store, he saw a man who was about five feet six inches or seven inches tall, weighed about 145 pounds, and had a mustache and wore a baseball cap. An investigator testified that Richard was five feet seven inches tall, weighed approximately 155 pounds, and had grey hair and a mustache, so the description given by the customer matched that of Richard, and in fact the customer testified that it looked like Richard. The man was standing outside next to the driver's side of that same van the customer had passed, which was parked "about parallel" in front of the store and was running. They walked past each other as the man proceeded to the store and the customer walked toward his vehicle. After the customer entered his vehicle and pulled forward, he saw the van move forward as well, three or four feet toward the front double doors, with the passenger side of the van closest to the doors. Both vehicles stopped, and the customer then drove around the van and saw it move forward again. The People contend that this showed that someone else was in the van while Richard was in the store. However, the cash register receipt showed that Richard made his purchase just one minute after this customer, and the customer testified that he entered his vehicle and opened a pack of cigarettes before moving his vehicle. It therefore could have been simply Richard who entered the van and started moving it.

Another customer testified that he pulled into the convenience store parking lot at approximately 7:41 a.m. and did not see anyone in the lot. He went inside the store to buy a newspaper but no one was there. After waiting a few minutes and looking around the store, he went outside and flagged down a passing sheriff's deputy who was stopped at the intersection. The deputy testified that he was flagged down at approximately 7:45 a.m. He spoke with the customer and then notified dispatch of suspicious activity at 7:55 a.m. Based on the times stamped on the cash register receipt, the clock on the cash register having been verified by the police, and the time recorded on the police dispatch, there was a very short window of time between 7:42 a.m. and 7:55 a.m. when Heidi was abducted. The time period was even shorter considering that the customer who flagged down the deputy spent a few minutes waiting inside the store, and a couple more minutes passed while the deputy spoke with the customer before notifying dispatch. The deputy found no signs of a struggle inside the store. The front door was unlocked, but the other doors were secured.

Five days after Heidi's disappearance, Christopher Bivens, who does vehicle autobody repair, contacted the police about observations he had made on April 3, 1994, i.e., he saw two men and a woman arguing outside the store. He could not describe them or any vehicles that were present. He thought that there was a van there but he was not sure. The police interviewed Bivens on April 18th, and he said that the van was light blue with dark trim but could not say whether it had pinstripes. He admitted that the police drove him past Richard's van on April 20th, and he told them that the van was the right style but the wrong color. The following day, the police showed him a photograph of Richard's van showing the passenger side and back doors, and the witness did not think that was the van, either. He was shown

a second photograph of Richard's van showing the black side doors, and he was now 80% certain that was the van. When shown another photograph of Richard's van the next day, the witness now said that he was positive it was Richard's van that he saw the morning of Heidi's disappearance because he recognized the rust spot over the rear wheel and the trailer hitch.

At trial, Bivens testified that, as he approached the store at approximately 30 miles per hour, he saw two white males and a white female outside the store, and the man closest to the store was holding the "struggling" female in a bear hug. Bivens described this man as "strong" and "husky." The other man was older and was walking toward a van that the witness identified as Richard's van. He said that the stripe on the van caught his attention because it was not ordinary to have it there and must have been painted on. He also noted the rust on the van, which, as an autobody repairman, he spotted all the time. Bivens told the police that both men appeared to be five feet eleven inches tall, husky, and between 30 and 40 years old. A police investigator described defendant as being five feet ten inches tall and weighing 180 to 190 pounds, with dark brown hair and a mustache. Defendant testified at trial and described himself as being five feet eight inches or nine inches tall and weighing 150 to 160 pounds. Bivens testified that the man holding the woman was a few inches taller than her. Heidi's boyfriend described her as five feet ten inches tall with dirty blonde hair.

Nancy Fabian testified that she left her house on Easter morning and arrived in the Village of Mexico at around 7:45 a.m. When she turned on Route 104, a van came up very fast behind her and was only two or three feet away. The van, which she identified as belonging to Richard, was swerving back and forth. A white male with dark hair and a "scruffy face," like with a beard and mustache, was driving and was using his right arm to try to "control something in the back of the van or push something down." Fabian reported what she observed to the police in early June and said that the van was light blue, which Richard's van is not. She also knew that there was something on the middle of the van, but was not sure if it was a stripe. The police then showed her Richard's van, and she made a positive identification.

Defendant testified that he and his girlfriend went to a friend's house the night before Easter and stayed past midnight, then went straight home and remained there until they were awakened by Richard's phone call shortly after 10:00 a.m. He denied seeing Richard on April 3, 1994. Some witnesses at trial corroborated his testimony, while others contradicted it. A bartender testified that defendant and Richard were at a bar drinking together the night before Heidi disappeared, and they left the bar between 12:00 and 12:30 a.m.

One of defendant's neighbors testified that he drove past defendant's house on Easter morning around 7:30 a.m. and saw tire tracks coming out of the driveway from the inch of wet snow they had, and there were no vehicles in the driveway. When he was pulling into a gas station, he saw Richard's van as he approached an intersection with Route 104. The neighbor then returned home and saw Richard's van

and two other vehicles in defendant's driveway. When the neighbor contacted the police two months after the incident, he did not tell them that he saw Richard's van at an intersection; he did not remember seeing that until almost a year after the incident. The neighbor's son testified that he heard yelling and screaming between a man and a woman from defendant's house around 10:45 a.m. on Easter that lasted about a half hour. His 14-year-old brother also heard the yelling.

Another neighbor, who was 13 years old at the time of her testimony, testified that she saw Richard's van in defendant's driveway on Easter morning at around 7:50 a.m. She did not tell anyone about the van until 13 months after Heidi disappeared. Another neighbor and his wife testified that, around 9:00 a.m. on Easter morning, they saw a van resembling Richard's van parked on the road at the end of defendant's driveway. They saw defendant standing outside the van talking to a man with grey hair on the passenger side of the van. They did not report this to the police until seven months after Heidi disappeared, even though they gave other statements to the police on earlier occasions.

On the other hand, two other neighbors testified that they never observed a van at defendant's residence on Easter morning, and never heard any loud voices. Richard's girlfriend testified that Richard left their residence around 7:30 a.m. and returned around 7:50 a.m. with two packs of cigarettes. They left their house around 8:30 a.m. to go to her grandparents' house. The girlfriend's relatives testified that Richard arrived at the grandparents' residence around 8:45 a.m. or 9:00 a.m. that morning. Two of Richard's neighbors testified that they saw his van parked in his own driveway between 8:15 a.m. and 8:45 a.m. Three other witnesses confirmed that they saw Richard's van headed toward the grandparents' residence around 8:45 a.m. Defendant's girlfriend corroborated his testimony about being inside his residence on Easter and not seeing Richard that day.

Richard and his girlfriend testified that, after they saw something on the television while they were at the grandparents' house, Richard called the police shortly after 10:00 a.m. to let them know he was at the store that morning, and also called defendant. The police went to the grandparents' residence, saw Richard's van in the driveway, and took a statement from Richard, who was cooperative and showed the packs of cigarettes that he had purchased. On April 9th, Richard consented to a search of his van. Prints were lifted from the van, but none was a match with Heidi. In addition, the van, which the police described as cluttered, was vacuumed and the material was sent to the FBI for processing; nothing matched Heidi. A forensic scientist testified that, if there was a struggle involved, it was more likely that there would be some sort of transfer. An investigator took impressions from tire marks left in the front of the store, which he believed looked like an acceleration mark, like "if somebody was leaving the store in a hurry." The impressions from Richard's van did not match.

The other evidence admitted at trial included the testimony of Heidi's boyfriend, who testified that he met defendant about five

months before Heidi disappeared, and the boyfriend and Heidi saw defendant about four or five times at a bar or bowling alley during that five-month period. Defendant knew Heidi by name and commented to the boyfriend that he "had an attractive girlfriend." Defendant admitted that he met Heidi on a couple of occasions.

Finally, the evidence at the trial included the testimony of two inmates. Defendant was incarcerated in Massachusetts in June 1994, where he was held in the same block as Robert Baldasaro and James McDonald, both of whom testified at trial that defendant implicated himself in Heidi's kidnapping. Defendant testified that he would speak with Richard and his girlfriend over the phone while in jail, and they would give him updates on the investigation, which defendant would then discuss with the two inmates. Baldasaro testified that defendant, while not admitting his involvement in Heidi's disappearance, told him that he knew she was dead and no one would find her. He also said that there was no struggle at the store so she must have known the person with whom she left. Baldasaro further testified that defendant said that he and Richard went to speak with Heidi regarding a disagreement over a drug deal, they drove her by the woods near defendant's house to talk to her, and then Richard drove Heidi back to the store. When Richard returned to the store to get cigarettes, no one was at the store. Baldasaro asked defendant how she died, and defendant responded that her head had been bashed in with a shovel. McDonald testified that he was in the cell with Baldasaro and heard defendant say that he went to the store in Richard's van, that Heidi was killed with his shovel, and that they would never find her.

Defendant was convicted as charged, and we affirmed the judgment of conviction on appeal (*People v Thibodeau*, 267 AD2d 952, *lv denied* 95 NY2d 805).

CPL 440 motion and hearing

On July 30, 2014, defendant moved to vacate the judgment pursuant to CPL 440.10 (1) (b) and (h) on the ground that the People withheld *Brady* material and thus engaged in misrepresentation or fraud, and pursuant to CPL 440.10 (1) (g) on the ground of newly discovered evidence. The *Brady* material involved the fact that Heidi was a confidential informant for the police, a fact of which defendant was allegedly not aware until after the trial. As stated at the outset, I agree with the majority that there was no *Brady* violation. The newly discovered evidence was based upon a police interview in early 2013 with Tonya Priest in which she disclosed that, in 2006, James Steen told her that he, Roger Breckenridge, and Michael Bohrer had abducted Heidi. After that, the police recorded a conversation between Priest and Jennifer Wescott, who was 17 years old at the time Heidi disappeared and had been Breckenridge's girlfriend for years thereafter. Wescott made various statements regarding Heidi's abduction but never implicated herself in the kidnapping. The police thereafter interviewed Wescott on two occasions. In addition, the defense proferred the statements of numerous witnesses implicating Steen, Breckenridge, and/or Bohrer in Heidi's disappearance.

The court held a hearing on the motion. William Pierce testified that he was stopped at an intersection in front of the store on Easter morning in 1994 and saw a man between 35 and 45 years old, husky, and with a beard strike a woman in the back of the head near a white van with a lot of rust on the side. The woman's hair appeared dark; not black, but not real light, either. Someone inside the van opened the side door and the man outside the van grabbed the woman and started toward the door. Pierce kept driving. He had believed that this man was defendant after drawing a beard on a picture of defendant, thought it looked "close enough," and figured that the police knew more than he did, so he never contacted the police. In July 2014, Pierce saw renewed news coverage of Heidi's case and a statement by the sheriff that one thing that bothered him in his career was Heidi's case. Pierce decided to come forward and report what he saw, and he confirmed with the police that defendant was the right person in custody. However, after seeing a picture in the newspaper about 10 days later of Steen with a full beard and mustache, Pierce realized that it had actually been Steen who he had seen striking the woman. This photo of Steen was taken at the time of an arrest in 2010. Pierce also testified that the van he saw was not Richard's van. The police showed Pierce a picture of Steen from 1988 in which he did not have a beard, and Pierce was not able to identify him.

The parties agreed to allow witnesses to testify regarding alleged third-party admissions by Steen, Breckenridge, and Bohrer, and the court would reserve decision on the ultimate admissibility of those statements. The parties also consented to Priest's statement being allowed into evidence. Priest stated that, in 2006, Steen told her that he, Breckenridge, and Bohrer drove Bohrer's white van to the store, Steen grabbed Heidi from behind the counter, and Breckenridge assisted Steen in taking Heidi out the side door of the store. Steen had Heidi in a bear hug, got her in the van, and they "flew out of there like a bat out of hell." They took Heidi to Breckenridge's garage on Rice Road, where they beat her up because she threatened to report a drug deal. Steen said that Wescott was at the residence and was upset with them for bringing Heidi there. They then took her into the woods to a cabin, cut her up, and placed her body under the floor. The cabin was through thick woods, across railroad tracks, and through another spot of thick brush. In the opening following the thick brush, there was a small cabin with a wood stove. Steen said that Breckenridge and Wescott moved to Florida because the authorities were searching behind Breckenridge's house, and defendant was implicated only because he had a white van. Priest knew that Bohrer had a big white van at the time of Heidi's disappearance.

Megan Shaw testified that, in 2010, Steen told her that he disposed of Heidi's body. While not admitting his involvement in her abduction or killing, he said that he helped others dispose of her body in a cabin in the woods. Ronald Clarke testified that, a few years after defendant's trial, Steen told him that Heidi had "gone to Canada" and that defendant and Richard were not involved. Steen did not say that he abducted or killed Heidi.

Amanda Braley testified that, in 2003, when she was with

Breckenridge and Wescott, someone mentioned Heidi's name, and Breckenridge laughed and said "he took that bitch to the scrap yard in the van, they had it crushed, and that she was shipped to Canada." Breckenridge then pointed to the sky and said, "See you, bye." Wescott was "irritated" and backhanded Breckenridge and said, "You shouldn't be talking about that s***, Rog," to which Breckenridge responded, "What, Jen, it's done and over with, and besides, nobody's ever going to find her." Around that same time period, something came on the television about Heidi, and Breckenridge laughed and looked at Wescott, prompting Wescott to say, "Don't look at me Rog, I didn't have anything to do with it. I only took the van to Murtaugh's." Braley further testified that, in 2006 or 2007, Steen made a comment that he was not afraid to go to jail, then paused and said, "I can, however, tell you I will never see a day in prison for what we did to Heidi."

Christopher Combes testified that, in the early 2000's, Breckenridge mentioned Heidi and told him that "[w]e chopped her up, we put her in a wood stove and put her in a vehicle and sent her to Canada." Combes did not believe Breckenridge. Jessica Howard testified that Breckenridge said on several occasions that Heidi was killed for being "a rat" with regard to drugs, but he never said that he killed her or knew where her body was buried, just that she would not be found. Joe Mannino, one of Steen's fellow inmates, testified that Steen told him that defendant and Richard had nothing to do with Heidi's kidnapping and that he hauled the van used in Heidi's kidnapping to Canada and scrapped it. He told Mannino that Heidi was "a rat," but he never said that he abducted or killed Heidi.

The police recorded a phone call on March 2, 2013 between Priest and Wescott. Priest told Wescott what Steen had told her, i.e., that they took Bohrer's van to the store and then "brought her to [Wescott's] house" and Wescott "flip[ped] out." Wescott responded that "in [her] own head" she "dropped that s*** . . . about ten years ago . . . but it took me a while." Later, Priest asked Wescott if she even knew it was Heidi they had brought there, and Wescott said no, that "they didn't even bring her in the house, they made her sit in the van." However, she "put two and two together" and later knew it was Heidi. When Priest asked who actually killed her, Wescott said that she had no idea, that it did not happen around her. Wescott said that it "bother[ed] her to talk about it" and, at the time it happened, she could not say anything to anybody because she was scared of all of them. Wescott said that the police "swarmed Grandma Breckenridge's house," and she agreed with Priest that was why she and Breckenridge moved to Florida. She said that she never thought about turning in Breckenridge; she "would never open a can of worms like that," she was "not doing the investigator's job," and they would just laugh in her face and say somebody has already been convicted.

Wescott testified at the hearing that she gave a statement to the police in March 2013 and again in August 2014. Before she gave her first statement, she texted Priest and asked if she was a cop. She also sent a text message to Richard Murtaugh, who runs a junkyard

where Breckenridge used to work. After Wescott's first statement to the police, Breckenridge, who was incarcerated, sent a message to her to keep her mouth shut about the Heidi case. Wescott told the police during her first interview, before she knew that the call with Priest had been monitored by the police, that she asked Priest "what the hell are you talking about," and told Priest that she was crazy when Priest asked her about Heidi's disappearance, but in fact Wescott made no such statements during that recorded conversation. She also told the police that she did not say anything to Priest about a van being brought to her house with a girl in it, but in fact she did. Wescott testified that she told "a lot of lies" to Priest. If she told Priest that Heidi was in the van, she did so only to "shut [Priest] up." Wescott testified that she did not meet Breckenridge until the summer of 1994 and met Bohrer in 2007. A witness, however, testified that he saw Wescott and Breckenridge together in 1991 or 1992. In addition, in her first statement to the police, Wescott gave an alibi for Breckenridge on the Easter morning that Heidi disappeared, i.e., he was with her.

Wescott told the police that she did not know what happened to Heidi, that she would have known if Steen, Breckenridge, and Bohrer had done anything, and that she would have come forward if she knew anything. However, she admitted texting someone that she gave a false statement in connection with the investigation. In her August 2014 statement to the police, Wescott said that Breckenridge told her in 1995 that all he knew was that Heidi was burned in a wood stove and taken care of in a van, but he did not explain how he knew that information.

Wescott denied ever living on Rice Road. A witness testified that her father owned property on Rice Road and rented out a trailer on it to Wescott's family in 1993 or 1994. Another witness, however, testified that she lived on that property from 1993 until 1996. A collapsed cabin was located off of Rice Road beyond a heavily wooded area, but not near railroad tracks, and there was no wood stove there. The Medical Examiner conducted a forensic examination of the site in July 2014 after a cadaver dog had indicated at a particular location; the examination found nothing of significance. In October 2014, two other cadaver dogs detected a scent of human remains at the area.

Steen, who is incarcerated for murdering his wife and his cousin in September 2010 (*People v Steen*, 107 AD3d 1608, *lv denied* 22 NY3d 959), testified that he hauled scrap for Murtaugh in 1994, sometimes to Canada. Steen knew Breckenridge and Wescott in 1994. Breckenridge told him that Steen had hauled a van to Canada that had Heidi's remains in it, but Steen believed that Breckenridge was full of "hot air." Steen testified that, "[k]nowingly, [he] had nothing to do with any of this Heidi Allen stuff." Steen said that he was not a snitch and, if he knew who kidnapped Heidi, he would not tell, but he did not know. Steen denied discussing Heidi's disappearance with Priest and denied telling Shaw that he had disposed of Heidi's body.

Breckenridge, who was incarcerated for stealing, testified that

he worked in Murtaugh's junkyard in 1994 and knew Steen at that time. He denied saying anything to Steen or anyone else about a van that Heidi may have been abducted in or where her remains were. He denied ever living on Rice Road.

Danielle Babcock used to work for Bohrer in 2001 and 2002 and testified that he would make comments that he would "do [her] like he did Heidi." Bohrer testified that he started scrapping vehicles at Murtaugh's junkyard prior to Heidi's abduction. He denied threatening Babcock.

The court denied the motion, and we granted defendant leave to appeal.

Analysis

A court may vacate a judgment upon the ground that "[n]ew evidence has been discovered . . . which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant" (CPL 440.10 [1] [g]). The defendant "must prove 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" (*People v Bryant*, 117 AD3d 1586, 1587 [internal quotation marks omitted]; *see People v Backus*, 129 AD3d 1621, 1623, *lv denied* 27 NY3d 991). The determination of such a motion rests within the sound discretion of the hearing court (*see Backus*, 129 AD3d at 1623-1624; *Deacon*, 96 AD3d at 967; *People v Tankleff*, 49 AD3d 160, 178).

In my opinion, defendant met his burden of establishing all six factors by a preponderance of the evidence, and I therefore conclude that the court abused its discretion in denying the motion (*see* CPL 440.30 [6]; *Tankleff*, 49 AD3d at 179-180). The only dispute in this case is the first element, i.e., whether the newly discovered evidence would probably change the result if a new trial was granted.

A. Pierce's testimony

Pierce was the only person who provided eyewitness testimony at the hearing, as opposed to providing hearsay evidence on statements made by Steen, Breckenridge, or Bohrer. The court concluded that Pierce's testimony was not credible and could not be the basis for a new trial. I disagree. An appellate court, of course, may make its own credibility determinations (*see Tankleff*, 49 AD3d at 178-179), and I conclude that the court erred in rejecting Pierce's testimony as not credible. Unlike some of the other witnesses at the hearing, Pierce did not come forward after the renewed media coverage in 2014 to implicate Steen, Breckenridge, or Bohrer. Instead, he went to the police to report what he had seen on the day of Heidi's disappearance and to confirm that defendant was the person he saw and that they had the right man in custody. It was not until he saw a photograph of

Steen in the newspaper over a week later that he realized he had made a mistake. At the hearing, he testified that Steen was the man he saw striking the woman.

The court found that Pierce was not credible because he was unable to identify Steen from a photograph that the police showed him. However, Steen was 23 years old at the time of Heidi's disappearance in 1994, and the police showed Pierce a photograph of Steen from 1988, when he was only 17 years old and without a beard. The court also found Pierce not credible because he testified that there was slush on the ground, but the photographs taken at the store showed only a partially wet road. Other witnesses at the trial, however, similarly testified that there was snow or slush on the road early that morning. Indeed, one of defendant's neighbors testified that he saw tire tracks in the snow/slush that was in defendant's driveway. The court also did not credit Pierce's testimony because he did not call the police to report what he saw, but the same could be said of Bivens, who waited five days before contacting the police because he also did not want to get involved. Pierce explained that he did not come forward at the time of defendant's trial because he believed that the police had the right person in custody. The court also suggested that Pierce's memory of the man he saw that morning was tainted by the photographs he had seen in the newspaper. While that may be true, the same could be said of the witnesses at trial regarding their identification of Richard's van, some of whom did not come forward until many months after the incident.

To be sure, some aspects of Pierce's description of the events he saw that morning were questionable, such as his testimony that the woman he saw had dark hair, when Heidi's hair was dirty blonde, and his testimony that the man he saw was 35 to 45 years old, when Steen was in fact only 23 years old at the time. However, there was no showing that his description of how the man otherwise looked, i.e., bearded and husky, was not consistent with how Steen appeared in 1994. In addition, even setting aside Pierce's identification of Steen as the perpetrator, Pierce also testified that the white van he saw that morning was *not* Richard's van. This is noteworthy considering that the identification of Richard's van by Bivens at trial was not very convincing. When he first contacted the police, Bivens was unable to identify the van he saw that morning as Richard's van, and he actually told the police that it was not Richard's van. At trial, he testified that the stripe on the van caught his attention, yet he could not tell the police when he initially approached them whether the van had pinstripes. After the police gave him a night to think about it, Bivens then told the police that Richard's van was the one that he saw. He knew that because of the rust spot over the rear wheel and the trailer hitch. Pierce, however, described the white van that he saw that morning as having a lot of rust on the side. It stands to reason that the van that Bivens actually saw was the same van that Pierce saw, which was not Richard's van.

Fabian had identified Richard's van as the one she saw that came up very fast behind her and swerved back and forth. She told the police that the van was light blue, but Richard's van was white and

black. In addition, the van remained behind her the entire time, and she saw only the front part of the van.

Bivens and Pierce were the only ones to witness Heidi's abduction. In several respects, their testimony was similar. Both described the man abducting Heidi as strong, husky, and with a beard, and both testified that she was placed in a white van with rust on the side. Bivens identified the van he saw as Richard's, but Pierce testified that it was not. This conflicting testimony, along with the absence of any forensic evidence tying defendant to the abduction and the absence of any eyewitness evidence identifying defendant as the perpetrator, leads me to conclude that Pierce's testimony would probably change the result of the trial (*see People v Bailey*, 144 AD3d 1562, 1564).

B. Hearsay evidence

With respect to the remaining evidence, the court concluded that the evidence would not be admissible at trial because it was hearsay not within any exception, and therefore defendant did not establish his entitlement to a new trial. I agree that "[i]mplicit in th[e] ground for vacating a judgment of conviction is that the newly discovered evidence be admissible" (*Backus*, 129 AD3d at 1624 [internal quotation marks omitted]). Indeed, without considering Pierce's testimony, that concept is critical to the resolution of this case. The People conceded at oral argument that, if all the evidence at the hearing was admissible evidence, it may be enough to warrant a new trial. Contrary to the conclusion of the majority, I conclude that at least some of the third-party admissions would be admissible at trial as declarations against penal interest.

Out-of-court statements that are introduced to prove the truth of the matters they assert are hearsay, and are admissible only if they fall within a recognized exception to the hearsay rule (*see People v Brensic*, 70 NY2d 9, 14, *remittitur amended* 70 NY2d 722). One such recognized exception is the declaration against penal interest. "This exception to the hearsay rule recognizes the general reliability of such statements, notwithstanding the absence of the declarant to testify, because normally people do not make statements damaging to themselves unless they are true" (*id.*). "A statement may be admitted as a declaration against penal interest where: the declarant is unavailable as a witness at trial; the declarant was aware the statement was against his or her penal interest when it was made; the declarant had competent knowledge of the facts underlying the statement; and 'supporting circumstances independent of the statement itself . . . attest to its trustworthiness and reliability' " (*People v DiPippo*, 27 NY3d 127, 136-137; *see People v Ennis*, 11 NY3d 403, 412-413, *cert denied* 556 US 1240; *Brensic*, 70 NY2d at 15). With respect to the final required element, i.e., the reliability of the statement, "there must be some evidence, independent of the declaration itself, which fairly tends to support the facts asserted therein" (*People v Settles*, 46 NY2d 154, 168). Where, as here, the declarations exculpate the defendant, they are subject to a more lenient standard and are admissible "if the supportive evidence 'establishes a

reasonable possibility that the statement might be true' " (*DiPippo*, 27 NY3d at 137; *see People v McFarland*, 108 AD3d 1121, 1122, *lv denied* 24 NY3d 1220; *Deacon*, 96 AD3d at 968). "Whether a court believes the statement to be true is irrelevant" (*Settles*, 46 NY2d at 170). If there is a possibility of trustworthiness, "it is the function of the jury alone to determine whether the declaration is sufficient to create reasonable doubt of guilt" (*id.*).

Defendant submitted evidence at the hearing regarding statements made by Steen, Breckenridge, and Bohrer that he contends fall within the exception. All three of those witnesses testified at the hearing, thus seemingly showing that the first element cannot be met, but I conclude that this element is met where, as here, the witnesses testified but denied making the statements (*see People v Oxley*, 64 AD3d 1078, 1083-1084, *lv denied* 13 NY3d 941).

In my opinion, the statements of at least Priest, Braley, and Combes would be admissible at trial. Priest stated that Steen told her in 2006 that he, Breckenridge, and Bohrer kidnapped Heidi by taking her from the store and placing her in Bohrer's white van. He further told her that they beat her up, took her into the woods to a cabin, cut her up, and placed her body under the floor. Braley testified that Steen said in 2006 or 2007 that he would never see a day in prison for what they did to Heidi, and Combes testified that in the early 2000's Breckenridge mentioned Heidi and said that they chopped her up, put her in a wood stove, put her in a vehicle, and sent her to Canada. These statements were against Steen's and Breckenridge's penal interests inasmuch as they admitted abducting and killing Heidi.

The court found that Priest was not credible because the cabin that was located on Rice Road was in thick brush in the woods, not near an open field, and it was not near railroad tracks and did not have a wood stove. There was, however, a cabin found off of Rice Road in the thick woods, and three different cadaver dogs alerted to the presence of human remains at that site, even though a forensic examination was unable to find anything of significance. The court also found that Braley's testimony was not trustworthy or reliable because she did not recite Steen's statements in the affidavit she gave to defense counsel in 2014. Braley lived with Wescott's parents in 2002 or 2003 and knew Wescott, Breckenridge, and Steen. Braley's affidavit stated in general that Steen and Breckenridge made admissions regarding a van being crushed at Murtaugh's that was then transported to Canada. Braley testified that she did tell defense counsel about Steen's specific statement, but it was not included in the affidavit. With respect to Combes, the court did not find him reliable because Combes himself did not believe Breckenridge and did not come forward until 2014. Combes worked with Breckenridge at the time he made his admission, and Combes testified that he did not report the admission to the police until the summer of 2014. He did not want to get involved, but he mentioned it to an officer who was a friend of his, who then had an investigator contact him. In determining the reliability of a declarant's statement, "[w]hether a court believes the statement to be true is irrelevant" (*Settles*, 46

NY2d at 170), and I similarly conclude that it is irrelevant whether Combes believed the statement to be true.

In determining the admissibility of a declaration against penal interest, "[t]he crucial inquiry focuses on the intrinsic trustworthiness of the statement as confirmed by competent evidence independent of the declaration itself" (*id.* at 169). Contrary to the court's determination, I conclude that the supportive evidence establishes a reasonable possibility that these statements might be true (*see generally DiPippo*, 27 NY3d at 137).

Competent evidence independent of the declarations included the fact that witnesses testified that Heidi was abducted by men in a white van, Bohrer had a white van, and Steen, Breckenridge, and Bohrer worked for or did business with Murtaugh, and Steen hauled scrap for Murtaugh to Canada. Inasmuch as no eyewitnesses could place defendant at the store when Heidi was abducted, at the trial the People relied on testimony regarding the presence of Richard's van at the store, on Route 104, and at defendant's residence that morning. The evidence at the hearing now showed that there may have been another van at the store that morning. Priest said that she knew that Bohrer had a white van at the time of Heidi's disappearance. Pierce testified at the hearing that he saw a man strike a woman outside the store and place her into a white van, but it was not Richard's van. At the trial, Bivens and Fabian identified the van that they saw the morning of the incident as Richard's van, but Richard's van was also a white van, albeit with black doors and trim. Notably, Bivens told the police that he saw a van when he first reported the incident, but he was unable to identify Richard's van as the van that he saw until the third time that he was shown a photograph of the van. Fabian testified at trial that she saw a man pushing something down in the back of the van, which was presumably the abductor trying to control Heidi. A forensic examiner testified that such a struggle was likely to leave some transfer of material. However, despite extensive searching of Richard's van, the police never recovered any evidence that Heidi had been in that van. Priest stated that Steen told her that, after grabbing Heidi, they took off like a bat out of hell. The police found tire tracks at the store that looked as if someone left in a hurry, but those tire tracks did not match Richard's van. Steen told Priest that defendant was implicated only because his brother had a white van.

The court noted that none of the witnesses could credibly place Steen, Breckenridge, or Bohrer at the store on the morning of Heidi's disappearance, but the same is true regarding the evidence against defendant at his trial. There were only two eyewitnesses to Heidi's abduction (Bivens and Pierce), and neither one identified defendant as the perpetrator. The court also noted that no witnesses testified that they saw Steen, Breckenridge, and Bohrer together around the time of Heidi's disappearance or that the men were more than just social acquaintances, but the evidence showed that all three worked for or did business with Murtaugh and were also connected with another man. Murtaugh owned a junkyard, and Steen testified that he hauled scrap for Murtaugh in 1994, sometimes to Canada. This provides an

explanation as to how a van with Heidi's remains could end up salvaged in Canada, as stated by Breckenridge to Combes. In addition, although Priest had never mentioned Murtaugh's name or scrapping the van in her recorded conversation with Wescott, Wescott contacted Murtaugh before giving her statement to the police in 2013. Priest also stated that Steen told her that Heidi was killed because she was going to report a drug deal. This evidence showed a motive for Heidi's abduction, which was missing from defendant's trial, inasmuch as the evidence at the hearing showed that Heidi was an informant for the police and Steen and Breckenridge sold or used drugs at the time of Heidi's disappearance (*see McFarland*, 108 AD3d at 1122-1123). The statements of Steen and Breckenridge also provided an explanation for what happened to Heidi's body, i.e., it was buried underneath a cabin and/or placed in a van that was sent to Canada to be salvaged.

With respect to Wescott's recorded statement to Priest, I agree with the majority and the People that this constituted hearsay and did not technically fall within the exception of a declaration against penal interest because Wescott did not admit to being involved in Heidi's abduction. However, the Supreme Court has cautioned that, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice" (*Chambers v Mississippi*, 410 US 284, 302). I conclude that Wescott's recorded statement should be admissible because it " 'bore persuasive assurances of trustworthiness' and was critical to [defendant's] defense" (*Oxley*, 64 AD3d at 1084, quoting *Chambers*, 410 US at 302). Contrary to the majority, I found Wescott's admissions on that recording to make perfect sense. Wescott told the police that she simply lied to Priest, but she could have just told Priest that she knew nothing about Heidi's abduction when asked about it. Instead, Wescott told Priest that she dropped it from her mind 10 years ago, that it took her a while to do so, and that it bothered her to talk about it. She said that she was scared to tell anyone about it at the time it happened, and she would never report it now and "open a can of worms." She also offered the explanation that Heidi was never brought inside the house, that they made her sit in the van. This statement was supported by Steen's statement to Priest that they placed Heidi in a van and brought her to Breckenridge's residence, where Wescott also lived. Wescott's admission that the police searched behind "Grandma Breckenridge's" house and that was why she and Breckenridge moved to Florida was also supported by Steen's statement to Priest to that same effect.

Further indicia of reliability of Wescott's statement was the evidence that, before giving a statement to the police after this phone call, Wescott texted Murtaugh even though his name was never mentioned by Priest. Wescott also admitted that Breckenridge reached out to her after she gave her first statement to the police and told her to keep her mouth shut about the case. The People note that, when Priest asked Wescott if she knew which one killed her, Wescott responded, "No idea. As far as I know Tibadeau [sic]." That was near the end of the conversation, however, after Wescott mentioned that defendant had been convicted, and Priest responded, "That's sad."

Wescott shut down after that when Priest tried asking more questions about it, and gave curt responses or said that she did not want to talk about it because she did not "want that stuff back in [her] head."

As the majority notes, Wescott later recanted those admissions, but her supposed recantations changed during the police interview and at the hearing. Before she knew that the conversation had been recorded, Wescott told the police that she responded to Priest that she was crazy and asked what she was talking about when she brought up what Steen had told her. Before she knew that the recording had been monitored by the police, she claimed that Priest had tampered with the recording. Finally, she simply said that she told "a lot of lies" to Priest. Her deception continued at the hearing, where she gave absurd explanations for why she gave an alibi for Breckenridge when she supposedly did not know him, why she texted someone that she gave a false statement to the police, and why a friend was wrong when he claimed she texted him about not telling anyone that she went to Florida when Heidi went missing.

"When considering the reliability of a declaration, courts should . . . consider the circumstances of the statement, such as, among other things, the declarant's motive in making the statement—i.e., whether the declarant exculpated a loved one or inculpated someone else, the declarant's personality and mental state, and 'the internal consistency and coherence of the declaration' " (*DiPippo*, 27 NY3d at 137). Here, Steen, Breckenridge, and Wescott were not related to defendant and were not his friends, and thus had no reason to exonerate him or implicate themselves or their friends in Heidi's disappearance. Wescott's statement to Priest revealed that she did not like discussing what happened to Heidi, and she showed fear and reluctance to speak to the police about it. The third-party admissions were made to people they knew, not strangers, and were made to provide explanations, rather than mere theories, to the listener as to what actually happened to Heidi. The majority notes that many of the third-party admissions were inconsistent with each other. At first blush, that seems to be the case inasmuch as the statements were that Heidi's body was cut up and buried in a cabin, or burned in a wood stove in the cabin, or placed in a van that was sent to Canada to be salvaged. It is certainly possible, however, that all three of those events could have occurred.

I therefore conclude that the testimony of Priest, Braley, and Combes, and the statement of Wescott, would be admissible at defendant's trial, and that evidence would probably change the result of the trial (*see Bailey*, 144 AD3d at 1564).

Finally, I believe a new trial should be granted based simply on the totality of the new evidence introduced at the hearing. There were numerous third-party admissions attributed to Steen, Breckenridge, and Bohrer. This is not a case where there was just one off-hand remark about Heidi's abduction, and I conclude that "[t]he sheer number of independent confessions provided additional corroboration for each" (*Chambers*, 410 US at 300). Many of the third-

party admissions cross-corroborated the others. Many of the witnesses were unknown to each other, yet they gave similar testimony regarding declarations that were made to them. I therefore believe that a new trial should be granted.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

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CA 16-01300

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

CHRISTINE M. MICHAEL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GINA M. WAGNER, DEFENDANT-APPELLANT,
AND LAKESHORE TIRE & AUTO, INC., DEFENDANT.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered January 11, 2016. The order, insofar as appealed from, denied the cross motion of defendant Gina M. Wagner for summary judgment dismissing plaintiff's complaint and any cross claims against her.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that she allegedly sustained as a result of a collision between the vehicle that she was driving north on I-190 in the City of Buffalo and a wheel that came flying off of a southbound vehicle owned and operated by defendant Gina M. Wagner. The complaint names as defendants both Wagner and Wagner's automobile mechanic, Lakeshore Tire & Auto, Inc. (Lakeshore). Lakeshore conceded its liability to plaintiff on plaintiff's motion for partial summary judgment against it, and that motion is not at issue on appeal. Wagner, on the other hand, appeals from an order denying her cross motion for summary judgment dismissing the complaint and any cross claims against her. Wagner contends that she is entitled to summary judgment on the grounds that she was not negligent and that her conduct was not a substantial factor in causing the accident.

Supreme Court properly denied the cross motion. An owner and operator of a vehicle has a duty to inspect his or her vehicle and to discover and rectify any equipment defects (*see Fried v Korn*, 286 App Div 107, 109-110, *affd* 1 NY2d 691; *Tully v Polito*, 49 AD2d 954, 954). Moreover, a vehicle operator has a duty to act reasonably to ensure the safe operation and safe stop of her vehicle once it becomes apparent that her vehicle is experiencing a potentially injurious

mechanical problem (*see generally Lyons v Zeman*, 106 AD3d 1517, 1517-1518; *Cohen v Crimenti*, 24 AD2d 587, 588; *Wheeler v Rabine*, 15 AD2d 407, 408). Here, we conclude that Wagner failed to carry her burden on the cross motion of demonstrating that she was not negligent as a matter of law in the operation of her vehicle and that there was nothing that she could have done, in the exercise of due care, to avoid the accident (*see Jackson v City of Buffalo*, 144 AD3d 1555, 1556). Wagner testified at her deposition that, despite perceiving that "something was wrong with her car," she continued to operate her vehicle for a period of time without pulling it over fully onto the shoulder of the highway and bringing it to a stop. We note that the "existence of an emergency and the reasonableness of a driver's response thereto generally constitute issues of fact" (*Lyons*, 106 AD3d at 1518; *see Coffey v Baker*, 34 AD3d 1306, 1308, *lv dismissed in part and denied in part* 8 NY3d 867 [internal quotation marks omitted]).

All concur except CARNI, J., who dissents and votes to reverse the order insofar as appealed from in accordance with the following memorandum: I respectfully dissent. Under the emergency doctrine, "when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context" (*Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327, *rearg denied* 77 NY2d 990). Although I agree with my colleagues that the existence of an emergency and the reasonableness of the response to it generally present issues of fact (*see Makagon v Toyota Motor Credit Corp.*, 23 AD3d 443, 444), those issues "may in appropriate circumstances be determined as a matter of law" (*Bello v Transit Auth. of N.Y. City*, 12 AD3d 58, 60). In my view, the circumstances presented here warrant the application of the emergency doctrine as a matter of law to the conduct of defendant Gina M. Wagner. I would therefore reverse the order insofar as appealed from and grant Wagner's cross motion for summary judgment dismissing the complaint and any cross claims against her.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

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KA 15-01503

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CALVIN CLANTON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DANIELI EVANS, OF THE MARYLAND BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered May 7, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The charges arose from an incident in which police officers detected the odor of marihuana emanating from a vehicle they had stopped for a traffic violation. Defendant, a passenger in that vehicle, attempted to flee from the scene upon exiting the vehicle but was detained by the officers. In response to one officer's pre-*Miranda* inquiry, defendant admitted to possessing a firearm. The officer then searched defendant and found a loaded firearm on his person. County Court subsequently refused to suppress defendant's statement to the police and the firearm.

Defendant contends that the court should have rejected the officer's testimony offered in support of the decision of the police to search the vehicle and its occupants inasmuch as there was no concrete evidence of marihuana possession presented at the suppression hearing. We reject that contention. It is well established that the odor of marihuana emanating from a vehicle, " 'when detected by an officer qualified by training and experience to recognize it, is sufficient to constitute probable cause to search a vehicle and its occupants' " (*People v Ricks*, 145 AD3d 1610, 1611; *see People v Chestnut*, 43 AD2d 260, 261-262, *affd* 36 NY2d 971; *People v Grimes*, 133 AD3d 1201, 1202; *People v Cuffie*, 109 AD3d 1200, 1201, *lv denied* 22

NY3d 1087). Here, the officer testified that, as soon as the front passenger-side window was rolled down, he "immediately observed the strong odor of burnt mari[h]uana coming from within the vehicle" and contemporaneously saw "what appeared to [him] to be ashes all over [defendant]'s pants, in his lap" (*see generally People v Ponzo*, 111 AD3d 1347, 1348; *People v Guido*, 175 AD2d 364, 365, *lv denied* 78 NY2d 1076). The officer further testified that he also observed "numerous small remnants of mari[h]uana blunts" in the plastic ashtray in the passenger-side door (*see generally People v Semanek*, 30 AD3d 547, 547-548). Significantly, the officer also testified that he had received "training in the Academy" regarding the "physical characteristics and odor" of marihuana, and that he had encountered the smell of burnt marihuana "thousands of times" in the field. "It is well settled that great deference should be given to the determination of the suppression court, which had the opportunity to observe the demeanor of the witnesses and to assess their credibility, and its factual findings should not be disturbed unless clearly erroneous" (*People v Layou*, 134 AD3d 1510, 1511, *lv denied* 27 NY3d 1070, *reconsideration denied* 28 NY3d 932). Here, we see "no basis to disturb the court's credibility assessments of the officer[] inasmuch as [n]othing about the officer[']s testimony was unbelievable as a matter of law, manifestly untrue, physically impossible, contrary to experience, or self contradictory" (*People v Walker*, 128 AD3d 1499, 1500, *lv denied* 26 NY3d 936 [internal quotation marks omitted]).

We agree with defendant, however, that the court should have suppressed the statement defendant made to the police in response to police questioning inasmuch as defendant was in custody at the time but had not waived his *Miranda* rights. After defendant had been restrained and handcuffed, an officer asked him, "why are you fighting us," or "[w]hy did you run from the car." As noted above, at the time the question was asked, defendant had been physically restrained and handcuffed after he had fled from an attempted body search and had engaged in a struggle with the police, and we therefore conclude that *Miranda* warnings were required. For purposes of *Miranda*, "interrogation" refers to "express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect" (*Rhode Island v Innis*, 446 US 291, 301 [footnotes omitted]; *see People v Ferro*, 63 NY2d 316, 322, *cert denied* 472 US 1007; *see also People v Lightner*, 56 AD3d 1274, 1275, *lv dismissed* 12 NY3d 760). "Although the police may ask a suspect preliminary questions at a crime scene in order to find out what is transpiring . . . , where criminal events have been concluded and the situation no longer requires clarification of the crime or its suspects, custodial questioning will constitute interrogation" (*People v Rifkin*, 289 AD2d 262, 262-263, *lv denied* 97 NY2d 759; *see People v Bastian*, 294 AD2d 882, 884, *lv denied* 98 NY2d 694; *People v Soto*, 183 AD2d 926, 927). Here, the interaction between defendant and the officers had traveled far beyond a "threshold crime scene inquiry" (*People v Brown*, 49 AD3d 1345, 1346) and, under such circumstances, it was likely that the officer's question "would elicit evidence of a crime and, indeed, it did elicit an incriminating response" (*id.*; *see People v Hardy*, 5 AD3d

792, 793, *lv denied* 3 NY3d 641, *reconsideration denied* 3 NY3d 675; *see also Lightner*, 56 AD3d at 1275).

In spite of the unlawful pre-*Miranda* custodial interrogation of defendant, we nevertheless conclude that the court was not required to suppress the firearm. Indeed, the court properly determined that "[a] cursory search of [d]efendant's person would have resulted in finding the subject gun regardless of any admission by [d]efendant that a gun was on his person." Under the doctrine of inevitable discovery, evidence that would otherwise have been suppressed pursuant to the fruit of the poisonous tree doctrine will be deemed admissible " 'where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence' " (*People v Garcia*, 101 AD3d 1604, 1605-1606, *lv denied* 20 NY3d 1098, quoting *People v Fitzpatrick*, 32 NY2d 499, 506, *cert denied* 414 US 1033). Here, defendant's statement admitting his possession of the handgun was the tainted primary evidence arising from the unlawful pre-*Miranda* custodial interrogation and must be suppressed (*see People v Stith*, 69 NY2d 313, 320); however, the inevitable discovery doctrine applies to the handgun as secondary evidence arising therefrom (*see People v Turriago*, 90 NY2d 77, 86, *rearg denied* 90 NY2d 936; *People v Dempsey*, 177 AD2d 1018, 1019, *lv denied* 79 NY2d 946). We conclude that there was a " 'very high degree of probability' " that the officers would have discovered the firearm, which was found inside the right leg of defendant's pants during a lawful and routine search of defendant's person prior to his attempted flight (*Turriago*, 90 NY2d at 86; *see People v Beckwith*, 303 AD2d 594, 595; *Dempsey*, 177 AD2d at 1019; *People v Deresky*, 134 AD2d 512, 512-513, *lv denied* 71 NY2d 895; *cf. People v Bookless*, 120 AD2d 950, 950-951, *lv denied* 68 NY2d 767).

Although defendant's statement admitting to the possession of the firearm should have been suppressed, we conclude that the particular circumstances of this case permit the rare application of the harmless error rule to defendant's guilty plea (*see Beckwith*, 303 AD2d at 595). "[W]hen a conviction is based on a plea of guilty an appellate court will rarely, if ever, be able to determine whether an erroneous denial of a motion to suppress contributed to the defendant's decision, unless at the time of the plea he states or reveals his reason for pleading guilty" (*People v Grant*, 45 NY2d 366, 379-380). "The *Grant* doctrine is not absolute, however, and [the Court of Appeals has] recognized that a guilty plea entered after an improper court ruling may be upheld if there is no 'reasonable possibility that the error contributed to the plea' " (*People v Wells*, 21 NY3d 716, 719). In our view, because the firearm was not suppressed and would have been admissible at trial, there is no reasonable possibility that the court's error in failing to suppress defendant's statement admitting possession of the firearm contributed to his decision to plead guilty (*cf. Grant*, 45 NY2d at 379-380).

All concur except LINDLEY, and TROUTMAN, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent. We agree with the majority's conclusion that County Court erred in denying that part of defendant's omnibus motion seeking suppression of the statement he made to the police in which he

admitted possession of the firearm. Unlike the majority, however, we cannot conclude that the error is harmless. Where, as here, "a conviction is based on a plea of guilty[,] an appellate court will rarely, if ever, be able to determine whether an erroneous denial of a motion to suppress contributed to the defendant's decision, unless at the time of the plea he [or she] states or reveals his [or her] reason for pleading guilty. This is especially true when the defendant has unsuccessfully sought to suppress a confession" (*People v Grant*, 45 NY2d 366, 379-380; *see People v Wells*, 21 NY3d 716, 717-718; *cf. People v Lloyd*, 66 NY2d 964, 965). In the absence of proof "that [a defendant] would have [pleaded guilty] even if his [or her] motion had been granted, harmless error analysis is inapplicable" (*People v Henry*, 133 AD3d 1085, 1087). Here, there is no such proof (*see People v Coles*, 62 NY2d 908, 910; *cf. Lloyd*, 66 NY2d at 965). Although the firearm is admissible and was found on defendant's person (*see People v Beckwith*, 303 AD2d 594, 595), we cannot say that the erroneous denial of the motion to suppress the statement did not contribute to defendant's decision to accept the plea offer that was extended to him by the People. We would therefore reverse the judgment, vacate the plea, grant that part of the omnibus motion seeking to suppress the statement at issue, and remit the matter to County Court for further proceedings on the indictment.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

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CA 16-01357

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

CHRISTOPHER R. MARRIOTT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VIRGINIA A. CAPPELLO, DEFENDANT-RESPONDENT.

GARVEY & GARVEY, BUFFALO (MATTHEW J. GARVEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MURA & STORM, PLLC, BUFFALO (KRIS E. LAWRENCE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered February 26, 2016. The order denied the motion of plaintiff to preclude the testimony and report of defendant's expert.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion insofar as it sought the imposition of a sanction, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action seeking to recover damages for injuries he allegedly sustained when his vehicle collided with a vehicle owned and operated by defendant. Plaintiff subsequently moved to preclude the testimony and report of defendant's expert, who conducted a medical examination of plaintiff. Plaintiff contends that Supreme Court should have granted the motion inasmuch as his right to have a representative present at the examination was violated. We agree that plaintiff's rights were violated, and we therefore modify the order accordingly.

On September 24, 2015, defendant served plaintiff with a notice of physical examination, scheduled for November 16, 2015, with a neurologist, who is also a licensed psychologist (hereafter, doctor). Plaintiff arrived at the scheduled examination with his attorney and a registered nurse. After the initial interview process started with the doctor's staff, plaintiff's counsel left the office. The nurse averred in her reply affidavit that plaintiff's counsel informed plaintiff, in front of office staff, that the nurse would be attending the entire evaluation. The nurse further averred in her reply affidavit, "The staff member who did the initial evaluation stated that would be the case so long as I stayed in the background and did not interfere with the examination." The parties presented various

accounts of what the doctor and the nurse said and did thereafter, but it is undisputed that the nurse hired by plaintiff to observe the examination was not present when the 2½-hour examination was conducted.

The doctor averred in his affidavit, "I am well aware that the law in the State of New York states that a party undergoing an independent medical examination may have a representative present during testing so long as that person does not interfere overtly with the conduct of the examination. This legal right conflicts with the ethical standards of my practice, but I am aware it exists." The doctor further averred that, in accordance with the ethical standards of his practice, he informed plaintiff and the nurse that, typically, he would conduct plaintiff's neuropsychological testing without the nurse in the room. The doctor averred that the nurse immediately "acquiesced" and that the doctor proceeded to conduct plaintiff's testing without a word of protest from either the nurse or plaintiff.

The nurse has a significantly different recollection. She averred instead that, as plaintiff was being escorted to the testing room, the doctor "stepped in front" of the nurse and said that the nurse was not allowed in the room during his testing. The nurse averred that she informed the doctor that she was there to attend the entire examination but was told by the doctor that she could not attend his testing. Although the nurse did not see the doctor again that day, she claims that she repeatedly asked his staff to be allowed to attend the examination and was told each time that she was not permitted to observe the examination. The portion of the examination from which the nurse was excluded spanned 2½ hours, not including a lunch break. The nurse averred that she made it clear to the doctor that she was there to observe the entire examination and that she in no way "acquiesced" to her exclusion therefrom.

As the dissent recognizes, a plaintiff "is 'entitled to be examined in the presence of [his or] her attorney or other . . . representative . . . so long as [that person does] not interfere with the conduct of the examinations' . . . , 'unless [the] defendant makes a positive showing of necessity for the exclusion of' such an individual" (*A.W. v County of Oneida*, 34 AD3d 1236, 1237-1238; *see Flores v Vescera*, 105 AD3d 1340, 1340-1341; *Jessica H. v Spagnolo*, 41 AD3d 1261, 1262-1263). Nonetheless, as the dissent notes, there is no requirement that a representative of plaintiff be present during the examination, and plaintiff may waive the right to have a representative present. Two examples of waiver are set forth by the dissent, the first of which involves the plaintiff's merely appearing for the examination without a representative. Clearly, that is not the factual situation here. Second, a waiver can occur by the examined party's unreasonable delay in making a motion to enforce the right (*see Pendergast v Consolidated Rail Corp.*, 244 AD2d 868, 869). Here, it was less than two months from the November 16, 2015 examination until the January 5, 2016 motion to preclude, not the 2½ years at issue in *Pendergast*, the decision relied upon the dissent.

The dissent, relying on *Cunningham v Anderson* (85 AD3d 1370,

1373, *lv dismissed in part and denied in part* 17 NY3d 948), concludes that the burden was on plaintiff to move for a protective order or otherwise seek judicial guidance before the examination took place. We note, however, that the Third Department in *Cunningham* shifted the burden to the plaintiff because the plaintiff's counsel had encountered the same situation with the same expert in a prior case. Plaintiff's counsel therefore should not have allowed the examination to proceed outside of the presence of the representative, and he failed to seek relief until after the note of issue was filed (*id.* at 1373). We conclude, instead, that it was incumbent upon the defense, which selected the doctor to perform the examination, to know of the doctor's "ethical standards" and to have either selected a different doctor who would follow the law or to seek guidance from the court before the examination concerning any limitations on plaintiff's right to have a representative present (*see* CPLR 3103 [a]).

Inasmuch as the determination of an appropriate sanction for the violation of a party's disclosure rights rests initially within the discretion of the trial court (*see generally Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strategies, Inc.*, 22 NY3d 877, 880), we remit the matter to Supreme Court for a determination of the appropriate remedy for the doctor's improper exclusion of the nurse hired by plaintiff to observe the physical examination.

All concur except SMITH, J.P., who dissents and votes to affirm in the following memorandum: I respectfully disagree with the majority that defendant or his expert were required to take any action to protect plaintiff's rights, and I therefore dissent. There is no dispute that plaintiff's attorney and a nurse accompanied plaintiff to the office of defendant's expert for the previously scheduled psychological examination, and that plaintiff's attorney left the office before the examination began. There is no indication that plaintiff's attorney inquired whether the nurse would be permitted to observe the examination, or that the attorney asked the defense expert for permission to have a representative observe it, and plaintiff did not move for permission to have his attorney or another representative observe the examination (*cf. Flores v Vescera*, 105 AD3d 1340, 1340). The parties presented varying evidence regarding what the defense expert said at the start of the examination, but they agree that the nurse was not present when the expert examined plaintiff. The record also establishes that neither plaintiff nor the nurse protested, and no one advised plaintiff to leave the examination room or to cease cooperating with the examination. Plaintiff appeals from an order denying his motion to preclude defendant from introducing the expert's testimony and report at trial. Contrary to the majority's conclusion, the defense expert was not required to take any action prior to examining plaintiff and, in the absence of any motion or protest by plaintiff's attorney or the nurse who was present, there is no basis upon which to preclude the expert's testimony.

I agree with the majority that "[a] party is 'entitled to be examined in the presence of [his or] her attorney or other . . . representative . . . so long as [that person does] not interfere with the conduct of the examinations' . . . , 'unless [the] defendant makes

a positive showing of necessity for the exclusion of' such an individual" (*A.W. v County of Oneida*, 34 AD3d 1236, 1237-1238; *see Flores*, 105 AD3d at 1340-1341; *Jessica H. v Spagnolo*, 41 AD3d 1261, 1262-1263). Nevertheless, as in many related situations in which a party "has the right to have an attorney observe the examination[, t]his right may, of course, be waived" (*Ughetto v Acrish*, 130 AD2d 12, 25, *appeal dismissed* 70 NY2d 871, *reconsideration denied* 70 NY2d 990; *see Gray v Crouse-Irving Mem. Hosp., Inc.*, 107 AD2d 1038, 1038-1039). There is no requirement that a representative of plaintiff be present during the examination of plaintiff by defendant's expert and, indeed, plaintiff could waive the right to have a representative present at an examination merely by appearing for the examination without a representative, or by waiting too long to make a motion to enforce such right (*see Pendergast v Consolidated Rail Corp.*, 244 AD2d 868, 869). Consequently, plaintiff's right to have a representative present was not violated inasmuch as "there is no indication in the record that any request for the presence [of the attorney or the nurse] was either made or denied" (*Matter of Lisa Marie S.*, 304 AD2d 762, 763, *lv denied* 100 NY2d 508, *lv dismissed* 100 NY2d 575; *cf. Pendergast*, 244 AD2d at 869). Therefore, plaintiff's "failure to demand his attorney's [or other representative's] presence at the exam is fatal to his claim" that he was improperly denied such presence (*Matter of Rosemary ZZ.*, 154 AD2d 734, 735, *lv denied* 75 NY2d 702). Based on that analysis, I conclude that Supreme Court "did not err in determining that, by failing to move for a protective order or seek guidance before the examination concerning counsel's ability to be present or observe it (*see* CPLR 3103 [a]), . . . plaintiff waived his rights and was not entitled to preclusion" (*Cunningham v Anderson*, 85 AD3d 1370, 1373, *lv dismissed in part and denied in part* 17 NY3d 948), and I would therefore affirm the order.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

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KA 14-01824

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHALLAMAR L. HAYWARD-CRAWFORD,
DEFENDANT-APPELLANT.

MULDOON, GETZ & RESTON, ROCHESTER (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered August 12, 2014. The judgment convicted defendant, upon a jury verdict, of arson in the third degree, arson in the fourth degree (two counts), attempted insurance fraud in the second degree, and conspiracy in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of arson in the third degree (Penal Law § 150.10 [1]), attempted insurance fraud in the second degree (§§ 110.00, 176.25), conspiracy in the fifth degree (§ 105.05 [1]), and two counts of arson in the fourth degree (§ 150.05 [1]), based on allegations that she conspired with others to set fire to her vacant rental property in order to collect insurance money. The fire destroyed defendant's property and caused damage to two neighboring properties. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We agree with defendant, however, that she was denied a fair trial based upon the cumulative effect of the prosecutor's misconduct during jury selection, cross-examination and summation. Although some of defendant's contentions were not preserved for our review, we exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

During jury selection, the prosecutor improperly inquired if defendant "look[ed] like an arsonist" because she was dressed in red-

colored clothing. During cross-examination, the prosecutor improperly questioned defendant on her inability to make bail, thus indicating that defendant was incarcerated (*see People v Fredrick*, 53 AD3d 1088, 1089), and improperly questioned defendant about the conviction of her codefendant husband of the same crime (*see generally People v Rivera*, 116 AD2d 371, 373-374). The prosecutor also improperly questioned defendant concerning the criminal history of her husband (*see People v Bartholomew*, 105 AD3d 613, 614). During summation, the prosecutor commented on the failure of defendant's husband to testify regarding her financial condition, again implying that her husband had been convicted of the same crime and was incarcerated (*see generally Rivera*, 116 AD2d at 373-374). Although County Court sustained many of defense counsel's objections and gave curative instructions, we cannot conclude on this record that any resulting prejudice was alleviated (*see People v Griffin*, 125 AD3d 1509, 1512; *People v Clark*, 195 AD2d 988, 991). Moreover, even when a trial court repeatedly sustains a defendant's objections and instructs the jury to disregard certain remarks by the prosecutor, "[a]fter a certain point, . . . the cumulative effect of a prosecutor's improper comments . . . may overwhelm a defendant's right to a fair trial" (*People v Riback*, 13 NY3d 416, 423), and that is the case here. We therefore "must reverse the conviction and grant a new trial, . . . without regard to any evaluation as to whether the errors contributed to . . . defendant's conviction. The right to a fair trial is self-standing and proof of guilt, however overwhelming, can never be permitted to negate this right" (*People v Crimmins*, 36 NY2d 230, 238).

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

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

435

CA 16-01207

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

GORDON GANNON AND GREGORY GANNON,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TODD SADEGHIAN, ET AL., DEFENDANTS,
AND ROSS M. BAIGENT, DEFENDANT-RESPONDENT.

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

BARCLAY DAMON, LLP, BUFFALO (CHARLES VON SIMSON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered October 1, 2015. The order and judgment, insofar as appealed from, granted that part of the motion of defendant Ross M. Baigent for summary judgment dismissing plaintiffs' causes of action against him for breach of contract and tortious interference with contract, denied that part of the cross motion of plaintiffs for summary judgment against defendant Ross M. Baigent and denied as moot that part of the cross motion of plaintiffs to preclude defendant Ross M. Baigent from offering any evidence at trial.

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

Memorandum: In this breach of contract action, plaintiffs appeal from those parts of an order and judgment that granted that part of the motion of defendant Ross M. Baigent seeking summary judgment dismissing the causes of action for breach of contract and tortious interference with contract against him; denied that part of plaintiffs' cross motion seeking summary judgment on the complaint against Baigent; and denied as moot that part of plaintiffs' cross motion seeking to preclude Baigent from offering evidence at trial on the ground that Baigent failed to comply with discovery demands. We note at the outset that plaintiffs have abandoned any contention that Supreme Court erred in dismissing the cause of action for tortious interference with a contract against Baigent by failing to address it in their brief (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Plaintiffs, Baigent, and defendants Rory O'Connor and Hugh Collins, now deceased, were founding members of Cataclean Americas,

LLC (CAL), an entity formed pursuant to an operating agreement between those individuals to act as the exclusive North and Central American distributor for a product called Cataclean. Cataclean was invented by Collins, who held Cataclean's patent. System Products UK, Ltd. (SPUK), an entity owned by Collins and Baigent, was Collins' agent for all matters related to Cataclean and the associated intellectual property. Cataclean's trademark was held by Rosehoff, Ltd. (Rosehoff), another entity owned by Collins and Baigent.

After CAL's formation, SPUK and CAL entered an agreement whereby CAL was licensed to distribute Cataclean. Although the licensing agreement expressly prohibited CAL from assigning its rights, CAL purported to assign its distribution rights to Prestolite Performance (Prestolite). Rosehoff and SPUK commenced a copyright infringement action in federal court against Prestolite, CAL, and plaintiffs, and Prestolite thereafter terminated its contractual relationship with CAL and allegedly entered into a contractual relationship with Rosehoff. Plaintiffs then commenced this action seeking, inter alia, damages for alleged breach of the CAL operating agreement by Baigent and Collins. Collins defaulted, and it was later discovered that he had died. The remaining defendants other than Baigent have left this action as the result of a settlement agreement.

We conclude that the court properly granted that part of Baigent's motion seeking summary judgment dismissing the cause of action for breach of the operating agreement and denied that part of plaintiffs' cross motion for summary judgment on that cause of action. The amended complaint alleges that Baigent breached the CAL operating agreement by entering into a business relationship with Prestolite, which plaintiffs contend was an opportunity usurped from CAL. The pertinent contractual provision allows members of CAL, such as Baigent, to compete with CAL, but requires an accounting and the imposition of a trust for any proceeds members receive through their use of "Company Property," including information developed exclusively for CAL and opportunities offered to CAL. The record establishes, however, that the Prestolite line of business was not CAL's company property, inasmuch as CAL had no right to assign to Prestolite any rights with respect to Cataclean or its distribution. Thus, Baigent established as a matter of law that he did not breach CAL's operating agreement because his business relationship with Prestolite did not amount to improper competition with CAL, and plaintiffs failed to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562), let alone demonstrate their own entitlement to judgment as a matter of law.

We reject plaintiffs' contention that summary judgment was premature because further discovery was needed. Plaintiffs failed "to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (*Buto v Town of Smithtown*, 121 AD3d 829, 830 [internal quotation marks omitted]; *see* CPLR 3212 [f]), and the " '[m]ere hope that somehow the plaintiff[s] will uncover evidence that will prove a case' " is insufficient for denial of the motion (*Mackey v Sangani*, 238 AD2d 919, 920). Although

plaintiffs contend that Baigent has refused to produce documents, no such refusal appears in the record, and plaintiffs, as the appellants, must suffer the consequences of proceeding on an incomplete record (*see Matter of Rodriguez v Ward*, 43 AD3d 640, 641).

We also reject plaintiffs' contention that they are entitled to summary judgment on the ground that Baigent should be collaterally estopped from defending himself in the action by virtue of the default of Baigent's deceased codefendant, i.e., Collins. It is well settled that a "judgment obtained . . . against [a] defaulting defendant is not entitled to collateral estoppel effect against the nondefaulting defendants who would otherwise be denied a full and fair opportunity to litigate issues of liability" (*Holt v Holt*, 262 AD2d 530, 530; *see Chambers v City of New York*, 309 AD2d 81, 85-86; *see also Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456-457).

In light of our determination, we further conclude that the court properly denied as moot that part of plaintiffs' cross motion seeking to preclude Baigent from offering evidence at trial on the ground that he failed to comply with discovery demands.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

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CA 16-01249

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

IN THE MATTER OF TOWN OF MARILLA AND TIMOTHY J. SCOTT, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

STANLEY E. TRAVIS, TRAV-CO FARMS, SUSTAINABLE BIOPOWER, LLC, AND NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, RESPONDENTS-RESPONDENTS.

RICHARD E. STANTON, BUFFALO, FOR PETITIONERS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS STANLEY E. TRAVIS, TRAV-CO FARMS, AND SUSTAINABLE BIOPOWER, LLC.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MEREDITH G. LEE-CLARK OF COUNSEL), FOR RESPONDENT-RESPONDENT NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION.

Appeal from a judgment (denominated judgment and order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered October 13, 2015 in a proceeding pursuant to CPLR article 78. The judgment, among other things, consolidated two separate proceedings and dismissed the consolidated proceeding.

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

Memorandum: Respondent Sustainable BioPower, LLC, and its predecessor in interest, quasar energy group, LLC (collectively, BioPower), applied to respondent New York State Department of Environmental Conservation (DEC) for a solid waste facility management permit (Permit), which would allow it to store the end product of wastewater and other waste treatment processes that BioPower conducted in two existing anaerobic digestion facilities. That end product, trade named equate, would eventually be used as an agricultural fertilizer. BioPower sought permission to store the equate in an existing million-gallon manure storage tank on a farm, until it could be transported and used as fertilizer. After petitioner Town of Marilla declined to seek lead agency designation for purposes of the State Environmental Quality Review Act ([SEQRA] ECL art 8), the DEC designated itself as lead agency. After reviewing the application and seeking further information and increased detail regarding the

proposal, the DEC issued a negative declaration of environmental significance. Next, after seeking more information from BioPower, seeking public comment, and considering the comments received, the DEC granted the Permit. Petitioners commenced separate CPLR article 78 proceedings, each seeking to annul the negative declaration and the determination to grant the Permit. Petitioners now appeal from a judgment that, inter alia, consolidated the proceedings and dismissed the consolidated proceeding. We affirm.

Petitioners contend that the DEC erred in granting the Permit based on its improper interpretation of the procedures set forth in its applicable regulations. "Our review of an agency determination that was not made after a quasi-judicial hearing is limited to consideration of whether the determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion" (*Matter of Harpur v Cassano*, 129 AD3d 964, 965, *lv denied* 26 NY3d 916; *see* CPLR 7803 [3]). Here, petitioners contend that the DEC's determination to issue the Permit was "made in violation of lawful procedure" (*Harpur*, 129 AD3d at 965), because the DEC's regulations mandate that any application for a permit be accompanied by a report signed, stamped and certified by an engineer, containing certain specific information, including wind maps, topographical maps showing streams and elevations, and other detailed environmental data (*see* 6 NYCRR part 360), and the application for the Permit did not include some of those items. We reject that contention.

"[I]t is well settled that an agency's failure to follow procedural provisions that are merely directory rather than mandatory in nature will not warrant annulling a subsequent determination unless the challengers show that substantial prejudice resulted from the agency's noncompliance" (*Matter of Dudley Rd. Assn. v Adirondack Park Agency*, 214 AD2d 274, 279, *lv dismissed in part and denied in part* 87 NY2d 952; *see Matter of Syquia v Board of Educ. of Harpursville Cent. Sch. Dist.*, 80 NY2d 531, 535-536). Here, the record regarding the DEC's determination of the application for the Permit establishes that the DEC obtained and reviewed all of the information that petitioners contend should be included in the engineering report, and that BioPower's engineers certified, signed and stamped all of the information presented in support of the application. In addition, the DEC established that it already possessed much of the information that petitioners claim was omitted from the application, including wind and topographical maps. Furthermore, the evidence in the record establishes that the process took more than a year, during which the DEC made several requests for additional information, documentation, or engineering certification from BioPower, and that all the requested information was provided. Thus, Supreme Court properly dismissed the petitions insofar as they sought to vacate the Permit because petitioners established no prejudice from the DEC's failure to insist that BioPower and its predecessor put all the information into a single report. In addition, the DEC's interpretation of its regulation is entitled to deference inasmuch as it "involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom"

(*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459; *see Matter of Lighthouse Pointe Prop. Assoc. LLC v New York State Dept. of Envtl. Conservation*, 14 NY3d 161, 176).

Conversely, with respect to the procedural rules governing determinations pursuant to SEQRA, it is well settled that a lead agency must strictly comply with SEQRA's procedural mandates, and failure to do so will result in annulment of the lead agency's determination of significance (*see Matter of King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 347; *Matter of Pyramid Co. of Watertown v Planning Bd. of Town of Watertown*, 24 AD3d 1312, 1313, *lv dismissed* 7 NY3d 803). Here, however, a review of the extensive record demonstrates that the DEC complied with the procedural requirements of SEQRA in determining that the issuance of the Permit would have no significant adverse environmental impacts and in issuing the negative declaration. At the DEC's request, BioPower prepared part one of a full environmental assessment form (EAF), which included a comprehensive report prepared by BioPower's engineers that identified and reviewed in detail the areas of environmental concern relevant to the storage of equate in the existing manure tank, including possible odor emissions, mitigation of the effects of accidental discharges, and traffic. Later, again pursuant to the DEC's request, BioPower prepared portions of parts two and three of the EAF. The DEC concluded that the EAF was properly completed, and we agree inasmuch as it "contain[s] enough information to describe the proposed action, its location, its purpose and its potential impacts on the environment" (6 NYCRR 617.2 [m]). We have considered petitioners' remaining contentions concerning the DEC's compliance with SEQRA's procedural mandates, and we conclude that they are without merit.

Where, as here, "an agency has followed the procedures required by SEQRA, a court's review of the substance of the agency's determination is limited" (*Matter of Eadie v Town Bd. of Town of N. Greenbush*, 7 NY3d 306, 318). "It is well established that, 'in reviewing the substantive issues raised in a SEQRA proceeding, [a] court will not substitute its judgment for that of the agency if the agency reached its determination in some reasonable fashion' " (*Matter of Kaufmann's Carousel v City of Syracuse Indus. Dev. Agency*, 301 AD2d 292, 304, *lv denied* 99 NY2d 508). Upon conducting such a review, contrary to petitioners' contention, we conclude that the DEC properly "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

473

KA 15-01067

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD HOUGH, JR., DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

RONALD HOUGH, JR., DEFENDANT-APPELLANT PRO SE.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JULIE BENDER FISKE 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 a jury verdict, of robbery in the first degree, attempted murder in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of robbery in the first degree (Penal Law § 160.15 [2]), attempted murder in the first degree (§§ 110.00, 125.27 [1] [a] [vii], [b]), and criminal possession of a weapon in the second degree (§ 265.03 [3]). In his main and pro se supplemental briefs, defendant contends that his conviction should be reversed inasmuch as County Court erred in denying suppression of his statements to the police, relief that defendant had sought on the ground that he was detained without reasonable suspicion and questioned without the benefit of *Miranda* warnings. We reject that contention. Based on the evidence adduced at the suppression hearing, we conclude that the court properly found that the stop and brief detention of defendant was, from its outset, a level three encounter under *De Bour* (*see People v De Bour*, 40 NY2d 210, 223; *see also People v Martinez*, 80 NY2d 444, 448; *People v Hicks*, 68 NY2d 234, 238). The court properly determined that the police officers' detection of the odor of burning marihuana emanating from the vicinity of defendant and his walking companion supplied the officers with reasonable suspicion of criminal activity sufficient to warrant stopping both men (*see People v Norman*, 142 AD3d 1107, 1108, *lv denied* 28 NY3d 1148; *People v Lightfoot*, 124 AD3d 802, 803, *lv denied* 25 NY3d 990; *cf. People v Walker*, 128 AD3d

1499, 1500, *lv denied* 26 NY3d 936). Moreover, the officers' level of suspicion was increased when defendant's companion immediately fled and, during the ensuing chase, displayed and discarded a handgun, which was promptly recovered by the officers. The evidence at the suppression hearing established that only at that point was defendant, who had been placed unhandcuffed in the rear of a patrol vehicle after the gun was sighted, briefly questioned before being released.

Moreover, the court properly determined that, to the extent that defendant may have been subjected to custodial questioning with respect to his name and other pedigree information, defendant's answers to those questions need not be suppressed even though the questions were not preceded by *Miranda* warnings (*see People v Rodney*, 85 NY2d 289, 293; *People v Carrasquillo*, 50 AD3d 1547, 1548, *lv denied* 11 NY3d 735). To the extent that defendant may have been subjected to custodial interrogation, meaning questioning or its functional equivalent intended to elicit an incriminating response (*see generally Rhode Island v Innis*, 446 US 291, 300-301; *People v Ferro*, 63 NY2d 316, 321-323, *cert denied* 472 US 1007), we conclude that the impact of defendant's unwarned answer to such questioning, i.e., that he did not know his gun-discarding companion, was of minimal impact in demonstrating defendant's guilt of the charged crimes. We therefore further conclude that any error on the part of the court in refusing to suppress that single nonpedigree statement of defendant is harmless beyond a reasonable doubt (*see People v Dean*, 145 AD3d 1633, 1633; *see generally People v Crimmins*, 36 NY2d 230, 237).

We conclude that defendant's challenge to the sufficiency of the evidence with respect to his intent to kill the victim is unpreserved for our review (*see People v Tyler*, 43 AD3d 633, 633, *lv denied* 9 NY3d 1010; *see also People v Gray*, 86 NY2d 10, 19) and, in any event, it is without merit. It is well established that a defendant's "[i]ntent to kill may be inferred from [his] conduct as well as the circumstances surrounding the crime" (*People v Lopez*, 96 AD3d 1621, 1622, *lv denied* 19 NY3d 998 [internal quotation marks omitted]), and that a " 'jury is entitled to infer that a defendant intended the natural and probable consequences of his acts' " (*People v Schumaker*, 136 AD3d 1369, 1370, *lv denied* 27 NY3d 1075, *reconsideration denied* 28 NY3d 974; *see People v Bueno*, 18 NY3d 160, 169; *People v Brown*, 120 AD3d 954, 955-956, *lv denied* 24 NY3d 1118). Further, 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 with respect to the issue whether defendant possessed the intent to kill (*see Schumaker*, 136 AD3d at 1371; *Brown*, 120 AD3d at 955-956; *see generally People v Bleakley*, 69 NY2d 490, 495).

We further conclude that the testimony of the accomplice was sufficiently corroborated (*see People v Davis*, 28 NY3d 294, 302-303; *People v Hilkert*, 145 AD3d 1609, 1609-1610, *lv denied* 29 NY3d 949; *see generally People v Reome*, 15 NY3d 188, 191-192; *People v Breland*, 83 NY2d 286, 292-294), and we likewise conclude that the jury did not fail to give that testimony the weight it should be accorded on the

issue of defendant's identity as the robber and shooter (*see generally Bleakley*, 69 NY2d at 495).

We have considered defendant's remaining contentions raised in his pro se supplemental brief, and we conclude that they are without merit. Finally, the sentence is not unduly harsh or severe.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

474

CA 16-01398

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

IN THE MATTER OF ARBITRATION BETWEEN LIBERTY MUTUAL INSURANCE COMPANY, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

MIA KADAH, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (LISA M. DIAZ-ORDAZ OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Walter W. Hafner, Jr., A.J.), entered January 8, 2016. The order denied the petition for a stay of arbitration.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reinstating the petition insofar as it seeks a temporary stay of arbitration, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this dispute over supplemental uninsured motorist (SUM) coverage, petitioner filed a petition seeking a permanent stay of arbitration on the ground that it had no responsibility to provide SUM coverage because the underlying insurance policies had not been exhausted. In the alternative, petitioner sought a temporary stay of arbitration to allow for discovery. Respondent opposed the petition. Supreme Court determined that petitioner failed to establish any ground for a stay of arbitration and therefore denied the petition. The court did not explicitly address petitioner's alternative request for a temporary stay. Thereafter, petitioner moved for leave to renew and/or reargue its petition.

In appeal No. 1, petitioner appeals from the order denying its petition for a stay of arbitration. In appeal No. 2, petitioner appeals from an order denying its motion for leave to renew and/or reargue its petition.

In light of this Court's recent decision in *Kadah v Byrd* (148 AD3d 1811, 1812-1814), the ground for that part of petitioner's motion seeking leave to renew no longer exists, and thus the corresponding

part of appeal No. 2 is dismissed on the ground of mootness (*see generally Matter of Curry v Vertex Restoration Corp.*, 252 AD3d 360, 360). Furthermore, no appeal lies from an order denying a motion seeking leave to reargue, and thus that part of petitioner's appeal must also be dismissed (*see Empire Ins. Co. v Food City*, 167 AD3d 983, 984). Appeal No. 2 is therefore dismissed in its entirety.

We agree with the court that petitioner is not entitled to a permanent stay of arbitration. It is unclear from the court's decision, however, whether it considered and denied petitioner's alternative request for a temporary stay of arbitration pursuant to the subject policy's conditions precedent to arbitration, or whether it left the request for a temporary stay pending and undecided. According to petitioner, it is entitled to the fulfillment of the conditions precedent, including respondent's submission to an IME and the disclosure of medical records. We note that at oral argument, respondent's counsel was amenable to conducting some discovery prior to arbitration. We therefore modify the order by reinstating the petition insofar as it seeks a temporary stay of arbitration, and we remit the matter to Supreme Court for a determination whether petitioner is entitled to a temporary stay based on the conditions precedent.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

475

CA 16-01399

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

IN THE MATTER OF ARBITRATION BETWEEN LIBERTY MUTUAL INSURANCE COMPANY, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

MIA KADAH, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (LISA M. DIAZ-ORDAZ OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Walter W. Hafner, Jr., A.J.), entered June 8, 2016. The order denied the motion of petitioner for leave to renew or reargue.

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

Same memorandum as in *Matter of Liberty Mutual Ins. Co. (Mia Kadah)* ([appeal No. 1] ___ AD3d ___ [June 9, 2017]).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

476

CAF 15-01696

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

IN THE MATTER OF CHARLA SHONYO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN SHONYO, RESPONDENT-APPELLANT.

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

THEODORE W. STENUF, ATTORNEY FOR THE CHILDREN, MINOA.

Appeal from an order of the Family Court, Onondaga County (William W. Rose, R.), entered September 14, 2015 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner residential custody of the subject children.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the fourth ordering paragraph and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: Prior to the commencement of the instant proceeding pursuant to Family Court Act article 6, custody of the parties' children was governed by the provisions of an oral stipulation incorporated into a judgment of divorce entered in March 2012. Pursuant to the judgment, petitioner mother and respondent father agreed to joint legal and physical custody of their two children—a 12-year-old son and 16-year-old daughter—with each parent receiving 50% of the parenting time. The mother filed a petition seeking "immediate temporary custody" and "sole custody" of the children, citing as a change in circumstances an incident that occurred in the summer of 2014. The father filed an amended petition seeking enforcement of the custody provisions incorporated into the 2012 judgment, claiming that the mother had violated the terms of the judgment by refusing him equal access to the children.

Family Court appointed an Attorney for the Children (AFC) and referred the matter to a referee. Prior to the commencement of the temporary custody hearing, the parties agreed that, given the daughter's age, she was no longer part of the proceeding, and the hearing was conducted with regard to only the son. The court (Rose, R.) issued a temporary order reducing the father's "parenting time" to

alternating weekends. After a permanent custody trial, the court issued findings of fact and conclusions of law, finding that the mother had established a substantial change in circumstances warranting a modification of the judgment as it related to custody, and awarded the mother residential custody. The court also determined that the father had failed to establish his entitlement to the relief he sought in his amended petition. The court's order, in addition to including the aforementioned determinations, also provided, as relevant here, that the parties would continue sharing legal custody of their son, and that the father would have visitation on alternating weekends.

As an initial matter, the father's contention that reversal of the order is warranted on the ground that the court was biased against him is unpreserved for our review because he failed to make a motion asking the court to recuse itself (*see Matter of Curry v Reese*, 145 AD3d 1475, 1476; *Matter of Baby Girl Z. [Yaroslava Z.]*, 140 AD3d 893, 894). In any event, there is no evidence in the record that the court exhibited any bias against the father (*see Curry*, 145 AD3d at 1476; *Matter of Rasyn W.*, 270 AD2d 938, 938, *lv denied* 95 NY2d 766). Having failed to make a motion seeking the AFC's removal, the father likewise failed to preserve his contention that the AFC had a conflict of interest that impacted her representation of the children because of the children's alleged divergent interests (*see Matter of Aaliyah H. [Mary H.]*, 134 AD3d 1574, 1575, *lv denied* 27 NY3d 906).

The father does not challenge the court's determination that the mother met her initial burden of establishing a change in circumstances (*see generally Matter of O'Connell v O'Connell*, 105 AD3d 1367, 1367). Rather, the father contends that the court did not consider the best interests of his son before initially awarding temporary custody to the mother and then awarding her permanent residential custody. With regard to the former contention, we note that the father's challenge to the temporary order has been rendered moot by the court's issuance of the final order (*see Matter of Viscuso v Viscuso*, 129 AD3d 1679, 1682).

Contrary to the father's contention, there is a sound and substantial basis in the record to support the court's determination that it is in the best interests of the parties' son that the mother have residential custody (*see Matter of Rokitka v Bauer*, 219 AD2d 834, 834). In reaching that conclusion, the court considered all the relevant factors, including the stability of the existing custody arrangement, parental fitness, each parent's ability to provide for the emotional and intellectual development of the child, the parents' financial status and ability to provide for the child, the child's individual needs and desires, and the child's need to live with siblings (*see Fox v Fox*, 177 AD2d 209, 210; *see also Eschbach v Eschbach*, 56 NY2d 167, 172-173).

We agree with the father, however, that remittal to the court is warranted so that it may fashion a schedule of visitation for holidays and school breaks. The court stated in the fourth ordering paragraph "that holidays and school breaks shall be shared as agreed between the

parties." Given the acrimonious nature of the parties' relationship, however, including the parties' repeated arguments over visitation, we conclude that the court order with regard to visitation for holidays and schools breaks is unrealistic to the extent that it requires the parties to cooperate in reaching an agreement (*see Gillis v Gillis*, 113 AD3d 816, 817). We therefore modify the order by vacating the fourth ordering paragraph and we remit the matter to Family Court to provide a more definitive schedule of visitation for holidays and school breaks that is in the son's best interests.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

482

CA 16-01843

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

MARDI JOHN, BY THE PARENT AND NATURAL GUARDIAN,
CHERYL KENDALL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL CASSIDY, DEFENDANT,
AND PAUL KLEINDIENST, DEFENDANT-APPELLANT.

DANIEL CASSIDY AND PAUL KLEINDIENST,
THIRD-PARTY PLAINTIFFS,

V

DANIEL A. MESSINA AND DIKK SCHRADER,
THIRD-PARTY DEFENDANTS.

FLINK SMITH LAW LLC, ALBANY (CHRISTOPHER A. GUETTI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered April 11, 2016. The order, among other things, denied that part of the motion of defendants seeking summary judgment dismissing the complaint against defendant-third-party plaintiff Paul Kleindienst.

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

Memorandum: Infant plaintiff, by her parent and natural guardian, commenced this action seeking damages for injuries she allegedly sustained as a result of her exposure to lead paint while residing in an apartment in a building allegedly owned by defendants-third-party plaintiffs Daniel Cassidy and Paul Kleindienst (defendants). Defendants jointly moved for, inter alia, summary judgment dismissing the complaint against them. Supreme Court granted the motion in part by awarding summary judgment to Cassidy and dismissing the complaint against him. On this appeal, Kleindienst contends that the court erred in denying that part of the motion seeking summary judgment dismissing the complaint against him. We reject that contention.

It is well settled that "[l]iability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of [the] premises . . . The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property" (*Clifford v Woodlawn Volunteer Fire Co., Inc.*, 31 AD3d 1102, 1103 [internal quotation marks omitted]). "It has been held uniformly that control is the test which measures generally the responsibility in tort of the owner of real property" (*Ritto v Goldberg*, 27 NY2d 887, 889). It is equally well settled that, "[i]n order for a landlord to be held liable for a lead paint condition, it must be established that the landlord had actual or constructive notice of the hazardous condition and a reasonable opportunity to remedy it, but failed to do so" (*Spain v Holl*, 115 AD3d 1368, 1369; *see generally Chapman v Silber*, 97 NY2d 9, 19-20). A plaintiff can establish that the landlord had constructive notice of a hazardous lead paint condition by showing that the landlord: "(1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment" (*Chapman*, 97 NY2d at 15).

Inasmuch as this was defendants' motion for summary judgment, Kleindienst had the burden of establishing either that he did not occupy, own, control, or have a special use of the property (*see generally Butler v Rafferty*, 100 NY2d 265, 270; *Basso v Miller*, 40 NY2d 233, 241), or that he "had no actual or constructive notice of the hazardous lead paint condition prior to an inspection conducted by the [Cattaraugus] County Department of Health" (*Stokely v Wright*, 111 AD3d 1382, 1382; *see generally Chapman*, 97 NY2d at 15). "The factors set forth in *Chapman* . . . remain the bases for determining whether a landlord knew or should have known of the existence of a hazardous lead paint condition and thus may be held liable in a lead paint case" (*Watson v Priore*, 104 AD3d 1304, 1305, *lv dismissed in part and denied in part* 21 NY3d 1052; *see Sykes v Roth*, 101 AD3d 1673, 1674).

Contrary to Kleindienst's contention, he failed to establish as a matter of law that he did not own or control the building in which infant plaintiff resided at all relevant times. In 1990, defendants entered into an installment sales contract (first contract) pursuant to which Cassidy would retain title to the property but would relinquish possession of the property to Kleindienst, who would make installment payments until 1998, at which time Cassidy would transfer a deed to Kleindienst "conveying good and marketable title . . . so as to convey to [Kleindienst] the fee simple of the premises." It is undisputed that Kleindienst took possession and control of the property at that time. Infant plaintiff's mother (mother), who at that time had two other minor children, thereafter entered into a rental agreement with Kleindienst and moved into an apartment in the building. Infant plaintiff was born in August of 1993, while her mother was still residing in the building. In March 1994, Kleindienst entered into a second installment sales contract with third-party

defendants (second contract), which was virtually identical in its terms to the first contract. In August 1994, infant plaintiff was found to have elevated lead levels in her blood and, by January 1995, those lead levels had increased. The mother and her family moved out of the apartment.

Inasmuch as infant plaintiff's elevated lead levels were not discovered until August 1994, months after Kleindienst entered into the second contract, he contends that he did not control or own the property at the time infant plaintiff was injured. Although we agree with Kleindienst that a nonassignment clause in the first contract did not render the second contract void inasmuch as the nonassignment clause "did not provide that any [future] assignment would be void or invalid" (*Almeida Oil Co., Inc. v Singer Holding Corp.*, 51 AD3d 604, 606; *cf. Singer Asset Fin. Co., LLC v Bachus*, 294 AD2d 818, 820, *lv denied* 98 NY2d 615), we nevertheless conclude that defendants' own submissions raise triable issues of fact whether Kleindienst owned or controlled the premises.

Upon execution of an installment contract, like those at issue on this appeal, "the vendee acquires equitable title . . . The vendor holds the legal title in trust for the vendee and has an equitable lien for the payment of the purchase price" (*Bean v Walker*, 95 AD2d 70, 72). Thus, "the vendee in possession, for all practical purposes, is the owner of the property with all the rights of an owner subject only to the terms of the contract" (*id.*). Nevertheless, "[t]he fact that [the vendor] ha[s] relinquished possession of the property in favor of [the vendee does] not extinguish [the vendor's] status as fee owner[] of the property" (*Nephew v Barcomb*, 260 AD2d 821, 822). Moreover, in assessing an out-of-possession landowner's duty in tort, it remains appropriate to "look not only to the terms of the agreement but to the parties' course of conduct—including, but not limited to, the landowner's ability to access the premises—to determine whether the landowner in fact surrendered control over the property such that the landowner's duty is extinguished as a matter of law" (*Gronski v County of Monroe*, 18 NY3d 374, 380-381, *rearg denied* 19 NY3d 856).

Kleindienst does not dispute his ownership interest and control over the building between execution of the first and second contracts. Rather, he contends that he neither owned nor controlled the property following execution of the second contract. While we agree with Kleindienst that cases analyzing the status of an owner under the liberal definition of "owner" under the Labor Law statutes are distinguishable (*see Custer v Jordan*, 107 AD3d 1555, 1556-1557), we nevertheless conclude that the evidence submitted by defendants raises triable issues of fact whether Kleindienst retained sufficient control over the property after the second contract to be liable for the dangerous lead paint condition in the mother's apartment (*cf. Conneely v Herzog*, 33 AD3d 1065, 1066; *see generally Gronski*, 18 NY3d at 380-382). Indeed, Kleindienst even testified that "between 1990 and 1995," i.e., after execution of the second contract, he had a right to enter the property and to make all repairs. Defendants also submitted the mother's deposition testimony in which she stated that Kleindienst entered her property to replace windows during the summer of 1994,

i.e., after the second contract was executed.

Even assuming, arguendo, that Kleindienst established as a matter of law that he owed no duty to infant plaintiff following execution of the second contract, we conclude that infant plaintiff raised triable issues of fact whether her ingestion of lead occurred during the time period before the second contract was executed. The evidence submitted by both defendants and infant plaintiff establish that infant plaintiff was observed with paint chips in her mouth and with her mouth on the apartment's windowsills during that time period. Infant plaintiff's expert opined that her injuries were caused by her significant exposure to lead (*see Rodrigues v Lesser*, 136 AD3d 1322, 1324). Inasmuch as infant plaintiff "had exclusively resided in that apartment at the time that [s]he tested positive for elevated" lead levels (*Wynn v T.R.I.P. Redevelopment Assoc.*, 296 AD2d 176, 184), there was evidentiary support for the opinion of infant plaintiff's expert that she had been exposed to and had ingested lead paint during the time period before the second contract was executed (*see Charette v Santspree*, 68 AD3d 1583, 1585-1586; *cf. Davis v Brzostowski*, 133 AD3d 1371, 1372). " '[T]he admissibility and scope of [expert] testimony is addressed to the trial court's sound discretion' " (*Robinson v Bartlett*, 95 AD3d 1531, 1536), and we reject Kleindienst's contention that the court should have disregarded the expert's opinion on the ground that it was based entirely on conjecture and speculation.

Finally, we conclude that defendants failed to establish as a matter of law that Kleindienst lacked constructive notice of the lead paint condition (*see generally Chapman*, 97 NY2d at 15). It is undisputed that Kleindienst was aware that young children were residing with the mother in the apartment and, as noted above, defendants' own submissions raise triable issues of fact whether Kleindienst retained a right of entry and assumed a duty to make repairs. In addition, defendants' own submissions raise triable issues of fact whether Kleindienst knew that the building was constructed at a time before lead-based interior paint was banned (*see Jackson v Brown*, 26 AD3d 804, 805), was aware that paint was peeling on the premises (*see Rodrigues*, 136 AD3d at 1324), and knew the hazards of lead-based paint to young children (*see Derr v Fleming*, 106 AD3d 1240, 1242). Thus, the burden never shifted to infant plaintiff to raise triable issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 620, 624).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

486

CA 16-02050

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

SANDRA J. SLACER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN M. KEARNEY, DEFENDANT-APPELLANT.

PHETERSON SPATORICO LLP, ROCHESTER (DERRICK A. SPATORICO OF COUNSEL), FOR DEFENDANT-APPELLANT.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered February 11, 2016. The judgment denied the motion of defendant for summary judgment, granted the cross motion of plaintiff for summary judgment and determined the boundary line between parcels of real property owned by the parties.

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

Memorandum: Plaintiff and defendant own adjoining parcels of real property, known as 130 and 138 Beresford Road, respectively, in Rochester. Plaintiff's chain-link fence, which exists near the boundary line of the parcels, encroaches onto a portion of defendant's parcel, and that strip of land is the center of the parties' dispute. Plaintiff commenced this action seeking a declaration that she is the title owner of the disputed land by adverse possession. Defendant moved for summary judgment dismissing the complaint with prejudice on the ground that it fails to state a cause of action and is barred by the applicable statute of limitations. Plaintiff cross-moved for summary judgment. We conclude that Supreme Court properly denied defendant's motion, granted plaintiff's cross motion, and issued a declaration in plaintiff's favor.

As an initial matter, we note that defendant did not dispute on the motion that the applicable limitations provision is CPLR 212 (a). Thus, defendant's contention, raised for the first time on appeal, that CPLR 212 (a) does not apply, is unpreserved for our review (*see generally Fischbein v 1498 Third Realty Corp.*, 225 AD2d 1104, 1105).

It is well settled that an adverse possessor gains title to occupied real property upon the expiration of the statute of limitations for an action to recover real property pursuant to CPLR

212 (a) (*see* RPAPL 501; *see also Franza v Olin*, 73 AD3d 44, 46-47). CPLR 212 (a) provides that "[a]n action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest, was seized *or possessed of the premises within ten years before the commencement of the action*" (emphasis added). Here, plaintiff gained possession of the disputed land when she purchased her property in 1986 and continued to possess the disputed land for 10 years; thus, so long as the other elements of adverse possession have been met, plaintiff acquired legal title to the disputed land in 1996.

Defendant contends that plaintiff was required to commence a judicial action after the requisite 10-year period passed, i.e., sooner than 2014, in order to gain title to the disputed land. We reject that contention on the ground that "RPAPL 501 (2), as amended, recognizes that *title, not the right to commence an action to determine title*, is obtained upon the expiration of the limitations period" (*Franza*, 73 AD3d at 47 [additional emphasis added]). As we explained in *Franza*, " '[A]dverse possession for the requisite period of time not only cuts off the true owner's remedies but also divests [the owner] of his [or her] estate' . . . Thus, at the expiration of the statutory period, legal title to the land is transferred from the owner to the adverse possessor . . . Title to property may be obtained by adverse possession alone, and '[t]itle by adverse possession is as strong as one obtained by grant' " (*id.*). Contrary to defendant's contention, plaintiff had no legal obligation to take any legal action to obtain title to the disputed land after 1996 inasmuch as title vested with her that year upon the expiration of the 10-year period.

Defendant further contends that the court erred in granting plaintiff's cross motion because plaintiff failed to meet her burden of establishing that her occupancy of the disputed land was "hostile" or "under claim of right" by the requisite clear and convincing evidence. We reject that contention. To establish a claim of adverse possession under the pre-2008 version of the RPAPL, a plaintiff is required to show that possession of the disputed property was: "(1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period" (*Walling v Przybylo*, 7 NY3d 228, 232; *see Corigliano v Sunick*, 56 AD3d 1121, 1121). "The character of the possession must be such 'that [it] would give the owner a cause of action in ejectment against the occupier' " (*Estate of Becker v Murtagh*, 19 NY3d 75, 81, quoting *Brand v Prince*, 35 NY2d 634, 636). "In addition, where, as here, the claim of right is not founded upon a written instrument, the party asserting title by adverse possession must establish that the land was 'usually cultivated or improved' or 'protected by a substantial inclosure' (RPAPL former 522)" (*id.*). The above-mentioned elements must be proven by clear and convincing evidence (*see Walling*, 7 NY3d at 232).

Defendant acknowledges that there is a presumption that the hostility element has been fulfilled when all of the other elements of adverse possession are met, but he attempts to rebut the presumption by contending that plaintiff did not establish that her possession was under a "claim of right." Specifically, he contends that plaintiff

had actual knowledge that she did not own the disputed land, and he points out in support of that contention that the survey given to plaintiff at the time she purchased the property shows that the chain-link fence is beyond her property line. Defendant further contends that plaintiff failed to establish either usual acts of cultivation or improvement of the land or protection by a substantial inclosure. We reject defendant's contentions and conclude that plaintiff met her burden on her cross motion of establishing entitlement to judgment as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557, 562).

Plaintiff testified that she received the survey after she closed, but that she did not know how to read the survey. When she purchased her home in 1986 and from that time forward, she believed that she owned the strip of land in dispute. Even if plaintiff had read the survey and was aware of the encroachment, the court properly determined that such would not defeat her claim of right. "Conduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors. The fact that adverse possession will defeat a [survey] even if the adverse possessor has knowledge of the [survey] is not new" (*Walling*, 7 NY3d at 232-233). In addition, plaintiff established that the chain-link fence was in place from at least 1986, and that she cultivated and maintained the lawn on her side of the fence from that time thereafter (*see Warren v Carreras*, 133 AD3d 592, 594). In opposition, defendant failed to raise an issue of fact (*see Zuckerman*, 49 NY2d at 562).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

500

CAF 16-00077

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

IN THE MATTER OF ANTHONY ARONICA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANDREA ARONICA, RESPONDENT-RESPONDENT.

HOPPE & ASSOCIATES, INC., BUFFALO (BERNADETTE M. HOPPE OF COUNSEL), FOR PETITIONER-APPELLANT.

FRANCIS W. TESSEYMAN, JR., ORCHARD PARK, FOR RESPONDENT-RESPONDENT.

NANCY J. BIZUB, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered December 11, 2015 in a proceeding pursuant to Family Court Act article 6. The order denied that part of the petition seeking to modify the existing joint custodial arrangement by granting petitioner sole legal and physical custody of the subject child.

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

Memorandum: Petitioner father contends in this proceeding pursuant to Family Court Act article 6 that Family Court erred in refusing to modify the existing joint custodial arrangement by awarding him sole legal and physical custody of the parties' minor child. We reject that contention. We note at the outset that, although the court did not expressly determine that there was a sufficient change in circumstances to warrant an inquiry into whether the best interests of the child would be served by a change in custody, " 'our review of the record reveals extensive findings of fact, placed on the record by Family Court, which demonstrate unequivocally that a significant change in circumstances occurred since the entry of the consent custody order' " (*Matter of Morrissey v Morrissey*, 124 AD3d 1367, 1367, *lv denied* 25 NY3d 902).

Contrary to the father's contention, the court properly considered the appropriate factors and determined that it was in the best interests of the child to maintain the existing custody arrangement, while affording the father greater visitation in order to "reflect a more shared and equal custody access arrangement." "The court's determination with respect to the child's best interests 'is

entitled to great deference and will not be disturbed [where, as here,] it is supported by a sound and substantial basis in the record' " (*Matter of Ladd v Krupp*, 136 AD3d 1391, 1393). Although the parties were hostile to each other, they both believed that the child should maintain a good relationship with each parent, and they have endeavored to achieve that goal for the child's benefit. Indeed, the record establishes that "their relationship is not so acrimonious that they are incapable of putting aside their differences . . . [and] work[ing] together in a cooperative fashion for the good of their child[ ]" (*Matter of Blanchard v Blanchard*, 304 AD2d 1048, 1049 [internal quotation marks omitted]). Furthermore, we agree with the father and the Attorney for the Child that "the wishes of the 15-year-old child are . . . entitled to great weight where, as here, the 'age and maturity [of the child] would make [her] input particularly meaningful' " (*Matter of Vandusen v Riggs*, 77 AD3d 1355, 1356). The court acknowledged that factor, and noted that it was the "only factor that weighed most in favor of" the father. However, the court further stated that, while the child was mature and articulate, she was "somewhat apprehensive" and "she carried a heavy burden of being 'in the middle' of her parents' persistent conflict." "Because the wishes of the child are 'not . . . determinative,' we perceive no error in how the court addressed that factor" (*Sheridan v Sheridan*, 129 AD3d 1567, 1569).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

504

CA 16-00282

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

JACQUE LYNN MROZ, PLAINTIFF-RESPONDENT,

V ORDER

3M COMPANY, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

SCHOEMAN UPDIKE & KAUFMAN LLP, NEW YORK CITY (BETH L. KAUFMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

COLLINS & COLLINS ATTORNEYS, P.C., BUFFALO (MICHAEL SZCZYGIEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered January 4, 2016. The order denied the posttrial motion of defendant 3M Company to set aside a jury verdict.

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

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

505

CA 16-00283

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

JACQUE LYNN MROZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

3M COMPANY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

SCHOEMAN UPDIKE & KAUFMAN LLP, NEW YORK CITY (BETH L. KAUFMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

COLLINS & COLLINS ATTORNEYS, P.C., BUFFALO (MICHAEL SZCZYGIEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered February 2, 2016. The judgment awarded plaintiff money damages upon a jury verdict.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she sustained when she was struck in the head by three boards that fell from the top of a vending machine she was servicing in the employee lunchroom of defendant 3M Company (3M). Following a jury trial, the jury found 3M negligent and awarded plaintiff damages for, inter alia, future medical expenses and future household services.

We reject 3M's contention that Supreme Court erred in denying its cross motion for a directed verdict at the close of plaintiff's proof and its posttrial motion to set aside the verdict on the ground that there was no evidence of an unsafe condition. 3M's Industrial Hygienist testified that, after her investigation of the accident, she concluded that one of 3M's employees had removed the boards from a lunch table and put them on top of the vending machine that plaintiff was servicing on the day of the incident. Plaintiff testified that she was unable to see the boards on top of the vending machine. Thus, plaintiff established that "a defective condition existed and that [3M] affirmatively created the condition or had actual or constructive notice of its existence" (*Gernat v State of New York*, 23 AD3d 1015, 1015 [internal quotation marks omitted]) and, with respect to 3M's cross motion for a directed verdict, it cannot be said that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by

the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499). With respect to 3M's posttrial motion, we conclude that the preponderance of the evidence in favor of 3M was not such that "the verdict could not have been reached upon any fair interpretation of the evidence" (*Campo v Neary*, 52 AD3d 1194, 1197 [internal quotation marks omitted]).

We reject 3M's further contention that there was no evidentiary foundation for the testimony of plaintiff's life care planning expert. It is well settled that an expert is permitted to offer opinion testimony based on facts not in evidence where the material is " 'of a kind accepted in the profession as reliable in forming a professional opinion' " (*Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 726). Here, the expert testified that the information on which he relied was of the type relied on in his profession. Thus, the court properly overruled 3M's objection to that testimony. 3M failed to preserve at trial its contention that there was no evidentiary foundation for the expert's testimony regarding an anticipated third surgery, as well as the cost therefor (*see generally Matter of State of New York v Wilkes* [appeal No. 2], 77 AD3d 1451, 1452-1453). Insofar as 3M preserved that contention for our review in its posttrial motion, we conclude that it is without merit. Plaintiff and her surgeon both testified to the necessity of and planning for that third surgery. We reject 3M's further contention that the court erred in permitting plaintiff's expert economist to testify regarding the value of future household services. An expert's opinion may be based on assumed facts that "are fairly inferable from the evidence" (*Tarlowe v Metropolitan Ski Slopes*, 28 NY2d 410, 414), and that is the case here.

We have examined 3M's remaining contentions and conclude that they do not require reversal or modification of the judgment.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

508

CA 16-01204

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

KELLY BURKE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

QUEEN OF HEAVEN ROMAN CATHOLIC ELEMENTARY SCHOOL,
QUEEN OF HEAVEN ROMAN CATHOLIC CHURCH,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS J. SPEYER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DEMPSEY & DEMPSEY, BUFFALO (CATHERINE B. DEMPSEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 17, 2016. The order granted the motion of plaintiff to strike the answer of, and for partial summary judgment on liability against, defendants Queen of Heaven Roman Catholic Elementary School and Queen of Heaven Roman Catholic Church.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion seeking to strike the answer of defendants-appellants and seeking partial summary judgment on liability, and reinstating that answer, and plaintiff is granted an adverse inference charge as a sanction under CPLR 3126, and as modified the order is affirmed without costs in accordance with the following memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained when she slipped and fell on stairs at premises owned and operated by defendants. Plaintiff moved to strike the answer of defendants-appellants (defendants), and for partial summary judgment on liability against them, on the ground that defendants had destroyed and replaced the stairs after plaintiff had notified defendants of their intent to have their expert inspect the stairs. Defendants appeal from an order that granted plaintiff's motion.

In order to obtain sanctions for spoliation of evidence, plaintiff had the burden of showing "that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense . . . Where the

evidence is determined to have been intentionally or wil[l]fully destroyed, the relevancy of the destroyed [evidence] is presumed . . . On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed [evidence was] relevant to the party's claim or defense" (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547-548 [internal quotation marks omitted]).

Defendants concede that the original condition of the stairway was relevant. Furthermore, an obligation to preserve the condition of the stairs existed because litigation had begun at the time the stairs were replaced (*see generally Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 608; *Mahiques v County of Niagara*, 137 AD3d 1649, 1651-1652). We agree with plaintiff that she met her burden of establishing that defendants destroyed the stairs with a culpable state of mind. As Supreme Court properly concluded, defendants' culpable state of mind was evidenced by their destruction of the stairs during the parties' ongoing debate about whether plaintiff had to disclose the name of her expert to defendants before defendants would agree to the inspection (*see Dzidowska v Related Cos., L.P.*, 148 AD3d 480, 480; *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45). We thus agree with plaintiff that the imposition of a sanction against defendant for spoliation of evidence was warranted here (*see* CPLR 3126).

Nevertheless, we conclude that the court abused its discretion in striking defendants' answer and granting plaintiff partial summary judgment on liability based on defendants' destruction of the stairway (*see Sarach v M&T Bank Corp.*, 140 AD3d 1721, 1722). In deciding whether to impose sanctions, and what particular sanction to impose, courts look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness (*see Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213, 218-219). The burden is on the party requesting sanctions to make the requisite showing (*see Mohammed v Command Sec. Corp.*, 83 AD3d 605, 605, *lv denied* 17 NY3d 708). "It is well established that 'a less drastic sanction than dismissal of the responsible party's pleading may be imposed where[, as here,] the loss does not deprive the nonresponsible party of the means of establishing his or her claim or defense' " (*Sarach*, 140 AD3d at 1722). Here, the record does not demonstrate that plaintiff has been left " 'prejudicially bereft' " of the means of prosecuting her action (*Rodman v Ardsley Radiology, P.C.*, 80 AD3d 598, 599; *see Sarach*, 140 AD3d at 1722), given that plaintiff has in her possession, among other evidence of the condition of the stairs, photographs of the stairs taken after the commencement of this action. Thus, we conclude that an appropriate sanction is that an adverse inference charge be given at trial with respect to any now unavailable evidence of the condition of the stairs (*see Sarach*, 140 AD3d at 1722; *Mahiques*, 137 AD3d at 1652-1653; *Jennings v Orange Regional Med. Ctr.*, 102 AD3d 654, 656), and we modify the order accordingly.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

521

CAF 16-00651

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

IN THE MATTER OF VERION PIERCE, SR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DEBORAH J. PIERCE, RESPONDENT-APPELLANT.

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

ADORANTE, TURNER & ASSOC., CAMILLUS (ANTHONY P. ADORANTE OF COUNSEL), FOR PETITIONER-RESPONDENT.

STEPHANIE N. DAVIS, ATTORNEY FOR THE CHILD, OSWEGO.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered March 31, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner primary physical custody of the subject child and awarded respondent visitation with the subject child in Onondaga County as the parties mutually agree.

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 modifying a prior custody and visitation order by awarding petitioner father primary physical custody of the subject child upon stipulation of the parties, and awarding the mother visitation with the child as the parties mutually agree, with the visitation to occur in Onondaga County. Contrary to the mother's contention, we conclude that there is a sound and substantial basis in the record supporting Family Court's determination that it is in the child's best interests to require that the mother's visitation occur in Onondaga County rather than to require that the child visit the mother in Florida, where the mother resides (*see Matter of Brown v Brown*, 130 AD3d 923, 924, *lv denied* 26 NY3d 916; *Matter of Shangraw v Shangraw*, 61 AD3d 1302, 1304). Although a child's wishes are not determinative, "[t]o the extent that the [court] relied upon the in camera interview of the then-13-year-old child, it was entitled to place great weight on the child's wishes, [inasmuch as she] was mature enough to express them" (*Matter of Mohabir v Singh*, 78 AD3d 1056, 1057; *see Matter of Coull v Rottman*, 131 AD3d 964, 965, *lv denied* 26 NY3d 914; *Matter of VanDusen*

v Riggs, 77 AD3d 1355, 1356).

We further conclude that the court did not improperly delegate to the parties its authority to schedule visitation, and we thus reject the mother's contention that the matter should be remitted to the court to fashion a more specific visitation schedule (*see Matter of Thomas v Small*, 142 AD3d 1345, 1345-1346; *Matter of Moore v Kazacos*, 89 AD3d 1546, 1547, *lv denied* 18 NY3d 806). The record does not support the mother's contention that the arrangement is untenable under the circumstances here (*see Matter of Alleyne v Cochran*, 119 AD3d 1100, 1102; *cf. Matter of Michael B. v Dolores C.*, 113 AD3d 517, 518). If the mother is unable to obtain visitation with the child "as the parties mutually agree," she may file a petition seeking to enforce or modify the order (*see Thomas*, 142 AD3d at 1346; *see generally Matter of Gelling v McNabb*, 126 AD3d 1487, 1487-1488).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

527

CA 16-01845

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

IN THE MATTER OF THE FORECLOSURE OF TAX LIENS BY PROCEEDING IN REM PURSUANT TO ARTICLE 11 OF THE REAL PROPERTY TAX LAW BY COUNTY OF SENECA, PETITIONER-RESPONDENT. MEMORANDUM AND ORDER

MAXIM DEVELOPMENT GROUP, RESPONDENT-APPELLANT.

HOLMBERG GALBRAITH, LLP, ITHACA (DIRK A. GALBRAITH OF COUNSEL), FOR RESPONDENT-APPELLANT.

FRANK R. FISHER, COUNTY ATTORNEY, WATERLOO, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), dated March 23, 2016. The order denied the motion of respondent to vacate a default judgment of foreclosure.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the judgment of foreclosure is vacated.

Memorandum: In this in rem tax foreclosure proceeding pursuant to RPTL article 11, respondent property owner appeals from an order denying its motion seeking, inter alia, to vacate a judgment of foreclosure entered upon default. We agree with respondent that the default judgment of foreclosure is jurisdictionally defective, and we therefore reverse the order and grant the motion.

"Under both the federal and state constitutions, the State may not deprive a person of property without due process of law" (*Matter of Harner v County of Tioga*, 5 NY3d 136, 140; *see* US Const 14th Amend; NY Const, art I, § 6; *Kennedy v Mossafa*, 100 NY2d 1, 8-9). " 'Due process does not require that a property owner receive actual notice before the government may take his [or her] property' " (*Matter of City of Rochester [Duvall]*, 92 AD3d 1297, 1298, quoting *Jones v Flowers*, 547 US 220, 226). "Rather, due process is satisfied by 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections' " (*Duvall*, 92 AD3d at 1298, quoting *Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 314; *see Kennedy*, 100 NY2d at 9). "To that end, each property owner is entitled to personal notice of the tax foreclosure proceeding, which is to be sent by both ordinary first class mail and by certified mail to the address contained in the public record" (*Lakeside Realty LLC v County of Sullivan*, 140 AD3d 1450, 1453, *lv denied* 28 NY3d 905; *see*

RPTL 1125 [1] [a], [b] [i]; *Matter of County of Herkimer [Moore]*, 104 AD3d 1332, 1333-1334; *Matter of County of Ontario [Helser]*, 72 AD3d 1636, 1637).

"[A]ll formal requirements governing tax sale proceedings must be scrupulously satisfied, because the result is divestiture of title to real property" (*Land v County of Ulster*, 84 NY2d 613, 616). Thus, "the failure to substantially comply with the requirement of providing the taxpayer with proper notice constitutes a jurisdictional defect which operates to invalidate the sale or prevent the passage of title" (*Matter of Byrnes v County of Saratoga*, 251 AD2d 795, 797, citing *Land*, 84 NY2d at 616). "Tax foreclosure proceedings enjoy a presumption of regularity, such that '[t]he tax debtor has the burden of affirmatively establishing a jurisdictional defect or invalidity in [such] proceedings' " (*Matter of County of Sullivan [Matejkowski]*, 105 AD3d 1170, 1171, *appeal dismissed* 21 NY3d 1062, quoting *Kennedy*, 100 NY2d at 8; *see* RPTL 1134; *Lakeside Realty LLC*, 140 AD3d at 1452). "Where . . . the proof exhibits an office practice and procedure followed in the regular course of business which shows that notices have been duly addressed and mailed, a presumption arises that those notices have been received by the party to whom they were sent" (*City of Yonkers v Clark & Son*, 159 AD2d 535, 536, *lv dismissed* 76 NY2d 845; *see* RPTL 1134; *Matter of County of Herkimer [Jones]*, 34 AD3d 1327, 1328, *lv dismissed* 8 NY3d 955; *Sendel v Diskin*, 277 AD2d 757, 758-759, *lv denied* 96 NY2d 707).

Here, the gravamen of respondent's contention is that the default judgment of foreclosure is jurisdictionally defective because petitioner did not substantially comply with the notice requirements of RPTL 1125 (*see* CPLR 5015 [a] [4]; *see generally Matter of Foreclosure of Tax Liens*, 144 AD3d 1033, 1034). Respondent's submissions in support of its motion established that, in late summer 2015, it received correspondence from petitioner at respondent's offices in New Jersey, advising that respondent owed real estate taxes on property that it owned in Seneca County. Respondent's managing partner subsequently sent a letter to petitioner in which he disputed that respondent owed taxes on the property, but he received no response from petitioner. Respondent received a tax bill at its mailing address in New Jersey in early January 2016, but received no further correspondence from petitioner until approximately February 10, 2016, when it received a letter from the director of petitioner's Office of Real Property Tax Services (director), advising that the property would be sold at public auction on March 2, 2016. Respondent denied that it received a notice of petition and petition of foreclosure by either ordinary first class or certified mail.

In support of its assertion that it did not receive a notice of petition and petition of foreclosure, respondent submitted an October 2015 affidavit of service by mail sworn by the director, in which she stated that the notice and petition were served upon the parties entitled to notice "at the addresses contained in the attached" list, that the addresses on the list were "designated by [the parties] for that purpose," and that the notice and petition were served by depositing a "properly addressed" envelope with the post office. The

affidavit of service by mail did not reference the requisite mailing by both certified mail and ordinary first class mail (*cf.* RPTL 1125 [1] [b] [i]). The list of addresses ostensibly attached to the affidavit of service provided the location of respondent's property as "Rte 89" in the Town of Seneca Falls, which is not a valid mailing address for the property (*cf.* RPTL 1125 [1] [b] [iv]), let alone respondent's proper mailing address in New Jersey. Furthermore, petitioner indisputably had notice of respondent's mailing address in New Jersey, as evidenced by correspondence from respondent to petitioner with respect to respondent's change of address following a prior vacatur of a judgment of foreclosure against the same property (*see* RPTL 1125 [1] [a] [i], [d]; *Maxim Dev. Group v Montezuma Props., LLC*, 2015 NY Slip Op 30143[U], *2-4), and petitioner's mailings to respondent at that address prior to petitioner's attempt to serve respondent with the instant notice and petition. The affidavit of service by mail thus did not establish that the notice and petition were sent by both ordinary first class mail and certified mail, nor did it establish that any mailing was sent to a proper address (*cf. Jones*, 34 AD3d at 1328).

In opposition to respondent's motion, petitioner submitted the affidavit of a clerk in the office of the Seneca County Treasurer, who averred that she had been responsible for addressing the mailings related to the tax foreclosure action and that she had prepared the certified and first class mailing envelopes for respondent at its New Jersey address, and the clerk attached photocopies of the envelopes to her affidavit. The clerk, however, did not state that she mailed those envelopes. Rather, she averred that, "as appears from the affidavit of mailing previously submitted herein," i.e., the affidavit of service by mail sworn by the director, the "envelopes were duly deposited with the U.S. Postage Service [sic] for mailing on October 19, 2015."

Thus, we conclude that respondent met its burden of establishing that petitioner did not substantially comply with the requirement of providing the taxpayer with proper notice of the foreclosure proceeding, inasmuch as the statutorily-required affidavit of service by mail pursuant to RPTL 1125 (3) (a) did not state that the notice and petition were mailed by both certified mail and ordinary first class mail (*see* RPTL 1125 [1] [b] [i]), or that the notice and petition were sent to respondent's address (*see* RPTL 1125 [1] [a] [i]). Moreover, the clerk's affidavit submitted by petitioner, read in conjunction with the director's affidavit of service by mailing, did not establish that the notice was duly addressed and mailed to respondent, and thus did not give rise to a presumption that notice was received by respondent (*cf. City of Yonkers*, 159 AD2d at 536). We therefore conclude that Supreme Court erred in denying respondent's motion to vacate the judgment of foreclosure inasmuch as it is jurisdictionally defective (*see Land*, 84

NY2d at 616; *Byrnes*, 251 AD2d at 797).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

533

TP 16-01684

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

IN THE MATTER OF JEAN OLIVER, PETITIONER,

V MEMORANDUM AND ORDER

JOSEPH A. D'AMICO, SUPERINTENDENT, NEW YORK STATE DIVISION OF STATE POLICE, RESPONDENT.

SANDERS & SANDERS, CHEEKTOWAGA (HARVEY P. SANDERS OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [John A. Michalek, J.], entered March 3, 2016) to review a determination of respondent. The determination terminated the employment of petitioner.

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

Memorandum: Petitioner, a former New York State Trooper, commenced this CPLR article 78 proceeding seeking to annul respondent's determination finding her guilty of disciplinary charges or, in the alternative, to vacate the penalty of dismissal. She contends, inter alia, that the determination is not supported by substantial evidence and that the penalty of dismissal is shocking to one's sense of fairness.

Petitioner, a Trooper for over 17 years, was previously assigned to work as an investigator with the Community Narcotics Enforcement Team (CNET). In 2014, after she had filed discrimination claims against various coworkers, she was transferred to the Counter-Terrorism Investigation Unit (CTIU). Following that transfer, she met with two of her CTIU supervisors. According to the supervisors, petitioner was given an order that she was "not to work on any CNET matters or cases" and "[was] to work only on Troop A CTIU cases." It is undisputed that, approximately two weeks after that meeting, petitioner transported a person who had been a CNET confidential informant to and from an interview with federal authorities who were investigating a person petitioner had investigated while working with CNET. Shortly thereafter, when petitioner's CTIU supervisors learned

of her involvement with that investigation, petitioner was interviewed by the Internal Affairs Bureau (IAB), and she denied ever receiving an order to refrain from any involvement in her prior CNET cases.

During the IAB investigation, which focused on whether petitioner had violated a direct order from a supervisor, it was discovered that petitioner had telephone contact with the same confidential informant. In memorializing that conversation, petitioner listed a CNET supervisor as a "backup" contact on a confidential informant contact sheet. That supervisor, however, was not aware of petitioner's telephone contact with the confidential informant and did not participate in the conversation. Petitioner admitted that she listed the supervisor as a backup merely because "he was in the office with [petitioner] when she was on the telephone" with the confidential informant. Several other discrepancies in petitioner's paperwork were also discovered during the IAB investigation.

Ultimately, five separate charges were filed against petitioner, alleging, inter alia, that she violated a direct order to refrain from "work[ing] on cases she was assigned while at CNET"; violated a direct order to be truthful in her IAB interview; caused a false entry to be made in official records when she made untrue statements during her IAB interview; failed to assume responsibility or exercise diligence in the performance of her duties; and knowingly made or caused to be made a false entry in official records when she listed her supervisor as a backup on a contact sheet.

Following a hearing on those charges, the Hearing Board found petitioner guilty of every allegation against her and recommended that she be dismissed. Respondent accepted the findings and recommendations of the Hearing Board and dismissed petitioner from the Division of State Police.

It is well established that, "[i]n CPLR article 78 proceedings to review determinations of administrative tribunals, the standard of review for the Appellate Divisions . . . is whether there was substantial evidence to support the Hearing Officer's decision" (*Matter of Wilson v City of White Plains*, 95 NY2d 783, 784-785; *see* CPLR 7803 [4]; *Matter of Kelly v Safir*, 96 NY2d 32, 38, *rearg denied* 96 NY2d 854). Contrary to petitioner's contention, we conclude that respondent's determination is supported by substantial evidence (*see generally Matter of Berenhaus v Ward*, 70 NY2d 436, 443; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-180).

Petitioner contends that the Hearing Board improperly expanded the charge in charge number one by expanding the scope of the alleged order from an order to refrain from working on *cases* she had been assigned while at CNET to an order to refrain from working on any "CNET *related* cases" or being involved in "any matters *related* to her previous work in CNET" (emphasis added). We reject petitioner's contention. Charge number one was "reasonably specific, in light of all the relevant circumstances, to apprise [petitioner] . . . of the charges against [her] . . . and to allow for the preparation of an adequate defense" (*Matter of Block v Ambach*, 73 NY2d 323, 333; *see*

Matter of Murray v Murphy, 24 NY2d 150, 157). In any event, the evidence at the hearing established that "[p]etitioner's guilt was based only on violations that were charged" (*Matter of Faure v Chesworth*, 111 AD2d 578, 579).

Petitioner further contends that the Hearing Board failed to consider the retaliatory motive of the disciplinary charges in violation of Civil Service Law § 75-b. Inasmuch as petitioner failed to raise that contention in her petition, that contention "is not properly before us" (*Matter of Dougherty v Degenhart*, 154 AD2d 898, 899; *see Matter of Zigarelli v New York State Police*, 126 AD2d 822, 824, *lv denied* 69 NY2d 611), and we therefore do not consider the merits of that contention.

Finally, we conclude that the penalty of termination is not shocking to one's sense of fairness. "Judicial review of an administrative penalty is limited to whether the measure or mode of penalty or discipline imposed constitutes an abuse of discretion as a matter of law . . . [T]he Appellate Division is subject to the same constraints as th[e] Court [of Appeals]—a penalty must be upheld unless it is 'so disproportionate to the offense as to be shocking to one's sense of fairness,' thus constituting an abuse of discretion as a matter of law" (*Kelly*, 96 NY2d at 38, quoting *Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 237). We are mindful that, "[i]n matters concerning police discipline, 'great leeway' must be accorded to the [Superintendent]'s determinations concerning the appropriate punishment, for it is the [Superintendent], not the courts, who 'is accountable to the public for the integrity of the [Division of State Police]' " (*Kelly*, 96 NY2d at 38, quoting *Berenhaus*, 70 NY2d at 445; *see Matter of Panek v Bennett*, 38 AD3d 1251, 1252). Of critical importance, "a State Trooper holds a position of great sensitivity and trust . . . and [a] higher standard of fitness and character pertains to police officers than to ordinary civil servants" (*Matter of Bassett v Fenton*, 68 AD3d 1385, 1387-1388 [internal quotation marks omitted]). Given the conduct underlying the offenses, i.e., directly disobeying an order and making false statements in an IAB interview and on official police records, and petitioner's refusal to accept any responsibility for her conduct, we cannot say that the penalty of dismissal shocks our sense of fairness (*see Matter of Harp v New York City Police Dept.*, 96 NY2d 892, 893-894; *Matter of Lyons v Superintendent of State Police*, 129 AD3d 1238, 1240; *Foster v Kelly*, 55 AD3d 403, 403-404, *lv denied* 12 NY3d 701).

We recognize that the allegations against petitioner do not involve any harm to the public (*cf. Matter of Franklin v D'Amico*, 117 AD3d 1432, 1432-1433; *Matter of Ortega v Kelly*, 15 AD3d 313, 314; *Matter of Ortiz v Safir*, 291 AD2d 214, 214), any misconduct for the personal gain of petitioner (*cf. Matter of Sindone v Kelly*, 15 AD3d 168, 168; *Matter of Rose v McMahon*, 1 AD3d 948, 949), or official corruption (*cf. Matter of Rodriguez v Diina*, 35 AD3d 1208, 1208). We are also aware that the disciplinary charges herein were filed following petitioner's initial complaints of discrimination and that

the Equal Employment Opportunity Commission has since found that "there is reasonable cause to believe that [the New York State Police] has discriminated against [petitioner] on account of her gender and in retaliation for engaging in a protected activity." Our review of the penalty, however, is extremely limited; we do not have any "discretionary authority or interest of justice jurisdiction in reviewing the penalty imposed" (*Kelly*, 96 NY2d at 38). The factual findings of the Hearing Board concerning petitioner's conduct are supported by substantial evidence, and the penalty of dismissal for such conduct is not "so grave in its impact on [petitioner] that it is disproportionate to the misconduct, incompetence, failure or turpitude of [petitioner], or to the harm or risk of harm to the agency or institution" (*Pell*, 34 NY2d at 234).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

536

KA 16-00153

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER PERRIN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (CARA A. WALDMAN 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 January 5, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from three judgments convicting him, upon his pleas of guilty, of various crimes. In appeal No. 1, defendant was convicted of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]) and sentenced to, inter alia, three years of incarceration. In appeal No. 2, defendant was convicted of grand larceny in the fourth degree (§ 155.30 [1]) and sentenced to, inter alia, one year of incarceration, to run concurrently and merge with the sentence in appeal No. 1 (*see* § 70.30 [2] [a]). Finally, in appeal No. 3, defendant was convicted of burglary in the second degree (§ 140.25 [2]) and sentenced to, inter alia, 10 years of incarceration, to run consecutively to the sentence in appeal No. 1.

We note at the outset that we dismiss the appeal from the judgment in appeal No. 2 because defendant raises no contentions with respect thereto (*see People v Scholz*, 125 AD3d 1492, 1492, *lv denied* 25 NY3d 1077). With respect to appeal No. 1, we agree with defendant that County Court's colloquy concerning the waiver of the right to appeal was insufficient "to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Lathrop*, 136 AD3d 1314, 1314, *lv denied* 27 NY3d 1134 [internal quotation marks omitted]). Furthermore, there was no discussion during the plea colloquy whether the waiver encompassed a challenge to the sentence; the court mentioned only a right to appeal the conviction (*see People*

v Maracle, 19 NY3d 925, 928). Although "[a] detailed written waiver can supplement a court's on-the-record explanation of what a waiver of the right to appeal entails, . . . a written waiver does not, standing alone, provide sufficient assurance that the defendant is knowingly, intelligently and voluntarily giving up his or her right to appeal" (*People v Banks*, 125 AD3d 1276, 1277, *lv denied* 25 NY3d 1159 [internal quotation marks omitted]). We thus conclude that the waiver of the right to appeal in appeal No. 1 does not preclude defendant's challenge to the enhanced sentence in that appeal.

Contrary to defendant's further contention, however, the enhanced sentence in appeal No. 1 and the sentence imposed in appeal No. 3 are not unduly harsh or severe.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

537

KA 16-00152

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER PERRIN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (CARA A. WALDMAN 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 January 5, 2016. The judgment convicted defendent, upon his plea of guilty, of grand larceny in the fourth degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Perrin* ([appeal No. 1] ___ AD3d ___ [June 9, 2017]).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

538

KA 16-00154

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER PERRIN, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (CARA A. WALDMAN 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 January 5, 2016. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Same memorandum as in *People v Perrin* ([appeal No. 1] ___ AD3d ___ [June 9, 2017]).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

546

KA 14-01675

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EFRAIN SANTOS, 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 June 27, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of assault in the first degree (Penal Law § 120.10 [1]) to assault in the second degree (§ 120.05 [2]), and vacating the sentence imposed on count three of the indictment, and as modified the judgment is affirmed and the matter is remitted to Onondaga County Court for sentencing on the conviction of assault in the second degree.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). This case arose from an incident in which two victims were ambushed on a residential street in the City of Syracuse by three assailants. One victim sustained gunshot wounds to the leg and survived. The other victim was shot in the head and died. Eyewitnesses initially identified defendant and Maximino Alvarez as two of the assailants, and Pedro Romero was later identified as the third assailant. A grand jury indicted defendant, Alvarez, and Romero on an acting-in-concert theory, and Alvarez eventually pleaded guilty and agreed to testify against defendant.

Defendant contends that his conviction of assault in the first degree as charged in count three of the indictment is based on legally insufficient evidence because there is insufficient evidence that the

surviving victim suffered serious physical injury (*see* Penal Law § 120.10 [1]). We agree. The Penal Law defines "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (§ 10.00 [10]). Although the jury had the opportunity to view the scars on the victim's leg caused by his gunshot wounds, "the record does not contain any pictures or descriptions of what the jury saw so as to prove that these scars constitute serious or protracted disfigurement" (*People v Tucker*, 91 AD3d 1030, 1032, *lv denied* 19 NY3d 1002; *see generally People v McKinnon*, 15 NY3d 311, 315-316). Furthermore, in our view, the victim's testimony that he "feel[s] pain in [his] leg" in cold weather does not constitute evidence of persistent pain so severe as to cause "protracted impairment of health" (§ 10.00 [10]; *see generally People v Stewart*, 18 NY3d 831, 832-833). We conclude, however, that the evidence is legally sufficient to support a conviction of the lesser included offense of assault in the second degree (§ 120.05 [2]), and we therefore modify the judgment accordingly.

We reject defendant's further contention that the verdict is against the weight of the evidence with respect to the issue whether he acted in concert with Alvarez and Romero. "The jury's resolution of credibility and identification issues is entitled to great weight" (*People v Houston*, 142 AD3d 1397, 1398, *lv denied* 28 NY3d 1146 [internal quotation marks omitted]), and we see no reason to disturb the jury's resolution of those issues in this case. Viewing the evidence in light of the elements of the crimes of murder, attempted murder, and criminal possession of a weapon, as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to those crimes is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant also contends that he was denied a fair trial when County Court allowed the prosecutor to question Alvarez about a threatening letter that Alvarez had received while he was in prison. We reject that contention. Although it is an abuse of discretion for the court to allow a witness to testify concerning threats made by third parties relative to the witness's testimony absent evidence linking those threats to the defendant (*see People v Jones*, 21 NY3d 449, 456; *People v Myrick*, 31 AD3d 668, 669, *lv denied* 7 NY3d 927), here, we conclude that there was no abuse of discretion. Alvarez in fact testified that he did not receive any threats from defendant or from any third party on defendant's behalf. Alvarez acknowledged receiving a letter, but he testified that he did not take the letter to be a threat.

Defendant failed to preserve for our review his contention that he was denied a fair trial due to prosecutorial misconduct during summation (*see People v Simmons*, 133 AD3d 1227, 1228), 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]). Contrary to defendant's further contention, we conclude that the court

properly denied his request for a missing witness charge because he "failed to meet his initial burden of establishing that [the] witness would provide testimony favorable to the prosecution" (*People v Butler*, 140 AD3d 1610, 1611, *lv denied* 28 NY3d 969). Finally, the sentence is not unduly harsh or severe.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

550

CA 16-01804

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

IN THE MATTER OF LOUIS J. JONES,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, NEW YORK STATE EXECUTIVE BOARD OF PAROLE APPEALS UNIT, ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, AND TINA STANFORD, CHAIRWOMAN, NEW YORK STATE DIVISION OF PAROLE, RESPONDENTS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

CALIHAN LAW PLLC, ROCHESTER (ROBERT B. CALIHAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered July 28, 2016 in a proceeding pursuant to CPLR article 78. The judgment granted the petition and granted petitioner a de novo parole hearing.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to vacate the determination of the New York State Division of Parole (Board) denying his release to parole supervision. Respondents appeal from a judgment granting the petition and ordering a de novo hearing before a different parole panel. We reverse the judgment and dismiss the petition.

"It is well settled that parole release decisions are discretionary and will not be disturbed so long as the Board complied with the statutory requirements enumerated in Executive Law § 259–i" (*Matter of Gssime v New York State Div. of Parole*, 84 AD3d 1630, 1631, *lv dismissed* 17 NY3d 847; *see Matter of Johnson v New York State Div. of Parole*, 65 AD3d 838, 839; *see generally Matter of King v New York State Div. of Parole*, 83 NY2d 788, 790-791). The Board is "not required to give equal weight to each of the statutory factors" but, rather, may "place[] greater emphasis on the severity of the crimes

than on the other statutory factors" (*Matter of MacKenzie v Evans*, 95 AD3d 1613, 1614, *lv denied* 19 NY3d 815; *see Matter of Huntley v Evans*, 77 AD3d 945, 947). Where parole is denied, the inmate must be informed in writing of "the factors and reasons for such denial of parole" (§ 259-i [2] [a] [i]). "Judicial intervention is warranted only when there is a 'showing of irrationality bordering on impropriety' " (*Matter of Silmon v Travis*, 95 NY2d 470, 476; *see Matter of Johnson v Dennison*, 48 AD3d 1082, 1083; *Matter of Gaston v Berbary*, 16 AD3d 1158, 1159).

Contrary to the contention of petitioner, the Board considered the requisite statutory factors and adequately set forth in writing its reasons for denying his release to parole supervision (*see Matter of Siao-Pao v Dennison*, 11 NY3d 777, 778, *rearg denied* 11 NY3d 885; *Matter of Kenefick v Sticht*, 139 AD3d 1380, 1381, *lv denied* 28 NY3d 902). Contrary to petitioner's further contention, the Board's determination does not exhibit " 'irrationality bordering on impropriety' " (*Silmon*, 95 NY2d at 476).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

554

CA 16-01723

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

IN THE MATTER OF ARBITRATION BETWEEN
COUNTY OF MONROE, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 828, UNIT 7423, RESPONDENT-APPELLANT.

JENNIFER C. ZEGARELLI, ALBANY, FOR RESPONDENT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (KYLE W. STURGESS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered February 2, 2016. The order and judgment granted the petition to stay arbitration and denied the cross motion of respondent to compel arbitration.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 75 seeking a permanent stay of arbitration. Respondent filed a grievance on behalf of, inter alia, certain retired former employees of the Monroe County Sheriff's Department, all of whom retired prior to January 1, 2000, when a collective bargaining agreement that covered the period between 1994 through 1999 was in effect (1994-1999 CBA). The grievance alleged, however, that petitioner had violated the collective bargaining agreement covering the period between January 1, 2009, through December 31, 2012 (2009-2012 CBA), by unilaterally changing the subject retirees' post-Medicare health insurance benefits. Respondent asserted that any such unilateral change is subject to the grievance and arbitration procedure set forth in the 2009-2012 CBA. In response to the grievance, petitioner, inter alia, denied that the parties had agreed to resolve retiree health insurance benefit disputes for those retiring prior to January 1, 2000, through the grievance and arbitration procedure of the 2009-2012 CBA. Respondent demanded arbitration pursuant to the 2009-2012 CBA, petitioner commenced this proceeding, and respondent cross-moved to compel arbitration. Supreme Court granted the petition, thereby permanently staying arbitration, and denied the cross motion. We affirm.

Contrary to respondent's contention, we conclude that the rights

and obligations of the subject retirees are governed by the 1994-1999 CBA, which was in effect when they retired (*see City of Buffalo v A.F.S.C.M.E. Council 35, Local 264*, 107 AD2d 1049, 1050). To determine whether the grievance is arbitrable under the 1994-1999 CBA, we must conduct the requisite two-step inquiry (*see Matter of Board of Educ. of Watertown City Sch. Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 137-138). First, we must determine " 'whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance' " (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City Sch. Dist. of City of N.Y.*, 1 NY3d 72, 79). Second, if there is no such prohibition against arbitrating the grievance at issue, we must determine "whether such authority was in fact exercised and whether the parties did agree by the terms of their particular arbitration clause to refer their differences in this specific area to arbitration" (*Board of Educ. of Watertown City Sch. Dist.*, 93 NY2d at 138). Here, it is undisputed that there is no prohibition against arbitration of the grievance (*see Matter of City of Ithaca [Ithaca Paid Fire Fighters Assn., IAFF, Local 737]*, 29 AD3d 1129, 1130-1131).

With respect to the second part of the inquiry, contrary to respondent's contention, we conclude that the court properly determined that the parties did not agree to refer to arbitration the retiree health benefit disputes of those who retired prior to January 1, 2000. The grievance clause in the 1994-1999 CBA specifically excludes retirement benefits from the grievance and arbitration procedure (*cf. Matter of City of Niagara Falls [Niagara Falls Police Club Inc.]*, 52 AD3d 1327, 1327).

In light of our determination, respondent's contentions concerning the timeliness of the grievance have been rendered academic. We have considered respondent's remaining contentions and conclude that they are without merit.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

555

CA 16-01956

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

EILEEN MALAY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, GARY W. MIGUEL, DANIEL BELGRADER, MICHAEL YAREMA AND STEVE LYNCH, DEFENDANTS-RESPONDENTS.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (FRANK S. GATTUSO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered January 11, 2016. The order and judgment granted defendants' motion for summary judgment dismissing the complaint.

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

Memorandum: In March 2007, the owner of the building in which plaintiff rented an apartment shot his own wife and took one or more relatives hostage. An intense, 24-hour standoff with police officers ensued. When negotiators were unable to end the standoff, police officers fired CS gas canisters into the building, including into plaintiff's apartment. Unbeknownst to the officers, plaintiff was inside her apartment. Following her telephone call to 911, plaintiff was extracted from the apartment, whereupon she was interviewed by police officers for several hours without any medical assistance or decontamination efforts.

Plaintiff thereafter commenced a federal action against, inter alia, defendant City of Syracuse (*Malay v City of Syracuse*, 638 F Supp 2d 303, 308 [NDNY 2009]), but the federal causes of action were dismissed, and the District Court declined to exercise jurisdiction over the state causes of action (*Malay v City of Syracuse*, ___ F Supp 2d ___, 2011 WL 4595201, *1 [NDNY 2011], *appeal dismissed* ___ F Supp 2d ___ [2d Cir 2012]). Plaintiff thereafter commenced this negligence action seeking damages for injuries she allegedly sustained as a result of the incident. Although a prior motion to dismiss the complaint was granted, the Court of Appeals reversed (*see Malay v City of Syracuse*, 25 NY3d 323, 325-326, *revg* 113 AD3d 1141). Defendants

thereafter moved for summary judgment dismissing the complaint. We conclude that Supreme Court properly granted that motion.

We agree with defendants that they established as a matter of law that they were immune from liability under the "professional judgment rule" (*Johnson v City of New York*, 15 NY3d 676, 680, *rearg denied* 16 NY3d 807). That rule "insulates a municipality from liability for its employees' performance of their duties where the . . . conduct involves the exercise of professional judgment such as electing one among many acceptable methods of carrying out tasks, or making tactical decisions" (*id.* at 680 [internal quotation marks omitted]; *see Valdez v City of New York*, 18 NY3d 69, 75-76). Nevertheless, the professional judgment rule "presupposes that judgment and discretion are exercised in compliance with the municipality's procedures, because 'the very basis for the value judgment supporting immunity and denying individual recovery becomes irrelevant where the municipality violates its *own* internal rules and policies and exercises no judgment or discretion' " (*Johnson*, 15 NY3d at 681 [emphasis added]; *see Valdez*, 18 NY3d at 80; *Lubecki v City of New York*, 304 AD2d 224, 233-234, *lv denied* 2 NY3d 701).

Here, we conclude that defendants established as a matter of law that the police officers' conduct in firing the CS gas canisters into the building involved the exercise of professional judgment, and plaintiff failed to raise a triable issue of fact (*see Johnson*, 15 NY3d at 681; *Arias v City of New York*, 22 AD3d 436, 437; *cf. Lubecki*, 304 AD2d at 234-235). Contrary to plaintiff's contention, "[t]here was no evidence presented by . . . plaintiff, through [her] expert or otherwise, to show any immutable *departmental* procedures that must invariably be followed" in the use of CS gas canisters (*Rodriguez v City of New York*, 189 AD2d 166, 177 [emphasis added]). Although plaintiff contends that the police officers did not comply with the chemical munitions manual provided by the Defense Technology Federal Laboratories, there is no evidence that the manual was ever adopted by the City of Syracuse Police Department and thus no evidence that the police officers violated their " '*own* internal rules and policies' " (*Johnson*, 15 NY3d at 681 [emphasis added]). Moreover, here, as in *Johnson*, the manual did not contain mandatory directives but, rather, afforded officers "discretion to make a judgment call as to when, and under what circumstances, it [was] necessary to discharge" the gas canisters (*id.*).

Similarly, the decision to interview plaintiff immediately in order to obtain vital information to end the standoff was a discretionary determination and was not in violation of any internal policies and procedures (*see generally id.*). We thus conclude that the court properly granted defendants' motion for summary judgment dismissing the negligence causes of action against them.

Although plaintiff correctly contends that the court failed to address her cause of action alleging negligent training and supervision of the police officers, we nevertheless address the merits of that contention inasmuch as "they were argued before the [court] and were briefed by the parties" (*Meyer v North Shore-Long Is. Jewish*

Health Sys., Inc., 137 AD3d 878, 879, *lv denied* 28 NY3d 909). We conclude that the cause of action concerning negligent supervision and training was properly dismissed inasmuch as such a cause of action does "not lie where, as here, the employee[s] [are] acting within the scope of [their] employment, thereby rendering the employer liable for damages caused by the employee[s'] negligence under the theory of respondeat superior" (*Watson v Strack*, 5 AD3d 1067, 1068; *see Karoon v New York City Tr. Auth.*, 241 AD2d 323, 324).

Inasmuch as we conclude that dismissal was appropriate by application of the professional judgment rule, we do not address plaintiff's remaining challenge to the dismissal of the complaint.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

560

KA 15-00020

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEAN M. VICKERS, DEFENDANT-APPELLANT.

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

THEODORE A. BRENNER, DEPUTY DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered October 10, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the second degree, attempted criminal sexual act in the first degree and attempted sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the periods of postrelease supervision imposed shall run concurrently and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sexual act in the second degree (Penal Law § 130.45 [1]), attempted criminal sexual act in the first degree (§§ 110.00, 130.50 [1]), and attempted sexual abuse in the first degree (§§ 110.00, 130.65 [4]). Contrary to defendant's contention, his waiver of the right to appeal was valid inasmuch as the record establishes that defendant appreciated the consequences of the waiver and knowingly and voluntarily accepted them (*see People v Lopez*, 6 NY3d 248, 256). The valid waiver by defendant of the right to appeal encompasses his challenge to the severity of the sentence (*see id.* at 255; *People v Hidalgo*, 91 NY2d 733, 737).

Conversely, defendant's waiver of the right to appeal does not foreclose his challenge to the legality of the postrelease supervision portion of the sentence (*see People v Pump*, 67 AD3d 1041, 1042, *lv denied* 13 NY3d 941). As the People correctly concede, County Court erred in imposing consecutive periods of postrelease supervision (*see People v Allard*, 107 AD3d 1379, 1379). Pursuant to Penal Law § 70.45 (5) (c), the periods of postrelease supervision merge and are satisfied by the service of the longest unexpired term (*see People v Kennedy*, 78 AD3d 1477, 1479, *lv denied* 16 NY3d 798). Here, the

longest period of postrelease supervision was 15 years imposed on the conviction of attempted criminal sexual act in the first degree, and the other two periods of postrelease supervision imposed should not run consecutively but instead should merge therein. We therefore modify the judgment accordingly.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

566

KA 12-01034

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OMAR ANWAR, DEFENDANT-APPELLANT.

THE WIESNER LAW FIRM, NEW YORK CITY (NEAL WIESNER 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 February 6, 2012. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, criminal sexual act in the first degree (two counts), sexual abuse in the first degree, unlawful imprisonment in the second degree 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 rape in the first degree (Penal Law § 130.35 [1]), two counts of criminal sexual act in the first degree (§ 130.50 [1]), sexual abuse in the first degree (§ 130.65 [1]), unlawful imprisonment in the second degree (§ 135.05) and assault in the third degree (§ 120.00 [1]). We reject defendant's contention that the verdict is against the weight of the evidence on the issues of forcible compulsion and the victim's consent. 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 jury did not fail to give the evidence the weight it should be accorded on those issues (*see People v Strauss*, 147 AD3d 1426, 1426; *People v Black*, 137 AD3d 1679, 1680, *lv denied* 27 NY3d 1128, *reconsideration denied* 28 NY3d 1026; *see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's further contention that he was deprived of a fair trial by County Court's evidentiary ruling permitting the People to cross-examine him concerning statements he made in a recent interview in jail by FBI agents. Contrary to defendant's contention, there was no violation of his rights under the New York right to counsel rule, which permits the use of uncounseled statements of a defendant for purposes of impeachment even where the use of such

statements would be precluded on the People's case-in-chief (*see generally People v Maerling*, 64 NY2d 134, 140; *People v Ricco*, 56 NY2d 320, 323-326; *People v Dansa*, 172 AD2d 1011, 1012, *lv denied* 78 NY2d 964). Here, the court properly concluded that defendant opened the door to such impeachment (*see People v Abrams*, 73 AD3d 1225, 1227-1228, *affd* 17 NY3d 760; *People v Ortiz*, 292 AD2d 307, 307, *lv denied* 98 NY2d 700; *see generally People v Goodson*, 57 NY2d 828, 830; *People v Cordero*, 110 AD3d 1468, 1470, *lv denied* 22 NY3d 1137).

We do not address defendant's contention that he was deprived of a fair trial by the court's denial of his request to call his friend "Modi" as a witness. Although the court and counsel discussed the prospect of the defense's calling that witness, as well as the inadmissible hearsay nature of the proffered testimony, the court did not definitively rule on the matter (*see People v Billip*, 65 AD3d 430, 430-431, *lv denied* 13 NY3d 834; *cf. People v Finch*, 23 NY3d 408, 413).

Finally, we reject defendant's contention that he was denied effective assistance of counsel. Defendant failed " 'to demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712; *see People v Bank*, 129 AD3d 1445, 1447, *affd* 28 NY3d 131). Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defense counsel provided defendant with meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147; *People v Jones*, 147 AD3d 1521, 1521-1522).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

568

CA 16-01680

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

PATRICIA M. CLAUSS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BANK OF AMERICA, N.A., VILLAGE OF WILLIAMSVILLE,
JONES LANG LASALLE AMERICAS, INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

BARCLAY DAMON LLP, BUFFALO (HEDWIG M. AULETTA OF COUNSEL), FOR DEFENDANT-APPELLANT JONES LANG LASALLE AMERICAS, INC.

ROBERT M. LIPPMAN, BUFFALO, FOR DEFENDANT-APPELLANT VILLAGE OF WILLIAMSVILLE.

NASH CONNORS, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR DEFENDANT-APPELLANT BANK OF AMERICA, N.A.

THE COSGROVE LAW FIRM, BUFFALO (EDWARD C. COSGROVE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered April 28, 2016. The order denied the motions of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motions of defendants Bank of America, N.A., and Jones Lang LaSalle Americas, Inc., and dismissing the complaint against them, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action against defendant Village of Williamsville (Village) and others to recover damages for injuries that she sustained when she allegedly tripped on an uneven stretch of public sidewalk. In addition to the Village, plaintiff asserted causes of action against the owner of the abutting property, defendant Bank of America, N.A. (Bank of America), as well as the manager of the abutting property, defendant Jones Lang LaSalle Americas, Inc. (Jones Lang).

Bank of America and Jones Lang contend that Supreme Court erred in denying their respective motions for summary judgment dismissing the complaint against them. We agree and therefore modify the order accordingly. “Generally, liability for injuries sustained as a result

of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner" (*Hausser v Giunta*, 88 NY2d 449, 452-453; *see Capretto v City of Buffalo*, 124 AD3d 1304, 1306). "That rule does not apply, however, if there is an ordinance or municipal charter that specifically imposes a duty on the abutting landowner to maintain and repair the public sidewalk and provides that a breach of that duty will result in liability for injuries to the users of the sidewalk; the sidewalk was constructed in a special manner for the use of the abutting landowner; the abutting landowner affirmatively created the defect; or the abutting landowner negligently constructed or repaired the sidewalk" (*Schroeck v Gies*, 110 AD3d 1497, 1497; *see Hausser*, 88 NY2d at 453).

We conclude that Bank of America and Jones Lang met their prima facie burden of establishing their entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Although the Code of the Village of Williamsville (Code) imposes a duty on landowners to keep public sidewalks "in good order and repair" (Code § 89-3), it is undisputed that the Code does not "clearly subject landowners to . . . liability" for failing to comply with that duty (*Smalley v Bemben*, 12 NY3d 751, 752; *see* § 89-3). It is also undisputed that the public sidewalk was not constructed in a special manner for the property owner's benefit, and that neither Bank of America nor Jones Lang negligently constructed or repaired the sidewalk or otherwise created the defect. Inasmuch as plaintiff concedes on this appeal that none of the exceptions to the general rule apply in this case, we conclude that plaintiff failed to raise an issue of fact in opposition (*see generally Zuckerman*, 49 NY2d at 562).

The Village contends that the court erred in denying its motion for summary judgment dismissing the complaint against it inasmuch as the defect in the sidewalk is trivial as a matter of law. We reject that contention. "[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [internal quotation marks omitted]; *see Grefrath v DeFelice*, 144 AD3d 1652, 1653). In determining whether a defect is trivial as a matter of law, a court "must consider 'all the facts and circumstances presented' " (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77; *see Stein v Sarkisian Bros., Inc.*, 144 AD3d 1571, 1571-1572). Such facts and circumstances may include the alleged defect's dimensions, appearance, or elevation, and the time, place, and circumstances of the plaintiff's injury (*see Hutchinson*, 26 NY3d at 77; *Stein*, 144 AD3d at 1572).

We conclude that the Village failed to "make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses" (*Hutchinson*, 26 NY3d at 79). In support of its motion, the Village submitted the affidavit of an employee who averred that he took photographs depicting the defect in the sidewalk, and that the

photographs “most clearly show that the height of the alleged defect is one-half inch or less.” The Village, however, did not offer a precise measurement and attached only black-and-white photographs of the defect. Moreover, the Village submitted excerpts of the deposition transcripts of two employees of Jones Lang, who reviewed plaintiff’s color photographs of the defect and testified that such a defect “should be repaired” because it “could be a tripping hazard.” We therefore conclude that the court properly denied the Village’s motion for summary judgment regardless of the sufficiency of plaintiff’s opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

569

CA 16-01765

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

CAROL ZAZZARO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HSBC BANK USA, NATIONAL ASSOCIATION, JONES LANG LASALLE OF NEW YORK, LLC, AND PRO COAT PAVING & CONSTRUCTION, INC., DEFENDANTS-RESPONDENTS.

CELLINO & BARNES, P.C., ROCHESTER (TIMOTHY R. HEDGES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ANDREW D. DRILLING OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered December 14, 2015. The order granted those parts of the motion of defendant Pro Coat Paving & Construction, Inc. and cross motion of defendants HSBC Bank USA, National Association and Jones Lang LaSalle of New York, LLC seeking summary judgment dismissing the complaint and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion in part and reinstating the first cause of action insofar as it alleges that defendant HSBC Bank USA, National Association, had constructive notice of the icy condition, and granting that part of the motion for summary judgment dismissing the cross claim for common-law indemnification against defendant Pro Coat Paving & Construction, Inc., and denying the motion in part, reinstating the cross claim of HSBC Bank USA, National Association, for contractual indemnification against Pro Coat Paving & Construction, Inc. and converting that cross claim to a third-party claim, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she slipped and fell on ice in a parking lot. The complaint alleges causes of action against HSBC Bank USA, National Association (HSBC), the owner of the parking lot, Jones Lang LaSalle of New York, LLC (Jones Lang), the property manager hired by HSBC, and Pro Coat Paving & Construction, Inc. (Pro Coat), the snowplow contractor.

Supreme Court granted the motion of Pro Coat and the cross motion of HSBC and Jones Lang insofar as they each sought summary judgment

dismissing the complaint against them. Plaintiff has not pursued in her brief the contentions raised in opposition to Pro Coat's motion that Pro Coat owed her a duty of care on the ground that Pro Coat, "in failing to exercise reasonable care in the performance of [its] duties, 'launche[d] a force or instrument of harm,' " or that it "entirely displaced the other [defendants'] duty to maintain the premises safely" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140). Nor has plaintiff raised any other contentions with respect to the order insofar as it granted Pro Coat's motion in part, and we therefore deem any challenge by plaintiff to that part of the order abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Plaintiff has also abandoned any issue with respect to whether Jones Lang owed her a duty of care (*see Espinal*, 98 NY2d at 140), or whether HSBC created the allegedly dangerous condition, inasmuch as she has failed to raise any contention with respect thereto in her brief (*see Hume v Town of Jerusalem*, 114 AD3d 1141, 1142). HSBC "met [its] initial burden with respect to actual notice by submitting evidence that [it] was not aware of the allegedly dangerous condition, and plaintiff failed to raise a triable issue of fact in opposition" (*Quigley v Burnette*, 100 AD3d 1377, 1378). We therefore do not disturb those parts of the order granting the cross motion to the extent that it sought dismissal of the complaint and cross claims against Jones Lang, and dismissal of plaintiff's claims alleging that HSBC created the allegedly dangerous condition or had actual notice of it.

We agree with plaintiff, however, that the court erred in granting that part of the cross motion seeking dismissal of plaintiff's claim against HSBC based on constructive notice, inasmuch as HSBC, by its own submissions, including in particular the deposition testimony of the HSBC branch manager, raised triable issues of fact in that regard (*see Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1188). The branch manager testified, inter alia, that he was aware on the morning of the accident that an ice advisory was in effect, that he remembered that it was icy that day, that he observed ice on the premises when he arrived at work and, with respect to the location of plaintiff's accident, that he "was surprised plaintiff had parked there because of how visible the ice was." That testimony alone warranted denial of the cross motion in part, inasmuch as it raised triable issues of fact with respect to constructive notice (*see Merrill v Falleti Motors, Inc.*, 8 AD3d 1055, 1056). We therefore modify the order by denying the cross motion insofar as it sought dismissal of plaintiff's claim based on constructive notice and reinstating that claim against HSBC.

To the extent that the claim is reinstated, it is necessary to consider the alternative relief sought in the cross motion, i.e., summary judgment on the cross claim of HSBC seeking common-law and contractual indemnification from Pro Coat, and also to consider that part of Pro Coat's motion seeking summary judgment dismissing those cross claims. We conclude that Pro Coat met its burden of establishing its entitlement to judgment dismissing the cross claim for common-law indemnification and that HSBC failed to raise a triable

issue of fact with respect thereto (*see Proulx v Entergy Nuclear Indian Point 2, LLC*, 98 AD3d 492, 493). We therefore further modify the order by granting that part of Pro Coat's motion seeking dismissal of the cross claim for common-law indemnification. We further conclude, however, that questions of fact preclude summary judgment on the cross claim for contractual indemnification to either Pro Coat or HSBC (*see Johnson v Wal-Mart*, 125 AD3d 1468, 1469; *Payton v 5391 Transit Rd., LLC*, 107 AD3d 1461, 1462), and thus we further modify the order by reinstating that cross claim. Inasmuch as Pro Coat is no longer a defendant in the action, the cross claim for contractual indemnification must be converted to a third-party claim (*see Kumar v PI Assoc., LLC*, 125 AD3d 609, 612; *Soodoo v LC, LLC*, 116 AD3d 1033, 1034).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

570

CA 16-01185

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

WM. SCHUTT & ASSOCIATES ENGINEERING & LAND SURVEYING P.C., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ST. BONAVENTURE UNIVERSITY, ET AL., DEFENDANTS, AND JAMES W. MANGUSO, DOING BUSINESS AS LAUER-MANGUSO & ASSOCIATES ARCHITECTS, DEFENDANT-APPELLANT.

HOGAN WILLIG, AMHERST (MICHAEL W. MICHALAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE KNOER GROUP, PLLC, BUFFALO (CHANEL T. MCCARTHY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered March 25, 2016. The order and judgment granted the motion of plaintiff for summary judgment against defendant James W. Manguso, doing business as Lauer-Manguso & Associates Architects.

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

Memorandum: Plaintiff, an engineering and land-surveying firm, entered into an agreement with defendant James W. Manguso, doing business as Lauer-Manguso & Associates Architects (Manguso) pursuant to which plaintiff would provide engineering services on a building construction project, with fees for the services determined by an agreed-upon basic services fee schedule and agreed-upon hourly rates for additional services. The agreement specifically excluded any "pay-when-paid" terms or conditions. Defendant Ross, Wilson & Associates (Ross Wilson) served as general contractor for the project, which involved improvements on a site owned by defendant St. Bonaventure University (St. Bonaventure). Plaintiff thereafter sent Manguso itemized invoices for the completed phases of the work plus additional fees computed on the agreed-upon hourly basis. Manguso did not pay plaintiff and never objected to the invoices. Plaintiff commenced this action asserting, inter alia, causes of action against Manguso for breach of contract and account stated. Plaintiff also asserted a cause of action for unjust enrichment against all defendants and a cause of action for foreclosure and enforcement of a mechanic's lien against St. Bonaventure. Ross Wilson and St.

Bonaventure each defaulted in the action, and Supreme Court granted plaintiff judgment against them. That judgment is not at issue on appeal. Plaintiff thereafter moved for summary judgment on its causes of action for breach of contract and account stated against Manguso. The court granted the motion, and we affirm.

We conclude that the court properly granted plaintiff's motion with respect to account stated. "An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due" (*Jim-Mar Corp. v Aquatic Constr.*, 195 AD2d 868, 869, *lv denied* 82 NY2d 660; *see Erdman Anthony & Assoc. v Barkstrom*, 298 AD2d 981, 981; *Chisholm-Ryder Co. v Sommer & Sommer*, 70 AD2d 429, 431). Here, plaintiff met its initial burden on its motion with respect to account stated by submitting evidentiary proof in admissible form that Manguso received and retained plaintiff's invoices without making an objection within a reasonable time (*see Francis W. King Petroleum Prods. v Geiger*, 231 AD2d 906, 906). Moreover, Manguso's verified answer admitted all of the elements of plaintiff's account stated cause of action, and those admissions are conclusive (*see GMS Batching, Inc. v TADCO Constr. Corp.*, 120 AD3d 549, 551; *Zegarowicz v Ripatti*, 77 AD3d 650, 653). Thus, Manguso failed to raise a triable issue of fact sufficient to defeat plaintiff's motion with respect to account stated (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

With respect to the breach of contract cause of action, the elements thereof are " 'the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages' " (*Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 111 AD3d 1374, 1376, *lv denied* 22 NY3d 864). Here, we conclude that the court properly granted that part of plaintiff's motion concerning breach of contract inasmuch as plaintiff met its initial burden of establishing all of the requisite elements (*see generally Minelli Constr. Co., Inc. v Volmar Constr., Inc.*, 82 AD3d 720, 721; *Hesse Constr., LLC v Fisher*, 61 AD3d 1143, 1144), and Manguso failed to raise an issue of fact in opposition thereto (*see generally Zuckerman*, 49 NY2d at 562). We reject Manguso's contention that he raised an issue of fact by referring to the denial contained in his answer with respect to the allegation in the amended complaint that "services, work, labor, equipment and materials were provided at the agreed to price and reasonable value." It is well settled that "the burden upon a party opposing a motion for summary judgment is not met merely by affidavits by a party which contain only a repetition or incorporation by reference of the allegations contained in pleadings or bills of particulars" (*Memory Gardens v D'Amico*, 91 AD2d 1159, 1159-1160; *see Indig v Finkelstein*, 23 NY2d 728, 729). We reject Manguso's further contention that the court should have denied that part of plaintiff's motion concerning breach of contract because plaintiff first expressly requested that relief in an amended notice of motion served just 16 days before the return date. We conclude that Manguso " 'was fully apprised of the nature of the motion and had every opportunity to contest it' and thus 'cannot claim any prejudice' " as a result of the service of the amended notice of motion (*Lanzisera v Miller*, 289 AD2d 1015, 1016).

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

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

577

CA 16-02019

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

HARLEYSVILLE WORCESTER INSURANCE COMPANY, AS ASSIGNEE/SUBROGEE OF FISHER DEVELOPMENT & GENERAL CONTRACTING, INC., PLAINTIFF-APPELLANT,

V ORDER

COUNTY OF ERIE, DEFENDANT-RESPONDENT.

REEVE BROWN PLLC, ROCHESTER (MARC S. BROWN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (MICHELLE M. PARKER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered January 8, 2016. The order, among other things, granted defendant's motion for summary judgment and dismissed plaintiff's complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 6, 2017,

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

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

578

CA 16-01997

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

JUSTIN BERNER, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF CHEEKTOWAGA, DEFENDANT-APPELLANT-RESPONDENT.

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

PERLA & PERLA, BUFFALO (STEPHEN C. HALPERN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered April 20, 2016. The order denied in part and granted in part the motion of defendant for summary judgment and denied the cross motion of plaintiff for partial summary judgment.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he allegedly sustained when he fell from a ladder while repairing a vacant home located in defendant, Town of Cheektowaga (Town). The Town contracted with plaintiff's employer to perform the work on the vacant home under the Town's statutory authority to repair vacant homes within its borders (*see* Town of Cheektowaga Code § 70-7 [A] [5]). At the time of the accident, plaintiff was standing on a ladder and replacing a board on the exterior of the house, when bees flew out of the hole and startled plaintiff. As he began to descend the ladder, he fell and injured his left arm.

The Town moved for summary judgment dismissing the complaint and contended, inter alia, that the Labor Law §§ 240 (1) and 241 (6) causes of action should be dismissed on the ground that the Town was not an owner of the property nor a general contractor for the project. In the alternative, the Town contended that, if it was an owner of the property for the purposes of the Labor Law, then the homeowner exemption to Labor Law liability was applicable. Plaintiff opposed the motion and cross-moved for summary judgment on his section 240 (1) claim. The Town appeals and plaintiff cross-appeals from an order

that granted that part of the Town's motion with respect to the section 200 and common-law negligence claims, denied that part of the motion seeking dismissal of the claims under sections 240 (1) and 241 (6), and denied the cross motion. We modify the order by granting the Town's motion in its entirety and dismissing the complaint.

We agree with the Town that it established as a matter of law that it is not liable for plaintiff's injuries under Labor Law §§ 240 (1) and 241 (6) inasmuch as it was not an owner of the property or a general contractor on the project. For the purposes of the Labor Law, the term "owner" encompasses the titleholder of the property where the accident occurred, as well as "a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit" (*Farruggia v Town of Penfield*, 119 AD3d 1320, 1321, *lv denied* 24 NY3d 906 [internal quotation marks omitted]). Here, the Town did not hold title to the property, nor did it have any interest in the property (*see id.* at 1321; *cf. Larosae v American Pumping, Inc.*, 73 AD3d 1270, 1272-1273; *Reisch v Amadori Constr. Co.*, 273 AD2d 855, 856). Furthermore, even assuming, arguendo, that the Town was an owner of the property, we conclude that the Town would be entitled to the homeowner exemption under the Labor Law (*see Castro v Mamaes*, 51 AD3d 522, 522-523; *see generally Fawcett v Stearns*, 142 AD3d 1377, 1378-1379; *Byrd v Roneker*, 90 AD3d 1648, 1650).

We further conclude that the Town established as a matter of law that it was not a general contractor on the project (*see generally Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1428; *Kulaszewski v Clinton Disposal Servs.*, 272 AD2d 855, 856). The Town submitted evidence establishing that no Town employees were on the job site, plaintiff's employer, and not the Town, directed plaintiff to the job site, and the Town did not have the authority to direct plaintiff with respect to the method and manner in which he would perform the work. Thus, the Town established that it was not a general contractor inasmuch as it was not "responsible for coordinating and supervising the project" (*Mulcaire*, 45 AD3d at 1428 [internal quotation marks omitted]; *see generally Loiacono v Lehrer McGovern Bovis*, 270 AD2d 464, 465; *Feltt v Owens*, 247 AD2d 689, 691), and plaintiff failed to raise a question of fact.

Finally, we note that plaintiff on his cross appeal has abandoned any contention that the court erred in granting those parts of the Town's motion seeking summary judgment dismissing his Labor Law § 200 and common-law negligence claims (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

589

KA 13-00892

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AGAPE A. TOWNS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered January 16, 2013. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (six counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of six counts of robbery in the first degree (Penal Law § 160.15 [2], [4]) arising out of a holdup at a restaurant. Defendant's primary contention on appeal is that County Court's conduct in negotiating and entering into a cooperation agreement with a prosecution witness denied defendant due process of law. Defendant contends that the court's actions, including acting as a prosecutor and implicitly vouching for the credibility of a witness, deprived him of a fair trial before an unbiased and neutral judge and usurped the jury's fact-finding function. Defendant's contention arises out of events that transpired in significant part outside the record of defendant's trial, in which the court interjected itself into stalled plea negotiations between the People and one of the codefendants, offering leniency in the sentencing of the codefendant on the condition that he testify truthfully against defendant at his trial.

"Trial judges have wide discretion in directing the presentation of evidence but must exercise that discretion appropriately and without prejudice to the parties" (*People v Arnold*, 98 NY2d 63, 67). "While 'neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-seeking process,' the court's discretion is not unfettered . . . The overarching principle restraining the court's discretion is that it is the function of the

judge to protect the record at trial, not to make it" (*id*.). "Where the Trial Judge oversteps the bounds and assumes the role of a prosecutor, however well intentioned the motive[,] there is a denial of a fair trial and there must be a reversal" (*People v Ellis*, 62 AD2d 469, 470; *see People v Jacobsen*, 140 AD2d 938, 940; *see generally People v Yut Wai Tom*, 53 NY2d 44, 56-58).

We criticize, in the strongest possible terms, the conduct of the court in this case in personally negotiating and entering into a quid pro quo cooperation agreement with the codefendant whereby the court promised to sentence the codefendant within a specific range in exchange for his testimony against defendant. We nevertheless cannot conclude on this record that defendant was deprived of a fair trial by the codefendant's testimony, nor can we conclude that the court in essence vouched for the truth of that testimony. Because the court's conduct in this case occurred wholly outside the presence of the jury, we conclude that the court did not assume the appearance and role of a prosecutor in the course of defendant's trial. Further, we note that the facts and circumstances surrounding the codefendant's plea deal and promise of cooperation were fully elucidated for the jury on the direct examination and cross-examination of the codefendant. Any prejudice to defendant caused by his counsel's decision to cross-examine the codefendant concerning his agreement with the court was cured by the court's instruction to the jury, which defense counsel helped to formulate. That instruction, which was to the effect that the jurors alone were to determine the credibility of the codefendant's testimony and were not to infer that the court had an opinion as to defendant's guilt or lack of guilt, is one that the jury is presumed to have followed (*see People v Morris*, 21 NY3d 588, 598; *People v Spears*, 140 AD3d 1629, 1630, *lv denied* 28 NY3d 974).

We also reject defendant's contention that the trial testimony of a different prosecution witness should have been precluded in its entirety as the fruit of the poisonous tree because the police learned the identity of that witness from defendant after violating his right to counsel. We conclude that the witness's trial testimony was sufficiently attenuated from the taint of any constitutional violation, because such violation led "not to contraband or other real evidence, but to a witness, a further and independent volitional source of information—a source which became productive only upon the application of additional, interacting forces to be found in the personality and character of the witness and, perhaps, in the intelligence and skill of her questioners" (*People v Mendez*, 28 NY2d 94, 101, *cert denied* 404 US 911). We further conclude that defense counsel was not ineffective for failing to move to preclude the witness's testimony on the foregoing basis because such a motion was unlikely to succeed (*see People v Ennis*, 41 AD3d 271, 274, *affd* 11 NY3d 403, *cert denied* 556 US 1240; *People v Caban*, 5 NY3d 143, 152). Although we agree with defendant's further contention that hearsay testimony was improperly elicited during that witness's testimony, we conclude that the error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Finally, we conclude that the sentence is not unduly harsh or

severe.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

594

CA 16-01709

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

BARBARA DIVENS AND JAMES DIVENS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

FINGER LAKES GAMING AND RACING
ASSOCIATION, INC., LP CIMINELLI, INC.,
DEFENDANTS-APPELLANTS-RESPONDENTS,
AND RAMSEY CONSTRUCTORS, INC.,
DEFENDANT-RESPONDENT-APPELLANT.

LP CIMINELLI, INC., THIRD-PARTY
PLAINTIFF-APPELLANT-RESPONDENT,

V

RAMSEY CONSTRUCTORS, INC., THIRD-PARTY
DEFENDANT-RESPONDENT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (MATTHEW LENHARD OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFF-APPELLANT-RESPONDENT.

CARTAFALSA, SLATTERY, TURPIN & LENOFF, LLP, NEW YORK CITY (BRIAN P. MINEHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT AND THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

HUTCHISON & MAIO, ELMIRA (TIMOTHY BOCEK OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal and cross appeal from an order of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered December 2, 2015. The order, among other things, denied the cross motions of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the cross motion of defendant-third-party defendant in part and dismissing the cross claims for common-law indemnification against it and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action to recover damages for injuries sustained by Barbara Divens (plaintiff) when she tripped and fell on or from a temporary walkway on casino premises owned by

defendant Finger Lakes Gaming and Racing Association, Inc. (Finger Lakes) and undergoing reconstruction by defendant LP Ciminelli, Inc. (Ciminelli) and defendant-third-party defendant Ramsey Constructors, Inc. (Ramsey). Insofar as pertinent herein, upon being sued by plaintiffs, Finger Lakes and Ciminelli interposed cross claims against Ramsey for contractual and common-law indemnification. Supreme Court denied defendants' respective cross motions for summary judgment dismissing the second amended complaint against them and for summary judgment with respect to the cross claims for indemnification. Finger Lakes and Ciminelli appeal, and Ramsey cross-appeals.

Supreme Court properly denied those parts of the cross motions for summary judgment dismissing the second amended complaint. We reject defendants' contentions that there was no non-trivial defect in the temporary walkway and that plaintiff can only speculate as to the cause of her fall. "[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case . . . , including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [internal quotation marks omitted]). The existence or non-existence of a defect " 'is generally a question of fact for the jury' " (*id*. at 977; *see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77). Thus, "there is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable . . . and therefore . . . granting summary judgment to a defendant based exclusively on the dimension[s] of the . . . defect is unacceptable" (*Hutchinson*, 26 NY3d at 77 [internal quotation marks omitted]). Here, the record contains testimony and averments from plaintiff and her husband describing, as well as photographs depicting, the alleged defect and its location. Such evidence, considered as a whole, "render[s] any other potential cause of [plaintiff's] fall [apart from the identified alleged defect] sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Nolan v Onondaga County*, 61 AD3d 1431, 1432 [internal quotation marks omitted]; *see Rinallo v St. Casimir Parish*, 138 AD3d 1440, 1441).

We further conclude that defendants failed to meet their initial burden of establishing on their respective cross motions that they did not create the alleged dangerous condition and did not have actual or constructive notice of it (*see Cleary v Walden Galleria LLC*, 145 AD3d 1524, 1526; *Gabriel v Johnston's L.P. Gas Serv., Inc.*, 143 AD3d 1228, 1230-1231). Plaintiffs in any event raised triable issues of fact on those matters (*see Cleary*, 145 AD3d at 1526; *Mandzyk v Manor Lanes*, 138 AD3d 1463, 1464-1465). We further conclude that Ramsey may be deemed to have owed and breached a duty to plaintiff if, as alleged, Ramsey constructed the walkway in an unduly dangerous or defective condition (*see Schosek v Amherst Paving, Inc.*, 11 NY3d 882, 883, *revg* 53 AD3d 1037; *Cumbo v Dormitory Auth. of State of N.Y.*, 71 AD3d 1513, 1514; *see generally Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140).

Concerning those parts of the cross claims by Finger Lakes and Ciminelli against Ramsey for contractual indemnification, we conclude that the savings language of the indemnification provision precludes a finding that the provision is void on its face pursuant to General Obligations Law § 5-322.1 (*see Charney v LeChase Constr.*, 90 AD3d 1477, 1479; *see also Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 209-211). However, an "indemnification agreement will be deemed void and unenforceable if the party seeking indemnification was itself negligent . . . , and Ciminelli [and Finger Lakes] failed to establish that [they were] not negligent as a matter of law" (*Giglio v St. Joseph InterCommunity Hosp.*, 309 AD2d 1266, 1268, *amended on rearg* 2 AD3d 1485; *see Smith v Nestle Purina Petcare Co.*, 105 AD3d 1384, 1387). By the same token, if Ramsey, or anyone for whom or which Ramsey is responsible, ultimately is found by the trier of fact not to have been negligent, Ciminelli and Finger Lakes will, by the explicit terms of the indemnification provision, be precluded from obtaining indemnification from Ramsey (*see Bellreng v Sicoli & Massaro, Inc.* [appeal No. 2], 108 AD3d 1027, 1031; *Sheridan v Albion Cent. Sch. Dist.*, 41 AD3d 1277, 1279). Given the questions of fact concerning the alleged negligence of the various defendants, neither Ciminelli and Finger Lakes nor Ramsey are entitled now to prevail as a matter of law on the cross claims for contractual indemnification.

We conclude, however, that the court erred in denying that part of the cross motion of Ramsey for summary judgment dismissing the cross claims of Ciminelli and Finger Lakes for common-law indemnification against it. We modify the order accordingly. Because the "predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453; *see Genesee/Wyoming YMCA v Bovis Lend Lease LMB, Inc.*, 98 AD3d 1242, 1244-1245). "Here, the liability of [Ciminelli and Finger Lakes on] the main [claim,] if any, is not vicarious or secondary," but rather would be based on their own alleged negligence (*Genesee/Wyoming YMCA*, 98 AD3d at 1245; *see Great Am. Ins. Co. v Canandaigua Natl. Bank & Trust Co.*, 23 AD3d 1025, 1028, *lv dismissed* 7 NY3d 741). "Thus, even viewing the allegations of [those parts of the cross claims] as true, we conclude that [Ciminelli and Finger Lakes] failed to state a cause of action for common-law indemnification against [Ramsey]" (*Genesee/Wyoming YMCA*, 98 AD3d at 1245; *see Great Am. Ins. Co.*, 23 AD3d at 1028).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

597

CA 16-01898

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

HILLCREST COATINGS, INC., HILLCREST INDUSTRIES, INC., AND DAN KIRSCH, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

COLONY INSURANCE COMPANY, DEFENDANT-APPELLANT.

STEWART BERNSTIEL REBAR & SMITH, NEW YORK CITY (WILLIAM F. STEWART OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE KNOER GROUP, PLLC, BUFFALO (ROBERT E. KNOER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Wyoming County (Deborah A. Chimes, J.), entered July 20, 2016. The order and judgment, inter alia, denied defendant's motion for summary judgment, granted in part plaintiffs' cross motion for summary judgment, dismissed defendant's first, third, sixth, eleventh and twelfth affirmative defenses, and declared that defendant is obligated to provide a defense to plaintiffs in the underlying litigation.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying that part of the cross motion with respect to the first and third affirmative defenses and reinstating those affirmative defenses and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiffs (hereafter, Hillcrest plaintiffs) commenced this action seeking, inter alia, a declaration that defendant is obligated to defend and indemnify them in the underlying environmental tort action. The plaintiffs in the underlying action (hereafter, tort plaintiffs) alleged, inter alia, that the Hillcrest plaintiffs operated their "glass, plastic and paper recycling facility" in a negligent fashion, allowing hazardous materials and substances to be discharged into and to contaminate the areas where the tort plaintiffs resided and worked. The tort plaintiffs further alleged that the Hillcrest plaintiffs "operated their facility in a way that has caused a malodorous condition to be created in the surrounding neighborhood." At the time the underlying action was filed, the Hillcrest plaintiffs were insured under a commercial general liability policy issued by defendant. That policy contained a hazardous materials exclusion, which provided that the insurance would not apply to bodily injury, property damage or personal and

advertising injury "which would not have occurred in whole or [in] part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'hazardous materials' at any time." Hazardous materials were defined as " 'pollutants', lead, asbestos, silica and materials containing them." Pollutants were defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

Defendant moved for summary judgment dismissing the complaint, contending that the hazardous materials exclusion precluded coverage for the claims asserted by the underlying plaintiffs. The Hillcrest plaintiffs cross-moved for summary judgment on the complaint as well as dismissal of various affirmative defenses. Supreme Court denied defendant's motion and granted the Hillcrest plaintiffs' cross motion in part, declaring that defendant was obligated to provide a defense for the Hillcrest plaintiffs in the underlying tort litigation but determining that a declaration concerning indemnification was not "ripe." In addition, the court, inter alia, granted those parts of the cross motion seeking dismissal of the first and third affirmative defenses and awarding the Hillcrest plaintiffs reimbursement of the cost of the defense. We conclude that the court properly denied defendant's motion and granted that part of the cross motion seeking a declaration that defendant had a duty to defend the Hillcrest plaintiffs in the underlying tort action and ordered defendant to reimburse the Hillcrest plaintiffs for the cost of the defense. We agree with defendant, however, that the court erred in granting the cross motion insofar as it sought dismissal of the first and third affirmative defenses, and we therefore modify the order and judgment accordingly. We note at the outset that defendant does not address that part of the order and judgment dismissing three other affirmative defenses and is therefore deemed to have abandoned its appeal with respect to the dismissal of those affirmative defenses (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

It is well settled that an insurance company's duty to defend is " 'exceedingly broad,' " and is broader than the duty to indemnify (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137; *see Henderson v New York Cent. Mut. Fire Ins. Co.*, 56 AD3d 1141, 1142). The duty to defend arises whenever allegations of an underlying complaint suggest " 'a reasonable possibility of coverage,' " even if facts outside the pleadings " 'indicate that the claim may be meritless or not covered' " (*Automobile Ins. Co. of Hartford*, 7 NY3d at 137; *see BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714; *Batt v State of New York*, 112 AD3d 1285, 1286-1287; *see also Allstate Ins. Co. v Zuk*, 78 NY2d 41, 45). "[U]pon a motion such as this[,] the court's duty is to compare the allegations of the complaint to the terms of the policy to determine whether a duty to defend exists" (*A. Meyers & Sons Corp. v Zurich Am. Ins. Group*, 74 NY2d 298, 302-303).

Moreover, "exclusions are subject to strict construction and must be read narrowly" (*Automobile Ins. Co. of Hartford*, 7 NY3d at 137).

"In order to establish that an exclusion defeats coverage, the insurer has the 'heavy burden' of establishing that the exclusion is expressed in clear and unmistakable language, is subject to no other reasonable interpretation, and is applicable to the facts" (*Georgetown Capital Group, Inc. v Everest Natl. Ins. Co.*, 104 AD3d 1150, 1152, quoting *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 654-655).

Here, liberally construing the allegations set forth in the second amended complaint in the underlying action (*see Automobile Ins. Co. of Hartford*, 7 NY3d at 137; *Henderson*, 56 AD3d at 1142), we conclude that there is a reasonable possibility of coverage, and that defendant therefore did not meet its heavy burden of establishing as a matter of law that the hazardous materials exclusion precludes coverage. The tort plaintiffs alleged in the second amended complaint that the Hillcrest plaintiffs' operation of the facility "caused a malodorous condition to be created in the surrounding neighborhood." Although many of the factual assertions in the second amended complaint allege that the odor resulted from hazardous materials, those are not the only factual allegations therein. Indeed, foul odors are not always caused by the discharge of hazardous materials. Inasmuch as there is a reasonable possibility of coverage, the court properly declared that defendant is obligated to defend the Hillcrest plaintiffs in the underlying tort action and ordered defendant to reimburse them for the cost of the defense.

Defendant contends, and we agree, that the court erred in granting that part of the cross motion seeking dismissal of the first and third affirmative defenses, which allege that coverage was barred because the claims in the tort action did "not allege bodily injury or property damage during the respective policy periods" and because "the allegations set forth in the [underlying] Lawsuit do not allege an occurrence or accident." We agree with defendant that those affirmative defenses "are fact-driven in nature, potentially implicate the quantum of any indemnification . . . , and cannot be determined on the face of the underlying complaint." Rather, resolution of the applicability of those affirmative defenses "should . . . be determined in the underlying lawsuit[], not in [this] declaratory judgment action" (*Evans v Royal Ins. Co.*, 192 AD2d 1105, 1106; *see Allcity Ins. Co. v Fisch*, 32 AD3d 407, 408).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

601

CA 16-01360

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

PATRICIA YOUNG-SZLAPAK, AS TRUSTEE OF THE TRUST CREATED UNDER THE LAST WILL AND TESTAMENT OF MILLARD YOUNG, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARK YOUNG, AS EXECUTOR OF THE ESTATE OF MILLARD YOUNG, DECEASED, HUNTS CORNERS DEVELOPMENT, LLC, CHRISTINE PAPKE AND LAURA YOUNG, DEFENDANTS-RESPONDENTS.

COLE, SORRENTINO, HURLEY, HEWNER & GAMBINO, P.C., BUFFALO (MICHAEL F. BARRETT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE KNOER GROUP, PLLC, BUFFALO (ROBERT EDWARD KNOER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered April 27, 2016. The order granted the motion of defendants for summary judgment dismissing the complaint and denied the cross motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this action in 2015 pursuant to article 15 of the RPAPL, alleging that the trust created under decedent's will became the owner of the entire 57-acre parcel located on McNeeley Road in the Town of Newstead, New York immediately upon decedent's death in June 2009, rather than merely two discrete improved properties located thereon. Without issuing a written decision, Supreme Court granted defendants' motion for summary judgment dismissing the complaint on the ground of res judicata, and denied plaintiff's cross motion for summary judgment. We affirm.

The record establishes that in 2013 a petition for the judicial settlement of decedent's estate was filed in Surrogate's Court, and the executor's accounting reflected that the two discrete improved properties would be distributed to the trust, while the remainder of the parcel would be transferred to defendants Christine Papke and Laura Young. Plaintiff filed objections to the executor's accounting, but the issue raised therein was resolved by the parties. Plaintiff thereafter moved for time in which to file further objections to the executor's accounting, but the Surrogate denied that request and

issued a final decree that, inter alia, approved the executor's accounting. Plaintiff filed a notice of appeal from the decree prior to commencing this action, but the parties filed a stipulation of discontinuance with respect to that appeal.

"Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation" (*Matter of Hunter*, 4 NY3d 260, 269). "These principles apply with equal force to judicially settled accounting decrees[,] . . . [and] an accounting decree is conclusive and binding with respect to all issues raised and as against all persons over whom Surrogate's Court obtained jurisdiction" (*id*. at 270). Because a "judicial settlement . . . is final as to all material matters embraced in the accounting and decree," and here the 57-acre parcel was contemplated by the accounting and decree, the court properly applied the doctrine of res judicata herein (*Matter of Zaharis*, 148 AD2d 868, 869, *lv dismissed* 74 NY2d 792; *see Zoeller v Lake Shore Sav. Bank*, 140 AD3d 1601, 1602-1603).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

602

KA 16-00218

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN PARKISON, 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 (John B. Nesbitt, J.), rendered October 8, 2015. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree and grand larceny in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the third degree (Penal Law § 140.20) and grand larceny in the third degree (§ 155.35 [1]). At sentencing, County Court ordered, inter alia, that defendant pay $9,000 in restitution, a $300 mandatory surcharge and a $25 crime victim assistance fee (CVAF). Defendant contends that, because the court told him prior to his guilty plea that he would have to pay $9,000 in restitution but did not inform him of the mandatory surcharge and CVAF until after the plea, the court had the discretionary authority to waive the imposition of the mandatory surcharge and CVAF and abused its discretion in imposing them. We reject that contention.

Notwithstanding certain exceptions that are inapplicable here, Penal Law § 60.35 (1) (a) provides that, “whenever proceedings in . . . a court of this state result in a conviction for a felony . . . , there *shall* be levied at sentencing a mandatory surcharge . . . and a [CVAF] in addition to any sentence required or permitted by law” (emphasis added). The statute further provides that “a person convicted of a felony shall pay a mandatory surcharge of [$300] and a [CVAF] of [$25]” (§ 60.35 [1] [a] [i]). Here, defendant was convicted of two felonies. Given the plain language of the statute, the sentencing court did not have the discretion to waive the mandatory surcharge and CVAF, nor does this Court. Defendant’s reliance on Penal Law § 60.35 (6) is misplaced. That statute provides that,

"where a person has made restitution . . . pursuant to [Penal Law §] 60.27 . . . , such person shall not be required to pay a mandatory surcharge or a [CVAF]," and there is no indication in the record that defendant has made restitution.

We reject defendant's contention that, under *People v Quinones* (95 NY2d 349), the mandatory surcharge and CVAF may be waived where restitution is ordered but has not yet been paid. In *Quinones*, the Court of Appeals addressed a split in the appellate divisions, two of which prohibited courts from simultaneously imposing both restitution and the mandatory surcharge/CVAF, and two of which allowed that practice. The Court determined that the statutory language of Penal Law §§ 60.27 and 60.35 (6) supported the latter position (*see Quinones*, 95 NY2d at 351-352). Thus, contrary to defendant's contention, the language in *Quinones* that, "until a defendant has in fact made restitution, a sentencing court *has the power to impose* an order to pay both restitution and the mandatory surcharge/[CVAF]" (*id.* at 352 [emphasis added]) did not implicitly grant sentencing courts discretionary authority to waive the mandatory surcharge/CVAF when restitution is ordered but remains unpaid. Indeed, CPL 420.35 (2) provides that "[u]nder no circumstances shall the mandatory surcharge . . . or the [CVAF] be waived," with an exception that is not applicable here. Moreover, although a defendant may seek "deferral of the obligation to pay all or part of a mandatory surcharge" (CPL 420.40 [1]) when, "due to the indigence of [the defendant,] the payment of said surcharge . . . would work an unreasonable hardship on the [defendant] or his or her immediate family" (CPL 420.40 [2]), there is no evidence in the record that defendant has sought such relief. Nor did the court have the discretion at the time of sentencing to entertain such an application, which a defendant may bring "at any time after sentencing, by way of a motion for resentence under CPL 420.10 (5)" (*People v Jones*, 26 NY3d 730, 732-733).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

605

KA 14-01829

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES LOPEZ, 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 May 7, 2014. The judgment convicted defendant, upon his plea of guilty, of intimidating a victim or witness in the third degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by amending the order of protection and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of intimidating a victim or witness in the third degree (Penal Law § 215.15 [1]) and endangering the welfare of a child (§ 260.10 [1]). Although we agree with defendant that his waiver of the right to appeal is invalid because "the minimal inquiry made by County Court was insufficient to establish that the court engage[d] . . . defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Jones*, 107 AD3d 1589, 1589, *lv denied* 21 NY3d 1075 [internal quotation marks omitted]; *see People v Brown*, 148 AD3d 1562, 1562), we nevertheless reject defendant's challenge to the severity of the sentence.

Even a valid waiver of the right to appeal would not encompass defendant's further contention that the court erred in setting the expiration date of the order of protection (*see People v Cameron*, 87 AD3d 1366, 1366; *People v Allen*, 64 AD3d 1190, 1191, *lv denied* 13 NY3d 794). Although defendant failed to preserve his contention for our review (*see People v Nieves*, 2 NY3d 310, 315-317), we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Inasmuch as we agree with defendant that the court erred in setting the expiration date of the order of

protection (*see People v Mingo*, 38 AD3d 1270, 1271), we modify the judgment by amending the order of protection, and we remit the matter to County Court to determine the jail time credit to which defendant is entitled and to specify an expiration date in accordance with CPL 530.13 (4) (A) (*see People v Richardson*, 143 AD3d 1252, 1255, *lv denied* 28 NY3d 1150).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

608

KA 16-01358

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN ROCKTASCHEL, DEFENDANT-APPELLANT.

MAYNARD LAW OFFICE, LLC, MORRISTOWN, NEW JERSEY (JAMES H. MAYNARD, OF THE NEW JERSEY BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Erie County Court (David W. Foley, A.J.), dated June 20, 2016. The order denied defendant's motion seeking that he be released from the registration requirements of the Sex Offender Registration Act.

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

Memorandum: In 2005, defendant was adjudicated a level one risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). In 2016, he moved pursuant to sections 168-h (1) and 168-o (1) to be released from the SORA registration requirements, and he appeals from an order denying that motion. We affirm.

Defendant is "ineligible for relief from SORA's registration requirements, as he has not been registered for at least 30 years" (*People v Pero*, 49 AD3d 1010, 1011; *see People v Shim*, 139 AD3d 68, 72, *lv denied* 27 NY3d 910; *see also People v Kindred*, 71 AD3d 1418, 1418), and he is not a level two risk (*see* Correction Law § 168-o [1]). Insofar as defendant contends that he should not be required to register pursuant to SORA because he has moved to another state, it is well settled that "the establishment of a residence in another state does not relieve petitioner of his SORA registration obligations" (*Matter of Doe v O'Donnell*, 86 AD3d 238, 242, *lv denied* 17 NY3d 713; *see People v Melzer*, 89 AD3d 1000, 1001, *lv denied* 19 NY3d 803, *rearg denied* 19 NY3d 954). Defendant's constitutional challenges to SORA are not properly before us because there is no indication in the record that the Attorney General was given the requisite notice (*see* Executive Law § 71; *People v Jewell*, 119 AD3d 1446, 1448, *lv denied* 24

NY3d 905; *People v McKeehan*, 2 AD3d 1421, 1422, *lv denied* 3 NY3d 644).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

610

KA 15-00923

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. KING, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered March 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, his waiver of the right to appeal is valid (*see generally People v Lopez*, 6 NY3d 248, 256; *People v Daigler*, 148 AD3d 1685, 1686). Defendant waived that right "both orally and in writing before pleading guilty, and [County Court] conducted an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v McGrew*, 118 AD3d 1490, 1490-1491, *lv denied* 23 NY3d 1065 [internal quotation marks omitted]; *see People v Weatherbee*, 147 AD3d 1526, 1526). Moreover, the record establishes that defendant "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Lopez*, 6 NY3d at 256; *see People v Nicometo*, 137 AD3d 1619, 1619-1620). Although the colloquy and the written waiver contain improperly overbroad language regarding the scope of the rights waived by defendant (*see generally People v Callahan*, 80 NY2d 273, 285; *People v Seaberg*, 74 NY2d 1, 9), "[a]ny nonwaivable issues purportedly encompassed by the waiver are excluded from the scope of the waiver [and] the remainder of the waiver is valid and enforceable" (*Weatherbee*, 147 AD3d at 1526 [internal quotation marks omitted]; *see People v Henion*, 110 AD3d 1349, 1350, *lv denied* 22 NY3d 1088; *People v Pelaez*, 100 AD3d 803, 804, *lv denied* 21 NY3d 945). Furthermore, although a waiver of the right to appeal does not foreclose review of

a court's failure to consider treatment as a youthful offender, defendant's "valid waiver of the right to appeal . . . forecloses appellate review of [the] sentencing court's discretionary decision to deny youthful offender status" to defendant inasmuch as the court considered such status before imposing a sentence (*People v Pacherille*, 25 NY3d 1021, 1024).

Defendant also challenges the lawfulness of certain conditions of probation that were imposed by the court at sentencing. Defendant's challenges are not precluded by his waiver of the right to appeal inasmuch as they implicate the legality of the sentence, i.e., the court's authority to impose the conditions, and it is well settled that "even a valid waiver of the right to appeal will not bar . . . challenge[s] to an illegal sentence" (*People v Fishel*, 128 AD3d 15, 17; *see Lopez*, 6 NY3d at 255; *Callahan*, 80 NY2d at 280). Moreover, while the People contend that defendant's challenges are not preserved for our review because defendant failed to object to the probation conditions at sentencing, there is a "narrow exception to [the] preservation rule permitting appellate review when a sentence's illegality is readily discernible from the trial record" (*People v Santiago*, 22 NY3d 900, 903; *see People v Nieves*, 2 NY3d 310, 315; *People v Samms*, 95 NY2d 52, 56). "The Court of Appeals has recognized that this 'illegal sentence' exception encompasses a defendant's claims that a probation condition is unlawful because it is not reasonably related to rehabilitation or is outside the authority of the court to impose" (*Fishel*, 128 AD3d at 17-18; *see People v Letterlough*, 86 NY2d 259, 263 n 1; *see also Samms*, 95 NY2d at 56; *see generally People v Fuller*, 57 NY2d 152, 156). We thus conclude that the narrow exception to the preservation rule applies to defendant's challenges to the probation conditions to the extent that they implicate the legality of his sentence and that any illegality is evident on the face of the record (*see Fishel*, 128 AD3d at 18; *see also Samms*, 95 NY2d at 56).

With respect to the merits, however, we reject defendant's contention that the condition that he sign a consent to waive his Fourth Amendment right protecting him from searches of his person, home, and personal property was unlawfully imposed by the sentencing court. Indeed, that condition was properly "circumscribed to specified types of searches by probation officers acting within the scope of their supervisory duty and in the context of the probationary goal of rehabilitation" (*People v Hale*, 93 NY2d 454, 460). Unlike the defendant in *People v Mead* (133 AD3d 1257, 1258), the 16-year-old defendant in this case had a history of drug and alcohol abuse beginning at a young age that resulted in, among other things, a referral to a treatment program from which defendant was unsuccessfully discharged. Additionally, the 10-year-old victim of defendant's sexual abuse reported that defendant had exposed her to marihuana. We thus conclude that the consent-to-search condition is tailored to suit defendant and reasonably related to his rehabilitation (*see* Penal Law § 65.10 [2] [l]; *Hale*, 93 NY2d at 461). The condition is also "reasonably necessary to insure that the defendant will lead a law-abiding life" (§ 65.10 [1]), and is necessary to prevent his future incarceration (*see* § 65.10 [5]). For

the same reasons, defendant's challenge to the probation condition requiring that he abstain from the use or possession of alcoholic beverages is without merit.

Contrary to defendant's further contention, the probation condition prohibiting him from using the internet to access any commercial social networking website is one of the mandatory conditions expressly required by statute where, as here, the court imposes a sentence of probation for an offense requiring registration as a sex offender and the victim was under 18 years old at the time of the offense (*see* Penal Law § 65.10 [4-a] [b]).

We reject defendant's challenge to the probation condition prohibiting him from possessing "a cellular phone with photograph/video capabilities." In light of defendant's sexual abuse of a 10-year-old victim, along with the evidence that defendant had exposed the victim to pornographic video and magazine images and the fact that a cellular phone with a camera is readily capable of being used to create such images of oneself or others and distribute them to other persons, we conclude that the subject prohibition relates to defendant's rehabilitation, would assist in preventing his incarceration, and is, in general, reasonably necessary to assist defendant in leading a law-abiding life (*see* Penal Law § 65.10 [1], [2] [l]; [5]).

Contrary to defendant's further contention, inasmuch as there is evidence in the record that he showed the victim pornographic images, the probation conditions prohibiting his possession of pornographic or sexually stimulating materials were properly " 'tailored in relation to the offense[], and were reasonably related to defendant's rehabilitation' " (*People v Franco*, 69 AD3d 981, 983, quoting *Hale*, 93 NY2d at 462; *see generally People v Wheeler*, 99 AD3d 1168, 1170, *lv denied* 20 NY3d 989).

Defendant's contention that the pornography-related probation conditions are unconstitutional is not preserved for our review inasmuch as he failed to object to those conditions at sentencing, and thus "the sentencing court was never given an opportunity to address any of the constitutional challenges that defendant now lodges with this Court" (*People v Pena*, 28 NY3d 727, 730; *see* CPL 470.05 [2]). Moreover, the narrow exception to the preservation rule is not applicable here (*see Pena*, 28 NY3d at 730). 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]; *People v Rawson*, 125 AD3d 1323, 1324, *lv denied* 26 NY3d 934; *People v Riley*, 9 AD3d 902, 903, *lv denied* 3 NY3d 741).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

612

CAF 15-01838

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

IN THE MATTER OF DARIO R. PEREZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KARIN C. JOHNSON, RESPONDENT-RESPONDENT.

IN THE MATTER OF KARIN C. JOHNSON,
PETITIONER-RESPONDENT,

V

DARIO R. PEREZ, RESPONDENT-APPELLANT.

MICHELLE A. COOKE, CORNING, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

WELCH & ZINK, CORNING (COLLEEN G. ZINK OF COUNSEL), FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

SALLY A. MADIGAN, ATTORNEY FOR THE CHILDREN, BATH.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered October 23, 2015 in a proceeding pursuant to Family Court Act article 6. The order, among other things, denied the petition of petitioner-respondent seeking modification of a prior custody order granting respondent-petitioner sole legal and primary physical custody of 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 6 proceeding, petitioner-respondent father appeals from an order that, inter alia, denied his petition seeking modification of a prior custody order issued by an out-of-state court granting respondent-petitioner mother sole legal and primary physical custody of the parties' son and daughter. In his petition and supplemental petition, the father sought joint legal custody of the children with primary physical placement of the children with him, and he contended that modification was warranted because the mother failed to provide the children with proper nutrition, failed to ensure that they received proper medical attention and failed to inform the father of the medical care required by the children.

We affirm. The evidence at the hearing established that the mother appropriately addressed the children's medical, education and dietary needs, and we therefore conclude that Family Court properly determined that the father 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 a modification of the prior order (*see Gizzi v Gizzi*, 136 AD3d 1405, 1406; *Matter of Hoffmeier v Byrnes*, 101 AD3d 1666, 1666-1667; *Matter of Goldsmith v Goldsmith*, 68 AD3d 1209, 1210).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

613

CAF 15-02046

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

IN THE MATTER OF LASONDRA D.

WYOMING COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CASSANDRA D., RESPONDENT,
AND VICTOR S., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

PALOMA A. CAPANNA, WEBSTER, FOR RESPONDENT-APPELLANT.

WILLIAM D. BRODERICK, JR., ATTORNEY FOR THE CHILD, ELMA.

Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J), entered November 9, 2015 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Victor S. had neglected the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals, in appeal No. 1, from an order in which Family Court, inter alia, found that he neglected his daughter. In appeal No. 2, the father appeals from a further order in which the court, inter alia, awarded custody of the subject child to the nonparty maternal grandmother.

Initially, we conclude that the appeal from the order in appeal No. 2 must be dismissed. In that appeal, the father challenges the court's determination to place the subject child with her maternal grandmother, which was initially issued in a temporary order of removal entered prior to the order in appeal No. 1, and which was continued in the order of disposition that is the subject of appeal No. 2. Those orders were issued upon the father's consent, and the father also consented to the continuation of that placement in a subsequent permanency order. The father's challenges to the dispositional provisions of those orders are not properly before this Court because "no appeal lies from that part of an order entered on consent" (*Matter of Charity M. [Warren M.]* [appeal No. 2], 145 AD3d 1615, 1617; *see Matter of Misti Z.*, 300 AD2d 1147, 1147).

Contrary to the father's contention in appeal No. 1, we conclude that petitioner established by a preponderance of the evidence that

the father neglected the child. It is well settled that "a party seeking to establish neglect must show, by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]), first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368; *see Matter of Afton C. [James C.]*, 17 NY3d 1, 9). " 'The minimum degree of care standard requires an objective evaluation of [the parent's] actions in light of what a reasonable and prudent parent would have done' " (*Matter of Dustin B.*, 24 AD3d 1280, 1281; *see Matter of Paul U.*, 12 AD3d 969, 971). We reject the father's contention that the court failed to apply the proper legal standard in determining that the father neglected the child.

Contrary to the father's further contention, " '[a] single incident where the parent's judgment was strongly impaired and the child [was] exposed to a risk of substantial harm can sustain a finding of neglect' " (*Matter of Raven B. [Melissa K.N.]*, 115 AD3d 1276, 1278). Here, petitioner established by a preponderance of the evidence that the father neglected the child because he "should have known of [respondent] mother's substance abuse and failed to protect the child" (*Matter of Joseph Benjamin P. [Allen P.]*, 81 AD3d 415, 416, *lv denied* 16 NY3d 710; *see Matter of Donell S. [Donell S.]*, 72 AD3d 1611, 1612, *lv denied* 15 NY3d 705; *Matter of Albert G., Jr. [Albert G., Sr.]*, 67 AD3d 608, 608). Although the father denied knowledge of the mother's substance abuse, "[w]here, as here, issues of credibility are presented, the hearing court's findings must be accorded great deference" (*Matter of Todd D.*, 9 AD3d 462, 463; *see Matter of Holly B. [Scott B.]*, 117 AD3d 1592, 1592), and we perceive no reason to reject the court's credibility determinations.

Finally, the father failed to preserve for our review his contention that the court was biased against him (*see Matter of Reinhardt v Hardison*, 122 AD3d 1448, 1448-1449; *Matter of Brian P. [April C.]*, 89 AD3d 1530, 1531). In any event, that contention is without merit (*see Matter of McDonald v Terry*, 100 AD3d 1531, 1531; *Brian P.*, 89 AD3d at 1531).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

614

CAF 15-02047

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

IN THE MATTER OF LASONDRA D.

WYOMING COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CASSANDRA D., RESPONDENT,
AND VICTOR S., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

PALOMA A. CAPANNA, WEBSTER, FOR RESPONDENT-APPELLANT.

WILLIAM D. BRODERICK, JR., ATTORNEY FOR THE CHILD, ELMA.

Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J), entered November 18, 2015 in a proceeding pursuant to Family Court Act article 10. The order, among other things, continued the placement of the subject child in the custody of the nonparty maternal grandmother.

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

Same memorandum as in *Matter of Lasondra D. (Victor S.)* ([appeal No. 1], ___ AD3d ____ [June 9, 2017]).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

615

CA 16-01666

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

KEITH MAY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BUFFALO MRI PARTNERS, L.P., ET AL., DEFENDANTS,
AND HARI GOPAL, M.D., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE TARANTINO LAW FIRM, LLP, BUFFALO (JENNA S. STRAZZULLA OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROLAND M. CERCONE, PLLC, BUFFALO (ROLAND M. CERCONE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered January 22, 2016. The order, inter alia, converted the motion of defendant Hari Gopal, M.D., to dismiss the amended complaint against him to a motion for summary judgment.

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

Same memorandum as in *May v Buffalo MRI Partners, L.P.* ([appeal No. 2] ___ AD3d ___ [June 9, 2017]).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

616

CA 16-01667

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

KEITH MAY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BUFFALO MRI PARTNERS, L.P., ET AL., DEFENDANTS,
AND HARI GOPAL, M.D., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE TARANTINO LAW FIRM, LLP, BUFFALO (JENNA S. STRAZZULLA OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROLAND M. CERCONE, PLLC, BUFFALO (ROLAND M. CERCONE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 8, 2016. The order, inter alia, denied the motion of defendant Hari Gopal, M.D., for summary judgment dismissing the amended complaint against him.

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

Memorandum: Plaintiff commenced this action against defendant Buffalo MRI Partners, L.P. (Buffalo MRI) and, after the applicable statute of limitations expired, plaintiff filed an amended complaint adding, inter alia, Hari Gopal, M.D. as a defendant. Dr. Gopal moved pursuant to CPLR 3211 (a) to dismiss the amended complaint against him as time-barred and, by the order in appeal No. 1, Supreme Court (Curran, J.) converted the motion to one for summary judgment. Dr. Gopal then moved for summary judgment seeking dismissal of the amended complaint against him as time-barred and, by the order in appeal No. 2, Supreme Court (Marshall, J.), inter alia, denied the motion. Dr. Gopal has not raised any contentions with respect to the order in appeal No. 1, and we therefore dismiss the appeal therefrom (*see Abasciano v Dandrea*, 83 AD3d 1542, 1545; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Contrary to Dr. Gopal's contention in appeal No. 2, the motion for summary judgment was properly denied based on the relation back doctrine (*see Goldstein v Brookwood Bldg. Corp.*, 74 AD3d 1801, 1802). "In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiff[] must establish that (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united

in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he will not be prejudiced in maintaining his defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff[] as to the identity of the proper parties, the action would have been brought against him as well" (*Nani v Gould*, 39 AD3d 508, 509; *see Buran v Coupal*, 87 NY2d 173, 178).

We reject Dr. Gopal's contention that plaintiff failed to establish the second and third prongs of the test. The second prong, unity of interest, is satisfied " 'when the interest of the parties in the subject-matter is such that they [will] stand or fall together and that judgment against one will similarly affect the other' " (*Mongardi v BJ's Wholesale Club, Inc.*, 45 AD3d 1149, 1150). There is unity of interest where " 'the defenses available . . . will be identical, [which occurs] . . . where one is vicariously liable for the acts of the other' " (*De Sanna v Rockefeller Ctr., Inc.*, 9 AD3d 596, 598; *see Johanson v County of Erie*, 134 AD3d 1530, 1531; *Verizon N.Y., Inc. v LaBarge Bros. Co., Inc.*, 81 AD3d 1294, 1296). Dr. Gopal contends that, even if he was an employee of Buffalo MRI, there is no unity of interest because he could not be vicariously liable for the acts of Buffalo MRI. We conclude, however, that plaintiff submitted evidence establishing that Buffalo MRI is vicariously liable for the acts of Dr. Gopal, and "unity of interest does not turn upon whether the actual wrongdoer or the person or entity sought to be charged vicariously was served first" (*Connell v Hayden*, 83 AD2d 30, 48; *see Nani*, 39 AD3d at 509-510; *see generally Kirk v University OB-GYN Assoc., Inc.*, 104 AD3d 1192, 1193-1194).

With respect to the third prong, the mistake by plaintiff need not be an excusable mistake (*see Buran*, 87 NY2d at 180-181), inasmuch as such a requirement would deemphasize "the 'linchpin' of the relation back doctrine[, i.e.,] notice to the defendant within the applicable limitations period," by shifting the focus away from this primary question (*id.* at 180). The relation back doctrine is not satisfied, however, when a plaintiff "omitted a defendant in order to obtain a tactical advantage in the litigation" (*id.* at 181; *see Nasca v DelMonte*, 111 AD3d 1427, 1429). Here, we conclude that the third prong was satisfied because plaintiff established "that [his] failure to include [Dr. Gopal] as a defendant in the original . . . complaint was a mistake and not . . . the result of a strategy to obtain a tactical advantage" (*Nasca*, 111 AD3d at 1429 [internal quotation marks omitted]; *see Goldstein*, 74 AD3d at 1802). Dr. Gopal's contention that plaintiff should have obtained his medical records and ascertained Dr. Gopal's identity sooner is not persuasive considering that plaintiff sought that very information through his discovery demands, which went unanswered by Buffalo MRI for a year, during which time the statute of limitations expired. In any event, even assuming, arguendo, that plaintiff was negligent in not ascertaining Dr. Gopal's identity sooner, we conclude that "there was still a mistake by plaintiff[] in failing to identify [Dr. Gopal] as a defendant" (*Kirk*, 104 AD3d at 1194). Plaintiff further established that Dr. Gopal, who did not dispute that he was the Medical Director of Buffalo MRI,

should have known that the action would be asserted against him and that he had notice within the applicable limitations period (*see Roseman v Baranowski*, 120 AD3d 482, 484-485).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

620

CA 16-01508

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

CATHERINE SCHRAUTH FORCUCCI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION OF HAMBURG CENTRAL SCHOOL DISTRICT, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

MURPHY MEYERS LLP, ORCHARD PARK (MARGARET A. MURPHY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (PATRICK J. HINES OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered December 3, 2015. The order and judgment denied plaintiff's motion for summary judgment on the second and fourth causes of action.

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

Memorandum: Plaintiff, a former member of defendant, Board of Education of Hamburg Central School District (Board), commenced this action after the Board sought plaintiff's removal from the Board pursuant to Education Law § 1709 (18). In appeal No. 1, plaintiff appeals from an order and judgment that denied her motion for summary judgment on the second and fourth causes of action, which asserted that the Board violated plaintiff's First Amendment right of access when it closed to the general public the first three days of her removal hearing. In appeal No. 2, the Board appeals from an order and judgment that, inter alia, denied its cross motion for leave to amend its answer to assert as a defense that plaintiff lacks standing.

In appeal No. 1, we conclude that Supreme Court erred in denying plaintiff's motion on the ground that she lacked standing. By failing to include that defense in its verified answer or in a pre-answer motion to dismiss, the Board waived it (*see Matter of Fossella v Dinkins*, 66 NY2d 162, 167-168; *Matter of Santoro v Schreiber*, 263 AD2d 953, 953, *appeal dismissed* 94 NY2d 817). Nevertheless, we affirm the order and judgment in appeal No. 1 on the alternative ground that plaintiff failed to establish her entitlement to summary judgment on her First Amendment causes of action.

The First Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" (US Const First Amend). "[A] trial courtroom . . . is a public place where the people generally – and representatives of the media – have a right to be present, and where their presence historically has been thought to enhance the integrity and the quality of what takes place" (*Richmond Newspapers, Inc. v Virginia*, 448 US 555, 578). The United States Supreme Court has applied a two-part test to determine whether there was a right of access under the First Amendment (*see Press-Enterprise Co. v Superior Ct. of Cal., County of Riverside*, 478 US 1, 8-10), and the Court of Appeals has used that test to determine whether there is a right of access to a professional disciplinary hearing (*see Matter of Johnson Newspaper Corp. v Melino*, 77 NY2d 1, 5). The test requires a court to consider "whether the place and process have historically been open to the press and general public and whether public access plays a significant positive role in the functioning of the particular process in question" (*id*. at 5 [internal quotation marks omitted]; *see Press-Enterprise Co.*, 478 US at 8). Once it has been determined that there is such a right of access, then the proceeding "cannot be closed unless specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest" (*Press-Enterprise Co.*, 478 US at 13-14 [internal quotation marks omitted]).

Here, plaintiff failed to submit evidence establishing as a matter of law that removal hearings conducted pursuant to Education Law § 1709 (18) have historically been open to the public and that the public has played a significant positive role in such proceedings (*see Johnson Newspaper Corp.*, 77 NY2d at 7-8). We therefore conclude that the court properly denied plaintiff's motion on the ground that plaintiff failed to meet her burden of establishing as a matter of law that there is a First Amendment right of access to an Education Law § 1709 (18) removal proceeding.

We reject the Board's contention in appeal No. 2 that the court abused its discretion in denying its cross motion seeking leave to amend its answer. "[L]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit" (*Baker v County of Oswego*, 77 AD3d 1348, 1350 [internal quotation marks omitted]; *see* CPLR 3025 [b]). "Prejudice has been defined as a special right lost in the interim, a change in position, or significant trouble or expense that could have been avoided had the original pleading contained the proposed amendment" (*Ward v City of Schenectady*, 204 AD2d 779, 781; *see Dawley v McCumber*, 45 AD3d 1399, 1400). Here, plaintiff established that she would suffer prejudice as a result of the amendment, and it therefore cannot be said that the court abused its

discretion in denying the cross motion.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

621

CA 16-01731

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

CATHERINE SCHRAUTH FORCUCCI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION OF HAMBURG CENTRAL SCHOOL DISTRICT, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

HODGSON RUSS LLP, BUFFALO (PATRICK J. HINES OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARGARET A. MURPHY, ORCHARD PARK, FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 11, 2016. The order and judgment, inter alia, denied defendant's cross motion seeking leave to amend its answer to assert as a defense that plaintiff lacks standing.

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

Same memorandum as in *Forcucci v Board of Educ. of Hamburg Cent. Sch. Dist.* ([appeal No. 1] ___ AD3d ___ [June 9, 2017]).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

622

CA 16-00453

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

GREGORY G. GUZEK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

B & L WHOLESALE SUPPLY, INC., AND ROBERT D. PATKALITSKY, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

MARTIN J. ZUFFRANIERI, WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Donna M. Siwek, J.), entered December 21, 2015. The judgment, entered upon a jury verdict of no cause of action, dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for personal injuries that he allegedly sustained as the result of a multi-vehicle collision. On a prior appeal, we, inter alia, affirmed that part of an order that denied defendants' motion for summary judgment dismissing the complaint (*Guzek v B & L Wholesale Supply, Inc.*, 126 AD3d 1506, 1507), and the matter proceeded to trial. In appeal No. 1, plaintiff appeals from a judgment, entered upon a jury verdict of no cause of action, dismissing the complaint, and in appeal No. 2, he appeals from an order denying his posttrial motion to set aside the verdict as against the weight of the evidence. Initially, we note that the appeal from the judgment in appeal No. 1 brings up for review the propriety of the order in appeal No. 2, and thus the appeal from the order in appeal No. 2 must be dismissed (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435, 435; *see also* CPLR 5501 [a] [1]).

The evidence at trial establishes that the accident occurred on William Street in the Town of Cheektowaga. Plaintiff's vehicle was stopped at a traffic signal, in the right of the two westbound lanes. A vehicle operated by former defendant Garret Butlak was stopped immediately behind plaintiff's vehicle. Behind Butlak's vehicle was an intersection with a side street, and a Jeep Grand Cherokee was stopped on William Street, behind Butlak's vehicle but across the side street. A vehicle driven by an unidentified person began to edge out

of the side street and started to cross William Street, then paused briefly between Butlak's vehicle and the Grand Cherokee. The unidentified driver suddenly spun the vehicle's tires and drove across several lanes of traffic in front of a pickup truck owned by defendant B & L Wholesale Supply, Inc., and operated by defendant Robert D. Patkalitsky, which was proceeding westbound in the left lane of William Street. Patkalitsky swerved to the right to avoid the unidentified driver's vehicle, but he lost control of the pickup, slid, and struck the rear of Butlak's vehicle, propelling it into the rear of plaintiff's vehicle. There was conflicting trial testimony regarding how heavily it was snowing and how much snow was on the roadway at the time of the accident.

We reject plaintiff's contention that Supreme Court abused its discretion in granting defendants' motion to preclude parts of the testimony of plaintiff's expert on the ground that plaintiff failed to comply with the disclosure requirements in CPLR 3101 (d). "It is within the sound discretion of the trial court to determine whether a witness may testify as an expert and that determination should not be disturbed in the absence of serious mistake, an error of law or abuse of discretion" (*Harris v Seager*, 93 AD3d 1308, 1309 [internal quotation marks omitted]). Given the deficiencies in plaintiff's expert disclosure, we perceive no abuse of the court's discretion in this case (*see id.*). We note that the court granted defendants' motion immediately after granting plaintiff's motion to preclude the testimony of defendants' expert on the cause of the accident, based upon nearly identical deficiencies in defendants' expert disclosure (*see generally Stark v Semeran* [appeal No. 2], 244 AD2d 894, 894, *lv dismissed* 91 NY2d 956).

We also reject plaintiff's contention that the court erred in permitting the driver of the Grand Cherokee to provide a general estimate of the speed of defendants' vehicle as it passed him. It has long been the rule that "[a]n estimate of the speed at which an automobile is moving at a given time is generally viewed as a matter of common observation rather than expert opinion, and it is well settled that any person of ordinary ability and intelligence having the means or opportunity of observation is competent to testify as to the rate of speed of such a vehicle" (*Marcucci v Bird*, 275 App Div 127, 129; *see Lo Faso v Jamaica Buses*, 63 AD2d 998, 998; *see generally Tavarez v Oquendo*, 58 AD3d 446, 446, *lv denied* 13 NY3d 703).

We agree with plaintiff that the court erred in admitting a prior consistent statement by Patkalitsky in evidence (*see Sansevere v United Parcel Serv.*, 181 AD2d 521, 524; *see also People v McClean*, 69 NY2d 426, 428), and in permitting the driver of the Grand Cherokee to express the opinion that Patkalitsky operated defendants' vehicle safely (*see generally Van Scooter v 450 Trabold Rd.*, 206 AD2d 865, 866). Nevertheless, we conclude that those errors are harmless inasmuch as we are " 'satisfied that the result would have been the same even if the evidence had not been improperly admitted' " (*Palmer v Wright & Kremers*, 62 AD2d 1170, 1171; *see Jaoude v Hannah*, 104 AD3d 1272, 1274, *lv denied* 22 NY3d 852; *Ithier v Harnden*, 41 AD3d 1198, 1198-1199).

Contrary to plaintiff's further contention, the court properly granted defendants' request for an instruction on the emergency doctrine. It is well settled that, in determining whether to give such a charge, the court must view "the evidence in the light most favorably toward giving the requested emergency doctrine instruction to the jury" (*Kuci v Manhattan & Bronx Surface Tr. Operating Auth.*, 88 NY2d 923, 924; *see Rivera v New York City Tr. Auth.*, 77 NY2d 322, 326, *rearg denied* 77 NY2d 990). It is also well settled that where, as here, a "reasonable view of the evidence establishes that an actor was confronted by a sudden and unforeseen occurrence not of the actor's own making, then the reasonableness of the conduct in the face of the emergency is for the jury" (*Kuci*, 88 NY2d at 924). Based on the evidence summarized above, we agree with defendants that the court properly gave the charge (*see Steuer v Town of Amherst*, 300 AD2d 1104, 1106).

Plaintiff further contends that the court erred in denying his posttrial motion to set aside the verdict as against the weight of the evidence because Patkalitsky was not confronted with an emergency. We reject that contention. It is well established that "[a] motion to set aside a jury verdict of no cause of action should not be granted unless the preponderance of the evidence in favor of the moving party is so great that the verdict could not have been reached upon any fair interpretation of the evidence" (*Dannick v County of Onondaga*, 191 AD2d 963, 964; *see Lolik v Big V Supermarkets*, 86 NY2d 744, 746). Here, there was no such preponderance of the evidence in favor of plaintiff. To the contrary, the jury could have concluded upon a fair interpretation of the evidence that Patkalitsky was proceeding with the right-of-way, and that Patkalitsky was therefore entitled to assume that the operator of the crossing vehicle would obey the traffic laws requiring that she yield the right-of-way to him (*see Dinham v Wagner*, 48 AD3d 349, 349-350; *Platt v Wolman*, 29 AD3d 663, 663). Moreover, based on the limited time in which Patkalitsky could view the crossing vehicle and its sudden acceleration across the roadway from between stopped vehicles, the jury could conclude that his reactions were reasonable under the circumstances (*see generally DiSalvo v Hiller*, 2 AD3d 1386, 1387).

We have considered plaintiff's remaining contentions, and we conclude that they do not require reversal of the judgment.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

623

CA 16-00459

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

GREGORY G. GUZEK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

B & L WHOLESALE SUPPLY, INC., AND ROBERT D. PATKALITSKY, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

MARTIN J. ZUFFRANIERI, WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered December 21, 2015. The order denied plaintiff's posttrial motion to set aside the jury verdict.

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

Same memorandum as in *Guzek v B & L Wholesale Supply, Inc.* ([appeal No. 1] ___ AD3d ___ [June 9, 2017]).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

627

KA 14-01501

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRELL KING, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of Supreme Court, Monroe County (Alex R. Renzi, J.), rendered June 18, 2014. The judgment convicted defendant, upon his plea of guilty, of arson in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of arson in the third degree (Penal Law §150.10 [1]), defendant contends that Supreme Court abused its discretion by denying him the promised youthful offender status. We reject that contention. " 'The determination . . . whether to grant . . . youthful offender status rests within the sound discretion of the court and depends upon all the attending facts and circumstances of the case' " (*People v Dawson*, 71 AD3d 1490, 1490, *lv denied* 15 NY3d 749). At the plea proceeding, the court stated that, in order to receive youthful offender status, defendant would have to, inter alia, comply with electronic monitoring and attend school every day while awaiting sentencing. The court warned defendant that he would go to jail if he failed to comply with those conditions. Defendant violated the conditions by absconding for approximately four months and failing to attend school. In light of defendant's failure to comply with the conditions of the plea agreement, his contention that the court abused its discretion in denying him youthful offender status and in imposing a term of incarceration is without merit (*see People v Perkins*, 188 AD2d 281, 281).

Contrary to defendant's further contention, we conclude that the sentence is not unduly harsh or severe.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

633

KA 12-02041

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHANIE A. MEACHAM, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered December 21, 2009. The judgment convicted defendant, upon a jury verdict, of gang assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence to a determinate term of incarceration of 10 years and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting her following a jury verdict of gang assault in the first degree (Penal Law § 120.07). Following that conviction, defendant, in appeal No. 2, entered a plea of guilty to attempted assault in the second degree (§§ 110.00, 120.05 [2]), with a promise that the sentence in appeal No. 2 would run concurrently with the sentence in appeal No. 1. The only contention raised with respect to appeal No. 2 is that, if the judgment in appeal No. 1 is reversed, then the judgment in appeal No. 2 must be reversed also (*see generally People v Pichardo*, 1 NY3d 126, 129). For the reasons that follow, we conclude that the judgment in appeal No. 1 should be modified as a matter of discretion in the interest of justice with respect to the sentence only, and as modified, affirmed. As a result, there is no basis to reverse the judgment in appeal No. 2.

Defendant contends that County Court abused its discretion in consolidating for trial defendant's indictment in appeal No. 1 with those of the two codefendants. We reject that contention for the same reasons we rejected that contention on the appeal of one of her codefendants (*People v Snyder*, 84 AD3d 1710, 1711, *lv denied* 17 NY3d 810). Defendant and her two codefendants "were part of a group that assaulted the same victim" and, although defendant's role in the victim's injuries was significantly less than those of her

codefendants, the evidence against the three codefendants "was virtually identical" (*id.*). Moreover, "there were no irreconcilable conflicts between the various defense theories . . . [;] none of the codefendants testified at trial . . . [;] [the] defense [of justification for one codefendant] was not inconsistent with any of the other defenses asserted at trial[;] . . . the three codefendants did not accuse each other of the crime[;] and none of their attorneys acted as a second prosecutor against another codefendant" (*id.*; *see generally People v Mahboubian*, 74 NY2d 174, 184-185). Defendant contends for the first time on appeal that the jury's reception of the evidence against her was affected by the fact that she was the only woman on trial, and that contention is therefore not preserved for our review (*see People v Osborne*, 88 AD3d 1284, 1285, *lv denied* 19 NY3d 999, *reconsideration denied* 19 NY3d 1104; *People v Wooden*, 296 AD2d 865, 866, *lv denied* 99 NY2d 541). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further contends that she was denied her right to an impartial jury based on an allegedly improper comment made by the prosecutor during jury selection. That contention is not preserved for our review inasmuch as defense counsel "fail[ed] to request any further relief after the court sustained his objection" (*People v Reyes*, 34 AD3d 331, 331, *lv denied* 8 NY3d 884). 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]).

At the close of the People's case, defense counsel made a motion for a trial order of dismissal, contending that the evidence was legally insufficient to establish that defendant was "actually present" during the gang assault (Penal Law § 120.07). Defense counsel renewed that motion following the close of defendant's proof, stating, "I also renew my motion to dismiss based on the legal insufficiency of the evidence." Contrary to the People's contention, defense counsel's renewal, directly referencing the earlier motion, is sufficient to preserve for our review his contention that the evidence is legally insufficient to establish that defendant was actually present for the gang assault (*cf. People v Maynard*, 143 AD3d 1249, 1250, *lv denied* 28 NY3d 1148; *see generally People v Hines*, 97 NY2d 56, 61-62, *rearg denied* 97 NY2d 678; *People v Gray*, 86 NY2d 10, 19). We nevertheless conclude that defendant's contention lacks merit. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to establish that defendant was "in the immediate vicinity of the crime, and [was] capable of rendering immediate assistance to an individual committing the crime" (*People v Sanchez,* 13 NY3d 554, 564, *rearg denied* 14 NY3d 750; *see* § 120.07; *People v Varughese*, 21 AD3d 1126, 1128, *lv denied* 6 NY3d 782).

Defendant further contends that the evidence is legally insufficient to support the conviction on the ground that there was no evidence she intended to cause serious physical injury to the victim. We note, however, that defendant's motion for a trial order of dismissal was not "specifically directed" at that alleged deficiency

in the proof (*Gray*, 86 NY2d at 19). In any event, that contention also lacks merit. It is well settled that "[a] defendant may be presumed to intend the natural and probable consequences of his[or her] actions . . . , and [i]ntent may be inferred from the totality of conduct of the accused" (*People v Mahoney*, 6 AD3d 1104, 1104, *lv denied* 3 NY3d 660 [internal quotation marks omitted]; *see generally People v Steinberg*, 79 NY2d 673, 684-685). Here, after viewing the evidence in the light most favorable to the People (*see Contes*, 60 NY2d at 621), we conclude that the evidence was sufficient to establish intent "based on evidence of defendant's conduct before, during and after the [beating] of the victim" (*People v Davis*, 300 AD2d 78, 78, *lv denied* 99 NY2d 627). We further conclude, after viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), that the verdict is not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495; *Snyder*, 84 AD3d at 1712; *People v Meacham*, 84 AD3d 1713, 1715, *lv denied* 17 NY3d 808).

With respect to defendant's contention that she was denied effective assistance of counsel, "we note that the constitutional right to effective assistance of counsel 'does not guarantee a perfect trial, but assures the defendant a fair trial' " (*People v Ennis*, 107 AD3d 1617, 1620, *lv denied* 22 NY3d 1040, *reconsideration denied* 23 NY3d 1036, quoting *People v Flores*, 84 NY2d 184, 187). Defense counsel made appropriate motions, effectively cross-examined the People's witnesses, and pursued a viable defense strategy. In our view, defense counsel made reasonable strategic decisions in an "unsuccessful attempt[] to advance the best possible defense" (*People v Henry*, 95 NY2d 563, 565). We thus conclude that "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147). To the extent that defendant contends that defense counsel was ineffective in advising her on whether to accept the plea offer, that contention involves matters outside the record and must be raised by way of a motion pursuant to CPL article 440 (*see People v Carver*, 124 AD3d 1276, 1280, *affd* 27 NY3d 418; *People v Santiago*, 118 AD3d 1032, 1033).

To the extent that defendant preserved for our review her additional contention that she was denied a fair trial by prosecutorial misconduct (*see* CPL 470.05 [2]), we conclude that it lacks merit. "The alleged misconduct was 'not so egregious as to deprive defendant of a fair trial' " (*People v Astacio*, 105 AD3d 1394, 1396, *lv denied* 22 NY3d 1154).

With respect to her sentence, defendant contends that she was penalized for exercising her right to trial inasmuch as the sentence imposed after trial was much greater than the sentence proposed in the pretrial plea offer. Inasmuch as defendant failed to raise that contention at sentencing, she failed to preserve it for our review (*see People v Grace*, 145 AD3d 1462, 1463-1464; *People v Stubinger*, 87 AD3d 1316, 1317, *lv denied* 18 NY3d 862). In any event, we conclude

that the contention lacks merit. "The mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his [or her] right to trial . . . , and there is no evidence in the record that the sentencing court was vindictive" (*People v Thomas*, 60 AD3d 1341, 1343, *lv denied* 12 NY3d 921 [internal quotation marks omitted]; *see Stubinger*, 87 AD3d at 1317).

Finally, we agree with defendant that the imposition of a determinate term of incarceration of 13 years is unduly harsh and severe. It is well settled that our "sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783), and that we may " 'substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence' " (*People v Johnson*, 136 AD3d 1417, 1418, *lv denied* 27 NY3d 1134). We conclude that a reduction in the sentence is appropriate and, as a matter of discretion in the interest of justice, we modify the judgment by reducing the sentence to a determinate term of incarceration of 10 years (*see* CPL 470.20 [6]; *Johnson*, 136 AD3d at 1418), to be followed by the five years of postrelease supervision imposed by the court.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

634

KA 16-00575

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHANIE A. MEACHAM, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered May 10, 2010. The judgment convicted defendant, upon her plea of guilty, of attempted assault in the second degree.

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

Same memorandum as in *People v Meacham* ([appeal No. 1] ___ AD3d ___ [June 9, 2017]).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

640

CAF 16-00674

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

IN THE MATTER OF LINDSAY TERRAMIGGI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA TAROLLI, RESPONDENT-APPELLANT,
ET AL., RESPONDENTS.

SUSAN B. MARRIS, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.

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

SUSAN B. MARRIS, ATTORNEY FOR THE CHILD, MANLIUS, APPELLANT PRO SE.

LISA DIPOALA HABER, SYRACUSE, FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered March 31, 2016 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole legal and primary physical custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the 5th, 6th, and 10th ordering paragraphs and inserting in place thereof and in addition thereto the following:

> ORDERED that respondent shall have parenting time with the child each year during her Christmas holiday school break.
>
> ORDERED that respondent shall have parenting time with the child each year during her winter and spring school breaks.
>
> ORDERED that, for all parenting times, the parties shall meet halfway between petitioner's home and respondent's home for the exchange of the child or, in the alternative, the parties shall share the cost of airfare for the child, petitioner and respondent shall each pay for his or her own cost of airfare, and petitioner and respondent shall each pay for the costs of any adult companion, who shall be mutually agreed upon, they use to travel with the

child.

ORDERED that, upon two weeks' notice, respondent shall have liberal visitation with the child whenever he is in Florida;

and, as modified, the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father and the Attorney for the Child (AFC) appeal from an order that, inter alia, awarded petitioner mother sole legal and primary physical custody of the subject child, with visitation to the father.

We note at the outset that, "[a]lthough a court may consider the effect of a parent's relocation as part of a best interests analysis, relocation is but one factor among many in its custody determination" (*Matter of Saperston v Holdaway*, 93 AD3d 1271, 1272, *appeal dismissed* 19 NY3d 887, 20 NY3d 1052). "[T]he relevant issue is whether it is in the best interests of the child to reside primarily with the mother or the father" (*id.*) and, here, contrary to the contentions of the father and the AFC, there is a sound and substantial basis in the record for Family Court's determination that awarding the mother sole legal and physical custody is in the child's best interests (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174).

The father and AFC also contend that the court could not make a proper custody determination without being advised of the child's wishes either through a *Lincoln* hearing or a closing statement from the AFC who represented the child at trial. The AFC further contends that the AFC who represented the child during the trial failed to zealously advocate for the child. The contention with respect to the *Lincoln* hearing is not preserved for our review. At the end of trial, the court asked all parties if the court needed to conduct a *Lincoln* hearing, and counsel responded in the negative (*see Bielli v Bielli*, 60 AD3d 1487, 1487, *lv dismissed* 12 NY3d 896). In any event, we conclude that the contention is without merit. Although a child's wishes are entitled to great weight, we note that the child was only four years old at the time of the trial (*see generally Olufsen v Plummer*, 105 AD3d 1418, 1419). Furthermore, we conclude that the failure of the AFC who represented the child at trial to request a *Lincoln* hearing and/or to submit a written closing argument does not constitute ineffective assistance (*see Matter of Venus v Brennan*, 103 AD3d 1115, 1116-1117).

Contrary to the father's further contention, the court did not abuse its discretion when it limited evidence of the mother's substance abuse to events occurring only after the child's birth. "It is well settled that, in determining the best interests of the children, the court is vested with broad discretion with respect to the scope of proof to be adduced" (*Matter of Brown v Wolfgram*, 109 AD3d 1144, 1145).

We agree with the father, however, that the court abused its discretion in fashioning a visitation schedule. "[V]isitation issues are determined based on the best interests of the children . . . and . . . trial courts have broad discretion in fashioning a visitation schedule" (*D'Ambra v D'Ambra* [appeal No. 2], 94 AD3d 1532, 1534 [internal quotation marks omitted]). It is also "within this Court's authority to modify orders to increase or decrease visitation" (*Matter of Mathewson v Sessler*, 94 AD3d 1487, 1490, *lv denied* 19 NY3d 815). We therefore modify the order by vacating the 5th, 6th, and 10th ordering paragraphs and inserting in place thereof and in addition thereto a visitation schedule that reflects a reasonable balance between the court's award of sole legal and primary physical custody to the mother in Florida and the father's residency in Oswego County, New York.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

641

CA 16-01827

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

GAIL JOHNSON, INDIVIDUALLY AND AS ADMINISTRATOR
OF THE ESTATE OF GARY JOHNSON, DECEASED,
CLAIMANT-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT-RESPONDENT.
(CLAIM NO. 113658.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. LANDERS OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

BRIAN CHAPIN YORK, JAMESTOWN, FOR CLAIMANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Court of Claims (Michael E. Hudson, J.), entered December 16, 2015. The interlocutory judgment apportioned liability 30% to defendant and 70% to claimant.

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

Memorandum: Claimant commenced this action seeking damages for injuries she sustained when her tractor-trailer rolled over on State Highway I-86. Claimant alleges that defendant, the State of New York, was negligent in failing to install "rumble strips" in the proper location on the highway's shoulder and in failing to repave the entire shoulder, resulting in a two-to-four-inch drop-off in the shoulder. The Court of Claims concluded that, while the drop-off was partially responsible for causing claimant's tractor-trailer to roll over, claimant's inattention and failure to reduce her speed were significant contributing factors. Thus, the court apportioned 30% liability to defendant and 70% liability to claimant. We affirm.

Claimant's contention that she is entitled to benefit from the emergency doctrine is raised for the first time on appeal, and it is therefore not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). Contrary to the contentions raised by both claimant and defendant, we conclude that the verdict is supported by a fair interpretation of the evidence (*see Black v State of New York* [appeal No. 2], 125 AD3d 1523, 1524-1525; *Farace v State of New York*, 266 AD2d 870, 870). "When the State or one of its governmental subdivisions undertakes to provide a paved strip or shoulder alongside a roadway, it must maintain the shoulder in a reasonably safe condition for foreseeable uses" (*Bottalico v State of New York*, 59 NY2d 302, 304;

see Marrow v State of New York, 105 AD3d 1371, 1373). We reject defendant's contention that the opinion of claimant's expert lacked a factual basis in the record or amounted to no more than speculation (*cf. Diaz v New York Downtown Hosp.*, 99 NY2d 542, 545). Rather, we conclude that the court properly credited the testimony of claimant's expert, who opined that the two-to-four-inch drop-off on the highway's shoulder was unsafe and was a contributing cause of claimant's accident.

We further conclude that the court also properly credited the testimony of defendant's witnesses and expert, who opined that the placement of the rumble strips was a proper exercise of engineering discretion and was not a proximate cause of claimant's accident. In addition, the court properly credited the testimony of defendant's expert insofar as he opined that claimant's inattention and failure to reduce her speed were significant factors contributing to the accident. We therefore conclude that the court's apportionment of liability was in all respects proper (*see Marrow*, 105 AD3d at 1373-1374; *Yerdon v County of Oswego*, 43 AD3d 1437, 1438).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

642

CA 16-02044

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

JOANN REFF, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF OTIS N. REFF, JR., DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ANNA MELYNNE YOUNGBLOOD, M.D., ET AL., DEFENDANTS, AND MAHMOUD HAMZA, M.D., DEFENDANT-APPELLANT.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (DANIEL P. LARABY OF COUNSEL), FOR DEFENDANT-APPELLANT.

DEFRANCISCO & FALGIATANO LLP, EAST SYRACUSE (JEFF D. DEFRANCISCO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered July 19, 2016. The order, insofar as appealed from, denied in part the motion of defendant Mahmoud Hamza, M.D., for summary judgment.

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

Memorandum: Mahmoud Hamza, M.D. (defendant), appeals from an order that, inter alia, denied his motion for summary judgment dismissing the cause of action asserted against him for medical malpractice arising from his treatment and care of plaintiff's decedent. We affirm. Supreme Court properly concluded that plaintiff raised triable issues of fact by submitting the affirmation of a physician who averred that there was a departure from the accepted standard of care and that such departure was a proximate cause of decedent's injuries (*see generally Bagley v Rochester Gen. Hosp.*, 124 AD3d 1272, 1273; *O'Shea v Buffalo Med. Group, P.C.*, 64 AD3d 1140, 1140-1141, *appeal dismissed* 13 NY3d 834). Furthermore, the court properly concluded that there is an issue of fact whether defendant's alleged refusal to administer anesthesia before performing surgery on decedent constitutes malicious conduct sufficient to support an award of punitive damages (*see Graham v Columbia Presbyt. Med. Ctr.*, 185 AD2d 753, 754-756; *see generally Dupree v Giugliano*, 20 NY3d 921, 924, *rearg denied* 20 NY3d 1045).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

645

CA 16-00228

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

IN THE MATTER OF MICHAEL BETHEA,
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 (JEFFREY W. LANG OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered January 20, 2016 in a proceeding pursuant to CPLR article 78. 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 pursuant to CPLR article 78 seeking to annul the determination of the Parole Board denying him parole release. We conclude that " '[t]his appeal must be dismissed as moot because the determination expired during the pendency of this appeal, and the Parole Board denied petitioner's subsequent request for parole release' " (*Matter of Porter v Annucci*, 148 AD3d 1779, 1779). Contrary to petitioner's contention, the exception to the mootness doctrine does not apply here (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

646

CA 16-01152

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

JOSEPH DUPRE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAM S. ARANT, DEFENDANT,
AND GYMO ARCHITECTURE, ENGINEERING & LAND
SURVEYING, P.C., DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

STANLEY LAW OFFICES, LLP, SYRACUSE (JOSEPH SCOTT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (BRITTANY L. MURGALLIS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered March 22, 2016. The order granted the motion of defendant GYMO Architecture, Engineering & Land Surveying, P.C., for summary judgment and dismissed the complaint and any cross claims against said defendant.

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

Memorandum: Plaintiff was allegedly injured while working at property owned by defendant William S. Arant. The property was purchased by Arant in 1989 with the intention of using it as his residence. However, Arant ultimately obtained employment out-of-state and never lived on the property. In 2012, Arant listed the property for sale and entered into a contract with plaintiff's employer, third-party defendant Independent Commercial Contractors, Inc. (ICC), to remove debris from the property. Because of concerns that asbestos might be present, defendant GYMO Architecture, Engineering & Land Surveying, P.C. (GYMO) was also retained to monitor air quality on the property.

At the time of plaintiff's accident, he was cutting a hole, using a six-foot ladder and a demolition saw, in a large tank that had been excavated from the property earlier in the day. Something inside the tank either caught fire or exploded, causing plaintiff to be blown from, or to jump from, the ladder and suffer the alleged injuries.

Plaintiff thereafter commenced this action against Arant and GYMO, asserting claims based on common-law negligence and the

violation of Labor Law §§ 200, 240 (1), and 241 (6).

In appeal No. 1, Supreme Court granted GYMO's motion for summary judgment dismissing the complaint and any cross claims against it on the ground that GYMO had no duty to plaintiff concerning the work on the tank. In appeal No. 2, the court denied plaintiff's motion for partial summary judgment against Arant on his Labor Law § 240 (1) claim, and granted Arant's cross motion for summary judgment dismissing the complaint against him. The court dismissed plaintiff's common-law negligence and Labor Law § 200 claims against Arant on the ground that Arant did not control the activity bringing about the injury. The court also dismissed the section 240 (1) claim on the ground that the injury was the result of ordinary construction-related risks, not a risk associated with elevation. Finally, the court determined that the claims pursuant to sections 240 (1) and 241 (6) should be dismissed under the homeowner exemption, reasoning that Arant had purchased the property to reside there, and that the injury-producing work resulted from the demolition of a dwelling.

With respect to appeal No. 1, we agree with the court that GYMO met its initial burden of establishing its entitlement to judgment as a matter of law, and we conclude that plaintiff failed to raise an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to plaintiff's contention, GYMO was not a construction manager with the ability to control the injury-producing activity (*see generally Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864).

With respect to appeal No. 2, we conclude, first, that the court erred in determining that Arant is entitled to the homeowner exemption. The Labor Law exempts from liability "owners of one and two-family dwellings who contract for but do not direct or control the work" (§§ 240 [1]; 241 [6]). The exemption "was not intended to insulate from liability owners who use their one- or two-family houses purely for commercial purposes" (*Lombardi v Stout*, 80 NY2d 290, 296; *see Van Amerogen v Donnini*, 78 NY2d 880, 882). " '[R]enovating a residence for resale or rental plainly qualifies as work being performed for a commercial purpose' " (*Batzin v Ferrone*, 140 AD3d 1102, 1103; *see Landon v Austin*, 88 AD3d 1127, 1128). "However, where a one-or two-family property serves both residential and commercial purposes, '[a] determination as to whether the exemption applies in a particular case turns on the nature of the site and the purpose of the work being performed, and must be based on the owner's intentions at the time of the injury' " (*Batzin*, 140 AD3d at 1103; *see Caiazzo v Mark Joseph Contr., Inc.*, 119 AD3d 718, 721).

Here, Arant purchased the property in 1989 with the intention of using it as his residence, but he never resided on the property. Years prior to the accident herein, Arant demolished all of the residential structures on the property, and there is nothing in the record to suggest that Arant ever intended to build a new residence on the property. Arant hired ICC to remove piles of debris on the property solely to improve the property for sale, and the property was in fact sold after the work was completed. Under those circumstances, we conclude that the work being performed was solely for a commercial

purpose, and thus, Arant failed to meet his burden of establishing that he is entitled to benefit from the homeowner exemption as a matter of law (*see Batzin*, 140 AD3d at 1103-1104; *see also Custer v Jordan*, 107 AD3d 1555, 1558).

We conclude, however, that the court properly granted Arant's cross motion seeking dismissal of the Labor Law §§ 240 (1) and 241 (6) claims against him. With respect to the Labor Law § 240 (1) claim, it is well settled that the mere fall from a ladder in and of itself does not give rise to an award of damages under the Labor Law (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288). Rather, "[t]o establish a violation of Labor Law § 240 (1), a plaintiff must show not only that he [or she] fell at a construction site, but also that he or she did so because of the absence or inadequacy of a safety device" (*Kuntz v WNYG Hous. Dev. Fund Co. Inc.*, 104 AD3d 1337, 1338; *see Blake*, 1 NY3d at 288-289).

Here, plaintiff makes the bare assertion that Arant did not provide any adequate safety devices. Plaintiff testified at his deposition, however, that the ladder he was using was properly placed next to the tank and that all four feet were planted such that it was not tipping or moving. Plaintiff admitted that he was not at a high enough elevation to need a harness, nor did he believe that the ladder needed to be secured to the tank in any way. Plaintiff further testified that he had all of the safety equipment necessary to perform the job. Additionally, there is no indication in the record that plaintiff's fall was caused by any failure in the ladder (*cf. Alati v Divin Bldrs., Inc.*, 137 AD3d 1577, 1578). Plaintiff claimed, instead, that he was "blown" from the ladder, either from the force of the fire that came out of the tank, or by the tank actually knocking into him during the fire and/or explosion (*see Walker v City of New York*, 72 AD3d 936, 937).

Therefore, we agree with the court that plaintiff's "injury did not occur because of a risk associated with elevation, but rather from the usual and ordinary risks of the construction site, in this case an explosion." Arant thus established that "plaintiff was not exposed to any risk that safety devices of the kind enumerated in Labor Law § 240 (1) would have protected against," and plaintiff failed to raise a triable issue of fact in opposition (*Garcia v Market Assoc.*, 123 AD3d 661, 663; *see generally Morrison v Christa Constr*. [appeal No. 2], 305 AD2d 1004, 1006, *lv denied* 1 NY3d 505).

Finally, plaintiff's Labor Law § 241 (6) claim against Arant is premised upon a violation of 12 NYCRR 23-1.25 (f). Plaintiff has failed to allege, however, that, at the time of the accident, he was engaged in any activity covered by that regulation, i.e., welding or flame-cutting operations (*see* 12 NYCRR 23-1.25 [d]). The court therefore properly granted the cross motion insofar as it sought dismissal of the section 241 (6) claim.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

647

CA 16-01346

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

JOSEPH DUPRE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAM S. ARANT, DEFENDANT-RESPONDENT,
AND GYMO ARCHITECTURE, ENGINEERING & LAND
SURVEYING, P.C., DEFENDANT.
(APPEAL NO. 2.)

STANLEY LAW OFFICES, LLP, SYRACUSE (JOSEPH SCOTT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (RYAN SUSER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered March 4, 2016. The order denied the motion of plaintiff for partial summary judgment and granted the cross motion of defendant William S. Arant for summary judgment dismissing the complaint against him.

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

Same memorandum as in *Dupre v Arant* ([appeal No. 1] ___ AD3d ___ [June 9, 2017]).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

654

KA 13-01902

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEAN ORLANDO PIZARRO, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, 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 June 24, 2013. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts by reversing that part convicting defendant of criminal possession of a weapon in the second degree and dismissing count three of the indictment, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends that he was denied a fair trial and his right of confrontation by the admission in evidence of out-of-court statements made by a codefendant. We reject that contention.

Defendant contends that County Court erred in allowing a witness to testify to statements made by a nontestifying codefendant. Defendant objected to that testimony on hearsay grounds, and later sought a mistrial on the ground that the admission of the statement violated his rights under *Bruton v United States* (391 US 123, 135-136), and we address first his *Bruton* contention. Even assuming, arguendo, that defendant's belated motion for a mistrial is sufficient to preserve for our review his current *Bruton* contention (*cf. People v Shabazz*, 289 AD2d 1059, 1060, *cert denied* 537 US 1165, *affd* 99 NY2d 634, *rearg denied* 100 NY2d 556), we conclude that the introduction of the statements did not implicate the principles of the Confrontation Clause that underlie the rule in *Bruton*.

The statements at issue were made by a nontestifying codefendant to a person who testified at trial. That witness testified that the

codefendant said before the incident that "we" were going to shoot the victim, and that after the incident the codefendant said that "we" had shot him. The witness testified that defendant was one of several people who were with the codefendant when the statements were made, but the witness then clarified that the codefendant also stated that both he and another perpetrator shot the victim, and the other perpetrator, who was also present during the conversation, agreed. With respect to defendant, the codefendant's "confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial" (*Richardson v Marsh*, 481 US 200, 208; *see Gray v Maryland*, 523 US 185, 195). " '*Bruton* and its progeny . . . do not construe the Confrontation Clause to demand further that a confession be redacted so as to permit *no* incriminating inference against the non-declarant defendant' " (*People v Cedeno*, 27 NY3d 110, 118, *cert denied* ___ US ___, 137 S Ct 205). To the contrary, it is well settled that "*Richardson* placed outside the scope of *Bruton*'s rule those statements that incriminate inferentially" (*Gray*, 523 US at 195). Thus, inasmuch as the statements are only inculpatory with respect to defendant when combined with other evidence establishing that he was also part of the crime, we conclude that the court did not err in admitting the nontestifying codefendant's statements because they were "not facially incriminating[with respect to defendant], and proper limiting instructions were given to the jury concerning the use of the codefendant's statement[s] as evidence against [this] defendant[]" (*People v Marcus*, 137 AD2d 723, 723, *lv denied* 72 NY2d 862; *see People v Gilocompo*, 125 AD3d 1000, 1001, *lv denied* 25 NY3d 1163; *People v Dickson*, 21 AD3d 646, 647).

"In addition, the testimony of the [witness] concerning a conversation between [an] accomplice and defendant did not violate defendant's right of confrontation because the statements of the . . . accomplice during that conversation were not themselves testimonial in nature" (*People v Robles*, 72 AD3d 1520, 1521, *lv denied* 15 NY3d 777). Although the United States Supreme Court "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial' " (*Crawford v Washington*, 541 US 36, 68), the Court wrote that such a statement must be " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact' " (*id.* at 51). A "casual remark to an acquaintance," such as the statements at issue, does not suffice (*id.*; *cf. People v Goldstein*, 6 NY3d 119, 129, *cert denied* 547 US 1159).

Contrary to defendant's further contention, the court properly overruled his hearsay objections to the admissibility of those statements. The codefendant's statements to the witness were admissible as statements against penal interest (*see generally People v Shabazz*, 22 NY3d 896, 898), and as the statements of a coconspirator in the furtherance of the conspiracy (*see Robles*, 72 AD3d at 1521; *see generally People v Caban*, 5 NY3d 143, 148).

Although the court erred in denying, without a *Mapp* hearing, defendant's midtrial motion to suppress a travel itinerary seized from him by police officers when they initially spoke with him at the

Syracuse airport, any error in that regard is harmless (*see People v Massimi*, 191 AD2d 969, 969; *see also People v Lazcano*, 66 AD3d 1474, 1475, *lv denied* 13 NY3d 940; *People v Michael A.D.*, 289 AD2d 1036, 1037). The evidence is cumulative of other properly admitted evidence that defendant was planning on leaving the country and flying to Puerto Rico, and there is no reasonable possibility that the admission of the travel itinerary contributed to defendant's conviction (*see generally People v Crimmins*, 36 NY2d 230, 237).

Defendant failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct on summation because he failed to object to any of those alleged improprieties (*see People v Young*, 100 AD3d 1427, 1428, *lv denied* 20 NY3d 1105; *People v Rumph*, 93 AD3d 1346, 1347, *lv denied* 19 NY3d 967). In any event, that contention is without merit (*see People v Carrasquillo-Fuentes*, 142 AD3d 1335, 1338, *lv denied* 28 NY3d 1143). Defendant failed to challenge the proficiency of the appointed interpreter at trial, and thus he also failed to preserve for our review his contention regarding the interpreter's alleged incompetence (*see People v Gutierrez*, 100 AD3d 656, 656-657, *lv denied* 21 NY3d 1015, *reconsideration denied* 21 NY3d 1074, *cert denied* ___ US ___, 134 S Ct 1034; *People v Kowlessar*, 82 AD3d 417, 418). In any event, that contention is without merit inasmuch as "all instances of possible misunderstanding were sufficiently rectified so that the witness'[s] testimony was properly presented to the jury" (*People v Nedal*, 198 AD2d 42, 42; *see Kowlessar*, 82 AD3d at 418).

Defendant further contends that the evidence is legally insufficient to establish his liability as an accessory to the murder charge. We reject that contention. "Accessorial liability requires only that defendant, acting with the mental culpability required for the commission of the crime, intentionally aid another in the conduct constituting the offense" (*People v Chapman*, 30 AD3d 1000, 1001, *lv denied* 7 NY3d 811 [internal quotation marks omitted]; *see* Penal Law § 20.00). Here, based on the evidence in the record, the jury could have reasonably concluded that defendant and the two codefendants shared "a common purpose and a collective objective" (*People v Cabey*, 85 NY2d 417, 422), and that defendant "shared in the intention of the codefendant[s]" to shoot the victim (*People v Morris*, 229 AD2d 451, 451, *lv denied* 88 NY2d 990). Viewing the evidence in light of the elements of the crime of murder in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is contrary to the weight of the evidence with respect to that charge (*see generally People v Bleakley*, 69 NY2d 490, 495).

We agree with defendant, however, that the verdict is contrary to the weight of the evidence with respect to the crime of criminal possession of a weapon in the second degree. Although several witnesses testified that defendant possessed a handgun, and other witnesses testified that the two codefendants fired weapons, the witnesses did not testify that they saw defendant fire his weapon. The evidence further establishes that defendant and the two

codefendants were at the scene and all three of them had a weapon, but the casings recovered at the scene matched only two weapons. Furthermore, two different types of projectiles were recovered either at the scene or from the body of the victim, and those projectiles matched the casings from the scene. Although one additional type of projectile was recovered from the body of the victim, the Medical Examiner opined that such projectile was likely from an earlier incident. In addition, defendant was not charged as an accomplice to the codefendants' possession of their weapons (*cf. People v Primakov*, 105 AD3d 1397, 1397-1398, *lv denied* 21 NY3d 1045; *People v Zuhlke*, 67 AD3d 1341, 1341, *lv denied* 14 NY3d 774). Consequently, we conclude that the verdict is against the weight of the evidence with respect to the criminal possession of a weapon count because the People failed to establish that defendant possessed an operable weapon (*cf. People v Hailey*, 128 AD3d 1415, 1416, *lv denied* 26 NY3d 929; *see generally People v Shaffer*, 66 NY2d 663, 664). We therefore modify the judgment accordingly.

Finally, the sentence is not unduly harsh or severe.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

657

KA 14-00055

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCELLUS W. TIMMONS, ALSO KNOWN AS HEAVY,
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARCELLUS W. TIMMONS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered November 4, 2013. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]). Defendant testified in his own defense, and admitted to stabbing, strangling, and beating the victim to death at the conclusion of a night at the victim's apartment. Defendant was sentenced to an indeterminate prison term of 22 years to life.

County Court properly denied defendant's request for a jury charge on extreme emotional disturbance (EED). "[A] defendant is precluded from raising any defense predicated on a mental infirmity, including [EED], if the defendant fails to file and serve a timely notice of intent to present psychiatric evidence" (*People v Diaz*, 15 NY3d 40, 45; *see* CPL 250.10 [2]), which is "broadly construed to encompass 'any' mental health evidence offered by a defendant, includ[ing] lay testimony" (*Diaz*, 15 NY3d at 47). Although "a defendant can choose to testify in his own defense to explain his actions without triggering the notice requirement of CPL 250.10 (2), . . . he would not be entitled to a jury instruction on [EED] pursuant to Penal Law § 125.25 (1) (a)" (*id.*). It is undisputed that defendant gave no notice pursuant to CPL 250.10.

Defendant's challenge to the legal sufficiency of the evidence

disproving justification is unpreserved for our review because it was not raised in his motion for a trial order of dismissal (*see People v Fafone*, 129 AD3d 1667, 1668, *lv denied* 26 NY3d 1039). Defendant's challenge to the legal sufficiency of the evidence of his intent to kill the victim is without merit inasmuch as he admitted that he stabbed the victim in the neck with a screwdriver and strangled him (*see generally People v Ross*, 270 AD2d 36, 36, *lv denied* 95 NY2d 803; *People v Keller*, 246 AD2d 828, 829, *lv denied* 91 NY2d 1009; *People v Wallace*, 217 AD2d 918, 918-919, *lv denied* 86 NY2d 847).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence because his own testimony raised a justification defense (*see generally People v Bleakley*, 69 NY2d 490, 495). "Great deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*Bleakley*, 69 NY2d at 495), and "the jury was free to reject all of defendant's testimony or to selectively credit any part that [it] deemed worthy of belief and reject the rest" (*People v Rose*, 215 AD2d 875, 876, *lv denied* 86 NY2d 801). We likewise reject defendant's contention that the court's *Sandoval* ruling was an abuse of discretion. By precluding the People from questioning defendant concerning four convictions and limiting questioning about two others, the court's ruling reasonably "limited both the number of convictions and the scope of permissible cross-examination" (*People v Hayes*, 97 NY2d 203, 208).

Insofar as defendant's claims of ineffective assistance of counsel are based on matters outside the record, the proper avenue for those claims is a CPL article 440 motion (*see People v Jones*, 63 AD3d 1582, 1583, *lv denied* 13 NY3d 797). Those claims of ineffective assistance that are properly before us are without merit, because they relate to defense counsel's failure to make certain motions and objections, none of which was likely to succeed (*see People v Patterson*, 115 AD3d 1174, 1175-1176, *lv denied* 23 NY3d 1066). Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, we reject defendant's challenge to the severity of the sentence, including his challenge to the seven-year increase from the People's pretrial plea offer (*see generally People v Lewis*, 93 AD3d 1264, 1267, *lv denied* 19 NY3d 963).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

658

CAF 15-02122

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

IN THE MATTER OF AKAYLA M.

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

MEMORANDUM AND ORDER

MARIE M., NOW KNOWN AS MARIE Z., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

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

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered December 4, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: In these consolidated appeals, respondent mother appeals from two orders that, inter alia, terminated her parental rights with respect to four of her children based upon her inability, by reason of her intellectual disability, to provide adequate and proper care for the subject children (*see* Social Services Law § 384-b [4] [c]; [6] [b]; *Matter of Joyce T.*, 65 NY2d 39, 48-49).

We conclude in both appeals that petitioner established by clear and convincing evidence that the mother is intellectually disabled and that by reason of such disability, she is unable to provide proper and adequate care for her children presently and for the foreseeable future (*see* Social Services Law § 384-b [4] [c]; *Matter of Cayden L.R. [Jayme R.]*, 83 AD3d 1550, 1550). Petitioner presented the testimony of two psychologists who examined the mother and concluded that she has below average intelligence and that, if the children were placed in her care, the children would be at significant risk of neglect for the foreseeable future. Further, petitioner presented evidence that the mother has been unable to improve her parenting skills and would

not benefit from any additional support services.

We reject the mother's contention in both appeals that the determination to terminate her parental rights is not supported by the record and that a suspended judgment would be in the best interests of the children. While a separate dispositional hearing is not statutorily required where, as here, parental rights are terminated based upon intellectual disability (*see Joyce T.*, 65 NY2d at 49), Family Court held such hearing. Under the circumstances of this case, including the fact that the foster parents planned to adopt three of the children, termination of the mother's parental rights was in the children's best interests (*see Matter of Donovan W.*, 56 AD3d 1279, 1279-1280, *lv denied* 11 NY3d 716; *Matter of Dessa F.*, 35 AD3d 1096, 1098). Moreover, there is no statutory authority for a suspended judgment when parental rights are terminated by reason of intellectual disability (*see generally Matter of Charles FF.*, 44 AD3d 1137, 1138, *lv denied* 9 NY3d 817).

We agree with the mother in both appeals that a report from a psychologist who examined the mother on behalf of petitioner was improperly admitted in evidence at the fact-finding hearing. The report did not qualify for the business records exception to the hearsay rule because it was prepared for the purpose of litigation, rather than in the ordinary course of business (*see Wilson v Bodian*, 130 AD2d 221, 229-230). We conclude, however, that the error is harmless inasmuch as " 'the result[s] reached herein would have been the same even had [the report] been excluded' " (*Matter of Alyshia M.R.*, 53 AD3d 1060, 1061, *lv denied* 11 NY3d 707; *see Matter of Kyla E. [Stephanie F.]*, 126 AD3d 1385, 1386, *lv denied* 25 NY3d 910).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

659

CAF 15-02125

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

IN THE MATTER OF ALONDRA S., JULIO S., AND KIARA S.

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

MEMORANDUM AND ORDER

MARIE M., NOW KNOWN AS MARIE Z., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

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

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

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered December 4, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject children.

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

Same memorandum as in *Matter of Akayla M. (Marie M.)* (___ AD3d ___ [June 9, 2017]).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

660

CAF 16-02036

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

IN THE MATTER OF COURTNEY L. KLEINBACH,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW W. CULLERTON, RESPONDENT-APPELLANT.

IN THE MATTER OF ANDREW W. CULLERTON,
PETITIONER-APPELLANT,

V

COURTNEY L. KLEINBACH, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

MICHAEL A. ROSENBLOOM, ROCHESTER, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

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

WENDY S. SISSON, ATTORNEY FOR THE CHILD, GENESEO.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered February 16, 2016 in proceedings pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the parties' child to Courtney L. Kleinbach, and suspended visitation with Andrew W. Cullerton.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the third and fourth ordering paragraphs and reinstating that part of the petition of respondent-petitioner seeking visitation with the subject child, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Genesee County, for further proceedings in accordance with the following memorandum: In these child custody and visitation proceedings, respondent-petitioner father appeals, in appeal No. 1, from an order granting the petition of petitioner-respondent mother for sole custody of the subject child, dismissing the father's petition, and denying the father visitation until certain conditions were met, including that the father obtain a report from a counselor or therapist regarding the impact that his visitation would have on the subject child. In appeal No. 2, he appeals from an order that, inter alia, granted that part of his motion seeking access to

the child's medical, educational and mental health records, and denied that part of his motion seeking leave to reargue the order in appeal No. 1.

Initially, we dismiss the appeal from the order in appeal No. 2 insofar as it denied leave to reargue. No appeal lies from an order denying leave to reargue (*see Matter of Mehta v Franklin*, 128 AD3d 1419, 1420; *see generally Empire Ins. Co. v Food City*, 167 AD2d 983, 984). We note in addition that, although the father also purported to seek leave to renew, he "failed to offer new facts that were unavailable at the time of the prior motion or to offer a valid excuse for [his] failure to present the allegedly new facts at the time of [his] prior motion. Thus, that part of the . . . motion purportedly seeking leave to renew was actually one for reargument and . . . no appeal lies from that part of the order" (*Matter of Wayne T.I. v Latisha T.C.*, 48 AD3d 1165, 1165-1166). With respect to the remainder of the order in appeal No. 2, the father contends that Family Court erred in denying him access to the subject child's extracurricular and religious records. The father failed to request access to those records in his motion, however, and thus he failed to preserve that contention for our review (*see generally Matter of Chautauqua County Dept. of Social Servs. v Rita M.S.*, 94 AD3d 1509, 1511).

In appeal No. 1, we reject the father's contention that the court erred in awarding sole custody of the subject child to the mother. It is well settled "that joint custody is inappropriate [where, as here,] the parties have an acrimonious relationship and are unable to communicate with each other in a civil manner" (*Matter of Christopher J.S. v Colleen A.B.*, 43 AD3d 1350, 1350; *see Matter of Hill v Trojnor*, 137 AD3d 1671, 1672; *Matter of Ingersoll v Platt*, 72 AD3d 1560, 1561). Based upon the evidence of the parties' acrimonious relationship, we perceive no error in granting the mother sole custody.

We agree with the father, however, that the court erred in eliminating his visitation with the subject child and in setting unattainable conditions upon any attempt by him to reinstitute visitation. "Although '[v]isitation decisions are generally left to Family Court's sound discretion' . . . , '[t]he denial of visitation to a noncustodial parent constitutes such a drastic remedy that it should be ordered only when there are compelling reasons, and there must be substantial evidence that such visitation is detrimental to the child[ ]'s welfare' " (*Matter of Tuttle v Mateo* [appeal No. 3], 121 AD3d 1602, 1604; *see generally Matter of Granger v Misercola*, 21 NY3d 86, 90-91). "The 'substantial proof' language should not be interpreted in such a way as to heighten the burden, of the party who opposes visitation, to rebut the presumption of visitation. The presumption in favor of visitation may be rebutted through demonstration by a *preponderance of the evidence*" (*Granger*, 21 NY3d at 92).

Here, we conclude that there is not "substantial evidence that [the father's] visitation is detrimental to the child[ ]'s welfare" (*Tuttle*, 121 AD3d at 1604). To the contrary, a mental health

counselor testified that the child suffered from anxiety, but the counselor could not correlate the child's condition with the father's visitation. In addition, the counselor and the child's teachers testified that the child's anxiety slowly subsided throughout the 2014-2015 school year, which began well before visitation was eliminated, and that the child's condition continued to improve throughout that school year notwithstanding the elimination of visitation in the midst of it. Thus, the court's inference that the improvement in the child's anxiety was the result of the cessation of visitation is not supported by the record (*see generally id.*).

Although the counselor recommended that both parents undergo counseling, neither party followed that recommendation. Furthermore, the mother's self-serving testimony was the only evidence of most of the troublesome behavior allegedly exhibited by the child. Also, the mother testified that she wished to eliminate the father from the child's life. Thus, the record establishes that "the mother has made little to no effort to encourage the relationship between the father and the child[ ], . . . the father submitted evidence supporting an inference that the mother was alienating the child[ ] from the father[, and] the court improperly allowed the [mother] essentially to dictate whether visits would ever occur with the father" (*Guy v Guy*, 147 AD3d 1305, 1306). In addition, we conclude that, "despite numerous allegations that [the father] had mental health issues, there is no evidence in the record before us to support a determination that [he] suffered from a mental health condition that would prohibit him from obtaining . . . visitation" with his child (*Matter of Van Orman v Van Orman*, 19 AD3d 1167, 1168). We therefore modify the order in appeal No. 1 by vacating the third and fourth ordering paragraphs, and we remit the matter to Family Court for further proceedings on the issue of visitation, including a new hearing after mental health evaluations of both parties and the subject child.

Also in appeal No. 1, we agree with the father that the initial Attorney for the Child (AFC) violated his ethical duty to determine the subject child's position and advocate zealously in support of the child's wishes, because that AFC advocated for a result that was contrary to the child's expressed wishes in the absence of any justification for doing so. "There are only two circumstances in which an AFC is authorized to substitute his or her own judgment for that of the child: '[w]hen the [AFC] is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child' " (*Matter of Swinson v Dobson*, 101 AD3d 1686, 1687, *lv denied* 20 NY3d 862, quoting 22 NYCRR 7.2 [d] [3]), neither of which was present here. In addition, although an AFC "should not have a particular position or decision in mind at the outset of the case before the gathering of evidence" (*Matter of Carballeira v Shumway*, 273 AD2d 753, 756, *lv denied* 95 NY2d 764; *see Matter of Brown v Simon*, 123 AD3d 1120, 1123, *lv denied* 25 NY3d 902), the initial AFC indicated during his first court appearance, before he spoke with the child or gathered evidence regarding the petitions, that he would be substituting his judgment for that of the child. Thus, we agree with the father that the

child's interests were not represented with respect to visitation. A new AFC has already been substituted for the original AFC, however, and the matter is being remitted for a new hearing regarding visitation for the reasons set forth above. Furthermore, we conclude that the AFC's erroneous actions implicate only the parts of the order that pertain to the father's request for visitation with the subject child. Consequently, we see no need to modify the order further, or to direct the appointment of a replacement for the new AFC, who has advocated in accordance with the child's wishes. The father's remaining contentions concerning the original AFC are academic.

The father further contends in appeal No. 1 that the court violated his due process rights by, inter alia, issuing a temporary order that curtailed his visitation without a hearing, based solely upon the unsubstantiated allegations in the mother's petition. That contention is moot based on the court's subsequent issuance of permanent orders of custody and visitation. "Any alleged defect in the temporary order does not render defective the permanent order, which was based upon a full and fair hearing" (*Matter of Miller v Shaw*, 51 AD3d 927, 927-928, *lv denied* 11 NY3d 706, *rearg denied* 11 NY3d 911; *see Matter of Kirkpatrick v Kirkpatrick*, 137 AD3d 1695, 1696).

We have considered the father's remaining contentions and conclude that they do not require reversal or further modification of the order in appeal No. 1.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

661

CAF 16-02038

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

IN THE MATTER OF COURTNEY L. KLEINBACH,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW W. CULLERTON, RESPONDENT-APPELLANT.

IN THE MATTER OF ANDREW W. CULLERTON,
PETITIONER-APPELLANT,

V

COURTNEY L. KLEINBACH, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

MICHAEL A. ROSENBLOOM, ROCHESTER, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

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

WENDY S. SISSON, ATTORNEY FOR THE CHILD, GENESEO.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered June 28, 2016 in proceedings pursuant to Family Court Act article 6. The order, inter alia, denied that part of the motion of Andrew W. Cullerton seeking leave to reargue.

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

Same memorandum as in *Matter of Kleinbach v Cullerton* ([appeal No. 1] ___ AD3d ___ [June 9, 2017]).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

665

CA 16-01955

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

COMBUSTION SCIENCE & ENGINEERING, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ARGUS ENGINEERING, PLLC, DEFENDANT-RESPONDENT.

MELVIN & MELVIN, PLLC, SYRACUSE (LOUIS LEVINE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GERMAIN & GERMAIN, LLP, SYRACUSE (JOHN J. MARZOCCHI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered January 14, 2016. The order and judgment granted the motion of defendant for a directed verdict.

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

Memorandum: In this breach of contract action, plaintiff appeals from an order and judgment that granted defendant's motion for a directed verdict after the jury returned a verdict in favor of plaintiff. Pursuant to its contract with defendant, plaintiff was required to design a "code compliant" fire prevention sprinkler system for a warehouse. The then-applicable provisions of the Building Code of New York State required that such sprinkler systems comply with National Fire Protection Association Code 13 ([NFPA Code 13]; *see* Building Code of NY State §§ 903.2.8.2, 903.3.1.1 [2007]). Because of an internal conflict within the prescriptive requirements of NFPA Code 13, the parties planned to submit plaintiff's design to the City of Buffalo (City) for a variance.

At trial, plaintiff's representative testified that the design that plaintiff submitted to defendant did not comply with the 2010 edition of NFPA Code 13, but that the design was "code compliant" for the purposes of the contract because it was likely that the City would approve a variance for the design. The proof at trial established that, through no fault of plaintiff, defendant did not submit the design to the City for a variance. In granting defendant's motion for a directed verdict after the jury returned a verdict in favor of plaintiff, Supreme Court concluded that the evidence at trial

established that plaintiff breached the contract because plaintiff's representative had admitted that the design was not "code compliant."

We conclude that the court erred in granting defendant's motion. "Where a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*Schreiber v University of Rochester Med. Ctr.*, 88 AD3d 1262, 1263 [internal quotation marks omitted]; *see Lesio v Attardi*, 121 AD3d 1527, 1528). A verdict should only be set aside where there is " 'simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial' " (*Dennis v Massey*, 134 AD3d 1532, 1532, quoting *Cohen v Hallmark Cards*, 45 NY2d 493, 499).

Although plaintiff's representative testified that the design did not comply with the 2010 edition of NFPA Code 13, the court took judicial notice of the fact that the 2007 version of the Building Code was the applicable version, which required that sprinkler systems comply with an earlier edition of NFPA Code 13 (*see generally* Building Code of NY State §§ 903.2.8.2, 903.3.1.1 [2007]). Because there was no evidence presented at trial describing the requirements of the earlier edition of NFPA Code 13, we conclude that it was error for the court to construe the testimony that the design did not comply with the 2010 edition of NFPA Code 13 as an admission that the design did not comply with the applicable version of the Building Code.

Contrary to defendant's contention, the jury could have reasonably determined that plaintiff did not breach the contract because the contractual requirement to provide a "code compliant" design was satisfied by plaintiff's submission of a design that would comply with the Building Code upon the issuance of a variance. Indeed, the phrase "code compliant" was not defined in the contract, and it is axiomatic that a construction project that has been granted a variance from the requirements of the Building Code is not in violation of that code. Thus, the verdict can be reconciled with a reasonable view of the evidence, and the court therefore erred in granting defendant's motion (*see generally Lesio*, 121 AD3d at 1528).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

667

CA 16-01798

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

MARK SCHEIDELMAN, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 126104.)

FRANK POLICELLI, UTICA, FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Francis T. Collins, J.), entered April 5, 2016. The order, among other things, granted defendant's motion to dismiss the claim.

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

Memorandum: Claimant commenced this action pursuant to Court of Claims Act § 8-b, seeking damages based upon allegations that he was unjustly imprisoned by defendant, State of New York (State). He now appeals from an order granting the State's motion to dismiss the claim. We affirm.

Claimant was previously convicted of sexual abuse in the first degree (Penal Law § 130.65 [3]), based on an indictment alleging that he, "on or about November 11, 2012, in the County of Oneida, Town of Trenton, did subject another person to sexual contact . . . , when the other person was less than eleven years old, to wit: a male born on October 22, 2002." On appeal from the judgment of conviction, this Court concluded that the verdict of guilty comported with the weight of the evidence, but we reversed the judgment of conviction based on several instances of prosecutorial misconduct, and granted a new trial (*People v Scheidelman*, 125 AD3d 1426, 1427-1429). After the matter was remitted to County Court, the parties entered into a plea agreement whereby claimant was permitted to plead guilty to one count of endangering the welfare of a child (§ 260.10 [1]), as charged in a misdemeanor information. That plea satisfied the sexual abuse charge in the indictment, which was then dismissed. The misdemeanor information alleged that claimant, "on or about November 11, 2012, in the County of Oneida, Town of Trenton, . . . did act in a manner likely to be injurious to the physical, moral or mental welfare of a child, To wit: a male born on October 22, 2002."

Under section 8-b of the Court of Claims Act, an unjustly convicted defendant may recover damages where the "judgment of conviction was reversed or vacated, and the accusatory instrument dismissed or, if a new trial was ordered, either he was found not guilty at the new trial or he was not retried and the accusatory instrument dismissed; provided that the [judgment] of conviction was reversed or vacated, and the accusatory instrument was dismissed, on any of [certain enumerated grounds, including, as relevant here,] paragraph . . . (b) . . . of subdivision one of section 440.10 of the criminal procedure law" (§ 8-b [3] [b] [ii]). Insofar as relevant here, CPL 440.10 provides for vacatur of a judgment on the ground that "[t]he judgment was procured by duress, misrepresentation or fraud on the part of . . . a prosecutor or a person acting for or in behalf of a . . . prosecutor" (CPL 440.10 [1] [b]).

Pursuant to Court of Claims Act § 8-b (4), a claim must "state facts in sufficient detail to permit the court to find that claimant is likely to succeed at trial in proving that (a) he did not commit any of the acts charged in the accusatory instrument . . . and (b) he did not by his own conduct cause or bring about his conviction." "[T]he 'linchpin' of the statute is innocence" (*Ivey v State of New York*, 80 NY2d 474, 479) and, thus, "if it appears that the claimant will not be able either to establish his innocence or to demonstrate that conviction was not the result of 'his own conduct', the claim must be dismissed" (*Britt v State of New York*, 260 AD2d 6, 8, *lv denied* 95 NY2d 753). Consequently, in order "[t]o defeat a motion to dismiss, the statute places the burden on the claimant to provide the requisite documentary evidence" establishing that the judgment of conviction was reversed and the indictment was dismissed pursuant to one of the grounds listed in section 8-b (3) (b) of the Court of Claims Act (*Guce v State of New York*, 224 AD2d 492, 493, *lv denied* 88 NY2d 805; *see Pough v State of New York*, 203 AD2d 543, 543-544, *lv denied* 85 NY2d 803). Furthermore, " '[t]he allegations in the claim must be of such character that, if believed, they would clearly and convincingly establish the elements of the claim, so as to set forth a cause of action' " (*Warney v State of New York*, 16 NY3d 428, 435).

Here, the claim establishes that claimant pleaded guilty to another charge in satisfaction of the indictment underlying the alleged unjust conviction, and nothing in the plea minutes establishes that the misdemeanor to which claimant pleaded guilty involved a separate incident. To the contrary, the allegations in the claim support only the inference that claimant pleaded guilty to a lesser charge involving the same alleged conduct that gave rise to the initial conviction, and claimant's assertion that he pleaded guilty to a wholly separate offense "cannot be determined from the record" (*David W. v State of New York*, 27 AD3d 111, 117, *lv denied* 7 NY3d 709). We therefore conclude that the claim does not satisfy the pleading requirements of Court of Claims Act § 8-b (3) (b), because the evidence submitted in conjunction with the claim establishes that the dismissal of the indictment was based on the plea to the misdemeanor, and was not based on any of the grounds set forth in the statute (*see Wilson v State of New York*, 127 AD3d 743, 744, *lv denied* 25 NY3d 913; *Woodley v State of New York*, 306 AD2d 524, 525). In

addition, although this Court reversed claimant's judgment of conviction on the ground of prosecutorial misconduct, that misconduct does not rise to the level of prosecutorial misrepresentation or fraud, as required by section 8-b (3) (b) and the applicable subdivisions of CPL 440.10 (*cf. Baba-Ali v State of New York*, 19 NY3d 627, 633-634).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

669

CA 16-01712

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

TODD SPRING, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF MONROE, MONROE COMMUNITY HOSPITAL, MAGGIE BROOKS, AS MONROE COUNTY EXECUTIVE, DANIEL M. DELAUS, JR., ESQ., WILLIAM K. TAYLOR, ESQ., BRETT GRANVILLE, ESQ., MERIDETH H. SMITH, ESQ., AND KAREN FABI, DEFENDANTS-APPELLANTS.

HARRIS, CHESWORTH, JOHNSTONE & WELCH, LLP, ROCHESTER (EUGENE WELCH OF COUNSEL), FOR DEFENDANTS-APPELLANTS COUNTY OF MONROE, MONROE COMMUNITY HOSPITAL, MAGGIE BROOKS, AS MONROE COUNTY EXECUTIVE, DANIEL M. DELAUS, JR., ESQ., WILLIAM K. TAYLOR, ESQ., BRETT GRANVILLE, ESQ., AND MERIDETH H. SMITH, ESQ.

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

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

Appeals from an order of the Supreme Court, Monroe County (James P. Murphy, J.), entered June 6, 2016. The order, inter alia, denied the motions of defendants to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendants County of Monroe, Monroe Community Hospital, Maggie Brooks, as Monroe County Executive, Daniel M. DeLaus, Jr., Esq., William K. Taylor, Esq., Brett Granville, Esq., and Merideth H. Smith, Esq., in part and dismissing the first and second causes of action, and as modified the order is affirmed without costs.

Memorandum: In this action arising from plaintiff's employment at defendant Monroe Community Hospital (MCH), plaintiff asserted three causes of action against various defendants. The first cause of action, for legal malpractice, was asserted against defendants Daniel M. DeLaus, Jr., Esq., William K. Taylor, Esq., Brett Granville, Esq., and Merideth H. Smith, Esq. (collectively, County attorneys). The second cause of action, for negligence, was asserted against MCH, the County attorneys, and defendants County of Monroe (County), and Maggie Brooks, as Monroe County Executive. The third cause of action, for

defamation, was asserted against Brooks and defendant Karen Fabi. The County, MCH, Brooks, and the County attorneys (collectively, County defendants) and Fabi made separate motions to dismiss the complaint against them. The County defendants and Fabi now appeal from an order that denied the motions, and we modify the order by granting the County defendants' motion in part and dismissing the first and second causes of action.

On these motions to dismiss, we accept the facts alleged in the complaint as true and accord plaintiff the benefit of every favorable inference (*see Daley v County of Erie*, 59 AD3d 1087, 1087-1088). According to plaintiff, he became employed by the County in 2001 and became the Executive Health Director/Chief Administrative Officer of MCH in 2004. In February or March 2013, "questions were raised" regarding the treatment of a patient of MCH and, in March 2013, an investigation was commenced by the New York State Department of Health (DOH) and the New York State Attorney General. The County provided plaintiff with legal representation by the County attorneys. Although plaintiff was assured that there was no conflict of interest, the County attorneys were also representing the County and other MCH staff members, whose interests were adverse to plaintiff. On March 29, 2013, the DOH issued a statement of deficiency that included accusations against plaintiff with respect to the treatment of a patient at MCH. In or around April 2013, the County hired an independent consultant to assist with a response to the statement of deficiencies and to contest DOH's allegations by preparing and filing an "Informal Dispute Resolution" (IDR/appeal). The consultant invited plaintiff to provide her with any information, and she told plaintiff that she agreed with him that an IDR/appeal should be filed. The written IDR/appeal report was finalized on April 25, 2013 but, at the last minute, the County attorneys decided not to submit it. In plaintiff's view, the filing of the IDR/appeal was in his best legal interests and would have protected his reputation, his license as a nursing home administrator, and his position as executive director of MCH. On May 8, 2013, plaintiff requested that he be represented by private counsel. The County defendants did not respond to that request and, on May 10, 2013, plaintiff was terminated.

We agree with the County attorneys that Supreme Court erred in denying that part of the motion of the County defendants seeking to dismiss the legal malpractice cause of action, and we therefore modify the order accordingly. It is well established that, "[t]o recover damages for legal malpractice, a plaintiff must prove, inter alia, the existence of an attorney-client relationship" (*Moran v Hurst*, 32 AD3d 909, 910; *see Berry v Utica Natl. Ins. Group*, 66 AD3d 1376, 1376; *Rechberger v Scolaro, Shulman, Cohen, Fetter & Burstein, P.C.*, 45 AD3d 1453, 1453). In a prior appeal arising from the same incident as here, we determined that plaintiff did not have an attorney-client relationship with the County attorneys inasmuch as "[c]ounsel for the County represented [plaintiff] only in [plaintiff's] capacity as a County employee" (*Matter of Spring v County of Monroe*, 141 AD3d 1151, 1152). Consequently, plaintiff is collaterally estopped from claiming here that the County attorneys represented him individually (*see generally Buechel v Bain*, 97 NY2d 295, 303-304, *cert denied* 535 US

1096). Thus, the legal malpractice cause of action must be dismissed because there was no attorney-client relationship between plaintiff and the County attorneys (*see Berry*, 66 AD3d at 1376; *Moran*, 32 AD3d at 911-912).

We further agree with the County defendants that the court erred in denying that part of their motion seeking to dismiss the negligence cause of action, and we therefore further modify the order accordingly. "In a negligence-based claim against a municipality, a plaintiff must allege that a special duty existed between the municipality and the plaintiff" (*Kirchner v County of Niagara*, 107 AD3d 1620, 1623; *see Valdez v City of New York*, 18 NY3d 69, 75; *Laratro v City of New York*, 8 NY3d 79, 82-83). Here, plaintiff's complaint fails to allege the existence of any special duty, and therefore plaintiff's second cause of action should also be dismissed.

To the extent that the court determined pursuant to CPLR 3211 (d) that the County defendants' motion was premature, we conclude with respect to the legal malpractice cause of action that there was no showing that "additional discovery would disclose facts 'essential to justify opposition' to defendants' motion," inasmuch as discovery will not reveal an attorney-client relationship between plaintiff and the County attorneys (*Bouley v Bouley*, 19 AD3d 1049, 1051). With respect to the negligence cause of action, additional discovery is not warranted inasmuch as it could not remedy plaintiff's failure to plead a special duty.

We reject the contentions of the County defendants and Fabi that the court erred in denying those parts of the motions seeking to dismiss the defamation cause of action asserted only against Brooks and Fabi. It is well established that " '[t]he elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se' " (*D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 962). A plaintiff in a defamation action "must allege that he or she suffered 'special damages'—'the loss of something having economic or pecuniary value' " (*El Jamal v Weil*, 116 AD3d 732, 733-734), unless the defamatory statement falls within one of the four "per se" exceptions, which "consist of statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman" (*Liberman v Gelstein*, 80 NY2d 429, 435). "A statement imputing incompetence or dishonesty to the plaintiff is defamatory per se if there is some reference, direct or indirect, in the words or in the circumstances attending their utterance, which connects the charge of incompetence or dishonesty to the particular profession or trade engaged in by plaintiff" (*Van Lengen v Parr*, 136 AD2d 964, 964).

With respect to Brooks, we reject the contention of the County defendants that her statements were not defamation per se. "[G]ranting 'every possible inference' " to plaintiff (*Accadia Site*

Contr., Inc. v Skurka, 129 AD3d 1453, 1454), we conclude that Brooks' statements constitute defamation per se inasmuch as they allegedly injure plaintiff in his professional standing (*see Elibol v Berkshire-Hathaway, Inc.*, 298 AD2d 944, 945; *see generally Accadia Site Contr., Inc.*, 129 AD3d at 1454). Furthermore, contrary to the County defendants' contention, "the complaint contains sufficient allegations that [Brooks] acted with malice in making the alleged defamatory statements to withstand that part of [the County] defendants' motion seeking dismissal of the defamation cause of action" against Brooks (*Kondo-Dresser v Buffalo Pub. Schools*, 17 AD3d 1114, 1115; *cf. O'Neill v New York Univ.*, 97 AD3d 199, 213).

With respect to Brooks and Fabi, we also reject the contentions of the County defendants and Fabi that the alleged defamatory comments made by Brooks and Fabi were not actionable inasmuch as they were statements of opinion. "While a pure opinion cannot be the subject of a defamation claim, an opinion that 'implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, . . . is a mixed opinion and is actionable' " (*Davis v Boeheim*, 24 NY3d 262, 269). "What differentiates an actionable mixed opinion from a privileged, pure opinion is 'the implication that the speaker knows certain facts, unknown to [the] audience, which support [the speaker's] opinion and are detrimental to the person being discussed' " (*id.*). Here, at this early stage of the litigation, we cannot state as a matter of law that the allegedly defamatory statements made by Brooks and Fabi are pure opinion (*see id.* at 274).

The parties' remaining contentions either are without merit, are improperly raised for the first time on appeal, or have been rendered academic by our determination.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

673

CA 16-01211

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

ROXANNE WILLIAMS, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF HAYDEN BLACKMAN, DECEASED, AND AS PARENT OF INFANT T.R., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, ET AL., DEFENDANTS.

COUNTY OF MONROE, APPELLANT.

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (MALLORIE C. RULISON OF COUNSEL), FOR APPELLANT.

E. ROBERT FUSSELL, LEROY, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered February 2, 2016. The order granted the motion of plaintiff by directing the County of Monroe to provide certain grand jury transcripts to the court for in camera review.

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

Memorandum: This matter arises out of the fatal shooting of Hayden Blackman (decedent) by a City of Rochester (City) police officer. Plaintiff, who was decedent's wife, commenced an action in federal court against defendants, the City, the City of Rochester Police Department, and two police officers, seeking damages based on allegations that defendants, inter alia, violated decedent's constitutional rights and caused his wrongful death. Plaintiff subsequently moved in Supreme Court pursuant to CPLR 3101 (a) (4) for an order requiring that nonparty municipality County of Monroe (County) and its District Attorney's Office disclose the testimony of any City employees who testified before the grand jury that investigated the shooting. The County appeals from an order granting plaintiff's motion and directing the County, upon being served with a judicial subpoena duces tecum issued pursuant to CPLR 2307, to "supply to the Court, to examine in-camera, for review and determination as to disclosure to counsel, the complete transcripts of each and every employee of the City of Rochester who testified at the Grand Jury presentation." We reverse.

We agree with the County that plaintiff failed to "demonstrat[e] 'a compelling and particularized need for access' " to the grand jury materials (*People v Fetcho*, 91 NY2d 765, 769; *see Matter of District Attorney of Suffolk County*, 58 NY2d 436, 444; *see generally United States v Procter & Gamble Co.*, 356 US 677, 682). Such a showing must be made in order to overcome the "presumption of confidentiality [that] attaches to the record of [g]rand [j]ury proceedings" (*Fetcho*, 91 NY2d at 769; *see District Attorney of Suffolk County*, 58 NY2d at 444; *see also* CPL 190.25 [4] [a]), and is a prerequisite to the court's exercise of its discretion in "balanc[ing] the public interest for disclosure against the public interest favoring secrecy" (*Fetcho*, 91 NY2d at 769; *see District Attorney of Suffolk County*, 58 NY2d at 444; *see also People v Di Napoli*, 27 NY2d 229, 234-235). Here, plaintiff failed to establish that the discovery proceedings in federal court would not be sufficient to ascertain the facts and circumstances surrounding the shooting (*see District Attorney of Suffolk County*, 58 NY2d at 445-446).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

680

TP 17-00127

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

IN THE MATTER OF RAYMOND ALLEN, 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 16, 2017) to review a determination of respondent. The determination found after a tier III 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: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

681

TP 16-02273

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

IN THE MATTER OF EBRIMA TAMBADOU, 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 (KATHLEEN M. TREASURE 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 November 30, 2016) to review a determination of respondent. The determination revoked the parole of petitioner.

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 revoking his release to parole supervision. We reject petitioner's contention that Supreme Court erred in transferring the proceeding to this Court. A review of the petition shows that petitioner is challenging whether there was substantial evidence at the hearing to support the determination (*see* CPLR 7803 [4]; 7804 [g]; *see generally Matter of Patterson v Fischer*, 104 AD3d 1218, 1219).

" '[I]t is well settled that a determination to revoke parole will be confirmed if the procedural requirements were followed and there is evidence [that], if credited, would support such determination' " (*Matter of Wilson v Evans*, 104 AD3d 1190, 1190). We conclude that the determination that petitioner violated the conditions of his parole is supported by substantial evidence (*see generally id.* at 1190-1191). In making that determination, the Administrative Law Judge was entitled to credit the testimony of respondent's witnesses and reject petitioner's version of the events (*see Matter of Mosley v Dennison*, 30 AD3d 975, 976, *lv denied* 7 NY3d

712).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

682

KA 14-01507

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARINO PADILLA, DEFENDANT-APPELLANT.

WILLIAMS HEINL MOODY BUSCHMAN, P.C., AUBURN (MARIO J. GUTIERREZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (ANDREW R. KELLY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered May 14, 2013. The judgment convicted defendant, upon his plea of guilty, of promoting prison contraband 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 plea of guilty, of promoting prison contraband in the first degree (Penal Law § 205.25 [2]), defendant contends that his plea was not knowingly, voluntarily or intelligently entered because, during his plea, he informed County Court that he was currently taking two medications for his mental health problems. Defendant contends that, instead of accepting his plea, the court should have conducted a hearing pursuant to CPL article 730. We reject defendant's contentions.

Even assuming, arguendo, that defendant's waiver of the right to appeal is valid, we note that his contentions survive even a valid waiver of the right to appeal (*see People v Davis*, 129 AD3d 1613, 1613-1614, *lv denied* 26 NY3d 966; *People v Hawkins*, 70 AD3d 1389, 1389, *lv denied* 14 NY3d 888). We nevertheless conclude that defendant failed to preserve his contentions for our review by failing to move to withdraw the plea or to vacate the judgment of conviction (*see People v Williams*, 124 AD3d 1285, 1285, *lv denied* 25 NY3d 1078), and the narrow exception to the preservation rule does not apply here (*see People v Lopez*, 71 NY2d 662, 666). Contrary to defendant's contention, "the court sufficiently inquired about defendant's mental health issues and medications and ensured that he was lucid and understood the proceedings" (*People v Russell*, 133 AD3d 1199, 1199-1200, *lv denied* 26 NY3d 1149), and there is nothing in the record to

support defendant's contention that his prescribed medication or his mental illness "so stripped him of orientation or cognition that he lacked the capacity to plead guilty" (*People v Alexander*, 97 NY2d 482, 486; *see People v Hayes*, 39 AD3d 1173, 1175, *lv denied* 9 NY3d 923).

To the extent that defendant contends that the court sua sponte should have ordered a competency evaluation pursuant to CPL article 730, we reject that contention. "There is no evidence in the record that would have warranted the court to question defendant's competency or ability to understand the nature of the proceedings or the charge[]" (*People v Dunn*, 261 AD2d 940, 941, *lv denied* 94 NY2d 822).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

683

KA 13-01425

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER A. ROBINSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, JEFFREY WICKS, PLLC (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered April 26, 2013. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class E felony.

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

Memorandum: On appeal from a judgment convicting her following a jury trial of driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]), defendant contends that she was denied effective assistance of counsel based upon defense counsel's failure to secure her testimony before the grand jury or to make an adequate motion to dismiss the indictment based on the alleged violation of CPL 190.50. We reject that contention. Defendant has not shown that she was prejudiced by her attorney's failure to effectuate her appearance before the grand jury or that the outcome of the grand jury proceeding would have been different if she had testified (*see People v Simmons*, 10 NY3d 946, 949; *People v James*, 92 AD3d 1207, 1208, *lv denied* 19 NY3d 962), nor has she shown that an adequate motion based on the violation of CPL 190.50 had any chance of success (*see generally People v Caban*, 5 NY3d 143, 152). Furthermore, defendant's sentence is not unduly harsh or severe.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

684

KA 16-01244

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD L. SCOTT, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered June 23, 2016. The judgment convicted defendant, upon his plea of guilty, of possessing a sexual performance by a child and tampering with physical evidence.

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 possessing a sexual performance by a child (Penal Law § 263.16) and tampering with physical evidence (§ 215.40 [2]). Defendant failed to move to withdraw his plea or vacate the judgment and thus failed to preserve for our review his contention that his plea was not knowing and voluntary because County Court advised him of his due process rights that would be waived by pleading guilty after, rather than before, conducting the factual allocution (*see People v Brinson*, 130 AD3d 1493, 1493, *lv denied* 26 NY3d 965). In any event, we reject defendant's contention. It is axiomatic that the court "need not engage in any particular litany" in order to ensure that a defendant makes a "knowing, voluntary and intelligent choice among alternative courses of action" (*People v Conceicao*, 26 NY3d 375, 382) and, here, the record establishes that defendant's plea was a knowing, voluntary and intelligent choice. Contrary to defendant's further contention, the court did not err in imposing consecutive sentences because the act of possessing the image of a sexual performance by a child on the hard drive of his computer is neither the same act as nor a material element of the offense of tampering with physical evidence, i.e., the hard drive of his computer (*see* § 70.25 [2]; *People v Laureano*, 87 NY2d 640, 643). The sentence is not unduly harsh or severe.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

685

KA 16-00329

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL MAIER, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (James J. Piampiano, J.), entered January 19, 2016. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). The Board of Examiners of Sex Offenders (Board) determined that defendant was a level one risk with a total risk factor score of 30, but it further determined that there were aggravating circumstances of a kind or to a degree not taken into account by the risk assessment guidelines, and the Board thus recommended an upward departure to a level two risk. Following a hearing, County Court recalculated defendant's presumptive risk level by assigning points under risk factor 3 (three or more victims) and 7 (relationship between offender and victims, i.e., strangers), resulting in a total risk factor score of 80, which is a level two risk.

We reject defendant's contention that the court erred in denying his request for a downward departure to a risk level one. Defendant failed to meet his initial burden of identifying and establishing mitigating factors that are not adequately taken into account by the risk assessment guidelines (*see People v Cooper*, 141 AD3d 710, 710-711, *lv denied* 28 NY3d 908).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

686

KA 12-00438

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN J. MCCORMACK, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered November 14, 2011. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of burglary in the third degree (Penal Law § 140.20). We reject defendant's contention that the plea colloquy was factually insufficient. Defendant admitted the essential elements of the crime during the plea colloquy, including that he entered the building with the intent to steal (*see People v Hinkson*, 59 AD3d 941, 941, *lv denied* 12 NY3d 817; *People v Jackson*, 286 AD2d 912, 912-913, *lv denied* 97 NY2d 755). Contrary to defendant's further contention, defense counsel did not take a position adverse to his pro se motion to withdraw the plea, and thus there was no reason for County Court to assign new counsel (*see People v Lindsay*, 134 AD3d 1452, 1452-1453, *lv denied* 27 NY3d 967; *People v Strasser*, 83 AD3d 1411, 1411-1412; *see generally People v Mitchell*, 21 NY3d 964, 967).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

689

CAF 16-00688

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

IN THE MATTER OF COLTON B.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES, ORDER
PETITIONER-RESPONDENT;

CODY A.B., RESPONDENT-APPELLANT.

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

COLLEEN S. HEAD, BATAVIA, FOR PETITIONER-RESPONDENT.

JACQUELINE M. GRASSO, ATTORNEY FOR THE CHILD, BATAVIA.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered March 23, 2016 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 in the decision at Family Court.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

690

CAF 16-01099

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

IN THE MATTER OF ANGELA M. KELLEY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY J. HOLMES, RESPONDENT-APPELLANT.

IN THE MATTER OF ANTHONY J. HOLMES,
PETITIONER-APPELLANT,

V

ANGELA M. KELLEY, RESPONDENT-RESPONDENT.

PALOMA A. CAPANNA, WEBSTER, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered June 9, 2016 in a proceeding pursuant to Family Court Act article 4. The order, among other things, adjudged that Anthony J. Holmes had willfully violated an order of support.

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

Memorandum: Respondent father appeals from an order granting the petition alleging that he was in willful violation of a child support order requiring that he pay child support in the amount of $50 per month and denying his cross petition seeking a downward modification of that order. Contrary to the father's contention, he failed to meet his burden of establishing a change in circumstances sufficient to warrant a downward modification of the prior order "inasmuch as he did not provide competent medical evidence of his disability or establish that his alleged disability rendered him unable to work" (*Matter of Gray v Gray*, 52 AD3d 1287, 1288, *lv denied* 11 NY3d 706; *see Matter of Commissioner of Cattaraugus County Dept. of Social Servs. v Jordan*, 100 AD3d 1466, 1467). Although we agree with the father that Family Court misstated the amount of arrears, that misstatement does not require reversal or modification because the court did not order the father to pay any arrears and thus the father is not aggrieved thereby (*see generally* CPLR 5511; *Rooney v Rooney* [appeal No. 3], 92 AD3d 1294, 1295, *lv denied* 19 NY3d 810). The father's further contention that the arrears must be limited to $500 pursuant to Family Court Act

§ 413 (1) (g) is not properly before us because it is raised for the first time on appeal (*see Matter of Erie County Dept. of Social Servs. v Morris* [appeal No. 1], 132 AD3d 1292, 1292). In any event, the father "failed to establish that his income was below the federal poverty income guidelines when the arrears accrued" (*Morris*, 132 AD3d at 1292). We reject the father's contention that he was denied effective assistance of counsel inasmuch as he failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Reinhardt v Hardison*, 122 AD3d 1448, 1449 [internal quotation marks omitted]; *see Matter of Ysabel M. [Ysdirabellinna L.—Elvis M.]*, 137 AD3d 1502, 1505). We have reviewed the father's remaining contentions and conclude that they are without merit.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

691

CAF 16-00106

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

IN THE MATTER OF MONICA M.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MARY M., RESPONDENT-APPELLANT.

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

WENDY G. PETERSON, OLEAN, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered December 23, 2015 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order that, inter alia, found that she neglected her daughter. Contrary to the mother's contention, we conclude that Family Court's finding that she neglected the child is supported by a preponderance of the evidence (*see* § 1046 [b] [i]). The undisputed evidence at the fact-finding hearing established, inter alia, that the mother left the then-seven-month-old child in the care of a person "who she knew . . . to be an inappropriate caregiver" (*Matter of Charisma D. [Sandra R.]*, 115 AD3d 441, 441), she violated her probation on a felony conviction by smoking marihuana while she had custody of the child (*see Matter of Chassidy CC. [Andrew CC.]*, 84 AD3d 1448, 1449; *Matter of Nikita A.*, 16 AD3d 736, 737), and she had not complied with substance abuse or mental health treatment on a consistent basis (*see Matter of Nhyashanti A. [Evelyn B.]*, 102 AD3d 470, 470; *Matter of Hailey W.*, 42 AD3d 943, 944, *lv denied* 9 NY3d 812). In addition, the psychologist who evaluated the mother on behalf of petitioner testified that, based upon the combination of the mother's significant substance abuse problems and mental health diagnoses, she was incapable of caring for the child without treatment for those conditions and, in any event, her ability to care for herself and the child was marginal even if she were engaged in such treatment (*see Matter of Majerae T. [Crystal T.]*, 74 AD3d 1784, 1785). Thus, contrary to the mother's contention, we conclude that petitioner established by a preponderance of the

evidence that the subject child was in imminent danger of impairment as a consequence of the mother's failure to exercise a minimum degree of parental care (*see* § 1012 [f] [i] [B]; *see generally Matter of Afton C. [James C.]*, 17 NY3d 1, 8-9).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

693

CA 16-01816

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

KAM CONSTRUCTION CORP., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. BERGEY, DEFENDANT,
TUG HILL ENVIRONMENTAL, LLC, AND TUG HILL
CONSTRUCTION, INC., DEFENDANTS-APPELLANTS.

BARCLAY DAMON, LLP, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HOGAN WILLIG, PLLC, AMHERST (STEPHEN M. COHEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered May 5, 2016. The order denied the motion of defendants Tug Hill Environmental, LLC, and Tug Hill Construction, Inc., for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion of defendants Tug Hill Environmental, LLC and Tug Hill Construction, Inc. is granted and the complaint against them is dismissed.

Memorandum: Plaintiff commenced this action alleging, inter alia, that defendant Michael J. Bergey breached a 2008 clay mining contract with plaintiff and that defendants Tug Hill Environmental, LLC and Tug Hill Construction, Inc. (collectively, Tug Hill defendants) intentionally interfered with that contract and intentionally interfered with plaintiff's "prospective economic advantage." We conclude that Supreme Court erred in denying the motion of the Tug Hill defendants for summary judgment dismissing the complaint against them.

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424; *see White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426; *Weaver v Town of Rush*, 1 AD3d 920, 924). Furthermore, "it must be proven, among other things, that the contract would not have been breached but for the defendant's conduct" (*Lana & Samer v Goldfine*, 7 AD3d 300, 301; *see Kansas State*

Bank of Manhattan v Harrisville Volunteer Fire Dept., Inc., 66 AD3d 1409, 1411). Even assuming, arguendo, that there are triable issues of fact concerning the existence of a valid contract between plaintiff and Bergey, and the Tug Hill defendants' actual knowledge of that contract, we conclude that the Tug Hill defendants established as a matter of law that they did not intentionally procure the breach of that contract. The Tug Hill defendants submitted evidence establishing that Bergey's decision to sell the property involved in the clay mining contract was made "prior to any involvement by" them (*Cantor Fitzgerald Assoc. v Tradition N. Am.*, 299 AD2d 204, 204, *lv denied* 99 NY2d 508; *see Pyramid Brokerage Co. v Citibank [N.Y. State]*, 145 AD2d 912, 913), and "plaintiff failed to proffer any evidence, in response to the [Tug Hill] defendant[s'] prima facie showing, that [they] intentionally procured a breach of the contract" (*Whitman Realty Group, Inc. v Galano*, 41 AD3d 590, 593).

We further conclude that the Tug Hill defendants were entitled to summary judgment dismissing the cause of action for intentional interference with prospective economic advantage. To prevail on such a cause of action, a plaintiff must show "that the action complained of was motivated solely by malice or to inflict injury by unlawful means rather than by self-interest or other economic considerations" (*Matter of Entertainment Partners Group v Davis*, 198 AD2d 63, 64; *see Advanced Global Tech., LLC v Sirius Satellite Radio, Inc.*, 44 AD3d 317, 318). Here, the Tug Hill defendants established that they were motivated by " 'normal economic self-interest' " (*Radon Corp. of Am., Inc. v National Radon Safety Bd.*, 125 AD3d 1537, 1538, quoting *Carvel Corp. v Noonan*, 3 NY3d 182, 190), and plaintiff failed to submit any evidence to the contrary (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

695

CA 16-00775

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

WILLIAM J. THYGESEN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NORTH BAILEY VOLUNTEER FIRE COMPANY, INC., WARREN G. HOLMES, INDIVIDUALLY AND IN HIS CAPACITY AS PRESIDENT OF NORTH BAILEY VOLUNTEER FIRE COMPANY, INC., DAVID HUMBERT, INDIVIDUALLY AND IN HIS CAPACITY AS FIRE CHIEF OF NORTH BAILEY VOLUNTEER FIRE COMPANY, INC., DANIEL STROZYK, INDIVIDUALLY AND IN HIS CAPACITY AS INVESTIGATOR FOR NEW YORK STATE DIVISION OF STATE POLICE AND NEW YORK STATE DIVISION OF STATE POLICE, DEFENDANTS-RESPONDENTS.

HOGAN WILLIG, PLLC, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

UNDERBERG & KESSLER LLP, BUFFALO (COLIN D. RAMSEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS NORTH BAILEY VOLUNTEER FIRE COMPANY, INC., WARREN G. HOLMES, INDIVIDUALLY AND IN HIS CAPACITY AS PRESIDENT OF NORTH BAILEY VOLUNTEER FIRE COMPANY, INC., AND DAVID HUMBERT, INDIVIDUALLY AND IN HIS CAPACITY AS FIRE CHIEF OF NORTH BAILEY VOLUNTEER FIRE COMPANY, INC.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS DANIEL STROZYK, INDIVIDUALLY AND IN HIS CAPACITY AS INVESTIGATOR FOR NEW YORK STATE DIVISION OF STATE POLICE AND NEW YORK STATE DIVISION OF STATE POLICE.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered February 9, 2016. The order granted the motions of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendants North Bailey Volunteer Fire Company, Inc., Warren G. Holmes, individually and in his capacity as president of North Bailey Volunteer Fire Company, Inc. and David Humbert, individually and in his capacity as Fire Chief of North Bailey Volunteer Fire Company, Inc. in part and reinstating the first and second causes of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a former member of defendant North Bailey

Volunteer Fire Company, Inc. (Fire Company), commenced this action alleging, inter alia, that defendants discriminated against him and violated his civil rights when they expelled him from membership in the Fire Company. On a prior appeal, we modified an order by reinstating certain causes of action (*Thygesen v North Bailey Volunteer Fire Co., Inc.*, 106 AD3d 1458). In a separate CPLR article 78 proceeding commenced by plaintiff, we confirmed the determination expelling plaintiff from membership in the Fire Company (*Matter of Thygesen v North Bailey Volunteer Fire Co., Inc.*, 100 AD3d 1416). Plaintiff now appeals from an order granting defendants' respective motions for summary judgment dismissing the complaint against them.

Contrary to plaintiff's contention, the court properly granted those parts of defendants' motions with respect to the causes of action alleging that they violated Executive Law § 296 (16), which are based upon the testimony of defendant Daniel Strozyk, individually and in his capacity as investigator for the New York State Division of Police, at the disciplinary hearing regarding admissions plaintiff made in connection with a criminal investigation that resulted in plaintiff's arrest for two offenses. It is undisputed that the charges against plaintiff were dismissed following adjournments in contemplation of dismissal and that the records of those criminal prosecutions were sealed prior to the disciplinary hearing. Nevertheless, as we explained in our decision in the CPLR article 78 proceeding, "it is permissible to consider the independent evidence of the conduct leading to the criminal charges . . . , [and thus] the police investigator was free to testify from memory [with respect to plaintiff's admissions] concerning the conduct that led to [his] arrests" (*Thygesen*, 100 AD3d at 1417 [internal quotation marks omitted]).

We agree with plaintiff, however, that he raised an issue of fact sufficient to defeat the motion of the Fire Company and defendants Warren G. Holmes, individually and in his capacity as president of the Fire Company, and David Humbert, individually and in his capacity as Fire Chief of the Fire Company (collectively, Fire Company defendants), with respect to the first and second causes of action, alleging that they violated Executive Law § 296 (1) and Civil Rights Law § 40-c by discriminating against him based upon his sexual orientation. We therefore modify the order accordingly. As relevant here, "[a] plaintiff alleging [sexual orientation] discrimination in employment has the initial burden to establish a prima facie case of discrimination . . . [and] must show[, inter alia,] that . . . the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305; *see Ferrante v American Lung Assn.*, 90 NY2d 623, 629). In support of their motion, the Fire Company defendants were required to "demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual" (*Forrest*, 3 NY3d at 305). We conclude that, although the Fire Company defendants did not meet their burden with respect to plaintiff's alleged failure to establish every element

of intentional discrimination, they met their burden of establishing that there were legitimate, nondiscriminatory reasons for their determination to expel plaintiff from membership of the Fire Company and that there are no issues of fact whether their explanations were pretextual, and thus the burden of proof shifted to plaintiff (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

"[P]laintiff is not required to *prove* his claim to defeat summary judgment" (*Ferrante*, 90 NY2d at 630). Rather, "[t]o defeat a properly supported motion for summary judgment in [a sexual orientation] discrimination case, plaintiff[] must show that there is a material issue of fact as to whether (1) the [Fire Company defendants'] asserted reason for [expelling him from membership] is false or unworthy of belief *and* (2) more likely than not the [plaintiff's sexual orientation] was the real reason" (*id.* [internal quotation marks omitted]). Viewing the facts in the light most favorable to the nonmoving party, as we must (*see Victor Temporary Servs. v Slattery*, 105 AD2d 1115, 1117), and without making credibility determinations (*see Ferrante*, 90 NY2d at 631), we conclude that plaintiff raised an issue of fact sufficient to defeat the motion. Plaintiff presented the deposition testimony of defendant Warren Holmes, wherein he admitted that he knew that another member of the Fire Company had been arrested, that information regarding the arrest had appeared in the media, and that the member at issue was not disciplined by the Fire Company. Holmes also admitted in his deposition that he was aware of allegations that another member of the Fire Company engaged in sexual misconduct with a child, and that the allegations were not investigated by the Fire Company and the member was not disciplined. In addition, plaintiff submitted hearsay evidence, which may be considered in opposition to a motion for summary judgment but "is by itself insufficient to defeat such a motion" (*Raux v City of Utica*, 59 AD3d 984, 985), that Holmes confronted Fire Company members who voted against plaintiff's expulsion from membership using derogatory language regarding plaintiff's sexual orientation. We therefore conclude that "the credibility issues raised by the plaintiff are sufficient to allow the case to go forward" with respect to the first and second causes of action (*Ferrante*, 90 NY2d at 631). We have considered plaintiff's remaining contentions and conclude that they are without merit.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

697

CA 16-02193

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

JOHN J. PERILLO, AS EXECUTOR OF THE ESTATE OF
JOHN A. PERILLO, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS I. DILAMARTER, JR., M.D., ET AL.,
DEFENDANTS,
AND ERIE COUNTY MEDICAL CENTER CORPORATION, ALSO
KNOWN AS ECMC CORPORATION, DEFENDANT-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (ELIZABETH G. ADYMY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered February 17, 2016. The order granted the motion of plaintiff for leave to file and serve a supplemental summons and amended complaint to add Oghenerukevwe Achoja, M.D. as a defendant.

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

Memorandum: Plaintiff commenced this wrongful death and medical malpractice action against, inter alia, defendant Erie County Medical Center Corporation, also known as ECMC Corporation (ECMC). Plaintiff thereafter moved pursuant to CPLR 3025 (b) for leave to file and serve a supplemental summons and amended complaint adding Dr. Achoja, an employee of ECMC at the relevant time, as a defendant. ECMC opposed that part of the motion with respect to the medical malpractice cause of action, contending that it was time-barred. In reply, plaintiff argued that the relation back doctrine applied, and Supreme Court granted the motion.

We reject ECMC's contention that plaintiff improperly raised the relation back doctrine for the first time in his reply papers. "The [s]tatute of [l]imitations is an affirmative defense that must be pleaded and proved" and is waivable (*Mendez v Steen Trucking*, 254 AD2d 715, 716). Therefore, plaintiff had no obligation to raise the relation back doctrine in his initial papers in support of his motion, and properly raised the doctrine in his reply papers in response to ECMC's opposition that the medical malpractice cause of action against

Dr. Achoja would be untimely.

We reject ECMC's further contention that the second prong of the relation back doctrine, i.e., unity of interest, is not met. As ECMC's employee, Dr. Achoja was united in interest with ECMC and as such is charged with notice of the action (*see May v Buffalo MRI Partners, L.P.*, ___ AD3d ___, ___ [June 9, 2017]; *Kirk v University OB-GYN Assoc., Inc.*, 104 AD3d 1192, 1193-1194). Finally, plaintiff established that the third prong of the relation back doctrine was met inasmuch as he made a mistake in naming in the original action another physician with a similar last name rather than Dr. Achoja, who knew or should have known that, but for the mistake, the action would have been brought against him in the first instance (*see Kirk*, 104 AD3d at 1193-1194). Plaintiff established that Dr. Achoja, who was one of the physicians named in decedent's medical records, could not have reasonably concluded that plaintiff's failure to name him meant that there was no intent to sue him (*see Roseman v Baranowski*, 120 AD3d 482, 484).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

699

CA 17-00143

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

CHARLENE SPICER, AS ADMINISTRATOR OF THE ESTATE
OF CHRISTOPHER SPICER,
DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

USA BODY, INC., DEFENDANT.

USA BODY, INC., THIRD-PARTY PLAINTIFF-RESPONDENT,

V

VOLLES DAIRY FARM, LLC, THIRD-PARTY
DEFENDANT-APPELLANT.

BARCLAY DAMON, LLP, SYRACUSE (ALAN R. PETERMAN OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

DELDUCHETTO & POTTER, SYRACUSE (ERNEST A. DELDUCHETTO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered September 28, 2016. The order, among other things, denied the motion of third-party defendant Volles Dairy Farm, LLC seeking summary judgment dismissing the third-party plaintiff's complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 31 and April 25, 2017,

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

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

700

CA 16-00311

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

IN THE MATTER OF THE APPLICATION OF HSBC BANK USA, N.A., GRACIA M. CAMPBELL (FORMERLY KNOWN AS GRACIA C. FLICKINGER) AND NORTHRUP R. KNOX, AS TRUSTEES,

FOR THE JUDICIAL SETTLEMENT OF THE INTERMEDIATE AND FINAL ACCOUNTS AS TRUSTEES OF TRUST UNDER THE AGREEMENT DATED SEPTEMBER 16, 1977,

FOR THE BENEFIT OF CLARISSA L. VAIDA (FORMERLY KNOWN AS CLARISSA L. VIMMERSTEDT), GRANTOR,

FOR THE PERIOD FROM SEPTEMBER 22, 1977 TO SEPTEMBER 24, 2011.

MEMORANDUM AND ORDER

CLARISSA L. VAIDA (FORMERLY KNOWN AS CLARISSA L. VIMMERSTEDT), RESPONDENT-APPELLANT.

V

HSBC BANK USA, N.A., PETITIONER-RESPONDENT.
(APPEAL NO. 1.)

LAWRENCE J. KONCELIK, JR., EAST HAMPTON, FOR RESPONDENT-APPELLANT.

BLAIR & ROACH, LLP, TONAWANDA (JOHN P. DEE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered December 22, 2015. The order, among other things, adjudged that petitioner shall be reimbursed for attorneys' fees as well as costs and disbursements.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating those parts of the second ordering paragraph awarding attorneys' fees and costs and disbursements and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: The respondent in each of these consolidated appeals established a revocable trust for her respective benefit. Two of the original three trustees for each trust are deceased and petitioner, successor in interest to the third original trustee, filed petitions in September 2011 seeking to approve the account for each trust. Supreme Court

granted the respective petitions. Respondents, as limited by their brief, contend, inter alia, that the court erred in approving the attorneys' fees assessed to each trust in the amount of $63,204.12 and costs and disbursements in the amount of $2,705.26. It is undisputed that there are minimal assets remaining in each of the trusts inasmuch as the bulk of the principal has been distributed to the respective respondents.

"In determining the proper amount of reimbursement sought by a trustee for those items, a [court] should consider the 'time spent, the difficulties involved in the matters in which the services were rendered, the nature of the services, the amount involved, the professional standing of the counsel, and the results obtained' " (*Matter of Chase Manhattan Bank [University of Rochester]*, 68 AD3d 1670, 1671, quoting *Matter of Potts*, 213 App Div 59, 62, *affd* 241 NY 593; *see Matter of HSBC Bank USA, N.A. [Knox]*, ___ AD3d ___, ___ [May 5, 2017]). Because the court failed to make any findings with respect to those factors, we are unable to review the court's implicit determination that the attorneys' fees and costs and disbursements are reasonable (*see HSBC Bank USA, N.A.*, ___ AD3d at ___). We therefore modify the orders in appeal Nos. 1 and 2 by vacating those parts of the second ordering paragraph awarding attorneys' fees and costs and disbursements, and we remit the matter to Supreme Court for a determination whether those fees and costs and disbursements are reasonable, following a hearing if necessary (*see id.*).

Contrary to respondents' contention, the court properly determined that, to the extent that the respective trusts do not contain sufficient assets to pay the reasonable attorneys' fees and costs and disbursements incurred by the trusts, respondents may be obligated to the respective trusts for those fees and costs and disbursements (*see Matter of White [Green]*, 128 AD3d 1366, 1368; *Matter of Dewar*, 62 AD2d 352, 355). Contrary to respondents' further contention, the court properly awarded commissions to petitioner at a rate of 1% of the amount of principal paid from each trust (*see* SCPA 2309 [1]), as well as expenses related to respondents' discovery demands (*see id.*). We have considered respondents' remaining contentions and conclude that they are without merit.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

701

CA 16-00312

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

IN THE MATTER OF THE APPLICATION OF HSBC BANK USA, N.A., GRACIA M. CAMPBELL (FORMERLY KNOWN AS GRACIA C. FLICKINGER) AND GRACIA E. CAMPBELL, AS TRUSTEES,

FOR THE JUDICIAL SETTLEMENT OF THE INTERMEDIATE AND FINAL ACCOUNTS AS TRUSTEES OF TRUST UNDER THE AGREEMENT DATED DECEMBER 20, 1974 AND RESTATED OCTOBER 19, 1998 AND MODIFIED BY AN INSTRUMENT DATED DECEMBER 26, 2000,

FOR THE BENEFIT OF GRACIA E. CAMPBELL (FORMERLY KNOWN AS GRACIA E.C. FLICKINGER), GRANTOR,

FOR THE PERIOD FROM DECEMBER 20, 1974 TO SEPTEMBER 24, 2011.

MEMORANDUM AND ORDER

GRACIA E. CAMPBELL (FORMERLY KNOWN AS GRACIA E.C. FLICKINGER), RESPONDENT-APPELLANT.

V

HSBC BANK USA, N.A., PETITIONER-RESPONDENT.
(APPEAL NO. 2.)

LAWRENCE J. KONCELIK, JR., EAST HAMPTON, FOR RESPONDENT-APPELLANT.

BLAIR & ROACH, LLP, TONAWANDA (JOHN P. DEE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered December 22, 2015. The order, among other things, adjudged that petitioner shall be reimbursed for attorneys' fees as well as costs and disbursements.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating those parts of the second ordering paragraph awarding attorneys' fees and costs and disbursements and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the same memorandum as in *Matter of*

HSBC Bank USA, N.A. ([appeal No. 1] ___ AD3d ___ [June 9, 2017]).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

702

KA 15-00080

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES L. BLACKWELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered September 24, 2014. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the third degree (Penal Law § 155.35 [1]). We agree with defendant that the waiver of the right to appeal is not valid. In order for this Court to uphold a waiver of the right to appeal, "[t]he record must establish that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty—the right to remain silent, the right to confront one's accusers and the right to a jury trial, for example" (*People v Lopez*, 6 NY3d 248, 256). Such a waiver is ineffective where as here, defendant, notwithstanding a written waiver, "never orally confirmed that he grasped the concept of the appeal waiver and the nature of the right he was forgoing" (*People v Bradshaw*, 18 NY3d 257, 267; *cf. People v Ramos*, 7 NY3d 737, 738; *People v Gibson*, 147 AD3d 1507, 1507). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

703

KA 15-01117

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SEANDELL KING, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN J. GILSENAN, OF THE PENNSYLVANIA AND MICHIGAN BARS, ADMITTED PRO HAC VICE, 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 April 19, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

704

KA 15-02164

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DYLAN J. SIMONS, DEFENDANT-APPELLANT.

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

THEODORE A. BRENNER, DEPUTY DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered October 26, 2015. 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.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). Initially, we agree with defendant that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence and thus does not foreclose our review of that challenge (*see People v Maracle*, 19 NY3d 925, 927-928; *People v Tomeno*, 141 AD3d 1120, 1120-1121, *lv denied* 28 NY3d 974). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

705

KA 15-01677

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVIN ISIDORE, DEFENDANT-APPELLANT.

TULLY RINCKEY, PLLC, ROCHESTER (PETER J. PULLANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered July 29, 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]). Defendant contends that Supreme Court erred in imposing an enhanced sentence because the evidence adduced by the People at the hearing conducted pursuant to *People v Outley* (80 NY2d 702) did not suffice to demonstrate defendant's violation of the plea conditions. We reject that contention. The court made a sufficient inquiry in order to ascertain "the existence of a legitimate basis" for the charges of postplea criminal conduct on the part of defendant (*Outley*, 80 NY2d at 713; *see People v Fumia*, 104 AD3d 1281, 1281, *lv denied* 21 NY3d 1004; *People v Ayen*, 55 AD3d 1305, 1306). We have considered defendant's challenge to the severity of the enhanced sentence and conclude that it is without merit.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

707

KA 11-01918

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT B. SPAHALSKI, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (DONALD M. THOMPSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Stephen R. Sirkin, J.), rendered December 12, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (five counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of five counts of murder in the second degree (Penal Law § 125.25 [1], [3]) arising from his commission of four homicides. One victim was killed in December 1990 on Lake Avenue in Rochester, a second was killed in July 1991 on Emerson Street in Rochester, and a third, Charles Grande, was killed in October 1991 in Webster. The fourth victim was killed in November 2005 at defendant's home in Rochester.

At the time of Grande's murder, defendant was represented by the Monroe County Public Defender's Office on unrelated charges being prosecuted in Rochester City Court and Gates Town Court. When the attorney representing defendant on those charges, Richard Marchese, learned that defendant was being questioned by Rochester police concerning Grande's murder, he ended the interrogation and followed up with separate letters to the Rochester Police Department and the Webster Police Department, advising them that defendant was not to be questioned without Marchese present. Neither letter asserted that Marchese represented defendant on the Grande case, and the charges on which Marchese had represented defendant were dismissed in 1992. A few days after the death of the fourth victim in November 2005, defendant of his own accord traveled to the Monroe County Public Safety Building and confessed to that murder. In the police interviews that followed, defendant confessed to each of the three

prior killings.

We reject defendant's contention that he was denied the right to counsel when the police questioned him concerning the Grande murder in 2005. The indelible right to counsel attaches when "(1) a person in custody requests the assistance of an attorney or a lawyer enters the case or (2) a criminal proceeding is commenced against the defendant by the filing of an accusatory instrument" (*People v Lopez*, 16 NY3d 375, 380). Marchese's letter did not establish his entry into the Grande case, however, because it "did not communicate that [he] represented defendant with respect" to that case (*People v Slocum*, 133 AD3d 972, 976, *lv dismissed* 29 NY3d 954; *see People v Cohen*, 90 NY2d 632, 638-642). Indeed, at the hearing on this matter, Marchese testified that he never represented defendant with respect to any homicide. Moreover, the indelible right to counsel "disappears" where, as here, the charge or charges on which the defendant is represented are disposed of by dismissal or conviction (*People v Bing*, 76 NY2d 331, 344, *rearg denied* 76 NY2d 890; *see People v Koonce*, 111 AD3d 1277, 1278). It is not necessary to address whether the police had actual or constructive notice of defendant's representation in 2005 because it is clear that defendant was not represented at that time.

Contrary to defendant's further contention, County Court properly denied his motion to sever the counts of the indictment and to try each incident separately. Defendant failed to show the requisite "good cause" for severance (CPL 200.20 [3]), and he made no "convincing showing" that he had important testimony to provide concerning one of the incidents and a strong need to refrain from testifying about others (CPL 200.20 [3] [b]; *see People v Lane*, 56 NY2d 1, 8-9; *People v Rios*, 107 AD3d 1379, 1380-1381, *lv denied* 22 NY3d 1158; *People v Burrows*, 280 AD2d 132, 135-136, *lv denied* 96 NY2d 826). Finally, the sentence is not unduly harsh or severe.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

708

KA 15-01972

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTOINE RICHARDS, ALSO KNOWN AS ANTOINE RICHARDS, JR., DEFENDANT-APPELLANT.

SESSLER LAW PC, GENESEO (STEVEN D. SESSLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered September 8, 2015. 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 reversed on the law, the plea is vacated, those parts of the omnibus motion seeking to suppress physical evidence are granted, the indictment is dismissed, and the matter is remitted to Livingston County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). We agree with defendant that County Court erred in denying that part of his omnibus motion seeking to suppress physical evidence found on his person.

The evidence at the suppression hearing established that defendant was a passenger in a vehicle that was stopped for a violation of the Vehicle and Traffic Law. The sheriff's deputy conducting the stop learned that the driver did not have a valid driver's license and placed the driver under arrest for aggravated unlicensed operation of a motor vehicle in the first degree (*see* § 511 [3]). In checking defendant's "data," the deputy learned that defendant also did not have a valid driver's license and that there was a warrant for defendant from the Elmira Police Department. The deputy took defendant into custody on the warrant and conducted a pat-down search of defendant, which yielded cocaine and other evidence. When questioned by defense counsel about the warrant, the deputy admitted that, at no time did he confirm the status of the warrant or determine whether the warrant was "still valid." The deputy

testified, however, that, in situations where there is a passenger and there is no warrant, he would either call for someone to pick up the person or drive the person to a gas station or residence. If he were going to transport the person, the deputy would "pat the person down before putting them in [his] car to transport" that person somewhere. After the court refused to suppress the physical evidence, defendant entered his plea.

Defendant now contends that the search of his person was not a lawful search incident to an arrest on a warrant because the People failed to meet their burden of establishing the existence of a valid and outstanding warrant (*see generally People v Jennings*, 54 NY2d 518, 522). Contrary to the People's contention, defendant challenged the validity of the warrant at the hearing and, therefore, his contention is preserved for our review (*cf. People v Ebron*, 275 AD2d 490, 491, *lv denied* 95 NY2d 934; *People v Boone*, 269 AD2d 459, 459, *lv denied* 95 NY2d 850, *reconsideration denied* 95 NY2d 961). We also note that the People, in response to defendant's suppression motion, asserted that the deputy arrested defendant after learning about the warrant.

In any event, we cannot address the merits of the People's contention that the search was a lawful search incident to an arrest on a warrant inasmuch as the court did not rule on that issue and, therefore, that " 'issue was not determined adversely to defendant' " (*People v Lee*, 96 AD3d 1522, 1526; *see People v Concepcion*, 17 NY3d 192, 194-195; *People v LaFontaine*, 92 NY2d 470, 472-474, *rearg denied* 93 NY2d 849; *cf. People v Garrett*, 23 NY3d 878, 885 n 2, *rearg denied* 25 NY3d 1215). In denying suppression of the physical evidence, the court stated it did not find "any problems with the protocol that was followed. [The deputy] has got an unlicensed driver, so obviously he has an obligation to check the other individual to see if he can drive the vehicle. He is also unlicensed; suspended. It is a pat-down, safety pat-down." At no time did the court determine that defendant was subjected to a lawful search incident to arrest.

We agree with defendant that the court erred in upholding the search on the ground that it was a lawful "safety pat-down." There was no evidence in the record of the hearing to support a conclusion that "defendant had a weapon or was a threat to [the deputy's] safety" (*People v Driscoll*, 101 AD3d 1466, 1468; *see People v Ford*, 145 AD3d 1454, 1456, *lv denied* ___ NY3d ___ [Apr. 4, 2017]). Moreover, "[a]lthough a police officer may reasonably pat down a person before he [or she] places [that person] in the back of a police vehicle, the legitimacy of that procedure depends on the legitimacy of placing [the person] in the police car in the first place" (*People v Kinsella*, 139 AD2d 909, 911; *see People v Rosa*, 30 AD3d 905, 908, *lv denied* 7 NY3d 851; *People v Hollins*, 248 AD2d 892, 894). Here, the People failed to establish the legitimacy of placing defendant in the patrol vehicle. First, the People failed to establish "the existence of a validly-issued and outstanding warrant" (*Boone*, 269 AD2d at 459). Once defendant challenged the validity of the warrant by questioning the deputy concerning the status of the warrant and whether it was still valid, the People were "required to make a further evidentiary showing

by producing the . . . warrant" (*id.*). The People did not do so. Thus, without establishing the existence of a valid and outstanding warrant, the People failed to establish the legitimacy of placing defendant in the patrol vehicle (*see Jennings*, 54 NY2d at 522-523). Although defendant, who did not have a valid driver's license, could not have driven the stopped vehicle from the scene after the arrest of the driver, the deputy testified that, in the absence of a warrant, defendant could have called for someone to pick him up and therefore could have lawfully refused to be transported away from the scene in the patrol vehicle.

In light of our conclusion that the court should have granted those parts of defendant's omnibus motion seeking to suppress physical evidence obtained as a result of the illegal search of defendant's person, defendant's guilty plea must be vacated (*see People v Stock*, 57 AD3d 1424, 1424). Further, because our conclusion results in the suppression of all evidence in support of the crime and violation charged, the indictment must be dismissed (*see id.* at 1425). We therefore remit the matter to County Court for proceedings pursuant to CPL 470.45.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

710

KA 11-02145

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TISHARA HARRIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered September 22, 2011. The judgment convicted defendant, upon a jury verdict, of attempted robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon a jury verdict, of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [1]). She contends that trial counsel should have been allowed to withdraw from representing her, and that County Court should have granted her request for new counsel or, at a minimum, should have made a more detailed inquiry regarding her complaints about the performance of counsel. As an initial matter, we conclude that defendant failed to preserve for our review any contention with regard to the court's denial of counsel's pretrial application to withdraw from representing her, in which application defendant did not join (*see People v Youngblood*, 294 AD2d 954, 955, *lv denied* 98 NY2d 702; *cf. People v Tineo*, 64 NY2d 531, 535-536). In any event, we conclude that the court did not improvidently exercise its discretion in denying counsel's pretrial application to withdraw or his subsequent similar application, made at the beginning of the second day of trial, in which motion defendant may be deemed to have joined. With regard to counsel's pretrial applicaton, we note that defendant's alleged inability to pay for counsel's services did not entitle counsel to withdraw as defendant's attorney (*see People v Woodring*, 48 AD3d 1273, 1274, *lv denied* 10 NY3d 846), nor did defendant's apparent indecision concerning whether to plead guilty or go to trial "render[ ] it unreasonably difficult for the lawyer to carry out [his] employment effectively" (*Woodring*, 48 AD3d at 1274, quoting former Code of Professional Responsibility DR 2-110 [C] [1]

[d]). With regard to counsel's request to withdraw during trial, we conclude that the reasons cited by counsel did not warrant his withdrawal from representation and that the court, in denying that request, properly "balance[d] the need for the expeditious and orderly administration of justice against the legitimate concerns of counsel" (*Woodring*, 48 AD3d at 1274 [internal quotation marks omitted]; *see generally People v O'Daniel*, 24 NY3d 134, 138; *People v Arroyave*, 49 NY2d 264, 270-272).

We further conclude that the court did not abuse its discretion in denying the request by defendant for an adjournment of trial to enable defendant to retain new counsel or to obtain a substitution of assigned counsel for retained counsel (*see generally People v Linares*, 2 NY3d 507, 510-511; *People v Sides*, 75 NY2d 822, 824; *see also O'Daniel*, 24 NY3d at 138; *Arroyave*, 49 NY2d at 271-272). "[A]bsent exigent or compelling circumstances, a court may, in the exercise of its discretion, deny a defendant's request to substitute counsel made on the eve of or during trial if the defendant has been accorded a reasonable opportunity to retain counsel of [her] own choosing before that time . . . At [that] point, public policy considerations against delay become even stronger, and it is incumbent upon the defendant to demonstrate that the requested adjournment has been necessitated by forces beyond [her] control and is not simply a dilatory tactic" (*Arroyave*, 49 NY2d at 271-272; *see Sides*, 75 NY2d at 824). We conclude that the court made the requisite "minimal inquiry" into defendant's complaints concerning her attorney and her request for a substitution of counsel (*Sides*, 75 NY2d at 825; *see People v Porto*, 16 NY3d 93, 99-100; *Linares*, 2 NY3d at 511). Although it was incumbent upon defendant to show " 'good cause' " for a substitution of counsel (*Sides*, 75 NY2d at 824), defendant expressed only "vague and generic" complaints having "no merit or substance" and thus failed to show that her counsel "was in any way deficient in representing" her (*Linares*, 2 NY3d at 511).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

713

OP 16-02271

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ANDREW WYNDER, PETITIONER,

V MEMORANDUM AND ORDER

ROBERT M. MACIOL, SHERIFF OF ONEIDA COUNTY JAIL,
OR ANY OTHER PERSON HAVING CUSTODY OF ANDREW
WYNDER, RESPONDENT.

REBECCA L. WITTMAN, UTICA, FOR PETITIONER.

Proceeding pursuant to CPLR article 70 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 7002 [b] [2]). Petitioner seeks his release from custody on recognizance or bail.

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

Memorandum: Petitioner commenced this habeas corpus proceeding in this Court pursuant to CPLR 7002 (b) (2), contending that County Court abused its discretion in declining to set bail on two pending indictments. We note, however, that petitioner has pleaded guilty to and been sentenced on those indictments. Thus, the instant petition "challenging the legality of petitioner's preconviction detention is moot[inasmuch as] petitioner is currently incarcerated pursuant to [] judgment[s] of conviction and sentence[s] rendered upon his plea[s] of guilty" (*People ex rel. Macgiollabhui v Schriro*, 123 AD3d 633, 634; *see People ex rel. Green v Saunders*, 145 AD3d 642, 642-643; *see also People ex rel. Wilson v Walsh*, 270 AD2d 885, 885, *lv denied* 95 NY2d 758). Furthermore, petitioner has failed to establish "the applicability of an exception to the mootness doctrine" (*Macgiollabhui*, 123 AD3d at 634; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

717

CA 16-01046

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

CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY, PLAINTIFF-APPELLANT,

V ORDER

COR DEVELOPMENT COMPANY, LLC, COR INNER HARBOR COMPANY, LLC, COR VAN RENSSELAER STREET COMPANY, LLC, COR WEST KIRKPATRICK STREET COMPANY, LLC, AND COR WEST KIRKPATRICK STREET COMPANY, III, INC., DEFENDANTS-RESPONDENTS.

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

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (CHRISTOPHER E. BUCKEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered March 31, 2016. The order and judgment granted the motion of defendants to dismiss the amended complaint.

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

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

718

CA 16-00504

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

IN THE MATTER OF SHOPPINGTOWN MALL, LLC,
PETITIONER-APPELLANT,

V ORDER

ASSESSOR, BOARD OF ASSESSORS AND BOARD OF
ASSESSMENT REVIEW OF TOWN OF DEWITT, AND TOWN OF
DEWITT, RESPONDENTS-RESPONDENTS.

JAMESVILLE DEWITT CENTRAL SCHOOL DISTRICT,
INTERVENOR-RESPONDENT.

CRONIN, CRONIN, HARRIS & O'BRIEN, P.C., UNIONDALE (RICHARD P. CRONIN OF COUNSEL), FOR PETITIONER-APPELLANT.

CERIO LAW OFFICES, SYRACUSE (DAVID W. HERKALA OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

BOND SCHOENECK & KING, PLLC, SYRACUSE (KATHLEEN M. BENNETT OF COUNSEL), FOR INTERVENOR-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered December 4, 2015 in a proceeding pursuant to RPTL article 7. The order granted the motion of intervenor and the cross motion of respondents for summary judgment dismissing the petition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court (*see generally Matter of ELT Harriman, LLC v Assessor of Town of Woodbury*, 128 AD3d 201, 207-211, *lv denied* 26 NY3d 918).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

719

CA 16-01651

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

MARIO PIETRANTONI, NELLY PIETRANTONI, ANNA DISANTO, JOSE PAGAN, HOWARD PRIESTLY, RUTH PRIESTLY, ESTATE OF LOUIS MONACELLI, DENNIS MONACELLI, ESTATE OF JESSIE M. JAMES, RAYMOND BURKE, KENT DAHAAN AND STEVEN KIMBALL, PLAINTIFFS-APPELLANTS,

V ORDER

EDUARDO GALAN, DEFENDANT, LANCE J. MARK, PLLC, AND LANCE J. MARK, ESQ., DEFENDANTS-RESPONDENTS.

CARLOS J. CUEVAS, YONKERS, FOR PLAINTIFFS-APPELLANTS.

BARCLAY DAMON LLP, BUFFALO (HEDWIG M. AULETTA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered June 28, 2016. The order granted the motion of defendants Lance J. Mark, PLLC, and Lance J. Mark, Esq., to dismiss the complaint against them and dismissed the complaint against said defendants.

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: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

720

CA 16-01338

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

ANTHONY MORRIS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO AND JOSE LORENZO,
DEFENDANTS-RESPONDENTS.

DEMARIE & SCHOENBORN, P.C., BUFFALO (JOSEPH DEMARIE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered March 31, 2016. The order denied the motion of plaintiff for partial summary judgment, granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action against defendants City of Buffalo and Officer Jose Lorenzo of the Buffalo Police Department, asserting that his civil rights under 42 USC § 1983 were violated by false arrest and malicious prosecution. Supreme Court denied plaintiff's motion for partial summary judgment on the issue of liability and granted defendants' motion for summary judgment dismissing the complaint. We affirm.

"An arresting officer is immune from a suit for damages if he or she had arguable probable cause to arrest a plaintiff" (*Brown v Hoffman*, 122 AD3d 1149, 1150). Arguable probable cause exists where "(a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met" (*Sanseviro v New York*, 2017 WL 1241934, *2 [2d Cir, Apr. 4, 2017, No. 16-454]).

Plaintiff was charged with, inter alia, possession of unstamped cigarettes for the purpose of sale, pursuant to Tax Law § 1814 (b). At a suppression hearing before Buffalo City Court, Lorenzo testified that he observed plaintiff give another man a cigarette in exchange for money, that plaintiff initially lied about the brand of cigarettes he possessed, and that two cartons of unstamped cigarettes were found in plaintiff's possession. We conclude that Lorenzo's testimony

establishes, as a matter of law, that it was objectively reasonable for him to believe that there was probable cause to arrest plaintiff for a violation of section 1814 (b) (*see People v Maldonado*, 86 NY2d 631, 635; *Fitzpatrick v Rosenthal*, 29 AD3d 24, 28, *lv denied* 6 NY3d 715).

Contrary to plaintiff's further contention, City Court's decision to suppress evidence against him in a related criminal case has no preclusive effect in this civil action. City Court made no written findings on the issue of probable cause, the issue of arguable probable cause was never litigated before that court, and Lorenzo was not a party to the criminal case in any event (*see Brown v City of New York*, 60 NY2d 897, 898-899; *Jenkins v City of New York*, 478 F3d 76, 85-86 [2d Cir 2007]).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

726

KA 10-02419

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAQUAN CRIMM, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER, FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered October 6, 2010. The appeal was held by this Court by order entered June 10, 2016, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (140 AD3d 1672). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, two counts of robbery in the first degree (Penal Law § 160.15 [1], [3]) and one count of assault in the first degree (§ 120.10 [1]). Contrary to defendant's contention, we conclude that the court did not abuse its discretion in refusing to grant him youthful offender status (*see People v Mohawk*, 142 AD3d 1370, 1371; *People v Green*, 128 AD3d 1282, 1283). Furthermore, upon our review of the record, we see no reason to exercise our own discretion in the interest of justice to adjudicate defendant a youthful offender. Finally, the sentence is not unduly harsh or severe.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

727

KA 16-00001

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SAVONNE J. WINSTEAD, ALSO KNOWN AS MOLLY,
DEFENDANT-APPELLANT.

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN JAMES MULDOON OF COUNSEL), 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 (Thomas G. Leone, J.), rendered May 7, 2015. The judgment convicted defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

728

KA 16-00051

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CINDY WELLES, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTOPHER BOKELMAN, ACTING DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered December 3, 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: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

729

KA 16-01241

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES J. ALLEN, ALSO KNOWN AS CJ,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered May 5, 2016. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree, tampering with physical evidence and conspiracy in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20), tampering with physical evidence (§ 215.40 [2]), and conspiracy in the fourth degree (§ 105.10 [1]), defendant contends that his plea was not knowing, voluntary, and intelligent based on County Court's failure to inform him of certain constitutional due process rights before eliciting his factual admissions. However, "defendant failed to preserve his contention for our review by failing to move to withdraw his guilty plea or to vacate the judgment of conviction on that ground" (*People v Wilson*, 115 AD3d 1229, 1229, *lv denied* 23 NY3d 969; *see People v Williams*, 27 NY3d 212, 221-222). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

730

KA 15-01897

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KENNETH SCOTT, DEFENDANT-APPELLANT.

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

THEODORE A. BRENNER, DEPUTY DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered October 28, 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: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

731

KA 15-01269

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES T. BRINSON, JR., DEFENDANT-APPELLANT.

ANDREA J. SCHOENEMAN, CONFLICT DEFENDER, CANANDAIGUA (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered July 16, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (six counts) and criminal sale of marihuana in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, six counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). Defendant's contention that he was denied effective assistance of counsel based upon defense counsel's alleged failure to pursue a meritorious speedy trial motion does not survive his plea or the valid waiver of the right to appeal "inasmuch as defendant failed to demonstrate that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [defense counsel's] allegedly poor performance" (*People v Lucieer*, 107 AD3d 1611, 1612 [internal quotation marks omitted]). In any event, it appears from the record before us that defendant did not have a meritorious speedy trial claim, and thus defense counsel " ' was not ineffective in failing to pursue a motion that had no chance of success' " (*id.*; *see generally People v Caban*, 5 NY3d 143, 152). Defendant's further contention that the sentence is unduly harsh and severe also is encompassed by the valid waiver of the right to appeal (*see People v Hidalgo*, 91 NY2d 733, 737; *People v Carter*, 147 AD3d 1540, 1540).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

732

KA 16-00268

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TONY O. FRAZIER, DEFENDANT-APPELLANT.

ADAM H. VANBUSKIRK, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered September 8, 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: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

733

KA 15-00604

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMONE LEWIS, ALSO KNOWN AS “MONE”, ALSO KNOWN AS “D”, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAMONE LEWIS, DEFENDANT-APPELLANT PRO SE.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JULIE BENDER FISKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.) and of Erie County Court (Sheila A. DiTullio, J.), rendered September 2, 2014 and February 26, 2015, respectively. The judgment, which was rendered in two parts because of the severance of the last three counts of the indictment prior to trial, convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree and, upon his plea of guilty, of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant was indicted on a series of five charges arising from two separate shooting incidents occurring in August 2012, and he appeals from the judgment convicting him of those charges. With respect to the first two counts of the indictment, defendant was convicted following a jury trial in Supreme Court (Wolfgang, J.) of murder in the second degree (Penal Law § 125.25 [1]), and criminal possession of a weapon in the second degree (§ 265.03 [3]), arising from an incident in which he shot a man to death in return for money. With respect to the last three counts of the indictment, defendant was convicted upon his plea of guilty in County Court (DiTullio, J.) of attempted murder in the second degree (§§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and an additional count of criminal possession of a weapon in the second degree (§ 265.03 [3]), arising from an incident in which he shot a 15-year-old because she was in a fight with defendant’s girlfriend.

With respect to the counts of the indictment of which he was convicted after trial, defendant contends that the evidence is legally insufficient to support the conviction and that the verdict is contrary to the weight of the evidence, primarily based on his challenge to the credibility of the witnesses regarding the identity of the perpetrator. Even assuming, arguendo, that defendant preserved his challenge for our review (*see generally People v Gray*, 86 NY2d 10, 19), we reject that challenge. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to support the conviction with respect to both charges (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is contrary to the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). With respect to the credibility of the witnesses, we conclude that their testimony "was not so inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Black*, 38 AD3d 1283, 1285, *lv denied* 8 NY3d 982). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury, which saw and heard the witnesses" (*People v Hernandez*, 288 AD2d 489, 490, *lv denied* 97 NY2d 729; *see People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942), and we see no basis for disturbing the jury's credibility determinations in this case.

Defendant failed to preserve for our review his further contention in his main and supplemental pro se briefs that the prosecutor engaged in prosecutorial misconduct on summation (*see People v Paul*, 78 AD3d 1684, 1684-1685, *lv denied* 16 NY3d 834; *People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849). In any event, the comments at issue were within " 'the broad bounds of rhetorical comment permissible' " during summations (*People v Williams*, 28 AD3d 1059, 1061, *affd* 8 NY3d 854, quoting *People v Galloway*, 54 NY2d 396, 399), and were " 'either a fair response to defense counsel's summation or fair comment on the evidence' " (*People v Green*, 60 AD3d 1320, 1322, *lv denied* 12 NY3d 915; *see People v McEathron*, 86 AD3d 915, 916, *lv denied* 19 NY3d 975). Furthermore, "[d]efendant was not denied effective assistance of counsel based on defense counsel's failure to object to the allegedly improper comments by the prosecutor on summation inasmuch as those comments did not constitute prosecutorial misconduct" (*People v Hill*, 82 AD3d 1715, 1716, *lv denied* 17 NY3d 806; *see People v Martin*, 114 AD3d 1154, 1155, *lv denied* 23 NY3d 964).

Defendant also failed to preserve for our review his contention that the court (Wolfgang, J.) "deprived him of a fair trial by . . . improperly influencing the jury to rush in its deliberation" (*People v Farnham*, 136 AD3d 1215, 1217, *lv denied* 28 NY3d 929, citing *People v Charleston*, 56 NY2d 886, 888; *see generally People v Pryor*, 48 AD3d 1217, 1218, *lv denied* 10 NY3d 868). We reject defendant's contention that the court thereby committed a mode of proceedings error (*see generally People v Kelly*, 16 NY3d 803, 804; *People v Autry*, 75 NY2d

836, 839), 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]).

With respect to the final three counts of the indictment, defendant contends that his waiver of the right to appeal is invalid because the court (DiTullio, J.) failed to differentiate the terms of the plea from those involving an earlier plea that had been withdrawn upon defendant's motion. That contention is without merit. It is well settled that "a trial court need not engage in any particular litany when apprising a defendant pleading guilty of the individual rights abandoned" (*People v Lopez*, 6 NY3d 248, 256; *see People v Sanders*, 25 NY3d 337, 340). Here, "[c]ontrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived the right to appeal" (*People v Bones*, 148 AD3d 1793, 1793). That valid waiver is a "general unrestricted waiver" that encompasses his contention that the sentence on the final three counts of the indictment is unduly harsh and severe (*People v Hidalgo*, 91 NY2d 733, 737; *see Lopez*, 6 NY3d at 255-256).

Finally, defendant contends that the sentence on the first two counts of the indictment is unduly harsh and severe. Contrary to defendant's contention, we perceive "nothing in the record to persuade us that [the c]ourt failed to consider the mitigating factors presented to it when imposing sentence" (*People v Ormsby*, 242 AD2d 840, 840-841, *lv denied* 91 NY2d 895, *reconsideration denied* 91 NY2d 975). Furthermore, contrary to the People's contention, it is well settled that our "sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783; *see Lopez*, 6 NY3d at 260 n 5). Consequently, we may "substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence" (*People v Smart*, 100 AD3d 1473, 1475, *affd* 23 NY3d 213 [internal quotation marks omitted]; *see People v Johnson*, 136 AD3d 1417, 1418, *lv denied* 27 NY3d 1134). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

737

KA 15-01226

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD WALKER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered April 7, 2015. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). The conviction arises from an incident in which defendant broke into the home of his former girlfriend in violation of a stay-away order of protection and allegedly threatened to kill her while armed with a kitchen knife.

Contrary to defendant's contention, the record establishes that he made a knowing, intelligent, and voluntary waiver of his right to appeal (*see People v Harris* [appeal No. 4], 147 AD3d 1375, 1376; *People v Johnson*, 125 AD3d 1419, 1419-1420, *lv denied* 26 NY3d 1089; *see generally People v Sanders*, 25 NY3d 337, 341-342). The fact that Supreme Court did not specifically explain that even a legal sentence may be challenged on appeal does not impair the scope or validity of the waiver, inasmuch as there is "no requirement that [a] defendant expressly waive every potential claim or defense . . . in order to produce a valid, unrestricted waiver of the right to appeal" (*People v Corbin*, 121 AD3d 803, 804; *see People v Muniz*, 91 NY2d 570, 574-575). Although the presentence report reflects that defendant has cognitive limitations, there is no indication in the record that he "was uninformed, confused or incompetent when he waived his right to appeal" (*People v DeFazio*, 105 AD3d 1438, 1439, *lv denied* 21 NY3d 1015 [internal quotation marks omitted]; *see People v Scott*, 144 AD3d 1597, 1598, *lv denied* 28 NY3d 1150; *see also People v Andrews*, 274 AD2d 670, 670, *lv denied* 95 NY2d 960), and we reject his contention that the

explanations of the waiver provided to him were themselves inconsistent or confusing (*see People v Ramos*, 135 AD3d 1234, 1235, *lv denied* 28 NY3d 935; *People v Reinhardt*, 82 AD3d 1592, 1593, *lv denied* 17 NY3d 799; *see also People v Yaw*, 120 AD3d 1447, 1448-1449, *lv denied* 24 NY3d 1005).

Defendant's valid waiver of his right to appeal with respect to both his conviction and sentence forecloses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256; *People v Carr*, 147 AD3d 1506, 1506). In addition, given that defendant expressly acknowledged that his waiver of the right to appeal would extend to "any orders of protection that are issued as to form, duration, or content," we conclude that the waiver encompasses his contention that the no-contact order of protection issued in favor of the victim is "unduly stringent" (*see People v Fontaine*, 144 AD3d 1658, 1658-1659; *cf. People v Lilley*, 81 AD3d 1448, 1448, *lv denied* 17 NY3d 860). In any event, although the victim asked the court to issue only a no-offensive-contact order of protection, we conclude that the court did not err in issuing a no-contact order (*see People v Richardson*, 134 AD3d 1566, 1567, *lv denied* 27 NY3d 1074). Finally, defendant contends that the court erred at sentencing because it did not "fairly consider the option of issuing a no-offensive-contact order of protection." Even assuming, arguendo, that his contention survives his waiver of the right to appeal and does not require preservation (*see generally People v Halston*, 37 AD3d 1144, 1145, *lv denied* 8 NY3d 985), we conclude that it is not supported by the record (*see generally People v Vasquez*, 131 AD3d 1076, 1077, *lv denied* 26 NY3d 1151).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

738

CAF 15-01441

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

IN THE MATTER OF TIMOTHY MYC,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

STACY WAGNER, RESPONDENT-APPELLANT.

ELIZABETH CIAMBRONE, BUFFALO, FOR RESPONDENT-APPELLANT.

MICHELLE G. CHAAS, BUFFALO, FOR PETITIONER-RESPONDENT.

JENNIFER PAULINO, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an amended order of the Family Court, Erie County (Michael F. Griffith, A.J.), entered August 21, 2015 in a proceeding pursuant to Family Court Act article 6. The amended order, among other things, awarded petitioner sole custody of the subject child.

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

Memorandum: In this proceeding pursuant to article 6 of the Family Court Act, respondent mother appeals from an amended order that, inter alia, awarded sole custody of the subject child to petitioner father. Contrary to the mother's contention, "this proceeding involves an initial court determination with respect to custody and, [a]lthough the parties' informal arrangement is a factor to be considered, [the father] is not required to prove a substantial change in circumstances in order to warrant a modification thereof" (*Matter of DeNise v DeNise*, 129 AD3d 1539, 1539-1540 [internal quotation marks omitted]; *see Matter of Walker v Carroll*, 140 AD3d 1669, 1669). Furthermore, contrary to the mother's additional contentions, we conclude that Family Court's determination that the best interests of the child would be best served by awarding custody to the father has a sound and substantial basis in the record (*see Matter of Bonnell v Rodgers*, 106 AD3d 1515, 1515, *lv denied* 21 NY3d 864; *Matter of Thillman v Mayer*, 85 AD3d 1624, 1625). "The court's determination following a hearing that the best interests of the child would be served by such an award is entitled to great deference . . . , particularly in view of the hearing court's superior ability to evaluate the character and credibility of the witnesses . . . We will not disturb that determination inasmuch as the record establishes that it is the product of the court's careful weighing of [the] appropriate factors" (*Matter of Joyce S. v Robert W.S.*, 142 AD3d 1343, 1344, *lv*

denied 29 NY3d 906 [internal quotation marks omitted]; *see Matter of Busse v Huerta*, 149 AD3d 1607, 1607).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

740

CA 16-02180

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

ALEXIS M. MAIETTA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DEAN A. SNYDER AND SUSAN C. SNYDER,
DEFENDANTS-RESPONDENTS.

JOHN J. DELMONTE, NIAGARA FALLS, FOR PLAINTIFF-APPELLANT.

HAGELIN SPENCER LLC, BUFFALO (WILLIAM SWIFT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered July 27, 2016. The order, inter alia, denied the cross motion of plaintiff for summary judgment on the issue of serious injury.

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

Memorandum: In this action to recover damages for injuries allegedly sustained by plaintiff in a motor vehicle accident, plaintiff appeals from an order that, inter alia, denied her cross motion for summary judgment on the issue of serious injury within the meaning of Insurance Law § 5102 (d). We affirm. We note as a preliminary matter that defendants contend for the first time on appeal that plaintiff failed to allege in her bill of particulars or supplemental bill of particulars that she suffered a serious injury in the nature of a fracture, and thus that contention is not properly before us (*see Smith v Besanceney*, 61 AD3d 1336, 1336-1337).

Even assuming, arguendo, that plaintiff met her initial burden of establishing as a matter of law that she sustained a fracture as a result of the subject accident (*see* Insurance Law § 5102 [d]), we conclude that defendants raised an issue of fact to defeat the cross motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). According to the affirmed report of the physician who examined plaintiff on behalf of defendants, which defendants submitted in support of their motion for summary judgment dismissing the complaint, plaintiff did not sustain a fracture in the subject accident. Plaintiff has abandoned on appeal her reliance in her cross motion on any of the other categories of serious injury set forth in her bills

of particulars (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

742

CA 16-01912

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

FRANK A. PATERNOSH AND REBECCA PATERNOSH,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

EDWARD A. WOOD, DEFENDANT-RESPONDENT.

BROWN CHIARI LLP, BUFFALO (MICHAEL R. DRUMM OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BOUVIER LAW, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Paul Wojtaszek, J.), entered December 4, 2015. The order, inter alia, granted in part the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Frank A. Paternosh (plaintiff) in an accident in which the vehicle he was driving was struck by a vehicle operated by defendant. In their bill of particulars, plaintiffs alleged that plaintiff sustained a serious injury under three categories set forth in Insurance Law § 5102 (d). Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury. Supreme Court granted the motion with respect to the permanent consequential limitation of use and significant limitation of use categories, but denied it with respect to the fracture category, and plaintiffs appeal. Inasmuch as plaintiffs' brief addresses only the significant limitation of use category, they are deemed to have abandoned their claim that plaintiff sustained a serious injury under the permanent consequential limitation of use category (*see Smith v Reeves*, 96 AD3d 1550, 1551).

As an initial matter, we reject defendant's contention that plaintiffs' appeal should be dismissed as untimely filed. Even where, as here, the appellant is the party that prepares and files the judgment or order appealed from, the 30-day period in which to file a notice of appeal is triggered only by service of a copy of the judgment or order, together with "written notice of its entry," on the opposing party (CPLR 5513 [a]; *see Peralta v City of New York*, 92 AD3d

554, 554). The record here does not contain a notice of entry, and it therefore does not establish that the 30-day period ever began to run (*see Montanaro v Weichert*, 145 AD3d 1563, 1563; *Mileski v MSC Indus. Direct Co., Inc.*, 138 AD3d 797, 799; *see also Matter of Reynolds v Dustman*, 1 NY3d 559, 560-561). Although plaintiffs' notice of appeal thus appears to be premature, rather than late as contended by defendant, we exercise our discretion to treat it as valid (*see* CPLR 5520 [c]; *Montanaro*, 145 AD3d at 1563). We note that we have not considered the letter submitted with plaintiffs' reply brief in evaluating the timeliness of plaintiffs' appeal because that letter is not part of the stipulated record on appeal (*see* 22 NYCRR 1000.4 [a] [1]; *Matter of Carano*, 96 AD3d 1556, 1556; *Sanders v Tim Hortons*, 57 AD3d 1419, 1420).

On the merits, we reject plaintiffs' contention that the court erred in granting defendant's motion with respect to the significant limitation of use category. Defendant met his burden by submitting evidence establishing that plaintiff sustained only temporary cervical and thoracic strains rather than any significant injury to his spine as a result of the accident (*see Williams v Jones*, 139 AD3d 1346, 1347; *Bleier v Mulvey*, 126 AD3d 1323, 1324; *Clarke v Dangelo*, 109 AD3d 1194, 1194), and that his alleged range of motion limitations were not supported by objective evidence (*see Bleier*, 126 AD3d at 1324; *Harrity v Leone*, 93 AD3d 1204, 1206; *Winslow v Callaghan*, 306 AD2d 853, 854). In opposition to the motion, plaintiffs failed to raise a triable issue of fact. Plaintiff's medical records are not sufficient to raise an issue of fact because there is no evidence that the muscle spasms and range of motion limitations referenced therein were objectively ascertained (*see Nitti v Clerrico*, 98 NY2d 345, 357-358; *O'Brien v Bainbridge*, 89 AD3d 1511, 1512; *Calucci v Baker*, 299 AD2d 897, 898; *cf. Burke v Moran*, 85 AD3d 1710, 1711). Although there is objective evidence that plaintiff had a vertebral fracture and plaintiffs presented evidence that the fracture was caused by the accident, they failed to present evidence, for purposes of their claim under the significant limitation of use category, that the fracture resulted in qualifying restrictions in the use of plaintiff's spine (*see generally Jones v Leffel*, 125 AD3d 1451, 1452).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

743

CA 16-00829

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

MICHAEL J. REW, PLAINTIFF-APPELLANT,

V ORDER

NIAGARA COUNTY SHERIFF THOMAS A. BEILEIN AND
NIAGARA COUNTY SHERIFF'S DEPUTY CORY DIEZ,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (JON MINEAR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered January 12, 2016. The order denied the posttrial motion of plaintiff to set aside a jury verdict.

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

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

744

CA 16-00830

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

MICHAEL J. REW, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NIAGARA COUNTY SHERIFF THOMAS A. BEILEIN AND NIAGARA COUNTY SHERIFF'S DEPUTY CORY DIEZ, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (JON MINEAR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered February 17, 2016. The judgment, entered upon a jury verdict in favor of defendants, awarded defendants costs and disbursements.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained when he was shot by defendant Niagara County Sheriff's Deputy Cory Diez. Although the original complaint sought damages from John Doe rather than Diez, Supreme Court granted plaintiff's motion for leave to amend the notice of claim and pleadings to substitute Diez for John Doe, and this Court affirmed that order (*Rew v County of Niagara*, 73 AD3d 1464, 1465, *abrogated on other grounds by Goodwin v Pretorius*, 105 AD3d 207, 215-216). The court later granted defendants' motion for summary judgment dismissing the amended complaint, but this Court reversed the order insofar as appealed from by reinstating certain causes of action (*Rew v County of Niagara*, 115 AD3d 1316, 1318-1319). The matter proceeded to trial, and a jury returned a verdict in favor of defendants. The jury found that Diez was not negligent in causing the incident, did not intentionally shoot plaintiff without justification, and reasonably believed that the use of deadly physical force was necessary to defend himself from what he reasonably believed to be the use or imminent use of deadly physical force against him. The court denied plaintiff's subsequent motion to set aside the verdict as against the weight of the evidence.

Prior to trial, defendants submitted a written motion seeking to preclude plaintiff from introducing evidence that a grand jury had declined to indict plaintiff on any charges arising from this incident. Plaintiff did not submit papers in opposition, but argued that the evidence was admissible as part of his case-in-chief. Plaintiff contends for the first time on appeal that the court erred in refusing to permit him to use that evidence to impeach the credibility of Diez, and thus that contention is not preserved for our review (*see Davis v Vallie*, 93 AD3d 1232, 1232; *see generally* CPLR 5501 [a] [3]). In any event, that contention is without merit inasmuch as "evidence of a failure to prosecute is inadmissible in a civil action arising out of the same circumstances" (*Bazza v Banscher*, 143 AD2d 715, 716; *see Kamenov v Northern Assur. Co. of Am.*, 259 AD2d 958, 959; *see also LaPenta v Loca-Bik Ltee Transp.*, 238 AD2d 913, 914). Furthermore, pursuant to plaintiff's request, the court informed the jury that "there were no charges ever filed in this case against anyone," and thus the evidence at issue was properly excluded as cumulative (*see Caplan v Tofel*, 58 AD3d 659, 660). Consequently, "[e]ven assuming, arguendo, that the court . . . abused its discretion[in granting defendants' motion], we nevertheless conclude that a new trial is not required because any such 'error did not adversely affect a substantial right of the plaintiff[]' " (*Cor Can. Rd. Co., LLC v Dunn & Sgromo Engrs., PLLC*, 34 AD3d 1364, 1365; *see* CPLR 2002).

Plaintiff further contends that the court erred in permitting defendants' attorney to cross-examine him regarding his conviction of driving while ability impaired because it is merely a violation. "[T]hat argument is raised for the first time on appeal, and we do not consider it" (*Gardner v Honda Motor Co.*, 214 AD2d 1024, 1025; *see Martinez v Paddock Chevrolet, Inc.*, 85 AD3d 1691, 1693; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985). Contrary to plaintiff's further contention, we conclude that the court did not abuse its discretion in permitting defendants' attorney to cross-examine him regarding other prior bad acts (*see generally Badr v Hogan*, 75 NY2d 629, 634).

We reject plaintiff's contention that the court abused its discretion in refusing to permit his attorney to cross-examine Diez regarding alleged prior incidents involving the use of force. There is no evidence that Diez had been subjected to any administrative action based on his use of force and thus, in the absence of any other evidence indicating that Diez improperly used force, "the 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 DiPlacido v Commodity Futures Trading Commn.*, 364 Fed Appx 657, 662 [2d Cir 2009], *cert denied* 559 US 1025; *see also People v Goodson*, 144 AD3d 1515, 1516, *lv denied* 29 NY3d 949).

Finally, plaintiff's contention that the court erred in denying his motion to set aside the verdict as against the weight of the

evidence is without merit. "It is well established that [a] verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence" (*Wentland v E.A. Granchelli Devs., Inc.* [appeal No. 2], 145 AD3d 1623, 1623 [internal quotation marks omitted]; *see Lolik v Big V Supermarkets*, 86 NY2d 744, 746). The determination of a motion to set aside a verdict as against the weight of the evidence "is addressed to the sound discretion of the trial court, but if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury" (*Ruddock v Happell*, 307 AD2d 719, 720; *see McMillian v Burden*, 136 AD3d 1342, 1343; *Sauter v Calabretta*, 103 AD3d 1220, 1220). "[I]t is within the province of the jury to determine issues of credibility, and great deference is accorded to the jury given its opportunity to see and hear the witnesses" (*McMillian*, 136 AD3d at 1343-1344 [internal quotation marks omitted]; *see Sauter*, 103 AD3d at 1220). Deference is also afforded where, as here, "the conflicting medical [and other] expert testimony raised issues of credibility for the jury to determine" (*Giorgione v Gibaud*, 147 AD3d 1448, 1449 [internal quotation marks omitted]; *see Christopher v Dokko*, 55 AD3d 1367, 1368). Based upon our review of the record, we conclude that the jury's findings "reasonably could have been rendered upon the conflicting evidence adduced at trial" (*Ruddock*, 307 AD2d at 721), and thus that the court properly denied plaintiff's posttrial motion to set aside the jury verdict (*see Giorgione*, 147 AD3d at 1449).

Frances E. Cafarell

Entered: June 9, 2017

Clerk of the Court

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

747.1

KA 12-00386

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT LOVERDE, DEFENDANT-APPELLANT.

STEVEN D. SESSLER, GENESEO, 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 February 7, 2012. 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: 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]). Contrary to defendant's contention, County Court's determination that his waiver of his *Miranda* rights was knowing, voluntary and intelligent is supported by the record (*see People v Dangerfield*, 140 AD3d 1626, 1627, *lv denied* 28 NY3d 928). Although the record establishes that defendant was under the influence of alcohol during the interview, "the evidence . . . establishes that [he] was not intoxicated to such a degree that he was incapable of voluntarily, knowingly, and intelligently waiving his *Miranda* rights" (*id.* [internal quotation marks omitted]; *see People v Peterkin*, 89 AD3d 1455, 1455, *lv denied* 18 NY3d 885).

We reject defendant's further contention that the judgment of conviction should be vacated because the order of protection, issued by a local court in January 2011, was subsequently vacated by that court upon defendant's motion pursuant to CPL 440.10 to vacate the underlying conviction of harassment in the second degree (Penal Law § 240.26). It is undisputed that the order of protection was vacated by the local court several months after defendant was indicted for violating it. It is well settled that "[a]n order of a court must be obeyed . . . so long as the court is possessed of jurisdiction and its order is not void on its face" (*People v Harden*, 26 AD3d 887, 888, *lv denied* 6 NY3d 834 [internal quotation marks omitted]), and defendant does not contend either that the local court lacked jurisdiction to

issue the order of protection or that it was void on its face.

Defendant failed to object at sentencing to the issuance of an order of protection on behalf of the victim's mother and thus failed to preserve for our review his challenges to the validity of that order of protection and its duration (*see People v Smith*, 122 AD3d 1420, 1421, *lv denied* 25 NY3d 1172). We decline to exercise our power to review defendant's challenges as a matter of discretion in the interest of justice (*see id.*).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

748

TP 17-00145

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

IN THE MATTER OF ROY TARBELL, PETITIONER,

V ORDER

S. HANSON, CAPTAIN, CAPE VINCENT CORRECTIONAL FACILITY, RESPONDENT.

ROY TARBELL, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Jefferson County [James P. McClusky, J.], entered November 9, 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: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

749

TP 16-02187

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

IN THE MATTER OF JAHMEL CLARK, 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 November 30, 2016) to review a determination of respondent. The determination found after a tier III 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: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

750

KA 14-00922

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALHASSAN KABBA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered April 4, 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: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the second degree (Penal Law § 130.30 [1]). We agree with defendant that the waiver of the right to appeal does not encompass his challenge to the severity of the sentence. "[N]o mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction that he was also waiving his right to appeal the [severity] of his sentence" (*People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076; *see People v Maracle*, 19 NY3d 925, 928). Moreover, the written waiver of the right to appeal signed by defendant does not state that defendant was waiving his right to appeal his sentence. We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

751

KA 15-01728

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY J. NICCLOY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered September 10, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted menacing a police officer or peace officer, resisting arrest and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted menacing a police officer or peace officer (Penal Law §§ 110.00, 120.18), resisting arrest (§ 205.30), and criminal possession of a weapon in the fourth degree (§ 265.01 [2]). Contrary to defendant's contention, we conclude that the record demonstrates that defendant's waiver of the right to appeal was made knowingly, intelligently and voluntarily (*see generally People v Lopez*, 6 NY3d 248, 256), and that "defendant ha[d] 'a full appreciation of the consequences' of such waiver" (*People v Bradshaw*, 18 NY3d 257, 264). We further conclude that the waiver encompasses defendant's challenge to the severity of his sentence (*see Lopez*, 6 NY3d at 255-256; *People v Hidalgo*, 91 NY2d 733, 737; *cf. People v Maracle*, 19 NY3d 925, 928).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

752

KA 14-01896

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES M. VERNOOY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered July 24, 2014. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

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 driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]), defendant contends that County Court failed to apprise him at his plea hearing of all of the components of his possible enhanced sentence, including a term of probation and a fine. That contention is not preserved for our review (*see generally People v Crowder*, 24 NY3d 1134, 1136-1137), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *see generally People v Jones*, 118 AD3d 1360, 1361).

Defendant's waiver of the right to appeal encompasses his contention that his sentence is unduly harsh and severe (*see People v Lopez*, 6 NY3d 248, 255-256; *People v Hidalgo*, 91 NY2d 733, 737; *cf. People v Maracle*, 19 NY3d 925, 928).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

755

KA 14-01635

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOMINIC DENNARD, DEFENDANT-APPELLANT.

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

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

Appeal, 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 July 3, 2014. The order denied defendant's motion pursuant to CPL 440.20 to set aside his sentence.

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

Memorandum: Defendant appeals from an order that denied his motion pursuant to CPL 440.20 seeking to set aside the sentence imposed upon his conviction of two counts each of murder in the second degree (Penal Law § 125.25 [3] [felony murder]) and robbery in the first degree (§ 160.15 [2]), and one count each of burglary in the first degree (§ 140.30 [1]) and criminal possession of a weapon in the second degree (former § 265.03 [2]), in connection with the armed robbery of four men, and the death of one of those victims. We previously affirmed the judgment of conviction (*People v Dennard*, 39 AD3d 1277, *lv denied* 9 NY3d 842). We reject defendant's contention that the sentence was "unauthorized, illegally imposed or otherwise invalid as a matter of law" (CPL 440.20 [1]). Contrary to defendant's contention, the imposition of consecutive sentences for his conviction of robbery in the first degree, relating to the three surviving victims, and the felony murder predicated on robbery was proper (*see* Penal Law § 70.25 [2]; *see generally People v Parks*, 95 NY2d 811, 814-815). Even assuming, arguendo, that the jury charge did not adequately specify which robbery served as the predicate offense for the count of felony murder, we conclude that the indictment explicitly stated that the robbery of the murder victim was the predicate offense (*cf. People v Davis*, 68 AD3d 1653, 1655, *lv denied* 14 NY3d 839; *People v Parton*, 26 AD3d 868, 870, *lv denied* 7 NY3d 760). We further conclude that the remaining consecutive sentences were lawful inasmuch

as the conduct underlying the offenses for which those sentences were imposed constituted “separate and distinct acts” (*People v Laureano*, 87 NY2d 640, 643).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

762

CA 16-02259

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

SHARON FRONGETTA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, DEFENDANT-APPELLANT.

BRIAN F. CURRAN, CORPORATION COUNSEL, ROCHESTER (PATRICK BEATH OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAMELA R. HALPIN, EAST ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered April 15, 2016. The order denied the motion of defendant to dismiss the amended complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she allegedly sustained when she tripped and fell on uneven bricks adjacent to a drainage grate in an area near Hayward Avenue and Railroad Street in the Rochester Public Market. Plaintiff's notice of claim mistakenly described the location of the accident as Hay Street rather than Hayward Avenue, but she corrected that error in her amended complaint. We conclude that Supreme Court properly denied defendant's motion to dismiss the amended complaint based on the error in the notice of claim. The court did not abuse its discretion in disregarding the mistake in the notice of claim because the mistake was not made in bad faith and defendant failed to establish that it was prejudiced by the defect (*see* General Municipal Law § 50-e [6]). Indeed, nothing in the record indicates that defendant instructed anyone to investigate the scene of the accident either before or after the correct location was revealed (*see Ciaravino v City of New York*, 110 AD3d 511, 511-512). We reject defendant's further contention that, after the error was corrected, plaintiff failed to identify the location of the accident with sufficient specificity (*see Brown v City of New York*, 95 NY2d 389, 393).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

765

CA 16-02218

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

JANE DOE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ONONDAGA COUNTY, ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (CAROL L. RHINEHART OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MARK D. GORIS, CAZENOVIA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Spencer J. Ludington, A.J.), entered July 20, 2016. The order denied the motion of defendants Onondaga County and Onondaga County Department of Social Services to dismiss the complaint against them.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained as a result of her placement by defendants-appellants (defendants) in a foster home where she was subjected to sexual abuse. Contrary to defendants' contention, Supreme Court properly denied their motion seeking dismissal of the complaint against them based upon plaintiff's alleged failure to comply with their demand for a hearing pursuant to General Municipal Law § 50-h. " 'It is well settled that a plaintiff who has not complied with General Municipal Law § 50-h [(5)] is precluded from maintaining an action against a [county]' " (*Legal Servs. for the Elderly, Disabled, or Disadvantaged of W. N.Y., Inc. v County of Erie*, 125 AD3d 1321, 1322; *see Gravius v County of Erie*, 85 AD3d 1545, 1545, *appeal dismissed* 17 NY3d 896; *Kemp v County of Suffolk*, 61 AD3d 937, 938, *lv denied* 14 NY3d 703). Here, however, plaintiff complied with the statute inasmuch as, after defendants demanded a General Municipal Law § 50-h hearing, she requested and was granted an adjournment of the hearing. Contrary to defendants' contention, it was incumbent upon them to reschedule the adjourned hearing (*see* § 50-h [5]; *October v Town of Greenburgh*, 55 AD3d 704, 704-705; *Page v City of Niagara Falls*, 277 AD2d 1047, 1048; *cf. Bernoudy v County of Westchester*, 40

AD3d 896, 897).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

767

CA 16-00976

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

IN THE MATTER OF THERESA A. SCHILLACI, SAMUEL SANZONE, DOROTHY OLSHEFSKI AND PAUL WINDOVER, PETITIONERS-APPELLANTS,

V ORDER

VILLAGE OF SACKETS HARBOR ZONING BOARD OF APPEALS, VILLAGE OF SACKETS HARBOR PLANNING BOARD, AND LIBERTY SACKETS HARBOR LLC, RESPONDENTS-RESPONDENTS.

SCOTT F. CHATFIELD, MARIETTA, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PETITIONERS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (J.P. WRIGHT OF COUNSEL), FOR RESPONDENTS-RESPONDENTS VILLAGE OF SACKETS HARBOR ZONING BOARD OF APPEALS AND VILLAGE OF SACKETS HARBOR PLANNING BOARD.

CURTIN LAW FIRM, P.C., CAZENOVIA (PAUL J. CURTIN, JR., OF COUNSEL) FOR RESPONDENT-RESPONDENT LIBERTY SACKETS HARBOR LLC.

Appeal from a judgment of the Supreme Court, Jefferson County (James P. McClusky, J.), entered January 26, 2016 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

768

TP 17-00147

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

IN THE MATTER OF NOEL KANE, PETITIONER,

V ORDER

NUNZIO DOLDO, SUPERINTENDENT, CAPE VINCENT CORRECTIONAL FACILITY, RESPONDENT.

NOEL KANE, 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, Jefferson County [James P. McClusky, J.], entered December 12, 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: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

769

KA 15-00065

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MHALIK J. BALDWIN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered October 15, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts).

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

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

770

KA 16-01035

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDGAR MILLS, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, 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 August 14, 2015. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of robbery in the second degree (Penal Law § 160.10 [2] [a]). We reject defendant's contention that the waiver of the right to appeal is invalid. Contrary to defendant's contention, Supreme 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; *see People v Bradshaw*, 18 NY3d 257, 264; *People v Lopez*, 6 NY3d 248, 256). Moreover, 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 Burt*, 101 AD3d 1729, 1730, *lv denied* 20 NY3d 1060 [internal quotation marks omitted]). Defendant's valid waiver of the right to appeal, which specifically included a waiver of the right to challenge the severity of the sentence, encompasses his contention that the sentence imposed is unduly harsh and severe (*see Lopez*, 6 NY3d at 255-256; *People v Hidalgo*, 91 NY2d 733, 737; *cf. People v Maracle*, 19 NY3d 925, 928).

Inasmuch as "no mention of youthful offender status was made on the record before defendant waived his right to appeal, . . . defendant's valid waiver does not encompass his challenge to the court's denial of youthful offender status" (*People v Weathington* [appeal No. 2], 141 AD3d 1173, 1174; *see People v Matsulavage*, 121 AD3d 1581, 1581, *lv denied* 24 NY3d 1045). We nonetheless conclude

that the court did not abuse its discretion in refusing to grant defendant youthful offender status (*see People v Ford*, 144 AD3d 1682, 1683, *lv denied* 28 NY3d 1184), and we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see Matsulavage*, 121 AD3d at 1581).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

771

KA 12-02208

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER A. CARTER, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered November 2, 2011. 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: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]). Contrary to defendant's contention, County Court's plea colloquy and the written waiver of the right to appeal establish that defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see generally People v Bradshaw*, 18 NY3d 257, 264-265; *People v Kesick*, 119 AD3d 1371, 1372), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

772

KA 14-01706

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SIERRA CLARK, 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 May 9, 2014. The judgment convicted defendant, upon her plea of guilty, of rape in the first degree (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 counts of rape in the first degree (Penal Law § 130.35 [3]). We agree with defendant that her waiver of the right to appeal is invalid and thus does not preclude her challenge on appeal to the severity of the sentence. Although the record reflects that defendant executed a written waiver of the right to appeal, County Court "did not inquire of defendant whether [s]he understood the written waiver or whether [s]he had even read the waiver before signing it" (*People v Grucza*, 145 AD3d 1505, 1506 [internal quotation marks omitted]). Thus, the record establishes that the court failed to ensure that "defendant . . . entered a knowing, intelligent and voluntary appeal waiver" (*People v Bradshaw*, 18 NY3d 257, 265; *see People v Lopez*, 6 NY3d 248, 256). We nevertheless reject defendant's contention that the bargained-for sentence is unduly harsh and severe.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

774

KA 16-00366

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

PAUL NAHALKA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), entered September 24, 2015. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

Now, upon reading and filing the stipulation of discontinuance signed by the defendant on May 5, 2017, and by the attorneys for the parties on May 9 and 10, 2017,

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

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

775

KA 09-02536

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANKLIN DECAPUA, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER, FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered October 21, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of stolen property in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [2]), defendant contends that the evidence is legally insufficient to support the conviction because the People failed to prove that he constructively possessed the stolen property, i.e., a debit card that was found by the police on a dresser in his bedroom. We reject that contention. Although there was no evidence that defendant was in direct possession of the debit card, the People established defendant's constructive possession by showing that he exercised "a sufficient level of control over the area" in which the card was found (*People v Manini*, 79 NY2d 561, 573; *see People v Forsythe*, 115 AD3d 1361, 1363). Granted, other people lived in the house with defendant and had access to his bedroom, but "exclusive access is not required" for a finding of constructive possession (*People v Nichol*, 121 AD3d 1174, 1177, *lv denied* 25 NY3d 1205; *see People v Farmer*, 136 AD3d 1410, 1412, *lv denied* 28 NY3d 1027). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that it is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Because the evidence is legally sufficient to establish defendant's guilt, we reject defendant's related contention that County Court erred in denying his motion to set aside the verdict pursuant to CPL 330.30 (1).

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). Pointing to evidence that another person who lived in his house may have possessed a cell phone that had been stolen from the same victim, defendant suggests that such other person could easily have placed the debit card on defendant's dresser when the police arrived at the house to execute a search warrant. If that were the case, however, one would think that defendant's housemate also would have planted the stolen cell phone in his bedroom, but that did not occur. In any event, that argument was made by defense counsel to the jury and, although a different verdict would not have been unreasonable, "it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Canfield*, 111 AD3d 1396, 1397, *lv denied* 22 NY3d 1087; *see generally Bleakley*, 69 NY2d at 495).

Finally, we reject defendant's contention that he was deprived of effective assistance of counsel at trial because his attorney stipulated that the bedroom in which the debit card was found belonged to him. We note that defendant does not assert that the bedroom was not his or that, absent the stipulation, the People would have had difficulty proving that fact. Indeed, despite the stipulation, evidence was adduced at trial showing that numerous papers with defendant's name on them were found in the bedroom, and defendant stated at sentencing that he had no idea that the debit card was in his room. Under the circumstances, defense counsel's decision to stipulate that the debit card was found in defendant's bedroom "could be seen as part of a valid strategy to avoid dwelling on facts that would almost certainly be established and instead maintain his focus on the hotly contested element[] of possession" (*People v Knox*, 80 AD3d 887, 889, *lv denied* 16 NY3d 860).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

781

CA 16-00710

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

IN THE MATTER OF LUIS ROSALES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY J. ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ET AL.,
RESPONDENTS-RESPONDENTS.

LUIS ROSALES, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.) entered February 2, 2016 pursuant to 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.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated inmate rules 113.25 (7 NYCRR 270.2 [B] [14] [xv] [drug possession]), and 113.23 (7 NYCRR 270.2 [B] [14] [xiii] [contraband]). Supreme Court dismissed the petition, and we affirm. Petitioner initially contends that he was not allowed to observe the search of his cell in violation of Department of Corrections and Community Supervision directive No. 4910 (V) (D) (1). Although that directive "provides that an inmate removed from his or her cell for a search has the right to observe the search absent a determination that he or she presents a safety or security risk," that directive is inapplicable here because petitioner was removed from his cell for a urine screen and administrative segregation and thus was not " 'removed from his cell for the purpose of conducting the search' " (*Matter of Hawley v Annucci*, 137 AD3d 1621, 1622; *see Matter of Burgos v Prack*, 129 AD3d 1434, 1434-1435).

Petitioner further contends that his hearing was not completed within the requisite 14-day time period (*see* 7 NYCRR 251-5.1 [b]). As a preliminary matter, we note that petitioner incorrectly measures the 14-day time period from the date of the incident rather than the date

of the misbehavior report (*see id.*). In any event, petitioner's contention lacks merit. "Although the hearing was not completed within 14 days following the writing of the misbehavior report . . . , it was commenced within that time limit[,] and an extension was properly authorized by the Commissioner's designee" (*Matter of Talley v Walker*, 203 AD2d 924, 924, *lv denied* 84 NY2d 803, *cert denied* 514 US 1131; *see Matter of Edwards v Fischer*, 87 AD3d 1328, 1329). We further note that " 'the time requirement set forth in 7 NYCRR 251–5.1 (b) is merely directory, . . . not mandatory, and there has been no showing by petitioner that he suffered any prejudice as a result of the delay' " (*Edwards*, 87 AD3d at 1329).

Contrary to the contention of petitioner, the failure to provide photographs of the contraband seized from his cell did not constitute a denial of his right to present documentary evidence inasmuch as such photographs did not exist (*see Matter of Spears v Fischer*, 103 AD3d 1135, 1136; *Matter of Rodriguez v Goord*, 18 AD3d 1081, 1081), and "[t]he employee assistant 'cannot be faulted for . . . failing to provide petitioner with documentary evidence that did not exist' " (*Matter of Green v Sticht*, 124 AD3d 1338, 1338, *lv denied* 26 NY3d 906; *see Matter of Russell v Selsky*, 50 AD3d 1412, 1413). Moreover, "the record establishes that petitioner was provided with all relevant documentation" (*Green*, 124 AD3d at 1339). We have reviewed petitioner's remaining contentions concerning the alleged ineffectiveness of his employee assistant, and we conclude that they lack merit. The employee assistant made the requisite efforts to obtain documents and witnesses (*see Matter of Perez v Fischer*, 62 AD3d 1104, 1105), and petitioner's requests for documents that were collateral and "irrelevant to the charge[s] at issue" were properly denied (*Matter of Mullamphy v Fischer*, 112 AD3d 1177, 1177).

Although petitioner contends in his brief that he was denied his right to be present for the telephonic testimony of two witnesses and to have one of those two witnesses recalled for the purpose of clarifying that witness's earlier testimony, we agree with respondents that most of petitioner's contentions are not properly before us. At the hearing, petitioner never complained that he was not allowed to be present for the witnesses' testimony. In the administrative appeal, petitioner complained of only the refusal to recall the one witness. Petitioner thus failed to exhaust his administrative remedies with respect to the contention that he was denied his right to be present during the testimony of the two witnesses, " 'and this Court has no discretionary authority to reach that contention' " (*Matter of McFadden v Prack*, 93 AD3d 1268, 1269; *see Matter of Jones v Annucci*, 141 AD3d 1108, 1109). With respect to petitioner's contention that the Hearing Officer erred in failing to recall the one witness, we conclude that petitioner's contention lacks merit. Petitioner claims that he needed to recall the witness to clarify who made a particular statement, but the witness never testified that he heard the statement. As a result, that witness's testimony "did not require clarifying" (*Matter of Culbreath v Selsky*, 286 AD2d 817, 817).

Petitioner failed to exhaust his administrative remedies with respect to his remaining contentions, including his contention that

the determination is not supported by substantial evidence, by failing to raise them on his administrative appeal, and this Court has no discretionary power to reach them (*see Matter of Sabino v Hulihan*, 105 AD3d 1426, 1426; *Matter of Wearen v Deputy Supt. Bish*, 2 AD3d 1361, 1362).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

783

CA 16-02279

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

DIPIZIO CONSTRUCTION COMPANY, INC.,
PLAINTIFF-APPELLANT,
AND TRAVELERS CASUALTY AND SURETY COMPANY
OF AMERICA, INTERVENOR-PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIE CANAL HARBOR DEVELOPMENT CORPORATION,
DEFENDANT-RESPONDENT.

LAW OFFICES OF DANIEL W. ISAACS, PLLC, NEW YORK CITY (ANNAMARIE RICHMOND OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TORRE, LENTZ, GAMELL, GARY & RITTMASTER, LLP, JERICHO (BENJAMIN D. LENTZ OF COUNSEL), FOR INTERVENOR-PLAINTIFF-RESPONDENT.

MANCABELLI LAW PLLC, ORCHARD PARK (PATRICIA A. MANCABELLI OF COUNSEL), AND PHILLIPS LYTLE LLP, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 11, 2016. The order, among other things, granted the cross motion of Travelers Casualty and Surety Company of America seeking to intervene in this action and to replace plaintiff DiPizio Construction Company, Inc., as the plaintiff and real party in interest in this action.

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

Memorandum: In a prior appeal we reinstated the complaint of DiPizio Construction Company, Inc. (DiPizio) seeking a declaration that defendant's notice of intent to terminate the construction contract (Contract) the parties entered into for a certain revitalization project and defendant's ultimate termination of that contract were nullities (*DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 134 AD3d 1418). We concluded that there were issues of fact whether defendant's president lacked authority to terminate the Contract without the express authority or formal action of defendant's Board of Directors (*id.* at 1420). During the pendency of that appeal, Supreme Court determined with respect to three other actions commenced by DiPizio against defendant that intervenor Travelers Casualty and Surety Company of America (Travelers) is the real party in interest, and the court therefore substituted Travelers as the plaintiff in those actions. On DiPizio's appeal from that order, we agreed with

the court's reasoning that the default provisions of the General Indemnity Agreement (GAI) between DiPizio and Travelers were triggered; that Travelers could rely in good faith on a declaration of delinquency and that such a declaration, as well as other factors, constituted a default under the GAI; and that, in the event of a default as specified in the GAI, DiPizio assigned to Travelers "all of [its] rights and interests growing in any manner out of the Contract" between DiPizio and defendant (*DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 148 AD3d 1595).

During the pendency of the appeal of the court's order determining that Travelers is the real party in interest with respect to the three actions at issue in that case, defendant moved and Travelers cross-moved for an order determining that Travelers also is the real party in interest in this action. Contrary to DiPizio's contention, the court properly determined that, pursuant to the terms of the GAI, Travelers is also the real party in interest in this action. We conclude that the declaratory relief sought in the instant action, i.e., a declaration that the termination of the Contract is a nullity because defendant's president lacked authority to terminate the Contract, concerns a right or interest of DiPizio's that "gr[ew] . . . out of the Contract" between DiPizio and defendant, pursuant to the terms of the GAI. Thus, the assignment provisions of the GAI are applicable to this action, and the court properly determined that Travelers is the real party in interest (*see James McKinney & Son v Lake Placid 1980 Olympic Games*, 61 NY2d 836, 838).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

786

CA 16-02316

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

DARRYL E. SOMMERFELDT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MADELINE PICKETT, DIANE HART AND STAR GROWERS FARM, LLC, DEFENDANTS-APPELLANTS.

DANIEL M. DIMATTEO, BATAVIA, AND DAVID M. DIMATTEO, WARSAW, FOR DEFENDANTS-APPELLANTS.

BONARIGO & MCCUTCHEON, BATAVIA (KRISTIE L. DEFREZE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Orleans County (Tracey A. Bannister, J.), entered June 20, 2016. The order granted the cross motion of plaintiff for summary judgment on liability against defendants Madeline Pickett and Diane Hart and denied the motion of defendant Star Growers Farm, LLC, for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting judgment in favor of plaintiff on the first cause of action as follows:

> It is ADJUDGED and DECLARED that the lease executed by plaintiff Darryl E. Sommerfeldt and defendants Madeline Pickett and Diane Hart is valid and in full force and effect,

and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking a declaration that the lease between him and defendants Madeline Pickett and Diane Hart (collectively, owners) is valid and alleging that the owners breached that lease. With respect to defendant Star Growers Farm, LLC (Star Growers), plaintiff alleged that it had intentionally induced the owners to breach their lease with plaintiff. We agree with plaintiff that Supreme Court properly granted, in part, his cross motion for summary judgment, determining that the lease is valid under the first cause of action and that the owners are liable for a breach of that lease under the second cause of action, and properly denied, explicitly and implicitly, the separate motions of the owners and Star Growers for summary judgment dismissing the complaint insofar as asserted against them. The court erred, however, in failing to declare the rights of the parties, and we therefore modify the order

by making the requisite declaration (*see generally Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954).

Contrary to the sole contention of defendants on appeal, plaintiff established as a matter of law that his lease was legally delivered, thus establishing that the lease is valid and enforceable. As the Court of Appeals has written, "[a] lease, as in the case of conveyances of an interest in land generally, requires the fulfillment by the parties of certain prerequisites to take effect. It is the well-established rule in this State that delivery is one such requirement, the absence of which, without more, renders the lease ineffective" (*219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 511). Legal delivery may be accomplished even in the absence of a physical delivery (*see Birch v McNall*, 19 AD2d 850, 850). Indeed, " '[a]ny evidence that shows that the parties to a written instrument intend that the same should be operative and binding upon them is sufficient in an action to enforce its provisions' " (*id.*, quoting *Sarasohn v Kamaiky*, 193 NY 203, 214; *see 219 Broadway Corp.*, 46 NY2d at 512).

Here, it is undisputed that plaintiff prepared the lease and signed it first. He then gave it to the owners, who also signed the lease but did not physically deliver it to plaintiff. Instead, the owners filed the signed lease with the Town Assessor in order to qualify for an agricultural tax exemption for the property. We conclude that, by filing the signed lease with the Town Assessor, the owners acknowledged "the existence and binding nature of the lease agreement" (*Townhouse Co. v Williams*, 307 AD2d 223, 224); "unequivocally demonstrated their intent that the [lease] be valid and effective" (*Thomson v Rubenstein*, 31 AD3d 434, 436); and "acted with the intent of unconditionally conveying [a leasehold] interest in the premises" (*Malik v Ingber*, 217 AD2d 535, 537).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

788

CA 16-02060

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

KRISTEN SMITH, NOW KNOWN AS KRISTEN BURGEOIS,
PLAINTIFF-APPELLANT,

V ORDER

TRAVELERS CASUALTY AND SURETY COMPANY,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

MICHELE E. DETRAGLIA, UTICA, FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (ANTHONY G. MARECKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered March 15, 2016. The order granted the motion of defendant Travelers Casualty and Surety Company for summary judgment and dismissed the complaint.

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

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

789

CA 16-02061

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

KRISTEN SMITH, NOW KNOWN AS KRISTEN BURGEOIS,
PLAINTIFF-APPELLANT,

V ORDER

TRAVELERS CASUALTY AND SURETY COMPANY,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

MICHELE E. DETRAGLIA, UTICA, FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (ANTHONY G. MARECKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered June 22, 2016. The order denied the motion of plaintiff for leave to renew or reargue.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984) and the order is affirmed without costs for reasons stated at Supreme Court.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

792

KA 14-02225

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW B. WOMACK, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREW B. WOMACK, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered June 25, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a forged instrument in the second degree and offering a false instrument for filing in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a forged instrument in the second degree (Penal Law § 170.25), and offering a false instrument for filing in the first degree (§ 175.35). Defendant failed to preserve for our review his contention in his main brief that he was penalized for exercising his right to a trial, "inasmuch as [he] failed to raise that contention at sentencing" (*People v Stubinger*, 87 AD3d 1316, 1317, *lv denied* 18 NY3d 862; *see People v Pope*, 141 AD3d 1111, 1112, *lv denied* 29 NY3d 951). In any event, that contention lacks merit. " 'Given that the *quid pro quo* of the bargaining process will almost necessarily involve offers to moderate sentences that ordinarily would be greater, it is also to be anticipated that sentences handed out after trial may be more severe than those proposed in connection with a plea' " (*People v Martinez*, 26 NY3d 196, 200). Here, contrary to defendant's contention, "[t]here is no evidence that defendant was given the lengthier sentence solely as a punishment for exercising his right to a trial" (*People v Aikey*, 94 AD3d 1485, 1486, *lv denied* 19 NY3d 956 [internal quotation marks omitted]; *see Pope*, 141 AD3d at 1112). We reject defendant's challenge in his main brief to the severity of the sentence.

In his pro se supplemental brief, defendant contends that the evidence is legally insufficient to establish two elements of the criminal possession of a forged instrument count, i.e., that he acted with knowledge that the instrument was forged and "with intent to defraud, deceive or injure another" (Penal Law § 170.25; *see People v Rodriguez*, 17 NY3d 486, 490). In his motion for a trial order of dismissal, defendant contended only that the evidence is legally insufficient to establish that he acted with the requisite knowledge, and he therefore failed to preserve for our review his contention with respect to the element of intent (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention lacks merit. It is well settled that intent may " 'be inferred from the defendant's conduct and the surrounding circumstances' " (*People v Bracey*, 41 NY2d 296, 301, *rearg denied* 41 NY2d 1010; *see Rodriguez*, 17 NY3d at 489). Here, viewing the evidence, as we must, in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient with respect to the element of intent (*see generally Rodriguez*, 17 NY3d at 489-491).

Furthermore, with respect to defendant's challenge to the sufficiency of the evidence regarding the element of knowledge, it is well settled that "[g]uilty knowledge of forgery may be shown circumstantially by conduct and events" (*People v Johnson*, 65 NY2d 556, 561, *rearg denied* 66 NY2d 759). Here, we conclude that "the jury . . . had a sufficient evidentiary basis upon which to find defendant's knowledge of the forged character of the possessed instrument beyond a reasonable doubt" (*id.*; *see People v Hold*, 101 AD3d 1692, 1693, *lv denied* 21 NY3d 1016). Thus, we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, contrary to the contention of defendant in his pro se supplemental brief, viewing the evidence in light of the elements of the crime of criminal possession of a forged instrument in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to that count is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant also failed to preserve for our review his contention in his pro se supplemental brief that he was deprived of a fair trial by prosecutorial misconduct on summation because he "failed to object to any of the remarks by the prosecutor during summation" (*People v Simmons*, 133 AD3d 1275, 1277, *lv denied* 27 NY3d 1006). In any event, defendant's contention lacks merit. The prosecutor did not improperly vouch for the credibility of a prosecution witness on summation, because "[a]n argument by counsel on summation, based on the record evidence and reasonable inferences drawn therefrom, that his or her witnesses have testified truthfully is not vouching for their credibility" (*People v Keels*, 128 AD3d 1444, 1446, *lv denied* 26 NY3d 969; *see People v Bailey*, 58 NY2d 272, 277). Furthermore, the prosecutor's remarks were "a fair response" to defense counsel's summation, inasmuch as defense counsel's entire summation was an attack on the credibility of that prosecution witness (*Simmons*, 133

AD3d at 1278; *see People v Halm*, 81 NY2d 819, 821).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

793

KA 15-00471

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS R. OSWOLD, DEFENDANT-APPELLANT.

ANDREA J. SCHOENEMAN, CONFLICT DEFENDER, CANANDAIGUA (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered February 11, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree and perjury 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 criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]) and perjury in the first degree (§ 210.15). Contrary to defendant's contention, we conclude that he knowingly, voluntarily and intelligently waived his right to appeal (*see generally People v Sanders*, 25 NY3d 337, 340-341), and thus defendant's challenge to the factual sufficiency of the plea allocution is encompassed by his waiver of the right to appeal (*see People v McCrea*, 140 AD3d 1655, 1655, *lv denied* 28 NY3d 933). Moreover, defendant failed to preserve that challenge for our review inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Lopez*, 71 NY2d 662, 665). In any event, "the plea allocution as a whole establishes that 'defendant understood the charges and made an intelligent decision to enter a plea' " (*People v Keitz*, 99 AD3d 1254, 1255, *lv denied* 20 NY3d 1012, *reconsideration denied* 21 NY3d 913, quoting *People v Goldstein*, 12 NY3d 295, 301). Defendant's challenge to the legal sufficiency of the evidence before the grand jury with respect to the perjury count does not survive the guilty plea (*see People v Gillett*, 105 AD3d 1444, 1445; *People v Lawrence*, 273 AD2d 805, 805, *lv denied* 95 NY2d 867), nor does his challenge to the sufficiency of the factual allegations in the indictment with respect to that count (*see People v Guerrero*, 28 NY3d 110, 116; *Lawrence*, 273 AD2d at 805; *People*

v Holt, 173 AD2d 644, 645).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

794

KA 15-01682

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

PHILLIP M. FRAISAR, ALSO KNOWN AS PHILLIP M. A. FRAISAR, ALSO KNOWN AS PHILLIP FRAISAR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered September 16, 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: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that his waiver of the right to appeal was not knowingly, intelligently, and voluntarily entered. We reject that contention (*see generally People v Lopez*, 6 NY3d 248, 256). Defendant's valid waiver of his right to appeal, however, does not preclude him from challenging the severity of his sentence, inasmuch as "the record establishes that defendant waived his right to appeal before County Court advised him of the potential periods of imprisonment that could be imposed" (*People v Mingo*, 38 AD3d 1270, 1271). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

795

KA 16-00550

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KRISTY L. CHAVIS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered January 7, 2016. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a controlled substance in the third degree (three counts), criminal use of drug paraphernalia in the second degree (two counts) and endangering the welfare of a child (two counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting her upon her plea of guilty of, inter alia, three counts of criminal possession of a controlled substance in the third degree ([CPCS] Penal Law § 220.16 [1], [12]) and, in appeal No. 2, she appeals from a judgment convicting her upon her plea of guilty of four counts of CPCS in the third degree (§ 220.16 [1]) and four counts of criminal sale of a controlled substance in the third degree ([CSCS] § 220.39 [1]). County Court imposed concurrent terms of imprisonment with respect to all counts in both indictments. As a preliminary matter, we reject the contention of the People that the appeal from the judgment in appeal No. 1 is not properly before us because defendant failed to file a timely notice of appeal. This Court granted defendant's motion seeking to extend her time to file the notice of appeal, and thus the notice of appeal was timely filed.

Contrary to defendant's contention in appeal No. 1, the record establishes that defendant expressly rejected a prior offer to plead guilty to one count of CPCS in exchange for a six-year determinate term of imprisonment, and she was thereafter indicted with the counts at issue in appeal No. 2. Defendant pleaded guilty to all counts in both indictments and was sentenced in accordance with the terms of her plea agreement, and she therefore cannot be heard to say that she

relied to her detriment on the prior offer (*see People v Stevens*, 64 AD3d 1051, 1054, *lv denied* 13 NY3d 839).

We reject defendant's further contention in appeal No. 1 that the court abused its discretion in denying her application to participate in judicial diversion (*see People v Williams*, 105 AD3d 1428, 1428, *lv denied* 21 NY3d 1021), which was made before she was indicted with the counts in appeal No. 2. The record supports the court's determination that, although defendant had a history of drug abuse, it was a factor in her criminal behavior, and diversion could effectively address her drug abuse (*see* CPL 216.05 [3]), institutional confinement was necessary for the protection of the public. The court properly considered the large amount of heroin and cash seized from defendant's home and her prior history of convictions related to the sale of narcotic substances, including her use of adolescents to sell drugs. Finally, we reject defendant's challenge in each appeal to the severity of the sentence.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

796

KA 16-00346

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KRISTY L. CHAVIS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered January 7, 2016. The judgment convicted defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third degree (four counts), and criminal possession of a controlled substance in the third degree (four counts).

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

Same memorandum as in *People v Chavis* ([appeal No. 1] ___ AD3d ___ [June 9, 2017]).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

800

KA 14-00669

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS L. KING, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered November 27, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree 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 his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]) and assault in the third degree (§ 120.00). Defendant's contention that reversal of the judgment and vacatur of the plea are required because he was not advised that his enhanced sentence could include a term of postrelease supervision is not preserved for our review. Defendant had a reasonable opportunity to challenge the validity of his guilty plea on the same ground now advanced on appeal, or to move to withdraw the plea or otherwise to object to the imposition of postrelease supervision, and he failed to do so (*see People v Williams*, 27 NY3d 212, 214; *People v Crowder*, 24 NY3d 1134, 1136-1137).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

801

KA 14-01295

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FLOYD VANHOOSER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN J. GILSENAN, OF THE PENNSYLVANIA AND MICHIGAN BARS, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE 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.), dated June 4, 2014. The order denied the motion of defendant to vacate a judgment of conviction.

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 further proceedings in accordance with the following memorandum: Defendant appeals from an order denying his motion pursuant to CPL 440.10 seeking to vacate a 2003 judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), for which he was sentenced in error as a violent felony offender, rather than as a second violent felony offender. Defendant contends that County Court erred in resentencing him in 2011 as a second violent felony offender without offering him the opportunity to withdraw his plea when it became apparent that the court could not honor the original plea agreement that he would be sentenced as a violent felony offender (*see generally People v Cameron*, 83 NY2d 838, 840; *People v Tellier*, 76 AD3d 684, 684-685, *lv denied* 15 NY3d 896). We note as a preliminary matter that defendant failed to provide the transcript of the plea and thus the record on appeal is incomplete with respect to whether his predicate felony status was a condition of the plea (*see Matter of Santoshia L.*, 202 AD2d 1027, 1028). In any event, it is apparent from the record that the court did not afford defendant the opportunity to withdraw his plea or to accept the legal resentence, and defendant failed to raise the contention, now raised here, on his direct appeal from the resentence (*People v VanHooser* [appeal No. 1], 126 AD3d 1531, 1531). Thus, the court properly declined to grant the motion on that basis

(*see* CPL 440.10 [2] [b], [c]; *People v Cuadrado*, 9 NY3d 362, 364-365; *People v Lee*, 59 AD3d 996, 997, *lv denied* 13 NY3d 746).

Defendant also contends that the court erred in denying his motion insofar as he asserted that he was denied effective assistance of counsel (*see* CPL 440.10 [1] [h]). That claim is based upon defense counsel's alleged failure to advise defendant that he had a right to withdraw his plea, and defendant's assertion that such failure subjected him to a sentence as a persistent violent felony offender for convictions in 2011 (*People v VanHooser* [appeal No. 2], 126 AD3d 1531, 1532). As noted above, we cannot determine from the record on appeal whether defendant had a right to withdraw his plea. Nevertheless, we conclude that defendant raised factual issues requiring a hearing, i.e., whether defense counsel determined if defendant had a right to withdraw the plea and, if so, whether he communicated that information to defendant (*see People v Conway*, 118 AD3d 1290, 1291). We therefore reverse the order and remit the matter to County Court to conduct a hearing on those issues pursuant to CPL 440.30 (5).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

802

KA 16-00072

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FLOYD VANHOOSER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN J. GILSENAN, OF THE PENNSYLVANIA AND MICHIGAN BARS, ADMITTED PRO VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Onondaga County Court (Thomas J. Miller, J.), rendered August 14, 2015. Defendant was resentenced upon his conviction of burglary in the second degree (three counts) and burglary in the third degree.

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

Memorandum: On a prior appeal, we determined that defendant's waiver of a persistent violent felony hearing was "not effective because it was the product of impermissible coercion by [County Court]" (Walsh, J.) (*People v VanHooser* [appeal No. 2], 126 AD3d 1531, 1532). We remitted the matter for a hearing (*id.* at 1532-1533), and the court (Miller, J.) determined that the People met their burden of establishing that defendant had been sentenced for two prior violent felony offenses within 10 years before committing the offenses at issue (*see* Penal Law §§ 70.04 [b] [ii], [iv], [v]; 70.08 [1] [b]). We affirm. The court properly determined that the People met their burden by presenting the persistent violent felony offender statement and the certified records of the Department of Corrections and Community Supervision, which established that defendant was imprisoned in excess of 18 years between the time of the first predicate violent felony offense in June 1986 and the commission of the offenses at issue in June 2011 (*see* § 70.04 [b] [v]; *People v Williams*, 30 AD3d 980, 983, *lv denied* 7 NY3d 852). We note that, on the prior appeal, defendant admitted the predicate violent felony offenses and contested only the calculation of the tolling periods (*see VanHooser*, 126 AD3d at 1532), and thus the court's proper calculation of those periods disposes of the issue in its entirety.

Defendant's further contention that Penal Law § 70.08 is unconstitutional in light of the United States Supreme Court's decision in *Johnson v United States*, (___ US ___, 135 S Ct 2551) is not properly before us inasmuch as he failed to notify the Attorney General of his challenge to the constitutionality of that statute (*see People v Reinard*, 134 AD3d 1407, 1409, *lv denied* 27 NY3d 1074).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

803

KA 11-01178

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LYNN LETA, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (JOSEPH PLUKAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered April 5, 2011. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a forged instrument in the second degree (two counts) and identity theft in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her following a nonjury trial of two counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and one count of identity theft in the second degree (§ 190.79 [1]). The charges arose from defendant's deposit of two forged checks into her bank account. Defendant contends that the conviction of identity theft is not supported by legally sufficient evidence because the People did not establish that she assumed the identity of another person. Defendant failed to preserve that contention for our review inasmuch as she moved for a trial order of dismissal on a different ground (*see People v Thomas*, 136 AD3d 1390, 1390, *lv denied* 27 NY3d 1140, *reconsideration denied* 28 NY3d 974) and she failed to renew the motion after presenting evidence (*see People v Graham*, 148 AD3d 1517, 1517). In any event, we reject that contention (*see People v Yuson*, 133 AD3d 1221, 1221-1222, *lv denied* 27 NY3d 1157).

Contrary to defendant's further contention, we conclude that Supreme Court properly refused to suppress the statement she made to a police officer without the benefit of *Miranda* warnings. The record supports the court's determination that "a reasonable person in defendant's position, innocent of any crime, would not have believed that he or she was in custody, and thus *Miranda* warnings were not required" (*People v Lunderman*, 19 AD3d 1067, 1068, *lv denied* 5 NY3d

830). Based upon the testimony at the suppression hearing, the court properly concluded that the relevant factors weighed against a determination that defendant was in custody (*see id.* at 1068-1069). Defendant invited the officer into her home, spoke with him at her kitchen table, moved about freely, and was not arrested until nearly three months later (*see People v Normile*, 229 AD2d 627, 627-628). In addition, the questioning was investigatory rather than accusatory (*see People v Smielecki*, 77 AD3d 1420, 1421, *lv denied* 15 NY3d 956), the entire conversation lasted only 90 minutes (*see People v Nova*, 198 AD2d 193, 194, *lv denied* 83 NY2d 808), and defendant was cooperative, never asked for questioning to cease, and never requested counsel (*see People v Mastin*, 261 AD2d 892, 893, *lv denied* 93 NY2d 1022).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

804

CA 16-02373

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

KENNETH M. QUINNIEY AND VERLAINE D. QUINNIEY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NINA H. BLUMLEIN, DEFENDANT,
NISSAN-INFINITI LT, AND NILT, INC.,
DEFENDANTS-APPELLANTS.

LONDON FISCHER LLP, NEW YORK CITY (CLIFFORD B. AARON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered November 30, 2016. The order, insofar as appealed from, denied in part the motion of defendants Nissan-Infiniti LT and Nilt, Inc., to dismiss plaintiffs' complaint against them.

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

Memorandum: Plaintiffs commenced this action against, inter alia, Nissan-Infiniti LT and Nilt, Inc. (defendants), seeking damages for personal injuries allegedly resulting from a motor vehicle accident. Defendants are the owners of a leased motor vehicle allegedly involved in the accident. The complaint alleges, insofar as relevant to this appeal, that defendants are vicariously liable as the owners of the vehicle pursuant to Vehicle and Traffic Law § 388, but further alleges that the subject accident "was caused as a result of the negligent, careless, reckless and unlawful conduct on the part of" defendants. Defendants moved pursuant to CPLR 3211 to dismiss the complaint against them on the ground that the action is barred by the Graves Amendment (49 USC § 30106). Defendants now appeal from an order that granted their motion with respect to the allegations that they are vicariously liable, but denied the motion insofar as the complaint alleges that defendants are directly liable for their own negligence. We affirm.

It is well settled that, "[t]he Graves Amendment provides, generally, that the owner of a leased or rented motor vehicle cannot be held liable for personal injuries resulting from the use of such

vehicle by reason of being the owner of the vehicle for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease if: (1) the owner is engaged in the trade or business of renting or leasing motor vehicles, and (2) 'there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)' " (*Cioffi v S.M. Foods, Inc.*, 129 AD3d 888, 892, quoting 49 USC § 30106 [a]). Contrary to defendants' contention, however, "the Graves Amendment (49 USC § 30106) [does] not apply where, as here, . . . plaintiffs seek to hold [defendants] directly liable for [their own] alleged" negligence (*Terranova v Waheed Brokerage, Inc.*, 78 AD3d 1040, 1041; *see Olmann v Neil*, 132 AD3d 744, 745; *cf. Gluck v Nebgen*, 72 AD3d 1023, 1023-1024). Consequently, Supreme Court properly denied defendants' motion to dismiss the complaint insofar as it alleges that the accident was the result of defendants' negligence.

Finally, defendants' contention that the complaint fails to allege sufficiently that they are directly liable for their own negligence is raised for the first time on appeal and thus is not properly before us (*see generally Oram v Capone*, 206 AD2d 839, 840; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

807

CA 16-02140

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

IN THE MATTER OF NEAL J. GOLDWATER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
FIRST NIAGARA FINANCIAL GROUP, INC., AND
FIRST NIAGARA RISK MANAGEMENT, INC.,
RESPONDENTS-RESPONDENTS.

LAW OFFICE OF LINDY KORN, PLLC, BUFFALO (CHARLES L. MILLER, II, OF COUNSEL), FOR PETITIONER-APPELLANT.

HODGSON RUSS LLP, BUFFALO (JOSHUA FEINSTEIN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS FIRST NIAGARA FINANCIAL GROUP, INC., AND FIRST NIAGARA RISK MANAGEMENT, INC.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 25, 2016 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.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of respondent New York State Division of Human Rights (Division) that there was no probable cause to support petitioner's allegations that respondents First Niagara Financial Group, Inc. and First Niagara Risk Management, Inc. (First Niagara respondents) discriminated against him on the basis of age and sex and that his termination was the result of unlawful retaliation. Contrary to petitioner's contention, the Division's determination is supported by a rational basis and is not arbitrary and capricious (*see Matter of Witkowich v New York State Div. of Human Rights*, 56 AD3d 1170, 1170, *lv denied* 12 NY3d 702; *cf. Matter of Mambretti v New York State Div. of Human Rights*, 129 AD3d 1696, 1696-1697, *lv denied* 26 NY3d 909). Upon our review of the record, we conclude that " 'the Division properly investigated petitioner's complaint . . . and provided petitioner with a full and fair opportunity to present evidence on his behalf and to rebut the evidence presented by' " the First Niagara respondents (*Witkowich*, 56 AD3d at 1170).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

815

KA 15-02149

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANE D. HIGGINS, DEFENDANT-APPELLANT.

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

THEODORE A. BRENNER, DEPUTY DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered June 18, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Contrary to defendant's contention, the record establishes that his waiver of the right to appeal was knowing, intelligent, and voluntary (*see People v Lopez*, 6 NY3d 248, 256), and we conclude that the valid waiver encompasses his challenge to the severity of the sentence (*see id.* at 255-256; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

816

KA 14-01904

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHASE WALKER, 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 January 29, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence. Specifically, defendant contends that Supreme Court's colloquy was insufficient to ensure that defendant understood all of the rights he was waiving. Contrary to defendant's contention, the record establishes that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). Defendant's valid waiver of the right to appeal, which specifically included a waiver of the right to challenge the "severity of any sentence," encompasses his contention that the sentence imposed is unduly harsh and severe (*see id.* at 255-256; *People v Hidalgo*, 91 NY2d 733, 737; *cf. People v Maracle*, 19 NY3d 925, 928).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

820

CAF 15-01112

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

IN THE MATTER OF DANARYEE B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ERICA T., RESPONDENT-APPELLANT.

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

LAUREN CREIGHTON, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered June 16, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred the guardianship and custody of the subject child to petitioner.

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

Memorandum: Respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child pursuant to Social Services Law § 384-b on the ground of permanent neglect. At the outset, we note that the mother expressly waived her right to a dispositional hearing, and thus Family Court properly entered a disposition without holding such a hearing (*see Matter Andrew Z.*, 41 AD3d 912, 913; *see generally* Family Ct Act § 625 [a]). Contrary to the mother's contention, the court did not abuse its discretion in declining to enter a suspended judgment. A suspended judgment "is a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311; *see* § 633), and may be warranted where the parent has made sufficient progress in addressing the issues that led to the child's removal from custody (*see Matter of James P. [Tiffany H.]*, 148 AD3d 1526, 1527; *Matter of Sapphire A.J. [Angelica J.]*, 122 AD3d 1296, 1297, *lv denied* 24 NY3d 916). Here, the credible evidence at the hearing, including the testimony of petitioner's caseworker that the mother's apartment lacked a stove, and a bed or clothes for the child, established that the mother had not made sufficient progress in providing the child with suitable living conditions (*see Matter of Andie M. [Kimberly M.]*, 101 AD3d 1638, 1638-1639, *lv denied* 20 NY3d 1053). Moreover, the court's findings concerning lack of meaningful visitation, lack of

transportation, financial concerns, and unsuitable living conditions demonstrate that the court was properly concerned with the child's best interests, and thus the court properly determined that a suspended judgment was unwarranted (*see Matter of Danielle N.*, 31 AD3d 1205, 1205; *see also Matter of Calvario Chase Norall W. [Denise W.]*, 85 AD3d 582, 583).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

821

CAF 15-00821

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

IN THE MATTER OF NEVAEH T.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ABREANNA T., RESPONDENT, AND
WILBERT J., III, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY R. LOVALLO, BUFFALO, FOR RESPONDENT-APPELLANT.

CHARLES J. GALLAGHER, JR., BUFFALO, FOR PETITIONER-RESPONDENT.

NOEMI FERNANDEZ, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered April 9, 2015 in a proceeding pursuant to Family Court Act article 10. The order directed respondent Wilbert J., III, to stay away from the subject child until the child is 18 years old.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by deleting the expiration date of the order of protection and substituting therefor an expiration date of March 26, 2015, and as modified the order is affirmed without costs.

Memorandum: Petitioner commenced these neglect proceedings against Wilbert J., III (respondent) and respondent mother alleging, inter alia, that respondent neglected the two children who are the subject of these proceedings and are the mother's children. The mother admitted that she neglected the children, and orders were issued granting her an adjournment in contemplation of dismissal, with expiration dates of March 26, 2015. The petitions against respondent proceeded to a hearing, after which Family Court issued an order finding that respondent was a parent substitute who was responsible for the children's care and finding that he neglected the children. After a dispositional hearing, the court issued orders of protection in favor of the children until their 18th birthdays.

We note at the outset that, although respondent failed to file a timely notice of appeal with respect to the order of fact-finding, he appealed from the combined dispositional/orders of protection (*see Matter of Dylynn V. [Bradley W.]*, 136 AD3d 1160, 1161), which bring up for review the propriety of the fact-finding order (*see Matter of*

Bradley M.M. [Michael M.—Cindy M.], 98 AD3d 1257, 1258). Contrary to respondent's contention, however, the court properly found that he was a person legally responsible for the care of the children (*see Matter of Angel R. [Syheid R.]*, 136 AD3d 1041, 1041, *lv dismissed* 27 NY3d 1045; *Matter of Donell S. [Donell S.]*, 72 AD3d 1611, 1611-1612, *lv denied* 15 NY3d 705; *see generally Matter of Trenasia J. [Frank J.]*, 25 NY3d 1001, 1004-1005). The testimony at the hearing established that respondent was at the mother's residence on at least a regular basis, if not actually living there.

We agree with respondent that the court erred in issuing orders of protection that did not expire until the children's 18th birthdays. Pursuant to Family Court Act § 1056 (1), the court may issue an order of protection in an article 10 proceeding, but such order of protection shall expire no later than the expiration date of "such other order made under this part, except as provided in subdivision four of this section." Subdivision (4) allows a court to issue an order of protection until a child's 18th birthday, but only against a person "who was a member of the child's household or a person legally responsible . . . , and who is no longer a member of such household at the time of the disposition and who is not related by blood or marriage to the child or a member of the child's household." Here, respondent was found to be a person legally responsible for the children and, at the time of the dispositional hearing, he no longer lived with the mother. He is also not related by blood or marriage to the children, but he is related to a member of their household. Petitioner's caseworker testified at the dispositional hearing that respondent was the father of the mother's recently-born child, who lived in the mother's home. Subdivision (4) is therefore inapplicable on its face (*see Matter of Alexis A. [Richard V.]*, 143 AD3d 700, 701). Inasmuch as the only other dispositional orders issued with respect to the children at the time the court issued the orders of protection had expiration dates of March 26, 2015, we modify the orders of protection issued in these proceedings to expire on that same date.

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

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

824

CAF 16-01179

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

IN THE MATTER OF FALISHA FLEISHER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID B. FLEISHER, RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Monroe County (Julie A. Gordon, R.), entered June 14, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted the petition of Falisha Fleisher to relocate with the subject child from Monroe County to Orleans County.

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

Memorandum: Petitioner mother commenced this proceeding seeking permission to relocate with the parties' only child from Brockport in Monroe County to Albion in Orleans County, a distance of 13 to 14 miles. Respondent father appeals from an order that granted the mother's petition to relocate and, inter alia, placed upon the mother more of the responsibility for transporting the child between residences. The order continued in effect the terms of the prior order setting forth the father's right to "have regular periods of residency with the child every weekend from Friday at 4:30 pm to Monday at 7:00 am" and on the father's share of holidays.

Factors to consider in assessing a parent's request to relocate include "each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and [each parent], the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and the child through suitable visitation arrangements" (*Matter of Tropea v*

Tropea, 87 NY2d 727, 740-741; *see Matter of Holtz v Weaver*, 94 AD3d 1557, 1557). "[E]ach relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child" (*Tropea*, 87 NY2d at 739).

In affirming the order, we conclude that "the mother established by the requisite preponderance of the evidence that the proposed relocation was in the child's best interests" (*Matter of Mineo v Mineo*, 96 AD3d 1617, 1618). We further conclude that Family Court properly weighed the *Tropea* factors in permitting the move. Among the reasons cited in support of the move were the mother's need for mental health treatment, which the prior order in fact directed her to continue, and the much easier access that she would have to such treatment in Albion as opposed to Brockport. The mother further demonstrated that she would have better access to vocational rehabilitation programs, including a job training workshop in Albion, opportunities denied to her in Monroe County because of her lack of transportation and mental health history. The mother also testified to certain other financial benefits of the move. In contrast, the father's reasons for opposing the move were unfounded and arbitrary and, indeed, were appropriately deemed by the court to be outweighed by other factors. Concerning the potential for the move to interfere with the relationship, including meaningful access, between the father and the child, we note that the court determined that the permitted relocation would not negatively impact the father's visitation time or otherwise interfere with his important role in the child's life.

We reject the father's further contention that the court abused its discretion in permitting the mother to consult with her attorney during a break in the direct examination of the mother. The cases on which the father relies, which place limitations upon a court's discretion to restrict consultations between a litigant and his or her attorney during trial, and more particularly during breaks in the testimony of that litigant (*see Matter of Jaylynn R. [Monica D.]*, 107 AD3d 809, 810-811; *see also People v Joseph*, 84 NY2d 995, 997-998), do not place restrictions on the court's discretion to permit such consultations (*see People v Branch*, 83 NY2d 663, 666-667; *see also Geders v United States*, 425 US 80, 86-91).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

826

CAF 15-00822

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

IN THE MATTER OF KARAE J.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

ABREANNA T., RESPONDENT,
AND WILBERT J., III, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY R. LOVALLO, BUFFALO, FOR RESPONDENT-APPELLANT.

CHARLES J. GALLAGHER, JR., BUFFALO, FOR PETITIONER-RESPONDENT.

NOEMI FERNANDEZ, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered April 9, 2015 in a proceeding pursuant to Family Court Act article 10. The order directed respondent Wilbert J., III, to stay away from the subject child until the child is 18 years old.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by deleting the expiration date of the order of protection and substituting therefor an expiration date of March 26, 2015, and as modified the order is affirmed without costs.

Same memorandum as in *Matter of Nevaeh T.* ([appeal No. 1] ___ AD3d ___ [June 9, 2017]).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

827

CA 16-00709

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

IN THE MATTER OF JAMES ADAMS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

JAMES ADAMS, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Christopher J. Burns, J.), entered August 26, 2016 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting the petition in part and annulling that part of the determination finding that petitioner violated inmate rules 113.23 (7 NYCRR 270.2 [B] [14] [xiii]) and 114.10 (7 NYCRR 270.2 [B] [15] [i]) and as modified the judgment is affirmed without costs, and respondent is directed to expunge from petitioner's institutional record all references to the violation of those rules.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III hearing on two separate misbehavior reports, that petitioner had violated various inmate rules. As a preliminary matter, we note that petitioner did not contend in his petition that the determination with respect to the charges contained in the first misbehavior report is not supported by substantial evidence, and he thus did not preserve that contention for our review (*see Matter of Rodriguez v Fischer*, 96 AD3d 1374, 1375; *Matter of Rosa v Fischer*, 87 AD3d 1252, 1253, *lv denied* 19 NY3d 802). We nevertheless agree with petitioner that the judgment must be modified with respect to the first misbehavior report by granting the petition in part because respondent failed to preserve and photograph the alleged contraband in violation of Department of Corrections & Community Supervision Directive No. 4910A (*see Matter of Clark v Fischer*, 114 AD3d 1116, 1116-1117; *cf. Matter of Motzer v Goord*, 273 AD2d 559, 559-560; *Matter of Roman v Selsky*, 270 AD2d 519, 520), and the error cannot be deemed harmless on this record. We therefore

modify the judgment by granting the petition in part and annulling that part of the determination finding that petitioner violated inmate rules 113.23 (7 NYCRR 270.2 [B] [14] [xiii] [contraband]) and 114.10 (7 NYCRR 270.2 [B] [15] [i] [smuggling]). Because the penalty has already been served and there was no recommended loss of good time, there is no need to remit the matter to respondent for reconsideration of the penalty (*see Matter of Reid v Saj*, 119 AD3d 1445, 1446).

With respect to the second misbehavior report, we reject petitioner's contention that he was denied his right to call witnesses inasmuch as the testimony from the sole witness that was not called " 'would have been either redundant or immaterial' " to the charges (*Matter of Medina v Fischer*, 137 AD3d 1584, 1586; *see Matter of Jackson v Annucci*, 122 AD3d 1288, 1288-1289). We also reject petitioner's contention that a discrepancy in the chain of custody report and the testimony at the hearing concerning chain of custody requires reversal. Two witnesses testified that the evidence was brought to a pharmacist by one particular correction officer, the officer identified in the chain of custody report. The pharmacist, who could not remember or identify the man who brought him the contraband, assumed it had been another person who had brought him the evidence. The Hearing Officer resolved the discrepancy in favor of the person identified in the chain of custody report, and we "perceive no basis in the record to disturb the Hearing Officer's resolution of th[at] issue[]" (*Matter of Dash v Goord*, 255 AD2d 978, 978, citing *Matter of Foster v Coughlin*, 76 NY2d 964, 966).

Although petitioner contends that he was denied adequate employee assistance because his employee assistant incorrectly informed him that requested documents did not exist, we conclude that any prejudice caused by that error was alleviated when petitioner was provided with copies of the documents at the hearing (*see Matter of Laliveres v Prack*, 136 AD3d 1082, 1083; *Matter of Hamid v Goord*, 25 AD3d 1041, 1041). Contrary to petitioner's final contention, the second misbehavior report was "sufficiently specific to enable petitioner to prepare a defense" (*Matter of Jones v Fischer*, 111 AD3d 1362, 1363; *see Matter of Sepe v Goord*, 1 AD3d 667, 667-668; *see generally Matter of Bryant v Coughlin*, 77 NY2d 642, 648).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

828

CA 16-01248

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

IN THE MATTER OF JOHNNIE L. YOUNG,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ERIE COUNTY OFFICE OF CHILD SUPPORT ENFORCEMENT,
RESPONDENT-RESPONDENT.

JOHNNIE L. YOUNG, PETITIONER-APPELLANT PRO SE.

KELLIE POYNTON-GALLAGHER, BUFFALO, FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered September 22, 2015 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this proceeding seeking, inter alia, a determination that respondent acted unlawfully in suspending his driver's license for failure to pay child support arrears. We conclude that Supreme Court properly dismissed the petition. Pursuant to CPLR 7801 (1), "a proceeding under this article shall not be used to challenge a determination . . . which . . . can be adequately reviewed by appeal to a court" and, here, the applicable statute provides for review of respondent's determination through objections filed with Family Court (*see* Social Services Law § 111-b [12] [d] [2]). Petitioner's failure to avail himself of the appropriate remedy precludes his request for relief pursuant to CPLR article 78 (*see Matter of Church of Chosen v City of Elmira*, 18 AD3d 978, 979, *lv denied* 5 NY3d 709, *cert denied* 547 US 1115).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

830

CA 16-01356

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

ABDUL W. ARRAHIM, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, CITY OF BUFFALO DEPARTMENT OF PUBLIC WORKS, PARKS & STREETS, AND JAMES R. EVANS, DEFENDANTS-APPELLANTS.

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

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

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered April 15, 2016. The order denied defendants' motion for summary judgment dismissing plaintiff's amended complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when his vehicle collided with a snowplow truck owned by defendant City of Buffalo and operated by defendant James R. Evans. Supreme Court properly denied defendants' motion for summary judgment dismissing the amended complaint. In support of their motion, defendants contended that the reckless disregard rather than the ordinary negligence standard of care applies based on the applicability of Vehicle and Traffic Law § 1103 (b), and Evans did not act with reckless disregard for the safety of others. Vehicle and Traffic Law § 1103 (b) "exempts all vehicles 'actually engaged in work on a highway'--including [snowplows]--from the rules of the road" (*Riley v County of Broome*, 95 NY2d 455, 461). Here, as defendants recognize, there is a triable issue of fact whether Evans was plowing or salting the road at the time of the accident and thus, contrary to defendants' contention, the ordinary negligence standard of care may indeed apply. Although we agree with defendants that Evans may have nevertheless been engaged in work even if the plow blade was up at the time of the accident and no salting was occurring (*see Matsch v Chemung County Dept. of Pub. Works*, 128 AD3d 1259, 1260-1261, *lv denied* 26 NY3d 997; *see also Lobello v Town of Brookhaven*, 66 AD3d 646, 646-647), defendants failed to establish as a matter of law that Evans was working his "run" or "beat" at the time of the accident. Section 1103 (b) would not apply if the snowplow driver was merely

traveling from one route to another route (*see Hofmann v Town of Ashford*, 60 AD3d 1498, 1499).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

833

CA 17-00172

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

PHH MORTGAGE CORPORATION, PLAINTIFF-APPELLANT,

V ORDER

MICHAEL HAMER, ALSO KNOWN AS MICHAEL J. HAMER,
ET AL., DEFENDANTS,
AND ROBERT J. NICHOLSON, RESPONDENT.

SHAPIRO, DICARO & BARAK, LLC, ROCHESTER (AUSTIN T. SHUFELT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (TIMOTHY J. FENNELL OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered May 19, 2016. The order, among other things, denied plaintiff's motion to vacate the foreclosure sale and relieve the bid of third-party purchaser Robert J. Nicholson.

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: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

836

TP 16-02186

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

IN THE MATTER OF FRANS SITAL, 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 (LAURA ETLINGER 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 November 30, 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: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

837

KA 15-00066

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHANIEL J. DOYLE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered April 2, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal contempt in the first degree (Penal Law § 215.51 [c]). Contrary to defendant's contention, the record establishes that his waiver of the right to appeal was knowing, intelligent, and voluntary (*see People v Lopez*, 6 NY3d 248, 256), and we conclude that the valid waiver encompasses his challenge to the severity of the sentence (*see id.* at 255-256; *People v Hidalgo*, 91 NY2d 733, 737; *cf. People v Maracle*, 19 NY3d 925, 928).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

839

KA 16-01034

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERALD D. LASHER, DEFENDANT-APPELLANT.

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

THEODORE A. BRENNER, DEPUTY DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered May 3, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the second degree and attempted 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 his plea of guilty of attempted rape in the second degree (Penal Law §§ 110.00, 130.30 [1]) and attempted sexual abuse in the first degree (§§ 110.00, 130.65 [1]), defendant contends that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence and that the sentence is unduly harsh and severe. We reject those contentions. The plea colloquy and the written waiver of the right to appeal, which was signed and acknowledged by defendant at the time of the plea, establish that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). Defendant's valid waiver of the right to appeal specifically included a waiver of the right to challenge the severity of the sentence, and thus encompasses defendant's contention that the sentence imposed is unduly harsh and severe (*see id.* at 255-256; *People v Hidalgo*, 91 NY2d 733, 737; *cf. People v Maracle*, 19 NY3d 925, 928).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

846

CAF 16-00265

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

IN THE MATTER OF MONIQUE DESIREE KELLY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHAUVONNE SENIOR, RESPONDENT-RESPONDENT.

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

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

MELISSA A. REESE, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered December 14, 2015 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order in which Family Court sua sponte dismissed her petition seeking custody of her son, with respect to whom her parental rights had previously been terminated (*Matter of Mikia H. [Monique K.]*, 78 AD3d 1575, 1576, *lv dismissed in part and denied in part* 16 NY3d 760). It is well settled that " '[n]o appeal lies as of right from an order [that] does not decide a motion made on notice,' " and here the mother has not sought leave to appeal (*Matter of Mary L.R. v Vernon B.*, 48 AD3d 1088, 1088, *lv denied* 10 NY3d 710; *see Sholes v Meagher*, 100 NY2d 333, 335). We therefore dismiss the appeal.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

847

CAF 15-01347

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

IN THE MATTER OF WILLIAM W. KELLY, III,
PETITIONER-RESPONDENT,

V ORDER

MELANIE WACHOWIAK, RESPONDENT-APPELLANT.

IN THE MATTER OF MELANIE WACHOWIAK,
PETITIONER-APPELLANT,

V

WILLIAM W. KELLY, III, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

VENZON LAW FIRM PC, BUFFALO (CATHARINE M. VENZON OF COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

GIOVANNI GENOVESE, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered July 7, 2015 in proceedings pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the subject children to William W. Kelly, III.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Tristyn R. [Jacqueline Z.] [appeal No. 2]*, 144 AD3d 1611, 1612).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

848

CAF 15-01348

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

IN THE MATTER OF MELANIE WACHOWIAK,
PETITIONER-APPELLANT,

V ORDER

WILLIAM W. KELLY, III, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR PETITIONER-APPELLANT.

VENZON LAW FIRM PC, BUFFALO (CATHARINE M. VENZON OF COUNSEL), FOR RESPONDENT-RESPONDENT.

GIOVANNI GENOVESE, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered July 10, 2015 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition of Melanie Wachowiak seeking sole custody of the subject children.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Tristyn R. [Jacqueline Z.] [appeal No. 2]*, 144 AD3d 1611, 1612).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

849

CAF 15-01602

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

IN THE MATTER OF WILLIAM W. KELLY, III,
PETITIONER-RESPONDENT,

V ORDER

MELANIE WACHOWIAK, RESPONDENT-APPELLANT.

IN THE MATTER OF MELANIE WACHOWIAK,
PETITIONER-APPELLANT,

V

WILLIAM W. KELLY, III, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

VENZON LAW FIRM PC, BUFFALO (CATHARINE M. VENZON OF COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

GIOVANNI GENOVESE, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered August 3, 2015 in proceedings pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the subject children to William W. Kelly, III.

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: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

850

CA 16-02328

PRESENT: SMITH, J.P., CENTRA, LINDLEY, AND NEMOYER, JJ.

DECHANTE BARLESTON, PLAINTIFF-RESPONDENT,

V ORDER

CHRISTOPHER J. GIANCARLO, JOHN C. RADEL,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

HURWITZ & FINE, P.C., BUFFALO (JENNIFER J. PHILLIPS OF COUNSEL), FOR DEFENDANT-APPELLANT CHRISTOPHER J. GIANCARLO.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JILL C. TREMBATH OF COUNSEL), FOR DEFENDANT-APPELLANT JOHN C. RADEL.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (KENNETH A. SZYSZKOWSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered September 20, 2016. The order denied the motions of defendants Christopher J. Giancarlo and John C. Radel to bifurcate the trial of this matter.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 24, 2017,

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

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

854

CA 16-02233

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

IN THE MATTER OF DARLENE SIKORSKI-PETRITZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, RESPONDENT-RESPONDENT.

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

HURWITZ & FINE, P.C., BUFFALO (ANN E. EVANKO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered April 7, 2016 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to vacate the decision of respondent, County of Erie (County), to demote her from a position as Counsel-Social Services to a position of Medical Caseworker. Petitioner contends that she was appointed to a permanent or contingent permanent position as Counsel-Social Services and was therefore entitled to the procedural protections of Civil Service Law § 75 prior to her demotion. Supreme Court properly dismissed the petition. The record establishes that the County appointed petitioner to a temporary Counsel-Social Services position, and therefore the protections of Civil Service Law § 75 do not apply (*see Matter of Jones v Westchester County Dept. of Social Servs.*, 228 AD2d 601, 601; *Matter of Ause v Regan*, 59 AD2d 317, 323). Contrary to petitioner's contention, the temporary appointment could exceed three months because the appointment was made for a position that was encumbered by an employee on leave of absence (*see* § 64 [1] [a]). Inasmuch as the Counsel-Social Services position did not become vacant before petitioner's demotion, her temporary appointment to that position could not have ripened into a permanent one (*see generally Matter of Albany Permanent Professional Firefighters Assn., Local 2007, IAFF, AFL-CIO v City of Albany*, 303 AD2d 819, 819-820; *Matter of Wadsworth v Garnsey*, 62 AD2d 1141, 1141, *lv denied* 45 NY2d 706). We have considered petitioner's remaining contentions and conclude that

they are without merit.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

857

CA 16-02374

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

DAVID BOUCHARD, PLAINTIFF-RESPONDENT,

V ORDER

PRIORITY CONTRACTING SERVICES, INC.,
DEFENDANT-APPELLANT,
PYRAMID MANAGEMENT GROUP, LLC, AND PYRAMID
WALDEN COMPANY, L.P., DEFENDANTS-RESPONDENTS.

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

DOLCE PANEPINTO, P.C., BUFFALO (MARC C. PANEPINTO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

RODGERS LAW FIRM, BUFFALO (MARK C. RODGERS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered March 30, 2016. The order, insofar as appealed from, granted that part of the motion of plaintiff seeking partial summary judgment pursuant to Labor Law § 240 (1) against defendant Priority Contracting Services, Inc., and granted the motion of defendants Pyramid Management Group, LLC, and Pyramid Walden Company, L.P., for summary judgment on common law indemnification against defendant Priority Contracting Services, Inc.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 20 and 21, 2017,

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

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

858

TP 16-02321

PRESENT: CARNI, J.P., CURRAN, TROUTMAN, WINSLOW, AND SCUDDER, JJ.

IN THE MATTER OF WELDON INGRAM, 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 (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. LANDERS 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 December 20, 2016) to review determinations. The determinations found, after tier II disciplinary hearings, that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking review of determinations, following tier II disciplinary hearings, that he violated inmate rules 104.13 (7 NYCRR 270.2 [B] [5] [iv] [creating a disturbance]), 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusing direct order]), 113.13 (7 NYCRR 270.2 [B] [14] [iii] [intoxication]), and 181.10 (7 NYCRR 270.2 [B] [26] [i] [noncompliance with hearing disposition]). To the extent that petitioner contends that the determination finding that he violated inmate rules 106.10 and 181.10 is not supported by substantial evidence, we note that his plea of guilty to those violations precludes our review of his contention (*see Matter of Edwards v Fischer*, 87 AD3d 1328, 1329). We further conclude that there is substantial evidence to support the determination with respect to inmate rules 104.13 and 113.13 (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139). Any denials by petitioner with respect to those two violations raised, at most, an issue of credibility for resolution by the Hearing Officer (*see generally Matter of Foster v*

Coughlin, 76 NY2d 964, 966).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

859

KA 15-00098

PRESENT: CARNI, J.P., CURRAN, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL L. PACHECO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered December 22, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree, assault in the first degree, burglary in the first degree (two counts), assault in the second degree and endangering the welfare of a child.

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

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

862

KA 15-01679

PRESENT: CARNI, J.P., CURRAN, TROUTMAN, WINSLOW, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAKUSHA M. MCMORRIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered August 17, 2015. The judgment convicted defendant, upon her plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]). Contrary to defendant's contention, the record establishes that County Court did not conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea (*see People v McCrea*, 140 AD3d 1655, 1655, *lv denied* 28 NY3d 933). The court " 'expressly ascertained from defendant that, as a condition of the plea, [s]he was agreeing to waive [her] right to appeal' " (*id.*), and the court expressly advised defendant that the waiver included any challenge to the severity of the sentence. Defendant is therefore foreclosed from challenging the severity of the negotiated sentence (*see People v Lopez*, 6 NY3d 248, 255-256).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

868

KA 14-01833

PRESENT: CARNI, J.P., CURRAN, TROUTMAN, WINSLOW, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANKLIN TERNOOIS, III, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (PETER G. CHAMBERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTOPHER BOKELMAN, ACTING DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered September 23, 2014. The judgment convicted defendant, upon his plea of guilty, 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 his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [3]), defendant contends that County Court abused its discretion in denying his request to adjudicate him a youthful offender. We reject that contention. " 'The determination . . . whether to grant . . . youthful offender status rests within the sound discretion of the court and depends upon all the attending facts and circumstances of the case' " (*People v Dawson*, 71 AD3d 1490, 1490, *lv denied* 15 NY3d 749). Here, the record reflects that the court considered the relevant facts and circumstances in denying defendant's request. Significantly, the record establishes that defendant twice violated the terms of interim probation that the court imposed between the time of the plea and sentencing (*see People v Lewis*, 128 AD3d 1400, 1401, *lv denied* 25 NY3d 1203; *People v Kocher*, 116 AD3d 1301, 1301-1303). We therefore conclude that the court did not abuse its discretion in denying defendant's request.

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

869

CAF 16-00135

PRESENT: CARNI, J.P., CURRAN, TROUTMAN, WINSLOW, AND SCUDDER, JJ.

IN THE MATTER OF LORI D. HOLMES,
PETITIONER-APPELLANT,

V ORDER

OTIS L. SIMMONS, JR., RESPONDENT-RESPONDENT.

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

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

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

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered December 10, 2015 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that respondent shall have sole legal and physical custody of the subject children.

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

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court

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

890

CA 16-02276

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

TROY S. KIENTZ AND WENDY L. KIENTZ,
CLAIMANTS-RESPONDENTS,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 111676.)

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

RICHARD S. JUDA, JR., BUFFALO, FOR CLAIMANTS-RESPONDENTS.

Appeal from a judgment of the Court of Claims (Michael E. Hudson, J.), entered February 25, 2016. The interlocutory judgment apportioned liability 60% to defendant and 40% to claimant Troy S. Kientz.

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: June 9, 2017

Frances E. Cafarell
Clerk of the Court

MOTION NO. (475/83) KA 17-00807. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LARRY KEVIN RENDELL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed June 9, 2017.)

MOTION NO. (1168/89) KA 17-00476. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V NEWNON A. FLAX, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, CARNI, LINDLEY, AND SCUDDER, JJ. (Filed June 9, 2017.)

MOTION NO. (1576/90) KA 90-01576. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HARRY AYRHART, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND SCUDDER, JJ. (Filed June 9, 2017.)

MOTION NO. (1683/00) KA 99-05091. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TOMAS LEWIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CURRAN, TROUTMAN, AND SCUDDER, JJ. (Filed June 9, 2017.)

MOTION NO. (539/05) KA 02-02566. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT JAMES COLVIN, JR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., PERADOTTO,

NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed June 9, 2017.)

MOTION NO. (796/12) KA 11-00972. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MIGUEL A. JARAMILLO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND CURRAN, JJ. (Filed June 9, 2017.)

MOTION NO. (1325/12) KA 11-01166. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KASIEM WILLIAMS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, CARNI, LINDLEY, AND SCUDDER, JJ. (Filed June 9, 2017.)

MOTION NO. (921/13) KA 09-02629. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARK WOODWORTH, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, LINDLEY, CURRAN, AND SCUDDER, JJ. (Filed June 9, 2017.)

MOTION NO. (540/14) KA 12-01248. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL A. ROSS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, LINDLEY, AND SCUDDER, JJ. (Filed June 9, 2017.)

MOTION NO. (933/14) KA 12-01069. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLARENCE E. SCARVER, ALSO KNOWN AS “C”, DEFENDANT-APPELLANT.

-- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, AND SCUDDER, JJ. (Filed June 9, 2017.)

MOTION NO. (41/17) CA 16-01215. -- TIMOTHY TAGGART, PLAINTIFF-RESPONDENT, V MARGARET FANDEL AND JOHN FANDEL, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ. (Filed June 9, 2017.)

MOTION NO. (131/17) KA 10-00287. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FRANK GARCIA, DEFENDANT-APPELLANT. -- Motion for reargument and reconsideration denied. PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, TROUTMAN, AND SCUDDER, JJ. (Filed June 9, 2017.)

MOTION NO. (142/17) CA 16-00031. -- IN THE MATTER OF EASTBROOKE CONDOMINIUM BY ITS BOARD OF MANAGERS ON BEHALF OF ALL HOMEOWNERS AND BRIGHTON EASTBROOKE HOMEOWNERS, PETITIONER-APPELLANT, V ELAINE AINSWORTH, ASSESSOR, AND BOARD OF ASSESSMENT REVIEW OF TOWN OF BRIGHTON, RESPONDENTS-RESPONDENTS. FOR REVIEW OF A TAX ASSESSMENT UNDER ARTICLE 7 OF THE REAL PROPERTY TAX LAW (PROCEEDING NO. 1.) –- IN THE MATTER OF EASTBROOKE CONDOMINIUM BY ITS BOARD OF MANAGERS ON BEHALF OF ALL UNIT OWNERS, PETITIONER-APPELLANT, V ELAINE AINSWORTH, ASSESSOR, AND BOARD OF ASSESSMENT REVIEW OF TOWN OF BRIGHTON, RESPONDENTS-RESPONDENTS. FOR REVIEW

OF A TAX ASSESSMENT UNDER ARTICLE 7 OF THE REAL PROPERTY TAX LAW (PROCEEDING NO. 2.) –- IN THE MATTER OF EASTBROOKE CONDOMINIUM BY ITS BOARD OF MANAGERS ON BEHALF OF ALL UNIT OWNERS, PETITIONER-APPELLANT, V TOWN OF BRIGHTON BOARD OF ASSESSMENT REVIEW, ASSESSOR OF TOWN OF BRIGHTON AND TOWN OF BRIGHTON, RESPONDENTS-RESPONDENTS. FOR REVIEW OF A TAX ASSESSMENT UNDER ARTICLE 7 OF THE REAL PROPERTY TAX LAW (PROCEEDING NO. 3.) (APPEAL NO. 1.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, TROUTMAN, AND SCUDDER, JJ. (Filed June 9, 2017.)

MOTION NO. (164/17) CA 16-00079. -- ACEA MOSEY, AS ADMINISTRATOR OF THE ESTATE OF LAURA CUMMINGS, DECEASED, PLAINTIFF-APPELLANT, V COUNTY OF ERIE, DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND NEMOYER, JJ. (Filed June 9, 2017.)

MOTION NO. (209/17) CA 16-00194. -- DIPIZIO CONSTRUCTION COMPANY, INC., PLAINTIFF-APPELLANT, AND TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, PLAINTIFF-RESPONDENT, V ERIE CANAL HARBOR DEVELOPMENT CORPORATION, DEFENDANT-RESPONDENT. (ACTION NO. 1.) –- DIPIZIO CONSTRUCTION COMPANY, INC., PLAINTIFF-APPELLANT, AND TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, PLAINTIFF-RESPONDENT, V ERIE CANAL HARBOR DEVELOPMENT CORPORATION, DEFENDANT-RESPONDENT. (ACTION NO. 2.) –- DIPIZIO CONSTRUCTION COMPANY,

INC., PLAINTIFF-APPELLANT, V NEW YORK STATE URBAN DEVELOPMENT CORPORATION, DOING BUSINESS AS EMPIRE STATE DEVELOPMENT, ERIE CANAL HARBOR DEVELOPMENT CORPORATION, SAM HOYT, THOMAS DEE AND MARK E. SMITH, DEFENDANTS-RESPONDENTS. (ACTION NO. 3.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ. (Filed June 9, 2017.)

MOTION NO. (278/17) CA 16-01325. -- EUGENE MARGERUM, JOSEPH FAHEY, TIMOTHY HAZELET, PETER KERTZIE, PETER LOTOCKI, SCOTT SKINNER, THOMAS REDDINGTON, TIMOTHY CASSEL, MATTHEW S. OSINSKI, MARK ABAD, BRAD ARNONE, DAVID DENZ, PLAINTIFFS-RESPONDENTS, ET AL., PLAINTIFF, V CITY OF BUFFALO, CITY OF BUFFALO DEPARTMENT OF FIRE, DEFENDANTS-APPELLANTS, AND LEONARD MATARESE, INDIVIDUALLY AND AS COMMISSIONER OF HUMAN RESOURCES FOR CITY OF BUFFALO, DEFENDANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed June 9, 2017.)

MOTION NO. (368/17) CA 16-00415. -- RONALD L. HAWE, PLAINTIFF-APPELLANT, V TODD DELMAR, INDIVIDUALLY AND AS AN EMPLOYEE OF OSWEGO COUNTY, I.E. OSWEGO COUNTY SHERIFF'S DEPARTMENT, OSWEGO COUNTY SHERIFF'S DEPARTMENT AND COUNTY OF OSWEGO, DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: PERADOTTO, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ. (Filed June 9, 2017.)

MOTION NO. (390/17) CA 16-01345. -- THOMAS P. JOUSMA AND ELLENE PHUFAS-JOUSMA, PLAINTIFFS-RESPONDENTS, V DR. VENKATESWARA R. KOLLI AND KALEIDA HEALTH, DOING BUSINESS AS DEGRAFF MEMORIAL HOSPITAL, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND SCUDDER, JJ. (Filed June 9, 2017.)

MOTION NO. (432/17) CA 16-01070. -- DARELYN CLAUSE, AS ADMINISTRATRIX OF THE ESTATE OF KYLE C. ATKINS, DECEASED, PLAINTIFF-APPELLANT, V ERIE COUNTY MEDICAL CENTER, ET AL., DEFENDANTS, WILLIAM J. FLYNN, JR., M.D. AND JAMES K. FARRY, M.D., DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed June 9, 2017.)

KA 13-00463. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RAYMOND M. STEED, ALSO KNOWN AS JOHN DOE, DEFENDANT-APPELLANT. -- Motion to dismiss granted. Memorandum: The matter is remitted to Monroe County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed June 9, 2017.)

KA 16-01084. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MANUEL L. VALDEZ, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38). (Appeal from a Judgment of the Oswego County Court, Donald E. Todd, J. - Burglary, 3rd Degree). PRESENT: WHALEN, P.J., SMITH, CARNI, CURRAN, AND SCUDDER, JJ. (Filed June 9, 2017.)