SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 7, 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

243

KA 14-01655

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH ELIOFF, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered March 21, 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 [3]). We agree with defendant that his waiver of the right to appeal is invalid because " 'the minimal inquiry made by County Court [during the plea proceeding] was insufficient to establish that the court engage[d] . . . defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Williams*, 136 AD3d 1280, 1281, *lv denied* 27 NY3d 1141, *reconsideration denied* 29 NY3d 954). Nevertheless, contrary to defendant's contention, we conclude that the sentence is not unduly harsh and severe.

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

244

KA 14-00207

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WESLEY A. SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered December 3, 2013. The judgment convicted defendant, upon his plea of guilty, of rape 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 rape in the second degree (Penal Law § 130.30 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

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CA 16-00572

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

JANE HASTEDT, AS TESTATRIX OF THE ESTATE OF MARK HASTEDT, DECEASED, AND JANE HASTEDT, INDIVIDUALLY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BOVIS LEND LEASE HOLDINGS, INC., GEORGE A. NOLE & SON, INC., AND CAMDEN CENTRAL SCHOOL DISTRICT, DEFENDANTS-RESPONDENTS-APPELLANTS.

BOVIS LEND LEASE HOLDINGS, INC., AND CAMDEN CENTRAL SCHOOL DISTRICT, THIRD-PARTY PLAINTIFFS-RESPONDENTS-APPELLANTS,

V

K.C. MASONRY, INC., THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT.

GEORGE A. NOLE & SON, INC., THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT,

V

K.C. MASONRY, INC., THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT.

NEWMAN MYERS KREINES GROSS HARRIS, P.C., NEW YORK CITY (PATRICK M. CARUANA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-RESPONDENTS-APPELLANTS BOVIS LEND LEASE HOLDINGS, INC. AND CAMDEN CENTRAL SCHOOL DISTRICT.

OSBORN, REED & BURKE, LLP, ROCHESTER (CLAIRE G. BOPP OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT AND THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT GEORGE A. NOLE & SON, INC.

SONIN & GENIS, BRONX (ALEXANDER J. WULWICK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered August 10, 2015. The order, among other

things, granted that part of plaintiff's motion seeking summary judgment on liability pursuant to Labor Law § 240 (1) against defendants George A. Nole & Son, Inc. and Camden Central School District.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying in its entirety plaintiff's motion for summary judgment on the Labor Law § 240 (1) cause of action, and granting those parts of the motion of defendants-third-party plaintiffs Bovis Lend Lease Holdings, Inc. (Bovis) and Camden Central School District seeking dismissal of the amended complaint against Bovis in its entirety, contractual indemnification for Bovis from defendant-third-party plaintiff George A. Nole & Son, Inc., and dismissal of the cross claim of defendant-third-party plaintiff George A. Nole & Son, Inc. insofar as it seeks contractual indemnification from Bovis, and as modified the order is affirmed without costs.

Memorandum: Plaintiff's decedent (decedent) was injured and ultimately died as a result of injuries sustained in a fall from either a ladder or a scaffold while performing work for his employer, third-party defendant, K.C. Masonry, Inc. (K.C.), on a school building owned by defendant-third-party plaintiff Camden Central School District (Camden). Decedent fell from a ladder or scaffolding while he was placing plastic sheeting used to protect masonry work that had been completed at a lower level. The ladder and scaffold were supplied and placed by employees of K.C. Decedent was a foreman on the job for K.C. on the day of the accident. Other than decedent, there were no witnesses to decedent's fall. Defendant-third-party plaintiff George A. Nole & Son, Inc. (Nole) was the general contractor and defendant-third-party plaintiff Bovis Lend Lease Holdings, Inc. (Bovis) was the construction manager on the project.

Plaintiff commenced this action seeking damages for, inter alia, a violation of Labor Law § 240 (1) and thereafter moved for partial summary judgment on the issue of liability thereunder. K.C. cross-moved for, inter alia, summary judgment dismissing the amended complaint. Bovis and Camden jointly moved, and Nole also moved for, inter alia, summary judgment dismissing the amended complaint against them. As a preliminary matter, we note that only the section 240 (1) cause of action and indemnification thereunder is at issue on appeal. Supreme Court, inter alia, granted plaintiff's motion with respect to Camden and Nole, but denied it with respect to Bovis, and correspondingly denied those parts of the cross motion of K.C., the joint motion of Bovis and Camden (joint motion), and the motion of Nole seeking summary judgment dismissing the section 240 (1) cause of action. We agree with defendants and K.C. that the court erred in, inter alia, granting plaintiff's motion to the above extent, and we therefore modify the order accordingly.

"A plaintiff is entitled to summary judgment under Labor Law § 240 (1) by establishing that he or she was 'subject to an elevation-related risk, and [that] the failure to provide any safety devices to protect the worker from such a risk [was] a proximate cause of his or her injuries' " (*Bruce v Actus Lend Lease*, 101 AD3d 1701,

1702). Here, it is undisputed that the safety ladder used by decedent did not tip, and that the scaffolding did not collapse, tip, or shift. Decedent, himself the only witness to the accident, was unable to provide any testimony or statement concerning how the accident happened. Thus, we note that this case is unlike those cases in which the plaintiff's version of his or her fall is uncontroverted because the plaintiff is the only witness thereto (*see e.g. Boivin v Marrano/Marc Equity Corp.*, 79 AD3d 1750, 1750; *Evans v Syracuse Model Neighborhood Corp.*, 53 AD3d 1135, 1136-1137; *Abramo v Pepsi-Cola Buffalo Bottling Co.*, 224 AD2d 980, 981).

It is now axiomatic that "[t]he simple fact that plaintiff fell from a ladder [or a scaffold] does not automatically establish liability on the part of [defendants]" (*Beardslee v Cornell Univ.*, 72 AD3d 1371, 1372). Thus, we conclude that the court erred in determining that plaintiff met her initial burden on her motion by simply establishing that decedent fell from a height. We further conclude that plaintiff's submissions raise triable issues of fact as to, inter alia, how the accident happened, from where decedent fell—the ladder or the scaffold, and whether a violation of Labor Law § 240 (1) occurred. We therefore conclude that plaintiff failed to meet her initial burden on her motion (*see Wonderling v CSX Transp., Inc.*, 34 AD3d 1244, 1245), and the motion should have been denied regardless of the sufficiency of the opposing papers (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Even assuming, arguendo, that plaintiff met her initial burden, we conclude that defendants and K.C. raised issues of fact with respect to, inter alia, how the accident happened, from where decedent fell—the ladder or the scaffold, and whether a violation of Labor Law § 240 (1) occurred (*see generally Singh v Six Ten Mgt. Corp.*, 33 AD3d 783, 783-784).

As part of the joint motion, Bovis sought a determination that it was not Camden's agent for purposes of Labor Law § 240 (1), and that it is therefore entitled to summary judgment dismissing the amended complaint against it. The court denied that part of the joint motion. That was error, and we therefore further modify the order accordingly. We conclude that Bovis established its entitlement to that determination as a matter of law (*see Hargrave v LeChase Constr. Servs., LLC*, 115 AD3d 1270, 1271; *Phillips v Wilmorite, Inc.*, 281 AD2d 945, 946). Pursuant to the express terms of the contract between Bovis and Camden, Bovis had no control over the means or methods of the performance of the work by contractors or subcontractors, and it also had no control over safety precautions for the workers at the construction site (*see Hargrave*, 115 AD3d at 1271; *cf. Griffin v MWF Dev. Corp.*, 273 AD2d 907, 908-909). In opposition, plaintiff failed to raise a triable issue of fact whether Bovis was an agent of Camden for the purpose of holding Bovis liable under section 240 (1) (*see Zuckerman v City of New York*, 49 NY2d 557, 562). To the extent that Bovis contends in the alternative that it is entitled to indemnification under Nole's contract with K.C. as an "agent" of the owner, our determination herein disposes of that contention.

Contrary to K.C.'s contention, we further conclude that the court

properly granted those parts of the joint motion and Nole's motion for summary judgment seeking contractual indemnification from K.C. for Camden and Nole. In support of their respective joint motion and motion, the parties met their respective initial burdens by submitting the contract between Nole and K.C., which contains clauses providing for K.C.'s indemnification of the owner and general contractor—Camden and Nole herein, and by establishing as a matter of law that Camden and Nole were not negligent; that any liability on the part of either of them for the injuries sustained by decedent is vicarious only; and that they exercised no supervision or control over the work of decedent (*see Lazzaro v MJM Indus.*, 288 AD2d 440, 441). In opposition, K.C. failed to raise a triable issue of fact whether the contractual indemnification provisions should not be enforced (*see Zuckerman*, 49 NY2d at 562).

We also agree with Bovis that the court erred in denying that part of the joint motion seeking contractual indemnification from Nole, and we therefore further modify the order accordingly. Section 3.18.1 of the General Conditions of the Contract, incorporated into Nole's contract with Camden, provides that Nole was obligated to indemnify the construction manager, among others, from any claims, damages, losses, and expenses "arising out of or resulting from performance of the Work . . . to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder." Thus, Bovis demonstrated its prima facie entitlement to summary judgment on its claim for contractual indemnification from Nole (*see Capstone Enters. of Port Chester, Inc. v Board of Educ. Irvington Union Free Sch. Dist.*, 106 AD3d 853, 855). In opposition, Nole failed to raise a triable issue of fact (*see Zuckerman*, 49 NY2d at 562). We also agree with Bovis that the court erred in failing to grant that part of the joint motion seeking dismissal of Nole's cross claim for contractual indemnification against Bovis, and we therefore further modify the order accordingly. There is simply no contract to support that cross claim (*see generally Trala v Afif*, 59 AD3d 1097, 1098).

We reject the contention of Bovis and Camden that the court erred in denying that part of the joint motion seeking common-law indemnification against Nole. We conclude that Bovis and Camden failed to establish as a matter of law that Nole was negligent or exercised supervision or control over the work of decedent (*see Lazzaro*, 288 AD2d at 441). Contrary to K.C.'s further contention, we likewise conclude that the court properly granted those parts of the joint motion and Nole's motion seeking common-law indemnification from K.C. (*see Colyer v K Mart Corp.*, 273 AD2d 809, 810; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 378).

With respect to that part of the joint motion seeking summary judgment dismissing the cross claim of Nole for contribution, we note that the court did not address that aspect of the motion, and we therefore deem it denied (*see Brown v U.S. Vanadium Corp.*, 198 AD2d

863, 864). We reject the contention of Camden and Bovis that the antisubrogation rule entitles them to dismissal of Nole's cross claim for contribution (*see generally Lodovichetti v Baez*, 31 AD3d 718, 719).

We have considered the remaining contentions of the parties and conclude that they are without merit.

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

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CA 16-00967

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

MICHAEL A. SERRANO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THOMAS A. GILRAY, JR., ET AL., DEFENDANTS,
AND MARCY A. SHEEHAN, DEFENDANT-RESPONDENT.

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ERIC S. BERNHARDT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered April 4, 2016. The order granted the motion of defendant Marcy A. Sheehan for summary judgment dismissing the complaint against her.

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

Memorandum: On April 1, 2013, plaintiff was one of three passengers in a vehicle operated by defendant Marcy A. Sheehan. Sometime between 10:30 p.m. and 11:00 p.m., Sheehan lost control of her vehicle and struck a concrete barrier. All of the occupants exited the vehicle and walked to a grassy area off of the roadway. Plaintiff then returned to the vehicle to retrieve his cell phone. Shortly thereafter, as plaintiff was returning to the grassy area, Sheehan's vehicle was struck by a vehicle operated by nonparty Chelsie Bertrand. Following that collision, plaintiff returned to the area where the two vehicles were situated, and the police arrived. Soon after the arrival of the police, plaintiff sustained personal injuries when he was struck by a vehicle operated by defendant Thomas A. Gilray, Jr. Thereafter, Gilray failed three field sobriety tests and, at 1:35 a.m. on April 2, 2013, his blood alcohol level was recorded as .127%. Earlier in the evening of April 1, 2013, Gilray had attended an event at defendant Corpus Christi Church (CCC), where alcohol was served. Plaintiff commenced the within action against, inter alia, Sheehan and CCC, alleging that he sustained injuries as a result of the multivehicle accident. Plaintiff further alleged that CCC was responsible for his injuries inasmuch as it sold and/or provided alcohol to Gilray, in violation of General Obligations Law § 11-101 and Alcoholic Beverage Control Law § 65, while Gilray was visibly intoxicated. CCC moved for summary judgment seeking dismissal of the

complaint and any cross claims against it, and Sheehan filed a separate motion for summary judgment seeking similar relief with respect to herself. Supreme Court granted each motion, and plaintiff appealed with respect to the relief granted to CCC and to Sheehan. During the pendency of this appeal, we were advised that plaintiff and CCC agreed to settle the action against CCC. We affirm the order granting Sheehan's motion.

We note at the outset that plaintiff does not challenge the court's determination that he made no claim of sustaining an injury in the initial accident when Sheehan lost control of her vehicle and struck a barrier. We therefore conclude that plaintiff abandoned any contention with respect to that determination (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Contrary to plaintiff's contention, the court properly granted Sheehan's motion. Sheehan's negligence, if any, " 'did nothing more than to furnish the condition or give rise to the occasion by which [plaintiff's] injury was made possible and which was brought about by the intervention of a new, independent and efficient cause' " (*Barnes v Fix*, 63 AD3d 1515, 1516, *lv denied* 13 NY3d 716; *see Gregware v City of New York*, 94 AD3d 470, 470; *Mikelinich v Giovannetti*, 239 AD2d 471, 472). Prior to the Gilray accident, the situation resulting from the first accident "was a static, completed occurrence" with plaintiff and all of the passengers of Sheehan's vehicle safely off the roadway (*Hallett v Akintola*, 178 AD2d 744, 744). The Gilray accident arose from a "new and independent cause and not as [the] consequence of [Sheehan's] original act[]" (*id*. at 745). "The risk undertaken by plaintiff" in returning to the roadway was created by himself (*Gralton v Oliver*, 277 App Div 449, 452, *affd* 302 NY 864).

In our view, the dissent's reliance on *Hain v Jamison* (28 NY3d 524, 532) is misplaced inasmuch as the Court of Appeals, citing *Gralton*, acknowledged that "proximate cause has been found lacking, as a matter of law, where a defendant negligently caused a vehicular accident, but the first accident was completed and the plaintiff was in a position of safety when a secondary accident occurred" (*id*.). Here, plaintiff returned to the roadway from a position of safety not once, but twice.

All concur except PERADOTTO, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent inasmuch as I disagree with the majority that defendant Marcy A. Sheehan met her burden of establishing that any negligence on her behalf was not a proximate cause of plaintiff's injury. I would therefore reverse the order granting Sheehan's motion for summary judgment, deny the motion, and reinstate the complaint against Sheehan.

Inasmuch as Sheehan is the moving party, the facts must be viewed in the light most favorable to plaintiff and every available inference must be drawn in his favor (*see De Lourdes Torres v Jones*, 26 NY3d 742, 763). Here, the submissions established that plaintiff was one of three passengers in a vehicle operated by Sheehan after leaving

Dyngus Day festivities in Buffalo at night. While traveling westbound along a multi-lane roadway divided by a concrete barrier, Sheehan felt the vehicle begin to slip and may have overcorrected in response. The left side of the vehicle subsequently struck the barrier and came to a stop. All of the occupants exited the vehicle, climbed over the barrier, and crossed over the eastbound lanes to a grassy area off of the roadway. Although the headlights were on, Sheehan did not turn on the emergency hazard lights, and she could not recall whether anyone had done so or whether the taillights were on. Plaintiff returned to the vehicle to retrieve his cell phone so that someone could call 911, and he turned off the disabled vehicle. Shortly thereafter, as plaintiff returned to the grassy area, a vehicle operated by nonparty Chelsie Bertrand struck Sheehan's disabled vehicle, which had been left positioned diagonally across the left westbound lane with the front resting against the barrier. According to Bertrand, the lights of the disabled vehicle were not on, and she did not see it prior to the collision. A police officer then arrived at the scene, and plaintiff and Sheehan's husband accompanied the officer back across the barrier toward the disabled vehicle so that the officer could inspect it and speak with them about the accident. Plaintiff decided to go back to that area because he was best able to communicate with the officer inasmuch as Sheehan's husband was intoxicated, Sheehan was erratic and disoriented, and the other passengers were taking care of each other. Shortly thereafter, defendant Thomas A. Gilray, Jr., drove his truck down the roadway at a high rate of speed and, despite the officer's attempts to have him slow down by signaling with a flashlight, Gilray struck the disabled vehicle, which did not have its flashing hazard lights activated as he approached. Plaintiff and Sheehan's husband were also struck as a result of the impact, and each suffered serious injuries.

Contrary to the majority's conclusion, this is not a "rare case[]" in which it can be determined, as a matter of law, that Sheehan's negligence "merely created the opportunity for, but did not cause, the event that resulted in harm" to plaintiff (*Hain v Jamison*, 28 NY3d 524, 530). It is well established that "[t]he overarching principle governing determinations of proximate cause is that a defendant's negligence qualifies as a proximate cause where it is a substantial cause of the events which produced the injury . . . Typically, the question of whether a particular act of negligence is a substantial cause of the plaintiff's injuries is one to be made by the factfinder, as such a determination turns upon questions of foreseeability and what is foreseeable and what is normal may be the subject of varying inferences . . . When a question of proximate cause involves an intervening act, liability turns upon whether the intervening act is a *normal or foreseeable consequence* of the situation created by the defendant's negligence . . . Thus, [w]here the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed . . . Rather, [t]he mere fact that other persons share some responsibility for plaintiff's harm does not absolve defendant from liability because there may be more than one proximate cause of an injury . . . It is [o]nly where the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of

events, or independent of or far removed from the defendant's conduct, [that it] may . . . possibly break[] the causal nexus . . . To state the inverse of this rule, liability *subsists* [w]hen . . . the intervening act is a natural and foreseeable consequence of a circumstance created by defendant" (*id.* at 528-529 [internal quotation marks omitted]; *see Kush v City of Buffalo*, 59 NY2d 26, 33; *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 314-315, *rearg denied* 52 NY2d 784).

Under the circumstances of this case, a factfinder could reasonably conclude that a foreseeable consequence of Sheehan's negligence in losing control, striking the barrier, and leaving the disabled vehicle obstructing the left lane of a divided roadway without activating the flashing hazard lights at night is that motorists, unable to see the vehicle at they approached, would strike it (*see Commisso v Meeker*, 8 NY2d 109, 117; *Gerse v Neyjovich*, 9 AD3d 384, 385; *Bertrand v Vingan*, 249 AD2d 13, 13; *Weary v Holmes*, 249 AD2d 957, 957-958). In determining that the situation resulting from Sheehan's accident was a static, completed occurrence prior to Gilray's collision, the majority fails to account for the critical facts that the disabled vehicle was not moved safely off the roadway and instead remained in a position of peril obstructing the left lane without its flashing hazard lights activated, and that plaintiff was injured while positioned near the disabled vehicle (*cf. Gralton v Oliver*, 277 App Div 449, 452, *affd* 302 NY 864; *Barnes v Fix*, 63 AD3d 1515, 1515-1516, *lv denied* 13 NY3d 716; *Mikelinich v Giovannetti*, 239 AD2d 471, 471-472; *Hallett v Akintola*, 178 AD2d 744, 744-745; *accord Gardner v Perrine*, 101 AD3d 1587, 1588). Plaintiff's positioning of himself in the area of the disabled vehicle where he was susceptible to further harm is also foreseeable. The fact that plaintiff, as a passenger involved in a vehicular accident, would leave a place of safety to return to the vehicle to speak with a responding officer—particularly where, as here, plaintiff was best positioned to provide the officer with information given the condition and preoccupation of Sheehan and the other passengers—is "an entirely normal or foreseeable consequence of the situation created by [Sheehan's] negligence" (*Hain*, 28 NY3d at 533 [internal quotation marks omitted]). The risk of returning to the roadway certainly implicates plaintiff's comparative fault, but it does not negate, as a matter of law, Sheehan's negligence as a proximate cause of plaintiff's injuries. Thus, neither Gilray's collision with the unlit, disabled vehicle obstructing the left lane nor plaintiff's positioning of himself in that area can be considered, as a matter of law, "so 'extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct' that it breaks the chain of causation" (*id.* at 534). Rather, Sheehan's own submissions raise a triable issue of fact whether her conduct " 'set into motion an eminently foreseeable chain of events that resulted in [the] collision' " between Gilray's truck and the disabled vehicle, and in plaintiff being struck (*Sheffer v Critoph*, 13 AD3d 1185, 1187).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

479

CA 16-01957

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

IN THE MATTER OF TOWN OF CICERO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

LAKESHORE ESTATES, LLC, AND OVADIA AVRAHAM,
RESPONDENTS-RESPONDENTS.

GERMAIN & GERMAIN, LLP, SYRACUSE (JOHN J. MARZOCCHI OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Supreme Court, Onondaga County (Walter W. Hafner, Jr., A.J.), entered January 12, 2016. The order denied the petition.

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

Memorandum: Without filing or serving either a summons, a complaint, a petition, or a notice of petition in this matter, the Town of Cicero (Town), which styles itself "petitioner" herein, obtained and served upon the so-styled "respondents" an order to show cause demanding a permanent injunction requiring that certain structures constructed by respondents on their property in alleged violation of the Town's zoning and building codes be removed at respondents' expense. The Town appeals from an order that purportedly denied the "Petition."

"[T]he valid commencement of an action is a condition precedent to [Supreme Court's] acquiring the jurisdiction even to entertain an application for a[n] . . . injunction" (*Matter of Hart Is. Comm. v Koch*, 150 AD2d 269, 272, *lv denied* 75 NY2d 705; *see Matter of Caruso v Ward*, 146 AD2d 486, 487; *see also Uniformed Firefighters Assn. of Greater N.Y. v City of New York*, 79 NY2d 236, 239). Here, however, there is no action supporting the application for an injunction. Indeed, the order to show cause and supporting papers themselves constitute the only request for an injunction. While " 'courts are empowered and indeed directed to convert a civil judicial proceeding not brought in the proper form into one which would be in proper form, rather than to grant a dismissal' " (*Hodges v Beattie*, 68 AD3d 1597, 1598), more than improper form is involved here (*cf. Matter of State of New York [Essex Prop. Mgt., LLC]*, ___ AD3d ___ [July 7, 2017]). Converting the order to show cause and supporting papers into a summons and complaint in these circumstances would effectively permit

the Town to seek an injunction by motion, a result that is at odds with the well-established principle that "[t]he pendency of an action is an indispensable prerequisite to the granting of a[n] . . . injunction" (*Tribune Print. Co. v 263 Ninth Ave. Realty*, 88 AD2d 877, 879, *affd* 57 NY2d 1038; *see* CPLR 6301; *Matter of Church Mut. Ins. Co. v People*, 251 AD2d 1014, 1014). We thus conclude that the court lacked jurisdiction to entertain the Town's request (*see Hart Is. Comm.*, 150 AD2d at 272). Without an underlying action the order putatively on appeal does not constitute an appealable paper (*see* CPLR 5701 [a], [c]; *see generally Noghrey v Town of Brookhaven*, 305 AD2d 474, 474-475; *Gastel v Bridges*, 110 AD2d 146, 146). The appeal must therefore be dismissed.

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

483

CA 16-02020

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

IN THE MATTER OF THE APPLICATION OF STATE OF NEW YORK, PETITIONER-APPELLANT, FOR AN ORDER PURSUANT TO ARTICLE 12 OF NAVIGATION LAW TO ENTER REAL PROPERTY COMMONLY KNOWN AS 55 MAIN STREET, ADDISON.

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

ESSEX PROPERTY MANAGEMENT, LLC, RESPONDENT-RESPONDENT.

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

ROBERT J. SANT, ROCHESTER, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered January 4, 2016. The order denied the application of petitioner for authority to enter certain real property.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the matter is converted to an action for declaratory judgment, and judgment is granted in favor of petitioner as follows:

> It is ADJUDGED and DECLARED that Navigation Law article 12 permits petitioner to use retained agents and contractors operating under its direction for the purpose of entering and inspecting any property with suspected petroleum discharges and undertaking the removal of unregulated discharges of petroleum.

Memorandum: In November 2010, Environmental Products & Services of Vermont, Inc. (EPSV), issued a corrective action investigation report (EPSV report) to the New York State Department of Environmental Conservation (DEC) as part of a due diligence analysis for a 7-Eleven store located at 47 Main Street in Addison, New York (47 Main Street). The EPSV report revealed the presence of gasoline in the groundwater. As a result, the DEC hired a contractor, Empire Geo Services, Inc. (EGS), to investigate an adjacent parcel owned by the Addison Central School District (District). EGS produced its own report, which concluded that the District's property was not the source of the gasoline discharge. The DEC then notified respondent that its upgradient property at 55 Main Street was suspected as the source of the gasoline. The DEC asked respondent for access to the property to

investigate and, possibly, to remediate the discharge. Respondent denied that it was responsible for any petroleum discharge and disavowed any knowledge of petroleum-related storage tanks on its property. Respondent then advised the DEC that it would permit the DEC's contractors to enter 55 Main Street if the DEC agreed to an access agreement containing numerous limiting conditions. The DEC found the access agreement to be unreasonable and filed an order to show cause requesting that respondent be directed to permit the DEC and/or its contractors to have access to 55 Main Street pursuant to its authority under the Oil Spill Act (*see* Navigation Law article 12). Supreme Court refused to sign the order, determining that, unlike the DEC itself, the DEC's contractors had no statutory right to enter the property under the Oil Spill Act, and that respondent's access agreement was a reasonable limitation upon the DEC's contractors. The DEC appeals, and we reverse.

At the outset, we note that the nature of the relief sought by the DEC, i.e., the interpretation of a legislative act, is available by way of a declaratory judgment action (*see* CPLR 3001; *see also Matter of Oglesby v McKinney*, 28 AD3d 153, 158, *affd* 7 NY3d 561; *Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 147-148, *cert denied* 464 US 993). The DEC, however, failed to commence a declaratory judgment action properly, instead filing only an order to show cause with supporting papers. We further note that " 'courts are empowered and indeed directed to convert a civil judicial proceeding not brought in the proper form into one which would be in proper form, rather than to grant a dismissal' " (*Hodges v Beattie*, 68 AD3d 1597, 1598). Here, we conclude that "the problem [is] one of improper form only" (*Matter of First Natl. City Bank v City of N.Y. Fin. Admin.*, 36 NY2d 87, 94). We therefore convert the matter to an action for declaratory relief and deem the order to show cause and supporting papers to be a summons and complaint, respectively, pursuant to CPLR 103 (c) (*see Matter of Miller v Lakeland Fire Dist.*, 31 AD3d 556, 557; *Matter of Bart-Rich Enters., Inc. v Boyce-Canandaigua, Inc.*, 8 AD3d 1119, 1119; *Fragoso v Romano*, 268 AD2d 457, 457; *see also* CPLR 304 [a]).

Contrary to the position of respondent, we agree with the DEC that the appeal is not moot. The DEC sought to gain entry to respondent's property by and through its retained contractors pursuant to its authority granted under the Oil Spill Act, and respondent has sought to restrict that access. That controversy lies plainly before us, and our decision "carries immediate, practical consequences for the parties" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 812, *cert denied* 540 US 1017), regardless whether the DEC could have exercised its statutory authority without the use of retained contractors.

We further agree with the DEC that the Oil Spill Act authorizes it and its contractors or agents to enter suspected spill sites. Navigation Law § 178 provides, in pertinent part, that "[t]he department is hereby authorized to enter and inspect any property or premises for the purpose of inspecting facilities and investigating either actual or suspected sources of discharges or violation of this article or any rule or regulation promulgated pursuant to this

article. The department is further authorized to enter on property or premises in order to assist in the cleanup or removal of the discharge." Respondent relies on the fact that the statute defines "the department" as "the department of environmental conservation, unless otherwise indicated" (§ 172 [7]), and respondent asserts that it is unnecessary to read other sections of the Oil Spill Act to ascertain the intent of the Legislature with respect to whether contractors are encompassed by the above definition. The court accepted respondent's analysis and statutory construction, but we do not.

"As a general principle of statutory construction, all sections of a law should be read together to determine its fair meaning" (*Matter of Village of Chestnut Ridge v Howard*, 92 NY2d 718, 722) "and, where possible, [a court] should harmonize[] [all parts of a statute] with each other . . . and [give] effect and meaning . . . to the entire statute and every part and word thereof" (*Friedman v Connecticut Gen. Life Ins. Co.*, 9 NY3d 105, 115 [internal quotation marks omitted]; *see* McKinney's Cons Laws of NY, Book 1, Statutes §§ 98, 130). "The [L]egislature intend[ed] by the passage of [the Oil Spill Act] to exercise the powers of this [S]tate to . . . requir[e] prompt cleanup and removal of" discharges of petroleum (Navigation Law § 170). Indeed, the Oil Spill Act's stated legislative purpose is to "prevent[ ] the unregulated discharge of petroleum which may result in damage to lands, waters or natural resources of the [S]tate by authorizing the [DEC] *to respond quickly* to such discharges and effect *prompt cleanup and removal* of such discharges, *giving first priority* to minimizing environmental damage" (§ 171 [emphasis added]). In order to effectuate those objectives, the Oil Spill Act expressly prohibits any "discharge of petroleum" (§ 173 [1]) that is not "in compliance with the conditions of a state or federal permit" (§ 173 [3]; *see* § 172 [8]). Where an unregulated discharge takes place, however, the "person" responsible "shall immediately undertake to contain such discharge" (§ 176 [1]). As this does not always occur, "the [DEC] may undertake the removal of such discharge and may *retain agents and contractors who shall operate under the direction of [the DEC] for such purposes*" (*id.* [emphasis added]; *see* § 176 [2] [a]). Giving the Oil Spill Act a liberal construction (*see* § 195; *State of New York v Green*, 96 NY2d 403, 406; *Henning v Rando Mach. Corp.*, 207 AD2d 106, 110), and in reading the Act's sections together to best effectuate the Legislature's intended objectives (*see Friedman*, 9 NY3d at 115; *Village of Chestnut Ridge*, 92 NY2d at 722), we conclude that the DEC's contractors who "operate under the direction of [the DEC]" to investigate and remediate suspected and actual discharges of petroleum are authorized by statute, like the DEC, to enter the subject property for such purposes without acceding to landowner access agreements, but remaining subject only to restrictions imposed by law.

The parties' remaining contentions are without merit or are academic in light of our determination.

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

487

KA 13-00392

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN REEVES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Donald E. Todd, A.J.), rendered January 11, 2013. The appeal was held by this Court by order entered June 10, 2016, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (140 AD3d 1584). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is reversed on the law, that part of defendant's omnibus motion seeking to suppress pretrial identification testimony is granted, and a new trial is granted.

Memorandum: We previously held this case, reserved decision, and remitted the matter to County Court for a hearing pursuant to CPL 710.60 (4) on that part of defendant's omnibus motion seeking to suppress the pretrial identification testimony of the undercover police officer who allegedly engaged in a transaction with defendant to purchase cocaine more than a year prior to defendant's arrest (*People v Reeves*, 140 AD3d 1584). We concluded that the court had erred in summarily refusing to suppress the challenged testimony on the ground that the identification procedure was "confirmatory," and we ordered a hearing to test the reliability of the People's identification testimony. Following the hearing upon remittal, the court denied suppression. We now reverse the judgment of conviction, grant that part of defendant's omnibus motion seeking to suppress the pretrial identification testimony, and grant a new trial.

In our prior decision, we identified in the People's evidence three deficiencies that raised serious and substantial doubts concerning the reliability of the identification procedure utilized by the police. First, the People failed to produce the photograph that was viewed by the undercover officer shortly after the alleged transaction with defendant. Second, defendant was not arrested until more than a year later by a police officer from a different police

agency. Third, no postarrest identification procedures were conducted by the police. The hearing record establishes that the People failed to address or remedy those deficiencies.

At the hearing, the People attempted to introduce in evidence a photograph that was allegedly used by the undercover officer. The court refused to admit the photograph in evidence, however, on the grounds that the People failed to produce it during discovery and that, in their discovery responses, the People expressly denied the existence of any photographs in the People's possession. Thus, the photograph, i.e., the linchpin to the undercover officer's identification of defendant, was not before the court, and we conclude that its absence created a presumption of unreliability in the pretrial identification of defendant by the undercover officer (*see generally People v Holley*, 26 NY3d 514, 521-523).

We further note that the People failed to adduce any evidence detailing the procedures used to obtain the photograph at issue (*see generally People v Campos*, 197 AD2d 366, 367, *lv denied* 82 NY2d 892). The undercover officer testified that he was given the name "Kevin Reeves" by a confidential informant. The confidential informant did not testify. Significantly, the officer could not recall if the confidential informant gave him any identifying factors about "Kevin Reeves" such as height, description, or skin color. The officer testified that he entered the name "Kevin Reeves" into a law enforcement computer database and that his search resulted in a photograph that he printed and viewed after the drug transaction. The officer did not testify, however, as to which search criteria he used, how many photos he viewed in response to his search criteria, and how he may have distinguished among more than one photograph generated by his search. As a result of the above shortcomings in the People's evidence, we conclude that the People failed to rebut the presumption of unreliability of the pretrial identification created by the absence of the photograph (*see generally Holley*, 26 NY3d at 521-523).

In light of the foregoing, we further conclude that the People failed to meet their burden of proof on the issue of reliability, and the pretrial identification testimony of the undercover officer based on the photograph should have been suppressed (*see People v Nelson*, 79 AD2d 171, 174-175).

We respectfully disagree with a number of the conclusions reached by our dissenting colleague. Initially, we note that this was a CPL 710.60 hearing. CPL article 710, concerning motions to suppress evidence, provides a method for a defendant "aggrieved by unlawful or improper acquisition of evidence" to suppress or exclude the use of that evidence against him in a criminal action (CPL 710.20). The term "suggestive" is not used in any section in CPL article 710. Instead, the article speaks of "improper identification testimony" (CPL 710.20) and "improperly made previous identification of the defendant" (CPL 710.20 [6]). We observe that the common-law concern about "suggestiveness" in police pretrial identification procedures arises in the context where there are at least three participants, i.e., the police officer, the complaining witness or eyewitness, and the

suspect. The law of "suggestiveness" has evolved out of the concern with the police "conveying the suggestion to the witness that the one presented is believed guilty by the police" (*United States v Wade*, 388 US 218, 234). Here, that concern is not present as there simply was no complaining witness or eyewitness to whom the police could suggest an identification.

We also disagree with the dissent's improper casting of the initial burden of proof upon defendant in the context of this hearing. The dissent criticizes defendant for not disputing that the photograph was not of him. That approach is contrary to the well settled rule that the People bear the burden of going forward in the first instance to "establish[ ] the reasonableness of the police conduct in a pretrial identification procedure" (*People v Jackson*, 98 NY2d 555, 559). Inasmuch as the People failed to enter their proffered photograph in evidence, we conclude that it is improper to suggest that defendant had any obligation to challenge the photograph.

We further disagree with the dissent's reliance upon a photograph that was not received in evidence at the hearing, and is not in this record, to reach the conclusion that the identification procedure was reliable and not suggestive. Even assuming arguendo that "suggestiveness" is the test, we note that there is a well settled burden-shifting mechanism when the police fail to preserve and produce a photograph used in a pretrial identification (*see Holley*, 26 NY3d at 521-522). In such a case, failure to preserve the subject photograph or photographs used in the pretrial identification procedure "creates a rebuttable presumption that the People have failed to meet their burden of going forward to establish the lack of suggestiveness" (*id.* at 522 [internal quotation marks omitted]). The People may rebut the presumption by testimony from the involved police officer or officers with respect to, inter alia, which search criteria were entered into the computer database, how many photographs were returned on such criteria, and how many photographs were viewed (*see id.*). The People adduced no such testimony in this case.

As to the dissent's discussion of our rejection of defendant's weight of the evidence challenge in the prior appeal, we simply note that the determination in that appeal was based upon the trial record as it existed at that time, and that the record on the prior appeal included the undercover officer's testimony concerning the now-precluded photograph and now-suppressed pretrial identification procedure. In that prior appeal, we addressed defendant's weight of the evidence challenge to the trial record because defendant raised it as an independent ground for reversal, and because it was expeditious to do so as a matter of judicial economy (*Reeves*, 140 AD3d at 1584).

Regarding our prior determination, we note that in conducting a weight of the evidence review, this Court acts as a thirteenth juror and decides which facts have been proven at trial (*see People v Danielson*, 9 NY3d 342, 348-349). It is well settled that weight of the evidence considerations do not involve the threshold legal issue of admissibility (*see generally People v Lovacco*, 234 AD2d 55, 55, *lv denied* 89 NY2d 1096; *People v McNair*, 32 AD2d 662, 662), and that "the

accuracy of an eyewitness identification remains a question of fact for the jury" (*People v Balsano*, 51 AD2d 130, 132). On the other hand, at a suppression hearing, the court is presented with the *legal* question of admissibility of identification testimony "upon the prospective trial of such charge owing to an improperly made previous identification of the defendant by the prospective witness" (CPL 710.20 [6]; *see People v Cherry*, 26 AD3d 342, 343, *lv denied* 10 NY3d 839). On the present appeal, we are concerned with the distinct threshold legal issue of admissibility, not weight of the evidence.

Contrary to the conclusion of the dissent that defendant's challenge to the police's identification procedure was narrowly limited to suggestiveness, we note that the part of defendant's omnibus motion seeking suppression was based on CPL 710.20 (6)—which is not in any manner limited to "suggestiveness"—and on the broad grounds that the pretrial identification procedure was "unnecessarily suggestive and conducive to a *substantial likelihood of irreparable misidentification* in violation of . . . the Constitution of New York State and the United States Constitution" (emphasis added).

Finally, we disagree with the dissent's conclusion that this is the "first reported case in New York where identification testimony has been suppressed in the absence of a finding of suggestiveness." As we held long ago in *Nelson* (79 AD2d at 174), the " 'linchpin' in determining the admissibility of a pretrial identification at a trial is reliability." "[B]ecause of the underlying concern that a conviction should not be based on potentially unreliable evidence," we held in *Nelson* that "it was proper to exclude this identification from the trial" (*id.*).

In light of the foregoing and, contrary to the dissent's analysis, we decline to unduly restrict CPL article 710 to the narrow concept of "suggestiveness."

All concur except LINDLEY, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent. As stated in my concurrence in the prior appeal, I do not believe that there is any legal basis to suppress identification testimony of a witness based on the alleged unreliability of the witness's identification unless the identification is the product of unduly suggestive police procedures (*see People v Reeves*, 140 AD3d 1584, 1587-1588). Indeed, a suppression court is not required to make "a threshold inquiry into the reliability of . . . identification testimony" (*People v Reeves*, 120 AD2d 621, 622, *lv denied* 69 NY2d 715), and "the reliability of untainted in-court identification testimony 'presents an issue of fact for jury resolution' " (*People v Gilmore*, 135 AD2d 828, 828, *lv denied* 71 NY2d 896; *see People v Dukes*, 97 AD2d 445, 445).

This is the first reported case in New York where identification testimony has been suppressed in the absence of a finding that the identification was influenced by unduly suggestive police procedures. In *People v Nelson* (79 AD2d 171), cited by the majority, we did not suppress identification testimony on reliability grounds, nor did the trial court. Instead, the trial court suppressed identification

testimony "because the People failed to produce at the suppression hearing for the trial court's review the photo array" shown to the witness by the police (*id.* at 174). Without the photo array, the People could not have met their initial burden of establishing "the lack of any undue suggestiveness" in the identification (*People v Chipp*, 75 NY2d 327, 335, *cert denied* 498 US 833).

Although we stated in *Nelson* that the " 'linchpin' in determining the admissibility of a pretrial identification at a trial is reliability" (*id.* at 174), in doing so we quoted from *Manson v Brathwaite* (432 US 98, 114), which held that, even when an identification is the product of unduly suggestive police procedures, the witness may nevertheless offer identification testimony at trial if, upon an examination of the totality of circumstances, it appears that the testimony "possesses certain features of reliability" (*id.* at 110). The federal rule set forth in *Manson*, which was rejected by the New York State Court of Appeals shortly after *Nelson* was decided (*see People v Adams*, 53 NY2d 241, 249-251; *see also People v Marte*, 12 NY3d 583, 586-587, *cert denied* 559 US 941), does not stand for the proposition that identification testimony should be suppressed on reliability grounds absent a finding that it was influenced by unduly suggestive police procedures.

In any event, even assuming, arguendo, that the majority is correct that we may suppress identification testimony that we deem to be insufficiently reliable, I do not find anything unreliable about the identification testimony at issue here. The undercover officer who purchased cocaine from defendant looked at a photograph of defendant approximately 15 to 20 minutes before the transaction and then again 10 minutes afterward. In my view, that was a reliable way for the undercover officer to identify the person who sold cocaine to him.

The only conceivable basis to conclude that the undercover officer's identification of defendant was unreliable is if the person depicted in the photograph was not defendant but, instead, another man with the same name and similar looks who also happened to live in Syracuse. The People produced the photograph at the hearing and offered it in evidence, but defendant opposed its admission on the ground that it had not been turned over prior to trial. County Court sided with defendant and refused to admit the photograph in evidence. Although defendant was able to see the photograph at the hearing, he has never contended that the photograph was of someone else. In fact, defendant has never contended, not even on resubmission of this appeal, that the undercover officer's identification of him was unreliable. Instead, defendant merely contends that the identification was tainted by suggestive police procedures. Thus, the majority is reversing the judgment of conviction and suppressing evidence based on a ground that has never been raised by defendant.

Finally, I note that, if the undercover officer's identification of defendant is so unreliable that he should be barred from testifying about it at trial, it would seem that the verdict, which was based largely on the officer's identification testimony, would be against

the weight of the evidence. Yet the majority rejected defendant's challenge to the weight of the evidence (*Reeves*, 140 AD3d at 1584), properly so in my view. I understand that there is a difference between the legal admissibility of identification testimony and the weight that should be accorded to such evidence, but the fact remains that the majority is upholding a verdict that is based almost exclusively on testimony that it deems too unreliable to present to the jury.

Frances E. Cafarell

Entered: July 7, 2017

Clerk of the Court

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

506

CA 16-01347

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

WILLIAM H. SHEEHAN AND MARCY A. SHEEHAN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

THOMAS A. GILRAY, JR., ET AL., DEFENDANTS,
AND CENTRAL TERMINAL RESTORATION CORPORATION,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

GOLDBERG SEGALLA LLP, BUFFALO, MAURO LILLING NAPARTY LLP, WOODBURY (SETH M. WEINBERG OF COUNSEL), FOR DEFENDANT-APPELLANT.

SMITH, MINER, O'SHEA & SMITH, LLP, BUFFALO (R. CHARLES MINER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered June 14, 2016. The order, among other things, denied in part the motion of defendant Central Terminal Restoration Corporation for summary judgment dismissing the complaint against it.

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

Memorandum: William H. Sheehan, a plaintiff in appeal No. 1, and Michael A. Serrano, the plaintiff in appeal No. 2, were passengers in a vehicle operated by Marcy A. Sheehan, the second plaintiff in appeal No. 1. Sometime between 10:30 p.m. and 11:00 p.m., Marcy Sheehan lost control of the vehicle and struck a concrete barrier, and the occupants exited the vehicle and walked to a grassy area off of the roadway. Shortly thereafter, the Sheehan vehicle was struck by a vehicle operated by a nonparty. Following that collision, William Sheehan and Serrano returned to the area where the two vehicles were situated, and the police arrived. Soon after the arrival of the police, a vehicle operated by defendant Thomas A. Gilray, Jr. collided with the Sheehan vehicle, which then struck William Sheehan and Serrano. Thereafter, Gilray failed three field sobriety tests and, at 1:35 a.m. on April 2, 2013, his blood alcohol level was recorded as .127%. Earlier in the evening, Gilray had attended an event at defendant Corpus Christi Church (CCC), where he consumed alcohol, and he thereafter consumed more alcohol at an event hosted by defendant Central Terminal Restoration Corporation (Central Terminal). Gilray left Central Terminal between 10:00 p.m. and 10:30 p.m., stopped at his place of employment, and then was involved in the subject motor

vehicle accident at 11:00 p.m. Plaintiffs commenced their respective actions against, inter alia, Central Terminal alleging, among other things, that Central Terminal was responsible for their injuries inasmuch as it sold and/or provided alcohol to Gilray while he was visibly intoxicated, in violation of General Obligations Law § 11-101 and Alcoholic Beverage Control Law § 65.

We conclude that Supreme Court properly denied that part of the motion of Central Terminal for summary judgment with respect to the claims against it for violations of General Obligations Law § 11-101 and Alcoholic Beverage Control Law § 65. Although Central Terminal met its initial burden on those parts of the motion by submitting the deposition testimony of individuals who had interacted with Gilray prior to the accident, none of whom had any recollection that Gilray was visibly intoxicated, plaintiffs raised a triable issue of fact in opposition thereto. It is well established that "visible intoxication may be established by circumstantial evidence, including expert and eyewitness testimony" (*Kish v Farley*, 24 AD3d 1198, 1200; *see McGilveary v Baron*, 4 AD3d 844, 845). "While proof of high blood alcohol count alone generally does not establish visible intoxication, in this case plaintiffs submitted the affidavit of [a forensic toxicologist with a Ph.D. in physical organic chemistry] who did not rely solely on the blood alcohol level of [Gilray]" in concluding that Gilray was likely showing signs of visible intoxication at Central Terminal (*Kish*, 24 AD3d at 1200). Rather, the expert relied on, inter alia, the deposition testimony of the police officer who arrested Gilray for driving while intoxicated and the police officer who spoke to Gilray at the police station. Those officers testified that Gilray failed every sobriety test administered, had bloodshot or glassy eyes and slurred speech, and smelled of alcohol (*see McGilveary*, 4 AD3d at 845; *see also Adamy v Ziriakus*, 92 NY2d 396, 402-403). The expert also relied on the testimony of an investigator for the New York State Police Collision Reconstruction Unit who reviewed the "black box" data and concluded that Gilray was traveling at a speed of 85 miles per hour within four seconds of the accident and 74 miles per hour at the time of impact, which was well above the speed limit (*see generally Kish*, 24 AD3d at 1200). We therefore conclude that plaintiffs raised a triable issue of fact whether Gilray exhibited signs of visible intoxication while he was present at Central Terminal " 'that should have alerted' " Central Terminal employees to his intoxication (*McGilveary*, 4 AD3d at 845).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

507

CA 16-01348

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

MICHAEL A. SERRANO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS A. GILRAY, JR., ET AL., DEFENDANTS,
AND CENTRAL TERMINAL RESTORATION CORPORATION,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

GOLDBERG SEGALLA LLP, BUFFALO, MAURO LILLING NAPARTY LLP, WOODBURY (SETH M. WEINBERG OF COUNSEL), FOR DEFENDANT-APPELLANT.

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered June 15, 2016. The order, among other things, denied in part the motion of defendant Central Terminal Restoration Corporation for summary judgment dismissing the complaint against it.

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

Same memorandum as in *Sheehan v Gilray* ([appeal No. 1] ___ AD3d ___ [July 7, 2017]).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

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CA 16-01849

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

LOTS 4 LESS STORES, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

INTEGRATED PROPERTIES, INC., IT MID-CITY PLAZA, LLC, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

HOGAN WILLIG, PLLC, AMHERST (LINDA LALLI STARK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JASON J. CAFARELLA, NIAGARA FALLS (JOHN J. DELMONTE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered January 8, 2016. The order granted the motion of defendants Integrated Properties, Inc., and IT Mid-City Plaza, LLC, to dismiss the amended complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the amended complaint against defendants Integrated Properties, Inc. and IT Mid-City Plaza, LLC is reinstated.

Memorandum: Defendant IT Mid-City Plaza, LLC (Mid-City) owns a shopping plaza that is managed by defendant Integrated Properties, Inc. (Integrated Properties) (collectively, defendants). A tanning business was operated in a unit of the shopping plaza by a nonparty husband and wife (former tenants) until January 2014, at which point the former tenants allegedly vacated the premises in violation of an unexpired modification of lease agreement that had previously named them as lessees. Remaining in the unit were tanning beds purportedly owned by The Beach Tanning Company, Inc. (Beach Tanning), which was a corporation held by the husband former tenant as president and sole shareholder. The former tenants subsequently filed for bankruptcy. In September 2014, plaintiff expressed interest to defendants in obtaining possession of the tanning beds, and correspondence between the parties regarding such a transaction continued for several months. During that time, the husband former tenant dissolved Beach Tanning. In January 2015, the bankruptcy trustee transferred all of the husband former tenant's shares in the then-dissolved Beach Tanning to plaintiff. Shortly thereafter, plaintiff claimed ownership of the tanning beds and requested that defendants allow it to retrieve the property from the shopping plaza. Defendants disputed plaintiff's

claim of ownership of the tanning beds. According to plaintiff, defendant Super Sun Capsule Inc. (Super Sun Capsule) is a tenant of the shopping plaza and is currently in possession of the tanning beds, which it uses as part of its business.

Plaintiff and Beach Tanning commenced this action against defendants and Super Sun Capsule alleging causes of action for conversion and replevin, and seeking injunctive relief. Beach Tanning subsequently executed a bill of sale transferring its purported interest in the tanning beds to plaintiff, and also executed an assignment of claim assigning to plaintiff its claims against defendants and Super Sun Capsule arising from ownership of the tanning beds. Plaintiff then amended its complaint by, as relevant here, asserting ownership of the tanning beds and removing Beach Tanning as a party plaintiff. Plaintiff appeals from an order granting defendants' motion to dismiss the amended complaint against them.

Preliminarily, contrary to plaintiff's contention, the record establishes that defendants' motion to dismiss was properly directed against the amended complaint, which had been filed as of right pursuant to CPLR 3025 (a), thereby superseding the original complaint and becoming the only complaint in the case (*see D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 957). In addition, the alternative grounds for affirmance asserted by defendants are not properly before us inasmuch as defendants did not raise before the trial court the purported defects in the amended pleading now claimed on appeal (*see Ambrose v Brown*, 142 AD3d 1312, 1314; *Matter of Wiley v Greer*, 103 AD3d 1218, 1219).

On the merits, we agree with plaintiff that Supreme Court erred in granting defendants' motion to dismiss the amended complaint against them. It is well established 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 [the] 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; *see Leon v Martinez*, 84 NY2d 83, 87-88). "A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted if the documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the [plaintiff's] claim[s]' " (*Baumann Realtors, Inc. v First Columbia Century-30, LLC*, 113 AD3d 1091, 1092; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326). Although a lease may constitute "documentary evidence" for purposes of CPLR 3211 (a) (1) (*see Sunset Café, Inc. v Mett's Surf & Sports Corp.*, 103 AD3d 707, 709; *Excel Graphics Tech. v CFG/AGSCB 75 Ninth Ave.*, 1 AD3d 65, 69, *lv dismissed* 2 NY3d 794), we conclude that the original lease purportedly between predecessor lessors and lessees and the several subsequent agreements to modify the lease submitted in support of defendants' motion "failed to utterly refute . . . plaintiff's allegations or conclusively establish a defense as a matter of law" (*Sabre Real Estate Group, LLC v Ghazvini*, 140 AD3d 724, 725; *see Maurice W. Pomfrey & Assoc., Ltd. v Hancock & Estabrook, LLP*, 50 AD3d

1531, 1532). According plaintiff the benefit of every favorable inference, we conclude that neither the original lease nor the subsequent agreements to modify the lease establish, as a matter of law, that Mid-City or Integrated Properties succeeded the lessor actually named in those documents and, in any event, the provision in the original lease upon which defendants rely does not conclusively establish their possessory rights to the tanning beds. Likewise, defendants are not entitled to dismissal under CPLR 3211 (a) (7) inasmuch as their evidentiary submissions do not establish conclusively that plaintiff has no cause of action against them (*see generally Rovello v Orofino Realty Co.*, 40 NY2d 633, 636).

Defendants also sought dismissal of the amended complaint against them pursuant to CPLR 3211 (a) (3) on the ground that plaintiff lacked standing because Beach Tanning, as a dissolved corporation, could not have transferred its shares and sold the tanning beds to plaintiff. We agree with plaintiff that defendants are not entitled to dismissal on that ground. Following dissolution, a corporation may continue to function for the purpose of winding up its affairs, which includes the ability to transfer shares and sell assets (*see* Business Corporation Law §§ 1005 [a] [2]; 1006 [a] [3]; *Matter of 172 E. 122 St. Tenants Assn. v Schwarz*, 73 NY2d 340, 348-349; *Matter of Schenectady Mun. Hous. Auth. v Keystone Metals Corp.*, 245 AD2d 725, 727, *lv denied* 92 NY2d 804). The record does not support defendants' cursory assertion in their motion papers that the subject transactions constituted impermissible new business rather than the winding up of Beach Tanning's affairs (*see Schenectady Mun. Hous. Auth.*, 245 AD2d at 727).

Finally, contrary to defendants' contention, plaintiff's claims are not barred by the statutory prohibition against champerty set forth in Judiciary Law § 489. The record establishes that plaintiff had a legitimate business purpose in acquiring the tanning beds and accepting the assignment from Beach Tanning, and that plaintiff's intent to litigate its claim to ownership of the tanning beds was merely incidental and contingent (*see Hill Intl. v Town of Orangetown*, 290 AD2d 416, 417).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

666

CA 16-01784

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

CHARLES B. CUMMINGS, PLAINTIFF-APPELLANT,

V OPINION AND ORDER

ROBERT W. MANVILLE, DEFENDANT-RESPONDENT.

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

TREVETT CRISTO P.C., ROCHESTER (MELANIE S. WOLK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered February 1, 2016. The order granted the motion of defendant for summary judgment.

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

Opinion by CURRAN, J.:

On April 4, 2010, plaintiff visited his friend Anthony Cringoli at his home on Walker Lake Ontario Road in Hamlin, New York. On that day, plaintiff brought to Cringoli's home, for the first time, his four-wheel all-terrain vehicle (ATV). Cringoli's home is accessed only by a private gravel road owned by defendant. At the time of the accident, plaintiff had intended to ride his ATV into Cringoli's backyard. Plaintiff, however, could not access the backyard directly from Cringoli's property. Instead, plaintiff traveled down defendant's gravel road with the intention to go around a hedgerow and onto a neighboring parcel of land, and then cut back into Cringoli's backyard. While traveling on the road on his ATV, plaintiff struck a pothole, which caused his wheel to jerk sideways, throwing him from the ATV.

Plaintiff commenced this negligence action against defendant seeking damages for the injuries he sustained in the accident. Following joinder of issue and discovery, defendant moved pursuant to CPLR 3212 for summary judgment dismissing the complaint on the ground that he was immune from liability pursuant to General Obligations Law § 9-103. Supreme Court granted the motion, and we conclude that the order should be reversed.

General Obligations Law § 9-103, commonly referred to as the recreational use statute, grants owners, lessees, or occupants of premises immunity from liability based on ordinary negligence if a member of the public enters their property to engage in specified activities, including motorized vehicle operation for recreational purposes (*see Bragg v Genesee County Agric. Socy.*, 84 NY2d 544, 546–547). Subject to certain exceptions not relevant to this appeal (*see* § 9-103 [2]), the statute provides that

> "an owner, lessee or occupant of premises, whether or not posted as provided in section 11-2111 of the environmental conservation law, owes no duty to keep the premises safe for entry or use by others for . . . motorized vehicle operation for recreational purposes . . . , or to give warning of any hazardous condition or use of or structure or activity on such premises to persons entering for such purposes" (§ 9-103 [1] [a]).

The purpose of the statute was articulated by the Court of Appeals as follows:

> "The premise underlying section 9-103 is simple enough: outdoor recreation is good; New Yorkers need suitable places to engage in outdoor recreation [and] more places will be made available if property owners do not have to worry about liability when recreationists come onto their land" (*Bragg*, 84 NY2d at 550).

Defendant, as the party seeking summary judgment, has the burden of establishing as a matter of law that he is immune from liability pursuant to the statute (*see generally Giuffrida v Citibank Corp.*, 100 NY2d 72, 81; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067). Thus, defendant is required to establish that he owned, leased or occupied the property, that plaintiff was engaged in a specified recreational activity, and that the property was suitable for recreational use (*see generally Bragg*, 84 NY2d at 548). Here, the parties do not dispute that plaintiff was engaged in a recreational activity, ATV riding, which falls within the scope of the statute (*see Bryant v Smith*, 278 AD2d 576, 576). It is also undisputed that defendant owned the road where the accident occurred. Thus, the central issue in this case is whether defendant established that the road is suitable for the recreational use of ATV riding (*see Albright v Metz*, 88 NY2d 656, 662).

In analyzing whether land is suitable for a specific recreational use, courts look to whether the portion of the land on which the plaintiff was injured was suitable for that particular activity. For instance, in *Pulis v T.H. Kinsella, Inc.* (156 Misc 2d 499, *affd for reasons stated* 204 AD2d 976), the plaintiff operated an ATV in a gravel pit owned by the defendant and, upon leaving the gravel pit, was injured when the ATV ran into a cable that stretched across the entrance roadway (*Pulis*, 156 Misc 2d at 501). Most of the property

owned by the defendant was undeveloped and suitable for ATV use, but the plaintiff never operated his ATV in those areas (*id*. at 502). Supreme Court differentiated between the suitable and unsuitable portions of the property for ATV use, determining that the Legislature could not have intended for General Obligations Law § 9-103 to apply to a gravel pit that was not suitable for ATVs (*id*. at 503-504). This Court agreed with Supreme Court's determination that the property owner was ineligible for the statutory immunity provided by section 9-103, and permitted the plaintiff's negligence action to proceed (*Pulis*, 204 AD2d at 976).

The Court of Appeals used the same analysis in *Albright* but ended in a different result under a different factual scenario therein. In that case, the plaintiff's son rode a motorized dirt bike on property, a portion of which was used by the defendant owner as a landfill (*Albright*, 88 NY2d at 660-661). The plaintiff's son drove up a path alongside the landfill to the top of a berm, and then plunged 35 feet into the bed of the landfill (*id*. at 660). The plaintiff contended that the landfill area of the property was not suited for dirt bikes, and that General Obligations Law § 9-103 therefore did not immunize the defendant owner from liability (*id*. at 661). The defendant owner contended, however, that the statutory immunity did apply because the dirt path on which the plaintiff's son was riding was suitable for such a recreational use. The Court of Appeals agreed with the defendant owner, and explained that, "[t]o the extent plaintiff argues that the land's suitability must be judged by its 'general characteristics' and that the general characteristic of the property at issue is landfill, plaintiff ignores the fact that portions of [the] land were not used as landfill and it was in these other areas that plaintiff's son injured himself while motorbiking" (*id*. at 663-664). In other words, while the general use of the property was as a landfill, a portion of that property (i.e., the dirt path) was suitable for motorbiking, particularly because it had been used for such purposes by various persons for many years (*id.* at 664-665). The Court therefore held that the defendant owner was entitled to the statutory immunity (*id*. at 665).

We recognize that the Second Department in *Morales v Coram Materials Corp*. (51 AD3d 86) determined that "the focus in *Pulis* on the use of a particular area of the property where an accident occurred . . . has been implicitly rejected by the Court of Appeals' more recent focus in *Albright* on the general character of the landowner's property" (*id*. at 94). However, we disagree with that interpretation of *Albright*. The Court in *Albright* looked to the particular area in which the plaintiff was injured and, although that area was different from the general character of the property surrounding it, found it suitable for the recreational activity of the plaintiff's son. While *Albright* looked to the "general suitability" of the particular area where the plaintiff's son was injured, it did so only when considering the plaintiff's contention that there was a recent change in the property (*Albright*, 88 NY2d at 664). Specifically, the plaintiff contended that the portion of the property on which her son was riding had been altered during the 24-hour period prior to the accident to create a cliff where none had existed before,

and thus that the suitability of the property for the recreational activity had changed (*id*. at 664). The Court rejected that contention, noting that the suitability must be "judged by viewing the property as it generally exists, not portions of it at some given time" (*id*., citing *Bragg*, 84 NY2d at 552). Thus, in *Albright* the Court was distinguishing between the general conditions of a parcel of land and a temporary condition on that land (i.e., a temporal distinction) and, contrary to the view of the court in *Morales* and the trial court in this case, the Court was not making a distinction between the general character of the whole property and the character of a certain portion of the property (i.e., a spatial distinction). In this case, we conclude that, by viewing defendant's property and surrounding area as a whole, rather than focusing on the general suitability of the road where the accident occurred, the trial court erred in its legal analysis when making its suitability determination.

Additionally, in looking at the suitability of a particular property, courts look to whether the premises are the "type of property which is not only physically conducive to the particular activity or sport but is also a type which would be appropriate for public use in pursuing the activity as recreation" (*Iannotti v Consolidated Rail Corp.*, 74 NY2d 39, 45). "A substantial indicator that property is 'physically conducive to the particular activity' is whether recreationists have used the property for that activity in the past; such past use by participants in the sport manifests the fact that the property is physically conducive to it" (*Albright*, 88 NY2d at 662; *see Bragg*, 84 NY2d at 552; *Iannotti*, 74 NY2d at 46-47).

The road where the accident occurred is the sole means of access to Walker Lake Ontario Road for three homes. Defendant maintains the road by scraping and re-leveling it almost every year. It is wide enough to accommodate one car traveling in each direction. While located in a rural area, the two-lane private road is used for residential purposes, including at times for school bus access. Thus, the physical characteristics of the road are residential, as opposed to recreational in nature (*cf. Obenauer v Broome County Beaver Lake Cottagers Assn.*, 170 AD2d 739, 740 [road described as "a narrow, secluded dirt path" was suitable for ATV use and thus the defendant was entitled to immunity]).

While defendant averred in an affidavit that persons on ATVs and snowmobiles have used the road to access surrounding areas that were conducive to ATV riding, we conclude that this was insufficient to establish the road was suitable for ATV riding. Even assuming, arguendo, that defendant's affidavit established that the road was suitable for ATV riding as a matter of law, we conclude that plaintiff raised a triable issue of fact by submitting affidavits from himself and Cringoli. Cringoli averred that he has resided at the property for approximately 14 years and, as a result, has personal knowledge of the surrounding properties and roadways. He routinely sees residents, and their visitors, using the road to get to their homes. He has never seen anyone, with the exception of defendant, use an ATV, snowmobile or any recreational vehicle on the road. Rather, Cringoli states that the road serves a residential area. Plaintiff also

submitted an affidavit in which he stated that he is familiar with the property and that the road upon which he was injured served "residents and visitors of numerous residents." Plaintiff testified at his deposition that he visited Cringoli almost every weekend, and in his affidavit he averred that, during those visits, he "witnessed many automobiles traveling on the residential road, which is wide enough to accommodate one car traveling in each direction." He further averred that there was "significant traffic in the general vicinity of the residential road, which is connected to Walker Lake Ontario Road. The Lake Ontario State Parkway, which is directly accessible from Walker Lake Ontario Road, is a busy highway with dense traffic."

Finally, the portion of property where plaintiff fell is not the type of property that the Legislature intended to cover under General Obligations Law § 9-103 (*see Sasso v WCA Hospital*, 130 AD3d 1546, 1548). As the Court of Appeals explained, courts should ask whether the property "is the sort which the Legislature would have envisioned as being opened up to the public for recreational activities as a result of the inducement offered in the statute. In other words, is it a type of property which is not only physically conducive to the particular activity or sport but is also a type which would be appropriate for public use in pursuing the activity as recreation?" (*Iannotti*, 74 NY2d at 45). Application of the statutory immunity to the road at issue would lead to its application to potentially any road in a rural area, which is inconsistent with the idea that this statute is in derogation of the common law and should therefore be narrowly construed (*see Seideman v County of Monroe*, 185 AD2d 640, 640).

Accordingly, we conclude that defendant failed to meet his burden of establishing that he is entitled as a matter of law to immunity under General Obligations Law § 9-103, and thus the court erred in granting defendant's motion for summary judgment dismissing the complaint.

DEJOSEPH and NEMOYER, JJ., concur with CURRAN, J.; PERADOTTO, J., dissents and votes to affirm in the following opinion in which SMITH, J.P., concurs: We respectfully dissent inasmuch as we conclude that defendant, the property owner, is entitled to immunity from liability under the recreational use statute (*see* General Obligations Law § 9-103). In particular, we disagree with the majority's conclusion that the property at issue is not suitable for the recreational activity in which plaintiff was engaged at the time of his accident, i.e., operation of an all-terrain vehicle (ATV). We would therefore affirm the order granting defendant's motion for summary judgment dismissing the complaint.

"Whether a parcel of land is suitable and the immunity available is a question of statutory interpretation, and is, therefore, a question of law for the [c]ourt" (*Bragg v Genesee County Agric. Socy.*, 84 NY2d 544, 552). "Suitability is established by showing that the subject property is (1) physically conducive to the activity at issue, and (2) of a type that is appropriate for public use in pursuing that activity as recreation" (*Sasso v WCA Hosp.*, 130 AD3d 1546, 1547

[internal quotation marks omitted]). "A substantial indicator that property is 'physically conducive to the particular activity' is whether recreationists have used the property for that activity in the past; such past use by participants in the sport manifests the fact that the property is physically conducive to it" (*Albright v Metz*, 88 NY2d 656, 662).

Here, the evidence establishes that the private access road where the accident occurred is physically conducive to the operation of an ATV. There are three residences located along the road, behind which there is a pond and wooded area, and the occupants of those residences use the road as a means of ingress and egress to and from a public roadway to which the road is connected. The road consists of "[c]rusher run gravel," which defendant maintains by leveling the surface and redistributing gravel scrapings into any holes that may have formed. Defendant averred that numerous individuals on ATVs, snowmobiles and dirt bikes had used the road for recreation in the past and, in particular, that such individuals had used the road to either access the pond and wooded area or cross over the public roadway to the rural area on the other side.

Plaintiff and the homeowner along the road whom plaintiff was visiting on the day of the accident did not dispute that there was past recreational use of the road by ATV riders. Plaintiff, who did not reside in the area, merely averred that, "[d]uring the multiple times" that he visited the homeowner, he saw recreationists operating ATVs in an adjacent field that is separated from defendant's property by a hedgerow. Plaintiff's averment does not conflict with defendant's observations and, in fact, corroborates defendant's account to the extent that plaintiff confirms that individuals frequently operated ATVs in an area adjacent to the road. Indeed, plaintiff's deposition testimony establishes that he too intended to drive the ATV down the road, around the hedgerow, and through the adjacent field to gain access to the homeowner's backyard that was otherwise fenced. The homeowner likewise averred that recreationists routinely rode ATVs in the adjacent field, and he further confirmed that the road had previously been used for operating recreational vehicles inasmuch as he had observed defendant doing so. Contrary to the majority's assertion, the fact that plaintiff and the homeowner indicated that the road is used to access three residences does nothing to undermine the conclusion that the gravel road is also physically conducive to the operation of ATVs. We thus conclude that, along with the physical characteristics of the road, the evidence of past recreational use of the road for ATV riding to access areas adjacent to the properly " 'clearly evinces that the property is physically conducive to that activity' " (*Moscato v Frontier Distrib.*, 254 AD2d 802, 803, *lv denied* 92 NY2d 817, quoting *Albright*, 88 NY2d at 662; *see Coogan v D'Angelo*, 66 AD3d 1465, 1465-1466 [the record on appeal establishes that the "path" deemed suitable for use by recreational motor vehicles was made of gravel over a hard fill base and was the sole means of ingress and egress to and from the property]).

We further disagree with the majority's conclusion that the road

is not appropriate for public use for the recreational operation of ATVs to access adjacent areas. The purpose of the statute is to promote the recreational use of private land, and it has thus been construed "liberally to apply it to public and private land . . . , [and] to rural or urban property whether developed or undeveloped" (*Bragg*, 84 NY2d at 548). Here, the presence of three residences along the private gravel access road that is adjacent to a pond and wooded area and other undeveloped areas does not preclude its suitability for recreational use (*see Rivera v Glen Oaks Vil. Owners, Inc.*, 41 AD3d 817, 820, *lv denied* 9 NY3d 817; *Wiggs v Panzer*, 187 AD2d 504, 505), and the primary use of the road to access those residences does not, ipso facto, render it inappropriate to operate ATVs thereon as a means of moving to the adjacent areas (*see Obenauer v Broome County Beaver Lake Cottagers Assn.*, 170 AD2d 739, 740-741). Considering the nature of the private gravel road and the evidence that the road provides access to other areas where ATVs may also be used for recreation, the submissions establish that, despite the three residences along the road, "the property is the sort which the Legislature would have envisioned as being opened up to the public for recreational activities" (*Iannotti v Consolidated Rail Corp.*, 74 NY2d 39, 45; *see Moscato*, 254 AD2d at 803). Finally, the majority's concern that application of the recreational use statute here will authorize its application to "potentially any road in a rural area" is unfounded given that, as here, suitability is determined based upon the particular property at issue.

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

706

KA 13-01187

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

ERIC A. MAGIN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered April 11, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of a forged instrument in the second degree (12 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 12 counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25). County Court sentenced him as a persistent felony offender to concurrent indeterminate terms of imprisonment of 15 years to life.

We reject defendant's contention that the court abused its discretion in sentencing him as a persistent felony offender. We conclude "that defendant's history and character . . . and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest" (Penal Law § 70.10 [2]; *see People v Bastian*, 83 AD3d 1468, 1470, *lv denied* 17 NY3d 813; *People v Perry*, 19 AD3d 619, 619, *lv denied* 5 NY3d 809, *reconsideration denied* 5 NY3d 855). We therefore further conclude that the sentence is not unduly harsh or severe.

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

722

CA 16-02002

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

JAMES MORRIS AND DOROTHY A. MORRIS, INDIVIDUALLY AND AS ADMINISTRATORS WITH LETTERS OF ADMINISTRATION WITH LIMITATIONS OF THE ESTATE OF KRISTY L. MORRIS, ALSO KNOWN AS KRISTY LOUISE MORRIS, DECEASED, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ONTARIO COUNTY, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS. (APPEAL NO. 1.)

MORRIS & MORRIS, ATTORNEYS, ROCHESTER (DEBORAH M. FIELD OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GARY L. CURTISS, COUNTY ATTORNEY, CANANDAIGUA (MICHAEL G. REINHARDT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered May 20, 2016. The order granted the motion of defendant Ontario County for summary judgment dismissing the complaint against it and denied as moot the cross motion of plaintiffs for partial summary judgment against defendant Ontario County.

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

Same memorandum as in *Morris v Ontario County* ([appeal No. 2] ___ AD3d ___ [July 7, 2017]).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

723

CA 16-01855

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

JAMES MORRIS AND DOROTHY A. MORRIS, INDIVIDUALLY AND AS ADMINISTRATORS WITH LETTERS OF ADMINISTRATION WITH LIMITATIONS OF THE ESTATE OF KRISTY L. MORRIS, ALSO KNOWN AS KRISTY LOUISE MORRIS, DECEASED, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ONTARIO COUNTY, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS. (APPEAL NO. 2.)

MORRIS & MORRIS, ATTORNEYS, ROCHESTER (DEBORAH M. FIELD OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GARY L. CURTISS, COUNTY ATTORNEY, CANANDAIGUA (MICHAEL G. REINHARDT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered June 2, 2016. The amended order granted the motion of defendant Ontario County for summary judgment dismissing the complaint against it and denied as moot the cross motion of plaintiffs for partial summary judgment against defendant Ontario County.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by denying the motion of defendant Ontario County and reinstating the complaint against it, and as modified the amended order is affirmed without costs.

Memorandum: Plaintiffs, individually and as administrators of the estate of Kristy L. Morris, also known as Kristy Louise Morris (decedent), commenced this negligence action following a motor vehicle accident. Decedent was operating her vehicle on County Route 41 when the vehicle traveled off the road and hit the guide rail on Fish Creek Bridge in the Town of Victor. The guide rail system was installed during a 2005 renovation project of County Route 41. Defendant Ontario County (County), the owner of the road, hired defendant Ramsey Constructors, Inc. (Ramsey), as the project contractor and defendant Phelps Guide Rail, Inc. (Phelps), as the subcontractor for the installation of the guide rails. Defendant FRA Engineering, P.C. (FRA), was the engineer on the project.

The original design plans by FRA for the project called for a

guide rail on Fish Creek Bridge to be installed with Type I box beam end assemblies, which meant that the end points of the rail were sloped downward and flared away from the road. The plans were later modified, however, and a Type II end assembly was installed on one end. The Type II end assembly is sloped and straight and does not flare from the road. The decedent's vehicle struck the Type II end of the guide rail, causing her vehicle to launch in the air, rotate for a distance of 90 feet, and finally stop in the creek below. The decedent died shortly thereafter.

As an initial matter, we note that appeal Nos. 1 and 3 must be dismissed inasmuch as the underlying orders in those appeals were superseded by later orders (*see Legarreta v Neal*, 108 AD3d 1067, 1068).

With respect to appeal No. 2, plaintiffs appeal from an amended order granting the motion of the County for summary judgment dismissing the complaint against it and denying as moot plaintiffs' cross motion against the County for summary judgment on the issue of liability. We agree with plaintiffs that Supreme Court erred in granting the motion, and we therefore modify the amended order accordingly. We conclude that the County failed to meet its initial burden of establishing its entitlement to summary judgment based on qualified immunity (*see Betts v Town of Mount Morris*, 78 AD3d 1597, 1598). In particular, the County failed to establish that the decision to change the end assembly of the guide rail from a Type I to a Type II end assembly was "the product of a deliberative decision-making process, of the type afforded immunity from judicial interference" (*id.*, citing *Appelbaum v County of Sullivan*, 222 AD2d 987, 989). Rather, the record reflects that the decision to change the guide rail end assembly was made after Phelps conducted a walk-through and learned that the owners of a hay field needed a "field drive" to allow them to access County Route 41. Although the County submitted evidence that the change order completed by Phelps was signed by FRA, there is no showing by the County that there was prior input from FRA regarding the change and, importantly, no analysis to support the decision for the change. Moreover, although the County contended on its motion that it followed the requisite standards of the New York State Department of Transportation, we note that the County's expert erroneously combined the criteria for two separate uses of Type II end assemblies into one standard.

We reject the contention of the County, advanced as an alternative ground for affirmance in appeal No. 2, that it cannot be held liable because it did not receive written notice of the dangerous condition or defect. Plaintiffs allege that the County affirmatively created the alleged dangerous condition or defect by, among other things, negligently changing the design plans and installing the Type II end assembly, as well as omitting an additional guide rail. It is well settled that the prior notice requirement does not apply where a tortfeasor's negligent design or construction creates a dangerous condition or defect (*see Hughes v Jahoda*, 75 NY2d 881, 882-883).

We further conclude that there are questions of fact whether the

County's alleged negligence with respect to the change in the end assembly was a proximate cause of the accident and, thus, neither the County nor plaintiffs are entitled to summary judgment on the issue of proximate cause (*see Ferguson v Sheahan*, 71 AD3d 1207, 1210).

In appeal No. 4, plaintiffs appeal from an amended order granting the motion of Ramsey for summary judgment dismissing the complaint against it, and granting the motion of Phelps for summary judgment dismissing the complaint against it. There is no dispute that the decedent was not a party to any contract between the County and Ramsey or Phelps, and therefore they owed no contractual duty to the decedent (*see Petito v City of New York*, 95 AD3d 1095, 1096). Further, the contract provided that all the work was under the direction of and subject to complete approval by the County. Accordingly, neither Phelps nor Ramsey had final authority regarding the ultimate installation of the guide rail at issue (*see Davies v Ferentini*, 79 AD3d 528, 530). In the absence of any duty, contractual or otherwise, the court properly dismissed the complaint against Ramsey and Phelps. Contrary to plaintiffs' contention, the *Espinal* exception concerning the launching of a force or instrument of harm does not apply to this case (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140; *Anderson v Jefferson-Utica Group, Inc.*, 26 AD3d 760, 760-761).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

724

CA 16-02003

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

JAMES MORRIS AND DOROTHY A. MORRIS, INDIVIDUALLY AND AS ADMINISTRATORS WITH LETTERS OF ADMINISTRATION WITH LIMITATIONS OF THE ESTATE OF KRISTY L. MORRIS, ALSO KNOWN AS KRISTY LOUISE MORRIS, DECEASED, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ONTARIO COUNTY, ET AL., DEFENDANTS, RAMSEY CONSTRUCTORS, INC., AND PHELPS GUIDE RAIL, INC., DEFENDANTS-RESPONDENTS. (APPEAL NO. 3.)

MORRIS & MORRIS, ATTORNEYS, ROCHESTER (DEBORAH M. FIELD OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (PHYLISS A. HAFNER OF COUNSEL), FOR DEFENDANT-RESPONDENT RAMSEY CONSTRUCTORS, INC.

RUSSO & TONER, LLP, BUFFALO (TIMOTHY P. WELCH OF COUNSEL), FOR DEFENDANT-RESPONDENT PHELPS GUIDE RAIL, INC.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered July 29, 2016. The order granted the motions of defendants Ramsey Constructors, Inc., and Phelps Guide Rail, Inc., for summary judgment.

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

Same memorandum as in *Morris v Ontario County* ([appeal No. 2] ___ AD3d ___ [July 7, 2017]).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

725

CA 16-02004

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

JAMES MORRIS AND DOROTHY A. MORRIS, INDIVIDUALLY AND AS ADMINISTRATORS WITH LETTERS OF ADMINISTRATION WITH LIMITATIONS OF THE ESTATE OF KRISTY L. MORRIS, ALSO KNOWN AS KRISTY LOUISE MORRIS, DECEASED, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ONTARIO COUNTY, ET AL., DEFENDANTS, RAMSEY CONSTRUCTORS, INC., AND PHELPS GUIDE RAIL, INC., DEFENDANTS-RESPONDENTS. (APPEAL NO. 4.)

MORRIS & MORRIS, ATTORNEYS, ROCHESTER (DEBORAH M. FIELD OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (PHYLISS A. HAFNER OF COUNSEL), FOR DEFENDANT-RESPONDENT RAMSEY CONSTRUCTORS, INC.

RUSSO & TONER, LLP, BUFFALO (TIMOTHY P. WELCH OF COUNSEL), FOR DEFENDANT-RESPONDENT PHELPS GUIDE RAIL, INC.

Appeal from an amended order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered October 27, 2016. The amended order granted the motions of defendants Ramsey Constructors, Inc., and Phelps Guide Rail, Inc., for summary judgment.

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

Same memorandum as in *Morris v Ontario County* ([appeal No. 2] ___ AD3d ___ [July 7, 2017]).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

760

CA 17-00086

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

PAMELA J. MOYER, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ARLENE I. MOODY, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AJOY K. ROY, M.D., DEFENDANT-RESPONDENT.

KUEHNER LAW FIRM, PLLC, SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered March 24, 2016. The order granted the motion of defendant for summary judgment.

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

Memorandum: Plaintiff, individually and as executrix of the estate of Arlene I. Moody (decedent), commenced this medical malpractice and wrongful death action seeking damages for decedent's injuries and death as a result of a pharyngeal laceration sustained during an endoscopic ultrasound (EUS) procedure performed by defendant. Plaintiff appeals from an order granting defendant's motion for summary judgment dismissing the complaint. We reverse.

While decedent was being treated for complaints of abdominal pain, nausea and vomiting, an ultrasound study of her abdomen revealed an incidental finding of a small pancreatic cyst. Defendant's initial consult note stated that "cysts [of] this size are of no significance and can be followed clinically and with ultrasound or CT." Defendant testified at his examination before trial that he explained to decedent that he "did not see any sign of malignancy" and that a cyst of this small size in a person with decedent's family medical history carried a "small risk of malignancy." According to defendant, he explained to decedent that treatment options included monitoring the cyst over a period of time through ultrasound or CT scans or performing an EUS with a fine needle biopsy of the cyst. Defendant's office notes recite that decedent had a family history of pancreatic cancer, and defendant testified that decedent was "extremely worried"

about the cyst developing into cancer. According to defendant, as a result of these concerns, decedent agreed to undergo the EUS procedure. There is no dispute that defendant injured decedent's pharynx during the EUS procedure and that she died approximately one month later as a result.

Defendant moved for summary judgment dismissing the complaint and submitted his own affidavit averring, inter alia, that he did not deviate from the acceptable standard of care in offering decedent the EUS procedure as a reasonable treatment option, and he opined that he performed the procedure in accordance with appropriate and accepted technique, notwithstanding the resultant injury to decedent's pharynx.

Plaintiff opposed the motion with an affidavit of an expert, who opined that the EUS procedure was not an acceptable treatment option within the standard of care when a patient presents with a pancreatic cyst of such a small size. According to plaintiff's expert, the only medically acceptable choice was to monitor the cyst over time with imaging scans. Plaintiff's expert also opined that defendant departed from the standard of care in failing to address decedent's concern and worry with noninvasive treatment and that the injury suffered by decedent during the EUS procedure only occurs "when a doctor is doing the procedure both wrongly and dangerously" (*see generally Stiles v Sen*, 152 AD2d 915, 916-917).

In support of his motion, defendant had the initial burden of establishing as a matter of law that he did not depart from the applicable standard of care (*see Stukas v Streiter*, 83 AD3d 18, 24). Contrary to plaintiff's contention, we conclude that defendant met his burden through the submission of his own affidavit and deposition testimony, and decedent's medical records (*see Starr v Rogers*, 44 AD3d 646, 648).

In opposition to the motion, plaintiff was required to "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). " 'Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury' " (*Hayden v Gordon*, 91 AD3d 819, 821). It is well settled that a medical malpractice cause of action may be based upon the theory that the physician performed an unnecessary surgical procedure on the patient and thereby caused an injury (*see Vega v Mount Sinai-NYU Med. Ctr. & Health Sys.*, 13 AD3d 62, 63), and we conclude that the affidavit of plaintiff's expert raised a triable issue of fact with respect to that theory (*see generally Alvarez*, 68 NY2d at 324-325). Furthermore, inasmuch as the affidavit of plaintiff's expert was as " 'detailed, specific and factual in nature' " as defendant's own affidavit with respect to the additional theory that defendant was negligent in the performance of the EUS procedure (*Webb v Scanlon*, 133 AD3d 1385, 1386), and plaintiff "was not required to prove the precise nature of defendant's negligence" (*Coluzzi v Korn*, 209 AD2d 951, 951, *lv denied* 85 NY2d 801), we

conclude that plaintiff raised a triable issue of fact on that theory as well (*see generally Alvarez*, 68 NY2d at 324-325).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

766

CA 16-02237

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

ROBERT WEICHERT AND SUSAN M. WEICHERT,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

KENNETH PLUMADORE, LEANNE PLUMADORE, JAMES E. HILTON AND ETHEL STEVENS-HILTON,
DEFENDANTS-RESPONDENTS.

ROBERT M. WEICHERT, PLAINTIFF-APPELLANT PRO SE.

SUSAN M. WEICHERT, PLAINTIFF-APPELLANT PRO SE.

BARCLAY DAMON, LLP, SYRACUSE (JOHN M. NICHOLS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS KENNETH PLUMADORE AND LEANNE PLUMADORE.

MARK D. GORIS, CAZENOVIA, FOR DEFENDANTS-RESPONDENTS JAMES E. HILTON AND ETHEL STEVENS-HILTON.

Appeal from an order and judgment (one paper) of the Supreme Court, Oswego County (James W. McCarthy, J.), entered May 9, 2016. The order and judgment, inter alia, dismissed the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by vacating the third and fifth ordering paragraphs and reinstating the complaint against defendants James E. Hilton and Ethel Stevens-Hilton, and as modified the order and judgment is affirmed without costs and the matter is remitted to Supreme Court, Oswego County, for further proceedings in accordance with the following memorandum: Plaintiffs, the titled owners of certain property in the Town of Albion, Oswego County, commenced this action against defendants Kenneth Plumadore and Leanne Plumadore (collectively, Plumadores), and defendants James E. Hilton and Ethel Stevens-Hilton (collectively, Hiltons), who are the respective titled owners of two different parcels of property adjacent to plaintiffs' property. In their complaint, plaintiffs allege that the Plumadores claim title to some property that is owned by plaintiffs, and plaintiffs seek to quiet title to the disputed property pursuant to RPAPL article 15, to recover damages based on the Plumadores' and the Hiltons' alleged trespass on plaintiffs' property, and injunctive relief against the Plumadores and the Hiltons. Plaintiffs moved for an order dismissing the answers of the Plumadores and the Hiltons for failure to comply with discovery demands and, in the alternative, for partial summary judgment. The Plumadores cross-moved for summary

judgment dismissing the complaint against them based on the statute of limitations and on the ground that they hold title to the disputed property. Plaintiffs appeal from an order and judgment that, inter alia, granted the Plumadores' cross motion, dismissed the complaint against the Plumadores as barred by the statute of limitations, determined that the Plumadores are the owners of the disputed property, dismissed the complaint against the Hiltons based on the "determination that [plaintiffs are] not titled owners of the subject property [and therefore] have no standing to . . . maintain an action sounding in trespass against [the] Hilton[s]," and "denied as moot" plaintiffs' motion.

At the outset, we note that plaintiffs do not challenge Supreme Court's denial of their motion, and contend only that the court erred in granting the Plumadores' cross motion and dismissing the complaint against both the Plumadores and the Hiltons. We conclude that the court properly granted the Plumadores' cross motion for summary judgment dismissing the complaint against them on the ground that the action was barred by the statute of limitations (*see WPA Acquisition Corp. v Lynch*, 82 AD3d 1215, 1216; *Vollbrecht v Jacobson*, 40 AD3d 1243, 1246; *James v Lewis*, 135 AD2d 785, 786). CPLR 212 (a) provides that "[a]n action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest, was seized or possessed of the premises within 10 years before the commencement of the action." "A person claiming title to real property, but not in possession thereof, must act, affirmatively and within the time provided by statute" (*Downs v Peluso*, 115 AD2d 454, 454; *see Ford v Clendenin*, 215 NY 10, 17; *WPA Acquisition Corp.*, 82 AD3d at 1216). Here, the Plumadores submitted evidence establishing that plaintiffs did not possess the disputed property during the 10 years immediately preceding the commencement of this action and, in opposition to the cross motion, plaintiffs failed to raise a triable issue of fact (*see WPA Acquisition Corp.*, 82 AD3d at 1216-1217; *see generally Vollbrecht*, 40 AD3d at 1246; *Dolan v Ross*, 172 AD2d 1013, 1013).

We conclude, however, that the court erred in dismissing the complaint against the Hiltons, and we modify the order and judgment accordingly. We note that plaintiffs' causes of action to enjoin and recover damages for the Hiltons' alleged trespass upon their property are factually unrelated to plaintiffs' dispute with the Plumadores concerning the title to the disputed property, and we thus conclude that the dismissal of the complaint against the Plumadores does not necessitate the dismissal of the complaint against the Hiltons. In light of our determination, we also conclude that the court erred in denying as moot that part of plaintiffs' motion seeking dismissal of the Hiltons' answer and we further modify the order and judgment accordingly. We remit the matter to Supreme Court to determine that part of plaintiffs' motion.

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

780

CA 16-01791

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

IN THE MATTER OF DAGMAR NEARPASS, DESIREE DAWLEY, JAMES DAWLEY, III, LYNN BARBUTO, ROBERT BARBUTO, JONATHAN MORELLI, JANE MORELLI, RICHARD BARNER, DAVID SCHOONMAKER AND CASINO FREE TYRE BY ITS PRESIDENT, JAMES DAWLEY, III, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

SENECA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, LAGO RESORT & CASINO, LLC, WILPAC HOLDINGS, LLC, WILMOT GAMING, LLC, WILPAC FUNDING, LLC, THOMAS C. WILMOT, SR., M. BRENT STEVENS, WILMORITE, INC., AND PGP INVESTORS, LLC, RESPONDENTS-RESPONDENTS.

WILLIAMS & CONNOLLY LLP, WASHINGTON, DC (JEFFREY R. HOOPS, OF THE WASHINGTON, DC AND VIRGINIA BARS, ADMITTED PRO HAC VICE, OF COUNSEL), AND MACKENZIE HUGHES LLP, SYRACUSE, FOR PETITIONERS-APPELLANTS.

THE HALPIN FIRM, MONTOUR FALLS (ROBERT L. HALPIN OF COUNSEL), FOR RESPONDENT-RESPONDENT SENECA COUNTY INDUSTRIAL DEVELOPMENT AGENCY.

KIRKLAND & ELLIS LLP, LOS ANGELES, CALIFORNIA (MARK C. HOLSCHER, OF THE CALIFORNIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND HARRIS BEACH PLLC, PITTSFORD, FOR RESPONDENTS-RESPONDENTS LAGO RESORT & CASINO, LLC, WILPAC HOLDINGS, LLC, WILMOT GAMING, LLC, WILPAC FUNDING, LLC, THOMAS C. WILMOT, SR., M. BRENT STEVENS, WILMORITE, INC., AND PGP INVESTORS, LLC.

Appeal from a judgment (denominated order) of the Supreme Court, Seneca County (W. Patrick Falvey, A.J.), dated August 18, 2016 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul the resolution of respondent Seneca County Industrial Development Agency (SCIDA) granting tax abatement relief in the form of a payment in lieu of taxes (PILOT) agreement and lease/leaseback agreements to the remaining respondents (hereafter, project respondents) with respect to the Lago Resort & Casino in the Town of Tyre, Seneca County. Supreme Court dismissed the petition. We affirm.

We begin by observing that only the first, second, and fourth causes of action in the petition are addressed by petitioners on appeal, and we therefore confine our analysis thereto. As a threshold matter, we reject respondents' contention that this appeal is moot because petitioners did not seek a preliminary injunction to halt the construction work on the resort and casino structures and facilities. Petitioners allege, inter alia, economic harm flowing from the PILOT agreement and the Lago Resort & Casino's exemption from real property taxes through the year 2037. The appeal is therefore not moot (*see Matter of AT/Comm, Inc. v Tufo*, 86 NY2d 1, 5-6; *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713-714; *cf. City of Utica v New York Susquehanna & W. Ry. Corp.*, 46 AD3d 1355, 1356).

With respect to the first cause of action, we reject petitioners' contention that the resort and casino development was ineligible for SCIDA financial assistance because it was not a "project" pursuant to General Municipal Law § 854 (4). "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature . . . , and where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208; *see Matter of Synergy, LLC v Kibler*, 124 AD3d 1261, 1262, *lv denied* 25 NY3d 967). "While as a general rule courts will not defer to administrative agencies in matters of 'pure statutory interpretation' " (*Matter of O'Brien v Spitzer*, 7 NY3d 239, 242, quoting *Matter of KSLM-Columbus Apts., Inc. v New York State Div. of Hous. & Community Renewal*, 5 NY3d 303, 312), "deference is appropriate 'where the question is one of specific application of a broad statutory term' " (*id.* at 242, quoting *Matter of American Tel. & Tel. Co. v State Tax Commn.*, 61 NY2d 393, 400, *rearg denied* 62 NY2d 943). Here, we conclude that the broad statutory terms "commercial" and "recreation" within the definition of "project" in section 854 (4) are ambiguous insofar as they are susceptible to conflicting interpretations. As such, SCIDA's interpretation "is entitled to great deference, and must be upheld as long as it is reasonable" (*Matter of Chin v New York City Bd. of Stds. & Appeals*, 97 AD3d 485, 487, *lv denied* 19 NY3d 815; *see Matter of Golf v New York State Dept. of Social Servs.*, 91 NY2d 656, 667). Contrary to petitioners' contention, we conclude that SCIDA's determination was not affected by an error of law inasmuch as its interpretation of section 854 (4) is not "irrational or unreasonable" (*Matter of Koch v Sheehan*, 95 AD3d 82, 89, *affd* 21 NY3d 697; *see Matter of Iskalo 5000 Main LLC v Town of Amherst Indus. Dev. Agency*, 147 AD3d 1414, 1416).

With respect to the second cause of action, we reject petitioners' further contention that SCIDA's award of financial assistance to the Lago Resort & Casino project was arbitrary and capricious or unlawful because such assistance was unnecessary to induce the project respondents to undertake development in Seneca County. We conclude that the record demonstrates that SCIDA had an "adequate and rational basis" for its determination (*Matter of Central NY Coach Lines v Larocca*, 120 AD2d 149, 152). Moreover, there is no requirement in the Industrial Development Agency Act that a particular

project be financially needy in order to qualify for assistance. An express purpose of the Act is "to actively promote, attract, encourage and develop recreation, economically sound commerce and industry" (General Municipal Law § 852), a purpose which SCIDA rationally determined would be furthered by providing assistance to the subject project. We reject the position of petitioners that our decision in *Matter of Barker Cent. Sch. Dist. v Niagara County Indus. Dev. Agency* (62 AD3d 1239) is controlling on the issue of financial necessity as a prerequisite for SCIDA financial assistance. In *Barker*, the Niagara County Industrial Development Agency's (NCIDA) Uniform Tax Exemption Policy (UTEP) specifically required companies seeking a tax exemption to show that the benefits obtained through such financial assistance were necessary to make the project for which tax exemption was sought economically feasible. Because the applicants in *Barker* failed to present the required financial statements, we determined that NCIDA's determination to award financial assistance was not supported by substantial evidence (*id.* at 1241). Here, SCIDA's UTEP did not require a showing that the benefits obtained were necessary to make the project economically feasible, and there is no dispute that SCIDA complied with all relevant procedural requirements (*see* General Municipal Law §§ 859-a [1] - [3]; 862 [1]; 874 [4] [a]).

Respondents argue as an alternative ground for affirmance that petitioners lack standing to assert the first, second, and fourth causes of action. With respect to petitioners' fourth cause of action alleging that SCIDA's determination was arbitrary and capricious because it was based on a flawed appraisal which allegedly undervalued the project for tax assessment calculations, we agree with respondents that petitioners lack common-law taxpayer standing to assert that claim and further conclude that, by failing to raise it in their briefs, petitioners have in any event abandoned any claim to common-law taxpayer standing with respect to the fourth cause of action (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

We conclude that the court properly determined that petitioners have common-law taxpayer standing with respect to the first and second causes of action (*see generally Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 814-815, *cert denied* 540 US 1017). However, we agree with respondents that petitioners lack traditional standing with respect to the environmental injuries alleged in the second cause of action because petitioners allege that the resort and casino would have been constructed even without SCIDA assistance. Thus, there is no causal nexus between the alleged environmental injuries and the granting of financial assistance by SCIDA (*see generally Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579, 587). We further conclude that petitioners lack traditional standing with respect to the first, second, and fourth causes of action challenging SCIDA's determination inasmuch as the economic injuries alleged are not distinct from other members of the general public (*see Matter of Quigley v Town of Ulster*, 66 AD3d 1295, 1296).

Even assuming, arguendo, that petitioners have traditional standing with respect to the fourth cause of action challenging the appraisal of the project respondents, we note that there is no

requirement in the Industrial Development Agency Act that the agency or applicant obtain an appraisal as part of the application process, and that "it is not the role of the court to resolve disagreements among experts, so long as the agency's conclusions are not affected by error of law, arbitrary and capricious, or an abuse of discretion" (*Matter of Chu v New York State Urban Dev. Corp.*, 47 AD3d 542, 543). Here, we perceive no reason to disturb SCIDA's conclusions.

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

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

808

CA 17-00122

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

JANIE GRIGSBY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOSEPH FRANCABANDIERO AND ROBERT MCDONALD,
DEFENDANTS-RESPONDENTS.

LAW OFFICE OF CHRISTOPHER W. MCMASTER, BUFFALO (F. BRENDAN BURKE, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GETMAN & BIRYLA, LLP, BUFFALO (JOSEPH S. MONTAGNOLA OF COUNSEL), FOR DEFENDANT-RESPONDENT JOSEPH FRANCABANDIERO.

AMIGONE, SANCHEZ & MATTREY, LLP, BUFFALO (RICHARD A. CLACK OF COUNSEL), FOR DEFENDANT-RESPONDENT ROBERT MCDONALD.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered October 20, 2016. The order, among other things, granted the motion of defendant Joseph Francabandiero to dismiss the amended complaint against him and that part of the cross motion of defendant Robert McDonald seeking to dismiss the amended complaint against him.

It is hereby ORDERED that the order so appealed from is modified on the law by denying the cross motion in its entirety and reinstating the amended complaint against defendant Robert McDonald, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to enforce a judgment obtained against Hyperion Recovery, LLC (Hyperion) in an action under the Fair Debt Collection Practices Act in the United States District Court for the Northern District of Illinois, which judgment was thereafter domesticated in New York. In her complaint in the instant action plaintiff alleged that, at all relevant times, defendants were the owners and members of Hyperion and that, in an effort to keep Hyperion judgment-proof, they had undercapitalized Hyperion and failed to adhere to corporate/LLC formalities. Plaintiff further alleged that, near the time that the domesticated judgment was entered, defendants wound down the business of Hyperion in favor of a newly-created business that acquired the physical assets of Hyperion and assumed its operations without providing for payment of Hyperion's outstanding liabilities, including the judgment debt owed to plaintiff.

Defendant Joseph Francabandiero moved to dismiss the complaint against him pursuant to CPLR 3211 (a) (1) and (7). In support of the motion, he submitted documents establishing that he had relinquished his interests as an owner, officer and member of Hyperion prior to May 2013, when the conduct complained of in the Federal District Court action occurred. In response, plaintiff amended her complaint to allege that "[a]t all times relevant . . . Francabandiero was an equitable owner of Hyperion."

Francabandiero thereafter asked Supreme Court to treat his motion as if it were addressed to the amended complaint. The court implicitly granted that request and granted his motion to dismiss the amended complaint against him. We agree with the court that plaintiff's bare allegation of equitable ownership was insufficient to salvage the amended complaint against Francabandiero. Plaintiff alleged no facts therein that, if proved, would establish that, after he divested himself of all interests in Hyperion, Francabandiero " 'dominated and controlled [the LLC] to such an extent that [he] may be considered its equitable owner' " (*Roohan v First Guar. Mtge., LLC*, 97 AD3d 891, 891). As the court concluded, "[t]he amended complaint contains mere bare-bones allegations and is completely devoid of any sufficiently particularized support, as required, for the assertion that" Francabandiero may be considered an equitable owner of Hyperion (*Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 211).

We reach a different conclusion, however, with respect to the cross motion of defendant Robert McDonald, who at all relevant times was the sole owner, officer and member of Hyperion. McDonald cross-moved to dismiss the amended complaint against him and for sanctions, and the court granted that part of the cross motion seeking dismissal of the amended complaint. Plaintiff sufficiently alleges in the amended complaint that McDonald, "through [his] domination of [Hyperion], abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against [her]" (*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174). Plaintiff specifically alleged that McDonald took actions calculated to make Hyperion judgment-proof by undercapitalizing the LLC (*see Rotella v Demer*, 283 AD2d 1026, 1027, *lv denied* 96 NY2d 720), and dissolving and thereafter diverting the assets of Hyperion to a new entity (*see Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407-408), without reserving funds to satisfy the judgment debt (*see Olivieri Constr. Corp. v WN Weaver St., LLC*, 144 AD3d 765, 766-767). We therefore conclude that, at this stage of the litigation, plaintiff sufficiently alleged that McDonald "engaged in acts amounting to an abuse or perversion of the LLC form to perpetrate a wrong or injustice against [her]" to survive his motion to dismiss the amended complaint (*Grammas v Lockwood Assoc., LLC*, 95 AD3d 1073, 1075). We therefore modify the order accordingly.

All concur except CURRAN, J., who concurs in the result in the following memorandum: I concur with the result reached by the majority and with the analysis of my colleagues, but I write separately to underscore what, in my view, is an underdeveloped issue in this area of the law. In order to pierce the corporate veil, a

plaintiff must show that: "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141). "Additionally, 'the corporate veil will be pierced to achieve equity . . . [w]hen a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego' " (*Williams v Lovell Safety Mgt. Co., LLC*, 71 AD3d 671, 672, *lv denied* 14 NY3d 713).

I agree with the majority that the allegations in the amended complaint against defendant Robert McDonald are sufficient to meet these standards. I further agree with the majority's different result with respect to defendant Joseph Francabandiero, i.e., that plaintiff failed to allege facts sufficient to establish that Francabandiero " 'dominated and controlled [the LLC] to such an extent that [he] may be considered an equitable owner' " (*Roohan v First Guar. Mtge., LLC*, 97 AD3d 891, 891).

Significantly, the only difference in the allegations in the amended complaint against the respective defendants is that Francabandiero is alleged to be "an equitable owner," while McDonald is alleged to be "a legal owner and member" of Hyperion Recovery, LLC (Hyperion). The remaining allegations with respect to seeking to pierce Hyperion's veil pursuant to an alter ego theory are identical against both defendants. Thus, this Court is drawing a distinction between "an equitable owner" and "a legal owner and member" for the purposes of piercing the corporate veil pursuant to an alter ego theory. I agree with the majority that, even at the pleading stage, a distinction exists between a non-owner who is alleged to be an "equitable owner" and an owner for purposes of piercing the corporate veil. Specific facts must be alleged demonstrating that the defendant non-owner has so dominated and controlled the business such that the non-owner may be considered an "equitable owner" of the business. In other words, as the majority's determination demonstrates, it is not enough to allege the elements of a claim to pierce the corporate veil premised on an alter ego theory and merely state that the defendant is an "equitable" owner.

All of this, of course, presumes that the concept of an "equitable owner" fits within the alter ego theory, which is an issue that none of the parties in this case raised on appeal. While the principle that a nonshareholder may be liable as an equitable owner has been used by other courts in cases involving piercing the corporate veil (*see Roohan*, 97 AD3d at 891; *M&A Oasis v MTM Assoc.*, 307 AD2d 872, 874; *Trans Intl. Corp. v Clear View Tech.*, 278 AD2d 1, 1-2*; Guilder v Corinth Constr. Corp.*, 235 AD2d 619, 619-620*; Lally v Catskill Airways*, 198 AD2d 643, 644-645; *see also Matter of Morris v New York State Dept. of Taxation & Fin.*, 183 AD2d 5, 8, *revd on other grounds* 82 NY2d 135 [recognizing that a nonshareholder's liability under an " 'alter ego' theory . . . has not been definitively addressed by the courts of this State"]), the Court of Appeals has not

expressly decided the issue (*see Morris*, 82 NY2d at 142 [determining that it is "not necessary to decide the question" of whether "a nonshareholder could be personally liable under a theory of piercing the corporate veil"]). The adoption of that concept by the Court of Appeals would involve wide-ranging policy considerations inasmuch as it would expand the pool of potential defendants subject to an alter ego theory to include non-owners (such as affiliated business entities, managers and employees), and could potentially reduce the protections afforded when forming a business entity. That concern may be even more significant to a limited liability company that, if the members so provide in their articles of organization, may be under the control of a manager or managers, rather than under the control of the members (*see* Limited Liability Company Law § 408 [a]).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

812

CA 17-00037

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

THOMAS H. WILLIAMS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PHILIPS MEDICAL SYSTEMS (CLEVELAND), INC., A DIVISION OF PHILIPS ELECTRONICS NORTH AMERICA CORPORATION, PHILIPS MEDICAL SYSTEMS MR, INC., PHILIPS ELECTRONICS NORTH AMERICAN CORPORATION, PHILIPS ELECTRONICS NORTH AMERICA FOUNDATION AND C.F. MEDICAL, INC., DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

JEFFREY R. PARRY, FAYETTEVILLE, FOR PLAINTIFF-APPELLANT.

GOODWIN PROCTER LLP, NEW YORK CITY (WILLIAM J. HARRINGTON OF COUNSEL), AND BARCLAY DAMON, LLP, SYRACUSE, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered March 21, 2016. The order, inter alia, dismissed the complaint upon the motion of defendants.

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

Memorandum: Plaintiff commenced this qui tam action, on behalf of himself and the State of New York, pursuant to the New York False Claims Act ([FCA] State Finance Law § 187 *et seq.*), asserting various causes of action against defendants Philips Medical Systems (Cleveland), Inc., a Division of Philips Electronics North America Corporation, Philips Medical Systems MR, Inc., Philips Electronics North American Corporation, Philips Electronics North America Foundation (collectively, Philips defendants), and CF Medical, Inc. (CF Medical). Plaintiff is a former sales representative for CF Medical, which sold medical equipment manufactured by the Philips defendants. Plaintiff alleged that defendants committed various improprieties in connection with, inter alia, the purported sales of medical equipment to two hospitals. Plaintiff asserted causes of action under the FCA (*see* State Finance Law §§ 189 [1] [a], [b], [g]; 191) and the Martin Act (General Business Law §§ 339-b, 352, 352-c, 353), and for repeated fraud and illegality in conducting business (Executive Law § 63 [12]), fraud, and unjust enrichment. The Attorney General declined to intervene in the action, but reserved his right to do so for good cause (*see* State Finance Law § 190 [2] [b], [f]).

In appeal No. 1, plaintiff appeals from an order dismissing the complaint in its entirety upon defendants' motion pursuant to CPLR 3211 (a), which was converted by Supreme Court pursuant to CPLR 3211 (c) to a motion for summary judgment. In appeal No. 2, plaintiff appeals from an order that appointed a referee to determine reasonable attorneys' fees.

With respect to appeal No. 1, we reject plaintiff's contention that the court erred in determining that he was collaterally estopped from alleging that he was improperly classified as an independent contractor, rather than as an employee. In support of their motion, defendants submitted a copy of the decision in an age discrimination action that plaintiff brought against CF Medical in federal court, in which the federal court determined that plaintiff was an independent contractor, and not an employee. Inasmuch as the issue whether plaintiff was improperly classified as an independent contractor is " 'identical to an issue which was raised [in the federal action], necessarily decided and material in the [federal] action, and the plaintiff had a full and fair opportunity to litigate the issue in the [federal] action' " (*City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 128), we conclude that the court properly granted that part of the motion seeking dismissal of the 6th, 7th, 8th and 12th causes of action, which were based upon allegations that sales representatives were employees of CF Medical, and not independent contractors.

Plaintiff's contention that his allegations of inappropriate sales revenue recognition relate to his 6th, 7th, 8th and 12th causes of action is raised for the first time on appeal and, thus, is unpreserved for our review (*see Ingutti v Rochester Gen. Hosp.*, 145 AD3d 1423, 1425; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985). We agree with defendants that the allegations of inappropriate sales revenue recognition can only pertain to the other causes of action in the complaint. Indeed, the facts alleged in the complaint relating to inappropriate sales revenue recognition are inadequate to support the 6th, 7th, 8th and 12th causes of action, all of which are based upon allegations that defendants filed false claims with the State. A " '[c]laim,' " under the relevant statute, is "any request or demand . . . for money or property" that is presented to an officer, employee, or agent of the State or a local government (State Finance Law § 188 [1] [a]). The complaint fails to allege any filing of a "claim," monetary or otherwise, with the State with respect to the inappropriate sales revenue recognition. The complaint also fails to allege that any other claim was filed with the State wherein a false representation was made regarding falsely *inflated* revenue.

We do not disturb that part of the order dismissing the 9th and 10th causes of action, alleging unjust enrichment and fraud, inasmuch as plaintiff correctly concedes that they are barred by the statute of limitations. We also do not disturb that part of the order dismissing the 1st, 2nd, 3rd and 11th causes of action, alleging violations of the Martin Act (*see* General Business Law §§ 339-b, 352, 352-c, 353), and the fifth cause of action, under Executive Law § 63 (12). Plaintiff correctly concedes that he lacks standing to pursue them personally, and we conclude that he also lacks standing to pursue them

as a relator. It is well established that " '[t]he Attorney General bears sole responsibility for implementing and enforcing the Martin Act' " (*Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership,* 12 NY3d 236, 244), and neither the General Business Law nor the Executive Law provide for a relator to represent the interests of the state in a qui tam action (*cf.* State Finance Law § 190 [2]).

We therefore affirm the order in appeal No. 1, and we likewise affirm the order in appeal No. 2.

All concur except SMITH and SCUDDER, JJ., who dissent in part and vote to modify in accordance with the following memorandum: We respectfully disagree with the majority's conclusion in appeal No. 1 that Supreme Court properly dismissed the sixth, seventh and eighth causes of action related to plaintiff's claim that defendants violated State Finance Law § 189 (1) (a), (b), and (g) insofar as those causes of action allege that defendants made a false record or fraudulent claim related to inappropriate sales revenue recognition, and the 12th cause of action, alleging retaliation in violation of State Finance Law § 191. We therefore dissent in part in appeal No. 1.

As the majority explains, defendants made a pre-answer motion to dismiss the complaint pursuant to CPLR 3211, which the court converted to a summary judgment motion pursuant to CPLR 3211 (c). We respectfully disagree with the majority's conclusion that plaintiff's claims related to inappropriate sales revenue are raised for the first time on appeal and thus are not preserved for our review. We also disagree with the majority that the complaint fails to allege those claims in the sixth, seventh and eighth causes of action. Those causes of action allege violations of State Finance Law § 189 (1) (a), (b), and (g), respectively, and specifically incorporate paragraphs, inter alia, 1 through 36, which address plaintiff's allegations regarding inappropriate sales revenue recognition.

Instead, we conclude that defendants failed to meet their initial burden of establishing their entitlement to judgment as a matter of law with respect to those claims (*see Zuckerman v City of New York*, 49 NY2d 557, 562; *Blackburn v James J. Shapiro PA, Inc.*, 288 AD2d 870, 871). Indeed, the attorney's affirmation submitted in support of the motion does not address those claims and none of the supporting documentation is in admissible form (*see* CPLR 3212 [b]; *Zuckerman*, 49 NY2d at 562). Although defendants also failed to meet their burden with respect to the 1st, 2nd, 3rd, 5th, 9th, 10th and 11th causes of action, we agree with the majority that those parts of the order dismissing those causes of action should not be disturbed. We would therefore modify the order in appeal No. 1 by reinstating the claims of inappropriate revenue recognition in the 6th, 7th and 8th causes of action and the 12th cause of action alleging retaliation. We dissent in appeal No. 2, because we would therefore also reverse the order in appeal No. 2 appointing a referee to determine reasonable attorneys' fees.

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

813

CA 17-00038

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

THOMAS H. WILLIAMS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PHILIPS MEDICAL SYSTEMS (CLEVELAND), INC., A DIVISION OF PHILIPS ELECTRONICS NORTH AMERICA CORPORATION, PHILIPS MEDICAL SYSTEMS MR, INC., PHILIPS ELECTRONICS NORTH AMERICAN CORPORATION, PHILIPS ELECTRONICS NORTH AMERICA FOUNDATION AND C.F. MEDICAL, INC., DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

JEFFREY R. PARRY, FAYETTEVILLE, FOR PLAINTIFF-APPELLANT.

GOODWIN PROCTER LLP, NEW YORK CITY (WILLIAM J. HARRINGTON OF COUNSEL), AND BARCLAY DAMON, LLP, SYRACUSE, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered May 3, 2016. The order appointed a referee to hear and report on the reasonableness of attorneys' fees.

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

Same memorandum as in *Williams v Philips Med. Sys. (Cleveland), Inc.* ([appeal No. 1] ___ AD3d ___ [July 7, 2017]).

All concur except SMITH and SCUDDER, JJ., who dissent and vote to reverse in accordance with the same dissenting memorandum as in *Williams v Philips Med. Sys. (Cleveland), Inc.* ([appeal No. 1] ___ AD3d ___ [July 7, 2017]).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

814

KA 13-00159

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY D. SAMUEL, DEFENDANT-APPELLANT.

DIANNE C. RUSSELL, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER, FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered July 2, 2012. The appeal was held by this Court by order entered March 25, 2016, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (137 AD3d 1691). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of criminal possession of a weapon in the second degree under counts 9 and 10 of the indictment and dismissing count 10 of the indictment with respect to defendant, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, kidnapping in the second degree (Penal Law § 135.20), and two counts each of robbery in the first degree (§ 160.15 [2], [4]) and criminal possession of a weapon in the second degree (§ 265.03 [1] [b]), arising from an incident occurring in a house in the City of Rochester. We previously held the case, reserved decision, and remitted the matter to Supreme Court (Moran, J.) for a hearing on defendant's midtrial *Payton* motion, in which he contended that police officers improperly searched his house and used their observations as the basis for a subsequent search warrant application, thus requiring suppression of the evidence seized pursuant to the warrant (*People v Samuel*, 137 AD3d 1691). Following that hearing, the court denied the motion to suppress the fruits of the search warrant on the ground that the initial warrantless search of the house was lawful pursuant to the emergency doctrine.

Contrary to defendant's contention, the People established that the warrantless search of the house was lawful. It is well settled that "the 'emergency doctrine' . . . recognizes that the Constitution 'is not a barrier to a police officer seeking to help someone in immediate danger' . . . , thereby excusing or justifying otherwise

impermissible police conduct that is an objectively reasonable response to an apparently exigent situation . . . [The Court of Appeals has] explained that the exception is comprised of three elements: (1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property and this belief must be grounded in empirical facts; (2) the search must not be primarily motivated by an intent to arrest and seize evidence; and (3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched" (*People v Doll*, 21 NY3d 665, 670-671, *rearg denied* 22 NY3d 1053, *cert denied* ___ US ___, 134 S Ct 1552). "Indeed, '[p]eople could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process' . . . Accordingly, 'what would be otherwise illegal absent an . . . emergency' becomes justified by the 'need to protect or preserve life or avoid serious injury' " (*People v Molnar*, 98 NY2d 328, 332; *see People v Harris*, 132 AD3d 1281, 1282, *lv denied* 26 NY3d 1109).

Here, the evidence at the suppression hearing on remittal established that all three prongs of the emergency doctrine standard were satisfied. The People submitted a large amount of evidence with respect to the first prong of the standard, including the information in the initial 911 call indicating that armed men were beating someone in a house, along with the evidence that the officers observed the bleeding and bound victim escaping from that house, one of the perpetrators attempting to escape, and the other perpetrators eventually emerging from it. Furthermore, the police had no reliable information regarding whether there were more victims or perpetrators inside the house. In addition, upon entry, the officers found quantities of blood in the basement of the house, which established that at least one person had been injured there. Thus, the first prong of the standard was met inasmuch as the evidence established that the police had reasonable grounds to believe that there was an emergency that required their immediate assistance for the protection of life or property (*see generally People v Rodriguez*, 77 AD3d 280, 282-283, *lv denied* 15 NY3d 955). Defendant's contention that the police were not sure whether there were additional victims or perpetrators in the house is not germane "because the emergency doctrine is premised on reasonableness, not certitude" (*Doll*, 21 NY3d at 671), and the officers' belief that there could be additional injured victims or perpetrators inside the house was reasonable under these circumstances. Contrary to defendant's further contention, "the danger [that created the emergency] did not abate during the period that the officers waited to gain entry into his" house (*People v Salazar*, 290 AD2d 256, 256, *lv denied* 97 NY2d 760; *see generally Molnar*, 98 NY2d at 334-335).

With respect to the second prong of the emergency doctrine standard, we reject defendant's contention that the initial search was motivated by an intent to seize evidence (*see People v Mitchell*, 39 NY2d 173, 177-179; *People v Stevens*, 57 AD3d 1515, 1516, *lv denied* 12 NY3d 822; *People v McKnight*, 261 AD2d 926, 926, *lv denied* 94 NY2d 826). Furthermore, with respect to the third prong, we agree with the

court that there was "some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched" (*Doll*, 21 NY3d at 671; *see generally People v Rivera*, 172 AD2d 1059, 1059).

Contrary to defendant's further contention, County Court (Piampiano, J.) properly denied without a hearing his pretrial motion to suppress the evidence seized pursuant to the warrant based on the insufficiency of the information in the warrant application. A challenge to the facial sufficiency of a written warrant application presents an issue of law that does not require a hearing, and here the court properly determined the merits of defendant's challenge "by reviewing the affidavits alone in order to determine whether they establish probable cause" (*People v Dunn*, 155 AD2d 75, 80, *affd* 77 NY2d 19, *cert denied* 501 US 1219). To the extent that defendant contends that the prosecutor's failure to turn over the search warrant application during the pretrial proceedings constituted a *Brady* violation, "that contention is not preserved for our review inasmuch as defendant failed to object on that ground" (*People v Caswell*, 56 AD3d 1300, 1303, *lv denied* 11 NY3d 923, *reconsideration denied* 12 NY3d 781, *cert denied* 556 US 1286). 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]). We have considered defendant's remaining contentions concerning the search and the warrant, and conclude that they are without merit.

Defendant further contends that the judgment must be modified by reversing those parts convicting him under counts 9 and 10 of the indictment because he was not indicted in count 9, which charged two codefendants with criminal possession of a weapon in the second degree, and the jury did not render a verdict on count 10. As the People correctly concede, defendant is correct. It is well settled that "[t]he New York State Constitution guarantees that '[n]o person shall be held to answer for a[n] infamous crime . . . unless on indictment of a grand jury' " (*People v Gonzalez*, 151 AD2d 601, 602, *lv denied* 74 NY2d 948, quoting NY Const, art I, § 6), and defendant was not charged in count 9 of the indictment. Although defendant was charged with criminal possession of a weapon in the second degree in count 10 of the indictment, the jury did not render a verdict on that count. It is well settled that a jury's failure to render a verdict upon every count upon which it was instructed to do so "constitutes an acquittal on every count on which no verdict was rendered" (*People v Lamb*, 149 AD2d 943, 943; *see* CPL 310.50 [3]; *People v Kinitsky*, 166 AD2d 456, 458, *lv denied* 77 NY2d 840). We therefore modify the judgment by reversing those parts convicting defendant under counts 9 and 10, and by dismissing count 10 of the indictment with respect to defendant.

Finally, defendant contends that the sentence is unduly harsh and severe. Contrary to the People's contention, it is well settled that our "sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783; *see People v Lopez*, 6 NY3d 248, 260 n 5). Consequently, we may "substitute our own discretion for that of a

trial court which has not abused its discretion in the imposition of a sentence" (*People v Smart*, 100 AD3d 1473, 1475, *affd* 23 NY3d 213 [internal quotation marks omitted]; *see People v Johnson*, 136 AD3d 1417, 1418, *lv denied* 27 NY3d 1134). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

832

CA 16-01929

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

JAMIE LOBELLO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, DEFENDANT-RESPONDENT.

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

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered December 21, 2015. The order, inter alia, granted in part the cross motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of plaintiff's motion seeking to dismiss defendant's affirmative defense of expiration of the two-year limitations period set forth in the policy, denying defendant's cross motion in its entirety and reinstating the complaint with respect to the loss of September 24, 2009 and granting that part of plaintiff's motion to compel defendant to produce unredacted claim notes for the September 24, 2009 claim through the date of the denial letters, September 30, 2011, and as modified the order is affirmed without costs.

Memorandum: Plaintiff's residence, which was insured by a homeowner's insurance policy issued by defendant, was burglarized on September 24, 2009 (2009 loss) and again on June 6, 2010 (2010 loss). After each theft, plaintiff filed a claim with defendant seeking coverage for the loss, and defendant disclaimed coverage for both losses on September 30, 2011. Plaintiff thereafter commenced this action, alleging that defendant had breached the terms of the insurance policy and seeking a declaration that the insurance policy issued by defendant provided coverage for the subject losses. Defendant moved to dismiss the complaint and appealed from an order insofar at it denied that part of the motion seeking dismissal of the first cause of action, for a declaratory judgment. We affirmed (*Lobello v New York Cent. Mut. Fire Ins. Co.*, 112 AD3d 1287).

Following discovery, during which defendant repeatedly failed to

provide documents in a timely manner or at all, plaintiff moved for various forms of relief, including an order striking defendant's answer based on discovery violations. Defendant cross-moved for summary judgment dismissing the complaint, contending, inter alia, that plaintiff was barred by the policy's two-year limitations period from recovery for any claims related to the 2009 loss. Supreme Court granted plaintiff's motion in part, ordering defendant to pay plaintiff $1,500 as costs and sanctions for discovery violations and to provide plaintiff with claim notes for only the 2010 loss, with the redactions modified. The court denied those parts of plaintiff's motion that sought a declaration that the denials of coverage were invalid, an order directing defendant to provide plaintiff with unredacted claim notes for the 2009 loss and an order granting plaintiff leave to serve an amended complaint. In addition, the court granted that part of defendant's cross motion "with regard to the [2009] loss" only. We conclude that the court should have denied defendant's cross motion in its entirety, and we therefore modify the order accordingly.

Contrary to plaintiff's contention, the court did not abuse its discretion in imposing only a monetary sanction on defendant for its failure to disclose all of its claim notes. That penalty was " 'commensurate with the particular disobedience it [was] designed to punish' " (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877, 880; *see Getty v Zimmerman*, 37 AD3d 1095, 1097; *see also Burchard v City of Elmira*, 52 AD3d 881, 881-882). Contrary to plaintiff's further contention, he was not entitled to summary judgment on the ground that defendant allegedly violated Insurance Law § 2601 inasmuch as an alleged violation of Insurance Law § 2601 "does not give rise to a private cause of action" (*Litvinov v Hodson*, 34 AD3d 1332, 1333; *see generally Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 614-615).

We agree with defendant that the court properly denied that part of plaintiff's motion in which he sought leave to amend his complaint to assert a cause of action alleging defendant's violation of General Business Law § 349. "A plaintiff under section 349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act" (*Stutman v Chemical Bank*, 95 NY2d 24, 29). We conclude that this action is "essentially a 'private' contract dispute over policy coverage and the processing of a claim which is unique to these parties, not conduct which affects the consuming public at large" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 321; *see generally Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25). The fact that defendant may have disclaimed coverage after the two-year policy period "in a few [other] cases . . . within the last [10] years is insufficient" to establish a cause of action under General Business Law § 349 (*JD&K Assoc., LLC v Selective Ins. Group Inc.*, 143 AD3d 1232, 1234; *cf. Ural v Encompass Ins. Co. of Am.*, 97 AD3d 562, 564-565; *Shebar v Metropolitan Life Ins. Co.*, 25 AD3d 858, 859).

We agree with plaintiff, however, that the court erred in granting that part of defendant's cross motion that sought summary judgment dismissing the complaint with respect to the 2009 loss as time-barred. The policy issued to plaintiff provides that no action can be brought against defendant unless, inter alia, the action "is started within two years after the date of loss." The policy contains no definition for the term "loss," but it defines an occurrence as "an accident . . . which results, during the policy period, in . . . 'Bodily injury'; or . . . 'Property damage.' "

Plaintiff commenced this action more than two years after the 2009 theft. Interpreting the phrase "date of loss" as the date on which the theft occurred, defendant contends that the action is time-barred under the terms of the policy. Plaintiff, on the other hand, interprets the phrase "date of loss" as the date on which the claim was denied and, as a result, contends that the action was timely commenced. We agree with plaintiff. Despite cases holding that "date of loss" means the date of the underlying catastrophe, including cases from this Department (*see Baluk v New York Cent. Mut. Fire Ins. Co.*, 114 AD3d 1151, *amended on rearg* 126 AD3d 1426; *Klawiter v CGU/OneBeacon Ins. Group*, 27 AD3d 1155), the Court of Appeals has found a distinction between the generic phrase "date of loss," and the term of art "inception of loss" (*see Medical Facilities v Pryke*, 95 AD2d 692, 693, *affd* 62 NY2d 716; *Proc v Home Ins. Co.*, 17 NY2d 239, 243-244, *rearg denied* 18 NY2d 751; *Steen v Niagara Fire Ins. Co.*, 89 NY 315, 322-325). As the Second Circuit noted in *Fabozzi v Lexington Ins. Co.* (601 F3d 88, 91), those cases have not been overruled or disavowed in any way.

Indeed, as the First Department recognized in *Medical Facilities*, "nothing in [*Proc*] suggests an intention to alter [the] general rule" (95 AD2d at 693), which is "that an action for breach of contract commences running at the time the breach takes place" (*id.*). Thus, only the very specific "inception of loss" or other similarly "distinct language" permits using the catastrophe date as the limitations date (*Steen*, 89 NY at 324; *see Medical Facilities*, 95 AD2d at 693). Here, the policy did not contain the specific "inception of loss" or other similarly distinct language, and we thus disavow our decisions in *Baluk* and *Klawiter* to the extent that they hold otherwise.

Inasmuch as " '[a]mbiguities in an insurance policy are to be construed against the insurer' " (*Dean v Tower Ins. Co. of N.Y.*, 19 NY3d 704, 708; *see Steen*, 89 NY at 324), we conclude that the two-year limitations period contained in the policy did not begin to run until "the loss [became] due and payable" (*Steen*, 89 NY at 324; *see Cooper v United States Mut. Benefit Assn.*, 132 NY 334, 337). As a result, we conclude that the court erred in granting that part of defendant's cross motion that sought summary judgment dismissing the complaint with respect to the 2009 loss, and we further modify the order by granting that part of plaintiff's motion to compel defendant to disclose the unredacted claim notes related to the 2009 loss, through

the date of the denial letters.

Frances E. Cafarell

Entered: July 7, 2017

Clerk of the Court

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

841

KA 14-02097

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VIRGIL R. BROWN, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered April 14, 2014. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence, and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon a jury verdict of predatory sexual assault against a child (Penal Law § 130.96), defendant contends that he did not validly waive the right to be present at trial. We reject that contention. It is well settled that "the right to be present is clearly waivable under both the Federal and State Constitutions" (*People v Epps*, 37 NY2d 343, 349, *cert denied* 423 US 999; *see generally People v Rossborough*, 27 NY3d 485, 488-489), and that, "for the waiver to be effective, the record must reveal that the defendant was aware that he had the right to be present and that the trial would proceed in his absence" (*People v McGee*, 161 AD2d 1195, 1195, *lv dismissed* 76 NY2d 861; *see People v Parker*, 57 NY2d 136, 141; *People v Tucker*, 261 AD2d 877, 877-878, *lv denied* 94 NY2d 830). Here, the record establishes that defendant signed written *Parker* warnings, and he was informed at the time that he signed them that they encompassed the situation that later occurred during trial, when he declined to leave his jail cell and come to court. In addition, after defendant initially refused to come to court from the jail on the first day of trial, County Court directed that he be brought to the courtroom by force if necessary and, after defendant arrived in the courtroom, the court explained to him at length his right to be present at trial. Contrary to defendant's contention, the court advised defendant that he had a right to be present for trial and that it was in his interests to do so, but defendant eventually stated that "I'm not going to attend this trial.

To me it's illegal."

We reject defendant's contention that the court should have directed that he be brought to court daily to ascertain whether he had changed his mind. The court properly determined that defendant "had waived his right to be present at various stages of his trial by refusing to be produced in the courtroom . . . Defendant was not entitled to set conditions under which he would agree to come out of the holding cell" (*People v Romance*, 35 AD3d 201, 202, *lv denied* 8 NY3d 926). Defendant's further contention that CPL 340.50 (2) mandates that he sign a waiver of the right to be present at trial is without merit. That statute is part of Title K of the Criminal Procedure Law, which applies to prosecutions in local court. Defendant, however, was prosecuted in a superior court. Title J, which governs prosecutions of indictments in superior courts, has no such requirement (*see* CPL 260.20), and it is well settled that an oral waiver of the right to be present is sufficient (*see e.g. People v Chandler*, 224 AD2d 992, 993, *lv denied* 88 NY2d 845). We have considered defendant's remaining contentions concerning his waiver of the right to be present at trial and we conclude that they are without merit.

We reject defendant's contentions that the conviction is not supported by legally sufficient evidence and that the verdict is contrary to the weight of the evidence. The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction (*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 generally Bleakley*, 69 NY2d at 495).

Defendant further contends that the court erred in denying his *Payton* motion, in which he sought to suppress statements that he made when he was taken into custody and the results of DNA tests that were performed upon evidence seized from him while he was in custody. With respect to defendant's challenge to the statements that he made when taken into custody, the only statement from defendant that was introduced at trial was defendant's date of birth. The People, however, also introduced the testimony of defendant's older sister regarding his date of birth, along with defendant's birth certificate. Thus, any error in admitting defendant's statement is harmless because it "[was] largely duplicative of the properly admitted" evidence (*People v Borukhova*, 89 AD3d 194, 216, *lv denied* 18 NY3d 881, *reconsideration denied* 18 NY3d 955; *see People v Smith*, 42 AD3d 553, 553, *lv denied* 9 NY3d 1039; *People v Higgins*, 299 AD2d 841, 842, *lv denied* 99 NY2d 615), the remaining, properly admitted evidence of guilt is overwhelming, and there is no reasonable possibility that the jury would have acquitted him if the statement was suppressed (*see generally People v Crimmins*, 36 NY2d 230, 237).

With respect to the DNA evidence, defendant's DNA was developed

from a sample taken upon court order issued approximately eight months after defendant was arrested. On appeal, defendant has failed to establish, or indeed present any argument, that such sample was an unattenuated byproduct of the allegedly unlawful arrest. Thus, because the DNA evidence was seized pursuant to an intervening court order based on an unchallenged finding of probable cause, "the connection between [any allegedly] lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint' " (*Wong Sun v United States*, 371 US 471, 487; *see generally Johnson v Louisiana*, 406 US 356, 365; *People v Allah*, 140 AD2d 613, 613, *lv denied* 72 NY2d 915, *cert denied* 490 US 1026).

Inasmuch as no other evidence that was the subject of the suppression hearing was introduced at trial, we reject defendant's contention that he was deprived of effective assistance of counsel based on his attorney's performance at that hearing. In our view, "counsel made every effort to suppress the . . . evidence and, inasmuch as it eventuated that such evidence was not introduced at trial, [there is] no basis for faulting counsel's performance" (*People v Jackson*, 140 AD3d 1771, 1772, *lv denied* 28 NY3d 931; *see generally People v Lott*, 55 AD3d 1274, 1275, *lv denied* 11 NY3d 898, *reconsideration denied* 12 NY3d 760). Thus, "[u]nder any view of the record in this case, [defense] counsel's [performance at the hearing] did not prejudice the defense or defendant's right to a fair trial" (*People v Hobot*, 84 NY2d 1021, 1024).

We also reject defendant's further contention that defense counsel was ineffective in failing to move for a *Dunaway* hearing " 'where, as here, such [a motion] was potentially futile' " (*People v Smith*, 128 AD3d 1434, 1434-1435, *lv denied* 26 NY3d 1011; *see People v Jackson*, 48 AD3d 891, 893-894, *lv denied* 10 NY3d 841; *People v Polanco*, 13 AD3d 100, 101, *lv denied* 4 NY3d 802).

Based on defense counsel's remarks at sentencing, however, we conclude that defense counsel "essentially[] became a witness against [defendant] and took a position adverse to him," thereby denying him effective assistance of counsel at sentencing (*People v Caccavale*, 305 AD2d 695, 695; *see People v Lawrence*, 27 AD3d 1091, 1091-1092). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for the assignment of new counsel and resentencing.

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

843

CAF 16-02055

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

IN THE MATTER OF ANDY FARNER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BRANDY FARNER, RESPONDENT-RESPONDENT.

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

RANDY S. MARGULIS, WILLIAMSVILLE, FOR RESPONDENT-RESPONDENT.

LYLE T. HAJDU, ATTORNEY FOR THE CHILD, LAKEWOOD.

Appeal from an order of the Family Court, Cattaraugus County (Judith E. Samber, R.), entered February 19, 2016 in a proceeding pursuant to Family Court Act article 6. The order granted the motion of respondent to dismiss the amended petition and directed the return of the child to respondent.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion and reinstating the amended petition, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Cattaraugus County, for further proceedings in accordance with the following memorandum: Pursuant to a parenting agreement that was incorporated in the parties' judgment of divorce, petitioner father and respondent mother shared joint custody of their child. The mother, who resided in Georgia, was designated the primary residential parent, and the father, who resided in Western New York, was afforded visitation with the child. The father appeals from an order that, inter alia, granted the mother's motion to dismiss the father's amended petition seeking to modify the custody and visitation provisions of the parenting agreement. We agree with the father that Family Court erred in dismissing the amended petition without a hearing, and we therefore modify the order accordingly.

It is well established that "[a] hearing is not automatically required whenever a parent seeks modification of a custody [or visitation] order" (*Matter of Esposito v Magill*, 140 AD3d 1772, 1773, *lv denied* 28 NY3d 904 [internal quotation marks omitted]). Rather, "[t]he petitioner must make a sufficient evidentiary showing of a change in circumstances to require a hearing on the issue whether the existing custody [and visitation] order should be modified" (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417-1418 [internal quotation marks

omitted]; *see Matter of Gelling v McNabb*, 126 AD3d 1487, 1487).

Preliminarily, we agree with the mother that she refuted the father's allegation that there was a change in circumstances because she was being investigated for possible drug use and neglect by the Division of Children and Family Services in Georgia (DCFS). In support of her motion to dismiss the amended petition, the mother submitted a letter from DCFS establishing that the investigation had been closed and there were no indications of maltreatment or child abuse and neglect (*see Matter of Chittick v Farver*, 279 AD2d 673, 675-676; *see generally Matter of Dana H. v James Y.*, 89 AD3d 844, 845).

We nonetheless agree with the father that he made a sufficient evidentiary showing of a change in circumstances to require a hearing with respect to certain remaining allegations in the amended petition. It was undisputed that the mother was facing prosecution for criminal possession of a controlled substance in Georgia. Although the mother submitted a negative drug test in support of her motion, the drug test was performed on a hair follicle sample that she submitted well after her arrest, and the assertions by the mother's attorney regarding how far back such a test could detect drug use raises an issue to be resolved at an evidentiary hearing, not on a motion to dismiss. Considering the mother's history of drug and alcohol addiction, as acknowledged by the parties in the parenting agreement, we conclude that the allegation that the mother was arrested and being prosecuted for criminal possession of a controlled substance is sufficient to warrant a hearing (*see Matter of Pollock v Wakefield*, 145 AD3d 1274, 1275; *Matter of Bell v Raymond*, 67 AD3d 1410, 1411), inasmuch as such conduct, including the mother's possible unlawful use of a controlled substance, "is plainly relevant to her fitness as a parent" (*Matter of Belcher v Morgado*, 147 AD3d 1335, 1336; *see Matter of Creek v Dietz*, 132 AD3d 1283, 1284, *lv denied* 26 NY3d 914).

The father further alleged that the mother had been hospitalized for drug-induced psychosis that resulted in a two-week inpatient treatment at a medical center in Georgia where she was also diagnosed with bipolar disorder. In support of her motion, the mother submitted an affidavit from her live-in boyfriend, who averred that he had falsely told the father that the mother had been hospitalized for a psychological evaluation for two weeks, and that he did not tell the father that she was hospitalized for drug-induced psychosis. The boyfriend nonetheless confirmed that the mother had been admitted to a psychological hospital for four days, rather than two weeks, and that she had been diagnosed with bipolar disorder. It is well settled that an evidentiary showing that a parent's mental health condition is inadequately treated and managed, results in hospitalization, impairs the parent's ability to parent effectively, and/or impacts the child may be sufficient to establish a change in circumstances warranting an inquiry into whether a change in custody is in the best interests of the child (*see Matter of Leo v Leo*, 39 AD3d 899, 901; *see generally Matter of Yearwood v Yearwood*, 90 AD3d 771, 774; *Matter of Morrow v Morrow*, 2 AD3d 1225, 1227). To the extent that the mother disputed the father's allegations regarding her hospitalization and the

treatment of her mental health condition, " '[i]t is well established that determinations affecting custody should be made following a full evidentiary hearing, not on the basis of conflicting allegations' " (*Lauzonis v Lauzonis*, 120 AD3d 922, 925).

The father also alleged that the boyfriend used a belt to discipline the child, and that the child had made disclosures of such corporal punishment to the father and the paternal grandmother. The allegations of excessive corporal punishment or inappropriate discipline in this case constitute a sufficient evidentiary showing of a change of circumstances to warrant a hearing (*see Matter of Isler v Johnson*, 118 AD3d 1504, 1505; *see generally Matter of DeJesus v Gonzalez*, 136 AD3d 1358, 1359-1360, *lv denied* 27 NY3d 906). Although the boyfriend denied the allegations in his affidavit, such conflicting assertions should be resolved at an evidentiary hearing (*see Lauzonis*, 120 AD3d at 925).

To the extent that the father's further allegations in the amended petition were based upon representations made to him by the boyfriend, we reject the contention of the mother and the Attorney for the Child that the recantations in the boyfriend's affidavit entitle the mother to dismissal of the amended petition. The boyfriend's credibility and the conflicting allegations in his affidavit and the amended petition should be resolved following an evidentiary hearing (*see id.*).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

853

CA 16-02141

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

BAUMANN REALTORS, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FIRST COLUMBIA CENTURY-30, LLC, AND HEALTHNOW NEW YORK, INC., DEFENDANTS-APPELLANTS.

LEWANDOWSKI & ASSOCIATES, WEST SENECA (KIMBERLY M. THRUN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BLAIR & ROACH LLP, TONAWANDA (DAVID L. ROACH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 28, 2016. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: In 2001, plaintiff entered into a broker commission agreement (agreement) with defendant First Columbia Century-30, LLC (First Columbia), which provided, inter alia, that plaintiff would be paid a five percent commission upon occupancy pursuant to a lease between First Columbia and a corporate relative of defendant HealthNow New York, Inc. (HealthNow). Insofar as relevant here, the agreement further stated that First Columbia "agrees to pay to [plaintiff] an additional commission of two and one half percent (2.5%) of the gross rents payable during the renewed or extended lease term" if the lessee "renews or extends the term of the lease." Defendants entered into a lease of an entire building in November 2001 (hereafter, 2001 lease), and plaintiff was paid a commission pursuant to the agreement. Defendants entered into a lease of part of the same building in 2011 (hereafter, 2011 lease), and plaintiff sought a commission pursuant to the agreement. When defendants declined to pay the commission, plaintiff commenced this action for breach of contract and related relief. Supreme Court originally granted defendants' motion to dismiss the complaint, but this Court reversed that order on appeal (*Baumann Realtors, Inc. v First Columbia Century-30, LLC*, 113 AD3d 1091). Defendants now appeal from an order denying their motion for summary judgment dismissing the complaint. We agree with defendants that the court erred in denying their motion.

In our prior appeal, we reviewed the motion to dismiss under the well established standard for such motions, i.e., " '[o]n a motion to dismiss pursuant to CPLR 3211, pleadings are to be liberally construed . . . The court is to accept the facts as alleged in the [pleading] as true . . . [and] accord [the proponent of the pleading] the benefit of every possible favorable inference' " (*id.* at 1092). In that appeal, we concluded that "the documentary evidence does not conclusively establish as a matter of law that the 2011 lease was a new lease, as opposed to a renewal or extension of the 2001 lease" (*id.*). We further concluded that plaintiff was entitled to discovery on the issue whether the 2011 lease was a renewal or extension of the 2001 lease (*see id.* at 1092-1093).

On this appeal, however, we review the motion pursuant to the "well settled [standard requiring] that 'the 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' " (*O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 36-37, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). In view of the current procedural posture of this case, our determination is now based upon, among other things, the additional evidence submitted by the parties after full discovery regarding the circumstances surrounding defendants' determination to enter into the 2011 lease. The law of the case doctrine therefore does not apply, because "[o]ur holding in relation to the prior motion to dismiss was based on the facts and law presented by the parties in that procedural posture, and no more" (*191 Chrystie LLC v Ledoux*, 82 AD3d 681, 682; *see Moses v Savedoff*, 96 AD3d 466, 468).

It is well established that, if a commission agreement provides that a broker will be entitled to a commission upon a renewal of a lease, then the terms of that agreement control, but no commission is due if "[t]he new lease itself showed that it was executed, not as the result of the exercise of the option by the tenant, but of an entirely new letting, upon different terms; and it was not, therefore, the result of any of the plaintiff's efforts to procure a tenant that the new lease was executed" (*Allwin Realty Co. v Barth*, 161 App Div 568, 572). Thus, "New York law provides that 'before the lessor is obligated to pay [ ] commissions, the renewal must be for the same term and the same rent as the original lease, or the new lease must have been the result of services performed by the broker' " (*John F. Dillon & Co. LLC v Foremost Maritime Corp.*, 2004 WL 1396180, *9 [SD NY 2004], quoting *Stern v Satra Corp.*, 539 F2d 1305, 1310). In order to establish that a subsequent lease of the same premises between the same parties is a renewal or extension of an earlier lease for which the broker of the original lease is entitled to recover a commission, rather than a new lease, "there must be proof (1) of a special agreement between the broker and the lessor . . . ; (2) [of] compliance with [the statute of frauds]; (3) that the renewal was for the same term and rent . . . ; [and] (4) in the event of failure to prove (3), there must be proof that the [subsequent] lease was the result of services performed by the broker and for which he should be

entitled to recover" (*Mitchnik v Brennan*, 159 Misc 287, 291). "Mere amendments to a preexisting tenant's lease, that do not materially affect the rights of the parties under it or otherwise work to annul the prior agreement, do not constitute a new agreement" (*Ernie Otto Corp. v Inland Southeast Thompson Monticello, LLC*, 91 AD3d 1155, 1157, *lv denied* 19 NY3d 802; *see e.g. The Wharton Assoc., Inc. v Continental Indus. Capital LLC*, 137 AD3d 1753, 1753-1754).

Here, we agree with defendants that they met their burden on their motion by establishing that the 2011 lease was a new lease, rather than a renewal of the 2001 lease. In support of their motion, defendants submitted evidence establishing that, under the 2011 lease, HealthNow was leasing only part of the subject building, rather than the whole building as called for under the 2001 lease. In addition, the 2011 lease called for First Columbia to make structural changes to the building to accommodate HealthNow's changing needs, and to install a backup generator at a cost in excess of $300,000. Furthermore, the rent was higher in the 2011 lease, it was not calculated in accordance with the terms for a renewal as provided in the 2001 lease, and the 2011 lease was for a term of seven years, whereas the 2001 lease called for a renewal term of five years. Finally, defendants established that the 2011 lease was not the result of any brokerage services performed by plaintiff.

In opposition, plaintiff failed to raise a triable issue of fact (*see generally Alvarez*, 68 NY2d at 324). We have considered plaintiff's further contentions and conclude that they do not require a different result. Consequently, we reverse the order, grant the motion, and dismiss the complaint.

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

855

CA 16-02059

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

IN THE MATTER OF KIM A. KIRSCH AND MICHAEL A. STARVAGGI, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION OF WILLIAMSVILLE CENTRAL SCHOOL DISTRICT AND WILLIAMSVILLE CENTRAL SCHOOL DISTRICT, RESPONDENTS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (KRISTIN KLEIN WHEATON OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

STARVAGGI LAW OFFICES, P.C., VALLEY COTTAGE (STANLEY J. SILVERSTONE OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an amended judgment (denominated amended order) of the Supreme Court, Erie County (James H. Dillon, J.), entered March 3, 2016 in a proceeding pursuant to CPLR article 78. The amended judgment, among other things, granted the motion to add Michael A. Starvaggi as a petitioner and, upon reconsideration, granted the amended petition.

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

Memorandum: Petitioner Kim A. Kirsch commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondents to comply with her request pursuant to the Freedom of Information Law ([FOIL] Public Officers Law art 6) for certain email records of the superintendent of respondent Williamsville Central School District. We reject respondents' contention that Kirsch lacks standing to maintain this proceeding. "Any 'person denied access to a record' may appeal and seek judicial review of any adverse appeal determination," and "any person on whose behalf a FOIL request was made has standing to maintain a proceeding to review the denial of disclosure of the records requested" (*Matter of Norton v Town of Islip*, 17 AD3d 468, 470, *lv denied* 6 NY3d 709, quoting Public Officers Law § 89 [4] [a], [b]). Here, although the FOIL request was made by petitioner Michael A. Starvaggi, Kirsch's attorney, the administrative appeal letter expressly stated that Starvaggi was making the request on behalf of Kirsch (*see Norton*, 17 AD3d at 469). We thus conclude that Kirsch has standing to maintain this proceeding (*see Matter of Gannett Satellite Info. Network, Inc. v County of Putnam*, 142 AD3d 1012, 1017-1018; *Norton*, 17 AD3d at 470).

Even assuming, arguendo, that respondents preserved for our review their further contention that the proceeding is barred by the statute of limitations (*cf. Matter of Troy Sand & Gravel Co. v New York State Dept. of Transp.*, 277 AD2d 782, 783-784, *lv denied* 96 NY2d 708), we conclude that respondents failed to meet their burden of establishing that petitioners received notice of the final decision denying the administrative appeal more than four months before the proceeding was commenced (*see* CPLR 217 [1]; *Matter of Covington v Fischer*, 125 AD3d 1320, 1320; *Matter of Advocates for Children of N.Y., Inc. v New York City Dept. of Educ.*, 101 AD3d 445, 445-446; *Matter of Arnold v Erie County Med. Ctr. Corp.*, 59 AD3d 1074, 1075-1076, *lv dismissed* 12 NY3d 838; *cf. Matter of Roman v Lombardi*, 298 AD2d 313, 313).

We further conclude that Supreme Court properly granted petitioners' oral motion to amend the petition to add Starvaggi as a petitioner. Contrary to respondents' contention, under the circumstances here, the relation back doctrine permits the addition of Starvaggi after the expiration of the statute of limitations inasmuch as the claims brought by Starvaggi and Kirsch are identical in substance, i.e., that respondents improperly denied the FOIL request made by Starvaggi on behalf of Kirsch, and Starvaggi and Kirsch are united in interest in seeking compliance with that request (*see* CPLR 203 [f]; *Fazio Masonry, Inc. v Barry, Bette & Led Duke, Inc.*, 23 AD3d 748, 749; *Fulgum v Town of Cortlandt Manor*, 19 AD3d 444, 446; *see generally Matter of Greater N.Y. Health Care Facilities Assn. v DeBuono*, 91 NY2d 716, 721).

Contrary to respondents' further contention, the court properly granted the amended petition and directed respondents to provide petitioners with the requested emails, with any claimed exemptions from disclosure documented in a privilege log that may be reviewed by the court. Here, petitioners "reasonably described" the requested emails to enable respondents to identify and produce the records (Public Officers Law § 89 [3] [a]), and respondents "cannot evade the broad disclosure provisions of [the] statute . . . upon the naked allegation that the request will require review of thousands of records" (*Matter of Konigsberg v Coughlin*, 68 NY2d 245, 249; *see Matter of Irwin v Onondaga County Resource Recovery Agency*, 72 AD3d 314, 318). In addition, respondents' "broad allegation here that the [emails may] contain[ ] exempt material is insufficient to overcome the presumption that the records are open for inspection . . . and categorically to deny petitioner[s] all access to the requested material" (*Konigsberg*, 68 NY2d at 251). In the event that respondents are able to establish that a requested email contains exempt material, "the appropriate remedy is an in camera review and 'disclosure of all nonexempt, appropriately redacted material' " (*Matter of Pflaum v Grattan*, 116 AD3d 1103, 1105, quoting *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

863

KA 13-00447

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAHEEM H. OQUENDO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered June 24, 2009. The judgment convicted defendant, upon a jury verdict, of petit larceny and grand larceny in the fourth degree (four 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 petit larceny (Penal Law § 155.25) and four counts of grand larceny in the fourth degree (§ 155.30 [1]). Defendant contends that he was deprived of a fair trial based on three improper remarks by County Court during jury selection. Defendant failed to preserve for our review his contention with respect to any of the alleged improper remarks (*see* CPL 470.05 [2]; *People v McAvoy*, 70 AD3d 1467, 1468, *lv denied* 14 NY3d 890). In any event, the remarks do not warrant reversal. Although some of the court's remarks, when isolated and taken out of context, were arguably improper, we conclude that, when they are viewed in their proper context, they did not prevent the jury "from arriving at an impartial judgment on the merits" or deprive defendant of a fair trial (*People v Moulton*, 43 NY2d 944, 946; *see McAvoy*, 70 AD3d at 1468).

We reject the further contention of defendant that the court erred in admitting in evidence video recordings from the surveillance system of the two stores where defendant allegedly committed the larcenies. "[A] video may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the video accurately represents the subject matter depicted" (*People v Patterson*, 93 NY2d 80, 84; *see People v Byrnes*, 33 NY2d 343, 347-349). The videos at issue herein were adequately authenticated by the testimony of two store employees

who were familiar with the surveillance system, copied the surveillance videos to the DVDs brought to court, and testified to the unaltered condition of the videos. The testimony of the employees supports the conclusion that the videos accurately depict the events at issue. Any gaps in the chain of custody went to the weight of the evidence, not its admissibility (*see People v Hawkins*, 11 NY3d 484, 494).

Defendant further contends that the court erred in permitting one of the store employees to identify him as the individual depicted in two of the surveillance videos. We agree with defendant that the court erred in permitting such opinion testimony inasmuch as there was an insufficient basis for concluding that the employee was more likely to identify defendant correctly from the videos than was the jury (*see People v Myrick*, 135 AD3d 1069, 1074; *People v Coleman*, 78 AD3d 457, 458, *lv denied* 16 NY3d 829). Nevertheless, we conclude that the error is harmless. The evidence of defendant's guilt is overwhelming and, taking into account the court's limiting instruction to the jury with respect to the testimony, we conclude that there is no significant probability that defendant would have been acquitted but for the error (*see People v Crimmins*, 36 NY2d 230, 241-242; *Coleman*, 78 AD3d at 458-459). We reject defendant's contention that the court also erred in permitting the employee to testify to the identity of the stolen items and their value. In addition to viewing the surveillance videos, the employee testified he was able to determine the identity and value of the stolen items by subsequently inspecting the prices posted in the stores (*see generally People v Irrizari*, 5 NY2d 142, 145-147; *People v Trilli*, 27 AD3d 349, 349-350, *lv denied* 6 NY3d 899; *People v Wandell*, 285 AD2d 736, 737).

Contrary to defendant's further contention, the court did not abuse its discretion in denying his request for an adjournment based on the People's late disclosure of certain surveillance videos, nor did that late disclosure warrant reversal, inasmuch as "[d]efendant failed to establish . . . that he was surprised or prejudiced by the late disclosure" (*People v Collins*, 106 AD3d 1544, 1546, *lv denied* 21 NY3d 1072; *see People v Resto*, 147 AD3d 1331, 1332, *lv denied* 29 NY3d 1000; *People v Rogers*, 103 AD3d 1150, 1151-1152, *lv denied* 21 NY3d 946; *People v Jacobson*, 60 AD3d 1326, 1328, *lv denied* 12 NY3d 916). Finally, the sentence is not unduly harsh or severe.

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

864

KA 16-02069

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICKY D. GATES, DEFENDANT-APPELLANT.

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (GEORGE R. SHAFFER, III, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered August 6, 2015. The judgment convicted defendant, upon his plea of guilty, of possessing or transporting 30,000 or more unstamped cigarettes.

It is hereby ORDERED that the judgment so appealed from is reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress physical evidence and statements is granted, the indictment is dismissed, and the matter is remitted to Jefferson County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of possessing or transporting 30,000 or more unstamped cigarettes (Tax Law § 1814 [c] [2]). When a State Trooper pulled over defendant for speeding on Interstate 81, he noticed "several large nylon bags" with "square edged contours" filling the area behind the driver's seat. The Trooper initially asked defendant what was inside the bags, i.e., whether there was luggage in the bags, and defendant gave a series of increasingly implausible answers, including "clothing," "presents," "riding toys," and "bicycles." Defendant asked if he could leave, but the Trooper instead requested that he exit the vehicle while the Trooper spoke to two passengers. When the Trooper returned to speak to defendant, but before he advised defendant of his *Miranda* rights, defendant admitted that the bags contained nearly 300 cartons of untaxed cigarettes purchased from an Indian reservation.

Defendant contends that County Court erred in refusing to grant that part of his omnibus motion seeking to suppress physical evidence seized from his vehicle and the statements he made to the police. Initially, we note that, contrary to the People's contention, defendant's challenge to the suppression ruling was adequately

preserved. Although the court did not issue a written decision addressing the suppression issues raised by defendant, the record establishes that the court implicitly but conclusively denied that part of defendant's omnibus motion seeking to suppress physical evidence and statements that he made to the police. Defendant is not precluded from challenging the court's suppression ruling simply because he did not request that it be memorialized in writing (*see People v Elmer*, 19 NY3d 501, 509; *People v Allman*, 133 AD2d 638, 639).

We conclude that the court erred in refusing to suppress the physical evidence and statements at issue. Contrary to defendant's contention, however, our rationale is not grounded in custody and/or *Miranda* issues. "In light of the heightened dangers faced by investigating police officers during traffic stops, a police officer may, as a precautionary measure and without particularized suspicion, direct the occupants of a lawfully stopped vehicle to step out of the car" (*People v Garcia*, 20 NY3d 317, 321). Here, defendant was not in custody during his temporary roadside detention, and it was permissible for the Trooper to engage in a reasonable interrogation of defendant without first advising him of his *Miranda* rights (*see People v Brown*, 107 AD3d 1305, 1305-1306, *lv dismissed* 23 NY3d 1018).

We conclude, however, that the Trooper's initial inquiry concerning the contents of the bags constituted a level two common-law inquiry, which required a founded suspicion of criminality that was not present at the time (*see People v Hightower*, 136 AD3d 1396, 1396-1397; *People v Carr*, 103 AD3d 1194, 1195; *see generally People v De Bour*, 40 NY2d 210, 223). Indeed, we note that nervousness, fidgeting, and illogical or contradictory responses to level one inquiries do not permit an officer to escalate an encounter to a level two *De Bour* confrontation (*see Garcia*, 20 NY3d at 320-322; *People v Dealmeida*, 124 AD3d 1405, 1407). Here, the facts are even more strongly in favor of defendant inasmuch as defendant's evasive and inconsistent answers were themselves induced by a level two inquiry from the Trooper. Because a founded suspicion of criminality did not arise until after the Trooper asked defendant what was inside the bags, the court erred in refusing to suppress the evidence.

As a result, defendant's guilty plea must be vacated and, because our determination herein results in the suppression of all evidence in support of the crimes charged, the indictment must be dismissed (*see Hightower*, 136 AD3d at 1397). In light of our determination, we do not address defendant's remaining contentions.

All concur except WINSLOW and SCUDDER, JJ., who dissent and vote to affirm in the following memorandum: We respectfully disagree with the majority's conclusion that County Court erred in refusing to suppress physical evidence seized from defendant's vehicle and statements that defendant made to the police, and we thus also disagree with the majority's further conclusion that the plea must be vacated and the indictment dismissed. We therefore dissent.

Defendant's vehicle was stopped by a State Trooper for speeding while traveling north on Interstate 81. The Trooper testified at the

suppression hearing that, as he approached the vehicle, he observed that the rear of the vehicle was "sagging excessively" as if there were a "heavy object" in the trunk. In response to the Trooper's question, defendant stated that he and his two passengers had visited family in Ohio for a couple of days and that they were en route to their home. The Trooper observed several large nylon bags with sharp edges protruding from the inner wall of the bags. The bags filled the backseat behind the driver's seat, as well as the floor of the backseat, leaving just enough space for the petite passenger to sit in the rear passenger seat. The Trooper asked defendant whether "this was [defendant's] luggage in the bags," and defendant responded that it was his clothing. Because he could observe sharp edges protruding through the bags, the Trooper asked defendant whether his clothing was in boxes because it looked like there were boxes inside the bags, and defendant answered "yes," the clothing was in boxes. Defendant then stated that it was not clothing in the bags, but presents that he bought in Ohio for children and other family members. He explained that there were toys for children in the bags. When asked what kind of toys, defendant replied, "riding toys," which he clarified as "bicycles." The Trooper testified that, based upon the nervous demeanor of defendant and the passengers, the responses to the questions that did not comport with the Trooper's observations of the bags, and his experience related to the transportation of illegal contraband, he was suspicious that there was criminal activity afoot—specifically, that defendant was transporting something illegal "north."

Defendant advised the Trooper that he was a retired federal law enforcement officer and he requested that he be "on his way." The Trooper asked defendant whether he would unzip a bag, and defendant declined, stating that he did not want to have the vehicle searched. The Trooper advised defendant that it was his right to refuse to have the vehicle searched, but stated that he believed there was a crime being committed and therefore asked him to step out of the vehicle, at which point the Trooper observed that defendant's pockets were bulging. The Trooper reminded defendant that his responses with respect to the contents of the bags had changed from clothing to bicycles, and defendant reiterated that there were bicycles inside the bags. The Trooper spoke to the passengers in the vehicle, both of whom denied that any of the bags belonged to them, and they denied knowing what was in the bags or in the trunk. The Trooper advised defendant that both passengers denied having luggage in the vehicle after a trip to Ohio, at which point defendant lowered his head and asked if he could just be truthful. Defendant then stated that he had cigarettes in the vehicle. The Trooper asked whether the cigarettes were taxed or untaxed, and defendant stated that they were untaxed, that there were approximately 300 cartons in the vehicle, and that he sold them to family and friends.

We agree with the majority's conclusion that defendant was not in custody during his temporary roadside detention and thus that it was permissible for the trooper to engage in a "reasonable initial interrogation attendant to a roadside detention that was merely investigatory" (*People v Brown*, 107 AD3d 1305, 1306, *lv dismissed* 23

NY3d 1018).

We disagree with the majority's conclusion that the Trooper lacked a founded suspicion of criminal activity. We would therefore affirm the judgment based upon, inter alia, the court's implicit determination that a level two *De Bour* inquiry was justified (*see generally People v De Bour*, 40 NY2d 210, 223). As an initial matter, we note that, in response to the level one inquiry regarding defendant's destination, and after defendant advised him that he was en route to his home from Ohio (*see People v McCarley*, 55 AD3d 1396, 1396, *lv denied* 11 NY3d 899), the Trooper followed up with what we conclude was an additional appropriate level one question, i.e., whether defendant's luggage was in the bags, which were numerous, were in plain view, and looked unusual based upon the sharp edges protruding through the nylon fabric (*see People v Hollman*, 79 NY2d 181, 191; *see also People v Moore*, 47 NY2d 911, 912, *revg for reasons stated in dissenting opn* 62 AD2d 155, 157-160). Defendant responded with an answer that did not correspond to the Trooper's observation, i.e., that the bags contained clothing. The Trooper properly made a further level one inquiry whether the clothing was in boxes based upon the "unusual" observation of multiple nylon bags containing what appeared to be boxes (*Hollman*, 79 NY2d at 191). At that point, defendant responded affirmatively, but then changed his answer, stating that the bags contained gifts including toys. At that point, the Trooper asked what kind of toys, and defendant ultimately responded that the bags contained bicycles.

We conclude that, based upon defendant's apparently untruthful responses to level one inquiries, the Trooper's observation of the sagging trunk and the number of bags in the backseat, the nervous demeanor of defendant and the passengers, and the Trooper's experience that illegal contraband was transported on that route, the Trooper had a founded suspicion that there was criminal activity afoot (*see Hollman*, 79 NY2d at 193; *People v Sykes*, 122 AD3d 1306, 1307, *lv denied* 26 NY3d 972; *McCarley*, 55 AD3d at 1396-1397; *cf. People v Garcia*, 20 NY3d 317, 321; *People v Hightower*, 136 AD3d 1396, 1396-1397; *see generally People v Devone*, 15 NY3d 106, 114-115). He was therefore justified in asking more invasive questions "focusing on the 'possible criminality' " of defendant, as well as in asking defendant to unzip a bag (*People v Tejeda*, 217 AD2d 932, 933, *lv denied* 87 NY2d 908, quoting *Hollman*, 79 NY2d at 191; *see McCarley*, 55 AD3d at 1396-1397).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

865

KA 10-02352

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAHSEAN K. EAVES, ALSO KNOWN AS “GUMS”,
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, TREVETT CRISTO P.C. (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John Lewis DeMarco, J.), rendered September 7, 2010. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree, murder in the second degree, attempted robbery in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (§ 125.25 [3]) and attempted robbery in the first degree (§§ 110.00, 160.15 [2]), defendant contends that County Court abused its discretion in issuing a protective order that allowed the People to withhold from the defense, until 10 days before trial, the identity of two witnesses, who were referred to in the People’s CPL 710.30 notice as witnesses “1” and “2.” We reject that contention.

Criminal Procedure Law § 240.90 (3) specifically permits ex parte motions and in camera testimony where a court is called upon to decide a motion for a protective order “[w]here the interests of justice so require.” Further, pursuant to CPL 240.50 (1), the court may issue a protective order “for good cause,” which includes “a substantial risk of physical harm . . . [or] intimidation . . . to any person.” Here, the court heard testimony offered by the People concerning specific instances of threats against, and intimidation of, both witnesses, which led the court to determine that both witnesses would be at substantial risk of suffering actual harm or intimidation for having cooperated with the People’s investigation if their identities were disclosed. We conclude that the court properly received the testimony from the People on an ex parte basis in the interests of justice and

further conclude that the testimony constituted good cause for issuing a protective order. In any event, we conclude that defendant was not prejudiced by the protective order inasmuch as a notice pursuant to CPL 710.30 need not name an identifying witness (*see People v Poles*, 70 AD3d 1402, 1403, *lv denied* 15 NY3d 808; *see generally People v Ocasio*, 183 AD2d 921, 922-923, *lv dismissed* 80 NY2d 932), and the identities of the witnesses "w[ere] turned over early enough" to permit defendant to prepare for effective cross-examination of the witnesses at trial (*People v Robinson*, 200 AD2d 693, 694-695, *lv denied* 84 NY2d 831; *see People v Pilgrim*, 101 AD3d 435, 435-436, *lv denied* 21 NY3d 946, *reconsideration denied* 21 NY3d 1045). We therefore see no reason to disturb the court's exercise of discretion.

We reject defendant's contention that the court erred in allowing the People to file an amended CPL 710.30 notice beyond the 15 days after arraignment authorized by statute. Because defendant sought to suppress all of his statements to the police and the court denied that relief after a hearing, any deficiencies in the CPL 710.30 notice are immaterial and cannot result in preclusion (*see* CPL 710.30 [3]; *People v Collins*, 145 AD3d 1479, 1480).

Finally, we reject defendant's contention that the court erred in denying his motion for a mistrial based on an improper question posed by the prosecutor to a witness on redirect examination. After the witness was asked on cross-examination about the details of his past conviction for armed robbery by defense counsel, the prosecutor asked on redirect examination if that robbery, like the one at issue herein, involved the shooting of a victim. The court sustained defense counsel's objection. We conclude that the one instance of prosecutorial misconduct was not so egregious as to deprive defendant of a fair trial and, thus, reversal is not warranted (*see People v Porco*, 71 AD3d 791, 794, *affd* 17 NY3d 877; *People v McCray*, 121 AD3d 1549, 1552, *lv denied* 25 NY3d 1204).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

866

KA 16-01615

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

SCOTT SCHAFER, DEFENDANT-RESPONDENT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (RICHARD W. YOUNGMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Wayne County Court (Daniel G. Barrett, J.), entered September 9, 2015. The order, insofar as appealed from, granted that part of the omnibus motion of defendant seeking to suppress physical evidence obtained upon a warrantless search.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law, the People's request for an adjournment is granted, the first ordering paragraph is vacated, and the matter is remitted to Wayne County Court for further proceedings in accordance with the following memorandum: The People appeal from an order that, inter alia, granted that part of defendant's omnibus motion seeking to suppress physical evidence obtained upon a warrantless search. The two sheriff's deputies who conducted that search found various pieces of heavy equipment that allegedly had been stolen from the complainant's property within the prior year. As a result, defendant was charged by indictment with one count of criminal possession of stolen property in the third degree (Penal Law § 165.50). Thereafter, the People provided defendant with a statement from his girlfriend indicating that she gave the deputies consent to search the property where the equipment was found. Defendant made an omnibus motion seeking, inter alia, suppression of all physical evidence on the ground that the deputies lacked consent to conduct the warrantless search or, in the alternative, a *Mapp* hearing.

County Court held a *Mapp* hearing on August 5, 2015, but the two deputies who conducted the warrantless search were not present, and they could not be reached by telephone. The People represented to the court that the deputies were under subpoena and requested a brief adjournment. The court noted down the names of the deputies and reserved decision. The next day, the People sent the court a letter explaining that one of the deputies had been in a meeting, the other

was home sick, and that both would be available to testify on an adjourned date. The court concluded, however, that there was "no reason" for the deputies' nonappearance and that the People had a "full and fair opportunity to present their case." Inasmuch as the People failed to meet their burden on the issue of consent, the court granted that part of defendant's omnibus motion seeking to suppress the physical evidence at issue.

We agree with the People that the court erred in refusing to grant their request for an adjournment. It is well settled that "the decision to grant an adjournment is a matter of discretion for the hearing court" (*People v Lashway*, 25 NY3d 478, 484; *see People v Lindsey*, 129 AD3d 1482, 1483, *lv denied* 27 NY3d 1001). There are, however, well settled considerations to help guide a court in the exercise of its discretion. As relevant herein, for instance, "when [a] witness is identified to the court, and is to be found within the jurisdiction, a request for a short adjournment after a showing of some diligence and good faith should not be denied merely because of possible inconvenience to the court or others" (*People v Foy*, 32 NY2d 473, 478; *see People v Venable*, 154 AD2d 722, 723). Additional relevant considerations in determining whether to grant a request for an adjournment include whether it was the moving party's first request, whether the subject witness or witnesses would offer material testimony favorable to that party, and the degree of prejudice to the nonmovant (*see Venable*, 154 AD2d at 723*; see also People v Hartman*, 64 AD3d 1002, 1003-1004, *lv denied* 13 NY3d 860). Here, the deputies who conducted the warrantless search were under subpoena and were identified to the court. Contrary to defendant's contention, the court was entitled to rely on the prosecutor's representation in open court concerning the issuance of subpoenas inasmuch as a prosecutor is an officer of the court with an " 'unqualified duty of scrupulous candor' " (*People v Hameed*, 88 NY2d 232, 238, *cert denied* 519 US 1065). Moreover, the request was the People's first request for an adjournment, the testimony of the witnesses would be material and favorable to the People, and there was minimal prejudice to defendant, who had been released from custody on his own recognizance. In contrast, the People suffered severe prejudice because the refusal to grant an adjournment resulted in the suppression of all physical evidence.

We therefore reverse the order insofar as appealed from, grant the People's request for an adjournment, vacate the first ordering paragraph, and remit the matter to County Court for a new *Mapp* hearing.

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

870

CA 16-02159

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

ALIZABETH LAMB, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF AIYANA ALIZABETH LAMB, AN INFANT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STEPHEN M. BAKER, O.D., P.C., ET AL., DEFENDANTS, STUART TRUST, P.C., AND STUART TRUST, M.D., DEFENDANTS-RESPONDENTS.

DEFRANCISCO & FALGIATANO LAW FIRM, EAST SYRACUSE (JEFF D. DEFRANCISCO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BROWN, GRUTTADARO, GAUJEAN AND PRATO, LLC, ROCHESTER (JEFFREY S. ALBANESE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered July 8, 2016. The order granted the motion of defendants Stuart Trust, P.C., and Stuart Trust, M.D., for summary judgment dismissing the complaint against those defendants.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendants Stuart Trust, P.C., and Stuart Trust, M.D., in part and reinstating the complaint against those defendants except insofar as it asserts claims of negligent hiring or supervision against them, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries sustained by her daughter as a result of, inter alia, the alleged medical malpractice of Stuart Trust, P.C., and Stuart Trust, M.D. (defendants). Defendants moved for summary judgment dismissing the complaint against them, which Supreme Court granted.

We conclude that the court erred in granting that part of the motion seeking summary judgment dismissing the claim for medical malpractice, and we therefore modify the order accordingly. Even assuming, arguendo, that defendants met their initial burden with respect to that part of the motion, we agree with plaintiff that her medical expert raised triable issues of fact (*see Selmensberger v Kaleida Health*, 45 AD3d 1435, 1436; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). "The conflicting opinions of the experts for plaintiff and defendant[s] with respect to . . . defendant[s'] alleged deviation[s] from the accepted standard of medical care,

present credibility issues that cannot be resolved on a motion for summary judgment" (*Ferlito v Dara*, 306 AD2d 874, 874; *see Gedon v Bry-Lin Hosps.*, 286 AD2d 892, 894, *lv denied* 98 NY2d 601).

We further conclude, however, that the court properly granted that part of defendants' motion seeking summary judgment dismissing the claims of negligent hiring or supervision asserted against them. An employer may be liable for a claim of negligent hiring or supervision if an employee commits an "independent act of negligence outside the scope of employment" and the employer "was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act" (*Seiden v Sonstein*, 127 AD3d 1158, 1160-1161). Here, plaintiff has failed to allege that Trust or any other individual employed by Stuart Trust, P.C., committed an act of negligence outside the scope of his or her employment.

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

873

CA 16-01727

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

IN THE MATTER OF THE ARBITRATION BETWEEN CITY OF WATERTOWN, PETITIONER-APPELLANT-RESPONDENT,

AND MEMORANDUM AND ORDER

WATERTOWN PROFESSIONAL FIREFIGHTERS' ASSOCIATION LOCAL 191, RESPONDENT-RESPONDENT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, GARDEN CITY (TERRY O'NEIL OF COUNSEL), FOR PETITIONER-APPELLANT-RESPONDENT.

BLITMAN & KING, LLP, SYRACUSE (NATHANIEL G. LAMBRIGHT OF COUNSEL), FOR RESPONDENT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered September 12, 2016. The order granted in part and denied in part the petition to stay arbitration.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the petition in its entirety, and as modified the order is affirmed without costs.

Memorandum: Petitioner, City of Watertown (City), commenced this proceeding pursuant to CPLR article 75, seeking a permanent stay of arbitration of a grievance filed by respondent. In its grievance and demand for arbitration, respondent alleged that the City violated, among other things, the parties' collective bargaining agreement (CBA) by failing to maintain the requisite staffing levels of captains within the City's Fire Department and by requiring other members of the Fire Department to perform out-of-title work. Supreme Court denied the petition with respect to that part of the grievance alleging a failure to maintain minimum staffing levels, but granted the petition with respect to that part of the grievance alleging out-of-title work. The City appeals, and respondent cross-appeals.

"It is well settled that, in deciding an application to stay or compel arbitration under CPLR 7503, we do not determine the merits of the grievance and instead determine only whether the subject matter of the grievance is arbitrable" (*Matter of City of Syracuse [Syracuse Police Benevolent Assn., Inc.]*, 119 AD3d 1396, 1397; *see* CPLR 7501; *Matter of Board of Educ. of Watertown City Sch. Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 142-143). "Proceeding with a two-part test, we first ask whether the parties may arbitrate the dispute by inquiring

if 'there is any statutory, constitutional or public policy prohibition against arbitration of the grievance' . . . If no prohibition exists, we then ask whether the parties in fact agreed to arbitrate the particular dispute by examining their [CBA]. If there is a prohibition, our inquiry ends and an arbitrator cannot act" (*Matter of County of Chautauqua v Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO, County of Chautauqua Unit 6300, Chautauqua County Local 807*, 8 NY3d 513, 519; *see Syracuse Police Benevolent Assn., Inc.*, 119 AD3d at 1397; *Matter of Mariano v Town of Orchard Park*, 92 AD3d 1232, 1233).

We reject the City's contention on appeal that arbitration of respondent's grievance with respect to the City's failure to maintain minimum staffing levels is prohibited by law. Under the first prong of the arbitrability test, "the subject matter of the dispute controls the analysis" (*Matter of City of New York v Uniformed Fire Officers Assn., Local 854, IAFF, AFL-CIO*, 95 NY2d 273, 280). Contrary to the City's contention, a pending administrative proceeding concerning respondent's alleged improper practices does not preclude arbitration inasmuch as there is no indication that the "particular subject matter of the dispute" is not "authorized," i.e., not " 'lawfully fit for arbitration' " (*id.*).

We reject the City's further contention that the parties did not agree to arbitrate the grievance. " 'Our review of that question is limited to the language of the grievance and the demand for arbitration, as well as to the reasonable inferences that may be drawn therefrom' " (*Matter of Wilson Cent. Sch. Dist. [Wilson Teachers' Assn.]*, 140 AD3d 1789, 1790; *see Matter of Niagara Frontier Transp. Auth. v Niagara Frontier Transp. Auth. Superior Officers Assn.*, 71 AD3d 1389, 1390, *lv denied* 14 NY3d 712). "Where, as here, the [CBA] contains a broad arbitration clause, our determination of arbitrability is limited to 'whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA' " (*Matter of Haessig [Oswego City Sch. Dist.]*, 90 AD3d 1657, 1657, quoting *Board of Educ. of Watertown City Sch. Dist.*, 93 NY2d at 143; *see Syracuse Police Benevolent Assn., Inc*, 119 AD3d at 1397; *Matter of Kenmore-Town of Tonawanda Union Free Sch. Dist. [Ken-Ton Sch. Empls. Assn.]*, 110 AD3d 1494, 1495). "If such a 'reasonable relationship' exists, it is the role of the arbitrator, and not the court, to 'make a more exacting interpretation of the precise scope of the substantive provisions of the CBA, and whether the subject matter of the dispute fits within them' " (*Syracuse Police Benevolent Assn., Inc*, 119 AD3d at 1397, quoting *Board of Educ. of Watertown City Sch. Dist.*, 93 NY2d at 143; *see Matter of Ontario County [Ontario County Sheriff's Unit 7850-01, CSEA, Local 1000, AFSCME, AFL-CIO]*, 106 AD3d 1463, 1464-1465).

In its grievance and demand for arbitration, respondent alleged, in relevant part, that the City demoted eight captains and thus violated the CBA by failing to maintain the requisite staffing levels, and by concomitantly forcing other members of the Fire Department to perform out-of-title work, i.e., captain's work, without the

appropriate compensation. Respondent's grievance specifically references articles 4 and 5 of the parties' CBA, which include provisions governing both minimum staffing levels and compensation for out-of-title work. We therefore conclude with respect to the appeal and cross appeal that the dispute is reasonably related to the general subject matter of the CBA (*see Matter of City of Lockport [Lockport Professional Firefighters Assn., Inc.]*, 141 AD3d 1085, 1088; *Niagara Frontier Transp. Auth.*, 71 AD3d at 1391).

Contrary to the City's contention, we conclude that the issue whether the CBA's minimum staffing provision requires a specific number of captains in each company involves an interpretation of that provision and the merits of respondent's grievance. It is therefore a question to be resolved by the arbitrator, who is tasked with making "a more exacting interpretation of the precise scope of the substantive provisions of the CBA, and whether the subject matter of the dispute fits within them" (*Board of Educ. of Watertown City Sch. Dist.*, 93 NY2d at 143; *see Lockport Professional Firefighters Assn., Inc.*, 141 AD3d at 1088).

We reject the City's further contention that strict compliance with the step-by-step grievance procedure set forth in the CBA is a condition precedent to arbitration (*see Kenmore-Town of Tonawanda Union Free Sch. Dist.*, 110 AD3d at 1496). "Questions concerning compliance with a contractual step-by-step grievance process have been recognized as matters of procedural arbitrability to be resolved by the arbitrators, particularly in the absence of a very narrow arbitration clause or a provision expressly making compliance with the time limitations a condition precedent to arbitration" (*Matter of Enlarged City Sch. Dist. of Troy [Troy Teachers Assn.]*, 69 NY2d 905, 907). Therefore, the question whether respondent complied with the requirements of the CBA's grievance procedure—in particular, whether respondent complied with the requirement that it submit a written statement "setting forth the specific nature of the grievance and the facts relating thereto"—is an issue of "procedural arbitrability" for the arbitrator to resolve (*Kenmore-Town of Tonawanda Union Free Sch. Dist.*, 110 AD3d at 1496; *see Enlarged City Sch. Dist. of Troy*, 69 NY2d at 907). We have considered the City's remaining contentions and conclude that they are without merit.

We agree with respondent on its cross appeal, however, that the court erred in granting the petition with respect to that part of the grievance alleging out-of-title work, and we therefore modify the order accordingly. We reject the City's contention that arbitration should be stayed with respect to the issue of out-of-title work because compensation for such work falls within the meaning of "salary," which is expressly excluded from the CBA's definition of "grievance." Because there is a reasonable relationship between the dispute over out-of-title work and the subject matter of the CBA, we conclude that "it is for the arbitrator to determine whether the [compensation for out-of-title work] falls within the scope of the arbitration provisions of the [CBA]" (*Wilson Cent. Sch. Dist.*, 140

AD3d at 1790 [internal quotation marks omitted]).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

891

CA 16-02323

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

MIRANDA HOLDINGS, INC.,
PLAINTIFF-PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN BOARD OF TOWN OF ORCHARD PARK,
DEFENDANT-RESPONDENT-APPELLANT.

BARCLAY DAMON, LLP, BUFFALO (KIMBERLY A. COLAIACOVO OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

HOPKINS, SORGI & ROMANOWSKI PLLC, WILLIAMSVILLE (SEAN W. HOPKINS OF COUNSEL), FOR PLAINTIFF-PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 23, 2016 in a proceeding pursuant to CPLR article 78 and a declaratory judgment action. The judgment, among other things, determined that the subject project is a Type II action pursuant to the State Environmental Quality Review Act.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by annulling the determination that the project is a Type II action pursuant to the State Environmental Quality Review Act (ECL art 8), and as modified the judgment is affirmed without costs, and the matter is remitted to defendant-respondent for a new determination in accordance with the following memorandum: This appeal arises from the request of plaintiff-petitioner (plaintiff) for the approval of defendant-respondent (defendant) for a proposed commercial structure that included a Tim Horton's restaurant with a drive-through window. Defendant initially issued a positive declaration pursuant to the State Environmental Quality Review Act ([SEQRA] ECL art 8) in which it, inter alia, designated the project as an "unlisted action" rather than a Type I or Type II action pursuant to SEQRA and requested that plaintiff prepare a draft environmental impact statement (DEIS) in connection with its proposal. After plaintiff submitted an updated site plan and requested that defendant reclassify the project as a Type II action pursuant to SEQRA, thereby eliminating the need for a DEIS, defendant adopted Orchard Park Local Law No. 9-2014, which provided, inter alia, that actions that involved "[d]rive-through stations or windows, including but not limited to restaurants and banks" would be designated as Type I actions under SEQRA. Defendant subsequently denied plaintiff's request that the project be reclassified as a Type II action, and unanimously adopted a resolution that designated the

project a Type I action.

Plaintiff commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, a declaration that Orchard Park Local Law No. 9-2014 is invalid, and a judgment annulling defendant's determination that the project is a Type I action and determining that the project is a Type II action. Supreme Court granted judgment in favor of plaintiff, declaring that Local Law No. 9-2014 is null and void "insofar as that law designates drive-through facilities as Type I actions under SEQRA," annulling defendant's classification of the project as a Type I action, and determining that the project is a Type II action. Defendant appeals.

Contrary to defendant's contention, we conclude that plaintiff's first cause of action, which seeks a declaration invalidating Local Law No. 9-2014 in full or to the extent that the law improperly empowered defendant to classify projects that are Type II actions pursuant to SEQRA as Type I actions, was timely commenced inasmuch as it is a challenge to the substance of the law and is therefore subject to a six-year statute of limitations pursuant to CPLR 213 (1) (*see Schiener v Town of Sardinia*, 48 AD3d 1253, 1254; *Matter of Jones v Amicone*, 27 AD3d 465, 470; *Matter of McCarthy v Zoning Bd. of Appeals of Town of Niskayuna*, 283 AD2d 857, 858).

We further conclude that the court properly declared that Local Law No. 9-2014 is invalid inasmuch as it is inconsistent with 6 NYCRR 617.5 (c) (7) to the extent that it classifies "[d]rive-through stations or windows" such as "restaurants" as Type I actions under SEQRA. A local law that is "inconsistent with SEQRA" must be invalidated (*Glen Head-Glenwood Landing Civic Council v Town of Oyster Bay*, 88 AD2d 484, 493; *see* Municipal Home Rule Law § 10 [1] [i]). Here, although 6 NYCRR 617.5 (c) (7) does not explicitly include the construction of a restaurant with a drive-through window as a Type II action, we conclude that the Department of Environmental Conservation contemplated restaurants with drive-through windows as Type II actions when it promulgated that regulation (*see e.g.* SEQR Handbook at 32 [3d ed 2010]; Healy and Karmel, Environmental Law and Regulation in New York § 4:5 [2d ed 9 West's NY Prac Series]; Department of Environmental Conservation, Final Generic Environmental Impact Statement on the Proposed Amendments to the State Environmental Quality Review Act [SEQRA] Regulations at 24-27 [1995]). We similarly conclude that the court properly annulled defendant's classification of the project as a Type I action on the ground that the classification was affected by an error of law inasmuch as Local Law No. 9-2014 is inconsistent with SEQRA (*see generally Matter of Zutt v State of New York*, 99 AD3d 85, 102; *Matter of Omni Partners v County of Nassau*, 237 AD2d 440, 442-443; *Town of Bedford v White*, 204 AD2d 557, 559). Nonetheless, the court should have declined to accept, without a revised review by defendant, plaintiff's contention that the project should be classified as a Type II action (*see generally Matter of London v Art Commn. of City of N.Y.*, 190 AD2d 557, 559, *lv denied* 82 NY2d 652*; Town of Bedford v White*, 155 Misc 2d 68, 70-72, *affd* 204 AD2d 557). We therefore modify the judgment by annulling the determination that the project is a Type II action, and we remit the

matter to defendant for a new determination.

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

892

CA 16-01532

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

KARI ANN FULL, INDIVIDUALLY, AND AS PERMANENT GUARDIAN OF SHANE D. FULL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MONROE COUNTY SHERIFF'S DEPARTMENT, MONROE COUNTY SHERIFF, CITY OF ROCHESTER, CITY OF ROCHESTER POLICE DEPARTMENT, TOWN OF GREECE, COUNTY OF MONROE, MONROE COUNTY AIRPORT AUTHORITY, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.
(APPEAL NO. 1.)

HOGAN WILLIG, PLLC, AMHERST (LINDA LALLI STARK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (MATTHEW D. BROWN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS MONROE COUNTY SHERIFF'S DEPARTMENT, MONROE COUNTY SHERIFF, COUNTY OF MONROE, AND MONROE COUNTY AIRPORT AUTHORITY.

GALLO & IACOVANGELO, LLP, ROCHESTER (JOHN C. PALERMO OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF GREECE.

BRIAN F. CURRAN, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CITY OF ROCHESTER AND CITY OF ROCHESTER POLICE DEPARTMENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), dated November 17, 2015. The order granted the motions of defendants-respondents for summary judgment and dismissed the complaint against defendants-respondents.

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

Same memorandum as in *Full v Monroe County Sheriff's Dept.* ([appeal No. 3] ___ AD3d ___ [July 7, 2017]).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

893

CA 16-01533

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

KARI ANN FULL, INDIVIDUALLY, AND AS PERMANENT GUARDIAN OF SHANE D. FULL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MONROE COUNTY SHERIFF'S DEPARTMENT, MONROE COUNTY SHERIFF, CITY OF ROCHESTER, CITY OF ROCHESTER POLICE DEPARTMENT, TOWN OF GREECE, COUNTY OF MONROE, MONROE COUNTY AIRPORT AUTHORITY, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.
(APPEAL NO. 2.)

HOGAN WILLIG, PLLC, AMHERST (LINDA LALLI STARK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (MATTHEW D. BROWN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS MONROE COUNTY SHERIFF'S DEPARTMENT, MONROE COUNTY SHERIFF, COUNTY OF MONROE, AND MONROE COUNTY AIRPORT AUTHORITY.

GALLO & IACOVANGELO, LLP, ROCHESTER (JOHN C. PALERMO OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF GREECE.

BRIAN F. CURRAN, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CITY OF ROCHESTER AND CITY OF ROCHESTER POLICE DEPARTMENT.

Appeal from an amended order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered November 18, 2015. The amended order granted the motions of defendants-respondents for summary judgment and dismissed the complaint against defendants-respondents.

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

Same memorandum as in *Full v Monroe County Sheriff's Dept.* ([appeal No. 3] ___ AD3d ___ [July 7, 2017]).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

894

CA 16-01534

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

KARI ANN FULL, INDIVIDUALLY, AND AS PERMANENT GUARDIAN OF SHANE D. FULL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MONROE COUNTY SHERIFF'S DEPARTMENT, MONROE COUNTY SHERIFF, CITY OF ROCHESTER, CITY OF ROCHESTER POLICE DEPARTMENT, TOWN OF GREECE, COUNTY OF MONROE, MONROE COUNTY AIRPORT AUTHORITY, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.
(APPEAL NO. 3.)

HOGAN WILLIG, PLLC, AMHERST (LINDA LALLI STARK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (MATTHEW D. BROWN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS MONROE COUNTY SHERIFF'S DEPARTMENT, MONROE COUNTY SHERIFF, COUNTY OF MONROE, AND MONROE COUNTY AIRPORT AUTHORITY.

GALLO & IACOVANGELO, LLP, ROCHESTER (JOHN C. PALERMO OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF GREECE.

BRIAN F. CURRAN, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CITY OF ROCHESTER AND CITY OF ROCHESTER POLICE DEPARTMENT.

Appeal from a judgment of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered November 18, 2015. The judgment dismissed the complaint against defendants-respondents.

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

Memorandum: Plaintiff, individually and as permanent guardian of her husband, Shane D. Full (Full), commenced this negligence action against, inter alia, defendants County of Monroe, the Monroe County Sheriff, the Monroe County Sheriff's Department, and the Monroe County Airport Authority (collectively, County defendants), the City of Rochester and the City of Rochester Police Department (collectively, City defendants), and the Town of Greece, seeking damages for injuries sustained by Full when he was struck by a motor vehicle. On the day of the accident, the County of Monroe (County) sponsored an air show

at Ontario Beach Park, which is owned by the City of Rochester (City) and operated by the County. To accommodate the vehicular traffic in the vicinity of the air show, an inter-agency task force involved in the planning of the air show temporarily designated Beach Avenue, normally a two-way street, as a one-way street in which the traffic could travel only westbound. Side streets were barricaded, and parking was banned along the length of the Beach Avenue corridor. Just prior to the accident, Full drove along the corridor, pulled into a private driveway, exited his vehicle, and crossed the street to seek parking advice from pedestrians. As Full re-crossed the street, he was struck by an oncoming vehicle, suffering severe brain injuries.

The County defendants, City defendants, and the Town of Greece moved separately for summary judgment dismissing the complaint against them. In appeal No. 3, plaintiff appeals from a judgment that granted the motions and dismissed the complaint against those defendants. The order and amended order appealed from in appeal Nos. 1 and 2, respectively, were subsumed within the judgment appealed from in appeal No. 3 (*see Matter of Aho*, 39 NY2d 241, 248). Thus, we dismiss the appeals from the order and amended order in appeal Nos. 1 and 2. In appeal No. 3, we affirm.

At the outset, we note that on appeal plaintiff does not challenge Supreme Court's dismissal of the complaint against the Monroe County Sheriff and the Town of Greece, and we therefore deem any issues with respect to those defendants abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). Moreover, we conclude that the court properly granted that part of the County defendants' motion seeking dismissal of the complaint against the Monroe County Sheriff's Department on the ground that it is not a proper party. "[A] Sheriff's Department does not have a legal identity separate from the County . . . , and thus an 'action against the Sheriff's Department is, in effect, an action against the County itself' " (*Johanson v County of Erie*, 134 AD3d 1530, 1531-1532).

With respect to the merits, contrary to plaintiff's contention, we conclude that the creation of the Beach Avenue corridor was a governmental function, and thus, the allegedly negligent conversion of Beach Avenue into a one-way street is not actionable in the absence of a special duty to Full (*see McLean v City of New York*, 12 NY3d 194, 199). "[T]raffic regulation is a classic example of a governmental function" (*Balsam v Delma Eng'g Corp.*, 90 NY2d 966, 968), and the governmental function of traffic regulation of the County, the Monroe County Airport Authority and the City defendants (hereafter, defendants) did not become a proprietary function merely because it was undertaken in furtherance of the proprietary air show (*see Bailey v City of New York*, 102 AD3d 606, 606; *Devivo v Adeyemo*, 70 AD3d 587, 587). Plaintiff does not allege that defendants failed in their responsibility to physically maintain Beach Avenue, which would be a breach of a proprietary duty (*see Balsam*, 90 NY2d at 968), and defendants' traffic regulation cannot be considered "integral" to the proprietary air show.

We further conclude that defendants established as a matter of

law that they did not have a special duty to Full. To prove a special duty to Full, plaintiff "must establish '[t]he elements of a special relationship includ[ing] . . . direct contact between the municipalit[ies'] agents and [Full], and [Full's] justifiable reliance . . . on the municipalit[ies'] affirmative promise to act' " (*Bynum v Camp Bisco, LLC*, 135 AD3d 1060, 1061). Defendants met their initial burden of establishing as a matter of law that there was no special duty inasmuch as Full did not have any direct contact with any of defendants' representatives, and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Thus, no special duty existed, and any alleged negligent act with respect to the creation of the Beach Avenue corridor is not actionable (*see Bynum*, 135 AD3d at 1062; *Rollins v New York City Bd. of Educ.*, 68 AD3d 540, 541; *McPherson v New York City Hous. Auth.*, 228 AD2d 654, 655). In the absence of a special duty, plaintiff's remaining contention regarding defendants' governmental function immunity defense is rendered academic (*see Valdez v City of New York*, 18 NY3d 69, 84).

We agree with plaintiff that the court erred in determining that plaintiff's cause of action for negligence under state law against defendants is preempted by federal law (*see generally Summers v Delta Airlines*, 805 F Supp 2d 874, 886-887). Furthermore, the alleged negligence of defendants in sponsoring the air show, including their decision to locate the show at Ontario Beach Park and their alleged failure to keep greater distance between the purportedly distracting planes and nearby pedestrians and drivers, arose from proprietary functions and thus are " 'subject to the same principles of tort law as a private [party]' " (*Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428, 446). We conclude, however, that defendants established as a matter of law that any negligent operation of the air show was not a proximate cause of Full's injuries. The undisputed evidence establishes that neither Full nor the driver of the vehicle was distracted by the overhead airplanes in the moments before the accident, and plaintiff has failed to raise any triable issues of fact (*see generally Zuckerman*, 49 NY2d at 562; *Ventricelli v Kinney Sys. Rent A Car*, 45 NY2d 950, 952, *mot to amend remittitur granted* 46 NY2d 770; *Giresi v City of New York*, 125 AD3d 601, 603-604, *lv denied* 26 NY3d 901).

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

910

KA 15-00696

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RANDOLPH S. MATTICE, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARK C. DAVISON 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 (Craig J. Doran, J.), rendered May 12, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Ontario County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of three counts of criminal sale of a controlled substance (CSCS) in the third degree (Penal Law § 220.39 [1]). County Court sentenced defendant to concurrent, determinate terms of five years of incarceration with three years of postrelease supervision, and defendant contends that the sentence is unduly harsh and severe. We conclude that the sentence is illegal and that defendant therefore must be resentenced.

We address the illegality of "the sentence . . . despite defendant's failure to raise the issue in the trial court or on appeal" (*People v Adams*, 45 AD3d 1346, 1346). The presentence report available to the court and uncontested by the parties at sentencing indicates that defendant had been convicted of a prior felony for which he may have been sentenced within the 10-year period preceding commission of the first count of CSCS in the third degree, as tolled by Penal Law § 70.06 (1) (b) (v) and excluding from that statutory period the time during which defendant was incarcerated on the prior felony (*see* § 70.06 [1] [b] [iv]; *People v Ellis*, 60 AD3d 1197, 1198). Where, as here, "information available to the court or to the [P]eople prior to sentencing for a felony indicate[d] that . . . defendant may have previously been subjected to a predicate felony conviction" (CPL 400.21 [2]), "the People were required to file a second felony

offender statement in accordance with CPL 400.21 and, if appropriate, the court was then required to sentence defendant as a second felony offender" (*People v Griffin*, 72 AD3d 1496, 1497; *see People v Scarbrough*, 66 NY2d 673, 674, *revg on dissenting mem of Boomer, J.*, 105 AD2d 1107, 1107-1109). The People nevertheless failed to file a second felony offender statement herein, and the court illegally sentenced defendant, a known predicate felon, as a first felony drug offender (*see People v Halsey*, 108 AD3d 1123, 1124). Moreover, as the People correctly concede, if defendant was properly sentenced as a first felony drug offender, the imposition of three years of postrelease supervision is illegal because the applicable period for such an offender upon conviction of a class B felony is "not less than one year and no more than two years" (§ 70.45 [2] [b]; *see* § 70.70 [2] [a] [i]). Inasmuch as we cannot allow an illegal sentence to stand, we modify the judgment by vacating the sentence imposed, and we remit the matter to County Court for the filing of a predicate felony offender statement and resentencing in accordance with the law. In light of our determination, we do not address defendant's challenge to the severity of the sentence.

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court

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

923

KA 15-02011

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KEVIN A. TRUESDELL, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL S. DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered October 19, 2015. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a misdemeanor, and aggravated unlicensed operation of a motor vehicle in the first degree.

Now, upon reading and filing the stipulation of discontinuance signed by the defendant on May 8, 2017, and by the attorneys for the parties on May 8 and 12, 2017,

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

Entered: July 7, 2017

Frances E. Cafarell
Clerk of the Court