SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 16, 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

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CA 16-01222

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

PAUL MARINACCIO, SR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF CLARENCE, DEFENDANT-RESPONDENT.

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

WEBSTER SZANYI LLP, BUFFALO (MICHAEL P. MCCLAREN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered January 14, 2016. The order granted the motion of defendant to dismiss the complaint and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by denying the motion in part and reinstating the first, second, and sixth causes of action, and as modified the order is affirmed without costs.

Memorandum: As we explained in a prior appeal, *Marinaccio v Town of Clarence* (90 AD3d 1599, *revd* 20 NY3d 506, *rearg denied* 21 NY3d 976), following a jury trial, plaintiff was awarded compensatory damages in the amount of $1,642,000 in an action asserting causes of action for, inter alia, trespass and private nuisance, concerning flooding on his property that was caused by water flowing from a subdivision on land adjacent to plaintiff's land. Following the trial, the parties entered into a confidential settlement agreement (agreement), pursuant to which defendant would pay plaintiff $1,200,000, and plaintiff would deed to defendant a 30-foot strip of land along the border of his property for defendant's use in constructing a drainage ditch for the purpose of diverting the storm water from the subdivision into the drainage ditch.

The agreement also contains a release by which plaintiff "irrevocably and unconditionally remises, releases, and forever discharges . . . [defendant] . . . of and from all, and all manner of action and actions, cause and causes of action, suits, . . . damages known or unknown, . . . [and] claims and demands whatsoever, in law or in equity, . . . relating to past, present or future damages related to the ongoing intrusion of storm water to [plaintiff's property], including all claims sounding in negligence, trespass, [and] nuisance

. . . [Plaintiff] expressly releases and waives any and all claims of economic damages of any sort . . . with respect to [his property]," with certain reservations. The agreement further provides that plaintiff "has been fully compensated for all damages to [his property]," and that defendant "shall promptly take such actions as may be deemed necessary to . . . undertake the construction of a drainage ditch or facility within the lands comprising the Drainage Deed . . . If, within four [4] years of the execution of this Agreement, [defendant] fails to obtain all necessary approvals, or if the described work is, in the opinion of [defendant], not economically feasible, the property transferred herein will revert to [plaintiff] . . . The Court in the Action shall retain continuing jurisdiction to hear any and all disputes arising from or related to this Agreement . . . [T]he prevailing party in any such action shall be entitled to recover its costs and reasonable attorneys' fees from the other party."

It is undisputed that plaintiff transferred the property to defendant and that defendant constructed a drainage ditch, which plaintiff alleges is not sufficient to drain the water from the subdivision without flooding his property. Plaintiff commenced the instant action alleging, inter alia, breach of contract, negligence and nuisance. Supreme Court granted defendant's motion pursuant to CPLR 3211 (a) (1), (5) and (7) and dismissed the complaint in its entirety, based upon the release contained in the agreement and the lack of any promise by defendant that the ditch would divert all storm waters from plaintiff's land.

It is well settled that settlement agreements and general releases are "governed by principles of contract law" (*Mangini v McClurg*, 24 NY2d 556, 562; *see Abdulla v Gross*, 124 AD3d 1255, 1257). Viewing the facts as alleged in the first and second causes of action, for breach of contract, in the light most favorable to plaintiff and affording plaintiff all favorable inferences (*see Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63), we conclude that the release does not "evince an intention to encompass the distinct contractual obligations defendant undertook upon which plaintiff's breach of contract causes of action are premised" (*Murray-Gardner Mgt. v Iroquois Gas Transmission Sys.*, 229 AD2d 852, 854), i.e., the breach of the settlement agreement itself. Viewing the facts as alleged in the sixth cause of action, for attorneys' fees, in the light most favorable to plaintiff and affording him all reasonable inferences (*see generally Whitebox Concentrated Convertible Arbitrage Partners, L.P.*, 20 NY3d at 63), we likewise conclude that the court erred in granting defendant's motion with respect to that cause of action. We therefore modify the order accordingly.

We reject plaintiff's contention that the court erred in granting those parts of defendant's motion with respect to the fourth and fifth causes of action, for negligence and nuisance, respectively, inasmuch as those causes of action were encompassed by the release (*see* CPLR 3211 [a] [5]; *see generally Abdulla*, 124 AD3d at 1257), and the third

cause of action, for breach of the covenant of good faith, inasmuch as it is premised on the same allegations and seeks the same relief as the first and second causes of action, for breach of contract (*see DiPizio Constr. Co., Inc. v Niagara Frontier Transp. Auth.*, 107 AD3d 1565, 1566-1567).

All concur except PERADOTTO, J., who dissents in part and votes to affirm in the following memorandum: I respectfully dissent in part inasmuch as I cannot agree with the majority that Supreme Court erred when, in reliance on the release in the parties' agreement, it dismissed plaintiff's first and second causes of action, for breach of contract, and his sixth cause of action, for attorneys' fees. In my view, the release discharges plaintiff's causes of action, and I would thus affirm the order.

Plaintiff brought suit after his property in Clarence sustained flooding and damages due to the development of a subdivision abutting his property (*Marinaccio v Town of Clarence*, 90 AD3d 1599, *revd* 20 NY3d 506, *rearg denied* 21 NY3d 976). Plaintiff obtained a jury verdict in his favor and was awarded $1,642,000 in compensatory damages, jointly and severally, against defendant and the developer for, among other things, the taking of 38.5 acres of his property. On December 20, 2010, while the judgment was still subject to appeal, the parties entered into an agreement settling the action, which included the release. As a condition precedent to defendant's payment of the settlement, plaintiff agreed to deed defendant a strip of his land so that defendant could divert storm water from the subdivision into a drainage ditch that defendant would construct. Plaintiff also reserved the right to drain water from his property into the drainage ditch constructed by defendant. Plaintiff subsequently commenced the instant action alleging, among other things, that defendant breached the agreement by constructing an inadequate drainage ditch, resulting in continued drainage of water onto his property, and by retaining title to the deeded area despite failing to meet the contingency of constructing an adequate ditch. In my view, Supreme Court properly granted defendant's motion to dismiss the complaint.

It is well settled that, "[w]hen a court rules on a CPLR 3211 motion to dismiss, it 'must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiff[] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63). "The motion may be granted if 'documentary evidence utterly refutes [the] plaintiff's factual allegations' . . . , thereby 'conclusively establishing a defense as a matter of law' " (*id.*; *see* CPLR 3211 [a] [1]). "One example of such proof is an unambiguous contract that indisputably undermines the asserted causes of action" (*Whitebox Concentrated Convertible Arbitrage Partners, L.P.*, 20 NY3d at 63), and such a contract may be in the form of a release (*see Darby Group Cos., Inc. v Wulforst Acquisition, LLC*, 130 AD3d 866, 867; *see also* CPLR 3211 [a] [5]).

"[W]here 'a release is unambiguous, the intent of the parties must be ascertained from the plain language of the agreement' " (*Dommer Constr. Corp. v Savarino Constr. Servs. Corp.*, 85 AD3d 1617, 1618; *see Northrup Contr. v Village of Bergen*, 129 AD2d 1002, 1003; *see generally Ellington v EMI Music, Inc.*, 24 NY3d 239, 244-245). "In construing a general release it is appropriate to look to the controversy being settled and the purpose for which the release was executed[,] . . . [and] a release may not be read to cover matters which the parties did not desire or intend to dispose of" (*Bugel v WPS Niagara Props., Inc.*, 19 AD3d 1081, 1082 [internal quotation marks omitted]). Thus, in determining the scope of a release, the document should be viewed "as a whole and in light of its stated purpose" (*id.* at 1083; *see Corzatt v Taylor*, 126 AD3d 1505, 1505-1506).

Plaintiff asserted in his complaint that, "[i]n essence, the purpose of the agreement was to remedy the excessive drainage onto plaintiff's property that resulted from the [subdivision] development," and that "the purpose of the drainage ditch was to transfer drainage from the [subdivision] development to [a road], without the drainage entering plaintiff's property." The agreement, however, refutes that assertion. The stated purpose of the agreement is expressed in the recitals in the third "whereas" clause (*see OneBeacon Ins. Co. v Uniland Partnership of Delaware, L.P.*, 121 AD3d 1548, 1548-1549; *see also* Black's Law Dictionary 1462 [10th ed 2014], recital). The clause provides that, "in order to avoid the cost, expense and uncertainty attendant to any further litigation, the parties wish to settle and resolve all matters related to the [a]ction." Consistent with the purpose of settling the action to avoid costs and uncertainty of further litigation—which included the pending (but not yet perfected) appeal to which plaintiff's judgment was subject at that time—plaintiff agreed to settle for a lump sum payment of $1,200,000 in guaranteed money, and the parties further agreed to enter a stipulation discontinuing the action with prejudice. Indeed, on the same day that plaintiff signed the agreement, the parties signed a stipulation that discontinued all claims with the exception of plaintiff's claim and judgment against the developer for punitive damages. By settling the case, plaintiff avoided the uncertainty of subjecting his judgment to appeal and was able to retain his property despite the fact that the jury had concluded that a taking occurred (*see generally O'Brien v City of Syracuse*, 54 NY2d 353, 357; *Feder v Village of Monroe*, 283 AD2d 548, 549). In fact, defendant agreed to release plaintiff from, among other things, any taking claims it possessed against him.

Plaintiff also agreed to deed defendant a strip of land so that defendant could construct a drainage ditch "for the purpose of diverting storm water from the" subdivision into that ditch. Contrary to plaintiff's allegation, there is no requirement in the agreement that the drainage ditch completely divert all water from the subdivision into the ditch without any drainage entering plaintiff's property. Moreover, there is no dispute that the drainage ditch was constructed, and plaintiff does not make any claim that the requirements of construction that were stated in the agreement were

not fulfilled. Instead, plaintiff now claims that defendant breached the agreement because it constructed an inadequate drainage ditch, resulting in continued drainage of water onto plaintiff's property. Plaintiff, however, was fully compensated for the ongoing intrusion of storm water onto his property, which resulted in a finding that a taking had occurred, and in exchange he forever discharged any claims against defendant, including but not limited to those relating to past, present or future damages related to the ongoing intrusion of storm water onto the property.

More particularly, the release provides in relevant part that plaintiff "irrevocably and unconditionally remises, releases, and forever discharges . . . [defendant] of and from all, and all manner of action and actions, cause and causes of action, suits, . . . damages known or unknown, apparent and not apparent, present or future, . . . [and] claims and demands whatsoever, in law or in equity, . . . including, but not limited to, . . . any and all claims that were or could have been asserted in the [first lawsuit], and . . . including but not limited to all claims, past, present or future, relating to past, present or future damages related to the ongoing intrusion of storm water to [plaintiff's property], including all claims sounding in negligence, trespass, [and] nuisance." The paragraph continues by stating that plaintiff "expressly releases and waives any and all claims of economic damages of any sort, now existing or arising at any point in the future, with respect to [plaintiff's property], reserving only: (1) [a claim by plaintiff—in the event that the land deeded to defendant for construction of the ditch reverts to plaintiff—that an easement claimed by defendant] does not exist and/or is not effective; and (2) the right to bring an equitable claim for injunctive relief only, should [defendant] by means of an artificial drainage system, other than that proposed in paragraphs nine . . . and eleven . . . herein [relating to construction of the drainage ditch], as opposed to natural drainage, cause storm water intrusion onto [plaintiff's property] causing damage thereto."

Contrary to plaintiff's contention, the canon of ejusdem generis does not limit the broad scope of the release. Ejusdem generis is "[a] canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed" (Black's Law Dictionary 631 [10th ed 2014]). As we have explained, "[w]here . . . [a] release . . . contain[s] specific recitals as to the claims being released, and yet conclude[s] with an omnibus clause to the effect that the releasor releases and discharges all claims and demands whatsoever which he [or she] . . . may have against the releasee . . . , the courts have often applied the rule of ejusdem generis, and held that the general words of a release are limited by the recital of a particular claim" (*Camperlino v Bargabos*, 96 AD3d 1582, 1583-1584 [internal quotation marks omitted]).

Here, by contrast, the release does not conclude with an omnibus clause to the effect that plaintiff discharges all claims whatsoever that he has or may have against defendant. The general words of

release come first, indicating an intent to release all claims, and those general words are followed by specific examples that fall within the scope of the general release. Critically, the specific examples are prefaced by the phrase "including but not limited to." Courts have long maintained that "the rule of *ejusdem generis* applies only if the provision in question does not express a contrary intent," and that, because "the phrase 'including, but not limited to' plainly expresses a contrary intent, the doctrine of *ejusdem generis* is inapplicable" to such a provision (*Cooper Distrib. Co., Inc. v Amana Refrig., Inc.*, 63 F3d 262, 280; *see Cintech Indus. Coatings, Inc. v Bennett Indus., Inc.*, 85 F3d 1198, 1202-1203; *Commissioner of Internal Revenue v Oswego Falls Corp.*, 137 F2d 173, 176).

Based on the foregoing, I cannot agree with plaintiff that ejusdem generis applies here and that the parties' inclusion of specific examples of what is included in the general release (e.g., all claims in the first lawsuit and past, present and future claims concerning past, present and future damages related to ongoing intrusion of storm water onto the property) removes from the general release plaintiff's breach of contract claims regarding the alleged failure of the drainage ditch to remediate the ongoing intrusion of storm water onto plaintiff's property. Rather, the contractual language specifies that the general release includes specific types of claims, but is expressly not limited thereby. Similarly, contrary to plaintiff's reliance on the expressio unius maxim, the fact that the specific examples of claims that were encompassed by the release did not include breach of the agreement itself is of no moment inasmuch as the examples are nonexhaustive and do not limit the general release (*see e.g.* Glen Banks, New York Contract Law § 10:13 [28 West's NY Prac Series]; *Society for Advancement of Educ., Inc. v Gannett Co., Inc.*, 1999 WL 33023, *7 [SD NY]).

Moreover, in a separate paragraph acknowledging the release, plaintiff agreed that he "specifically acknowledges that by virtue of the payments set forth herein, he has been fully compensated for all damage to [his property] as well as for his alleged inability to develop the [property] which is the subject of the [first lawsuit] and [plaintiff] recognizes that he is forever barred from making, among others, any such claims against [defendant and the developer] except as provided in paragraph 3, above," i.e., the release clause. Indeed, the release clause does provide certain claims that plaintiff retains, but those specifically enumerated exceptions do not include claims for breach of contract based upon the alleged inadequacy of the drainage ditch in preventing ongoing intrusion of storm water onto his property.

Rather, the only claims reserved in the release clause are (1) a claim regarding an easement that is not applicable here, and (2) "the right to bring an equitable claim for injunctive relief only, should [defendant] by means of an artificial drainage system, other than that proposed in paragraphs nine . . . and eleven . . . herein [relating to construction of the drainage ditch], as opposed to natural drainage, cause storm water intrusion onto [plaintiff's property] causing damage thereto." Thus, the release expressly reserved plaintiff's ability to

seek injunctive relief if defendant caused water intrusion onto the property causing damage thereto by means of an artificial drainage system *other than* the drainage ditch to be constructed as proposed elsewhere in the agreement. In other words, the release reserved specific claims that plaintiff could make, contemplated that a drainage ditch would be constructed pursuant to the agreement, and expressly *excluded* from the reserved claims anything but injunctive relief for water intrusion caused by another artificial drainage system different from the agreed-upon drainage ditch. The release thus did not reserve for plaintiff his current breach of contract claims that defendant constructed an inadequate drainage ditch resulting in continued drainage of water onto plaintiff's property.

In sum, the unambiguous language of the general release governs here, and plaintiff is forever barred from making any claims whatsoever with respect to the ongoing intrusion of storm water onto his property, for which he was already fully compensated (*see generally Matter of Jana-Rock Constr. v New York State Dept. of Transp.*, 267 AD2d 686, 687). The release reserved only certain claims for plaintiff to make against defendant, and his breach of contract claims are not among them.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

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CAF 14-01363

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

IN THE MATTER OF JAYLA A., JALISA A.,
JAVANI A., AND MALACHI K.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, MEMORANDUM AND ORDER
PETITIONER-RESPONDENT;

CHELSEA K., RESPONDENT,
AND ISAAC C., RESPONDENT-APPELLANT.

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

JOSEPH JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered June 30, 2014 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents had neglected the subject children.

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

Memorandum: In these proceedings brought pursuant to Family Court Act article 10, respondent Isaac C., the paramour of the mother of the four subject children, but the father of none of them, appeals from an order of fact-finding determining, inter alia, that he was a "person legally responsible" for the neglect of the children. At the outset, we note that although Family Court subsequently issued a combined order of fact-finding and disposition, and although no appeal has been taken from that order, we have jurisdiction to hear this appeal inasmuch as "[a]n appeal from an intermediate or final order in a case involving abuse or neglect may be taken as of right" (Family Ct Act § 1112 [a]; *see Matter of Christy C. [Roberto C.]*, 77 AD3d 563, 563, *lv denied* 16 NY3d 712; *Matter of Krystal F. [Liza R.]*, 68 AD3d 670, 670).

Contrary to the contention of respondent, we conclude that the court properly determined that he was a "[p]erson legally responsible" for the care of the children and, as such, was a proper party to the child protective proceeding (Family Ct Act § 1012 [g]; *see Matter of Angel R. [Syheid R.]*, 136 AD3d 1041, 1041, *lv denied* 27 NY3d 1045; *Matter of Allyssa O. [Edward N.]*, 132 AD3d 768, 769; *see generally*

Matter of Trenasia J. [Frank J.], 25 NY3d 1001, 1004). We reject respondent's further contention that the court erred in determining that he neglected the children. "[A] party seeking to establish neglect must show, by a preponderance of the evidence . . . , first, that [the] 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* §§ 1012 [f] [i]; 1046 [b] [i]). In reviewing the court's determinations, "we must accord great weight and deference to them, 'including [the court's] drawing of inferences and assessment of credibility,' and we will not disturb those determinations, where, as here, they are supported by the record" (*Matter of Merrick T.*, 55 AD3d 1318, 1319; *see Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401, *lv denied* 21 NY3d 862; *Matter of Shaylee R.*, 13 AD3d 1106, 1106). We also note that the court was entitled to draw the strongest possible inference against respondent as a result of his failure to testify at the fact-finding hearing (*see Matter of Burke H. [Richard H.]*, 117 AD3d 1455, 1455-1456; *see also Matter of Brian S. [Tanya S.]*, 141 AD3d 1145, 1146). We conclude that the evidence adduced at the hearing preponderated in support of the court's finding that the subject children were neglected as a result of the failure of respondent, as a person legally responsible for their care, to exercise a minimum degree of care in supplying the children with adequate food, clothing, shelter, or education, and/or in providing the children with proper supervision or guardianship so as not to unreasonably inflict, allow there to be inflicted, or imminently risk the potential infliction of serious harm upon them (*see* § 1012 [f], [g]; *see also Matter of Mary R.F. [Angela I.]*, 144 AD3d 1493, 1494, *lv denied* 28 NY3d 915; *Brian S.*, 141 AD3d at 1146; *Matter of Ashley B. [Lavern B.]*, 137 AD3d 1696, 1697).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

411

CA 16-01124

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

COUNTY OF JEFFERSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ONONDAGA DEVELOPMENT, LLC, DEFENDANT-APPELLANT.

MCMAHON, KUBLICK & SMITH, P.C., SYRACUSE (JAN S. KUBLICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (TERESA M. BENNETT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered March 25, 2016. The order, among other things, granted plaintiff's motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion seeking partial summary judgment on liability on the third cause of action and summary judgment dismissing the first, second, fifth and seventh counterclaims and the third affirmative defense, and reinstating those counterclaims and that affirmative defense, and as modified the order is affirmed without costs.

Memorandum: In this breach of contract action, defendant appeals from an order that granted the motion of plaintiff, County of Jefferson (County), seeking partial summary judgment on liability on the County's third cause of action, for breach of contract, and for summary judgment dismissing defendant's affirmative defenses and counterclaims. We agree with defendant that Supreme Court erred in granting those parts of the motion with respect to liability on the third cause of action and dismissal of the first, second, fifth and seventh counterclaims and the third affirmative defense. We therefore modify the order accordingly.

In June 2007, the County entered into a "Contract of Purchase and Sale" (contract) with defendant whereby the County would acquire from defendant property needed for a road construction project. In pertinent part, the contract provided that defendant would convey to the County a portion of its property on which a gas station and a trucking depot were located (parcel), and the County would "assemble and convey at closing to [defendant] . . . the abandoned road bed of Fisher Road and the two parcels contiguous to the abandoned road and fronting on NYS Route 12 F as depicted in Schedule 'A' " (assembled

property). Upon execution of the contract, the County was to pay defendant a deposit of $200,000, which the parties agreed was the expected cost of demolishing the gas station and trucking depot and remediating any environmental concerns with the parcel. At closing, the County was to deliver the remaining portion of the purchase price as well as "any other documents required by this contract to be delivered," and defendant was to deliver a deed for the parcel and two temporary easements allowing the County to enter defendant's property adjacent to the parcel while the County was building the new road. Although the contract required that defendant demolish the buildings and remediate the parcel by closing, the parties entered into a license agreement granting defendant use of the parcel for the operation of the gas station until January 2008. The "closing of title pursuant to th[e] contract" was to occur on the first day of October 2007 and, in the event that the closing did not occur before the first day of November 2007, there was a liquidated damages provision.

On October 30, 2007, defendant conveyed the parcel to the County and the County paid the remaining portion of the purchase price. It is undisputed that the County did not deliver title to the assembled property, and that defendant did not provide the County with the required easements. Although defendant demolished the trucking depot, defendant failed to demolish the gas station building or remediate the property after the license agreement expired.

In 2011, the County commenced this action alleging, inter alia, that defendant had breached the contract by failing to complete its obligations before closing. The record on appeal establishes that there were various amendments to the pleadings. The most recent version of the complaint included in the stipulated record on appeal is the amended complaint, which is dated March 13, 2012. The most recent answer included in the stipulated record on appeal is the third amended answer to the second amended complaint. That third amended answer is dated December 5, 2012, and it contains seven counterclaims and eight affirmative defenses.

We note at the outset that many of defendant's contentions concern issues related to Route 57, LLC (Route 57), a separate entity controlled by defendant's principal. Those issues are not properly before us inasmuch as Route 57 is a separate and distinct entity, and defendant does not have standing to assert claims for damages sustained by Route 57 (*see Alexander & Alexander of N.Y. v Fritzen*, 114 AD2d 814, 815, *affd* 68 NY2d 968; *Lyman Rice, Inc. v Albion Mobile Homes, Inc.*, 89 AD3d 1488, 1488-1489). We therefore do not address defendant's contentions related to that separate entity.

We agree with defendant that the court erred in granting those parts of the County's motion seeking partial summary judgment on liability with respect to the third cause of action and summary judgment dismissing the first and second counterclaims. As noted, the most recent version of the complaint included in the record is the amended complaint dated March 13, 2012. Although there is reference in the record to a second amended complaint, that document is not

included in the record and our review is thus limited to the third cause of action as it is asserted in the amended complaint. Although the County submitted evidence establishing as a matter of law that defendant breached the contract by failing to demolish the gas station building or to remediate the parcel before either the closing or the expiration of the license agreement, the County also submitted evidence establishing that it failed to convey the assembled property to defendant at closing, and that it did not make that conveyance until October 2012. It is well settled that "a party who seeks to recover damages from the other party to the contract for its breach must show that he himself is free from fault in respect of performance" (*Rosenthal Co. v Brilliant Silk Mfg. Co., Inc.*, 217 App Div 667, 671). Indeed, one of the essential elements of a cause of action for breach of contract is the performance of its obligations by the party asserting the cause of action for breach (*see Resetarits Constr. Corp. v Elizabeth Pierce Olmsted, M.D. Center for the Visually Impaired* [appeal No. 2], 118 AD3d 1454, 1455; *Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 111 AD3d 1374, 1376, *lv denied* 22 NY3d 864). Contrary to the County's contention, defendant has consistently raised the County's failure to deliver title to the assembled property in its third amended answer to the second amended complaint, in opposition to the County's motion and on this appeal. We thus conclude that defendant may properly rely on that alleged failure by the County in contending that the court erred in awarding summary judgment to the County. Inasmuch as the County's own submissions raise triable issues of fact whether it breached the contract at closing, we conclude that the County failed to establish its entitlement to judgment on liability as a matter of law on the third cause of action as well as summary judgment dismissing the first and second counterclaims insofar as those two counterclaims allege damages sustained by defendant only, and not Route 57 (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Thus, the burden never shifted to defendant to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

For similar reasons, we conclude that the County failed to establish its entitlement to summary judgment dismissing the third affirmative defense, in which defendant asserted that it had substantially complied with the contract at the time of the County's breach. Contrary to the County's contention, although defendant abandoned any contentions that the court erred in dismissing the second and fourth through eighth affirmative defenses by failing to address them in its brief (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984), defendant did not abandon its reliance on the third affirmative defense.

We further agree with defendant that the court erred in granting the County's motion insofar as it sought summary judgment dismissing the fifth counterclaim, seeking damages for inverse condemnation and trespass. The County did not specifically address this counterclaim in the affidavits or evidence submitted in support of the motion and thus did not establish as a matter of law either that it did not encroach upon defendant's property or that any encroachment was permissible (*see generally Zuckerman*, 49 NY2d at 562). Nevertheless,

attached to the motion was the County's reply to defendant's counterclaims as asserted in the third amended answer to the second amended complaint. In that reply, the County contended that the fifth counterclaim was invalid based on defendant's failure to comply with the notice of claim requirements of General Municipal Law §§ 50-e and 50-i and County Law § 52. Assuming without deciding that an issue raised only in a reply pleading and not referenced in the supporting affidavit to which it was attached may be viewed as raising a particular ground for dismissal on the motion for summary judgment, we address the merits of that contention inasmuch as the County's contentions present legal issues that could not have been " 'obviated or cured by factual showings or legal countersteps' in the trial court" (*Oram v Capone*, 206 AD2d 839, 840, quoting *Telaro v Telaro*, 25 NY2d 433, 439, *rearg denied* 26 NY2d 751). On the merits, we conclude that the County's reliance on those statutes is misplaced. "A cause of action sounding in inverse condemnation is not founded in tort, and, therefore, compliance with the notice of claim provisions of General Municipal Law § 50–e [and County Law § 52] is unnecessary" (*Clempner v Town of Southold*, 154 AD2d 421, 425).

To the extent that the County contends for the first time on appeal that the encroachment was permissible under the doctrine of lateral support, that contention is not preserved for our review (*see generally Ciesinski*, 202 AD2d at 985), and does not represent a purely legal issue that could not have been " 'obviated or cured by factual showings or legal countersteps' in the trial court" (*Oram*, 206 AD2d at 840, quoting *Telaro*, 25 NY2d at 439).

We again agree with defendant that the court erred in granting that part of the County's motion for summary judgment dismissing the seventh counterclaim, alleging a breach of contract based on the failure to provide access to defendant's property from Route 12 F. The contract specifically provided that the County would provide defendant with certain assembled property "as depicted in Schedule 'A.' " Schedule A, which was attached to the contract, depicted two separate access points from Route 12 F to the assembled property. There is no dispute that, when the assembled property was finally delivered to defendant, there were no access points from Route 12 F. In its motion and on this appeal, the County does not address this counterclaim in any meaningful way. Inasmuch as the County failed to establish as a matter of law that it was entitled to summary judgment dismissing this counterclaim, the burden never shifted to defendant to raise a triable issue of fact (*see generally Alvarez*, 68 NY2d at 324).

Contrary to defendant's contention, however, the court properly granted the County's motion insofar as it sought summary judgment dismissing the third counterclaim, seeking liquidated damages. The liquidated damages provision of the contract provided for such damages in the event that "the closing of title pursuant to th[e] contract ('Closing')" did not occur before the 1st day of November 2007 due to the fault of the County. The contract does not further define "closing," and the only references to "title" in the contract concern title to the parcel. There is no dispute that the parcel was conveyed to the County on October 30, 2007, but the assembled property

was not conveyed to defendant until years later. Inasmuch as the County established that the liquidated damages provision was implicated only if there was no "closing of title," that the only property for which a closing of title was required was the parcel, and that the parties did in fact close on the title of the parcel in October 2007, we conclude that the County established its entitlement to judgment as a matter of law dismissing this counterclaim. In opposition to the motion, defendant failed to raise a triable issue of fact.

We further conclude that the court properly granted the County's motion insofar as it sought summary judgment dismissing the fourth and sixth counterclaims, which alleged that the County breached the contract with respect to the grading of the new road adjacent to defendant's property. Although defendant contends that the contract is ambiguous with respect to grading issues, we agree with the County that the contract, including Schedule A, is silent with respect thereto. Defendant's alternative contention that the failure of the contract to address grading allows the court to look beyond the four corners of the document to discern the parties' true intent conflicts with the well-settled principle that "silence does not equate to contractual ambiguity" (*Greenfield v Philles Records*, 98 NY2d 562, 573). This is not a case in which "an omission as to a material issue . . . create[s] an ambiguity and allow[s] the use of extrinsic evidence [inasmuch as] the context within the document's four corners [does not] suggest[] that the parties intended a result not expressly stated" (*Hart v Kinney Drugs, Inc.*, 67 AD3d 1154, 1156). Thus, the County met its initial burden of establishing its entitlement to judgment as a matter of law dismissing the fourth and sixth counterclaims, and defendant failed to raise a triable issue of fact. Based on our determination, we do not address the County's additional contentions supporting the dismissal of the fourth and sixth counterclaims.

Finally, we reject defendant's contention that the court erred in granting that part of the County's motion for summary judgment dismissing the first affirmative defense, which alleged that the County waived defendant's performance under the contract by failing to provide title to the assembled property at closing. While the County's failure to perform may preclude the County from asserting causes of action for breach of contract, it does not constitute "the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it" (*City of New York v State of New York*, 40 NY2d 659, 669 [internal quotation marks omitted]).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

499

CAF 16-00305

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

IN THE MATTER OF DESTINY G. AND JAYLIN G.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LARICIA H., RESPONDENT-APPELLANT.

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered February 9, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject children.

It is hereby ORDERED that the order so appealed from is unanimously vacated on the law without costs and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following memorandum: Respondent mother appeals from an order that terminated her parental rights with respect to two of her children. Following an evidentiary hearing, Family Court determined that the mother is presently and for the foreseeable future unable to provide proper and adequate care for her children by reason of her intellectual disability (*see* Social Services Law § 384-b [4] [c]; [6] [b]; *Matter of Joseph A.T.P. [Julia P.]*, 107 AD3d 1534, 1535).

We agree with the mother that the court abused its discretion in denying her counsel's request for a continuance when, due to emotional distress, the mother was unable to appear in the afternoon on the final day of her hearing. The determination whether to grant a request for an adjournment for any purpose is a matter resting within the sound discretion of the trial court (*see Matter of Steven B.*, 6 NY3d 888, 889; *Matter of Latonia W. [Anthony W.]*, 144 AD3d 1692, 1692-1693, *lv denied* 28 NY3d 914; *Matter of Sophia M.G.-K. [Tracy G.-K.]*, 84 AD3d 1746, 1747). Under the circumstances presented here, including that the issue is the termination of parental rights, we conclude that it was an abuse of discretion to deny the mother's request for a continuance. We therefore vacate the order and remit the matter to Family Court to allow the mother to present evidence at

a reopened fact-finding hearing (*see Matter of Joy Cynlinda C.*, 243 AD2d 631, 632; *Matter of Tesema H.*, 227 AD2d 122, 122).

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

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

529

CA 16-01706

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

MICHELLE MARIE PROVENZANO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOE MARK PROVENZANO, DEFENDANT-APPELLANT.

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR DEFENDANT-APPELLANT.

MAUREEN A. PINEAU, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

EDWARD W. RILEY, ATTORNEY FOR THE CHILDREN, BROCKPORT.

Appeal from an order of the Supreme Court, Monroe County (Philip B. Dattilo, Jr., J.H.O.), entered February 19, 2016. The order, inter alia, increased the child support obligation of defendant.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second through fifth, seventh, and ninth ordering paragraphs and, with respect to paragraphs IA and IC of the visitation schedule, ordering that defendant shall have alternating weekend visitation with the children, year-round, with pick-up at 7:30 p.m. on Friday and drop-off at 7:30 p.m. on Sunday, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Plaintiff mother and defendant father are the parents of three minor children. The parties divorced in 2013, and the divorce judgment incorporated a voluntary agreement concerning, inter alia, child custody, visitation, and support. With respect to child custody and visitation, the parties agreed to joint custody and to a visitation schedule pursuant to which the father had the children from 7:30 a.m. on Tuesdays until 7:30 a.m. on Thursdays, as well as overnight visitation on Mondays and Fridays if the father was able to pick the children up before 7:00 p.m. on those evenings. With respect to child support, the parties agreed to opt out of the requirements of the Child Support Standards Act (CSSA) in favor of a provision requiring the father to pay the mother $900 per month. In addition, the father and the mother agreed to split all of the children's other expenses equally. The parties' agreement also contained an attorney's fees provision, which stated that, if either party had to seek judicial intervention to enforce the agreement, the party who had failed to pay a monetary amount owing under the agreement would be responsible for the other party's attorney's fees, costs, and disbursements in securing reimbursement

for such amount owing.

In November 2014, by order to show cause and supporting affidavits, the mother sought sole custody of the children, an increase in the father's child support obligation to comport with the CSSA, and a money judgment for certain expenses that the father had not paid. The mother also sought attorney's fees pursuant to the provision in the parties' agreement. Following a hearing by a judicial hearing officer, Supreme Court denied the mother's request for sole custody but modified the visitation schedule, awarded the mother $1,914.57 for unpaid expenses, and increased the father's child support obligation to comport with the CSSA. The court also awarded the mother $11,336.94 for attorney's fees, costs, and disbursements.

We conclude, first, that the court erred in increasing the father's child support obligation, and we therefore modify the order accordingly. A court "may modify an order of child support, including an order incorporating without merging an agreement or stipulation of the parties, upon a showing of a substantial change in circumstances" (Domestic Relations Law § 236 [B] [9] [b] [2] [i]; *see Matter of Brink v Brink*, 147 AD3d 1443, 1444). Here, the mother failed to demonstrate a substantial change in circumstances warranting an upward modification of child support (*see Mancuso v Mancuso*, 134 AD3d 1421, 1421-1422). In her affidavit supporting her request for increased child support and during her hearing testimony, the mother stated only that the father failed to pay his share of the expenses for the children's extracurricular activities. She admitted during her hearing testimony, however, that the children's basic needs are being met. Inasmuch as the mother's remedy for the father's failure to pay his share of the expenses is to seek enforcement of the agreement, the court erred in increasing the father's child support obligation as a substitute for that relief (*see generally Matter of Covington v Boyle*, 127 AD3d 1393, 1394).

The court's determination that a modification of the visitation schedule is in the children's best interests is supported by a sound and substantial basis in the record (*see generally Sitts v Sitts*, 74 AD3d 1722, 1723). The father's constantly changing work schedule results in his inability to see the children for visitation on certain days and has created animosity between the parties. Thus, the court's new schedule providing for visitation with the father on alternating weekends, instead of Mondays and Fridays, is in the children's best interests (*see Matter of Murphy v Wells*, 103 AD3d 1092, 1093, *lv denied* 21 NY3d 854; *Matter of Vasquez v Barfield*, 81 AD3d 1398, 1399). We agree with the father, however, that the court's order is ambiguous regarding the timing of his weekend visitation. We therefore further modify the order to clarify that the father will pick up the children at 7:30 p.m. on Fridays, and drop them off at 7:30 p.m. on Sundays, on alternating weekends, year-round.

Lastly, we agree with the father that the court abused its discretion in awarding the mother $11,336.94 in attorney's fees, costs, and disbursements, and we therefore further modify the order accordingly. The father was not provided a meaningful opportunity to

object to, or request a hearing on, the mother's attorney's affirmation requesting fees. Further, inasmuch as the majority of the hearing was spent on the mother's request for sole custody, which the court denied, we conclude that the sum awarded was excessive. That is especially true in light of the fact that the mother sought the attorney's fees under the provision of the parties' agreement providing for reimbursement of expenses sought under that agreement. We therefore remit the matter to Supreme Court for a determination of reasonable attorney's fees, costs, and disbursements, in accordance with the parties' agreement, after the father has been afforded an opportunity to oppose the application.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

632

KA 13-00943

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NELSON CASTILLO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, THE LAW OFFICE OF GUY A. TALIA (GUY A. TALIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 27, 2013. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the first degree (five counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of five counts of criminal contempt in the first degree (Penal Law § 215.51 [c]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support his conviction inasmuch as the ground advanced for defendant's trial motion for an order of dismissal was different than that now advanced on appeal (*see People v Kelly*, 79 AD3d 1642, 1642, *lv denied* 16 NY3d 832; *see also People v Gray*, 86 NY2d 10, 19; *People v Nuffer*, 70 AD3d 1299, 1299). In any event, we reject defendant's contention. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to support the conviction (*see People v Bleakley*, 69 NY2d 490, 495).

Defendant further contends that a special information setting forth a prior conviction of criminal contempt in the second degree could not serve to establish a predicate conviction because it references an incorrect Penal Law provision for that crime. We note, however, that defendant never objected to the irregularity, and thus his contention is not preserved for our review (*see* CPL 470.05 [2]). In any event, we further note that the special information refers to the correct name of the crime, thereby establishing that the error is "akin to a mere misnomer in the designation of the crime charged, which does not create a jurisdictional defect" (*People v Bishop*, 115

AD3d 1243, 1244, *lv denied* 23 NY3d 1018, *reconsideration denied* 24 NY3d 1082 [internal quotation marks omitted]). Moreover, defendant admitted in Supreme Court that "[he was] in fact the same person who was previously convicted of criminal contempt in the second degree on April 7, 2010 in Greece," which eliminated any possible confusion.

Defendant's contention that the court erred in allowing proof of the predicate conviction in violation of CPL 200.60 is unpreserved for our review (*see People v Anderson*, 114 AD3d 1083, 1086, *lv denied* 22 NY3d 1196), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We further conclude that any error in the court's *Molineux* and *Sandoval* rulings is harmless inasmuch as the evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the error (*see People v Arafet*, 13 NY3d 460, 467; *People v Grant*, 7 NY3d 421, 424-425).

Defendant failed to preserve for our review all but one of his present claims with respect to alleged instances of prosecutorial misconduct (*see* CPL 470.05 [2]) and, in any event, we conclude that "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Resto*, 147 AD3d 1331, 1333, *lv denied* ___ NY3d ___ [Apr. 28, 2017] [internal quotation marks omitted]).

Defendant's contention that the order of protection issued at sentencing lacked a sufficient rationale and was not issued in accordance with procedures mandated under the Criminal Procedure Law is unpreserved for our review. Defendant "failed to challenge the issuance of the order of protection at sentencing or to seek vacatur of the final order of protection" (*People v Lewis*, 125 AD3d 1462, 1462, *lv denied* 25 NY3d 1074). We decline to reach that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Although we have broad power to modify a sentence that is unduly harsh and severe, even if the sentence falls within the permissible statutory range (*see* CPL 470.15 [6] [b]; *see also People v Smart*, 100 AD3d 1473, 1475, *affd* 23 NY3d 213; *People v Delgado*, 80 NY2d 780, 783; *People v Woods*, 142 AD3d 1356, 1358-1359), we see no reason to do so in this case.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

643

CA 15-02142

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

IN THE MATTER OF AN APPLICATION FOR A SUBSEQUENT RETENTION ORDER PURSUANT TO CPL 330.20 IN RELATION TO S.J.

MEMORANDUM AND ORDER

LAURENCE GUTTMACHER, M.D., CLINICAL DIRECTOR OF THE ROCHESTER PSYCHIATRIC CENTER, PETITIONER-APPELLANT,

V

S.J., RESPONDENT-RESPONDENT.

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

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (DANIELLE C. WILD OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Monroe County Court (Vincent M. Dinolfo, J.), entered December 23, 2015 in a proceeding pursuant to CPL 330.20. The order, among other things, denied petitioner's application for a subsequent retention order and directed the immediate release of respondent from custody.

It is hereby ORDERED that the order so appealed from is unanimously vacated on the law without costs and the matter is remitted to Monroe County Court for a hearing pursuant to CPL 330.20 (9).

Memorandum: In a proceeding pursuant to CPL 330.20, petitioner appeals, by permission of this Court, from an order that, without a hearing, released and discharged respondent, hereafter referred to as defendant (*see* CPL 330.20), from the care and custody of the New York State Office of Mental Health (OMH).

In 2007, after being indicted for assault, defendant entered a plea of not responsible by reason of mental disease or defect (*see* Penal Law § 40.15), and he was subsequently confined to a secure facility for treatment (*see* CPL 330.20 [1] [c]; [6]). Although originally determined to suffer from a "dangerous mental disorder," defendant progressed in treatment to the point where he was transferred to a nonsecure psychiatric facility. Petitioner nevertheless contends that defendant remains "[m]entally ill" and in

need of "care and treatment as a patient, in the in-patient services of a psychiatric center under the jurisdiction of the state office of mental health" (CPL 330.20 [1] [d]). As a result, petitioner commenced this proceeding seeking a "[s]ubsequent retention order" (CPL 330.20 [1] [i]). In support of the application, petitioner submitted, inter alia, an appropriate affidavit from a psychiatric examiner in accordance with CPL 330.20 (20). Defendant demanded a hearing pursuant to CPL 330.20 (9), but he did not submit any affidavits in opposition to the application.

Following a conference, County Court issued a temporary order of retention on consent, which provided defendant with a period of unescorted furloughs (*see* CPL 330.20 [1] [k]). The court otherwise preserved all rights of the parties and stated its intention of "setting a hearing of the [OMH's] application for a [s]ubsequent [r]etention [o]rder pursuant to CPL 330.20." After the expiration of the agreed-upon furlough period, the parties appeared before the court, and the court summarily, i.e., without conducting an evidentiary hearing and over petitioner's objection to that omission, issued a release order that, inter alia, provided for defendant's immediate release, directed that defendant "shall be discharged from further supervision by the Commissioner of Mental Health," and forthwith terminated such supervision. We note at this juncture that, under the circumstances presented, defendant correctly concedes that the provision in the release order discharging him from further supervision by the Commissioner of Mental Health is improper, and we therefore vacate that provision.

Petitioner contends that the court erred in issuing a release order without conducting an evidentiary hearing and in failing to issue an order of conditions therewith (*see* CPL 330.20 [12]). We agree and therefore vacate the remainder of the release order.

Before issuing a release order, the court must conduct a hearing to "determine the defendant's present mental condition" (CPL 330.20 [12]). Here, the undisputed submissions before the court in support of petitioner's application for a subsequent retention order demonstrated that defendant remained "mentally ill" as defined in CPL 330.20 (1) (d) and in need of in-patient treatment. Nonetheless, without taking any testimony or receiving any evidence, the court issued a release order. That, itself, was error. Moreover, before issuing a release order, the court must "find[] that the defendant does not have a dangerous mental disorder and is not mentally ill" (CPL 330.20 [12]; *see Matter of Ramon M.*, 294 AD2d 59, 63, *lv dismissed* 98 NY2d 727). Here, we agree with petitioner that the court further erred in failing to make any finding on that issue.

Even assuming, arguendo, that the release order was properly issued, we further conclude, as petitioner correctly contends, that the court erred in failing to issue therewith an order of conditions which, inter alia, "shall incorporate a written service plan prepared by a psychiatrist familiar with the defendant's case history and approved by the court" (CPL 330.20 [12]).

In light of the foregoing analysis and our vacatur of the release order, we remit the matter to County Court for the requisite hearing pursuant to CPL 330.20 (9).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

655

KA 15-00325

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDUARDO BURTES, DEFENDANT-APPELLANT.

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

VALERIE G. GARDNER, DISTRICT ATTORNEY, PENN YAN (DAVID G. MASHEWSKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered February 3, 2015. 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]). Contrary to defendant's contention, we conclude that the record establishes that County Court "conducted an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Davis*, 129 AD3d 1613, 1613, *lv denied* 26 NY3d 966 [internal quotation marks omitted]), and that "[t]he 'plea colloquy, together with the written waiver of the right to appeal, adequately apprised defendant that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Williams*, 132 AD3d 1291, 1291, *lv denied* 26 NY3d 1151; *see People v Lopez*, 6 NY3d 248, 256). Contrary to defendant's further contention, the court "was not required to specify during the colloquy which specific claims survive the waiver of the right to appeal" (*People v Rodriguez*, 93 AD3d 1334, 1335, *lv denied* 19 NY3d 966).

Defendant's contention that "his plea was not knowing, intelligent and voluntary 'because he did not recite the underlying facts of the crime but simply replied to [the court's] questions with monosyllabic responses is actually a challenge to the factual sufficiency of the plea allocution,' which is encompassed by the valid waiver of the right to appeal" (*People v Simcoe*, 74 AD3d 1858, 1859, *lv denied* 15 NY3d 778). Defendant's further contention that his plea

was not knowing, intelligent and voluntary because the court was unclear in reciting the value of the stolen property "is actually an additional challenge to the factual sufficiency of the plea allocution, and that challenge also does not survive his valid waiver of the right to appeal" (*People v Daniels*, 59 AD3d 943, 943, *lv denied* 12 NY3d 852; *see People v Copp*, 78 AD3d 1548, 1549, *lv denied* 16 NY3d 797). In addition, defendant contends that his plea was involuntary because he stated that he was dependent on narcotic pain medication and expressed uncertainty about his understanding of the proceedings, and the court failed to conduct a sufficient inquiry to ensure that the plea was voluntary. Although that contention survives the waiver of the right to appeal, defendant failed to preserve his contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Feliz*, 70 AD3d 1355, 1356, *lv denied* 14 NY3d 887; *People v Brown*, 305 AD2d 1068, 1068-1069, *lv denied* 100 NY2d 579). In any event, that contention lacks merit. The record establishes that the court conducted a sufficient inquiry to ensure that the plea was voluntary, and defendant responded that he had not taken any narcotic pain medication for nearly two weeks prior to the plea and that he understood the proceedings (*see People v Rosado*, 70 AD3d 1315, 1316, *lv denied* 14 NY3d 892; *People v Zulian*, 68 AD3d 1731, 1732, *lv denied* 14 NY3d 894).

Finally, defendant's valid waiver of the right to appeal encompasses his challenges to the court's suppression ruling (*see People v Sanders*, 25 NY3d 337, 342; *People v Kemp*, 94 NY2d 831, 833), and to the severity of his sentence (*see Lopez*, 6 NY3d at 255-256; *Davis*, 129 AD3d at 1615; *cf. People v Maracle*, 19 NY3d 925, 928).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

671

CA 16-00902

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

DAVID G. HARRIS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WARD GREENBERG HELLER & REIDY LLP, TONY SEARS, THOMAS S. D'ANTONIO, SYRACUSE UNIVERSITY, NANCY CANTOR, ERIC SPINA, MELVIN STITH, RANDAL ELDER, SUSAN ALBRING AND BRIAN DEJOSEPH, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

DAVID G. HARRIS, PLAINTIFF-APPELLANT PRO SE.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (HAROLD A. KURLAND OF COUNSEL), FOR DEFENDANTS-RESPONDENTS WARD GREENBERG HELLER & REIDY LLP, TONY SEARS, AND THOMAS S. D'ANTONIO.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (TONY R. SEARS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS SYRACUSE UNIVERSITY, NANCY CANTOR, ERIC SPINA, MELVIN STITH, RANDAL ELDER, AND SUSAN ALBRING.

JOHN W. MCCONNELL, OFFICE OF COURT ADMINISTRATION, ALBANY (JOHN J. SULLIVAN OF COUNSEL), FOR DEFENDANT-RESPONDENT BRIAN DEJOSEPH.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered February 1, 2016. The order granted the motions of defendants to dismiss the supplemental complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and defendants' motions are denied.

Memorandum: Plaintiff commenced this action asserting various causes of action arising out of prior litigation. Prior to answering, defendant Brian DeJoseph moved pursuant to CPLR 3211 to dismiss the supplemental complaint against him, and defendants Ward Greenberg Heller & Reidy LLP, Tony Sears, and Thomas S. D'Antonio (collectively, attorney defendants) and defendants Syracuse University, Nancy Cantor, Eric Spina, Melvin Stith, Randal Elder and Susan Albring (collectively, university defendants) moved separately to dismiss the supplemental complaint against them pursuant to CPLR 3211 and for sanctions. Prior to the return date on the motions, plaintiff filed voluntary notices of discontinuance pursuant to CPLR 3217 (a) (1) with respect to all defendants. In appeal No. 1, plaintiff appeals from an

order in which Supreme Court, inter alia, determined that plaintiff's voluntary discontinuance was untimely and granted the relief sought in defendants' respective motions. In appeal No. 2, plaintiff appeals from an order that determined the amount of monetary sanctions against him.

Addressing first the order in appeal No. 1, we conclude that the court erred in determining that plaintiff's notices of discontinuance were untimely. When interpreting a statute, " '[t]he starting point is always to look to the [statutory] language itself' " (*Pultz v Economakis*, 10 NY3d 542, 547). CPLR 3217 provides, in relevant part, that "[a]ny party asserting a claim may discontinue it without an order . . . by serving upon all parties to the action a notice of discontinuance at any time *before a responsive pleading* is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court" (CPLR 3217 [a] [1] [emphasis added]). Thus, the statute provides a plaintiff with "an 'absolute and unconditional' right to discontinue an action prior to the service of a responsive pleading" (*Minkow v Metelka*, 46 AD3d 864, 864). This method of discontinuing an action requires no intervention from the court (*see McMahon v McMahon*, 279 AD2d 346, 348; *Chandler v Chandler*, 108 AD2d 1035, 1036).

We conclude that the notices of discontinuance were not untimely because a motion to dismiss pursuant to CPLR 3211 is not a "responsive pleading" for purposes of CPLR 3217 (a) (1). A motion pursuant to CPLR 3211 does not fall within the meaning of a "pleading" as defined by CPLR 3011. Rather, a "motion" is defined in the CPLR as "an application for an order" (CPLR 2211). Indeed, the terms "responsive pleading" and "motion to dismiss pursuant to CPLR 3211" are not used interchangeably in the CPLR but, rather, are treated as distinct, separate items. For instance, CPLR 3211 (d) provides that, under certain circumstances, "the court may deny the [CPLR 3211] motion, allowing the moving party to assert the objection in his *responsive pleading*" ([emphasis added]). Likewise, CPLR 3211 (e) provides that, "[a]t any time before service of the responsive pleading is required, a party may move on one or more grounds set forth in [CPLR 3211 (a)]." It is clear from the language used throughout the CPLR that the Legislature did not intend a CPLR 3211 motion to be considered a "responsive pleading."

The legislative history of CPLR 3217 supports our interpretation of the statute. Under the common law, a plaintiff had an absolute right to discontinue an action at any time before the jury rendered a verdict (*see Schintzuis v Lackawanna Steel Co.*, 224 NY 226, 231). Rule 301 of the Rules of Civil Practice superseded the common law and set forth a procedure based, in part, on rule 41 of the Federal Rules of Civil Procedure, which prohibited discontinuances as of right after an answer (*see* First Preliminary Rep of Advisory Comm on Prac and Pro, 1957 NY Legis Doc No. 6 [b] at 104). Upon the enactment of the CPLR, the relevant rule utilized the term "responsive pleading" rather than "answer" (*see* CPLR 3217 [a] [former (1)] [as added by L 1962, ch 308]). The Advisory Committee on Practice and Procedure noted that

the court has the "power to impose terms and conditions, *except* if the parties stipulate or the discontinuance comes within the limited period specified in subdivision (a) (1)" (First Preliminary Rep of Advisory Comm on Prac and Pro, 1957 NY Legis Doc No. 6 [b] at 104). The language of the newly enacted CPLR 3217 provided a voluntary discontinuance without an order "by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or within twenty days after service of the pleading asserting the claim, whichever is earlier, and filing the notice with proof of service with the clerk of the court" (CPLR 3217 [a] [former (1)] [as added by L 1962, ch 308]). Thus, the voluntary discontinuance upon notice could only be served, at the very latest, 20 days after the complaint.

In 2011, the Legislature amended the statute by removing the "whichever is earlier" clause and limiting the requirement that a voluntary discontinuance occur within 20 days of service of the pleading to the situation in which the pleading for the claim does not require a response (*see* L 2011, ch 473, § 4, eff Jan. 1, 2012). The legislative history of that amendment provides that "the change would give maximum flexibility to parties who may want to settle claims very early in the litigation process" (Senate Introducer Mem in Support, Bill Jacket, L 2011, ch 473 at 7), and would "bring the CPLR into line with" Federal Rules of Civil Procedure rule 41, which allows voluntary discontinuance of an action up until an answer is served (Senate Introducer Mem in Support, Bill Jacket, L 2011, ch 473 at 7). Thus, the legislative change provided that, if a responsive pleading is required or demanded, a plaintiff has an absolute right to discontinue an action voluntarily until a responsive pleading is served.

Based on the statute's language and the legislative history, we conclude that a determination that a motion to dismiss is a responsive pleading is contrary to the statute. Moreover, if the Legislature intended for a motion to dismiss to defeat a plaintiff's absolute right to serve a notice of discontinuance, it could easily have said so. Thus, in appeal No. 1, we conclude that plaintiff's notices of discontinuance were timely, and we therefore reverse the order therein.

With respect to appeal No. 2, because plaintiff's voluntary notices of discontinuance were timely, the action was discontinued and "it is as if it had never been; everything done in the action is annulled and all . . . order[s] in the case are nullified" (*Newman v Newman*, 245 AD2d 353, 354). Thus, the order in appeal No. 2 is a nullity and plaintiff's appeal from that order is academic.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

672

CA 16-01567

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

DAVID G. HARRIS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WARD GREENBERG HELLER & REIDY LLP, TONY SEARS, THOMAS S. D'ANTONIO, SYRACUSE UNIVERSITY, NANCY CANTOR, ERIC SPINA, MELVIN STITH, RANDAL ELDER, SUSAN ALBRING AND BRIAN DEJOSEPH, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

DAVID G. HARRIS, PLAINTIFF-APPELLANT PRO SE.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (HAROLD A. KURLAND OF COUNSEL), FOR DEFENDANTS-RESPONDENTS WARD GREENBERG HELLER & REIDY LLP, TONY SEARS, AND THOMAS S. D'ANTONIO.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (TONY R. SEARS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS SYRACUSE UNIVERSITY, NANCY CANTOR, ERIC SPINA, MELVIN STITH, RANDAL ELDER, AND SUSAN ALBRING.

JOHN W. MCCONNELL, OFFICE OF COURT ADMINISTRATION, ALBANY (JOHN J. SULLIVAN OF COUNSEL), FOR DEFENDANT-RESPONDENT BRIAN DEJOSEPH.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered July 28, 2016. The order directed plaintiff to pay attorneys fees.

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

Same memorandum as in *Harris v Ward Greenberg Heller & Reidy LLP* ([appeal No. 1] ___ AD3d ___ [June 16, 2017]).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

687

CAF 15-01245

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

IN THE MATTER OF KATRINA V. DESHOTEL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MARK A. MANDILE, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

PRO BONO APPEALS PROGRAM, ALBANY, HANCOCK ESTABROOK, LLP, SYRACUSE (JAMES P. YOUNGS OF COUNSEL), FOR PETITIONER-APPELLANT.

TERRENCE C. BROWN-STEINER, EAST ROCHESTER, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered June 30, 2015 in a proceeding pursuant to Family Court Act article 4. The order denied petitioner's objection to orders issued by the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the objection in part and reinstating the cross petition of Katrina V. Deshotel for a downward modification of child support and as modified the order is affirmed without costs and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: Katrina V. Deshotel (mother), the petitioner in appeal No. 1 and the respondent in appeal No. 2, appeals from an order in appeal No. 1 that, inter alia, denied her objection to four separate orders issued by a support magistrate. In those four orders, the Support Magistrate denied the mother's motion for recusal, dismissed the violation petition of Mark A. Mandile (father), the respondent in appeal No. 1 and the petitioner in appeal No. 2, denied the mother's motion "to reduce or 'cap' arrears" and dismissed the mother's cross petition for a downward modification of child support.

In appeal No. 2, the mother appeals from an order, issued after a remittal from this Court (*Matter of Mandile v Deshotel*, 136 AD3d 1379), that denied the mother's objections to the Support Magistrate's denial of her cross petition for a downward modification of child support. The cross petition in appeal No. 1 was filed while the prior appeal in appeal No. 2 was pending.

Addressing first appeal No. 2, we conclude that Family Court did not err in imputing income to the mother in denying her objections to the denial of her cross petition for a downward modification of child

support. "A court need not rely upon a party's own account of his or her finances, but may impute income based upon the party's past income or demonstrated future potential earnings . . . The court may impute income to a party based on his or her employment history, future earning capacity, educational background, or money received from friends and relatives . . . [In addition, a court] may properly impute income in calculating a support obligation where [it] finds that a party's account of his or her finances is not credible or is suspect" (*Matter of Rohme v Burns*, 92 AD3d 946, 947). In our view, the record supports the determination that the mother "has access to, and receives, financial support from" her paramour, with whom she resides (*id.*; *see Matter of Collins v Collins*, 241 AD2d 725, 727, *appeal dismissed and lv denied* 91 NY2d 829).

Contrary to the mother's contention in appeal Nos. 1 and 2, the court did not err in failing to impute income to the father when addressing the mother's initial burden on her cross petitions for a downward modification of child support. It is well settled that "[a] party seeking a downward modification of his or her child support obligation must establish a substantial change in circumstances" (*Matter of Gray v Gray*, 52 AD3d 1287, 1288, *lv denied* 11 NY3d 706). In the mother's cross petitions, the mother alleged that the change in circumstances was a reduction in her income level. Thus, the father's income or imputed income would have become relevant only if the mother met her initial burden of establishing a reduction in her income. "The Support Magistrate was not bound by the account provided by [the mother] of [her] own finances . . . [, and] was therefore entitled to impute income to [the mother] from [support provided by her paramour]" in determining whether the mother had established a substantial change in circumstances (*Matter of Todd R.W. v Gail A.W.*, 38 AD3d 1181, 1182; *see* Family Ct Act § 413 [1] [b] [5] [iv] [D]).

We reject the mother's contention in appeal No. 1 that the Support Magistrate was biased and had prejudged her cross petition. " 'Absent a legal disqualification under Judiciary Law § 14, which is not at issue here, [the Support Magistrate] is the sole arbiter of recusal, and his or her decision, which lies within the personal conscience of the [Support Magistrate], will not be disturbed absent an abuse of discretion' " (*Matter of Barney v Van Auken*, 97 AD3d 959, 960, *lv denied* 20 NY3d 856, *rearg denied* 20 NY3d 1083). Here, we perceive no such abuse of discretion. To the extent that the mother contends that the Support Magistrate improperly assisted the father in examination of the mother, that contention is not preserved for our review (*see Matter of Reinhardt v Hardison*, 122 AD3d 1448, 1448-1449), and the record does not establish that the Support Magistrate crossed the line between judge and advocate (*see generally Matter of Cadle v Hill*, 23 AD3d 652, 653).

We conclude in appeal No. 1, however, that the Support Magistrate erred in dismissing the mother's cross petition for a downward modification of child support. The sole justification for that dismissal was the mother's failure to provide financial disclosure from her paramour, a nonparty, who had filed an affidavit stating that

he refused to provide financial disclosure to the court. "While certain penalties or sanctions may be appropriate for the individual conduct of [the mother] . . . , it is apparent that the actions of a nonparty weighed heavily in the decision to invoke the 'ultimate penalty' " (*Fox v Fox*, 9 AD3d 549, 550). Under the circumstances of this case, we conclude that the court erred in dismissing the cross petition based on a nonparty's refusal to disclose financial information voluntarily (*see id.*; *see also Matter of Anthony S. v Monique T.B.*, 148 AD3d 596, 597). We therefore modify the order in appeal No. 1 by granting the mother's objection in part and reinstating the mother's cross petition for a downward modification of child support, and we remit the matter to Family Court for a new hearing on the cross petition.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

688

CAF 16-00384

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

IN THE MATTER OF MARK A. MANDILE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KATRINA V. DESHOTEL, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

TERRENCE C. BROWN-STEINER, EAST ROCHESTER, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered February 24, 2016 in a proceeding pursuant to Family Court Act article 4. The order denied respondent's objections to an order of the Support Magistrate.

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

Same memorandum as in *Matter of Deshotel v Mandile* ([appeal No. 1] ___ AD3d ___ [June 16, 2017]).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

696

CA 17-00099

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

DALLAS M. GROVE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CORNELL UNIVERSITY, SKANSKA USA BUILDING, INC.,
DEFENDANTS-RESPONDENTS-APPELLANTS,
SKYWORKS EQUIPMENT LEASING, LLC, SKYWORKS, LLC,
AND JLG INDUSTRIES, INC.,
DEFENDANTS-APPELLANTS-RESPONDENTS.

BARCLAY DAMON, LLP, BUFFALO (DENNIS R. MCCOY OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS SKYWORKS EQUIPMENT LEASING, LLC, AND SKYWORKS, LLC.

COLUCCI & GALLAHER, P.C., BUFFALO (MARYBETH P. MANTHARAM OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT JLG INDUSTRIES, INC.

HURWITZ & FINE, P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

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

Appeals and cross appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered August 2, 2016. The order, among other things, denied the motion of defendants Skyworks Equipment Leasing, LLC and Skyworks, LLC for summary judgment dismissing the complaint and cross claims against them, and granted the motion of defendant JLG Industries, Inc. for leave to file cross claims against all defendants.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendants Skyworks Equipment Leasing, LLC and Skyworks, LLC, dismissing the complaint and cross claims against them and denying that part of the motion of defendant JLG Industries, Inc. seeking leave to file a cross claim for contribution against those defendants, and as modified the order is affirmed without costs.

Memorandum: Plaintiff was injured when he fell from an elevated boom lift that he was using to install windows in a building under construction at defendant Cornell University (Cornell). At the time of the accident, plaintiff was employed as a glazier by a subcontractor hired by defendant Skanska USA Building, Inc. (Skanska),

the general contractor on the construction project. The elevated boom lift was designed and manufactured by defendant JLG Industries, Inc. (JLG) and leased to plaintiff's employer by defendants Skyworks Equipment Leasing, LLC, and Skyworks, LLC (collectively, Skyworks defendants).

Plaintiff originally commenced an action in Supreme Court, Tompkins County (Mulvey, J.), against only Cornell and Skanska, alleging common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). That court denied plaintiff's motion for partial summary judgment on Labor Law § 240 (1) liability and granted the cross motion of Cornell and Skanska seeking summary judgment dismissing that claim. On appeal, the Third Department affirmed the order (*Grove v Cornell Univ.*, 75 AD3d 718), but the Court of Appeals thereafter modified the Third Department's order by denying the cross motion and reinstating the Labor Law § 240 (1) claim (*Grove v Cornell Univ.*, 17 NY3d 875). While the appeal to the Court of Appeals was pending, plaintiff, Cornell and Skanska stipulated to dismiss the remaining claims on the merits.

In addition, while the appeal to the Third Department was pending, plaintiff commenced an action in Supreme Court, Erie County, against the Skyworks defendants, JLG and another defendant that is no longer a party. In that action, plaintiff alleged that his injuries were the result of the defective condition of the boom lift. Plaintiff alleged causes of action for negligence and defective manufacture and design against JLG and negligence in the maintenance, repair, servicing and/or inspection of the boom lift against the Skyworks defendants. After the Court of Appeals reinstated the Labor Law § 240 (1) claim against Cornell and Skanska, the Tompkins County and Erie County actions were consolidated into a single action in Supreme Court, Erie County. In their amended answer following consolidation, Cornell and Skanska asserted cross claims for indemnification against the Skyworks defendants and JLG. JLG did not assert any cross claims in its answer.

JLG moved for summary judgment dismissing the complaint and cross claims against it, Cornell and Skanska cross-moved for summary judgment seeking a conditional order of indemnification against JLG, the Skyworks defendants moved for summary judgment dismissing the complaint and cross claims against them, and JLG moved separately for leave to assert cross claims for contribution against the other defendants. By the order on appeal, Supreme Court (Michalski, A.J.) granted JLG's motion for leave to file cross claims for contribution and otherwise denied the motions and the cross motion.

Turning first to the appeal of the Skyworks defendants, we conclude that the court erred in denying their motion seeking summary judgment dismissing the complaint and the cross claims of Cornell and Skanska against them, and in granting that part of JLG's motion seeking leave to assert a cross claim against the Skyworks defendants for contribution. The Skyworks defendants established as a matter of law that they did not owe plaintiff a duty of care based upon their obligations under the contract with plaintiff's employer. As a

general rule, a contractual obligation, standing alone, does not give rise to tort liability in favor of a third party (*see Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257; *Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226), and the Skyworks defendants presented evidence demonstrating that none of the exceptions to that general rule applied here (*see generally Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140). In response, plaintiff failed to raise a triable issue of fact. Further, there is no basis for JLG's cross claim for contribution against the Skyworks defendants inasmuch as they owed no duty to plaintiff that would trigger any liability for contribution (*see Board of Educ. of Hudson City Sch. Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 27-28; *Molley v Aziz*, 154 AD2d 578, 578-579), nor did they owe any duty directly to JLG that would support such liability (*see Raquet v Braun*, 90 NY2d 177, 182; *cf. Sommer v Federal Signal Corp.*, 79 NY2d 540, 559). In addition, with respect to the cross claim of Cornell and Skanska seeking common-law indemnification against the Skyworks defendants, there is no duty owed by the Skyworks defendants to them and thus "the key element of a common-law cause of action for indemnification" is lacking (*Raquet*, 90 NY2d at 183). We therefore modify the order by granting the motion of the Skyworks defendants and denying that part of JLG's motion seeking leave to assert a cross claim for contribution against them.

With respect to the cross appeal of Cornell and Skanska, we conclude that the court properly denied their cross motion for summary judgment seeking a conditional order of indemnification against JLG. We agree with JLG that the stipulation between plaintiff, Cornell and Skanska dismissing the common-law negligence cause of action and Labor Law §§ 200 and 241 (6) claims in the original action does not resolve the issue whether Cornell and Skanska were actively negligent in favor of those defendants and against JLG, inasmuch as JLG was not a party to the stipulation (*see Matter of Gregory v Gregory*, 109 AD3d 616, 617). We agree with Cornell and Skanska, however, that the record establishes as a matter of law that neither of them was actively negligent or had the type of supervision and control over the injury-producing work that would subject them to liability based on negligence (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378). Thus, Cornell and Skanska established that their liability to plaintiff, if any, arises solely under Labor Law § 240 (1), and JLG failed to raise a triable issue of fact in that regard. Nevertheless, "[t]o establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident' " (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685; *see Foots v Consolidated Bldg. Contrs., Inc.*, 119 AD3d 1324, 1327). While we conclude that Cornell and Skanska met their burden of establishing that they were "not guilty of any negligence beyond the statutory liability" (*Perri*, 14 AD3d at 685), we further conclude that those defendants failed to establish that JLG was guilty of some negligence that contributed to the accident.

The court also properly granted that part of JLG's motion seeking

leave to assert a cross claim for contribution against Cornell and Skanska. That cross claim may be asserted despite the showing of Cornell and Skanska that they were not negligent. Under article 14 of the CPLR, "[n]owhere is it required that the liability [for contribution] be predicated upon negligence" (*Doundoulakis v Town of Hempstead*, 42 NY2d 440, 451), and the culpable conduct that supports a contribution claim may include the violation of a statutory duty (*see Lippes v Atlantic Bank of N.Y.*, 69 AD2d 127, 137; *see also Belmer v HHM Assoc., Inc.*, 101 AD3d 526, 528).

Finally, with respect to the appeal of JLG, we conclude that the court properly denied that part of its motion seeking summary judgment dismissing the cross claim of Cornell and Skanska for common-law indemnification against it. Contrary to the contention of JLG, Cornell and Skanska are not barred by principles of judicial estoppel from contending that the boom lift was defective. Although those defendants took a contrary position in the original action in Tompkins County, that position did not prevail (*see Baje Realty Corp. v Cutler*, 32 AD3d 307, 310), and thus all of the elements of judicial estoppel are not present (*see generally Reynolds v Krebs*, 143 AD3d 1256, 1256). Nor would any negligence on plaintiff's part defeat the cross claim of Cornell and Skanska for common-law indemnification from JLG (*see generally Frank v Meadowlakes Dev. Corp.*, 6 NY3d 687, 693).

The court also properly denied that part of JLG's motion seeking summary judgment dismissing plaintiff's manufacturing defect claim against it. JLG did not meet its burden with respect to that claim by merely establishing plaintiff's failure to present evidence of a specific defect but, "[r]ather, [JLG] was required to come forward with evidence in admissible form establishing that plaintiff's injuries were not caused by a manufacturing defect in the product" (*Graham v Pratt & Sons*, 271 AD2d 854, 854).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

698

CA 16-02130

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

LILLIE MOORE, AS GRANDMOTHER AND CUSTODIAL GUARDIAN OF DAIQUAN SANDERS, AN INFANT UNDER THE AGE OF EIGHTEEN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DEL-RICH PROPERTIES, INC., DEFENDANT, CITY OF BUFFALO URBAN RENEWAL AGENCY AND CITY OF BUFFALO, DEFENDANTS-APPELLANTS.

SCOTT C. BILLMAN, BUFFALO, FOR DEFENDANT-APPELLANT CITY OF BUFFALO URBAN RENEWAL AGENCY.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF COUNSEL), FOR DEFENDANT-APPELLANT CITY OF BUFFALO.

LIPSITZ & PONTERIO LLC, BUFFALO (ZACHARY JAMES WOODS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 17, 2016. The order, among other things, denied the motions of defendants City of Buffalo and City of Buffalo Urban Renewal Agency for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries her grandson allegedly sustained as a result of exposure to lead paint while he was visiting and then residing with plaintiff in an apartment owned by defendant Del-Rich Properties, Inc. (Del-Rich). After it was discovered that there were dangerous levels of lead paint throughout the structure, Del-Rich applied to enroll in the Lead Hazard Control Project (Project), which was a federally-funded grant program designed to address the high rate of lead poisoning in and around defendant City of Buffalo (City). Employees of defendant City of Buffalo Urban Renewal Agency (BURA) helped manage the Project, and properties enrolled in the Project would receive lead abatement work performed by contractors chosen by the Project.

The lead abatement work was performed at plaintiff's apartment in or around February 2000. Nevertheless, when the property was retested in April 2001, dangerous levels of lead were again detected. Plaintiff alleges that the City and BURA (collectively, defendants)

are liable for the injuries sustained by her grandson as a result of the negligent lead abatement work performed at the residence pursuant to the Project.

The City moved for summary judgment dismissing the complaint against it, contending that it was not negligent as a matter of law; that plaintiff could not establish liability against the City, a government entity, because plaintiff could not establish a special relationship with the City; and that the City was immune from suit because its actions were discretionary. BURA likewise moved for summary judgment dismissing the complaint against it, incorporating all of the factual and legal arguments raised by the City. Plaintiff cross-moved for partial summary judgment on the issue of negligence against defendants. We conclude that Supreme Court properly denied defendants' respective motions and properly granted in part plaintiff's cross motion for summary judgment, determining as a matter of law that defendants' actions were proprietary and therefore not subject to governmental immunity.

"When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose. If the municipality's actions fall in the proprietary realm, it is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties" (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425). "The relevant inquiry in determining whether a governmental agency is acting within a governmental or proprietary capacity is to examine the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred" (*Turturro v City of New York*, 28 NY3d 469, 478 [internal quotation marks omitted]). That determination " 'turns solely on the acts or omissions claimed to have caused the injury' " (*id.*).

"If it is determined that a municipality was exercising a governmental function, the next inquiry focuses on the extent to which the municipality owed a 'special duty' to the injured party . . . It is the plaintiff's obligation to prove that the government defendant owed a special duty of care to the injured party because duty is an essential element of the negligence claim itself" (*Applewhite*, 21 NY3d at 426; *see Turturro*, 28 NY3d at 478). Finally, even if plaintiff can establish a special duty or relationship, defendants may nevertheless be entitled to dismissal of the claims under the "governmental function immunity" defense, which provides, in pertinent part, that " '[a] public employee's discretionary acts—meaning conduct involving the exercise of reasoned judgment—may not result in the municipality's liability even when the conduct is negligent' . . . In other words, even if a plaintiff establishes all elements of a negligence claim, a state or municipal defendant engaging in a *governmental function* can avoid liability if it timely raises the defense and proves that the alleged negligent act or omission involved the exercise of discretionary authority" (*Valdez v City of New York*, 18 NY3d 69, 76 [emphasis added]).

We agree with plaintiff that the court properly determined that defendants were acting in a proprietary capacity as a matter of law. The acts and omissions of defendants, as alleged by plaintiff, " 'essentially substitute for or supplement traditionally private enterprises' " (*Turturro*, 28 NY3d at 477). The evidence submitted by defendants in support of their motions established that defendants, through the jointly-managed Project, solicited homeowners to apply for enrollment in the Project; determined whether those applicants were qualified for the Project; performed preabatement testing of the property; identified the areas in need of abatement; prepared a list of specifications for each individual remediation project; prepared a bid package; solicited bids for work at the applicant's residence; chose the particular contractor to perform the abatement work; typed up the contract between the homeowner and the contractor; approved that contract after it was signed by the homeowner and the contractor at City Hall; issued a permit for the remediation work; arranged for the relocation of the occupants during the remediation work; established a time schedule for the remediation work; inspected the remediation work "as it was being performed"; tested the property after the abatement work was completed; and obtained a written approval of the work from the homeowner.

Contrary to defendants' contentions, they did not merely inspect the premises and order that abatement work be performed (*cf. Pelaez v Seide*, 2 NY3d 186, 194-196; *Rivera v Village of Spring Val.*, 284 AD2d 521, 522). Indeed, they coordinated and oversaw the entire abatement process at plaintiff's residence. It is well established that maintenance and care related to buildings with tenants is generally a proprietary function (*see Miller v State of New York*, 62 NY2d 506, 513; *Johnson City Cent. Sch. Dist. v Fidelity & Deposit Co. of Md.*, 272 AD2d 818, 821; *see generally Turturro*, 28 NY3d at 478). In our view, defendants voluntarily assumed the homeowner's duty to remediate the lead paint at plaintiff's residence. Once defendants assumed that proprietary duty, they "also assume[d] the burdens incident thereto" (*Augustine v Town of Brant*, 249 NY 198, 206, *rearg denied* 250 NY 537).

Based on our determination, we do not address defendants' remaining contentions concerning plaintiff's failure to establish a special duty or relationship with defendants or the governmental immunity defense, which "has no applicability where[, as here,] the municipality has acted in a proprietary capacity" (*Turturro*, 28 NY3d at 479).

Contrary to defendants further contentions, they may be liable "for affirmative acts of negligence, such as negligent lead paint abatement, notwithstanding a lack of ownership" (*Ortiz v Lehmann*, 118 AD3d 1389, 1390), and there are triable issues of fact whether the abatement was negligently performed, causing plaintiff's grandson to sustain additional injuries after the abatement was performed (*see*

Manford v Wilber, 128 AD3d 1544, 1544, *lv dismissed* 26 NY3d 1082).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

709

KA 14-01974

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM T. REED, 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 Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered July 22, 2014. The judgment convicted defendant, upon a jury verdict, of robbery 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 a jury verdict, of two counts of robbery in the first degree (Penal Law § 160.15 [3], [4]), arising from an incident in which the victim was beaten and robbed at gunpoint of cash and drugs. Contrary to defendant's contention, Supreme Court properly denied his motion to dismiss the indictment on speedy trial grounds, without a hearing, because defendant failed to meet his initial burden on the motion. It is well settled that "[a] defendant seeking a speedy trial dismissal pursuant to CPL 30.30 meets his or her initial burden on the motion simply by alleging only that the prosecution failed to declare readiness within the statutorily prescribed time period" (*People v Goode*, 87 NY2d 1045, 1047 [internal quotation marks omitted]; *see People v Beasley*, 16 NY3d 289, 292). Here, defendant alleged only that six months had passed after the action was commenced, without stating whether the People had announced their readiness for trial. Thus, "[d]efendant's motion papers failed to assert a legal basis for dismissal of the indictment on the grounds of either prereadiness or postreadiness delay. The motion papers omitted any allegation concerning when the People declared readiness, and also failed to allege that the People were in fact not ready following their declaration of readiness" (*People v Donaldson*, 156 AD2d 988, 989; *see generally People v Lomax*, 50 NY2d 351, 357-358).

Defendant contends that he was denied effective assistance of counsel by defense counsel's failure to make an adequate speedy trial motion (*see* CPL 30.30 [1] [a]). "The record on appeal is inadequate to enable us to determine whether such a motion would have been successful and whether defense counsel's failure to make that motion deprived defendant of meaningful representation . . . , and thus defendant's contention is appropriately raised by way of a motion pursuant to CPL article 440" (*People v Youngs*, 101 AD3d 1589, 1589, *lv denied* 20 NY3d 1105; *see People v Olsen*, 126 AD3d 515, 516, *lv denied* 26 NY3d 1111).

We reject defendant's further contention that he was denied effective assistance of counsel owing to a series of additional alleged errors by defense counsel. Defendant's claim that he was deprived of effective assistance of counsel because defense counsel failed to object to inferential bolstering by a police investigator is without merit. It is well settled that the failure to make an objection that has "little or no chance of success" does not constitute ineffective assistance of counsel (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Here, the testimony at issue, i.e., a police investigator's testimony that the victim identified defendant as the perpetrator of the crime, "did not constitute improper bolstering inasmuch as it was offered for the relevant, nonhearsay purpose of explaining the investigative process and completing the narrative of events leading to . . . defendant's arrest" (*People v Wragg*, 115 AD3d 1281, 1282, *affd* 26 NY3d 403 [internal quotation marks omitted]; *see People v Perry*, 62 AD3d 1260, 1261, *lv denied* 12 NY3d 919), and thus defense counsel was not ineffective for not objecting to it. In any event, even assuming, arguendo, that the testimony constituted inferential bolstering, we note that defense counsel "may have had a strategic reason for failing to [object to such testimony] inasmuch as he may not have wished to draw further attention to [such testimony]" (*People v Williams*, 107 AD3d 1516, 1517, *lv denied* 21 NY3d 1047; *see Wragg*, 115 AD3d at 1282). We therefore conclude that defendant failed to meet his burden of demonstrating the absence of a strategic or other legitimate explanation for defense counsel's alleged error (*see People v Benevento*, 91 NY2d 708, 712).

Similarly, we reject defendant's claim that he was deprived of effective assistance of counsel because defense counsel failed to object to alleged prosecutorial misconduct on summation. Even assuming, arguendo, that the prosecutor committed misconduct on summation, we conclude that, inasmuch as any such misconduct was "not so egregious as to deprive defendant of a fair trial, defense counsel's failure to object thereto did not deprive defendant of effective assistance of counsel" (*People v Lewis*, 140 AD3d 1593, 1595, *lv denied* 28 NY3d 1029; *see People v Henley*, 145 AD3d 1578, 1580, *lv denied* ___ NY3d ___ [Apr. 4, 2017]). With respect to defendant's remaining claims of ineffective assistance of counsel, we conclude that they lack merit and that defendant was afforded "meaningful representation" (*People v Baldi*, 54 NY2d 137, 147).

Defendant failed to preserve for our review his contentions that

he was denied the right to a fair trial when the prosecutor knowingly elicited false and misleading testimony from a police investigator with respect to a benefit that the victim would receive in exchange for the victim's truthful testimony against defendant, and that the court erred in admitting that testimony (*see People v Williams*, 61 AD3d 1383, 1383, *lv denied* 13 NY3d 751; *People v Hendricks*, 2 AD3d 1450, 1451, *lv denied* 2 NY3d 762). In any event, "[a]lthough a prosecutor has a duty to correct trial testimony if he or she knows that it is false" (*People v Mulligan*, 118 AD3d 1372, 1374 [internal quotation marks omitted], *lv denied* 25 NY3d 1075; *see People v Savvides*, 1 NY2d 554, 556-557), defendant failed to establish that the police investigator gave false or misleading testimony. Furthermore, even assuming, arguendo, that the court erred in allowing the police investigator to testify regarding the reasons why he did not charge the victim with a crime, we conclude that such "erroneous admission is harmless error because the [testimony] was neither incriminating nor prejudicial" (*People v Crenshaw*, 278 AD2d 897, 897, *lv denied* 96 NY2d 799, *reconsideration denied* 96 NY2d 900).

We reject defendant's contention that the court erred in permitting the prosecutor to introduce evidence of uncharged crimes, i.e., defendant's prior drug dealings with the victim. "Evidence of defendant's extensive involvement in the drug trade was highly probative of motive, was inextricably interwoven with the narrative of events and was necessary background to explain [defendant's] relationship with the victim" (*People v Chebere*, 292 AD2d 323, 324, *lv denied* 98 NY2d 673; *see People v Burnell*, 89 AD3d 1118, 1120-1121, *lv denied* 18 NY3d 922; *People v Woods*, 72 AD3d 1563, 1564, *lv denied* 15 NY3d 811). Furthermore, " 'any prejudice to defendant was minimized by [the court's] limiting instructions' " (*People v Carson*, 4 AD3d 805, 806, *lv denied* 2 NY3d 797; *see People v Mitchell*, 144 AD3d 1598, 1599).

Defendant further contends that the court erred in refusing to suppress evidence seized from the victim's apartment, where defendant had been staying. That contention is without merit. "It is well established that the police need not procure a warrant in order to conduct a lawful search when they have obtained the voluntary consent of a party possessing the requisite authority or control over the premises or property to be inspected" (*People v Adams*, 53 NY2d 1, 8, *rearg denied* 54 NY2d 832, *cert denied* 454 US 854; *see People v Holley*, 148 AD3d 1605, 1605). It is equally "well settled that consent may be inferred from an individual's words, gestures, or conduct" (*United States v Buettner-Janusch*, 646 F2d 759, 764, *cert denied* 454 US 830; *see People v Bunce*, 141 AD3d 536, 537, *lv denied* 28 NY3d 969; *People v Gonzalez*, 222 AD2d 453, 453). Here, based on the evidence adduced at the hearing, the court properly concluded that the victim implicitly consented to the officers' entry into his apartment.

Contrary to defendant's further contention, the weight of the evidence supports the jury's conclusion that the People established "[t]he 'taking' element of [robbery] . . . 'by . . . showing that [defendant] exercised dominion and control over the property for a

period of time, however temporary, in a manner wholly inconsistent with the owner's continued rights' " (*People v Hardy*, 26 NY3d 245, 250, quoting *People v Jennings*, 69 NY2d 103, 118). Thus, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see People v Bleakley*, 69 NY2d 490, 495).

Finally, the sentence is not unduly harsh or severe.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

711

KA 17-00100

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVIN GRIFFIN, ALSO KNOWN AS DEVIN D. GRIFFIN, SR., DEFENDANT-APPELLANT. (APPEAL NO. 1.)

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

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered December 14, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence on the conviction of criminal possession of a weapon in the third degree is unanimously dismissed and the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]) and, in appeal No. 2, he appeals from a resentence in connection with his conviction of criminal possession of a weapon in the third degree. As a preliminary matter, we dismiss the appeal from the resentence 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).

Contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted])

and "[w]here, as here, the defendant's challenge is focused upon the credibility of the witnesses, we [must] accord 'great deference to the resolution of credibility issues by the trier of fact because those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record' " (*People v Cole*, 111 AD3d 1301, 1302, *lv denied* 23 NY3d 1019, *reconsideration denied* 23 NY3d 1060).

Defendant contends that County Court erred in refusing to grant his motion for a mistrial. We reject that contention. Defendant's motion was based upon the prosecutor's cross-examination of a defense witness with questions implying that defendant had threatened the witness to testify, particularly through two of defendant's friends who were spectators in the courtroom. Inasmuch as we construe defendant's contention to be based on alleged prosecutorial misconduct, we note that reversal is warranted only if the misconduct has caused such substantial prejudice to defendant that he was denied due process of law (*see People v Jones*, 100 AD3d 1362, 1366, *lv denied* 21 NY3d 1005, *cert denied* ___ US ___, 134 S Ct 694; *People v Rubin*, 101 AD2d 71, 77, *lv denied* 63 NY2d 711). "In measuring whether substantial prejudice has occurred, one must look at the severity and frequency of the conduct, whether the court took appropriate action to dilute the effect of that conduct, and whether review of the evidence indicates that without the conduct the same result would undoubtedly have been reached" (*People v Mott*, 94 AD2d 415, 419). Here, we conclude that the disputed questions were isolated, and that the court took appropriate action to dilute the effect of the questions by granting the alternative relief requested by defendant, i.e., permitting defense counsel to recall the witness to explain that the two spectators were the witness's cousins, and that they were in the courtroom to support him. We thus conclude that the alleged prosecutorial misconduct did not warrant reversal, and that the court therefore did not abuse its discretion by denying the motion for a mistrial (*see generally People v Ortiz*, 54 NY2d 288, 292; *People v Love*, 135 AD2d 1099, 1099).

We agree with defendant that the court erred in refusing to admit in evidence a prior consistent statement of a witness, which statement defendant had sought to introduce in order to overcome the People's claim of recent fabrication (*see People v McClean*, 69 NY2d 426, 428). We conclude, however, that the error was harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

712

KA 12-02099

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVIN GRIFFIN, ALSO KNOWN AS DEVIN D. GRIFFIN, SR., DEFENDANT-APPELLANT. (APPEAL NO. 2.)

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

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

Appeal from a resentence of the Monroe County Court (John L. DeMarco, J.), rendered December 21, 2011. Defendant was resentenced upon his conviction of criminal possession of a weapon in the third degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Griffin* ([appeal No. 1] ___ AD3d ___ [June 16, 2017]).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

715

CA 16-02230

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

DEBRA VELEY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PATRICIA A. MANCHESTER, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

RAYMOND M. PFEIFFER, DELEVAN, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JAMES P. RENDA, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered August 22, 2016. The order, upon reargument, granted the cross motion of defendant Patricia A. Manchester for summary judgment and dismissed the complaint.

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

Memorandum: In May 2010, Ronald Manchester (decedent) converted a Summit Federal Credit Union account into a Totten trust. Decedent's wife (defendant) was listed as a beneficiary on the conversion documents while decedent's daughter (plaintiff) was listed as an additional beneficiary. On the same day that decedent executed the Totten trust, he completed a form titled "Traditional IRA Trust Application Packet (Form 2300-T)," which listed defendant as "primary beneficiary" and plaintiff as "secondary beneficiary." After decedent died on June 30, 2013, defendant transferred the trust funds to her own account, and plaintiff commenced the instant action to recover those funds. Defendant cross-moved for summary judgment dismissing the complaint, submitted, inter alia, the Totten trust and IRA documents, and argued that, because plaintiff is listed as a secondary beneficiary on Form 2300-T, she herself became the sole beneficiary of the Totten trust upon decedent's death. Supreme Court denied the cross motion, and defendant subsequently moved for leave to reargue and to renew it. The court granted the motion insofar as it sought leave to reargue and reserved decision on the motion insofar as it sought leave to renew. Upon reargument, the court granted defendant's cross motion and dismissed the complaint. Plaintiff appeals, and we reverse.

" '[T]he proponent of a summary judgment motion must make a prima

facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact' " (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). " 'This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party' " (*id.* at 833). The "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez*, 68 NY2d at 324). Here, we conclude that the submissions of defendant on her cross motion do not conclusively establish that she was the sole beneficiary of the Totten trust at the time of decedent's death. Consequently, defendant failed to meet her initial burden of proof, and there is no need to assess the sufficiency of plaintiff's opposing papers or any of plaintiff's related arguments in opposition to the cross motion (*see id.*).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

716

CA 17-00171

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

IN THE MATTER OF PAUL LEONE, ANN SERVOSS AND TIMOTHY MILLS, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF JAMESTOWN ZONING BOARD OF APPEALS, JAMESTOWN COMMUNITY COLLEGE AND LYNN DEVELOPMENT, INC., RESPONDENTS-RESPONDENTS.

BRAUTIGAM & BRAUTIGAM, LLP, FREDONIA (DARYL P. BRAUTIGAM OF COUNSEL), FOR PETITIONERS-APPELLANTS.

MARILYN FIORE-LEHMAN, CORPORATION COUNSEL, JAMESTOWN, FOR RESPONDENT-RESPONDENT CITY OF JAMESTOWN ZONING BOARD OF APPEALS.

LUNDBERG PRICE P.C., JAMESTOWN (STEPHEN M. ABDELLA OF COUNSEL), AND HALL & LEE YAW, LLP, FOR RESPONDENTS-RESPONDENTS JAMESTOWN COMMUNITY COLLEGE AND LYNN DEVELOPMENT, INC.

Appeal from a judgment (denominated order) of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), dated August 11, 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 reversed on the law without costs, the petition is reinstated, the petition is granted, and the determination is annulled.

Memorandum: Petitioners, residents of the City of Jamestown, challenge the determination of respondent City of Jamestown Zoning Board of Appeals (ZBA) to grant a use variance to respondents Jamestown Community College (JCC) and Lynn Development, Inc. (Lynn), thereby permitting the use of a mansion (hereafter, Sheldon House) for, in part, commercial purposes. JCC acquired the Sheldon House when its previous owner donated it to JCC in 1977. In 2015, Lynn offered to purchase the Sheldon House, contingent on the obtaining of a use variance allowing Lynn to locate its corporate headquarters there. After an environmental review and a public hearing, the ZBA granted the use variance, albeit without making any findings of fact or reaching any conclusions of law addressing whether JCC and Lynn met their burden of establishing the four requirements of unnecessary hardship set forth in the Zoning Ordinance of the City of Jamestown, New York (Zoning Ordinance; *see* General City Law § 81-b [3]).

Petitioners, owners of homes near the Sheldon House who opposed the granting of the use variance, filed a CPLR article 78 petition seeking to annul the ZBA's determination as legally deficient and arbitrary and capricious. In dismissing the petition, Supreme Court concluded that JCC and Lynn had "presented substantial evidence, especially regarding the four-pronged hardship test, providing the ZBA with a rational basis upon which to issue a variance." Petitioners contend on appeal that JCC and Lynn failed to satisfy the four requirements for the issuance of a use variance based on unnecessary hardship, and that the court erred in deferring to the ZBA. We agree, and we therefore reverse the judgment and reinstate and grant the petition, thereby annulling the ZBA's determination.

Section 300-1106 (A) of the Zoning Ordinance provides in pertinent part, "No . . . use variance shall be granted without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship." In order to prove such unnecessary hardship, the Zoning Ordinance requires the applicant to establish, among other things, that, for each and every permitted use under the zoning regulations for the particular district where the property is located, the applicant cannot realize a reasonable return and that the lack of return is substantial as demonstrated by competent financial evidence (*see* § 300-1106 [A] [1]; *see generally Matter of Morrissey v Apostol*, 75 AD3d 993, 996-997). In other words, the applicant must demonstrate "by dollars and cents proof" that he or she cannot realize a reasonable return by any conforming use (*Matter of Village Bd. of Vil. of Fayetteville v Jarrold*, 53 NY2d 254, 256). As part of that demonstration, the applicant must necessarily establish what a reasonable return for the property is (*see id.* at 257). An applicant's failure to establish that he or she cannot realize a reasonable return by any conforming use requires denial of the use variance by the ZBA (*see generally Edwards v Davison*, 94 AD3d 883, 884; *Matter of Carrier v Town of Palmyra Zoning Bd. of Appeals*, 30 AD3d 1036, 1038, *lv denied* 8 NY3d 807; *Matter of Stamm v Board of Zoning Appeals of Town of Greece*, 283 AD2d 995, 995).

Here, JCC and Lynn failed to present any evidence to the ZBA to satisfy the first requirement of unnecessary hardship, i.e., that they could not realize a reasonable return on the property by any conforming use. In the absence of such evidence in dollars and cents form, there is no rational basis for the ZBA's finding that the premises would not yield a reasonable return in the absence of the requested use variance and, for that reason, we conclude that the ZBA's determination must be annulled (*see Jarrold*, 53 NY2d at 256; *Edwards*, 94 AD3d at 884; *Matter of Park Hill Residents' Assn. v Cianciulli*, 234 AD2d 464, 464). In light of our conclusion with respect to the first requirement, we do not consider whether JCC and Lynn met their burden of establishing the other three requirements of unnecessary hardship (*see Carrier*, 30 AD3d at 1038; *Stamm*, 283 AD2d at 995).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

745

CA 16-01698

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

ANTHONY RINE, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL QUADT, DOING BUSINESS AS VISTA MOTORS,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

JOSEPH E. DIETRICH, III, WILLIAMSVILLE, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (THOMAS P. CUNNINGHAM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered July 7, 2016. The order granted the motion of defendant Michael Quadt, doing business as Vista Motors, for summary judgment dismissing the complaint against him.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while he was assisting Michael Quadt, doing business as Vista Motors (defendant), back up his truck in a parking lot. While defendant was backing up the truck, plaintiff's arm became caught between defendant's truck and another vehicle in the parking lot. Plaintiff alleged, inter alia, that defendant had a duty to keep a proper lookout, to use proper care when backing up his vehicle, and to warn of his approach. Defendant moved for summary judgment dismissing the complaint against him, contending that he had no duty to prevent plaintiff from placing his arm between the two vehicles and no duty to warn him that it was dangerous to do so. In the alternative, defendant contended that plaintiff's own conduct was the sole proximate cause of the accident. We agree with plaintiff that Supreme Court erred in granting the motion.

With respect to defendant's contention that he had no duty to prevent plaintiff from placing his arm between the two vehicles, we note that plaintiff never alleged that defendant had such a duty. We further note that plaintiff has abandoned his reliance on a duty to warn theory. As alleged by plaintiff, defendant had a generalized duty to exercise reasonable care in backing up his truck and to avoid

hitting any pedestrian, including those assisting him in backing up the truck (*see* Vehicle and Traffic Law § 1211 [a]; *see generally McLaurin v Ryder Truck Rental*, 123 AD2d 671, 672-673), and defendant failed even to address that duty in support of his motion. Finally, with respect to defendant's contention that plaintiff's conduct was the sole proximate cause of the accident, we conclude that defendant failed to meet his initial burden with respect thereto (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Defendant submitted conflicting deposition testimony that raises a triable issue of fact whether defendant contributed to the accident by failing to exercise reasonable care in operating his truck (*see Bishop v Curry*, 83 AD3d 1431, 1432; *Pareja v Brown*, 18 AD3d 636, 637; *see generally Kellogg v Pernat*, 140 AD3d 1639, 1639-1640).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

753

KA 13-01453

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. COOPER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered June 11, 2013. The judgment convicted defendant, upon a nonjury verdict, of course of sexual conduct against a child 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 nonjury verdict of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]). Contrary to defendant's contention, the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). The victim's testimony established that defendant engaged in two or more acts of sexual conduct with her over more than three months in duration, and her testimony was not incredible as a matter of law (*see generally People v Dupleasis*, 112 AD3d 1318, 1319, *lv denied* 22 NY3d 1138; *People v Meacham*, 84 AD3d 1713, 1715, *lv denied* 17 NY3d 808). In addition, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends that he was denied effective assistance of counsel because defense counsel failed to move to suppress certain evidence obtained from underneath the porch of his former residence. We conclude that "the record on appeal is inadequate to enable us to determine whether such a motion would have been successful and whether defense counsel was ineffective for failing to make that motion and thus, defendant's contention must be raised by way of a motion pursuant to CPL article 440" (*People v Walter*, 138 AD3d 1479, 1480, *lv denied* 27 NY3d 1141). Indeed, the testimony at the trial suggested

that defendant may not have had standing to bring such a motion inasmuch as he may not have lived at the residence at the time of the search (*see People v Bradley*, 17 AD3d 1050, 1051, *lv denied* 5 NY3d 786; *People v Sapp*, 280 AD2d 906, 906, *lv denied* 96 NY2d 834), and the area of the search was a common area accessible to other tenants of the building (*see People v Lovejoy*, 92 AD3d 1080, 1082; *see also People v Pucci*, 37 AD3d 1068, 1069, *lv denied* 8 NY3d 949). We reject defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to cross-examine two of the witnesses who testified at trial (*see People v Thomas*, 136 AD3d 1390, 1391, *lv denied* 27 NY3d 1140, *reconsideration denied* 28 NY3d 974; *People v Lewis*, 67 AD3d 1396, 1396-1397, *lv denied* 14 NY3d 772). We have examined the remaining allegations of ineffective assistance of counsel raised by defendant and conclude that they lack merit. Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, the sentence is not unduly harsh or severe.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

754

KA 15-00916

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TODD A. EDWARDS, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered April 9, 2015. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, criminal possession of a weapon in the third degree and menacing in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the sentence imposed and as modified the judgment is affirmed, and the matter is remitted to Steuben County Court for the filing of a predicate felony offender statement and resentencing.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, robbery in the first degree (Penal Law § 160.15 [3]). Contrary to defendant's contention, the record establishes that County Court conducted a sufficient inquiry and considered the relevant factors, including the charged offenses, defendant's history of multiple felony convictions, and his prior conduct, before acting within its broad discretion in determining that requiring defendant to wear a stun belt was necessary for courtroom security (*see People v Brooks*, 139 AD3d 1391, 1392, *lv denied* 28 NY3d 1026; *see generally People v Buchanan*, 13 NY3d 1, 4).

Defendant further contends that trial counsel was ineffective in failing to request a mid-trial *Wade* hearing or preclusion of identification testimony based on the People's violation of CPL 710.30 after the clerk of the store that was robbed testified on cross-examination that an investigator had showed her a photograph of defendant during the course of the criminal investigation. We conclude that defendant's contention is based on matters outside the record and therefore must be raised by way of a motion pursuant to CPL

article 440 (*see generally People v Alligood*, 139 AD3d 1398, 1398). To the extent that we are able to review defendant's contention that he was denied effective assistance of counsel based on the record before us, we conclude that defendant was provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Defendant's attorneys were not ineffective for failing to pursue a *Wade* hearing with respect to his employer's identification of him from the surveillance video of the robbery where, as here, " 'no *Wade* hearing was required because the identifying witness[ ] knew defendant, and thus the identification was merely confirmatory' " (*People v Sebring*, 111 AD3d 1346, 1346-1347, *lv denied* 22 NY3d 1159; *see generally People v Walker*, 115 AD3d 1357, 1358, *lv denied* 23 NY3d 1069). To the extent that defendant contends that his trial counsel was ineffective for failing to challenge certain prospective jurors and to request particular jury instructions, we conclude that defendant failed " 'to demonstrate the absence of strategic or other legitimate explanations' for [those] alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712; *see People v Slack*, 137 AD3d 1568, 1570, *lv denied* 27 NY3d 1139; *People v Martinez*, 59 AD3d 1071, 1072-1073, *lv denied* 12 NY3d 856).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that, although an acquittal would not have been unreasonable, the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Finally, defendant contends that the People failed to comply with the procedural requirements of CPL 400.15 in seeking to have him sentenced as a second violent felony offender inasmuch as they did not file a predicate felony offender statement as required by CPL 400.15 (2). Although that contention is not preserved for our review (*see People v Pellegrino*, 60 NY2d 636, 637; *People v Myers*, 52 AD3d 1229, 1230), we nonetheless exercise our discretion to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v VanGorden*, 147 AD3d 1436, 1441). Contrary to the assertion of the prosecutor at sentencing, "the need for a predicate felony offender statement was not obviated by defendant's pretrial admission to a special information setting forth his prior felony conviction as an element of a count charging criminal possession of a weapon. The special information did not permit defendant to raise constitutional challenges to his prior conviction, as he had the right to do before being sentenced as a second felony offender" (*VanGorden*, 147 AD3d at 1441; *see People v Brown*, 13 AD3d 667, 669, *lv denied* 4 NY3d 742; *see generally* CPL 200.60 [3]; 400.15 [7] [b]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for the filing of a predicate felony offender statement pursuant to CPL 400.15 and resentencing. In light of our determination, we do not reach defendant's challenge to the severity of the sentence.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

756

KA 15-00766

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROMEO WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered July 23, 2014. The judgment convicted defendant, upon a jury verdict, of 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 criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that the evidence is not legally sufficient to support the conviction inasmuch as the People failed to establish that the firearm at issue was operable. We reject that contention. The People presented testimony establishing that defendant was observed carrying "something black," which appeared to be a gun, immediately before two witnesses heard several gunshots emanating from his direction (*see People v Spears*, 125 AD3d 1401, 1402, *lv denied* 25 NY3d 1172; *People v Jackson*, 122 AD3d 1310, 1311, *lv denied* 24 NY3d 1220; *People v Samba*, 97 AD3d 411, 414, *lv denied* 20 NY3d 1065). Defendant was later observed throwing a revolver from a moving vehicle, and that revolver was recovered by the police. The firearms examiner testified that damage to the loading and unloading mechanism did not affect the operability of the revolver (*see People v Cavines*, 70 NY2d 882, 883; *People v Hailey*, 128 AD3d 1415, 1416, *lv denied* 26 NY3d 929), and he further testified that he successfully test-fired the revolver without damaging, repairing, or otherwise materially altering the weapon's firing apparatus (*cf. People v Shaffer*, 66 NY2d 663, 664; *see generally People v Brown*, 107 AD3d 1477, 1478, *lv denied* 21 NY3d 1040; *People v Francis*, 126 AD2d 740, 740). We therefore conclude that defendant's conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495) and, viewing the evidence in light of the

elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contention that County Court erred in sua sponte taking judicial notice of the dismissal of the criminal charges against the two other occupants of the vehicle in which defendant was a passenger at the time of his arrest (*see People v Strauts*, 26 AD3d 796, 796, *lv denied* 6 NY3d 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]). Defendant also failed to preserve for our review his contention that he was deprived of a fair trial based on prosecutorial misconduct (*see People v Love*, 134 AD3d 1569, 1570, *lv denied* 27 NY3d 967), and we conclude that defendant's contention is without merit in any event. Likewise, defendant failed to preserve for our review his contention that the court abused its discretion in reopening the suppression hearing to clarify a witness's testimony before rendering its decision (*see generally People v Valentin*, 132 AD3d 499, 500, *affd* 29 NY3d 150). In any event, we reject that contention (*see People v Suphal*, 7 AD3d 547, 547, *lv denied* 3 NY3d 682; *People v Tirado*, 266 AD2d 130, 130, *lv denied* 94 NY2d 867; *see also Matter of State of New York v Stein*, 85 AD3d 1646, 1647, *affd* 20 NY3d 99, *cert denied* ___ US ___, 133 S Ct 1500).

We also reject defendant's contention that he was deprived of his right to effective assistance of counsel based on defense counsel's failure to object to those three alleged errors. "Defendant, of course, bears the burden of establishing his claim that counsel's performance is constitutionally deficient" (*People v Nicholson*, 26 NY3d 813, 831). To meet that burden, "[i]t is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's alleged failures" (*People v Jarvis*, 113 AD3d 1058, 1059, *affd* 25 NY3d 968 [internal quotation marks omitted]; *see People v Benevento*, 91 NY2d 708, 712). "[A] reviewing court must be careful not to second-guess counsel, or assess counsel's performance with the clarity of hindsight, effectively substituting its own judgment of the best approach to a given case" (*People v Conway*, 148 AD3d 1739, 1741-1742 [internal quotation marks omitted]; *see People v Pavone*, 26 NY3d 629, 647). Here, we conclude that "defendant failed 'to demonstrate the absence of strategic or other legitimate explanations for [defense] counsel's alleged shortcomings' " (*People v Elliott*, 73 AD3d 1444, 1445, *lv denied* 15 NY3d 773, quoting *Benevento*, 91 NY2d at 712).

Finally, the sentence is not unduly harsh or severe.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

757

KA 14-00854

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRIEN E. WILSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered January 7, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sexual act in the first degree (Penal Law § 130.50 [3]). We reject defendant's contention that County Court erred in refusing to suppress his statements to the police. Defendant was not in custody when he made the statements, and thus the police were not required to advise defendant of his *Miranda* rights (*see People v Lunderman*, 19 AD3d 1067, 1068-1069, *lv denied* 5 NY3d 830). On two occasions, police officers in plain clothes interviewed defendant at his home and in the surrounding area. During those interviews, defendant was cooperative and voluntarily agreed to speak with the police. Further, defendant's mother was permitted to participate in the interviews, which lasted under an hour. Under these circumstances, "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" (*id.* at 1068; *see People v Thomas*, 292 AD2d 549, 550).

We likewise conclude that *Miranda* warnings were not required before two subsequent interviews that took place at the police station, inasmuch as they also were noncustodial (*see Lunderman*, 19 AD3d at 1069; *People v Andrews*, 13 AD3d 1143, 1144-1145; *People v Blake*, 177 AD2d 636, 637, *lv denied* 79 NY2d 853). Defendant voluntarily went to the police station on those occasions and was driven to and from the station by his mother. He was told that he was not under arrest and that he would be able to leave with his mother.

Additionally, his mother was invited to participate in the interviews, which were short in duration, each lasting about half an hour.

We further reject defendant's contention that his statements should have been suppressed because he did not have the intellectual capacity to make voluntary statements. A "defendant's impaired intelligence is but one factor to be considered in the totality of circumstances voluntariness analysis where, as here, there is no evidence of mental retardation 'so great as to render the accused completely incapable of understanding the meaning and effect of [the] confession' " (*People v Marx*, 305 AD2d 726, 728, *lv denied* 100 NY2d 596, quoting *People v Williams*, 62 NY2d 285, 289).

We agree with defendant, however, that the court erred in failing to determine whether he should be afforded youthful offender status (*see People v Rudolph*, 21 NY3d 497, 501). Defendant was convicted of a sex offense enumerated in CPL 720.10 (2) (a) (iii), and the court therefore was required " 'to determine on the record whether . . . defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3)' " (*People v Dukes*, 147 AD3d 1534, 1535, quoting *People v Middlebrooks*, 25 NY3d 516, 527). Because the court failed to make such a determination, we hold the case, reserve decision, and remit the matter to County Court to make and state for the record "a determination of whether defendant is a youthful offender" (*Rudolph*, 21 NY3d at 503).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

758

KA 14-01239

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN J. COFFEE, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SHAWN J. COFFEE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered April 24, 2014. The judgment convicted defendant, upon a jury verdict, 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 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 a jury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Contrary to defendant's contention, County Court did not abuse its discretion in denying his request for substitution of counsel (*see People v Correa*, 145 AD3d 1640, 1640). Defendant failed to show good cause for substitution inasmuch as his claims that defense counsel was ineffective were without merit (*see People v Linares*, 2 NY3d 507, 510-511; *People v Johnson*, 114 AD3d 1132, 1133, *lv denied* 24 NY3d 961). We reject defendant's further contention that he was improperly permitted to proceed pro se. The record establishes that defendant made a "knowing, voluntary and intelligent waiver of the right to counsel" (*People v Arroyo*, 98 NY2d 101, 103). Defendant's request was unequivocal and was not made simply in the alternative to seeking substitute counsel (*see People v Paulin*, 140 AD3d 985, 987, *lv denied* 28 NY3d 935; *cf. People v Gillian*, 8 NY3d 85, 88). The court did not abuse its discretion in declining defendant's request for standby counsel (*see People v Brown*, 6 AD3d 1125, 1126, *lv denied* 3 NY3d 657). "A criminal defendant has no Federal or State

constitutional right to hybrid representation . . . While the Sixth Amendment and the State Constitution afford a defendant the right to counsel or to self-representation, they do not guarantee a right to both . . . Thus, a defendant who elects to exercise the right to self-representation is not guaranteed the assistance of standby counsel during trial" (*People v Rodriguez*, 95 NY2d 497, 501). Contrary to defendant's contention, he was afforded effective assistance of counsel during the period of defense counsel's representation (*see Brown*, 6 AD3d at 1126).

Defendant's contention that the court gave an improper instruction to the jury with respect to drawing an inference from defendant's exercise of his right to represent himself is not preserved for our review (*see People v Quinones*, 235 AD2d 437, 437, *lv denied* 90 NY2d 862). In any event, defendant's contention lacks merit. The variation from the pattern jury charge "was too inconsequential to warrant reversal or to have detracted from the neutral tone of the charge" (*People v Webb*, 215 AD2d 704, 705, *lv denied* 86 NY2d 804; *see Quinones*, 235 AD2d at 437). Defendant also failed to preserve for our review his contention that the court violated CPL 300.10 (4) (*see People v Armstrong*, 134 AD3d 1401, 1402, *lv denied* 27 NY3d 962), and it is without merit in any event inasmuch as, prior to defendant's summation, the court informed defendant of the charges that would be submitted to the jury.

Defendant failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct (*see People v Peterkin*, 12 AD3d 1026, 1028, *lv denied* 4 NY3d 766). 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]). The sentence is not unduly harsh or severe. We have examined defendant's remaining contentions in his main and pro se supplemental briefs and conclude that they are without merit.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

759

KAH 15-01228

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JAMES MOORE, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DAVID STALLONE, SUPERINTENDENT, CAYUGA
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

WILLIAMS HEINL MOODY BUSCHMAN, P.C., AUBURN (MARIO J. GUTIERREZ OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered May 8, 2015 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition for a writ of habeas corpus. The appeal has been rendered moot by petitioner's release to parole supervision (*see People ex rel. Yourdon v Semrau*, 133 AD3d 1351, 1351), and the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

761

CA 16-02048

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

CHARLES F. DAMICK, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF GENEVA, DEFENDANT-RESPONDENT.

TREVETT CRISTO P.C., ROCHESTER (DAVID H. EALY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered January 21, 2016. The judgment, inter alia, dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking to vacate a default judgment of foreclosure entered in an underlying in rem tax foreclosure proceeding, and to vacate the tax foreclosure deed by which defendant acquired title to plaintiff's property. Plaintiff appeals from a judgment that granted defendant's motion to dismiss the complaint for failure to state a cause of action and to vacate a lis pendens filed by plaintiff, and that denied plaintiff's cross motion for summary judgment.

Plaintiff contends that the default judgment was prematurely granted inasmuch as plaintiff's time to answer or redeem his property in the tax foreclosure proceeding was extended pursuant to 11 USC § 108 (c) based on plaintiff's previously pending bankruptcy proceeding. We reject plaintiff's contention. That statute does not extend the time in which a debtor in a bankruptcy proceeding may file a pleading or cure a default in a separate proceeding. Rather, it extends the time in which a litigant must act in "commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor" (§ 108 [c]; *see generally Husmann v Trans World Airlines, Inc.*, 169 F3d 1151, 1153-1154; *Rogers v Corrosion Prods., Inc.*, 42 F3d 292, 295-297, *cert denied* 515 US 1160; *Aslanidis v United States Lines, Inc.*, 7 F3d 1067, 1072-1073).

The applicable provision here is 11 USC § 108 (b), which provides that, "if applicable nonbankruptcy law . . . fixes a period within

which the debtor . . . may file any pleading, . . . cure a default, or perform any other similar act, . . . the trustee may only file, cure, or perform . . . before the later of– (1) the end of such period . . . ; or (2) 60 days after the order of relief" (§ 108 [b]; *see Weiner v Sprint Mtge. Bankers Corp.*, 235 AD2d 472, 473-474, citing *Eagle-Picher Indus., Inc. v United States*, 937 F2d 625, 639-640; *Matter of Flores*, 55 BR 210, 211 [Bankr D NJ]), i.e., before the later of the deadline (as temporarily automatically stayed because of the bankruptcy filing) for answering or redeeming the property in the underlying tax foreclosure proceeding, or 60 days after the onset of that automatic stay in the bankruptcy proceeding. We conclude that, pursuant to 11 USC § 108 (b), and under the particular facts of this case, plaintiff's time for filing an answer or redeeming his property expired on September 16, 2014. The bankruptcy proceeding commenced on January 13, 2014, and on that date four days remained for plaintiff to answer or redeem the property in the tax foreclosure proceeding. The bankruptcy case and the automatic stay were dismissed on September 12, 2014, and thus plaintiff's time to answer or redeem the property expired four days later. We therefore conclude that defendant did not prematurely seek a default judgment on September 18, 2014.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

763

CA 16-01914

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

TERESA CRANE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CASEY GLOVER AND PAMELA DEVENDORF,
DEFENDANTS-RESPONDENTS.

PARISI & BELLAVIA, LLP, ROCHESTER (TIMOTHY C. BELLAVIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN J. KROGMAN DAUM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered July 7, 2016. The order, inter alia, granted the motion of defendants for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendants' motion in part and reinstating the complaint, as amplified by the bill of particulars, with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury within the meaning of Insurance Law § 5102, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the taxi cab in which she was a passenger collided with a vehicle operated by defendant Casey Glover and owned by her mother, defendant Pamela Devendorf. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff had not sustained a serious injury within the meaning of Insurance Law § 5102 (d) or an economic loss in excess of basic economic loss. Plaintiff moved for summary judgment on the issue of negligence and cross-moved for summary judgment with respect to two categories of serious injury, i.e., permanent consequential limitation of use and significant limitation of use. Supreme Court granted defendants' motion, denied plaintiff's motion and cross motion, and dismissed the complaint.

We agree with plaintiff that the court erred in granting defendants' motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury, and we therefore modify the order accordingly.

Defendants' own submissions in support of their motion raise triable issues of fact with respect to those two categories (*see Thomas v Huh*, 115 AD3d 1225, 1225). Defendants submitted an imaging study of plaintiff's lumbar spine, which showed a bulging disc at L4-5, and the affirmed report of the physician who conducted an examination of plaintiff on behalf of defendants and found that plaintiff had significant limited range of motion in flexion and extension. That study and report raise a triable issue of fact whether plaintiff had objective evidence of a serious injury (*see Courtney v Hebeler*, 129 AD3d 1627, 1628; *see generally Clark v Boorman*, 132 AD3d 1323, 1324). Defendants also submitted plaintiff's medical records, which showed that plaintiff's chiropractor detected muscle spasms at L4-5, which also raises a triable issue of fact whether there was objective evidence of an injury (*see Marks v Alonso*, 125 AD3d 1475, 1476; *Harrity v Leone*, 93 AD3d 1204, 1206). While the affirmed report of the physician who conducted the examination of plaintiff on behalf of defendants concluded that the disc bulge was "typically" consistent with degenerative disc disease, defendants also submitted medical records from one of plaintiff's treating physicians, which contained the physician's opinion that "[i]t [wa]s more likely than not" that plaintiff's lumbar spine complaints were caused by the motor vehicle accident (*see Thomas*, 115 AD3d at 1226). Furthermore, the affirmed report of the physician does not establish that plaintiff's condition is the result of a preexisting degenerative disc disease inasmuch as it "fails to account for evidence that plaintiff had no complaints of pain prior to the accident" (*id.*; *see Ashquabe v McConnell*, 46 AD3d 1419, 1419).

We reject plaintiff's contention, however, that she was entitled to summary judgment with respect to those two categories of serious injury. Plaintiff failed to meet her initial burden of establishing a permanent consequential limitation of use or a significant limitation of use through either a quantitative determination of any limited range of motion or a qualitative assessment of plaintiff's condition (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 350, 353). It is well settled that a " 'minor, mild or slight limitation of use' " is insufficient (*Gaddy v Eyler*, 79 NY2d 955, 957).

Contrary to plaintiff's contention, defendants met their initial burden on their motion with respect to the 90/180-day category of serious injury. Defendants submitted the deposition testimony of plaintiff, which established that she was not prevented "from performing substantially all of the material acts which constituted [her] usual daily activities" for at least 90 out of the 180 days following the accident (*Licari v Elliott*, 57 NY2d 230, 238; *see Jones v Leffel*, 125 AD3d 1451, 1452). Defendants also met their initial burden on their motion with respect to plaintiff's claim for economic loss in excess of basic economic loss, and plaintiff does not contend otherwise. Instead, plaintiff contends that she raised a triable issue of fact with respect to the 90/180-day category and economic loss in excess of basic economic loss by submitting her second set of responding papers to defendants' motion. The court, however, properly declined to consider those papers inasmuch as they constituted an improper surreply (*see Flores v Stankiewicz*, 35 AD3d 804, 805).

Finally, we agree with the court that plaintiff's motion seeking summary judgment on negligence was premature inasmuch as the taxi driver has not been deposed (*see Schlau v City of Buffalo*, 96 AD3d 1589, 1590).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

777

KA 12-00859

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOE N. FLOWERS, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered August 19, 2011. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [b]). Defendant contends on appeal that he was denied his right to a fair trial based upon prosecutorial misconduct, particularly during summation. Although defendant did not object to all of the statements alleged on appeal to constitute prosecutorial misconduct, and thus failed to preserve for our review his claims with respect to those particular statements, we nevertheless exercise our power to review all of his claims of prosecutorial misconduct as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

The People correctly concede that the prosecutor improperly appealed to the sympathy of the jury (*see People v Presha*, 83 AD3d 1406, 1408). The People also correctly concede that the prosecutor improperly implied that a potential adolescent witness did not testify because he felt “guilt” about defendant’s actions; County Court, however, properly sustained defense counsel’s objection to the prosecutor’s statement and gave a curative instruction, which the jury is presumed to have followed (*see generally People v Allen*, 78 AD3d 1521, 1521, *lv denied* 16 NY3d 827). Thus, with respect to that instance of misconduct, we conclude that any prejudice was alleviated (*see id.*). The People also correctly concede that the prosecutor denigrated defense counsel by stating that he intentionally attempted

to confuse an adolescent prosecution witness. We further conclude that, in an attempt to discredit the testimony of an adolescent defense witness, the prosecutor misstated the evidence with respect to whether the witness had spoken with defendant regarding the allegations against him. Although the prosecutor properly responded to defense counsel's remarks during summation attacking the credibility of the victim (*see People v Walker*, 117 AD3d 1441, 1441-1442; *People v Martinez*, 114 AD3d 1173, 1173, *lv denied* 22 NY3d 1200), she also improperly vouched for the credibility of the victim's testimony (*see Presha*, 83 AD3d at 1408). Furthermore, the prosecutor improperly acted as an unsworn expert by describing defendant's behavior towards the victim as "classic grooming behavior," and as an unsworn witness with respect to reasons why the victim delayed in reporting what had occurred (*see People v Fisher*, 18 NY3d 964, 966).

We nevertheless conclude that reversal is not mandated here inasmuch as "the misconduct [did] not substantially prejudice[] . . . defendant's trial" (*People v Galloway*, 54 NY2d 396, 401). It is axiomatic that we must consider whether "the conduct of the prosecutor 'has caused such substantial prejudice to the defendant that he [or she] has been denied due process of law. In measuring whether substantial prejudice has occurred, one must look at the severity and frequency of the conduct, whether the court took appropriate action to dilute the effect of that conduct, and whether review of the evidence indicates that without the conduct the same result would undoubtedly have been reached' " (*People v Griffin*, 125 AD3d 1509, 1511). Although there were several instances of misconduct during the prosecutor's summation, the court thoroughly instructed the jury before summations that, inter alia, nothing that an attorney says during his or her summation is evidence, and that the jury must decide the case only on the evidence and the law, and not on anything that is said during a summation. The court also gave curative instructions after the objections it sustained. Furthermore, the evidence against defendant was overwhelming (*cf. Fisher*, 18 NY3d at 966; *People v Jones*, 134 AD3d 1588, 1589; *Griffin*, 125 AD3d at 1512; *People v Mott*, 94 AD2d 415, 419), and thus we conclude that, "without the conduct[,] the same result would undoubtedly have been reached" (*Mott*, 94 AD2d at 419).

We note that we have recently considered appeals from several judgments in cases prosecuted by the Monroe County District Attorney's Office that have resulted in reversal based upon prosecutorial misconduct (*see Fisher*, 18 NY3d at 965; *Jones*, 134 AD3d at 1588; *Griffin*, 125 AD3d at 1509), or in which we have admonished the prosecutor for misconduct (*see People v Gibson*, 134 AD3d 1512, 1513, *lv denied* 27 NY3d 1151; *Presha*, 83 AD3d at 1408), and most of those cases involved charges of sexual abuse against a child. It is undisputed that, three months before the trial herein, we admonished the same prosecutor in *Presha* (83 AD3d at 1408), and that the Court of Appeals reversed the judgment in *Fisher* (18 NY3d at 965) based upon this same prosecutor's misconduct. We therefore take this opportunity to admonish again the prosecutor in this case, in particular, and prosecutors in the Monroe County District Attorney's Office, in general, that " '[i]t is not enough for [a prosecutor] to be intent on

the prosecution of [the] case. Granted that [the prosecutor's] paramount obligation is to the public, [he or she] must never lose sight of the fact that a defendant, as an integral member of the body politic, is entitled to a full measure of fairness. Put another way, [the prosecutor's] mission is not so much to convict as it is to achieve a just result' " (*People v Bailey*, 58 NY2d 272, 276-277, quoting *People v Zimmer*, 51 NY2d 390, 393). Indeed, "[p]rosecutors play a distinctive role in the search for truth in criminal cases. As public officers they are charged not simply with seeking convictions but also with ensuring that justice is done. This role gives rise to special responsibilities—constitutional, statutory, ethical, personal—to safeguard the integrity of criminal proceedings and fairness in the criminal process" (*People v Santorelli*, 95 NY2d 412, 420-421).

We conclude that, contrary to defendant's further contention, he was not deprived a fair trial based upon the court's allegedly erroneous evidentiary rulings to which he objected (*see People v Smith*, 21 AD3d 1340, 1340, *lv denied* 5 NY3d 885). Finally, we have considered defendant's remaining contentions and conclude that they are without merit.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

782

CA 16-00937

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

BETTE DAVIS WEHLE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALFREDA MOROCZKO, DEFENDANT,
AND ACEA M. MOSEY, ESQ., AS ADMINISTRATOR
OF THE ESTATE OF NICHOLAS MOROCZKO, DECEASED,
DEFENDANT-APPELLANT.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (RALPH C. LORIGO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered January 6, 2016. The order, inter alia, granted the 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 to recover on a promissory note, naming as defendants Nicholas Moroczko (Nicholas) and Alfreda Moroczko (Alfreda). Alfreda died, however, before plaintiff filed the summons and complaint. Plaintiff moved for summary judgment on her complaint, and Nicholas opposed plaintiff's motion and cross-moved to dismiss the complaint for plaintiff's failure to join a necessary party, i.e., Alfreda's estate. Supreme Court granted the motion, denied the cross motion, and awarded plaintiff judgment against Nicholas in the amount of $149,652, the outstanding balance on the note. Thereafter, Nicholas died, and the administrator of his estate was substituted as a defendant.

We conclude that the court properly granted the motion. Plaintiff met her prima facie burden by submitting a copy of the note and evidence of nonpayment (*see Di Marco v Bombard Car Co., Inc.*, 11 AD3d 960, 960-961; *see also Harvey v Agle*, 115 AD3d 1200, 1200). The evidence of nonpayment consisted of plaintiff's affidavit and Nicholas's deposition testimony. Plaintiff averred that she lent Nicholas the amount reflected in the note, that he signed the note in her presence, and that he refused to repay the note on demand. Nicholas testified that he signed the note, owed plaintiff the amount reflected in the note, and had not repaid her.

In opposition, Nicholas "failed to 'come forward with evidentiary proof showing the existence of a triable issue of fact with respect to a bona fide defense of the note' " (*Harvey*, 115 AD3d at 1200). We reject Nicholas's contention that the note is unclear with respect to who owes the debt and when it must be repaid. Where, as here, two or more persons execute a promissory note, each is bound to repay the entire amount unless otherwise stated (*see United States Print. & Lithograph Co. v Powers*, 233 NY 143, 152; *Wujin Nanxiashu Secant Factory v Ti-Well Intl. Corp*., 22 AD3d 308, 310-311, *lv denied* 7 NY3d 703). Furthermore, inasmuch as "no time for payment is stated" in the note, it is "payable on demand" (UCC 3-108; *see Shah v Exxis, Inc*., 138 AD3d 970, 972).

We further conclude that the court properly denied the cross motion. Although Alfreda executed the note, her estate is not a necessary party to this action pursuant to CPLR 1001 inasmuch as the note allows plaintiff to recover the entire debt from Nicholas (*see NC Venture I, L.P. v Complete Analysis, Inc.*, 22 AD3d 540, 543; *see also Taran Furs v Champagne Bridals*, 116 AD2d 970, 970).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

784

CA 16-01946

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

LORI L. MARTINEZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BARBARA A. GRIMM AND FIRST STUDENT INC.,
DEFENDANTS-APPELLANTS.

THE LONG FIRM, LLP, BUFFALO (WILLIAM A. LONG, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WALSH, ROBERTS & GRACE, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered February 10, 2016. The order granted the motion of plaintiff for leave to reargue, vacated an order granting the motion of defendants for summary judgment, denied the motion of defendants for summary judgment, reinstated the complaint, and granted 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: Plaintiff commenced this action seeking damages for personal injuries and property damage sustained when a school bus owned by defendant First Student Inc., and operated by defendant Barbara A. Grimm, left the roadway and impacted a building owned and occupied by plaintiff. Subsequent medical tests concluded that Grimm experienced an episode of syncope, which caused her to suddenly lose consciousness, while operating the school bus. Although the school bus was not carrying any student passengers, a school bus aide was on board, and she was a witness to the accident and the events thereafter.

Defendants moved for summary judgment dismissing the complaint on the grounds that Grimm suffered an unforeseen medical emergency that caused her to lose consciousness and that she could not be charged with negligence as a result thereof (*see generally Dalchand v Missigman*, 288 AD2d 956, 956). Plaintiff cross-moved for partial summary judgment on the issue that she sustained a serious injury within the meaning of Insurance Law § 5102 (d). Supreme Court initially granted the motion but, upon granting plaintiff's motion for leave to reargue, denied the motion, reinstated the complaint, and

granted the cross motion. Defendants appeal, as limited by their brief, from that part of the order denying their motion. We affirm.

We note at the outset that defendants do not challenge the court's determination to grant plaintiff's motion for leave to reargue (*see generally* CPLR 2221 [d]), and thus we are concerned only with the merits of the court's determination of defendants' summary judgment motion. In support of the motion, defendants submitted, inter alia, the affidavit of Grimm's primary care physician, who opined, based upon her treatment history and tests performed upon Grimm as a result of the accident, that Grimm's loss of consciousness was caused by a previously undiagnosed condition known as "neurocardiogenic syncope" and that the event was sudden and unforeseeable. We reject plaintiff's contention that the affidavit is not competent evidence because the physician did not specifically frame her opinions in terms of a "reasonable degree of medical certainty" (*see Matott v Ward*, 48 NY2d 455, 460, 463). Defendants also submitted the deposition testimony of a bystander who immediately boarded the school bus after the impact in order to render assistance. In response to Grimm's inquiry "What happened?" after she regained consciousness, the bystander heard the school bus aide respond: "You must have had another seizure."

It is well settled that the operator of a vehicle who becomes involved in an accident as the result of suffering a sudden medical emergency will not be chargeable with negligence as long as the emergency was unforeseen (*see Pitt v Mroz*, 146 AD3d 913, 914; *Dalchand*, 288 AD2d at 956). Here, although defendants submitted evidence establishing that Grimm experienced a medical emergency that caused her to suddenly lose consciousness while operating the school bus (*cf. Hazelton v D.A. Lajeunesse Bldg. & Remodeling, Inc.*, 38 AD3d 1071, 1072), we conclude that the deposition testimony of the bystander, also submitted by defendants, raised a triable issue of fact whether the medical emergency was unforeseen by Grimm (*see generally Karl v Terbush*, 63 AD3d 1359, 1360). We reject defendants' contention that the bystander's testimony constitutes inadmissible hearsay. We instead further conclude that, because the school bus aide's statement was made under the stress of excitement caused by the accident, it constitutes an excited utterance admissible as an exception to the hearsay rule (*see Langner v Primary Home Care Servs., Inc.*, 83 AD3d 1007, 1009-1010; *see generally Nucci v Proper*, 95 NY2d 597, 602). Because defendants' submissions failed to eliminate all triable issues of fact with respect to the unforeseeability of the medical emergency, the court properly denied the motion regardless of the sufficiency of the opposing papers (*see generally Monroe Abstract & Tit. Corp. v Giallombardo*, 54 AD2d 1084, 1085).

We have considered defendants' remaining contentions and conclude that they are without merit or rendered academic by our determination.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

787

CA 17-00084

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

DEMARIS WILSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EXIGENCE OF TEAM HEALTH, DEFENDANT-RESPONDENT.

SANDERS & SANDERS, CHEEKTOWAGA (HARVEY P. SANDERS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JACKSON LEWIS P.C., NEW YORK CITY (MARTIN W. ARON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered March 22, 2016. The order granted the motion of defendant to dismiss the complaint and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and in the interest of justice without costs, the motion is denied and the complaint is reinstated.

Memorandum: Plaintiff commenced this action pursuant to Labor Law § 741 alleging retaliatory discharge. The summons and complaint were filed electronically on October 13, 2015. Defendant thereafter moved to dismiss the complaint pursuant to CPLR 3211 (a) (5) on the ground that the statute of limitations period had expired. In a supporting memorandum of law, defendant contended that plaintiff's cause of action accrued on October 10, 2013, and thus the two-year statute of limitations period expired on October 10, 2015 (*see generally* § 740 [4] [d]). Supreme Court granted defendant's motion and dismissed the complaint. We reverse the order, deny the motion and reinstate the complaint.

Defendant failed to meet its initial burden of establishing that the statute of limitations period had expired (*cf. Wendover Fin. Servs. v Ridgeway*, 137 AD3d 1718, 1719, *lv denied* 140 AD3d 1715). Even assuming, arguendo, that plaintiff's cause of action accrued on October 10, 2013, we note that the two-year statute of limitations period ended on a Saturday and therefore was extended until "the next succeeding business day" (General Construction Law § 25-a [1]; *see Curto v New York Law Journal*, 144 AD3d 1543, 1543). Because Columbus Day fell on the Monday following that Saturday (*see* § 24), the next business day was October 13, 2015, the date on which the action was commenced. Plaintiff's complaint therefore was timely.

Although plaintiff did not assert that calculation in opposing defendant's motion before the motion court or on this appeal, we deem it appropriate to consider it sua sponte in the interest of justice (*see generally Hecker v State of New York*, 92 AD3d 1261, 1262, *affd* 20 NY3d 1087, *rearg denied* 21 NY3d 987). As noted above, defendant had the burden of establishing that the statute of limitations period had expired, and it could not refute that such period was extended by operation of law to October 13, 2015 (*see generally Matter of Persing v Coughlin*, 214 AD2d 145, 148-149).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

791

TP 17-00178

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

IN THE MATTER OF KELLI HELMER AND ERIC MIKOLAJEK,
PETITIONERS,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY
SERVICES AND ERIE COUNTY DEPARTMENT OF SOCIAL
SERVICES, RESPONDENTS.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (DAVID E. GUTOWSKI OF COUNSEL), FOR PETITIONERS.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR RESPONDENT NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Erie County [John F. O'Donnell, J.], entered January 24, 2017) to review a determination of respondent New York State Office of Children and Family Services. The determination affirmed the determination of respondent Erie County Department of Social Services to remove two foster children from petitioners' home.

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

Memorandum: In this proceeding pursuant to CPLR article 78, petitioners challenge the determination of respondent New York State Office of Children and Family Services (OCFS) that affirmed, after a fair hearing, the determination of respondent Erie County Department of Social Services (DSS) to remove two foster children from petitioners' home. Petitioners contend that the determination is arbitrary and capricious and not supported by substantial evidence inasmuch as the evidence established that removal of the children would be contrary to their best interests. We note at the outset that, in reviewing the determination, "it is not our proper role to substitute our judgment here for that of the agencies in resolving the issue of 'best interests' " (*Matter of O'Rourke v Kirby*, 54 NY2d 8, 14 n 2; *see Matter of John B. v Niagara County Dept. of Social Servs.*,

289 AD2d 1090, 1091-1092), but rather, we must determine whether there is "such relevant proof as a reasonable mind may accept as adequate to support" the determination to remove the children (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180; *see Matter of Bottom v Annucci*, 26 NY3d 983, 984-985). The evidence presented by DSS and relied upon by OCFS meets that standard. OCFS was entitled to credit the testimony of the DSS witnesses and to conclude, based upon that testimony, that serious doubts existed with respect to the stability of petitioners' home and the ability of petitioners to care for the older foster child and protect the younger foster child and the other child in their care (*see Matter of Emerson v New York State Off. of Children & Family Servs.*, 148 AD3d 1627, 1627-1628). We therefore decline to disturb the determination that removal was in the best interests of the children, inasmuch as that determination is supported by substantial evidence and is not arbitrary or capricious.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

797

KA 14-01986

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARRY L. ROBINSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered November 4, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), based upon the recovery of a revolver from a bush near the location where defendant was detained by police officers. We reject defendant's contention that Supreme Court erred in refusing to suppress his statement as the alleged fruit of an illegal detention not supported by a reasonable suspicion of criminality. An officer testified that he observed defendant repeatedly grabbing at his waistband (*see People v Benjamin*, 51 NY2d 267, 271; *People v Rivera*, 286 AD2d 235, 235-236, *lv denied* 97 NY2d 760). The officer also observed defendant remove an object from his waistband and place the object in a bush when he saw a marked patrol car approach, and then return the item to his waistband after the patrol car passed (*see generally People v Meredith*, 201 AD2d 674, 674-675, *lv denied* 83 NY2d 1005). The officer thereafter observed defendant remove the object from his waistband and hide it in the bush a second time when a second marked patrol car turned onto the street where defendant was standing. We conclude that the evidence thus supports the court's determination that defendant's conduct gave rise to a reasonable suspicion that he was in possession of illegal contraband, most likely a weapon (*see People v Roots*, 13 AD3d 886, 887, *lv denied* 4 NY3d 890).

The evidence also supports the court's determination that defendant's act of discarding the weapon in the bush before the officers detained him constituted an abandonment, i.e., a strategic, calculated decision not made in response to any police illegality (*see People v Johnson*, 111 AD3d 469, 470, *lv denied* 22 NY3d 1157; *People v Morris*, 105 AD3d 1075, 1077-1078, *lv denied* 22 NY3d 1042). Thus, the court also properly refused to suppress the weapon.

Finally, in light of defendant's resentencing, we do not consider his challenge to the severity of his original sentence, and we dismiss the appeal from the judgment to that extent (*see People v Williams*, 136 AD3d 1280, 1284, *lv denied* 27 NY3d 1141, 29 NY3d 954).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

798

KA 14-02226

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, ALSO KNOWN AS WORM,
DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (GARY MULDOON 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 May 30, 2014. The judgment convicted defendant, upon a jury verdict, of robbery in the third degree, grand larceny in the fourth degree, petit larceny, endangering the welfare of a child (two counts), assault in the third degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, robbery in the third degree (Penal Law § 160.05), arising from an incident involving the taking of property from his girlfriend. Initially, we note that defendant's challenges to the sufficiency of the evidence regarding the taking of property in an incident occurring at 9:00 a.m. are moot, inasmuch as defendant was acquitted of the count of the indictment that charged him with robbery at that time. Furthermore, defendant's challenges to the sufficiency of the evidence with respect to the counts of which he was convicted are not preserved for our review, inasmuch as his motion for a trial order of dismissal was not " 'specifically directed' " at the grounds now raised on appeal (*People v Gray*, 86 NY2d 10, 19).

In any event, defendant's challenges are without merit. We conclude that the evidence is legally sufficient to establish that he used physical force for the purpose of retaining the property "immediately after" he had stolen it (Penal Law § 160.00 [1]; *see People v Gosier*, 35 AD3d 1241, 1241, *lv denied* 8 NY3d 984; *People v Williams*, 12 AD3d 317, 318, *lv denied* 4 NY3d 749; *see generally People v Carrel*, 99 NY2d 546, 547), and thus the conviction concerning the robbery occurring at 11:00 a.m. is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Furthermore, "there is [a] valid line of reasoning and permissible inferences which could lead a rational person" to conclude that the victim sustained a physical injury during the incident (*id.* at 495; *see People v Lewis*, 129 AD3d 1546, 1547-1548, *lv denied* 26 NY3d 969; *People v Carson*, 126 AD3d 996, 997, *lv denied* 25 NY3d 1161), and thus the conviction of assault in the third degree is supported by legally sufficient evidence (*see generally Bleakley*, 69 NY2d at 495). Finally, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

799

KA 11-00094

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYON L. WONG, 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 (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered January 5, 2011. The judgment convicted defendant, upon his plea of guilty, of insurance fraud in the fourth degree and criminal possession of a forged instrument 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 insurance fraud in the fourth degree (Penal Law § 176.15) and criminal possession of a forged instrument in the second degree (§ 170.25). Defendant moved to withdraw his plea on the ground that he was denied effective assistance of counsel, and he contends that County Court erred in denying his motion. As a preliminary matter, we note that defendant's contention survives his valid waiver of the right to appeal " 'only insofar as he contends that his plea was infected by the allegedly ineffective assistance and that he entered the plea because of his attorney's allegedly poor performance' " (*People v Strickland*, 103 AD3d 1178, 1178; *see People v Montgomery*, 63 AD3d 1635, 1635-1636, *lv denied* 13 NY3d 798). We conclude that the court properly denied the motion.

"The decision to permit a defendant to withdraw a guilty plea rests in the sound discretion of the court" (*People v Smith*, 122 AD3d 1300, 1301-1302, *lv denied* 25 NY3d 1172 [internal quotation marks omitted]; *see People v Frederick*, 45 NY2d 520, 524-525), and "a guilty plea will be upheld as valid if it was entered voluntarily, knowingly and intelligently" (*People v Fiumefreddo*, 82 NY2d 536, 543; *see People v Moissett*, 76 NY2d 909, 910-911). Here, defendant's claim that he pleaded guilty because of ineffective assistance of counsel is not supported by the record, which reveals that defendant communicated

adequately with defense counsel, that he received a favorable plea bargain, and that the court properly determined that the plea was knowing and voluntary after holding a hearing on defendant's motion (*see generally People v Ford*, 86 NY2d 397, 404). We likewise reject defendant's claim that he was denied effective assistance of counsel based on defense counsel's alleged failure to advise him of the immigration consequences of the guilty plea. The record reveals that both the court and defense counsel advised defendant of potential immigration consequences of his plea, including the risk of deportation, as required by *Padilla v Kentucky* (559 US 356, 374; *see People v Lawrence*, 148 AD3d 1472, 1474; *People v Dealmeida*, 124 AD3d 1405, 1406). We thus conclude that the guilty plea was knowingly, voluntarily, and intelligently entered (*see Fiumefreddo*, 82 NY2d at 543), and that the court providently exercised its discretion in denying the motion.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

805

CA 16-02066

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

IN THE MATTER OF THE APPLICATION OF JON Z. AND VICTOR Z. FOR THE APPOINTMENT OF A GUARDIAN OF THE PROPERTY AND/OR PERSON OF MARGARET Z., AN ALLEGED INCAPACITATED PERSON.

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

JON Z., PETITIONER-APPELLANT;

THERESA M. GIROUARD, ESQ., APPOINTED GUARDIAN FOR MARGARET Z., AN ALLEGED INCAPACITATED PERSON, RESPONDENT-RESPONDENT.

JON Z., PETITIONER-APPELLANT PRO SE.

SCHMITT & LASCURETTES, LLC, UTICA (WILLIAM P. SCHMITT OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered October 13, 2016. The order denied the motion of petitioner to compel respondent to provide certain evidence, and for other relief.

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

Memorandum: In this guardianship proceeding, petitioner appeals from an order denying his motion for, among other relief, removal of respondent as guardian of petitioner's incapacitated mother. Supreme Court concluded that the issues raised in petitioner's motion had previously been raised by petitioner and determined by the court in earlier proceedings. We are unable to determine the merits of petitioner's contentions on appeal inasmuch as the 40-page record before us does not contain sufficient information to enable us to determine whether the court properly denied petitioner's motion on that ground. Petitioner, as the appellant, "submitted this appeal on an incomplete record and must suffer the consequences" (*Matter of Santoshia L.*, 202 AD2d 1027, 1028; *see Resetarits Constr. Corp. v City of Niagara Falls*, 133 AD3d 1229, 1229; *Matter of Rodriguez v Ward*, 43 AD3d 640, 641).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

806

CA 16-02181

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

JOHN J. GABRIEL, III, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GREAT LAKES CONCRETE PRODUCTS LLC, AND
WAYNE T. BONNETT, DEFENDANTS-RESPONDENTS.

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

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (MAUREEN G. FATCHERIC OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered August 23, 2016. The order denied in part the motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained when his vehicle was struck by a cement-mixer truck operated by defendant Wayne T. Bonnett and owned by defendant Great Lakes Concrete Products LLC. Plaintiff appeals from an order that, inter alia, denied that part of his motion seeking summary judgment dismissing defendants' affirmative defense of comparative negligence. We affirm.

In support of his motion, plaintiff submitted evidence that the truck driven by Bonnett was traveling in the center lane, and then moved into the right lane and struck plaintiff's vehicle, thus establishing that Bonnett's negligence was a proximate cause of the accident (*see Williams v New York City Tr. Auth.*, 37 AD3d 827, 827-828; *see also* Vehicle and Traffic Law § 1128 [a]; *see generally Russo v Pearson*, 148 AD3d 1762, 1763). Defendants raised a triable issue of fact in opposition, however, by submitting evidence that Bonnett checked his mirror, saw that the lane was clear, and put on his signal prior to moving into the right lane, and that plaintiff was accelerating in order to pass Bonnett on the right at the time of the accident and therefore did not use reasonable care to avoid the collision (*see Romano v 202 Corp.*, 305 AD2d 576, 577). Thus, viewing the evidence in the light most favorable to defendants (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340), we conclude that defendants raised a triable issue of fact concerning the cause of the accident

(*see Fogel v Rizzo*, 91 AD3d 706, 707), and whether plaintiff's conduct contributed to it (*see Romano*, 305 AD2d at 577; *see generally Russo*, 148 AD3d at 1763).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

809

CA 16-01808

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

IN THE MATTER OF GENE MAJCHRZAK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
UPONOR INFRA CORPORATION, RESPONDENTS-RESPONDENTS.

LAW OFFICE OF LINDY KORN, PLLC, BUFFALO (CHARLES L. MILLER, II, OF COUNSEL), FOR PETITIONER-APPELLANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (VINCENT M. MIRANDA OF COUNSEL), FOR RESPONDENT-RESPONDENT UPONOR INFRA CORPORATION.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered December 9, 2015 in a proceeding pursuant to Executive Law § 298. The order dismissed the petition.

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

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 seeking to annul the determination of respondent New York State Division of Human Rights (SDHR) that there was no probable cause to believe that petitioner's employer, respondent Uponor Infra Corporation (Uponor), discriminated and retaliated against him. We reject petitioner's contention that Supreme Court erred in dismissing the petition.

"Where, as here, SDHR 'renders a determination of no probable cause without holding a hearing, the appropriate standard of review is whether the probable cause determination was arbitrary and capricious or lacked a rational basis' " (*Matter of Napierala v New York State Div. of Human Rights*, 140 AD3d 1746, 1747; *see Matter of McDonald v New York State Div. of Human Rights*, 147 AD3d 1482, 1482). "Probable cause exists only when, after giving full credence to the complainant's version of the events, there is some evidence of unlawful discrimination . . . There must be a *factual* basis in the evidence sufficient to warrant a cautious [person] to believe that discrimination had been practiced" (*Matter of Mambretti v New York State Div. of Human Rights*, 129 AD3d 1696, 1697, *lv denied* 26 NY3d 909 [internal quotation marks omitted]). Although petitioner's "factual showing must be accepted as true on a probable cause determination" (*id.*), "full credence need not be given to petitioner's allegation in

his complaint that he was discriminated against on the basis of his [age or] disability, for this is the ultimate conclusion, which must be determined solely by [SDHR] based upon all of the facts and circumstances" (*Matter of Vadney v State Human Rights Appeal Bd.*, 93 AD2d 935, 936; *see McDonald*, 147 AD3d at 1483; *Matter of Smith v New York State Div. of Human Rights*, 142 AD3d 1362, 1363-1364).

Here, we conclude that SDHR properly investigated petitioner's complaint and provided him with a full and fair opportunity to present evidence on his behalf and to rebut the evidence presented by Uponor (*see Matter of Witkowich v New York State Div. of Human Rights*, 56 AD3d 1170, 1170, *lv denied* 12 NY3d 702). We further conclude that SDHR's determination is supported by a rational basis and is not arbitrary or capricious (*see McDonald*, 147 AD3d at 1483; *Witkowich*, 56 AD3d at 1170; *Matter of Murphy v Russell Sage Coll.*, 134 AD2d 716, 717).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

810

CA 15-00988

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

IN THE MATTER OF ELROY HENDRIX,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MONROE COUNTY DEPARTMENT OF COMMUNICATION,
RESPONDENT-RESPONDENT.

ELROY HENDRIX, PETITIONER-APPELLANT PRO SE.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered April 20, 2015 in a CPLR article 78 proceeding. The judgment denied the petition.

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

Memorandum: Petitioner appeals from a judgment that denied his CPLR article 78 petition seeking to compel respondent to produce certain documents pursuant to the Freedom of Information Law ([FOIL] Public Officers Law art 6) and CPL 190.25 (4). We affirm. Petitioner was not entitled to the requested grand jury minutes because "the minutes are court records and [are] exempt from the ambit of FOIL" (*Matter of Bridgewater v Johnson*, 44 AD3d 549, 550; *see Matter of Hall v Bongiorno*, 305 AD2d 508, 509). With respect to petitioner's application pursuant to CPL 190.25 (4), we conclude that Supreme Court properly determined that petitioner failed to provide a compelling and particularized need for the minutes (*see Matter of Mullgrav v Santucci*, 195 AD2d 786, 786-787; *Matter of Gibson v Grady*, 192 AD2d 657, 657).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

811

CA 16-01559

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

KIMBERLY CROWNER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS A. KING, DEFENDANT-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (REBECCA C. CRONAUER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered May 26, 2016. The order, among other things, granted in part plaintiff's motion for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she allegedly sustained when defendant's vehicle struck an ambulance in which plaintiff was riding while acting in the course of her employment as an emergency medical technician and administering emergency care to a patient. In her complaint, plaintiff alleged that defendant, among other things, negligently failed to pull over or yield the right-of-way to the ambulance, which had its emergency lights and siren activated at the time of the accident. Defendant appeals from an order that, inter alia, granted that part of plaintiff's motion seeking summary judgment on the issues of negligence and proximate cause. Defendant's contention that there is a triable issue of fact whether the ambulance's emergency lights and siren were activated at the time of the accident is raised for the first time on appeal and thus is not preserved for our review (*see generally British Am. Dev. Corp. v Schodack Exit Ten, LLC*, 83 AD3d 1247, 1248).

Contrary to defendant's further contention, even assuming, arguendo, that there are triable issues of fact whether the ambulance driver was reckless and whether that recklessness was a proximate cause of the accident, we conclude that they do not preclude plaintiff's entitlement to summary judgment on the issue whether defendant's negligence was a proximate cause of the accident, inasmuch as "[i]t was not plaintiff[']s burden to demonstrate that defendant's negligence was the sole proximate cause" (*Strauss v Billig*, 78 AD3d

415, 415, *lv dismissed* 16 NY3d 755).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

817

KA 11-00861

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY WIGGINS, 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 (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), entered February 24, 2011. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: On appeal from a judgment revoking his sentence of probation imposed upon his conviction of robbery in the third degree (Penal Law § 160.05) and criminal contempt in the first degree (§ 215.51 [b] [v]) and imposing a sentence of incarceration, defendant contends that Supreme Court erred in finding that he violated the conditions of his probation. We reject that contention.

Preliminarily, the People contend that defendant's appeal is rendered moot by the expiration of the maximum term of his sentence. We reject that contention, and note our disagreement with the Third Department on this issue (*see e.g. People v Lesson*, 32 AD3d 1083, 1083; *People v Hamilton*, 214 AD2d 783, 783). Defendant challenges the determination that he violated the conditions of his probation, and does not challenge the legality or severity of his sentence (*cf. People v Parente*, 4 AD3d 793, 794; *People v Griffin*, 239 AD2d 936, 936; *People v Meli*, 142 AD2d 938, 939, *lv denied* 72 NY2d 921). A determination that defendant has violated the conditions of his probation is "a continuing blot on [his] record" with potential future consequences (*Matter of Williams v Cornelius*, 76 NY2d 542, 546). Indeed, it will impact future sentencing determinations (*see People v Newton*, 24 AD3d 1287, 1288, *lv denied* 6 NY3d 836; *People v Tucker*, 272 AD2d 992, 992, *lv denied* 95 NY2d 872), including whether defendant is eligible for a subsequent probationary sentence (*see People v Gassner*, 118 AD3d 1221, 1221-1222, *lv denied* 23 NY3d 1062). We thus conclude

that defendant's appeal is not moot (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714).

Nonetheless, we reject defendant's contention on the merits. "The People have the burden of establishing by a preponderance of the evidence that defendant violated the terms and conditions of his probation" (*People v Dettelis*, 137 AD3d 1722, 1722). " 'Although hearsay evidence is admissible in probation violation proceedings . . . , the People must present facts of a probative character, outside of the hearsay statements, to prove the violation' " (*People v Paris*, 145 AD3d 1530, 1531). Contrary to defendant's contention, the testimony of his probation officer regarding defendant's admissions is not hearsay, and it is sufficient to establish a violation of probation (*see People v Holland*, 95 AD3d 1504, 1505, *lv denied* 19 NY3d 974; *People v Pettway*, 286 AD2d 865, 865, *lv denied* 97 NY2d 686; *see also People v Perna*, 74 AD3d 1807, 1807-1808, *lv denied* 17 NY3d 716). Defendant's probation officer testified that defendant admitted that he was arrested for possession of marihuana and that he had smoked marihuana. The probation officer confirmed that defendant's conduct "violate[d] the [probation] condition that prohibit[ed the] use of any mood altering substance, and it also violate[d] the condition that require[d] law abiding behavior." We thus conclude that the court properly determined that the People demonstrated by a preponderance of the evidence that defendant had possessed and used marihuana in violation of the conditions of his probation (*see People v Wheeler*, 99 AD3d 1168, 1173, *lv denied* 20 NY3d 989; *Pettway*, 286 AD2d at 865).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

818

KA 15-00910

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EUGENE STEWART, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

KATHLEEN A. KUGLER, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

EUGENE STEWART, DEFENDANT-APPELLANT PRO SE.

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 March 20, 2015. 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: In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the third degree (Penal Law § 140.20) and, in appeal No. 2, he appeals from a judgment convicting him, upon his plea of guilty, of three counts of burglary in the third degree (*id.*). In both appeals, defendant contends in his main brief that the aggregate sentence imposed by Supreme Court is unduly harsh and severe. In eliciting defendant's waiver of his right to appeal as an explicit condition of the plea agreement in each matter, the court advised defendant of the maximum sentences that could be imposed on each conviction (*see People v Lococo*, 92 NY2d 825, 827), and the record establishes that defendant knowingly, intelligently, and voluntarily waived his right to appeal with respect to both his convictions and sentences (*see People v Lopez*, 6 NY3d 248, 256; *cf. People v Maracle*, 19 NY3d 925, 928). We thus conclude that the valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentences imposed (*see Lopez*, 6 NY3d at 255-256).

In appeal No. 2, defendant contends in his pro se supplemental brief that his waiver of indictment and consent to be prosecuted under a superior court information (SCI) were jurisdictionally defective.

We note that defendant's challenges to the jurisdictional requirements of the waiver of indictment and the SCI need not be preserved for our review (*see People v Boston*, 75 NY2d 585, 589 n; *People v Tun Aung*, 117 AD3d 1492, 1493) and are not precluded by defendant's valid waiver of his right to appeal (*see Tun Aung*, 117 AD3d at 1493; *People v Lugg*, 108 AD3d 1074, 1074). We nonetheless conclude that defendant's challenges lack merit (*see People v Attea*, 84 AD3d 1700, 1701; *see generally* CPL 195.10 [1] [b]; *People v D'Amico*, 76 NY2d 877, 879).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

819

KA 15-00911

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EUGENE STEWART, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

KATHLEEN A. KUGLER, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

EUGENE STEWART, DEFENDANT-APPELLANT PRO SE.

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 March 20, 2015. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree (three counts).

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

Same memorandum as in *People v Stewart* ([appeal No. 1] ___ AD3d ___ [June 16, 2017]).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

822

CAF 15-01695

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

IN THE MATTER OF JESSICA N. AUSTIN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PHILIP W. WRIGHT, RESPONDENT-RESPONDENT.

IN THE MATTER OF BONNIE S. LOWERY, PETITIONER,

V

JESSICA N. AUSTIN AND PHILIP W. WRIGHT,
RESPONDENTS.

IN THE MATTER OF JESSICA N. AUSTIN,
PETITIONER-APPELLANT,

V

PHILIP W. WRIGHT, RESPONDENT-RESPONDENT.

CHAFFEE & LINDER, PLLC, BATH (RUTH A. CHAFFEE OF COUNSEL), FOR PETITIONER-APPELLANT.

HUNT & BAKER, HAMMONDSPORT (TRAVIS J. BARRY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

MARYBETH D. BARNET, ATTORNEY FOR THE CHILD, CANANDAIGUA.

Appeal from an order of the Family Court, Steuben County (Joseph W. Latham, J.), entered September 24, 2015 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that the primary placement of the child shall be with respondent Philip W. Wright.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Family Court, Steuben County, for further proceedings in accordance with the following memorandum: Petitioner mother appeals from an order that denied her two separate petitions to modify a prior custody order and granted in part respondent father's cross petition to modify the prior custody order by awarding the father primary placement of the parties' child. "It is well established that alteration of an established custody arrangement will be ordered *only* upon a showing of a change in

circumstances which reflects a real need for change to ensure the best interest[s] of the child" (*Matter of Irwin v Neyland*, 213 AD2d 773, 773 [emphasis added]; *see Matter of McClinton v Kirkman*, 132 AD3d 1245, 1245-1246). Here, although Family Court determined that the mother had "failed to show the existence of a change of circumstances that require[d] or justifie[d] a change in custody," the court did not make an express finding whether the father, in support of his cross petition to modify custody, established that there had been the requisite change in circumstances in the 10 months since entry of the prior order.

We decline to exercise our power " 'to independently review the record' to ascertain whether the requisite change in circumstances existed" (*Matter of Curry v Reese*, 145 AD3d 1475, 1475), inasmuch as it appears from the court's decision that it improperly dispensed with the change in circumstances requirement when it stated that "to dismiss the Petitions herein without a determination of the best interests of the child would be to elevate form over substance." It is thus not clear on this record what the court would have found had it actually addressed the issue. We therefore hold the case, reserve decision and remit the matter to Family Court to make that determination.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

823

CAF 16-00210

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

IN THE MATTER OF JOHN F. YOUNG,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MERRY L. RIOS, RESPONDENT-RESPONDENT.

PAUL M. DEEP, UTICA, FOR PETITIONER-APPELLANT.

MICHAEL N. KALIL, ATTORNEY FOR THE CHILD, UTICA.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered December 22, 2015 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: Petitioner father commenced this violation proceeding, alleging that respondent mother has not allowed him visitation with their child despite a prior order that, inter alia, allowed the father visitation "at times and places as [the] parties can agree." The Attorney for the Child (AFC) moved to dismiss the petition on the ground that the father was equitably estopped from asserting his visitation rights due to his failure to establish a relationship with the child. Family Court proceeded with a hearing on both the violation petition and the AFC's motion and thereafter granted the motion of the AFC. The father appeals. We affirm the order dismissing the petition, but our reasoning differs from that of the court.

We agree with the father that the court erred in invoking the doctrine of equitable estoppel in the context of a violation petition and in granting the AFC's motion based on that doctrine. "The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position" (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326). Here, there is a prior order establishing the father's visitation rights, and he is

alleging that the mother violated that order; he is not seeking visitation rights in the first instance (*cf. Matter of Johnson v Williams*, 59 AD3d 445, 445; *Matter of Razo v Leyva*, 3 AD3d 571, 571-572; *see generally Jean Maby H. v Joseph H.*, 246 AD2d 282, 285-290).

Nevertheless, because the court proceeded with a full hearing on the merits, we have an adequate record and may determine the merits of the father's violation petition " 'in the interest of judicial economy and to avoid further delay' " (*Matter of Maher v Maher*, 1 AD3d 987, 988). We conclude that the father failed to establish by clear and convincing evidence that the mother willfully violated the order regarding visitation (*see Matter of Palazzolo v Giresi-Palazzolo*, 138 AD3d 866, 867; *see also Matter of Oravec v Oravec*, 89 AD3d 1475, 1475). Finally, we note that the father's contention that a specific visitation schedule is in the child's best interests is not properly before us in the context of this violation petition, but the father may properly raise that contention in the context of a modification petition.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

829

CA 16-00614

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

BANK OF AKRON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SPRING CREEK ATHLETIC CLUB, INC., ET AL.,
DEFENDANTS,
AND ROBERT LEE LOWMAN, JR., DEFENDANT-APPELLANT.

ROBERT LEE LOWMAN, JR., DEFENDANT-APPELLANT PRO SE.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (DANIEL E. SARZYNSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered January 5, 2016. The order, among other things, granted the motion of plaintiff for summary judgment, dismissed the answer and counterclaim of defendant Robert Lee Lowman, Jr., and determined the easements held by Robert Lee Lowman, Jr. to be subject to foreclosure.

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

Memorandum: Plaintiff commenced this mortgage foreclosure action regarding two properties, naming as defendants the property owners and mortgagors, and also Robert Lee Lowman, Jr. (defendant), the recent grantee of solar and wind energy easements in the properties. Defendant appeals from an order that, inter alia, granted plaintiff's motion for an order of reference and summary judgment on its complaint, dismissed defendant's answer and counterclaim, and determined that the easements held by defendant are subject to foreclosure, i.e., are competing interests in the properties that have a lower priority than plaintiff's mortgages. We affirm.

Contrary to defendant's sole contention before Supreme Court, defendant's easements constitute interests in the realty that are subject to foreclosure by plaintiff. A mortgage creates a lien upon the property to the extent of the mortgagor's own interest or title at the time of the giving of the mortgage. Thus, "[t]he effect of the foreclosure [judgment and sale] . . . is to vest in the purchaser the entire interest and estate of mortgagor and mortgagee as it existed at the date of the mortgage, and unaffected by the subsequent [e]ncumbrances and conveyances of the mortgagor" (*Christ Prot. Episcopal Church in City of N.Y. v Mack*, 93 NY 488, 492; *see V.R.W.,*

Inc. v Klein, 68 NY2d 560, 566). Given that defendant's easements were not granted and recorded until June 2015, after the subject mortgages were given and recorded in August 2012 and April 2014, respectively, the mortgagors' interests at the time of the giving of the mortgages included the use or control of the airspace above their properties. Thus, the mortgages are prior in time and right to defendant's easements (*see HSBC Bank USA v Regional Specialty Food Mktg. & Distrib. Servs.*, 294 AD2d 803, 804).

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

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

834

CA 16-02280

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

JEFFREY TATE, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE UNIVERSITY CONSTRUCTION FUND,
RESPONDENT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DANIEL R. ROSE OF COUNSEL), FOR RESPONDENT-APPELLANT.

DOLCE PANEPINTO, P.C., BUFFALO (ANNE M. WHEELER OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered May 13, 2016. The order granted claimant's application for leave to serve a late notice of claim.

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

Memorandum: Claimant was injured in April 2015 in a work-related accident at a construction site. Respondent had contracted for the performance of the work by an entity known as Northland, which had subcontracted with claimant's employer. We agree with respondent that Supreme Court, which did not issue a decision indicating its rationale, abused its discretion in granting claimant's application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5) and Education Law § 376-a (2) (*see Folmar v Lewiston-Porter Cent. Sch. Dist.*, 85 AD3d 1644, 1645; *Palumbo v City of Buffalo*, 1 AD3d 1032, 1033). "In determining whether to grant such leave, the court must consider, inter alia, whether the claimant has shown a reasonable excuse for the delay, whether the municipality had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the municipality" (*Matter of Friend v Town of W. Seneca*, 71 AD3d 1406, 1407; *see generally* General Municipal Law § 50-e [5]).

Here, claimant failed to demonstrate a reasonable excuse for his failure to serve the notice of claim within 90 days of the claim's accrual or within a reasonable time thereafter (*see Matter of Heffelfinger v Albany Intl. Airport*, 43 AD3d 537, 539; *Le Mieux v Alden High Sch.*, 1 AD3d 995, 996). A claimant's mistaken belief that workers' compensation is his or her sole remedy does not constitute a

reasonable excuse (*see Singh v City of New York*, 88 AD3d 864, 864; *Matter of Hurley v Avon Cent. Sch. Dist.*, 187 AD2d 982, 983). Furthermore, given that claimant was diagnosed with a torn right meniscus in August 2015, his assertion that he did not know the extent of his injuries does not constitute a reasonable excuse for his failure to serve or seek permission to serve a notice of claim until March 2016 (*see Heffelfinger*, 43 AD3d at 539).

Moreover, claimant is unable to show that respondent had "actual knowledge of the essential facts constituting the claim within" the first 90 days after the accident or a reasonable time thereafter (General Municipal Law § 50-e [5]; *see Folmar*, 85 AD3d at 1645; *Palumbo*, 1 AD3d at 1033). "Contrary to claimant's contention, the accident report [prepared by Northland based on information supplied by claimant] did not impute to respondent the requisite actual knowledge inasmuch as the evidence in the record failed to establish that [Northland] was an agent of respondent" (*Kennedy v Oswego City Sch. Dist.*, 148 AD3d 1790, 1791; *see Mehra v City of New York*, 112 AD3d 417, 418; *Williams v City of Niagara Falls*, 244 AD2d 1006, 1007). In any event, we conclude that the accident report would have been insufficient to provide respondent with actual knowledge of the essential facts constituting the claim inasmuch as the report described the accident and claimant's injuries in only vague and general terms that differed from the detail set forth in the proposed notice of claim, and the accident report drew no connection between the accident and any liability on the part of respondent (*see Kennedy*, 148 AD3d at 1791; *Mehra*, 112 AD3d at 418).

Finally, we agree with respondent that claimant failed to sustain his burden of showing that a late notice of claim would not substantially prejudice respondent's interests (*see Kennedy*, 148 AD3d at 1792; *see generally Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466, *rearg denied* 29 NY3d 963). Indeed, respondent affirmatively showed that it would be prejudiced (*see Folmar*, 85 AD3d at 1645; *Le Mieux*, 1 AD3d at 996-997). Given our determination, we do not consider respondent's contention regarding the asserted patent lack of merit of the proposed claim.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

838

KA 15-00279

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT F. HERMAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered December 3, 2014. The judgment convicted defendant, upon his plea of guilty, of failure to register as a sex offender.

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 failure to register as a sex offender (Correction Law §§ 168-f [4]; 168-t). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Davis*, 114 AD3d 1166, 1167, *lv denied* 23 NY3d 1035), we conclude that the sentence is not unduly harsh or severe.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

840

KA 14-02283

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FABIAN RANDALL, 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 (Victoria M. Argento, J.), rendered October 2, 2014. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of rape in the first degree (Penal Law § 130.35 [4]). Preliminarily, we note that defendant's waiver of the right to appeal is not valid. The perfunctory inquiry made by County Court during the plea colloquy was not sufficient "to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Beaver*, 128 AD3d 1493, 1494 [internal quotation marks omitted]). Moreover, although the record includes a signed written waiver of the right to appeal, there was no "attempt by the court to ascertain on the record an acknowledgment from defendant that he had, in fact, signed the waiver or that, if he had, he was aware of its contents" and understood them (*People v Callahan*, 80 NY2d 273, 283; *see People v Bradshaw*, 18 NY3d 257, 265; *cf. People v Bryant,* 28 NY3d 1094, 1095-1096). We nevertheless conclude that defendant's challenge to the severity of the sentence is without merit.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

842

CAF 16-00234

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

IN THE MATTER OF NEVAEH D.J.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

DANIEL J., RESPONDENT-APPELLANT,
AND JANELLE J., RESPONDENT-RESPONDENT.

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered January 15, 2016 in a proceeding pursuant to Family Court Act article 10. The order granted custody of the subject child to Kimberly J.S.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following memorandum: Petitioner commenced this neglect proceeding against respondent father and respondent mother, and the mother admitted neglecting the child. The father failed to appear at multiple court appearances and, although his attorney appeared at the fact-finding hearing, she elected not to participate. The grandmother thereafter filed petitions for custody against the father and the mother, but then withdrew the petition against the father. At a hearing on petitioner's neglect petition and the grandmother's custody petition, the mother consented to custody being granted to the grandmother, but the father's counsel objected. The father now appeals from an order that ordered that, pursuant to Family Court Act § 1055-b, a final order of custody under Family Court Act article 6 was awarded to the grandmother, and no further review was required on the neglect petition. We reverse.

The father initially contends that the finding of neglect should be vacated because he was denied effective assistance of counsel based on his counsel's failure to participate in the hearing, and he did not have notice of the hearing. Those contentions are not reviewable on this appeal inasmuch as the finding of neglect was made upon the father's default (*see Matter of Makia S. [Catherine S.]*, 134 AD3d

1445, 1445; *Matter of Lastanzea L. [Lakesha L.]*, 87 AD3d 1356, 1356, *lv dismissed in part and denied in part* 18 NY3d 854).

We agree with the father, however, that Family Court erred in granting custody to the grandmother without first determining whether extraordinary circumstances existed. Pursuant to Family Court Act § 1055-b, in an article 10 proceeding a court may grant custody to a relative but, if any parent fails to consent to granting the petition for custody, the court must find, inter alia, that the relative has "demonstrated that extraordinary circumstances exist that support granting" such an order of custody (§ 1055-b [a] [iv] [A]; *see Matter of James GG. v Bamby II.*, 85 AD3d 1227, 1228; *see generally Matter of Devon EE. [Evelyn EE.]*, 125 AD3d 1136, 1138, *lv denied* 25 NY3d 904). Here, the court made no such findings. We therefore reverse the order and remit the matter to Family Court for further proceedings in accordance with section 1055-b (a).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

845

CAF 16-00360

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

IN THE MATTER OF CARLOS SANCHEZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ALBA ALVAREZ, RESPONDENT-RESPONDENT.

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

ELIZABETH CIAMBRONE, BUFFALO, FOR RESPONDENT-RESPONDENT.

RONALD M. CINELLI, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Brenda Freedman, J.), entered February 8, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent sole custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by striking the word "condition" in the third ordering paragraph and substituting therefor the word "component," and as modified the order is affirmed without costs in accordance with the following memorandum: Petitioner father appeals from an order that awarded sole custody of the parties' child to respondent mother, granted the father access to the child, and ordered that, as a "condition of such [a]ccess," the father "shall complete a program of [a]nger [m]anagement classes." We reject the father's contention that Family Court abused its discretion in denying his attorney's request for an adjournment of the hearing (*see Matter of Sophia M.G.-K. [Tracey G.-K.]*, 84 AD3d 1746, 1747; *see also Matter of Latonia W. [Anthony W.]*, 144 AD3d 1692, 1693-1694, *lv denied* 28 NY3d 914; *Matter of VanSkiver v Clancy*, 128 AD3d 1408, 1408). It is well settled that the determination whether to grant a request for an adjournment for any purpose is a matter resting within the sound discretion of the trial court (*see Matter of Steven B.*, 6 NY3d 888, 889; *Matter of Cameron B. [Nicole C.]*, 149 AD3d 1502, 1503; *Matter of Biles v Biles*, 145 AD3d 1650, 1650). "In making such a determination, the court must undertake a balanced consideration of all relevant factors" (*Matter of Sicurella v Embro*, 31 AD3d 651, 651, *lv denied* 7 NY3d 717; *see Latonia W.*, 144 AD3d at 1693). Here, the father's attorney "failed to demonstrate that the need for the adjournment . . . was not based on a lack of due diligence on the part of the [father] or [his] attorney" (*Sophia M.G.-K.*, 84 AD3d at 1747; *see Matter of*

Venditto v Davis, 39 AD3d 555, 555).

We also reject the father's challenge to the court's directive that he complete an anger management program. It is well established that a court may direct a parent "to obtain counseling or therapy, as one of the aspects of a custody or visitation order, if such intervention will serve the [child's] best interests" (*Gadomski v Gadomski*, 256 AD2d 675, 677; *see Matter of Cross v Davis*, 298 AD2d 939, 940), and here there is an ample evidentiary basis for the court's issuance of such a directive (*see Cross*, 298 AD2d at 940; *Gadomski*, 256 AD2d at 677-678). We conclude, however, that the court erred in ordering that the father complete a program of anger management classes as a condition of his access to the child (*see Matter of Avdic v Avdic*, 125 AD3d 1534, 1536; *Shuchter v Shuchter*, 259 AD2d 1013, 1013), instead of as a component of such access (*see Matter of Ordona v Cothern*, 126 AD3d 1544, 1546; *see generally Matter of Cramer v Cramer*, 143 AD3d 1264, 1265, *lv denied* 28 NY3d 913; *Matter of Jones v Jones*, 190 AD2d 1076, 1076). We modify the order accordingly.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

851

CA 15-01487

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

SHARON OCCHINO AND FREDERICK OCCHINO,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

X. CYNTHIA FAN, M.D., PH.D., AND WINDSONG
RADIOLOGY, P.C., DEFENDANTS-RESPONDENTS.

VIOLA, CUMMINGS & LINDSAY, LLP, NIAGARA FALLS (MICHAEL J. SKONEY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

RICOTTA & VISCO, ATTORNEYS & COUNSELORS AT LAW, BUFFALO (TOMAS J. CALLOCCHIA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered May 22, 2015. The order granted the motion of defendants for summary judgment.

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

Memorandum: In this medical malpractice action, plaintiffs appeal from an order granting defendants' motion for summary judgment dismissing the complaint. We affirm. Plaintiffs commenced this action seeking damages for injuries plaintiff Sharon Occhino (plaintiff) allegedly sustained because of a seven-month delay in diagnosing her breast cancer. On April 12, 2010, plaintiff presented to defendant Windsong Radiology, P.C. (Windsong) for a screening mammogram. Defendant X. Cynthia Fan, M.D. interpreted the mammogram, finding that there were "[n]o suspicious nodules, microcalcifications, architectural distortion, or abnormality of the skin or nipples" and that there was "no evidence of malignancy." Seven months later, after feeling a lump in her breast during a self-examination, plaintiff again presented to Windsong for a diagnostic mammogram, following which she was diagnosed with invasive ductal carcinoma. She underwent a lumpectomy with axillary lymph node dissection, chemotherapy, radiation therapy and hormone replacement therapy.

Defendants moved for summary judgment and thus had "the initial burden of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff's injuries" (*Bagley v Rochester Gen. Hosp.*, 124 AD3d 1272, 1273). Supreme Court determined that defendants met their initial burden of establishing both that

defendants did not deviate or depart from the applicable standard of care and that any alleged departure did not cause any injury to plaintiff. Plaintiffs, on this appeal, do not challenge that determination.

Plaintiffs contend that the affidavit of their expert raised triable issues of fact sufficient to defeat defendants' motion. We reject that contention. In order to defeat the motion, plaintiffs were required to submit a physician's affidavit establishing both that defendants deviated from the applicable standard of care and that such deviation was a proximate cause of plaintiff's injuries (*see id.*). It is well settled that "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat [a] defendant physician's summary judgment motion" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325; *see Bagley*, 124 AD3d at 1273). Where, as here, "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, . . . [his or her] opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544; *see Bagley*, 124 AD3d at 1273).

In the affidavit in opposition to defendants' motion, plaintiffs' expert physician misstates the facts in the record, stating that Dr. Fan had noted a "nodular density" or "suspicious area" in the April 2010 mammogram. That is factually incorrect. Neither Dr. Fan nor plaintiff's treating physician, in subsequently reviewing that mammogram, had noted anything abnormal in that mammogram. Thus, any statements to the contrary are "unsupported by any evidentiary foundation" (*Diaz*, 99 NY2d at 544). The additional claims of plaintiffs' expert physician are "vague, conclusory, speculative, and unsupported by the medical evidence in the record before us" (*Bagley*, 124 AD3d at 1274). We therefore conclude that plaintiffs failed to raise a triable issue of fact, and that defendants were entitled to summary judgment dismissing the complaint.

Based on our determination, we do not reach plaintiffs' remaining contentions concerning causation.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

867

KA 14-01746

PRESENT: CARNI, J.P., CURRAN, TROUTMAN, WINSLOW, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL K. HOLLOMAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered July 29, 2014. The judgment convicted defendant, upon a jury verdict, of aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [ii]). Contrary to defendant's contention, we conclude that, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), the evidence is legally sufficient to support the conviction. The People presented the testimony of two police witnesses who stated that, when defendant was asked to produce his driver's license and registration following a traffic stop, he stated that he did not have a license and that "it was pretty bad." An employee of the New York State Department of Motor Vehicles (DMV) testified that, on the date defendant was stopped by the police, defendant's driver's license was under active suspension and that the driving abstract, which was admitted in evidence, reflected 44 revocations and suspensions on 11 dates. The DMV witness explained that an automated system sends a letter of suspension to the driver. She further testified that defendant had a nondriver identification card, which could be issued only in person, at which time a DMV employee would advise the person that his or her driver's license was suspended or revoked. Thus, contrary to defendant's contention, the evidence is legally sufficient to establish that he knew or should have known that his driver's license was suspended on the date that he was stopped. In addition, viewing the elements of the crime as charged to the jury, we further conclude that the verdict is not

against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349), either with respect to defendant's knowledge or constructive knowledge that his driver's license was suspended or of the fact that he had "ten or more suspensions, imposed on at least ten separate dates for failure to answer, appear or pay a fine" (§ 511 [3] [a] [ii]).

Contrary to defendant's further contention, Supreme Court properly refused to charge the jury on the lesser included offense of operating a motor vehicle without a license (*see* Vehicle and Traffic Law § 509 [1]), inasmuch as there is no reasonable view of the evidence that would support a finding that defendant was not aware that his driver's license was suspended and thus that he was guilty only of the violation of operating a motor vehicle without a license (*see* § 509 [11]), but not guilty of the felony of aggravated unlicensed operation of a motor vehicle in the first degree (*see People v Glover*, 57 NY2d 61, 63).

We agree with defendant, however, that the record fails to reflect that the court provided defense counsel with meaningful notice of a substantive jury note (*see* CPL 310.30 [1]; *People v O'Rama*, 78 NY2d 270, 277-278). Thus, a mode of proceedings error occurred, requiring reversal (*see People v Walston*, 23 NY3d 986, 989; *see generally People v Mack*, 27 NY3d 534, 538). The record reflects that, during a period of approximately 30 minutes when the court had excused counsel, the jury sent three notes, which the court properly marked as court exhibits. The last note stated that the jury had reached a verdict; a prior note, however, stated "we the jury request a copy of the wording of the law." Inasmuch as the court would have been prohibited from providing the jury with either a copy of the statute, or a copy of its jury instructions, without the consent of defendant (*see People v Johnson*, 81 NY2d 980, 982), we reject the contention of the People that the note was ministerial, and not substantive (*see generally People v Nealon*, 26 NY3d 152, 161). We therefore reverse the judgment and grant a new trial.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

871

CA 16-02188

PRESENT: CARNI, J.P., CURRAN, TROUTMAN, WINSLOW, AND SCUDDER, JJ.

TOWN OF TURIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JAMES E. CHASE, DEFENDANT-RESPONDENT.

HRABCHAK, GEBO & LANGONE, P.C., WATERTOWN (MARK G. GEBO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

YOUNG LAW OFFICE, PLLC, LOWVILLE (MICHAEL F. YOUNG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Lewis County (Hugh A. Gilbert, J.), entered March 2, 2016. The order granted 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: The Town of Turin (plaintiff) commenced this action against James E. Chase, a former town justice (defendant), to recover damages arising from, inter alia, defendant's alleged mishandling of fines and fees and his failure to maintain complete and accurate books and records while in office. Defendant moved for summary judgment dismissing the complaint, contending that the alleged actions and omissions took place within the context of his judicial capacity and thus were cloaked with judicial immunity. Supreme Court granted the motion, and we affirm.

Plaintiff contends that defendant's actions were performed outside his judicial capacity and that the court therefore erred in granting the motion. We reject that contention. It is well established that "a judicial officer acting within the limits of his [or her] jurisdiction is not civilly liable, though his [or her] act may be wrong" (*Seneca v Colvin*, 176 App Div 273, 274; *see Swain v State of New York* [appeal No. 2], 294 AD2d 956, 957, *lv denied* 99 NY2d 501). When a judge performs actions in carrying out duties mandated by the applicable statutes and regulations, those actions "fall within the scope of judicial immunity though done maliciously or corruptly" (*Murray v Brancato*, 290 NY 52, 57; *see Rosenstein v State of New York*, 37 AD3d 208, 208-209). Judicial immunity, however, does not protect a judge who is not acting as a judge or who lacks jurisdiction supporting any authority for his or her actions (*see Best v State of New York*, 116 AD3d 1198, 1199; *see also Mireles v Waco*, 502 US 9, 11-

12).

We conclude that defendant's alleged improper actions and omissions were cloaked with judicial immunity inasmuch as the handling of fines and fees, and the keeping of books and records related thereto, are duties of a town justice mandated by statute and regulation. The Uniform Civil Rules for the Justice Courts (22 NYCRR 214.1 *et seq.*) require every town justice to deposit any monies received by the court into a separate bank account pending disposition, and to maintain proper books and records (*see* 22 NYCRR 214.9 [a]; 214.11). The Uniform Justice Court Act requires the court to pay all fines and penalties collected to the persons or agencies entitled to such funds (*see* § 2020; *see also Matter of Corning*, 95 NY2d 450, 451). Thus, we conclude that none of the acts or omissions alleged in the complaint were outside of defendant's judicial capacity or were beyond the scope of his jurisdiction. The court therefore properly determined that defendant was protected by judicial immunity, granted the motion, and dismissed the complaint (*see Best*, 116 AD3d at 1199).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

875

CA 17-00150

PRESENT: CARNI, J.P., CURRAN, TROUTMAN, WINSLOW, AND SCUDDER, JJ.

STEPHEN J. JONES AND LAURIE KLEHR-JONES,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JAY P. TOVEY CO., INC., DEFENDANT-APPELLANT.

JAY P. TOVEY CO., INC., THIRD-PARTY PLAINTIFF,

V

STEPHEN J. JONES CONTRACTING, INC., MELISSA RICE, KENNETH RICE AND OXFORD EAST LANDSCAPE AND DESIGN, INC., THIRD-PARTY DEFENDANTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF.

FITZSIMMONS, NUNN & PLUKAS, LLP, ROCHESTER (JASON E. ABBOTT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered September 13, 2016. The order granted plaintiffs' cross motion for partial summary judgment on the issue of defendant-third-party plaintiff's liability under Labor Law § 240 (1).

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

Memorandum: Stephen J. Jones (plaintiff), an employee and owner of third-party defendant Stephen J. Jones Contracting, Inc., fell from a ladder while working on a single-family home. Plaintiff and his wife thereafter commenced this Labor Law and common-law negligence action against, inter alia, defendant-third-party plaintiff Jay P. Tovey Co., Inc. (defendant), the general contractor on the project. Insofar as relevant to this appeal, plaintiffs cross-moved for partial summary judgment on the issue of defendant's liability under Labor Law § 240 (1). We agree with defendant that, in view of the limited discovery that has been conducted, Supreme Court erred in granting the cross motion (*see Coniber v Center Point Transfer Sta., Inc.*, 82 AD3d 1629, 1629). Notably, discovery has been limited to plaintiff's own account of the accident during his examination before trial, and defendant has not had an opportunity to explore potential defenses

(*see generally Groves v Land's End Hous. Co., Inc.*, 80 NY2d 978, 980).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

881

KA 14-01878

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERTO A. GUERRERO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered July 21, 2014. The judgment convicted defendant, upon his plea of guilty, of burglary 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 burglary in the second degree (Penal Law § 140.25 [2]). Defendant's contention that he was unlawfully arrested in his home without an arrest warrant in violation of *Payton v New York* (445 US 573) is not preserved for our review (*see* CPL 470.05 [2]), because that contention is based on grounds that were not raised before Supreme Court (*see People v Martin*, 50 NY2d 1029, 1031). 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]), particularly in view of the fact that the lack of preservation resulted in a hearing record that was not fully developed with respect to that contention (*see People v Flores*, 83 AD3d 1460, 1460, *affd* 19 NY3d 881). We note, however, that our affirmance should not be construed as a ratification of the suppression court's characterization of the police work as it was described at the hearing (*see generally Tydings v Greenfield, Stein & Senior, LLP*, 43 AD3d 680, 684, *affd* 11 NY3d 195).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

882

KA 15-01765

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DURVAL W. PARKER, DEFENDANT-APPELLANT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (HANNAH STITH LONG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered April 21, 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 affirmed.

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 [12]). Defendant's sole contention is that, under CPL 20.40 and the New York Constitution, the Erie County grand jury lacked authority and jurisdiction to indict him for the crime committed in Niagara County to which he pleaded guilty. We conclude that defendant's contention is foreclosed by his valid waiver of the right to appeal (*see generally People v Muniz*, 91 NY2d 570, 573-574). Although defendant contends that the waiver does not encompass his challenge to the geographic jurisdiction of the grand jury inasmuch as that issue was not specifically mentioned during the waiver colloquy, the court "need not expressly delineate for a defendant those appellate issues that are foreclosed by a waiver of the right to appeal, and those that survive, in order for the court to obtain a valid appeal waiver" (*People v Nickell*, 49 AD3d 1024, 1025). We note, in any event, that defendant's challenge to geographical jurisdiction in Erie County is foreclosed by his guilty plea (*see People v Hand*, 140 AD3d 636, 637, *lv denied* 28 NY3d 971).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

883

KA 14-02280

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PETROS SOUTEMENIDES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered October 23, 2014. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of burglary in the third degree (Penal Law § 140.20), defendant contends that County Court erred in refusing to suppress statements he made to the police investigator on the ground that they were involuntary. We reject that contention. The investigator testified at the suppression hearing that defendant did not appear to be intoxicated or high on drugs at the time of the interview, and that defendant was coherent, acknowledged that he understood his rights, and was willing to answer questions. When the investigator asked defendant if he was "high," he responded in the negative. We conclude that there was no evidence at the hearing that defendant was "intoxicated to such a degree that he was incapable of voluntarily, knowingly, and intelligently waiving his *Miranda* rights" (*People v Downey*, 254 AD2d 794, 795, *lv denied* 92 NY2d 1031), or that his statements were not otherwise voluntarily made (*see People v Pruitt*, 6 AD3d 1233, 1233, *lv denied* 3 NY3d 646).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

884

KA 16-00558

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH SMITH, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered March 2, 2016. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his brief responses to County Court's questions during the plea colloquy were insufficient to establish that the plea was knowingly, voluntarily, and intelligently entered. Even assuming, arguendo, that defendant's contention is not merely a challenge to the factual sufficiency of the plea allocution and thus survives his valid waiver of the right to appeal (*see People v Wisniewski*, 128 AD3d 1481, 1481, *lv denied* 26 NY3d 967), we conclude that it is not preserved for our review because defendant did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Russell*, 133 AD3d 1199, 1199, *lv denied* 26 NY3d 1149; *People v Lewis*, 114 AD3d 1310, 1311, *lv denied* 22 NY3d 1200). In any event, we conclude that defendant's contention is without merit (*see Russell*, 133 AD3d at 1199; *People v Dunham*, 83 AD3d 1423, 1424, *lv denied* 17 NY3d 794).

Defendant's valid waiver of the right to appeal with respect to both the conviction and sentence encompasses his challenge to the severity of the sentence (*see People v Jones*, 144 AD3d 1590, 1590, *lv denied* 28 NY3d 1147; *see generally People v Lopez*, 6 NY3d 248, 255-256), and there is no merit to his contention that his sentence is illegal (*see* Penal Law §§ 70.02 [1] [a]; 70.06 [6] [a]; *People v Parker*, 133 AD3d 1300, 1302, *lv denied* 27 NY3d 1154, *reconsideration denied* 28 NY3d 1030; *People v Solano*, 49 AD3d 671, 671, *lv denied* 10

NY3d 964).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

886

KA 16-00616

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW C. LEADER, 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 December 23, 2014. The judgment convicted defendant, upon his plea of guilty, of burglary in the third 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 burglary in the third degree (Penal Law § 140.20). Defendant contends that he was denied his right to be sentenced without an unreasonable delay in violation of CPL 380.30 (1) (*see People v Drake*, 61 NY2d 359, 364). Even assuming, arguendo, that defendant preserved his contention for our review by objecting to the delay (*see People v Washington*, 121 AD3d 1583, 1583), we conclude that it lacks merit. "[O]nly unexcusable or unduly long delays violate the statutory directive" (*People v Dissottle*, 68 AD3d 1542, 1543; *see Drake*, 61 NY2d at 366) and, here, defendant was sentenced fewer than six months after he entered his guilty plea. The portion of that period attributable to defendant's grand jury testimony against a codefendant is excusable (*see People v Ingvarsdottir*, 118 AD3d 1023, 1024), and another portion of that period was attributable to at least two adjournments requested by defense counsel (*see People v Brooks*, 118 AD3d 1123, 1124, *lv denied* 24 NY3d 959). We reject defendant's further contention that the sentence is unduly harsh and severe.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court

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

887

CAF 15-01961

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF CHERIS N. LAWRENCE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN C. LAWRENCE, RESPONDENT-RESPONDENT.

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

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

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

Appeal from an order of the Family Court, Oswego County (Thomas Benedetto, R.), entered August 28, 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, the Attorney for the Child representing the parties' oldest child appeals from an order dismissing the mother's petition seeking modification of a custody order. Inasmuch as "the mother has not taken an appeal from that order[, the] child[ ], while dissatisfied with the order, cannot force the mother to litigate a petition that she has since abandoned" (*Matter of Kessler v Fancher*, 112 AD3d 1323, 1324). A child in a custody matter does not have "full-party status" (*Matter of McDermott v Bale*, 94 AD3d 1542, 1543), and we decline to permit the child's desires "to chart the course of litigation" (*Kessler*, 112 AD3d at 1324).

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court